The regulation of article 23 of the Macau Basic Law
A commentary of the draft law on the protection of State security

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This paper discusses the proposal to give execution to the obligation stated in article 23 of the Macau Basic Law to criminalize a range of conducts related to the protection in the macau Special Administrative Region of national security interests of the PRC. The argument proceeds on the basis of the public consultation document released on 22 October 2008 by the Macau SAR Government 1.

The paper tries to provide an account of the key features of the proposal. Suggestions for amendment and improvement are offered. An English translation of the key articles of the proposal is provided.

Readers should be aware that this paper was written in around only one week, so as to comply with the deadline of the consultation period, and apologies are due for its shortcomings. If more time was available, it would be written also in Portuguese; the choice of English language is due to the need to reach easily and rapidly all stakeholders in this debate. In addition, this is not a standard academic research paper: it tries essentially to be practical in its approach, and to point to questions and issues that it suggests be addressed, even if all are not fully discussed and answered at this stage. For this reason,

1 See Governo da Região Administrativa Especial de Macau and Gabinete para a Reforma Jurídica, Lei relativa à defesa da segurança do Estado (projecto). Documento de consulta, Macau, October 2008 (hereinafter ‘Consultation document’).
and due to the time limitation, footnotes and references were kept to a minimum.

I. Background, timeline and possible broader implications

As well known, article 23 of the Macau Basic Law, like many other of its provisions, has exactly the same wording of the Hong Kong Basic Law\(^2\).

This means that the competent body — the Legislative Assembly of the Macau SAR — should approve laws criminalizing the offences described in it. The other alternative would be to have such legislation approved by means of a national law for the entire PRC; such law would also be applicable in the SAR under Annex III of the Basic Law. However, this route was not taken, and this is an option that should be applauded. Therefore, the fact that the competence rests in the SAR is certainly a rather positive factor: it namely enables a definition in line with the local legal system’s characteristics, concepts and basic criminal policy orientations.

In terms of background, the Portuguese Penal Code of 1886 had norms on the protection of State security, but these were designed to protect the Portuguese State, and accordingly were kept in force only up to the transfer of sovereignty on 20 December 1999. On the other hand, the new 1995 Penal Code only regulates crimes against the Macau SAR Region (arts. 297 to 307), and not crimes against the PRC as a whole. Therefore, under the Basic Law there is currently a void that needs to be filled.

No initiative was ever taken in this regard in Macau, namely before or after the 2002-2003 events in Hong Kong, which culminated in the massive demonstration of 1 July 2003\(^3\), soon after which the proposal was abandoned.

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\(^2\) Art. 23 reads: ‘The Macao Special Administrative Region shall enact laws, on its own, to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies’. We first wrote about article 23 of the then draft Basic Law in an article published in 1993: see J. Godinho, ‘A Lei Básica e o Direito Penal’ [The Basic Law and criminal law], in Administração. Revista da Administração Pública de Macau, no. 19/20, April 1993, at 153 et seq.

\(^3\) As well known, the legal system of Macau is separate from that of the Mainland, although there are some linkages, one being the applicability of national laws listed in Annex III of the Macau Basic Law. See J. Godinho, Macau business law and legal system, LexisNexis, Hong Kong, 2007, at 13 et seq.

\(^4\) For the Hong Kong process see, in great detail, Fu Hualing, Carole Peterson and Simon Young (eds.), National security and fundamental rights. Hong Kong’s
In late September 2008 it became public that the Macau Government would be soon advancing a proposal to regulate article 23. This effectively took place on 22 October 2008, with a formal announcement in a press conference chaired by the Macau Chief Executive, Edmund Ho. Six public discussion sessions were immediately held in late October and early November, also chaired by the Chief Executive. The end of consultation period was set for 30 November 2008.

Secretary for Justice Florinda Chan has stated that submission to the Legislative Assembly is expected before the end of 2008. It seems likely that discussion and approval will take place in the first half of 2009, and it is also clear that the law will be passed, given broad support of the Government in the Legislative Assembly. This timing coincides with the end of the mandates of both the Chief Executive (second term ends 19 December 2009) and the Legislative Assembly (next elections are due in September 2009).

