

Submission No. 159

"Robert Rutkowski"

2003/05/20 08:54 AM
Please respond to "Robert
Rutkowski"

To:
cc: "Colin Powell"
Subject: National Security (Legislative Provisions) Bill (the "Blue
Bill")

May 19, 2003

Members of the Legislative Council of Hong Kong

Dear Respected Members:

I write to express its profound concern regarding the National Security (Legislative Provisions) Bill (the "Blue Bill"). Pursuant to Article 23 of the Basic Law, the bill amends the Crimes Ordinance, the Official Secrets Ordinance, and the Societies Ordinance. Modifications to the legislation following the public consultation period addressed some of the more problematic provisions. However, if enacted the law would threaten basic human rights and fundamental freedoms in Hong Kong. I believe the Blue Bill is fundamentally flawed and should be rejected.

It is unfortunate that the legislation was not issued as a White Paper, which would have provided the widest possible public consultation on the specific text. As a result, a greater burden is placed on the Legislative Council to ensure that any law adopted conforms to Hong Kong's obligations under the 1984 Sino-British Joint Declaration, the International Covenant on Civil and Political Rights (ICCPR) and other international human rights law.

The Hong Kong government regularly argues that Article 23 requires it to legislate to prohibit subversion and other offenses. The Hong Kong government has asked that the Blue Bill be enacted promptly. Yet the Basic Law also mandates a move toward democratic election of the legislature and chief executive with the ultimate goal of "universal suffrage," a process that has not begun.

I urge the Legislative Council, before adopting legislation that will have a serious impact on fundamental human rights in Hong Kong, to first address one of the core principles of the Basic Law--the right of people to choose their own leaders. A measure such as this, so far reaching in nature and clearly so flawed, deserves careful scrutiny. I believe that the necessary safeguards for such a potentially dangerous law cannot be fully in place unless and until the Hong Kong Special Administrative Region (HKSAR) becomes a fully democratic entity with a wholly elected legislature and chief executive.

Ensuring Fundamental Freedoms

The Joint Declaration guarantees explicitly that all of Hong Kong's freedoms--including press freedom, religious freedom, and freedom of association and assembly-- will continue. They are guaranteed by Hong Kong's strong tradition of adherence to the rule of law and its international commitments under the ICCPR. These obligations may not be partially fulfilled; instead, they require full compliance.

The Blue Bill raises serious questions about the commitment of the HKSAR to its obligations under international human rights law. Article 23 of the Basic Law states that the HKSAR "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." However, as the Hong Kong Bar Association and numerous legal authorities have stated, in most areas the existing laws of the HKSAR are sufficient to prohibit the acts and activities listed in Article 23. Indeed, Hong Kong people have consistently and peacefully exercised their human rights within the rule of law. In the nearly six years since the territory's transfer of sovereignty from the United Kingdom to the People's Republic of China, there have been no significant political upheavals or acts of treason or subversion.

Amendments to the Crimes Ordinance

I am especially concerned about new offenses under Article 23 that relate to freedom of expression. An independent and unfettered media and a free flow of information have been and will continue to be essential to Hong Kong's long-term success. Hong Kong's competitive advantage, both as a place to do business and a place to live, depend on an atmosphere of openness -- whether to undertake a new business enterprise or criticize a government policy -- that is essential to the Hong Kong way of life.

Sedition laws have long been used by high government officials in China and other countries to protect themselves from criticism by the media and public. The Blue Bill would allow prosecution of individuals for sedition solely for the expression of their thoughts and their writings. The provision on "handling seditious publication" defines a seditious publication as one "likely to cause the commission" of a treasonous, subversive or secessionist offense. This includes criminal penalties of up to seven years' imprisonment for publishing, selling, distributing, displaying, printing, reproducing, or trading any seditious publication with intent to incite others.

Any law dealing with sedition should incorporate the "Johannesburg Principles," drafted in 1996, which are based on international and regional law and standards relating to the protection of human rights, evolving state practice, and the general principles of law recognized by the community of nations. Drawing from the ICCPR, the Johannesburg Principles assert the right of all people to freedom of opinion, expression, and information. Any restrictions on these rights must be narrowly proscribed by law. And any restrictions on the basis of national security "must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest." In effect, the offense of sedition must be strictly limited to what is required to prohibit direct incitement (a call for imminent action) to armed rebellion.

