

To: Clerk to Bills Committee on
National Security (Legislative
Provisions) Bill FAX 2509 0775
3/F Citibank Tower,
3 Garden Road,
Hong Kong.

Re: Basic Law Article 23

From: Benjamin Tsz-ming LIU

Sir,

I submit my views in writing and am willing, on invitation, to make oral representation to the Bills Committee at the meeting to be convened on Saturday, 3 May, 2003.

ARTICLE 23 of the BASIC LAW

That the Hong Kong Special Administrative Region brooks no further delay in enacting laws on its own under Article 23 cannot be doubted. Legislative process is not an exact science and has yet to produce a truly immaculate law draft. However, the Administration has bared their intent in the forthcoming enforcement of the laws proposed to be enacted. I, for one, have faith in our Government which has earned international indorsement on matters of rights and freedoms.

I am somewhat overwhelmed by the apparent concessions our Government has managed to secure and the efforts they make to cater for, whenever possible, the critical views expressed. I need say little more save for giving my views below:

BT 25/4/2003

HK is obliged under BL23 to enact laws *on her own* to maintain stability and national security. That would involve legislating on treason, subversion, secession, sedition, theft of state secrets, foreign political bodies conducting political activities in HK, and political bodies of HK linked to foreign political bodies. Legislating to meet HK's obligation to implement BL23 needs to be compatible with the fundamental rights and freedoms entrenched by the BL. It goes without saying that protection of these fundamental rights is summed up in Chapter III of the BL, in particular, BL39, which focuses on the rights afforded by ICCPR and ICESCR, and ILO as applied to HK.

During the consultation period for implementing BL23, the legislative proposals have been critically assessed as being too vague and too broad, and legislating on the proposals as being basically inimical to the rights and freedoms now in place. These reactions are only to be expected and are sought to be redressed by the National Security (Legislative Provisions) Bill published in Feb 2003, which presents a wide-ranging refinement and tightening up of the initial proposals. The Bill does not overlook the importance of conformity with the letter

and spirit of BL39. Put another way, the provisions must, inter alia, comply with the standards set by ICCPR as applied to HK. Let me elaborate on the separate offences in the Bill.

Treason

This offence is tightly re-aligned and the format for treasonably assaulting the sovereign is abolished. The existing common law offences of misprision and compounding treason will also be removed. In addition, the offence of treason will not apply to non-Chinese nationals, whether or not the offending act is committed in HK or elsewhere.

Subversion and Secession

The offences of subversion and secession might affect legitimate dissent, and therefore they are narrowly confined to criminal acts perpetrated in the course of engaging in war, using force or other serious unlawful means. Furthermore, a very high threshold of either impairing the territorial integrity of the state or toppling its government must also be crossed. The two offences represent yet a further liberalization of offences against the state, which are being embraced by other common law jurisdictions.

Sedition and Seditious Publication

Receptive to public concerns, HK provides in the Bill that no offence of sedition is committed unless one incites others to commit treason, secession or subversion or to seriously endanger China's stability by engaging in violent public disorder. Not only does the Bill take out the existing offence of possession of seditious publication, but it also substantially narrows the wide scope of "seditious publication" and introduces criminal intention as a necessary ingredient for securing conviction. Seditious publication is re-defined as meaning a publication likely to cause the commission of treason, subversion or secession.

Unlawful Disclosure of State Secrets

As regards unauthorised disclosure of information concerning the relationship between HK and the Chinese Government, the Bill restricts information to that on the affairs of HK falling within the responsibility of the Central Authorities. Disclosure of information in the context of spying will only be penalized if the protected information would likely be of use to an enemy and would endanger the safety or interest of the state. Therefore, disclosures that are advisory or merely cause embarrassment to the government will not be criminalised. It will be an offence to make unauthorised disclosure of protected information obtained by illegal access, but the Bill confines "illegal access" strictly to five specified criminal activities, namely unauthorised hacking into a computer, theft, robbery, burglary and bribery.