As to possible implications for Hong Kong, the question is whether there will be any impact or influence of the Macau regulation on Hong Kong future initiatives. Some deny any such possible influence of Macau developments on Hong Kong, considering that the two SARs are totally different, but this seems

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*article 23 under scrutiny*, Hong Kong University Press, Hong Kong, 2005 (hereinafter ‘Fu, Peterson and Young’; this volume covers exhaustively all aspects of the Hong Kong proposal); Simon Young, *Hong Kong Basic Law Bibliography*, Hong Kong Law Journal, Hong Kong, 2006; Johannes Chan, *Hong Kong Human Rights Bibliography*, Hong Kong Law Journal, 2006. The Hong Kong Government website can be found at [http://www.basiclaw23.gov.hk/](http://www.basiclaw23.gov.hk/).

5 The Legislative Assembly is made of 29 members. Of these, only 12 are directly elected by all residents, as 10 are elected by functional constituencies and 7 are appointed directly by the Chief Executive himself.

6 At the time of writing, it is totally unclear who the next Chief Executive will be, and the political life is still somehow under the shadow of the Ao Man Long case. Ao Man Long (歐文龍) was the Secretary for Public Works in the Government of the Macau SAR, appointed 20 December 1999 (at age 43), and reappointed 2004 for a second term. Ao was arrested 6 December 2006, tried during the second half of 2007. The trial took place directly before the Court of Final Appeal. He was convicted 30 January 2008 to 27 years imprisonment, and no appeal was lodged. Family members and businessmen associated with the case were sentenced to various prison terms on 10 July on first instance, confirmed 30 Oct 2008 on appeal, but with a substantial reduction of the prison terms. The impact of the case is obvious in the economy (as many public works projects have been delayed, or not yet approved) and in politics. Allegedly, more criminal prosecutions will be opened, perhaps involving more people. The situation has not yet fully stabilized.
too simplistic a claim: the Macau precedent may, at least, be a factor to be considered or that cannot be ignored when the time arrives for a second attempt to pass legislation in Hong Kong.

II. General aspects of the proposal

In terms of form, the proposal aims at approving a separate law, and not to make an amendment to the Criminal Code 1995. Indeed, such would not be practical, as it would require too many amendments, including the insertion of provisions on the criminal liability of criminal liability of collective persons, which would not fit in the Criminal Code without a major rearrangement, possibly including the General Part. On the other hand, a very small amendment to the Criminal Procedure Code is foreseen.

The format of the proposal is standard for criminal law matters regulated is special laws outside the Criminal Code. The law need only concern itself with specific issues that have to be addressed: all other matters are regulated by the Criminal Code and the Criminal Procedure Code.

The proposal is made of 15 articles, and has no formal preamble. As mentioned, a consultation document was released on 22 October 2008, which includes succinct explanatory notes. The printed version was made widely available in free distribution, and a dedicated website was created (www.gov.mo/basiclaw23). Comments received from the public were being added to the site.

The consultation document is available in the Macau official languages only, and not in English (unlike the proposal for amendment of the Commercial Code, which had a summary of proposed changes released in three languages).

The comparative law references mentioned in the consultation document are all taken from civil law legal systems (Portugal, France, Italy, Spain, Germany). References to common law legal systems are totally absent. Strikingly, there is no reference whatsoever to the Hong Kong precedent: one would not know just by reading the proposal and its explanatory note that a similar exercise took place in the neighbour SAR five years ago.

Another feature of the consultation document is its somehow emotional tone, which at times seems to imply that support of this issue is as an exercise in patriotism or love to the Motherland7. This tone is perhaps not the more

7 The document inter alia states: ‘Love to the Motherland and love to Macau, of body and soul, have been a tradition by excellence of the residents of the Region. After the return to the Motherland, the spirit of this love has transformed itself into a driving force in building and developing the Region, and shaping a common notion under which it is for the Macau SAR to perform the mission of defending national security’; see Consultation document, at 3.
advisable one as it creates a charged atmosphere on the discussion issues that should be considered in an objective manner, and mixes patriotism and other matters that should be kept separate. One can have a deep sincere love for Macau and for China, their status and their progress and improvement, and still worry about or disagree with some aspects of the proposal. This emotional tone cannot have a bearing on the interpretation of some fine distinctions that need to be operated, such as between the crime of sedition and the legitimate exercise of freedom of expression, a matter discussed below.

