



DRACONIAN MEASURES OF DRAGON: HONG KONG SECURITY LAW

*By Vishwan Upadhyay
From Chanakya National Law University*

I. INTRODUCTION:

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Law or commonly known as The National Security Bill of Hong Kong is a legislation passed by the People's Republic of China with the aim to improve legal systems and enforcement mechanisms for safeguarding national security in the Hong Kong Special Administrative Region along with enforcing the policy of one country, two systems; preventing, suppressing and imposing punishment for the offenses of secession, subversion, organization and perpetuation of terrorist activities, and collusion with a foreign country or with external elements to endanger national security concerning the Hong Kong Special Administrative Region.¹

A. HISTORY OF HONG KONG:

Hong Kong first came in control of Chinese in 3rd B.C when the Qing dynasty gained power in the area. The Chinese held onto Hong Kong as a part of their mainland for about 2000 years. China lost Hong Kong to the British Empire in 1839 in the first opium war. According to historians, the first opium war was fought because the Chinese were trying to crack down on illegal trade of opium by British smugglers in Hong Kong. The war

¹ Article 1, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, 2020.

cost the Chinese a fortune and not to forget, the islands of Hong Kong too.

Hong Kong, through the Treaty of Nanjing, fell into the hands of the British Empire for perpetuity. But in July 1997, the flag of the British Empire was lowered and the territory was handed back to the Chinese after 150 years of prosperous rule.

B. SPECIAL ADMINISTRATIVE REGION:

These areas are those which have a certain degree of political and economic independence. Mostly Special Administrative Regions (SAR) fall under the general auspices of one country.² This term is widely used to refer to Hong Kong and Macau, the two SARs of the People's Republic of China. These SARs are given special considerations like the people of Hong Kong can elect their leaders but this like other ideas is also based upon one country, two systems formulated by Deng Xiaoping. This is because although the people have the right to vote but the candidates standing are those who have been nominated by the Communist Party of China.

II. ARTICLE 23:

A. Background:

Hong Kong has a long history with China. It was in Chinese control for around 2000 years and then in British control for around 156 years. In 1997, it was given back to the Chinese and was given the tag of SAR (Special Administrative Region) of China.

The people of Hong Kong in 156 years, the time it was under British rule showed the world what Hong Kong can achieve and how much it can progress without Chinese

² Adam Hayes, Special Administrative Region (SAR) Investopedia, <https://www.investopedia.com/terms/s/special-administrative-region.asp> (last visited Jul 4, 2020)



interference. But, when in 1997, Hong Kong went back into the hands of Chinese, people didn't celebrate. For them, this meant going back to their old ways of being oppressed and not being free anymore. To curb this negative feeling while holding the territory of Hong Kong posed a problem for the Chinese. Therefore, the policy of one country and two systems was adopted and put in place. Under the same policy, Hong Kong was given the 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China'; this acts as a de facto Constitution of Hong Kong. This also fulfilled the aim of the Sino-British Joint Declaration.

B. Provisions of Article 23:
One of the most important parts of the Constitution of Hong Kong is its Article 23, which reads as;

*"The Hong Kong 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."*³

Article 23 stated above is a mandatory provision that needs to be implemented by the Government of Hong Kong.

Article 23 is China's way of showing the people of Hong Kong that it trusts them. The SAR government in 2003 tried to introduce a

National Security (Legislative Provisions) Bill to the Legislative Council. This was followed by huge unrest in the streets of Hong Kong. This bill was an attempt to implement Article 23 of the Basic Law. Since this attempt failed, it can be said that Article 23 has never been implemented before. The attempt in 2003 failed because the citizens of the concerned area feel that the implementation of Article 23 would mean the destruction of their basic rights and freedom.