In order to dispel fears that the sedition law would be used against people engaged in political and social debate, the Blue Bill excludes as sedition an act by a person whose only intent was to engage in certain forms of public discourse. I welcome the exclusion of activity showing that the HKSAR or the mainland government have "been misled or mistaken in any of [their] measures," pointing out errors or defects in the laws and justice system of the HKSAR and the mainland "with a view to the remedying of such errors or defects," and publicly advocating for legal change or disparaging the source of any ill-will or enmity between the mainland and Hong Kong.

However, the Blue Bill wrongly places the burden on the defendant to show that the only intent was criticism. More problematic, criticism that does not point to a remedy may not constitute a legal defense to a charge of sedition. The effect of the exclusions is to highlight the slender legal reed upon which free expression will rest should the Blue Bill become law.

The elimination of the offense of "possessing seditious material" from the public consultation document is positive, but this may in practice mean very little should the crime of "handling" seditious material remain in the legislation. Mainland authorities have frequently abused anti-sedition laws to punish people in violation of their rights to free expression and belief.

In addition to sedition, crimes such as treason, secession, and subversion are invariably imprecise and open for selective abuse. Provisions defining them must be drawn as narrowly as possible. Although the Blue Bill improves somewhat on the language of the consultation document, the

provisions remain overbroad and vague. A Chinese national could commit treason if he or she "instigates" foreign armed forces to invade China or "assists" any public enemy at war with China with "intent to prejudice the position" of China in such a war. What is meant by the terms "instigates," "assists," or "intent to prejudice" is unclear, leaving individuals with no clear understanding of what is and what is not permitted. In this way, arbitrariness will be introduced into Hong Kong criminal law proceedings if prosecutions are undertaken. Given China's history of arbitrary application of its criminal law against dissenters and China's clear ability to interfere in the decision-making process of the HKSAR, I am deeply concerned about the use of such elastic terms.

Similarly, a person can commit subversion if he or she "disestablishes" the basic system of China or "intimidates" the mainland government by using force or serious criminal means that endangers the "stability" of China. None of these terms is defined in the law. As a result, the HKSAR could classify public rallies such as those commemorating the Tiananmen events of June 4 as "serious unlawful means" and prosecute those participating for subversion.

Also very troubling is the new authority given to senior police commanders to order searches without a warrant in national security cases. This is a serious break with Hong Kong legal tradition. Any such authority should be reserved for the judiciary and permitted only in the narrowest of circumstances.

As human rights organizations have documented over the past decade, similar laws on the mainland are regularly used to convict and imprison journalists, labor activists, Internet entrepreneurs, and academics. The Chinese government has tried and sentenced many activists who used the Internet to promote causes ranging from political change to worker rights. All were charged with subversion. Now that Hong Kong is part of China, these examples, taken together with the proposed language of the new subversion laws, give reason for concern that human rights in Hong Kong may be under threat.

Amendments to the Official Secrets Ordinance

The Blue Bill amends the Official Secrets Ordinance by adding a new category of protected information--"information related to Hong Kong affairs within the responsibility of the Central Authorities." This new category includes information, documents, or articles on defense and foreign affairs as related to Hong Kong.

Under the new language, the law will be violated if the unauthorized government information has been obtained through illegal means, such as theft, bribery, or computer hacking. But the requirement that the information be obtained unlawfully is likely to have little effect against abusive prosecutions. Mainland authorities have a long history of prosecuting persons in possession of materials commonly available in democratic societies.

The Blue Bill amendments to the Official Secrets Ordinance fail to specify a "public interest" defense for obtaining such information. This makes clear that claims of national security will override the public interest in cases in which secret information is disclosed.

The amendments to the Official Secrets Ordinance will have a dangerously chilling effect on journalists and scholars writing on foreign policy and defense issues. Under the Official Secrets provisions of the Blue Bill, information about relations between the mainland government and the HKSAR could be defined as a "state secret." Again, these terms are overbroad and would put at risk anyone who published even a routine account about China-Hong Kong relations. Editors and journalists remain concerned about the case of Xi Yang, who in 1994 published what appeared to be an ordinary article about economics but later was imprisoned in China for publishing an article based on information not officially released about government financial policies. If these provisions become law, public servants and government contractors may fear speaking to the media on any matter touching on HKSAR and China relations for fear that the matter discussed, even though already public information, could also be a classified subject under the Official Secrets Ordinance.