The explanatory notes found in the consultation document are sometimes repetitive and not extremely detailed. In addition, there are no footnotes or detailed references to the studies used in the preparation of the proposal\(^8\), aside from a table comparing the legislation of the civil law legal systems mentioned.

As has been pointed out by many individuals and entities, a consultation period of only 40 days for such a sensitive and complex matter seems to be way too modest, and may not allow sufficient time for a proper and thorough study and debate by the public. Although there have been many request to have the consultation period extended, at the time of writing it is not clear whether that shall indeed occur.

The following discusses the crimes included in the proposal in turn, in the same order as they appear.

### III. Treason

Article 2 of the consultation document provides:

1. Whover, being a Chinese citizen:
   1) Takes up arms against the State, as part of foreign armed forces;
   2) Has intelligence with the Government of a foreign State, organization or association, or their agents, with the intention of promoting or causing a war or armed conflict against the State; or
   3) In times of war or armed conflict against the State, with the intention to favor or to support the execution of enemy military operations against the State, or to cause harm to its military defence, has

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\(^8\) A similar critique was in connection with the 2007 consultation document advancing proposals to amend the Commercial Code. The proposal should be more detailed in terms of the sources used: comparative law, doctrinal works, and so on, all of which should have been fully referenced in footnotes, so that the sources of the proposal would be easier to trace, understand and debate; see J. Godinho, *The revision of the Commercial Code*, in Macau Business, May 2007.
direct or indirect understandings with foreigners or practices acts for the same purposes, shall be punished with 15 to 25 years imprisonment.

2. For the purposes of this law, State is the People’s Republic of China.

It is normal for States to punish this conduct, which breaches the allegiance to one’s State, especially in case of armed conflict.

Unlike all other crimes under this law, there is a restriction based on nationality of the possible perpetrators. Only Macau residents who are Chinese citizens can commit this crime: Macau residents who are of other nationalities were intentionally excluded.

The crime is very broadly conceived and covers the three sides of the equation: fighting or attacking the Chinese State, gathering intelligence for foreign powers, and weakening the military defences of China.

It is clear that the types of events foreseen in this crime seem a somehow remote possibility, as one does not easily conceive of armed conflict in which Macau residents of Chinese nationality would side against China.

The main critique that can be levelled against this provision is that a penalty of 15 to 25 years of imprisonment seems excessive. The consultation document is totally silent on why such penalty is proposed.9

Given the general scale of penalties in the penal system of Macau, one fails to realize why is the penalty among the harshest in the entire Macau legal system, where the absolute maximum penalty for any single crime is 25 years of imprisonment. Indeed, the penalty for homicide is from 10 to 20 years for standard cases (art. 128, Penal Code), and 15 to 25 years in aggravated cases (art. 129, Penal Code).

Historically, treason tended to be considered as the most horrendous of all crimes, but the modern trend is to downgrade its relative importance, especially when compared when crimes against persons, which are now regarded as more serious. Reflecting this view, the Macau Penal Code regulates in its Special Part first the crimes against persons (Title I of Book II), while crimes against the State are left to the end (Title V of Book II). The preamble of the Code explains that this is a means of ‘affirming human dignity as the fundamental moral value of the penal system’10.

The proposal seems to run against this feature of the Macau system of criminal law.

The harshest penalty foreseen in the chapter on crimes against the Macau SAR of the Criminal Code is of 5 to 15 years of imprisonment: see art. 297(2) of the Penal Code, which punishes the crime of attempting to destroy, alter or

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10 Decree-Law no. 58/95/M, of November 14, preamble.
subvert the political, economic or social system of Macau, by means or armed violence.

There is a need to keep consistency among penalties for different crimes. A penalty for treason of 5 to 15 years seems to be more than sufficient to satisfy the prevention needs at issue.

