



ASIAN HUMAN RIGHTS COMMISSION

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Submission No. 135

Submission on National Security (Legislative Provisions) Bill

The Asian Human Rights Commission has been deeply concerned about the legislation on national security in Hong Kong. In our previous submission to the Panel on Security and Panel on the Administration of Justice and Legal Services of the Legislative Council, we expressed our concern that the proposals, if they become law, will seriously threaten the freedoms of Hong Kong's people and the rule of law in Hong Kong. We hold the same view towards the National Security (Legislative Provisions) Bill. In particular, we are greatly dissatisfied that the Hong Kong government has disregarded the public demand for a White Bill to allow a thorough consultation.

We have chosen to set up our office here because of Hong Kong's relatively free environment and respect for the rule of law. At the same time, the free flow of information, enhanced by an efficient communication system, provides great convenience for the promotion of international cooperation and exchange among people in the region. These are the advantages that Hong Kong offers over other parts of Asia and that have made Hong Kong a valuable member of international society. We have witnessed, however, that in all countries in Asia where similar national security laws have been adopted the rule of law has suffered severely. In addition, the role of basic institutions, such as an independent judiciary, prosecution and police, have been fundamentally undermined. Consequently, we expect a similar pattern to unfold in Hong Kong over the course of time if this law is enacted with the resulting deterioration of the rule of law and dilution of freedoms suffocating the vitality of Hong Kong and its economy.

There is almost nothing for the government and people of Hong Kong to gain, but there is a great deal to lose if the National Security (Legislative Provisions) Bill becomes law. Hong Kong is a unique city in which there is a high population density concentrated within a small space, which is especially evident in our high-rise buildings. This unique living arrangement is the very basis for an open society with full transparency and accountability. If severe acute respiratory syndrome (SARS) made any message apparent, it was this. We are at a moment in time when we are more in need of transparency and accountability and not of less of it. SARS reminds us of this wisdom. Whatever doubts anyone may have had before the SARS crisis of legislation on Article 23, now it can be said to be a bad law, a law that can threaten the people of Hong Kong's survival. If we want to recreate the confidence that is required to return crowds to our airports, a return of investments and even to the reopening of schools in a normal manner, we need to create the public impression that we have a type of governance that can be trusted to maintain a high standard of public scrutiny. In such a climate, legislation on Article 23 will do enormous damage to Hong Kong's public image. Let us discard this law for our common good, and let no one think of it as a matter of prestige to insist on this law. For a long period of time, we as a society will have to wrestle with SARS and its consequences. Let us not tie our hands or shut our mouths with a law like Article 23. Let us not shackle ourselves. Let us be wise enough to see that this legislation on Article 23 brings us insecurity, not security. Let us not be our own enemies when a deadly disease is challenging us. If September 11 was a landmark for America, SARS is a landmark for East and Southeast Asia—Hong Kong in particular—regarding the issue of security.

The Hong Kong government emphasises that it is the obligation of people to protect national security. However, what about its obligation to the people. The fundamental responsibility of the State is to protect the rights and welfare of the people. If a government makes laws in the name of “national security” to infringe on the rights of the people, it is no more a government for the people but an agent of oppression. The real security of the people, as shown in this battle against SARS, is to ensure the protection of human rights—civil and political as well as economic and social rights, such as the right to health.

Considering the threats of the National Security (Legislative Provisions) Bill to human rights, we strongly urge the Hong Kong government to withdraw this bill. The government’s withdrawal of the bill can show to Hong Kong’s people that its priority is to ensure their real security.

While the bill ought not to proceed at all, we offer the recommendations below for the public record of the Legislative Council and Hong Kong government.

Treason

Section 2(1)(b) of the bill provides that a Chinese national commits treason if he or she “instigates foreign armed forces to invade the People’s Republic of China with force.” The term “instigates” is so vague that it allows the government to prosecute individuals solely for the expression of an opinion. This part should be deleted

Section 2(1)(c) of the bill provides that a Chinese national commits treason if he or she “assists any public enemy at war with the People’s Republic of China.” The term “assists” in Section 2(1)(c) should be clearly defined and should exclude the provision of humanitarian aid.

Subversion

The situations for committing the offence of subversion in respect to “disestablishing” the “basic system” of the People’s Republic of China as established by the Constitution of the People’s Republic of China in (2A(1)(a)) and “intimidating the Central People’s Government” in (2A(1)(c)) should be deleted. The definitions of “disestablishing,” “basic system” and “intimidating” are not clear and could be interpreted in a very broad manner.