Article 23 while being drafted in early 1989 simply mandates Hong Kong to make laws to prohibit treason, secession, sedition, and theft of state secrets. Later on, in 1997 the basic law saw Article 23 having a new word, 'subversion'. It is pertinent to note that this word, i.e., 'subversion', is common for the people of mainland China and not for people of Hong Kong because Hong Kong followed the common law system. Post Tiananmen Square Massacre of 1989, there were widespread protests in the city of Hong Kong. Following that, the lawmakers added the words, 'subversion' and 'foreign powers'. Although the addition of the phrase 'foreign power' did not meet any opposition, it was not the case with 'subversion'.

III. HONG KONG NATIONAL SECURITY LEGISLATION, 2020:

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region is a legislation passed by Beijing which gives it unprecedented judicial powers in the financial hub, with jurisdiction over cases, secret trials without a jury and a national security agency.⁴ This law contains 66

³ Article 23, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

⁴ The Hindu, *Hong Kong national security law: five key facts you need to know*, 2020, <https://www.thehindu.com/news/international/hong->



articles, 6 chapters, and approximately 7200 words.

Hong Kong, as laid down under Article 23 of the Basic Laws was also meant to have a security law. This security law was not passed until recently because of the unpopular opinion associated with Article 23 and security law.

China passed this act in complete secrecy and the details of this legislation's 66 articles were known to very few people. This is because in the past few months many bills and statutes have been passed by the governments of China and Hong Kong. One such example is that of Fugitive Offenders Bill passed in June. Due to such drastic steps being taken by the governments, the citizens came out in huge numbers on the streets and protested against such bills which harmed the autonomy of Hong Kong and gave the Chinese mainland plethora of powers. Following all of these protests and violence, the government of China started blaming the Hong Kong government for not implementing Article 23. The example of Macau implementing the same provision was cited again and again by the relevant authorities⁵.

A. Key Provisions:

Chapter III under the title of 'Offences and Penalties' lays down that crime of secession, subversion, terrorism, and collusion with foreign forces are punishable by a maximum sentence of life in prison.

Article 20 and Article 21 deal with secession and lay down the provisions regarding

punishments based upon the seriousness of the crime.

Articles 22 and 23 deal with the offense of subversion whereas articles 24-28 deal with terrorist activities and part IV of this chapter deals with collusion with international forces. These articles also state rules such as damaging public transport will be considered as an act of terrorism and individuals found guilty will not be allowed to stand for elections and companies involved in any of the above-stated offenses will be fined.

There are various more provisions like those in Chapter IV of the act which states that laws of China will prevail over Hong Kong's laws and that Beijing will have the power over interpretation of laws. Also, some trials now can be held behind closed doors in complete secrecy. The privacy of people is also at risk since the authorities have the power to wire-tap and put the offenders under surveillance.

One of the most worrying provisions which would hurt the autonomy of Hong Kong SAR is Chapter V of the Security Law. According to this chapter which contains Article 48 to Article 61, the government of China now has the authority to establish its own National Security Commission in Hong Kong to enforce the laws and that too with a Beijing appointed adviser.

B. Why is this Security Law worrying?

To answer this question, one needs some time, to think about where to start. This is a draconian law aimed at harming the autonomy of the SAR of Hong Kong and

kong-national-security-law-five-key-facts-you-need-to-know/article31959413.ece (last visited Jul 5, 2020)

⁵ Hong Kong has only itself to blame for failing to implement Article 23 South China Morning Post,

<https://www.scmp.com/comment/opinion/article/3086440/if-hong-kong-had-enacted-national-security-laws-its-own-beijing> (last visited Jul 5, 2020)



suppressing the voices and freedom of the citizens of the abovementioned SAR.

In just a few hours of the introduction of this law, there were reports of people deleting their posts and comments from social networking sites, thus showing the fear that has set into the minds of people there. Professor Johannes Chan, a legal scholar at the University of Hong Kong while making a statement to BBC, said that “It is clear that the law will have a severe impact on freedom of expression, if not personal security, on the people of Hong Kong”⁶.

With this law in hand, the freedom of citizens of Hong Kong is in question. For example, Article 29(5) of the Security Law, 2020, states that:

“provoking by unlawful means hatred among Hong Kong residents towards the Central People’s Government or the Government of the Region, which is likely to cause serious consequences.”