In addition, article 297(3) of the Penal Code could be made applicable to treason. This provisions states that the penalty may be lowered or exempted if the person surrenders without resistance, or hands in or abandons the arms before or immediately after warnings by the authorities. This is clearly intended to stimulate

IV. Secession

Article 3 of the consultation document provides:

1. Whoever, by means of violence or by employing other serious unlawful means, attempts to separate from State sovereignty, or tries to submit to foreign sovereignty, a part of the territory, shall be punished with 15 to 25 years imprisonment.
2. For the purposes of this law, the following are deemed to be serious unlawful means:
   1) acts against the life, physical integrity or freedom of persons;
   2) acts of destruction of means of transport or telecommunications, or other infrastructures, or acts against the security of transportation and communications, including by telegraph, telephone, radio, television or other electronic communication systems;
   3) acts of causing fire, releasing radioactive substances or toxic or suffocating gases, contamination of food or water intended for human consumption or spreading diseases;
   4) acts involving the use of nuclear energy, fire weapons, incendiary means, explosives devices or substances, postal parcels or letters containing dangerous substances or devices.

The crime of secession covers attempts to create a sovereign State from parts of the Chinese territory, and also attempts to submit national territory to foreign sovereignty. Unlike treason, not only Chinese citizens can commit the crime of secession: anyone can. The crime seems to be defined essentially as a case of violence or terrorism for purposes of secession.

While a lenghty definition of ‘other serious unlawful means’ is given, ‘violence’ remains undefined.

The penalty for the crime of secession is also very harsh. The same critique as for treason applies: a penalty for treason of 5 to 15 years seems
sufficient. The consultation document, which covers all issues related to this crime in one page only, is silent on why such penalty is proposed\(^{11}\).

V. Subversion

Article 4 of the consultation document provides:

\[\text{Whoever, by means of violence or by other serious unlawful means, attempts to topple the Central People’s Government, or to constrain the Central People’s Government to practice an act or an omission, shall be punished with a penalty of 15 to 25 years of imprisonment.}\]

The criminalization of subversion mentioned in this provision is intended to protect the constitutional structure and independent functioning of the State from two possible attacks.

The first is its outright overthrow: conducts that attempt to topple the Government are criminalized.

The second is, on the other hand, its free functioning. Attempts to constrain the Government to practice or not to practice an act are also forbidden.

The crime requires, in both cases, and as in the previous crime of secession, ‘violence’ or ‘other serious unlawful means’. Perhaps an express reference could be made to the previous article, stating that these concepts should be interpreted similarly.

When comparing this crime with the Penal Code, it does have elements similar to two provisions:

a) the first aspect — the overthrow of the Government — is similar to art. 297 (violent overthrow of the established order), punishable with 3 to 10 years for standard cases and 5 to 15 years if armed violence is deployed;

b) the second aspect — coercion — is analogous to art. 303 (coercion against organs of the SAR), where the penalty is much lower: 1 to 8 years.

The consultation document is again silent on why a single unified penalty of 15 to 25 years is proposed\(^{12}\). We suggest breaking down the provision in two paragraphs with two different sets of penalties fully aligned with the Penal Code.

VI. Sedition

\(^{11}\) See Consultation document, p. 30.

\(^{12}\) See Consultation document, p. 31-32.
Article 5 of the consultation document provides:

1. Anyone who incites, directly and in public, the acts described in articles 2, 3 or 4, shall be punished with 1 to 8 years imprisonment.

2. Anyone who incites, directly and in public, the members of the Macau Garrison of the People’s Liberation Army to abandon their functions or to engage in acts of rebellion, shall be punished with 1 to 8 years imprisonment.

The crime of sedition is essentially a derivative crime: as incitement to treason, secession and subversion, and also as an incitement to the rebellion of the army stationed in the Macau SAR. In this manner, and unlike the previous three crimes, sedition amounts to an act of communication: it consists in public and direct attempts to cause others to commit the acts mentioned.

The nature of the offence as the spreading of communication or information raises various issues, especially the border with the legitimate exercise of freedom of expression, namely through the media.

The drafters of the consultation document were aware of this important problem, and to allay the fears the explanatory note places emphasis on clarifying the meaning of the wording ‘in public and in a direct way’.

The wording ‘in public’ is to include namely the press and the internet. The requirement that the incitement be done ‘in a direct way’ (or ‘directly’) is met when the person ‘undoubtedly’ incites another.

