COMMENT

How Hong Kong Law Will Change When Article 23 of the Basic Law is Implemented

Article 23 of the Basic Law (BL 23) requires the Hong Kong Special Administrative Region (HKSAR) to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government". It also deals with issues of state secrets and the activities of foreign political organisations in Hong Kong. Many of the issues raised by BL 23 are considered to be politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997 there have been anxieties over the implementation of BL 23.

What is interesting about BL 23 is that it does not directly prohibit treason, sedition, subversion and related actions, nor does it define the precise meaning of these words. Instead, it empowers the HKSAR – in practice its legislature – to enact laws to define and penalise such actions. This is an important aspect of the autonomy of the HKSAR under the concept of "one country, two systems", which demonstrated respect for the existing social, economic and legal systems in Hong Kong at the time of the handover of Hong Kong to China in 1997 by ensuring that mainland laws and practices will not be imposed on Hong Kong.

In the five years since the handover, nothing has happened in Hong Kong that raises the issues touched upon by BL 23. It has never been suggested that any activity in Hong Kong constitutes a possible threat to China's national security. It is therefore understandable that the publication by the HKSAR Government on 24 September 2002 of the consultation document on *Proposals to Implement Article 23 of the Basic Law* caused much public anxiety. Hong Kong people are concerned that the Hong Kong or Beijing Governments may have sinister intentions to curtail civil liberties and human rights in Hong Kong and extend mainland standards regarding matters such as subversion or the theft of state secrets to Hong Kong. However, from the legal or constitutional perspective, it seems that BL 23 does impose a legal obligation on the HKSAR Government to enact laws on the matters covered by it. The Government would be abdicating its constitutional duty if it did not address the question of the implementation of BL 23 within a reasonable time after the establishment of the SAR, and instead postponed the matter indefinitely.

Why, then, did it take the HKSAR Government as long as five years to come up with its proposal on the implementation of BL 23? This can perhaps be explained by the fact that immediately after the establishment of the HKSAR Government in 1997, there were many matters for it to address with a higher priority than BL 23. After all, as mentioned above, nothing has happened in Hong Kong since the handover that comes close to the kind of

activities to be proscribed under BL 23. Legislation under BL 23 therefore has no sense of urgency or pressing necessity. Another possible factor is that the matter is politically sensitive and therefore very difficult to deal with, particularly if the mainland laws on matters of treason, subversion, etc are not to be imported wholesale into Hong Kong. The existing Hong Kong law that is relevant to these matters had to be thoroughly reviewed, and foreign legislative models had to be researched and compared to those of Hong Kong.

The consultation exercise on the Government's legislative proposal on the implementation of BL 23 concluded with the publication on 28 January 2003 of the multi-volume *Compendium of Submissions* and the Government's announcement on the same day of nine sets of clarifications to or modifications of the original proposal. This was followed by the publication of the National Security (Legislative Provisions) Bill (the Bill) on 13 February and its first reading in the Legislative Council (LegCo) on 26 February. Although the Bill has not been enacted at the time of writing, it seems that the basic principles underlying it have the support of the majority of LegCo members. Therefore, it is now possible to see in broad outline how Hong Kong's laws will change as a result of the proposed legislation on the implementation of BL 23.

Treason

The existing definition of treason in the Crimes Ordinance will be narrowed to cover only situations where the accused joins foreign armed forces at war with China, instigates foreign armed forces to invade China or assists a public enemy at war with China. The term "war" used in the existing law will be narrowed to include only open armed conflicts (and not mere riots and civil disturbances). The existing "treasonable offences" (which are extremely broad and criminalise all "overt acts" or publications manifesting treasonous intention), the offence of assault on the sovereign, and the common law offences of "compounding treason" (corruption in deciding not to prosecute treason) and "misprision of treason" (failure to report treason) will be abolished. The proposed reform of the law of treason as particularised above, together with the proposed reform of the law of sedition discussed below, demonstrate that the BL 23 exercise is not intended to make Hong Kong's laws more draconian. Instead, it is an exercise to review and reform the existing law in light of the principles enshrined in BL 23, and to remove repressive laws that Hong Kong has inherited from its colonial era which are now out of date and inconsistent with progressive notions of human rights.