The question now is whether this would include criticism of the Chinese Communist Party or not? Such vague provisions not only are ambiguous but tend to create an atmosphere of confusion that develops into a sense of fear.

Hong Kong’s autonomy was protected through its mini-constitution which was granted to it by China. According to Article 27 of the Basic Laws, freedoms of speech, press, publication, association, etc. have been granted to the people of Hong Kong. These have been violated by the law passed by China. As stated above, one of the examples is that of Article 29(5).

The International Covenant on Civil and

Political Rights has also been enshrined under Article 39 of Basic laws. This Covenant aims to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. Making laws to curb protests and ensure the security of citizens is completely different from making a law which ambiguous, vague, curbs the freedom of people affected by it and above everything else, creating a sense of fear in the people on whom such law is applicable. The law is wearing a veil of securing national security of Hong Kong but inside the veil hides provisions such as those in Chapter IV. These provisions have incited fear in the minds of people there and they are afraid to raise their voices now. Thus, curbing the right to protest of the people of Hong Kong, a right granted to them by the Basic Laws of the territory.

Article 41 (trials behind closed doors), article 44 (judges can be handpicked) and article 46 (no jury trials) are few examples set out in the new provision which harm the judicial autonomy of the SAR of Hong Kong. It is pertinent to note that Hong Kong follows a common law system, unlike the Chinese mainland. The judges in Hong Kong are appointed by Chief Secretary of Justice who is appointed by the chief executive of Hong Kong. The catch is here is that autonomy is just a facade. Although elections are democratic the people contesting for the post of Chief executive are appointed directly by the Central Government party.

The judicial autonomy of Hong Kong is fighting for its survival. This legislation is a multi-pronged attack on the judiciary and its

⁶ Grace Tsoi & Lam Wai, *Hong Kong security law: What is it and is it worrying?*, BBC, 2020,

<https://www.bbc.com/news/world-asia-china-52765838> (last visited Jul 6, 2020)



freedom in Hong Kong. The legislation gives the Chinese mainland power to try cases related to the national security of Hong Kong in the territory of China. Although certain rules have been laid down by the lawmakers as to when a case can be transferred, all of that is ambiguous and vague since they all are revolving around the same object, i.e., if national security of Hong Kong is in danger or not. Article 57 very clearly states that if a case related to national security and state secrets is being tried by authorities other than those belonging to the Judiciary of Hong Kong, the laws of China will prevail over laws of Hong Kong.

Also, the act of establishing an Office for Safeguarding National Security of the Central People's government in the Hong Kong SAR as laid down under chapter V is an extreme step and a desperate attempt to take over control by giving the office unquestionable powers under Article 60 of the National Security legislation. Giving authorities unfathomable power to act on an apprehension is not at all justified. Moreover, anyone questioning or verifying documents of the members of the office is liable to be charged as obstructing the duty of a government official.

Above mentioned reasons are why this legislation is worrisome and why it induces a sense of fear. Individually stated, these provisions don't seem to be dangerous to autonomy, freedom, etc.; but coupling an office of security with immense powers and no one to answer to with the state's judiciary not having any control over cases in its territory and passing extremes punishments for not so grave offenses is frightening.

IV. CONCLUSION

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Law is the law that might be termed as the beginning of the end of the autonomy of Hong Kong.

This law was passed to put a full stop to the ongoing protests in Hong Kong. Under article 23 of the Basic Laws, Hong Kong was to implement a security law but failed to do so on previous occasions owing to widespread protests. Using this as a reason, the Chinese Central Party formulated and implemented this law and used it as an opportunity to set up its own office of Security in Hong Kong.

Through this law, the Chinese Communist Party has not only created a sense of fear in the minds of the people of Hong Kong but also curbed a few basic rights. This law has invoked responses of the same kind from many countries and all say the same thing, that, this law is draconian legislation that aims to reduce the autonomy of the SAR of Hong Kong.
