

Submission No.79**Comments on the National Security (Legislative Provisions) Bill**

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The Bill to implement Article 23 of the Basic Law is controversial but it is important to understand the obligation placed upon the HKSAR to enact laws under Article 23. The background is the principle of 'one country two systems' on the basis of mutual non interference. In this context, reciprocal obligation is placed upon the HKSAR to enact laws to ensure that the HKSAR is not made into a safe haven for those supporting subversive activities in the PRC. It is easy to understand that if the HKSAR wishes not to be interfered with, it should ensure that it does not permit nor acquiesce in the interference in the affairs of our neighbour from Hong Kong. In reviewing the Bill, one should see whether the proposed legislation is tightly drafted, whether the provisions conform to Articles 27 and 39 of the Basic Law and the ICCPR as applied in Hong Kong, whether the provisions are within the matters that require legislation under Article 23 and whether the proposed legislation strikes a proper balance between the freedom of expression by individuals, the interest of the community as a whole, the protection of the State and the obligation of the HKSAR to enact laws under Article 23.

To appreciate the arguments, I have looked at the Consultation Document of the Security Bureau, the views expressed by the Bar and the public and the proposed Bill. I find in general there is a narrowing of the offences as existed in the Crimes Ordinance (for example treason and sedition under sections 2 and 9 of the Crimes Ordinance) and

a further narrowing of the offences as suggested in the Consultation Document by the deletion of certain provisions or terms (for example the deletion of the offences of misprision of treason and possession of seditious publications and the deletion of terms such as 'levying war' and 'threat of force' from subversion and secession and the tightening of certain provisions). For the offences of secession and subversion, the offences would only be committed by using force, serious criminal means or by engaging in war (proposed sections 2A(1) and 2B(1) of the Crimes Ordinance). There are general safeguards that the provisions are to be interpreted and applied in a manner consistent with Article 39 (proposed section 18A of the Crimes Ordinance and section 12A of the Official Secrets Ordinance) and the provision for trial or election to trial by jury (the proposed sections 18A, D and E of the Crimes Ordinance and section 24A of the Official Secrets Ordinance).

I will now focus on sedition. The offence of sedition has long existed in the Crimes Ordinance of Hong Kong (Sections 9-14). Under the existing law, it is an offence to make any speech and utter any seditious words or do any acts with any of the intentions defined as seditious (Section 9) and one can be convicted without having the "intention of causing violence or creating public disorder or a public disturbance" (See the case *The Crown v Fei Yi-ming and Lee Tsung-ying* (1952) 36 HKLR 133). The proposed section 9A to the Crimes Ordinance for sedition is a step in liberalisation in that, for the offence to be committed, it requires:

- (1) incitement to commit an offence of treason, subversion or secession; or

- (2) incitement to *violent disorder* that would seriously endanger the stability of the PRC. [the words 'or the HKSAR' having been deleted]

and provides a defence under the proposed section 9D that certain acts are not incitement such as:

- (1) showing that the Central People's Government has been misled or mistaken in any of its measures;
- (2) pointing out errors or defects (i) in the government or constitution of; (ii) in the laws of; or (iii) in the administration of justice in the PRC with a view of remedying such errors or defects;
- (3) persuading the public to attempt to procure by lawful means the alteration of any matter provided for in the laws of the PRC; or
- (4) pointing out any matter which is producing ill-will or enmity between different classes of the population of the PRC.

For the commission of the offence of 'handling seditious publication' under the proposed section 9C of the Crimes Ordinance, the mens rea of intent is required as an element of offence.

One criticism is that the proposed section still falls short of what is stipulated in the Johannesburg Principles which provides that expression might be punished only if "the expression was intended to incite *imminent violence*". But the express words and

the purposive intent of Article 23 is to prohibit the proscribed acts which includes sedition and to ensure that the HKSAR would not be used as a base from which subversive acts against the PRC are carried out. Thus "imminent violence" is not made a requirement to the commissioning of the offence. As drafted, it seems that the offences of treason, subversion, secession and sedition do not cover domestic dissent and acts carried out against the government of the HKSAR.

On police investigation powers, under the proposed section 18B of the Crimes Ordinance, a police officer above the rank of chief superintendent may direct any police officer to enter upon and search the premises where it is believed that an offence of treason, subversion, secession, sedition or handling seditious publication has been or is being committed. It is suggested as an improvement is to make a magistrate's search warrant mandatory such as under section 50(7) of the Police Force Ordinance (There is a similar police power to search under section 33 of the Societies Ordinance).

On the matter of Theft of State Secrets, the Bill proposes to amend the Official Secrets Ordinance by (i) adding section 16A in relation damaging disclosure by a public servant or government contractor of information related to Hong Kong affairs within the responsibility of the Central Authorities, (ii) by adding "illegal access" to "unauthorized disclosure" of information under section 18 and (iii) by adding subsection 18(5A) to define "illegal access as unauthorized access or access to computer with criminal or dishonest intent and obtaining information, document or articles by theft, robbery,

burglary and bribery. Most troubling is section 18(1), an existing section, which stipulates that:

"A person who comes into possession of any information, document or other articles in circumstances mentioned in subsection (2) commits an offence if he discloses it without lawful authority and knowing, or having reasonable cause to believe, that-

- (a) it is protected against disclosure by any of sections 13 to 17; and*
- (b) it has come into his possession as mentioned in subsection (2) "*

I agree with the Bar that this provision may affect press reporting in that (i) the protected information under sections 13 to 17 is defined by source and not by content, (ii) it may cover information already in the public domain and (iii) there may be public interest to know. As the Official Secrets Ordinance covers not only matters relating to the Theft of State Secrets but includes disclosure such as under subsection 18(2)(a) where information comes into a person's possession as a result of unauthorized disclosure to him or another by a public servant, a thorough review of the Official Secrets Ordinance to bring it into line with the standards as set out in the ICCPR and the Johannesburg Principles (Principles 15 and 16) may be preferable.

As to the Societies Ordinance, the Bill proposes to amend the Ordinance by inserting sections 8A, B, C, D and E. By section 8A, the Secretary of Security *may*

proscribe a local organization if she reasonably believes that proscription is necessary in the interest of national security and is proportionate for such purpose. The Secretary for Security may proscribe under section 8A(2)(b) if a local organization has for its purpose or has committed or attempting to commit treason, subversion, secession or sedition or is subordinate to a prohibited mainland organization. As a safe guard, under section 8B, the Secretary of Security must offer the organization an opportunity to be heard and the proscribed organization may appeal to the Court of First Instance against proscription. As a further assurance, the Chief Justice may make rules for appeals under section 8E of the Ordinance.

Having reviewed the proposed Bill and the other related documents, I am of the view that save as to the provisions of the Official Secrets Ordinance which may require further consideration, the Bill as a whole is narrowly drafted and proportionate to the need for enactment under Article 23.

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