

**National Security (Legislative Provisions) Bill :
interpretation, application and enforcement**

The Bill provides that Parts I and II of the Crimes Ordinance, Part III of the Official Secrets Ordinance, and the whole of the Societies Ordinance are to be “interpreted, applied and enforced in a manner that is consistent with Article 39 of the Basic Law”.

2. Article 39 of the Basic Law provides as follows.

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

Background to the provisions

3. In the Consultation Document on Proposals to implement Article 23 of the Basic Law, the government stated that one of its guiding principles was the need to meet fully the requirements of the Basic Law, including Article 39.

4. The government was, and is, committed to ensure that none of the provisions in the Bill should criminalise acts in a manner that would contravene Article 39. In response to a question concerning this issue, a leading UK human rights expert, Mr David Pannick QC, advised that, for the avoidance of any doubt, it may well be considered desirable to state generally in the new law that nothing in it is intended to contravene Articles 27 or 39 of the Basic Law.

Does the provision add anything?

5. Article 11 of the Basic Law provides that no law enacted by the legislature of the Hong Kong SAR shall contravene the Basic Law. This being so, it is clear that the current Bill cannot be inconsistent with Article 39 of the Basic Law. However, this does not mean that the interpretative provisions do not add anything. On the contrary, they have two significant legal effects.

(a) *Saving a provision from invalidity*

6. This first is that, if any provision in the legislation were inconsistent with Article 39, the court might in the absence of the interpretative provision refuse to give effect to it. However, the provision will require the courts to interpret the provision in a manner that is consistent with Article 39, thereby preserving its validity.

7. The provision may be compared with section 3(1) of the UK Human Rights Act, which states that –

“so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

8. An example of the application of section 3(1) of the English Act is found in the House of Lords’ decision in *R v Lambert* [2001] 3 WLR. The defendant was convicted of possessing a controlled drug. It was a defence to that offence for the accused “to prove” that he neither knew of nor suspected nor had reason to suspect the existence of any fact that was an element of the offence. If that defence required the accused to prove on the balance of probabilities that an element of the offence was absent, that would have contravened the presumption of innocence guaranteed by the Human Rights Act. The House of Lords avoided that results by interpreting the defence provision as imposing only an evidential burden on the accused (i.e. a requirement to produce some evidence that an element of the offence was absent).

9. The interpretation provisions in the Bill could have a similar effect if, contrary to the government’s intentions, any other provision in the Bill appeared to the court to be inconsistent with Article 39. Unlike the English interpretative provision, the provisions in the Bill are not qualified by any “so far as it is possible” requirement. This is because the intent is that this legislation should, in no circumstances, be inconsistent with Article 39. By interpreting the legislation in a manner that is consistent with Article 39, the courts will give effect to the legislative intent, ensure that fundamental human rights are protected, and prevent any provision in the Bill from being invalid.

(b) *Clarifying the relationship with Article 23*

10. Article 23 states that the Hong Kong SAR shall enact laws “on its own” in certain areas. The government is firmly of the view that, in doing so, it must comply with other parts of the Basic Law, including Article 39.

11. In that respect, Mr David Pannick QC has advised as follows.

“Concern has been expressed that Article 23 of the Basic Law might override Articles 27 and 39. I do not see how that conclusion could be reached as a matter of interpretation of the Basic Law. Article 23 imposes a duty on the Hong Kong Special Administrative Region to enact laws relating to specified matters. But Article 23 says nothing about the content of those laws. Nor does it suggest that Hong Kong has power in this context to override the rights conferred in Chapter III of the Basic law (in particular Articles 27 and 39). I can see no basis on which the Basic Law could be interpreted to mean that the content of the law enacted to implement Article 23 is not subject to Articles 27 and 39.”

12. What would be the position if, contrary to the above advice, someone tried to argue that Article 23 authorizes or requires laws to be enacted that are inconsistent with Article 39? In the absence of the interpretative provision, it could then be argued that legislation implementing Article 23 need not be interpreted in a manner that is consistent with Article 39. However, the presence of the interpretative provision would make that argument untenable.

NPCSC Interpretation

13. Under Article 158 of the Basic Law, the power of interpretation of the Basic Law is vested in the Standing Committee of the National People’s Congress. That power has been exercised on only one occasion since Reunification, in relation to the right of abode issue.

14. In response to concerns that this power of interpretation might be resorted to in other cases, the SARG has emphasized the extraordinary circumstances surrounding that right of abode interpretation, and has repeatedly said that it would not lightly seek any further interpretation. However, since it is impossible to know what the future may hold, the SARG has not undertaken never to seek any further interpretation.