Sedition

Like treason, sedition is an existing crime under Hong Kong's Crimes Ordinance. The existing law of sedition, introduced by the British colonial government and modelled on similar laws in other British colonies, is very harsh, although it has not been strictly enforced in recent decades. For example, any speech or publication that "brings into hatred or contempt or excite[s] disaffection against the Hong Kong Government" is regarded as seditious under the existing law. This law was actually used in 1952[1] to prosecute and convict the publisher and editor of the pro-China newspaper in Hong Kong, *Ta Kung Po*, for re-publishing an article from the *People's Daily* that was critical of the colonial government. Furthermore, the existing law criminalises possession and handling (eg printing, importing, displaying or selling) of seditious publications. The Bill now proposes liberalising the existing law of sedition by:

1 Narrowing the definition of sedition to confine it to situations where there is incitement to commit treason, secession or subversion, or incitement to "engage in violent public disorder that would seriously endanger the stability of the People's Republic of China". Thus, unless the use of violence or serious criminal means is advocated (as discussed below) for certain specified purposes, sedition will not be committed.
2 Abolishing the offence of possession of seditious publications.
3 Restricting the offence of "handling seditious publications" to situations where the accused actually intends to incite treason, subversion or secession.
4 Incorporating into the definition of "seditious publications" the "likelihood" test in "principle 6" of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (adopted at a conference in 1996 convened by Article 19, a London-based non-governmental organisation) so that "seditious publications" are those that are "likely to cause the commission of" the offence of treason, subversion or secession.

Such proposed liberalisation of the sedition law is undoubtedly a welcome development in respect of freedom of information and freedom of expression and the press in the HKSAR.

[1] In the case of *The Crown v Fei Yi-ming and Lee Tsung-ying* (1952) 36 HKLR 133.

Subversion and Secession

BL 23 requires that the HKSAR should legislate to prohibit "subversion" and "secession" – two concepts that are unknown to Hong Kong's existing law but exist in mainland Chinese law. It is therefore necessary for the Government to formulate new definitions of the crimes of subversion and secession. Some people have expressed concern that any introduction of the mainland concepts of subversion and secession into Hong Kong will be inconsistent with the principles of "one country, two systems", of not changing Hong Kong people's way of life and of not reducing the pre-1997 level of protection of human rights in Hong Kong. The HKSAR Government has risen to the challenge of legislating on subversion and secession by *not* importing the relevant mainland laws and standards to Hong Kong, and by creatively designing for these two crimes legislative models that are unique to the HKSAR. Thus, according to the Bill, secession and subversion will be defined as "withdraw[ing] any part of the PRC from its sovereignty" (in the case of secession) and "disestablish[ing] the basic system of the PRC as established by the Constitution of the PRC; overthrow[ing] the Central People's Government; or intimidat[ing] the Central People's Government" (in the case of subversion), in both cases by "engaging in war" or using "force or serious criminal means that seriously endangers the stability of the PRC".[2] It should be noted that the definitions of secession and subversion proposed for the HKSAR are much narrower than the corresponding definitions in Articles 103 and 105 of the Chinese Criminal Code, which do not require acts of violence as an essential element in the offences of secession and subversion. However, the loose language used in the definitions in the Bill still leaves much to be desired. It is hoped the definitions may be refined in the committee stage of the Bill.

State Secrets

BL 23 also requires the HKSAR to legislate against theft of state secrets. The protection of official secrets against espionage and unlawful disclosure is already provided for fairly adequately in the Official Secrets Ordinance 1997, which was modelled on the corresponding British legislation. The Bill now proposes three major amendments to this Ordinance. First, a new category of official secrets is to be created to include information on "affairs concerning the HKSAR which are, under the Basic Law, within the responsibility of the Central Authorities", where disclosure is likely to endanger national security.

[2] The means are similar to those "terrorist acts" defined in Hong Kong's United Nations (Anti-terrorism Measures) Ordinance 2002.