It is also mentioned that ‘direct incitement’ does not include suggestions or recommendations, and does not include academic research or mere commentary. It is clear that such fine distinctions (between a ‘suggestion’ and an incitement, between a ‘recommendation’ and an ‘incitement’) and concepts ('academic research'; 'commentary') can cause considerable conceptual difficulty and practical concerns.

This is evidently a matter that calls for further clarification and discussion, as these very sensitive and potentially unclear borders need to be well defined and understood by the public in general and the press in particular. For example, persons may wonder as whether a peaceful event or report touching upon the issues of Tibet, Xinjiang or Taiwan (topics that may have angles that some may consider unpatriotic or subversive) would be considered sedition or the regular exercise of freedom of expression.

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13 Consultation document, at pp. 34-35. The discussion is somewhat short (two pages) and does not provide any examples.

14 Consultation document, at p. 35.

15 Consultation document, at p. 35.

16 Consultation document, at p. 35.
The proposed penalty for the crime of sedition is 1 to 8 years. The same penalty is foreseen in article 298 of the Macau Penal Code for incitement to the violent overthrow of the established order.

VII. Theft of State secrets

1. Whoever steals, spies or purchases State secrets, causing danger to or harming State interests related to national independence, to State integrity and unity, or its internal or external security, shall be punished with imprisonment from 2 to 8 years.

2. Whoever receives instructions, directives, money or assets from a Government, organization or association from outside of the Macau SAR, or any of their agents, for the practice of spying acts, namely to steal, spy or purchase State secrets, or to recruit others to practice such acts, with knowledge of such [conhecendo-o por tal], or, in any way, renders assistance or facilitates the practice of such acts, shall be punished with imprisonment from 3 to 10 years.

3. If the perpetrator, breaching a specific duty imposed by the status of his function or service, or of the mission of which he was charged by a competent authority, practices the following conducts, he shall be punished:

   1) In case of the conducts described in paragraph 1, with imprisonment of 3 to 10 years;
   2) In case of the conducts described in paragraph 2, with imprisonment of 5 to 15 years;
   3) In case he renders public or makes accessible to unauthorized persons a State secret, with imprisonment of 2 to 8 years;
   4) In case of the previous subparagraph, by negligence, with imprisonment up to 3 years.

4. For the purposes of this article, ‘State secret’ shall cover the documents, information or objects that should be kept secret in the framework of national defence, external relations, or other matters having to do with the relation between the Central Authorities and the Macau SAR mentioned in the Basic Law of the MSAR.

5. Judicial organs shall obtain from the Chief Executive a certificate on the specific documents, information or objects relating to State secrets, whenever questions are posed in a criminal procedure; before issuing such certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.

State secrets — eg, sensitive matters such as military and space technology — demand penal protection, which translates into a prohibition on
the flow of information. The problems that penal laws may create for freedom of the press are stated most clearly by Prof. Johannes Chan:

Protection of state secrets, however, should be an exception to the general right of access to official information and should be narrowly and clearly defined. If it is difficult to predict with reasonable certainty whether the publication of a story will infringe the law, a prudent editor will tend to err on the side of caution by not publishing the story at all. Likewise, public servants who are uncertain about the limits of the law on what can be disclosed will tend to seal their lips. Thus complicated or ambiguous law will lead to a culture of secrecy. In the context of state secrets, what is important is not so much the number of criminal prosecutions that have been pursued, but the chilling effect that the law may have. Ambiguity is likely to lead to self-censorship. \(^{17}\)

The crime is intended to protect national secrets, that is, secrets of the PRC, as opposed to ‘regional secrets’ of the Macau SAR.

Article 6, with five paragraphs, is the longest of the proposal, and it raises a long list of important issues. The wording seems directly based upon articles 316 (breach of State secret) and 317 (spying) of the Portuguese Penal Code, which the proposal merges in one unified provision that deals with both aspects, although the description of the conduct emphasizes the spying component.

