

**National Security (Legislative Provisions) Bill:
Basic system of the People's Republic of China**

Introduction

This paper sets out the Administration's response to a number of questions raised during the meetings of the Bills Committee on 8 April 2003 and 15 April 2003 concerning the phrase “basic system of the People's Republic of China (PRC) as established by the Constitution of the People's Republic of China.”

Protection of the Constitution

2. The proposed section 2A(1) of Crimes Ordinance in the Bill stipulates that it would be an offence of subversion to, *inter alia*, disestablish the basic system of the PRC as established by the Constitution of the PRC by using force or serious criminal means that seriously endangers the stability of the PRC, or by engaging in war.

3. The Constitution is the fundamental law of the state. It has supreme legal authority, and stipulates, among others, the fundamental system and task of the state. A number of jurisdictions specifically protect the constitution or laws of their countries from being overthrown by illegal means, by considering such acts as an offence against the state. For example, it is treachery in Australia to overthrow *the constitution of Australia* by revolution or sabotage¹; high treason in Germany to change the *system of government established by the constitution* by violence or threat of violence²; and insurrection in Japan to create a disorder for the purpose of subverting the *national constitution*³. In the US, whoever incites, sets on foot, assists or engages in any rebellion or insurrection against the *authority of the United States or the laws thereof* would be committing an offence under the section of the US Code against “treason, sedition and subversive activities.”⁴

4. As explained in an earlier paper to the Bills Committee (Paper No. 31), the Central People's Government exists and operates under and in accordance with the Constitution, and it is considered that protection of the Constitution is appropriate in the context of our proposed offence of subversion. The Constitution of the PRC comprises of the Preamble and 138 Articles in four Chapters, stipulating fundamental issues such as the basic system, rights and

¹ See section 24AA at Part 2 of the *Australian Crimes Act 1914*

² See section 81 of the *German Penal Code of 1871*

³ See Article 77 of the *Japanese Penal Code*

⁴ See 18 USCS §2383.

duties of citizens and the structure of the state. In line with our guiding principle to define the offences as clearly and tightly as appropriate, however, we consider that instead of specifying the Constitution as a broad target of protection, the provision should be narrowly drafted to focus on the most relevant aspects of the Constitution, so far as our purpose of protecting the state against subversion is concerned. This is achieved with the present qualification to focus scope of the protection on the “basic system” of the state.

Basic system of the state

5. The nature of the state is provided in Article 1 of the Constitution, which states clearly that the socialist system led by the working class and based on the alliance of the workers and farmers is the fundamental system of the People's Republic of China.

6. The fundamental system of the state includes the fundamental political system, the organizational form for the state power to exercise its governance of the state. This is dependent on the nature of the state. In our Constitution, Article 2 states that all the power in the country belongs to the people, who exercise their power through the National People's Congress (NPC) and local people's congresses at all levels. Article 3 further provides that the NPC and local people's congresses are established through democratic elections, responsible to and supervised by the people, and state administrative, judicial and procuratorial organs are created by, responsible to and supervised by the people's congresses. Chapter 3 of the Constitution provides, among others, the responsibilities and functions of the NPC and local people's congresses in details.

7. The reference to “socialist system” in Article 1 should be understood in the light of the Preamble and other Articles of the Constitution. Paragraph 7 of the Preamble, as last amended in March 1999, states that “China will stay in the primary stage of socialism for a long period of time. The basic task of the nation is to concentrate its efforts on socialist modernization by following the road of building socialism with Chinese characteristics.” Article 6 of the Constitution elaborates on “primary stage of socialism” -

“During the primary stage of socialism, the State adheres to the basic economic system with the public ownership [of the means of production] remaining dominant and diverse sectors of the economy developing side by side, and to the distribution system with the distribution according to work remaining dominant and the coexistence of a variety of modes of distribution.”

The Administration's view on the term

8. While it is our view that Articles 1 and 2 of the Constitution are the most important provisions on what constitutes the “basic system” of the state so far as the Bill is concerned, the Constitution, as with other legal documents, should be understood in its entirety. The Preamble and other Articles may therefore assist in the comprehension of the term, the extent and specifics of which would depend on the circumstances. Similarly, while socialism is understood to encompass economic and social elements, whether the disestablishment of, say, part of the socialist economic system as established in the Constitution would amount to the disestablishment of the basic system of the state would also depend on the circumstances.

Further definitions on the reference to “basic system”?

9. As discussed above, the extent to which the Constitution is referenced to comprehend the “basic system” of the state depends on the circumstances. It would be impossible to foresee all the possibilities, and in such case the court should be provided with appropriate flexibility in determining what is encompassed. Moreover, the current formulation of the offence is already as tightly defined as appropriate, and adequately convey the legislative intention to protect the essential system of the state. As currently formulated, there is no room for a person to “inadvertently” breach the law. It should also be noted that in term of clarity and preciseness, the formulation compares favourably with similar legislation in other jurisdictions.

10. We therefore consider it inappropriate and unnecessary to further define the reference to “basic system.”

Security Bureau
June 2003