I believe that journalists and scholars must be able to report information in the public interest. This is a fundamental freedom essential to protecting all other rights.

Any law on official secrets should conform to the Johannesburg Principles. The Principles say that for information to be restricted, it must pose a serious threat to a legitimate national security interest, that the restriction impose the least restrictive means necessary, and that the restriction be compatible with democratic principles. Regarding the disclosure of information, the Principles provide that the public interest in knowing the information shall be a primary consideration. Furthermore, no one may be punished on national security grounds for disclosure of information if the public interest in knowing the information outweighs the harm.

Amendments to the Societies Ordinance

I am particularly concerned that the proposed changes to the Societies Ordinance will give the Secretary for Security wide authority to ban non-governmental organizations without due process. The so-called proscription mechanism under the Blue Bill permits the Secretary of Security to ban a Hong Kong-based organization that has been publicly banned by the mainland government for being a threat to national security. The Secretary for Security would only need to show that the local branch is "subordinate" to the mainland organization, meaning that it is directed or controlled, has its policies determined by, or accepts substantial financial contributions from the mainland organization.

Once an organization is banned, group officers, members, donors, and even attendees at a meeting can be sentenced to prison terms of up to three years. Under the proposed appeals mechanism, the appellant need not be given "full particulars of the reasons for the proscription" and court proceedings may be held in the absence of "the appellant and any legal representative appointed by him." This would be a shocking departure from due process standards and put Hong Kong on the road to the deplorable standards regularly observed on the Mainland.

The Blue Bill states that the proscription mechanism may only be exercised in accordance with the standards under the ICCPR. However, on its face, the proscription mechanism violates the rights to freedom of association (art. 22) and assembly (art. 21) under the ICCPR. The banning of religious groups and media organizations would also infringe on the rights to freedom of thought, conscience and religion (art. 18) and expression (art. 19). Banning any organization for acts for which it is not responsible would raise issues of the fundamental rights of due process and equal protection under law.

In short, the authorities in Hong Kong will have the power to close down a Hong Kong organization because of decisions taken by the mainland government, which has never respected basic rights to freedom of association. Especially at risk would be organizations such as Falun Gong and the Catholic Church. Even without banning a particular group, the proscription mechanism will allow Hong Kong authorities to investigate any aspect of a law-abiding organization in Hong Kong on the pretext it might have a connection to a banned group in the mainland. Limiting the power to conduct such investigation to the Secretary of State for Security provides no real measure of protection from abusive and harassing investigations.

The provision also greatly increases the possibility of Chinese government intervention in Hong Kong by introducing Chinese law and Chinese political control into Hong Kong through the back door, and is a clear violation of both the letter and spirit of the Basic Law. This is particularly worrying since the statements of senior Chinese government officials make it appear that the impetus for the changes to Hong Kong's legal system has come not from the people of Hong Kong, but rather from Beijing. In February 2002, Li Peng urged the adoption of a new law, while in late June, when Hong Kong marked five years of return to Chinese sovereignty, Qian Qichen, China's deputy prime minister responsible for Hong Kong affairs, and other senior Chinese government officials told the Hong Kong government to enact a subversion law as soon as possible. Mr. Qian also warned that the group Falun Gong should be banned as an "evil cult."

The Blue Bill states that the Hong Kong courts will act as the ultimate safeguard against arbitrary application of any new laws, such as which organizations could be banned. But the decision by the Chinese Communist Party's Standing Committee to overrule a decision of the Hong Kong courts in 1999 undermined the previously high confidence in the independence of the Hong Kong judiciary. The HKSAR will not be able to guarantee that a similar intervention could not happen if Beijing were dissatisfied with the decision of the Hong Kong courts in implementing these new laws.

Thank you for the opportunity to bring these remarks to your attention.

Mindful of the enormous responsibilities which stand before you, I am,

Yours sincerely,
Robert E. Rutkowski

cc:
Secretary Colin L. Powell