For the purposes of this discussion, three separate matters shall be considered:

a) the concept of State secret (paras. 4 and 5);

b) the basic two crimes (paras. 1 and 2);

c) the revelation of secrets by civil servants (para. 3).

a) The concept of State secret

What is a State secret for the purposes of this law? The answer to this question is found in three provisions — paragraphs 1, 4 and 5 —, with each contributing a different aspect or angle of analysis. In particular, paragraph 4 provides an abstract delimitation of which State secrets are protected, while paragraph 5 provides a mechanism to ascertain whether a specific matter arising in individual cases is indeed a secret. In addition, the relation between these provisions needs to be understood.

It seems appropriate to start by the last aspect, mentioned in paragraph 5. Indeed, in actual cases the first doubt that may arise is whether the information at issue is actually a State secret or not. Who decides what a State secret is? The

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\(^{17}\) Johannes Chan, ‘National security and the unauthorized and damaging disclosure of protected information’, in Fu, Peterson and Young (note 4), at 252.
draft states that, in concrete court cases, a certificate shall be obtained from the Central Government, via the Chief Executive. In other words, what is a national State secret of the PRC is determined by the central Government: indeed, only the authorities in Beijing actually know for sure what information has been previously classified as such, under the procedure in force in the Mainland for that purpose. A local Macau judge, prosecutor, lawyer or journalist has no way of knowing with any degree of certainty.

The role or function of the certificate needs to be understood clearly.
The certificate, once received, shall provide one of two possible answers.
If the answer is negative, that is, if no State secret is involved, the case should be dismissed: this element of the crime is not present, and without it the crime cannot subsist.

If the answer is positive, other sets of questions need to be asked in order to determine if a crime has been committed, as the certificate certainly is not a final determination of criminal responsibility. To be clear: the central government is not being asked whether a certain person should be convicted for having committed the crime of theft of State secrets. That is a broader issue, with other ingredients that should be determined by the courts of Macau and not by an executive body, the Central Government in this case. If there is indeed a State secret, the discussion continues.

This being the case, the next question that needs to be decided is whether the State secret is actually protected under the law of Macau. Art. 6(4) answers this question by providing that State secrets protected by this law may refer to confidential matters in three fields: defence (such as military equipment and deployment); external relations (such as diplomatic issues); and other matters related to the linkages between the central authorities and the Macau SAR, under the Basic Law.

Therefore, not any secret matter in the Mainland is granted penal protection in the Macau SAR. This provision operates a delimitation, in abstract, of what matters may be considered State secrets. The criterion used refers to the competence of the SAR.†

The third category — matters related to the linkages between the central authorities and the Macau SAR, under the Basic Law — is extremely broad and not particularly clear: the list of matters that have a bearing on the relation between the central authorities and the Macau SAR can be extremely long. Referring to the parallell Hong Kong draft, Prof. Johannes Chan lists 26 categories of issues. These include such diverse matters as foreign affairs, defence, appointment of the Chief Executive, extension of national laws via their inclusion in Annex III, providing certificates on ‘acts of State’, entry and visa issues, arrangements for judicial assistance, aviation, and many others. Prof. Johannes Chan concludes that ‘[t]he scope of the protected information is so

† Consultation document, at p. 37.
broad that virtually any information that has anything to do with relations between the HKSAR and the Mainland could be caught by the provision. It should be clarified if this really is the intended scope of protection of the proposal.

Does the proposal mean that henceforth all matters related to any linkages between the central authorities and the Macau SAR under the Basic Law, regardless of classification, are a matter of national secret?

Or does it mean that only matters actually classified as secret, within the said ambit, fall within the criminal law provision?

Whatever the answer, it highlights the role of the requirement stated in art. 6(1), which is extremely important to keep the content of the scope of the criminal law intervention within reasonable bounds. Under this provision, the revelation must effectively endanger the independence, unity, integrity or security of the PRC as a whole, and this should be demonstrated convincingly in every single case. A mere allegation of such an outcome is not sufficient. In this manner, the substantive scope of the State secrets that may be protected by criminal law is considerably narrowed. Namely, the fact that a topic was formally classified as secret is not sufficient to afford criminal law protection: it must also meet the substantive test of art. 6(1).

Another point in this connection is that there cannot be retroactive determinations or classifications regarding State secrets.