Proscription

- Before a local organisation can be proscribed,
- (1) there must be reasonable ground for believing that it is necessary for and proportionate to the interests of national security to ban a local organization;
 - (2) the Mainland organization to which the local organisation is tied must be prohibited by an open decree on the ground of national security by the Central Authorities in accordance with national laws; and
 - (3) there must be evidence that the local organization is subordinate to the prohibited Mainland organization (subordination includes acceptance of substantial financial sponsorship from the Mainland organization concerned or being under the control of the Mainland organization; ordinary association does not amount to subordination).

It has to be pointed out that concerns about "automatic" banning of organizations prohibited on the Mainland are exaggerated. Any administrative decision to proscribe an organization in HK must be reasonably grounded and is subject to appeal to Court in accordance with HK laws. The Bill provides that the Chief Justice may make such rules as are necessary for conducting these appeals. This mechanism may bring about the appointment of a "special advocate" to represent the interest of an absent appellant who has but less than full information. However, account must be taken of the need to balance confidentiality of security information against procedural safeguards for human rights guarantees.

The introduction of the somewhat unusual procedure for prosecuting the appeals falls clearly within the bounds of the ICCPR, particularly Article 14.1. There can be little doubt that existing freedoms and rights as guaranteed by the BL will continue to be comfortably enjoyed by HK residents.

Oral Representation of
Benjamin Tsz-ming LIU
on
Saturday, 3 May, 2003.

Mr Chairman,

I have tendered a written submission.

I am honoured to be called upon to address the Bills Committee.

In the 5 minutes allotted, I believe there will be time enough to offer a meaningful input.

In the years since Reunification, the Government and people of HK successfully follow through under the "One Country; Two Systems".

Those who are involved in the affairs of HK are free to voice their concerns and vent their aspirations. They have done so on human rights, with emphasis as of late on our national security legislation. Allow me to present an informed view on the issue.

Under Article 23 BL, HK is obliged to make laws on her own to maintain stability and national security. The proposed legislation, time and again refined, is compatible with the fundamental rights and freedoms entrenched by the BL, in particular Article 39 which focuses on the rights afforded by ICCPR and ICESCR as well as ILO as applied to HK.

The legislative proposals have often been critically assessed as being too vague and too broad. These reactions are only to be expected and are sought to be redressed by the National Security (Legislative Provisions) Bill published in 2003.

Treason is tightly re-aligned. The existing common law offences of misprision and compounding treason will be removed. In addition, the offence of treason will not apply to non-Chinese nationals, whether or not the offending act is committed in HK or elsewhere.

To promote legitimate dissent, offences impairing territorial integrity or threatening government are narrowly confined to criminal acts perpetrated in ~~engaging~~ in war, using force or other serious unlawful means. ~~engaging~~

No offence of Sedition is committed UNLESS one incites others to commit treason, secession or subversion or to seriously endanger China's stability by engaging in violent disorder. No one will be held liable for possessing seditious publication which is itself re-defined as a publication likely to cause the commission of treason, secession or subversion.

Only unauthorised disclosure of affairs in the relationship between HK and the Central Authorities falling within the responsibility of the latter is prohibited. Disclosures that are advisory or merely embarrassing the government will not be criminalised. An offence will be created for disclosing, without proper authority, protected information obtained by illegal access, but the Bill confines "illegal access" strictly to five specified criminal activities, that is to say, unauthorised hacking into a computer, theft, robbery, and bribery.

burglary

Banning of organizations is strictly supervised and cannot be said to be "automatic". Any administrative decision to proscribe an organization in HK is subject to appeal. The Chief Justice may make such rules as are necessary for conducting these appeals in which a "special advocate" may be appointed to represent the interest of an absent appellant, given less than full information, but human rights guarantees will not be unceremoniously compromised.

➔ An optimal balance has been struck between rights and freedoms and national security.

I support the Bill.