15. In these circumstances, some have questioned whether the SARG could seek an NPCSC interpretation of Article 23 and, if so, whether that would then cause the implementing legislation to override fundamental human rights.

16. It must be emphasized that, if the Article 23 legislation were being enforced in the courts (e.g. by way of a criminal prosecution), it would be that

legislation that the courts would need to interpret. It is difficult, if not impossible, to envisage a situation in which the courts would need to interpret Article 23 itself. The situation is completely different from the right of abode issue.

17. In the right of abode cases, litigants argued that domestic legislation should not be enforced since it was inconsistent with the Basic Law. The central issue was the meaning of Article 24 of the Basic Law, which confers rights on certain categories of people, and whether domestic legislation was inconsistent with those rights. There was therefore a need to determine the meaning of Article 24.

18. In the current context, it is difficult to see how anyone could argue that the proposed legislation is inconsistent with Article 23 of the Basic Law. Article 23 neither confers nor denies rights. It merely requires the Hong Kong SAR to enact certain laws “on its own”. Once those laws are enacted, it is those laws and not Article 23 which Hong Kong courts will need to interpret. The defendant in a prosecution under the legislation could not argue that Article 23 conferred on him rights that the legislation purported to take away. The prosecution could not argue that Article 23 denied the defendant certain rights that the legislation purported to give him. There would therefore be no need to determine the meaning of Article 23.

19. Unlike Article 23, Article 39 does confer rights on people. But the current Bill does not purport to take away those rights, nor would it be arguable that it may accidentally contravene those rights. The interpretation provisions ensure that Article 39 will be fully complied with. Article 39 has been before the courts on numerous occasions and it has never been suggested that there is a need to seek an NPCSC interpretation of it. Given the points made in paragraphs 10 to 12 above, one cannot envisage a situation in which such an interpretation would be needed in the current context.

20. The NPCSC’s power to interpret the Basic Law is part of the new constitutional order. However, that power is not relevant to the consideration of the content of the current Bill, or to the future interpretation and enforcement of the legislation by the courts.

Other human rights Articles in Chapter III of the Basic Law

21. The interpretative provisions refer only to Article 39 of the Basic Law, as this is the operative clause of the Basic Law which entrenches the International Covenant on Civil and Political Rights, the International Covenant

on Economic, Social and Cultural Rights, and other relevant international labour conventions in our legal framework. Through Article 39 of the Basic Law, these international treaties on fundamental rights and freedoms are given constitutional status in Hong Kong. There are, however, other Articles in the Basic Law relating to fundamental rights. These include –

- ★ Article 25 (equality before the law)
- ★ Article 27 (freedom of speech, association, demonstration, right to strike etc)
- ★ Article 32 (freedom of religious belief etc)
- ★ Article 35 (access to the courts, choice of lawyers etc).

22. The fact that those other articles are not referred to does not mean that the rights guaranteed by them are not protected. The Administration considers that the Bill fully complies with those rights. However, if that were not the case, the Bill would not override them. On the contrary, the rights guaranteed by the Basic Law would prevail since, under Article 11 of the Basic Law, no law enacted by the legislature of the Hong Kong SAR shall contravene the Basic Law. If any provision in the Bill were inconsistent with any of those articles, the court would not give effect to the provision to the extent of that inconsistency.

23. Similarly, if any power created by the legislation were exercised in a manner that was inconsistent with rights guaranteed by the Basic Law, that exercise would be invalid.

Application to the three Ordinances

24. The interpretative provision applies to Parts I and II of the Crimes Ordinance. Those parts relate to treason and other offences endangering the security of the State. Other parts of that Ordinance deal with such things as perjury, incest, forgery and sexual offences, which do not call for such a provision. Moreover, the extension of the provision to those parts would probably be outside the scope of the Bill.

25. The provision also applies to Part III of the Official Secrets Ordinance. That part relates to unlawful disclosure, and is the only part being amended by the current Bill. The only other substantive part is Part II, which deals with espionage, and which is not being amended.

26. The provision applies to the whole of the Societies Ordinance.

Implications for other parts and other Ordinances

27. The fact that some parts of the Crimes Ordinance and Official Secrets Ordinance, and other Ordinances (apart from the Societies Ordinance), do not contain the interpretative provision will not prevent anyone from challenging any provision as being inconsistent with the human rights guarantees in the Basic Law. As explained in paragraph 22 above, if the provision is so inconsistent, the court would not give effect to it.

Department of Justice
April 2003

#65233 v2