It would also appear that if it is clear beforehand that the matter does not fall within art. 6(4) (eg, the ‘state secret’ is related to tourism policy, to financial matters, or other topics fully within the competence of the SAR) there is no point in even asking for the certificate and the case must be dismissed.

b) the basic two crimes

The prohibited conduct in art. 6(1) has two main objective elements.

The first is to obtain State secrets by three possible ways: stealing; spying; or purchasing. Of these concepts, the most unclear is ‘spying’, which may potentially include a wide range of conducts.

The second objective element relates to the result of the conduct, and is a further important limitation in the scope of the provision. For the crime to exist

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19 Johannes Chan, ‘National security and the unauthorized and damaging disclosure of protected information’ (note 17), at 260.

20 It may be reminded that Macau does not have today a law on State secrets. Prior to the transfer of sovereignty, Law no. 6/94, of April 7, was a national Portuguese law that had been extended to Macau, which regulated, among other aspects, which matters could be classified as (Portuguese) State secrets and who could grant such status, the Governor of Macau being one of such entities. The law was in force until 19 December 1999. No corresponding rules currently exist.
there should also be a certain outcome, the danger to the fields stated in the legal provision: national independence; State integrity and unity; State internal or external security. It is of course a highly debatable matter, in practical cases, to ascertain whether this actually occurs. In any event, it cannot be said that the mere fact that information was disclosed or has fallen on wrong hands can be sufficient to demonstrate the existence of such danger. Furthermore, as mentioned, such harm also cannot be seen to arise automatically from the general nature of the information, which can be innocuous.

The prohibited conduct in art. 6(2) is essentially the same, plus its financing, recruitment and organization. The main difference is that there is foreign intervention — this may be the justification for the higher penalty: 3 to 10 years of imprisonment. The Portuguese version of art. 6(2) seems poorly drafted: it is not easy to read and interpret, and should be rewritten.

c) The revelation by civil servants

Theft of State secrets under art. 6(3) covers essentially cases where a person subject to special duties of confidentiality breaches State secrets, eg. a civil servant, or a scientist involved in nuclear or space research. It covers intention as well as negligence.

Various sets of offences and penalties are foreseen.

The penalties are much higher than those stated in art. 348 of the Criminal Code for the revelation of confidential information by civil servants.

d) Subjective elements

How to know what is State secret? Journalists have pointed out that they may not know that the information they are dealing with is State secret. This seems to be a legitimate concern, and an important safeguard in order preserve the press from falling into self-censorship.

The general answer is that, for a conviction to occur, knowledge is required. But this is not sufficient. We believe that the crime should explicitly require a firm knowledge, and therefore should exclude the subjective state known as ‘eventual intention’ or ‘dolus eventualis’. To clarify this matter, it should be said that under Macau criminal law, mens rea covers a range or possibilities. The Penal Code mentions two different degrees of fault: intention (dolo) and negligence (negligência). The Penal Code further defines three instances of intention (art. 13):

- direct intention (dolo directo): ‘Acts in an intentional manner whoever, perceiving a fact which corresponds to a type of crime, does act with the intention to commit it’;
- necessary intention (dolo necessário): ‘Also acts in an intentional manner whoever perceives the commitment of a fact, which corresponds to a type of crime, as a necessary consequence of his conduct’;
• eventual intention (dolo eventual): ‘If the the commitment of a fact which corresponds to a type of crime is perceived as a possible consequence of the conduct, there is intention if the agent acts conforming himself with such commitment’.

The most problematic case has always been the last. A person may be in three possible situations: know for sure; hesitate and not be sure; or be totally unaware.

Eventual intention is met if it can be demonstrated that a person hesitated or wondered whether a State secret was involved, and it crossed the persons’ mind that that indeed could be the case. The person realized that a crime could occur, accepted that risk, and went ahead with the forbidden conduct. In the case of journalists, this would always occur if a journalist merely wondered whether a State secret was at issue and decided to anyway proceed with the publication. The scope for a possible shadow on press freedom is crystal clear, given that a journalist will almost never be able to obtain a response from State officials in order to clarify the matter. The journalist will be left in doubt, inclined not to publish, and it is important that the law does not contribute or induce to self-censorship.