This category of information is not provided for in the existing Ordinance, which was enacted shortly before the handover. Secondly, it is proposed that unauthorised and damaging disclosure of official secrets "acquired by means of illegal access" – defined to mean computer hacking, theft, robbery, burglary or bribery – be criminalised. This proposed amendment is apparently designed to close a loophole in the existing law whereby a computer "hacker may openly sell stolen protected information to a publisher who may then openly publish the information for profit"[3] without the publisher committing any offence under the existing official secrets law. Thirdly, the existing definition of "public servants" (which is crucial because official secrets are defined mainly by reference to their being in the possession of public servants and falling within the defined categories), which includes not only Hong Kong civil servants but also "any person employed in the civil service of the Crown in right of the United Kingdom" and "any member of the armed forces", will be localised to refer only to Hong Kong civil servants. This proposed amendment is significant because it limits the scope of official secrets covered by the Ordinance and excludes official secrets in the hands of mainland Chinese officials. Taken as a whole, the proposed amendments to the Official Secrets Ordinance are reasonable and consistent with the spirit of "one country, two systems". However, it remains to be seen whether the "public interest" and "prior publication" defences advocated by the legal and journalistic communities in Hong Kong will be added to the Bill during its committee stage.

Proscribed Organisations

The requirements in BL 23 to prohibit links between local and foreign political organisations were implemented by the amendment of the Societies Ordinance at the time of the handover in 1997. Under this Ordinance, the HKSAR Government has the power to prohibit the operation of a local society or association on the ground of national security. The Government is now proposing a set of amendments to the Societies Ordinance designed to elaborate this power. According to the Bill, where a local organisation: (a) has the objective of engaging in treason, secession, subversion, sedition or spying; or (b) has committed or is attempting to commit treason, secession, subversion, sedition or spying; or (c) is "subordinate to" an organisation in mainland China which has been proscribed by the Central Authorities' open decree for reasons of national security, the HKSAR's Secretary for Security may proscribe the local organisation "if he reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose". The Hong Kong courts will have the power to review

[3] Consultation Document, para 6.22.

whether the proscription is justified by applying the human rights standards enshrined in the International Covenant on Civil and Political Rights. Part (c) of the proposal faces much public opposition, but it seems unlikely that the Government will agree to omit it at the committee stage of the Bill. The policy behind the proposal is apparently to send a signal to deter people from "making use of Hong Kong's free and open environment as a base against national security and territorial integrity".[4] Another controversial amendment proposed in this regard empowers the Chief Justice to make rules on the hearing of appeals against proscription that may enable the court, in cases where disclosure of certain information is considered detrimental to national security, "to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him", although the court may "appoint a legal practitioner to act in the interests of the appellant" in such cases. The Government argues that precedents for such provisions exist in Canada and Britain in the context of immigration and anti-terrorism laws (eg the UK Special Immigration Appeals Commission Act 1997 and the Terrorism Act 2000). However, in so far as the Bill has not brought the existing system of appeals (to the Chief Executive in Council rather than the court) against the cancellation of a society's registration or prohibition of a society's operation (which may also be on the ground of national security) in line with the proposed system of judicial appeals against proscription of local organisations, there will be a significant anomaly in the law unless this problem is addressed at the committee stage of the present Bill.

Other Aspects

Space does not permit a detailed exploration here of other aspects of the Bill, such as the right to trial by jury in all cases of treason, secession, subversion, sedition and unlawful disclosure of official secrets; the extra-territorial application of some offences; adjustment of levels of punishment; removal of existing time limits for prosecution; and enhanced police powers of investigation. These issues should be addressed in further research.

Conclusion

During the three-month consultation period for the legislative proposal between September and December 2002, public opinion in Hong Kong was sharply divided; the debate was at times impassioned, and large-scale demonstrations were organised by both supporters and opponents of the proposal.

[4] *Ibid.*, para 3.8.

The vigour of the public debate on the issue and the active political participation of members of the public in this matter testify to the health of civil society and the vitality of the democratic spirit in Hong Kong. We need not be afraid of controversies. At the same time, scholars of Hong Kong law owe a duty to the community to provide an objective assessment of the state of our existing law and the extent to which it will be changed by the proposed legislation implementing BL 23. And once the legislation is enacted, this responsibility will pass to the strong and independent courts of the HKSAR which will have to strike the correct balance between the defence of human rights and the protection of national security as they interpret and apply the legislation in cases litigated before them. It is hoped that such cases will be extremely rare.

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