In Section 2A(1)(c), the offence of subversion should be narrowed to an act of “engaging in war” and should exclude “using force or serious criminal means.” The term “force” is unclear and should be deleted. Some of the definitions of “serious criminal means” in (2A(4)(b)) are so broad that a massive e-mail campaign to government departments or a large demonstration that blocks traffic might be interpreted as seriously disrupting an electronic system or essential service, facility or system. Existing laws are adequate enough to punish those crimes as defined by “serious criminal means.”

Secession

The offence of secession should be narrowed to an act of “engaging in war” in (2B(1)(b)) and should exclude “using force or serious criminal means” in (2B(1)(a)). The reasons are the same as those above under the offence of subversion.

Sedition

The offences of sedition and the handling of seditious publications should be deleted. The new offences appear to criminalise only an intention and pose a serious threat to the freedoms of expression and the press.

If the government insists, however, on enacting legislation on this offence, the government should bring the offence of sedition fully in line with the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

Amendments to the Official Secrets Ordinance

The new offences created—the unauthorised disclosure of information related to Hong Kong affairs within the responsibility of the Central Authorities and the disclosure of information acquired by means of illegal access to it—will inhibit the free flow of information and should be removed. The experience of dealing with SARS in Hong Kong and mainland China shows that a free flow of information is essential to the protection of people's basic rights, even to the right to life. The revised definition—matters relating to any affairs concerning the Hong Kong Special Administrative Region which are, under the Basic Law, within the responsibility of the Central Authorities—remains vague and can cover a wide range of information related to political and economic rights and the livelihood of Hong Kong's people. Furthermore, the bill does not indicate who will make the important decision about what specific information is a state secret. Presumably, it will be the Chinese government without any oversight of the courts in Hong Kong—a potentially dangerous mechanism.

Moreover, there is no justification for this new category of information. Since Hong Kong reunited with China, the experience of the last five years has not shown any threat to national security without these proposed offences. Instead, freedom of the press will be jeopardised as journalists could be prosecuted, even if they were unaware that the information they published had been obtained illegally. As a result, the right to information will be curtailed.

If the government is to retain these two new offences, it must provide sufficient protection against abuse, such as the defence of public interest and public availability of the information.

Warrantless Searches

There is no need to provide search and seizure powers for the police without warrants. Existing legislation has already provided the police with sufficient powers. To believe that strict rules relating to arrest without warrants, detention and judicial supervision can be changed without causing an abuse of power and an increase of corruption, both within and outside the police force, is a delusion that other societies, especially in Asia, have paid a heavy price for holding. This power should be removed from the bill.

The fear is that in case the proposed article becomes effective the police may have the right to retain and maintain certain practices, procedures, persons, documents or information under the guise of national security which cannot be examined by the Independent Commission against Corruption (ICAC) even if there are serious complaints. This will seriously undermine the authority of the ICAC and could lead to police abuses being ignored and necessary investigations neglected on the grounds of national security. The confidence of both investors and the general public in the economic management of Hong Kong is closely related to the mechanisms for accountability and transparency put in place by the government. If the prevailing system is tampered with, especially during the present economic downturn, potential investors may transfer their funds elsewhere.

Proscription of Local Organisations

The intention to proscribe any organisation in the community that has been banned on national security grounds by the central government in (8(A)(2)(c)) absolves the Hong Kong government from having any responsibility or authority over such matters. Under this particular proposal, the definition of "national security" in Hong Kong will be determined in

Beijing, and local organisations will become unlawful without any oversight and protection by the courts in Hong Kong, thereby eroding the “one country, two systems” model. This part should be removed.

The bill suggests that the appeal against proscription lies in the Court of First Instance (8D(1)). This means no judicial review of the secretary for security’s decision will be available at the appeal stage. Instead of this appeal mechanism, a judicial review should be provided to review the decision. The bill also suggests excluding the appellant and his or her lawyer from attending the hearing of the appeal on the grounds of protecting the publication of evidence which might prejudice national security. This arrangement goes against the principles of equality before the courts and the right to a fair and public hearing and should be removed.

Conclusion

Legislators play a very important role in safeguarding the rights of the people and the rule of law against the exercise of arbitrary power by the executive through examining bills thoroughly based on the interests of the people, not political expedience. Those enacting laws often think from the perspective of the implementers of the law and neglect the possible suffering incurred on ordinary people by an unjust law. Thus, a responsible legislator should examine the bill from the perspective of ordinary people and should encourage the participation of ordinary people to voice their concerns about the possible impact the bill will have on their daily life.

The National Security (Legislative Provisions) Bill is now in your hands. Considering the detrimental effects of the bill if it becomes law to the freedoms of Hong Kong’s people and the rule of law, we call upon all members of the Legislative Council to not repeat the same mistake as the government did during the consultation period and rush the examination of the bill. It is the responsibility of the Legislative Council to protect the human rights of Hong Kong’s people and to ensure their right to be fully consulted in the legislative process.