In order to deal with this issue in a satisfactory manner, our proposal is to require direct intention or necessary intention, and to expressly exclude ‘eventual intention’. This is not without precedent, as various crimes in the Special Part of the Penal Code take this route; see eg, article 331, which uses the language ‘with the intention or in the knowledge of’ (‘com intenção ou com consciência de’).

e) The defence of public interest

The introduction of a defence of public interest was proposed in Hong Kong. The text is as follows:

\[(5B)\] A person does not commit an offence under this section if –

(a) he makes a disclosure that reveals –

(i) any unlawful activity, abuse of power, serious neglect

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21 For a discussion of this point, see J. Godinho, Do crime de branqueamento de capitais, Almedina, Coimbra, 2001.


of duty or other serious misconduct by any public official; or
(ii) a serious threat to –
(A) public order;
(B) public security; or
(C) the health or safety of the public;
(b) the disclosure does not exceed the extent that is necessary for revealing that matter; and
(c) having regard to all the circumstances of the case, the public interest served by the disclosure outweighs the public interest served by not making that disclosure.

The Macau proposal is silent on the mere discussion of the matter. This is regrettable, given that this defence does exist in the Macau Penal Code, in articles 174(2)(a) and 186(2). These provisions clearly are intended to enable the press to report matters that may involve issues of privacy or honourability24, and discharge its basic function of ensuring the existence of a free public opinion, denouncing corruption and illegality, the misuse of public funds, among many other matters of general interest to the community at large.

Our proposal is that the introduction of this defence should be done. The exact details of the wording require further study.

VIII. Foreign and local political associations

One of the more striking features of the proposal is that these two crimes (arts. 7 and 8) are defined essentially not as a separate offence but rather as the practice of the crimes stated previously in the law, by political associations.

Associations can have international links provided that the security of the State is not at issue.

There is no provision allowing the prohibition of certain banned organizations in the Mainland to be extended to Macau.

It is clear that the Basic Law was, on this point, read in a very narrow way, to make it compatible with freedom of association and free speech.

24 For a very comprehensive discussion of this matter, see Manuel da Costa Andrade, Liberdade de imprensa e inviolabilidade pessoal. Uma perspectiva jurídico-penal, Coimbra Editora, Coimbra, 1996. See also J. Godinho, ‘Algumas considerações sobre a tutela penal da privacidade’ [Some observations on the protection of privacy by criminal law], in Boletim da Faculdade de Direito da Universidade de Macau, 4/1997, pp. 139 ff.
IX. Preparatory acts

Preparatory acts of crimes mentioned in articles 2, 3, 4, 5 and 6 are punishable with up to 3 years imprisonment. This provision has raised considerable controversy in Macau, due to its perceived lack of clarity.

Standard criminal law doctrine separates a progression between:
- Preparatory act of the prohibited conduct
- Attempt of the prohibited conduct
- Perpetration of the prohibited conduct

Attempts are clearly defined in the Penal Code (art. 21). Preparatory acts are not defined. One can only say that a preparatory act is, by definition, any external act which does not yet amount to an attempt. Typical examples, in the context of homicide, are buying the gun or studying the movements of the victim.

There is a broad concern on the separate punishment of mere preparatory acts. An attempt of sedition can be understood as the mere jotting down of incendiary text in a piece of paper or computer, without ever distribution or publication taking place. This is a case where the reach of criminal law provisions is too broad.

The provision should be deleted, without the law losing any of its effectiveness. For reasons of consistency, article 305 of the Penal Code should be revoked.

XI. Criminal procedure issues

Art. 13 of the proposal.

XII. Final remarks

The overall impression is that there is clearly an effort to produce a moderate law, and to allay some of the fears; in addition, the Government has signalled that it may adjust and clarify points where the consultation shows need some improvements. The proposal is positive overall. However, it has some important problems, and various aspects ought to be improved, as discussed in this paper:
- Various penalties are too harsh and conflict with the basic criminal policy orientations of the Penal Code;
- *Dolus eventualis* in theft of State secrets should be excluded, in order to safeguard the freedom of the press;
• A defence of public interest should be introduced, in the same manner as already stated in the Penal Code, also to safeguard the freedom of the press;
• Preparatory acts should not be punished.

Macau, 17 November 2008

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