

Submission regarding "Local legislation to implement the National Anthem Law"

Asterism
Proposed cabinet of Executive Committee,
The Hong Kong University Students' Union, Session 2018

We Asterism, the proposed cabinet of Executive Committee, The Hong Kong University Students' Union, Session 2018, strongly oppose the local legislation to implement the National Anthem Law.

1. Conflicts with freedom of speech

It is submitted that the implementation of the National Anthem Law is in conflict and cannot reconcile with the protection of freedom of speech in the current law, namely article 27 of the Basic Law and article 16 of the Hong Kong Bill of Rights Ordinance.

The current position of Hong Kong regarding the conflict between national symbol and freedom of speech is illustrated in the case of *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 (hereinafter *Ng Kung Siu*). In the *Ng Kung Siu* case, the court held that the national flag as a unique symbol of the state, relevant to the societal interest of social order, shall be protected and that the restriction on freedom was proportionate as the ban on desecration of the flag was only banning "one mode of expression".

It is submitted that the Legislative Council shall rethink the importance and essence of freedom of speech. The issue is whether it is right and just for the legislature (or the government) to "prohibit expression simply because it disagrees with its message," or to "foster its own view of the flag (or the anthem, as in our discussion) by prohibiting expressive conduct relating to it" (*Texas v. Johnson*, 491 U.S. 397 (1989)).

The Legislative Council should be very careful when approaching the concept of freedom of speech. The essence of freedom of speech is the protection of expression of ideas, including the ones that dissent from the majority in society or even the law. And it is submitted and suggested that the safest position in reconciling with the freedom of speech for the Legislative Council is to avoid local legislation of the National Anthem Law.

2. Distinguishing the National Flag and National Emblem Ordinance

Although the *Ng Kung Siu* case set out the current position of the laws in Hong Kong, that a unique symbol of the state shall be protected as an interest with the concept of *ordre public*. We submit that the National Flag and National Emblem Ordinance is not a good reference for the legislation of the National Anthem Law.

Article 7 of the National Flag and National Emblem Ordinance:

“A person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.”

The article sets out a clear and exhaustive list of conduct prohibited by the law for the protection of the national flag. It is possible to draft such a list of conduct for the national flag for the sake that a national flag is a physical object. This is not the case for the national anthem. An anthem cannot be touched, and the quality of the anthem performed by different persons are different. There cannot, and is impossible to write an exhaustive list of conduct for the national anthem. The nature of an anthem makes it unsuitable to be protected by legislation or pure words.

We submit that any restriction on people’s rights, especially the freedom of speech and expression as concerned in this situation, shall be clear and exhaustive. An uncertain restriction would only lead to disproportionate burden and hardship on people when exercising such rights, and possibly and foreseeably a “chill effect”.

3. Conflicts with “Constitutional Duty” and the Extent of Local Legislation

We believe that “constitutional duty” is not a sufficient ground for the local legislation of the National Anthem. The “duty” shall not be fulfilled and performed if such duty is in conflict with people’s rights and interests (not the state’s interest). Yet, if the Legislative Council regards there is an unavoidable need to bring National Anthem Law into legislation locally, the Legislative Council shall also consider to what extent the National Anthem Law shall be implemented in Hong Kong through local legislation.

According to article 18 of the Basic Law:

“National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.”

The article does not bar the legislature from making amendments to the law listed in Annex III in order to make it applicable locally. Therefore, it is submitted that the Legislative

Council is reminded to think and discuss how the National Anthem Law can be applicable in Hong Kong, if and only if the Legislative Council finds there is full necessity to bring local legislation. It is also noted that the Legislative Council should have the discretion not to legislate certain articles if they deem such articles unfit to be implemented in Hong Kong.

It is further submitted that the Legislative Council may take a reference to the National Anthem Act in Canada. The Act consist of 3 articles only:

“Short title

1 This Act may be cited as the National Anthem Act.

1980-81-82-83, c. 5, s. 1.

Marginal note: National anthem

2 The words and music of the song “O Canada”, as set out in the schedule, are designated as the national anthem of Canada.

1980-81-82-83, c. 5, s. 2.

Marginal note: Public domain

3 The words and music of the national anthem of Canada are hereby declared to be in the public domain.

1980-81-82-83, c. 5, s. 3.”

The whole Act merely defines the National Anthem and nothing more. It is suggested that the Legislative Council may consider carrying out local legislation for articles only regarding the definition of the National Anthem. And we strongly oppose any legislation for articles prohibiting expressions related to the National Anthem.