

Submission No.80**Comments on the National Security( Legislative Provisions ) Bill****Sylvia Siu**

The Bill to implement Article 23 is important, the issues at stake are fundamental and controversial as it may affect Hong Kong people's freedom of expression and access to information. It has become the talk of the town by all walks of life in Hong Kong as well as making headlines in international newspapers/ magazines. The question whether Hong Kong people's civil liberties will survive the implementation of Article 23 is a concern to every citizen in Hong Kong. There is suggestion that this Bill should be postponed indefinitely as the existing laws of Hong Kong are already adequate to cover the issues. It is important to appreciate that by Article 23, the HKSAR has a constitutional obligation to enact laws on its own within reasonable time to prohibit acts of treason, sedition, secession and subversion against the PRC, to deal with theft of State secrets and activities of foreign political organizations in Hong Kong. Dr. Priscilla Leung has written an article to explain the practical necessity of enacting legislation pursuant to Article 23 to avoid the possibility of the Central Authorities exercising their powers under Articles 18 and 158 of the Basic Law, I share her view. It is to be noted that the HKSAR has no obligation to go beyond Article 23, the existing and proposed laws should be evaluated on this basis. The Bill to implement Article 23 presents an opportunity to re-examine provisions of existing ordinances, repealing those parts which are outdated and inconsistent with the requirements of Articles 27 and 39 of the Basic Law.

As the Law Society has commented on the Consultation Document, my comments are based on whether suggestions proposed by the Law Society are adopted in the Bill on the following controversial issues:-

### 1. Treason

It was suggested by Law Society that the common law definition of levying war should not be adopted.

In the Bill, "levying war" is now deleted.

### 2. Misprision of Treason

It was suggested by Law Society that this offence be repealed.

This offence is no longer in the Bill.

### 3. Secession

It was suggested by Law Society that any law on secession should only become activated when and only for so long as there is a *declared state of secession* in respect of a specified territory, evidenced by a certificate of the Chief Executive.

The Bill proposes that "a person commits secession if he *withdraws* any part of the PRC from its sovereignty by (a) using force or serious criminal means that seriously endangers the territorial integrity of the PRC" or (b) engaging in war." The words "he *withdraws* any part of the PRC" is effectively the same as "declared state of secession".

#### 4. Seditious

(i) The Law Society suggested that the proposed offence of inciting others (a) to commit the substantive offence of treason, secession or subversion; or (b) to cause violence or public disorder which seriously endangers the stability of the state or the HKSAR should replace all existing seditious offences

The Bill seeks to repeal the existing sections 9 and 10 of the Crimes Ordinance dealing with the definition of acts done with a *seditious intent* and the offences, and enact ss 9A, 9B, 9C and 9D which is much narrower. The words "or the HKSAR" is deleted after the words "to cause violence or public disorder which seriously endangers the stability of the state"

(ii) The Law Society suggested that there should be a high threshold of proof to establish the offences. The wordings of the Law Society came from Principle 6 of the Johannesburg Principles.

This suggestion has not been taken up.

#### 5. Seditious Publication

The Law Society suggested there should be no separate offence relating to seditious publications and the current law dealing with seditious publication should be repealed. It is also suggested that possession of seditious publications should not be an offence.

The offence of possession of seditious publication is deleted in the Bill, and a new section (9C) on "Handling seditious publication" is inserted, which states that

" a person who

- (a) publishes, sells, offers for sale... ;
- (b) prints or reproduces any seditious publication; or
- (c) imports or exports any seditious publication ,

with intent to incite others, by means of the publication, to commit an offence under section 2 ( treason) , 2A (subversion) or 2B (secession) is guilty of an offence....."

#### 6. Subversion

The Law Society suggested "intimidating" the PRCG should not be part of the offence of subversion . The wording "intimidating" is unnecessarily far-reaching.

The Bill has not taken this point. "Intimidating" is an ambiguous and vague. It may fail to satisfy the requirement of clarity and precision in the criminal law.

#### 7. Theft of State Secret

The Law Society suggested that the concepts of " *damaging disclosure*" " and "*interests of the state*" should be considerably narrowed down and more precisely defined.

In the Bill, "interest of the state" is now replaced by s 16A (2) which states

" a disclosure is damaging if -

- (a) the disclosure endangers national security ;or

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(b) the information, document or article in question is of such a nature that its unauthorized disclosure would be likely to endanger national security.

The offence is narrowed down to disclosure which would endanger or would be likely to endanger national security, and national security is now defined in the Interpretation section (12) to mean

“ the safeguarding of the territorial integrity and the independence of the PRC.”

#### **7. Foreign Political Organization**

The Law Society suggested that the power to proscribe an organization on the ground of “National security” is unnecessary and beyond the scope of Article 23

The Bill proposed s8A (Proscription of organizations endangering national security) to the Societies Ordinance. The section applies to local organizations. It is noted that there is no requirement to proscribe local organizations. This implementation would be unnecessary and beyond the scope of Article 23.

#### **8. Investigation Powers**

The Law Society suggested that it is unnecessary and undesirable to give an additional power and discretion to a senior police officer to enter and search premises without a warrant issued by the Magistrate.

The Bill has not taken this suggestion ( s18B of Crime Ordinance )

**9. Trial by jury**

The Law Society proposed the an accused under any of the Article 23 offences should have a right to elect for a trial by jury

The Bill has adopted this suggestion

Most of the suggestions made by the Law Society are adopted, it is for the Bills Committee to further consider the remaining suggestions not yet taken up.

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