

**Law Association, HKUSU's opinions on the special procedures for appeal
against proscription**

After reading the proposal submitted by the Department of Justice in June 2003, the Law Association, HKUSU has the following opinions.

In that proposal, concerning the selection of the special advocate, three principles will need to be taken into account and the selection process will be contained in subsidiary legislation that will be subject to vetting by the Legislative Council. We notice that it is only subject to vetting by the Legislative Council, we contend that it should be subject to affirmative resolution of the Legislative Council. This is because these three principles are very important and they should be strictly observed. Although the courts may announce the regulations invalid if it finds that it is contrary to the International Covenant on Civil and Political Rights (ICCPR) which is incorporated in Article 39 of the Basic Law or inconsistent with other articles of the Basic Law, an affirmative resolution of the Legislative Council would provide a safeguard to our fundamental rights.

Moreover, it should be noted that under certain conditions the breach of the ICCPR could be justified in Hong Kong. This could be seen in the cases of *R. v. Sin Yau-ming*¹, *R. v. Lum Wai-ming*² and *The Queen v. Chan Wai-ming*³. As in *R. v. Sin Yau-ming*, the breach of presumption of innocence for defendants involved in criminal offences is justified by a three-fold test mentioned by the judge. Therefore, if the procedure of selection of the special advocate is inconsistent with the ICCPR, would there be any justification? If there is justification, we contend that it should be made by the legislature but not the judiciary. After all, judge should not make any law but to apply the law.

In addition, concerning the second principle, that is the need to ensure that the appellant's interests are represented by an experienced and independent lawyer from the private sector. We submit that it is appropriate but it would be meaningless and unjust that the lawyer representing the appellant is experienced but the one representing the prosecution is more experienced. According to the adversarial mode of the common law system, the barristers representing the two parties should be equally competent and experienced. Only under this situation can justice be done. Therefore, we suggest that the lawyers representing the prosecution should also be selected from the same panel as the appellant does.

Generally, we appreciate the consultation work of the Panel on Administration of Justice and Legal Services. Nevertheless, we contend that the prerequisites of these special procedures are problematic. First of all, as submitted to the Bills Committee of the Legislative Council before, we contend that the right to proscribe the local organizations which are subordinate to a mainland organization is not mandated by Article 23. Secondly, according to the second draft of the proposed Committee Stage Amendments of the Bill, the Secretary for Security may make regulations for appeals to enable the Court of First Instance to hold proceedings in the absence of the

¹ [1992] 1 HKCLR 127

² [1992] 2 HKCLR 221

³ [1993] 1 HKCLR 51

appellant and any legal representative appointed by him. We contend that it is problematic and unjust. The Secretary for Security is responsible for proscribing a local organization. If s/he has also got the power to make regulations concerning the appeal, it may not be just. We believe that “Justice must not only be done, but must manifestly be seen to be done.”⁴ Therefore, we submit that the Secretary for Security should not make the regulations unless the proposed regulations must be subject to affirmative resolution of the Legislative Council.

We believe that this may be the last chance we could speak here concerning the legislation mandated by Article 23 of the Basic Law. Therefore, we would like to take this opportunity to share some of our opinions as an executive committee member of our Association. First of all, being an executive committee member, we pay full respect to our constitution and the rule of law. We are elected under democracy and we are fully aware that we should be responsible to our members. We will listen to our members’ voice, but not just hear. After listening, we will reflect their opinions and we will carry out our duties to the best of our members. Even students could have this concept, why is our government unaware of it?

Law Association, HKUSU
Session 2003-2004

⁴ R. v. Sussex Justice, ex parte McCarthy [1924] 1 KB 256, 259-260