

Submission No.168

9 June 2003

Mr Raymond Lam
Clerk to Bills Committee
Legislative Council Building
8 Jackson Road
Central
[Yr Ref : CB2/BC/5/02]

[Fax No. : 2509 0775]

Dear Mr Lam,

Bills Committee on
National Security (Legislative Provisions) Bill

I catered for Chinese readership for the entire earlier period and switched on to English, for an overseas commitment, in the last 2 months. For the time constraint, I propose to send you my views, sought by Hon Ip Kwok-him, in English without providing a Microsoft Word 97 format.

RESPONSE

Prologue

It must not be forgotten that Hong Kong's own security is not the real issue. It is national security overspreading all parts of PRC, including the HKSAR. Measures taken on the Mainland are to be gauged by the needs and wants of the country, the essence of which is within the peculiar knowledge of the Central Government alone. For Hong Kong, legislating as regards stability and national security is left in the hands of our local legislature. How, so reunification may be aptly tested, is PRC said to have effectively resumed her exercise of jurisdiction over Hong Kong if her territorial integrity remains, if only in the eyes of the Central Government, less than wholly protected. For obvious reasons, laws to be enacted under Article 23 of the Basic Law must therefore not disregard the PRC norms. The parameters are virtually set for the SAR government which has, in my view, fared well in having dexterously procured for Hong Kong the optimal balance between stability/national security and rights/freedoms guarantees under the Basic Law.

For historical reasons, there exists a considerable margin in human rights concept between the Mainland and the SAR, but Hong Kong must try to come to grips with the pragmatism in a matter the Central Government may well be irresponsible to make further compromises.

National security is acceded to, the world over, as top priority. The international community acknowledges the vital importance of national security with little hesitation, such as in the case of the overriding provision of "security exceptions (安全例外)" in Article 21 of the General Agreement on Tariffs and Trade (GATT) (GATT 1994), Article 14.2 of the General Agreement on Trade in Services (GATS) and Article 73 in the Trade-related Intellectual Property Agreement (TRIPS) in Annex 1 within the WTO framework, whereby solemn multilateral treaties may be preemptorily departed from without given reasons.

That national security stands in the forefront of paramount interests on the Mainland and elsewhere, as it should in Hong Kong as part of PRC, cannot be questioned.

No law draft is "teflon" – proof. The Tung administration, known to be parochially beneficent and moderate, has assured us all that rights and freedoms hitherto enjoyed will continue. Such an assurance should not be lightly ignored.

Answer

My views, following your "List of Affected Provisions", are given below :

1. Proposed section 9A in clause 6

A. For Sedition, criminal intent is made an essential ingredient for the offence of incitement, and no conviction may be sought without evidence of intent. Proof of "criminal intent" is no small onus for the prosecution.

Not only are "the nature" of the act of incitement and "the circumstances" surrounding it made relevant, but these matters must be demonstrated by the prosecution to be such that the person alleged to have been intentionally incited is likely to be led into misconducting himself/herself.

The onus and the essential elements in the proof for securing a criminal conviction would cast a heavier burden on the prosecutor, and it goes without saying that in turn the alleged offender would be better protected.

B. For Handling Seditious Publication : The prosecution will be more hard put to prove, not just that the offending publication is likely to cause the commission of the crime, but that another person is likely to be led into committing it. In other words, another person's perception of the publication is made an issue. That would certainly render the prosecutor's task much more onerous.

C. Time limit : A time limit of 3 years is also laid down for bringing a prosecution.

3. Proposed section 18A in clause 7

Substitute "Chapter III" for "Article 39" would bring in the whole range of the "Fundamental Rights and Duties of the Residents", including the three international covenants..

4. Proposed section 18B in clause 7

The replacement of a "chief superintendent" by an "assistant commissioner" would enhance the input experienced prudence and heighten the professional responsibility in the decision-making process.

5. Proposed new section 8A

Same as 3 above .

6. & 7. Proposed clause 9 & Proposed new clause 14A

Consequential amendments on account of redundancy.

"National security" is lifted from section 8(1)(a) of the Societies Ordinance (Chapter 151) for the regulatory law regarding the same comprehensively introduced by the National Security (Legislative Provisions) Bill.

8. Proposed section 2A in clause 14

Same as 3 and 5 above.

9. Proposed section 8C in clause 15

Less obscure semantics is adopted.

10. Proposed section 8D in clause 15

A. 8D(3) : Same as 9 above. Generally, the proving of a negative would often give rise to uncalled for complications.

B. 8D(5) : Since the Secretary for Security is to make regulations [8E(1), (2), (3) & (4)] and the High Court Rules Committee is to, "subject to the regulations made under section 8E", make rules [8F], this is merely a tidying-up exercise.

11. Proposed section 8E in clause 15

The Secretary for Security replacing the Chief Justice is intended to ease some expressed concerns (which I can hardly accept as "real" because the Chief Justice enjoys rules-making powers elsewhere, the exercise of which may similarly be impugned under the Basic Law and general law. Also, we have no Lord Chancellor who may be called upon to make these rules.)

Delicate material is best left to one single official instead of the entire Chief Executive-in-Council, whose duty of confidentiality may not be unquestionably taken on board *en bloc* by the Central Government in matters crucial to national interest.

Further, there is all the more to be said in favour of a professional, well-informed and equally high ranking top government official such as the Secretary for Security.

12. Proposed new section 8F in clause 15

It is designed to separate procedural matters from the circumvention of sensitive evidence or the embrace of an official stance.

Kindly note : rules-making under (d) for "admission of evidence", though subject to the regulations made by the Secretary for Security needs perhaps to be overhauled, restricting the former to matters other than those dealt with by regulations made for admission of evidence with the view to side-stepping sensitive information or assuming an official stance without much ado, particularly when 8D(6) unspecifically covers admission of "any" evidence sought to be introduced by

regulations as well as by rules. (This would seem to be a matter for the consideration of the Law Draftsman).

Epilogue

Save as hereinbefore stated, the amendments seek to intensify the already well-balanced approach in terms of national security and rights.

Yours sincerely,



Benjamin Tsz-ming Liu

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