

**Law Association, HKUSU's views
on the National Security (Legislative Provisions) Bill**

According to Article 23 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, HKSAR is mandated to enact laws to protect national security and the Security Bureau has decided to amend the Crimes Ordinance, the Official Secrets Ordinance, and the Societies Ordinance and to provide for related, incidental and consequential amendments. The National Security (Legislative Provisions) Bill was published in the Gazette on the 14th of February 2003.

In respect of the Bill, the Law Association, HKUSU has the following points to make:

Regarding Section 4 of the Bill

Section 2 of the Crimes Ordinance currently in force is repealed and substituted by a new section. In our opinion, the word 'assist' in Section 2 (1)(c) is not clearly defined, and humanitarian aid should be exempted from the offence of treason in the Ordinance, as humanitarian aid merely provides for life necessities and would not prejudice the position of the People's Republic of China in the war.

The proposed ordinance has added Section 2A to the Crimes Ordinance to contain the offence of subversion. In Section 2A (1)(a), it is stated that "a person commits subversion if he disestablishes the basic system of the People's Republic of China as established by the Constitution of the People's Republic of China by using force or serious criminal means that seriously endangers the stability of the People's Republic of China or by engaging in war". In the trial proceedings for the offence of subversion, the Court has to determine the exact contents and meaning of the basic system of the PRC as established by the Constitution of the PRC. In doing so, there may lay a need to interpret the Constitution of the PRC. However, it is the duty of the Standing Committee of the National People's Congress to interpret the Constitution of the PRC, according to the Paragraph 1 of Article 67 of the Constitution of the PRC. Courts in Hong Kong may not have the power to interpret the Constitution of the PRC. In this way, we question how the courts can judge whether the accused has committed the offence of subversion without the power to interpret the Constitution. Even if the courts are entitled to interpret the Constitution, problems may arise when the interpretations of the Hong Kong courts are in conflict with those made by the Standing Committee of the National People's Congress.

The proposed ordinance has also added Section 2B to the Crimes Ordinance to regulate the offence of secession. We urge the HKSAR Government to fulfill her promise in Paragraph 3.7 of the Consultation Document on Proposals to implement Article 23 of the Basic Law Article, which stipulates that the protected rights under the Basic Law such as the freedom of demonstration, and of assembly allowing acts like holding and joining peaceful assemblies and expressing one's opinions shall be adequately and effectively protected and upheld. It is hoped that the Government can expressly lay down that acts like peaceful demonstration, assembly and expression of opinions are not included in the offence of secession.

Regarding Section 6 of the Bill

The proposed ordinance has added Section 9A to the Crimes Ordinance to restrict the offence of sedition. Our view is that the proposed ordinance should strictly comply with the Johannesburg Principles. Unless the speech is aimed at "inciting imminent criminal acts and the expression is very likely to incite such criminal acts", speeches, spoken or published, should receive proper protection against prosecution.

The proposed ordinance has added Section 9C to the Crimes Ordinance to control the offence of handling seditious publication. We think that this new section is not necessary because the general seditious acts are already encompassed by Section 9A.

The proposed ordinance has added Section 9D to the Crimes Ordinance and stated certain 'prescribed acts' are not incitement. Among the 'prescribed acts', Section 9D (3) (b) has set out that pointing out errors or defects in the government or constitution of; in the laws of; or in the administration of justice in the People's Republic of China or the Hong Kong Special Administrative Region with a view to the remedying of such errors or defects is not considered as incitement. Since the courts, in dealing with the trial for the offence of sedition, might have to interpret the Constitution or the laws of the PRC, the problem similar to the one emerged from Section 2A of the Crimes Ordinance will come up again.

Regarding Section 7 of the Bill

The proposed ordinance has added Part II A and Section 18B to the Crimes Ordinance which confers a police officer of or above the rank of chief superintendent of police power to conduct 'warrantless searches' under certain circumstances. We suggest that a separate mechanism should be established in order to assess and review the use of this power independently.

Regarding Section 10 of the Bill

The proposed new Section 16A of the Official Secrets Ordinance creates a wholly new category of protected information, namely, any information, document or article that relates to Hong Kong affairs which are, under Basic Law, within the responsibility of the Central Authorities. We submit that the clause should have a clear indication of what is "information related to Hong Kong affairs which are, under the Basic Law, within the responsibility of the Central Authorities", whether it is those information specified in Chapter 2 of the Basic Law, defence, external affairs or others.

Regarding Section 11 of the Bill

The proposed new Section 18(5A) of the Official Secrets Ordinance makes it a criminal offence to publish protected information that comes into a person's possession through illegal means. We submit that the Government should appear to recognize that, notwithstanding the fact that it has been obtained by illegal means, it may be in the public interest to publish that piece of information. There should be an exemption made for information which can in fact be obtained in the public domain.

Regarding Section 15 of the Bill

The proposed new Section 8A of the Societies Ordinance allows the Secretary for Security to proscribe an organization in Hong Kong on the grounds of national security. If these organizations in Hong Kong are subordinate to a mainland

organization the operation of which has been prohibited on the ground of security of the People's Republic of China, as officially proclaimed by means of an open decree, by the Central Authorities under the law of the People's Republic of China, they will be proscribed.

Firstly, we note that the right to proscribe the organizations which are subordinate to a mainland organization is not mandated by Article 23, because Article 23 only indicates that "The Hong Kong Special Administrative Region shall enact laws on its own...to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies." but not the organizations in mainland. Even if Section 8A is necessary, a certificate is needed to prove that the nature of the local organizations is the same as its 'mother' organization in mainland, or the local organization has committed an offence under Hong Kong law.

The proposed new Section 8B of the Societies Ordinance concerning the procedure of proscription indicates that the Secretary for Security should allow the organization to raise the reasons why it should not be proscribed. However, if the Secretary for Security has reasonable ground to believe that it is not feasible to do so, he/she can retain the right. But it is not clarified what accounts for "not feasible to do so", if there is no specific measure, the Secretary for Security is over powered.

According to the proposed new Section 8E, the Chief Justice may make rules for appeals. Originally rules for appeals are just like legislation, we suspect that allowing Chief Justice to make rules for appeals is against the principle of separation of power. Mostly importantly, where rules made under this section enable the Chief Justice to hold proceedings in the absence of the appellant and any legal representatives appointed by him, it may be against the Article 35 of the Basic Law which states that Hong Kong residents shall have the right to confidential legal advice, access to the court, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Finally, we urge our government to consider and consult the opinions of different organizations.

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