

政制及內地事務局  
政府總部

香港添馬添美道2號  
政府總部東翼



**LC Paper No. CB(2)1127/18-19(27)**

CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU  
GOVERNMENT SECRETARIAT

EAST WING  
CENTRAL GOVERNMENT OFFICES  
2 TIM MEI AVENUE, TAMAR  
HONG KONG

本署檔號 Our Ref : CMAB E4/1/1  
電話 Tel No : 2810 2333  
傳真 Faxline : 2524 7437

(By email and fax)  
(Fax no.: 2509 9055)

Ms Joanne MAK  
Clerk to Bills Committee on National Anthem Bill  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

29 March 2019

Dear Ms MAK,

**Re: Request for supplementary information  
on the National Anthem Bill**

Regarding the letter from Hon Tanya CHAN of 22 March 2019,  
our reply is set out below.

Legal certainty

2. The National Anthem Bill (the Bill) is legally certain. Article 39(2) of the Basic Law provides that the rights and freedoms of Hong Kong residents shall not be restricted unless as “prescribed by law”. This requirement mandates the principle of legal certainty.

3. The courts have held that a criminal offence must be so clearly defined in law that it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, whether his course of conduct is lawful or not.

4. However, the courts also accepted that absolute certainty is unattainable and would entail excessive rigidity. The law must be able to keep pace with changing circumstances. Hence it is recognised that a prescription by law inevitably may involve some degree of vagueness in the prescription which may require clarification by the courts.<sup>1</sup>

5. As observed by the Court of Final Appeal in *Shum Kwok Sher v HKSAR*,<sup>2</sup> some conduct which the law prescribes as criminal may best be described by reference to the nature of the activity rather than to particular methods of committing it. It may be impossible to predict all these methods with absolute certainty, or there may be good grounds for thinking that attempts to do so would lead to undesirable rigidity. In such situations a description of the nature of the activity which is to be penalised will provide sufficient notice to the individual that any conduct falling within that description is to be regarded as criminal. The application of that description to the various situations as they arise will then be a matter for the courts to decide in the light of experience.

6. Unlike the national flag and national emblem which are physical objects, the national anthem is a piece of music. It is impossible to specify all the prohibited methods of insulting the national anthem exhaustively in the law. Clause 7(8) of the Bill has already provided a definition of “insult” in relation to national anthem which means “*to undermine the dignity of the national anthem as a symbol and sign of the People’s Republic of China*”. This will provide a clear basis for the courts to determine whether an accused person has committed an offence under clause 7.

7. The authorities would not have unfettered discretion to prohibit the insulting of the national anthem. The prosecution must prove beyond reasonable doubt that all elements of the offence are present before the court may find the accused person guilty.

#### Proportionality test

8. The Bill is consistent with the right to freedom of expression protected by Article 27 of the Basic Law and Article 16 of the Bill of Rights. In *HKSAR v Ng Kung Siu*, the Court of Final Appeal agreed that “freedom of expression is not an absolute” (para 45 of the judgment). It may be restricted if the restriction is provided by law and is necessary for

---

<sup>1</sup> *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, para. 63; *Mo Yuk Ping v HKSAR* [2007] 3 HKLRD 750, para. 61.

<sup>2</sup> *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, para. 89, quoting *Sabapathee v Mauritius* [1999] 1 WLR 1836 at 1843 (PC).

the protection of “public order (*ordre public*)”. The concept of “public order (*ordre public*)” is not limited to public order in terms of law and order.

9. In the context of public law, the concept of “*ordre public*” includes “the existence and the functioning of the state organisation, which not only allows it to maintain peace and order in the country but ensures the common welfare by satisfying collective needs and protecting human rights”.<sup>3</sup> In other words, it includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole, and must remain a function of time, place and circumstances.<sup>4</sup>

10. In *HKSAR v Ng Kung Siu*, the Court of Final Appeal agreed that it is necessary to protect the national flag as a unique symbol of the Nation. The legitimate societal interests in protecting the national flag are interests within the concept of “public order (*ordre public*)” because they form part of the general welfare and the interests of the collectivity as a whole. As only one mode of expression is banned (the desecration of the national flag), the prohibition is justifiable and proportionate to the aims sought to be achieved.<sup>5</sup>

11. Clause 7 of the Bill prohibits only one mode of expression, that is the mode of insulting the national anthem. It does not impose any restriction on the content of the message that a person wishes to convey. Given the constitutional importance of the national anthem (as prescribed in Article 141 of the Constitution of the People’s Republic of China), the HKSAR’s constitutional duty to implement the National Anthem Law faithfully, and the limited restriction on freedom of expression, the restriction is rationally connected with, and no more than necessary for, the legitimate aim of protecting “public order (*ordre public*)” which covers the legitimate societal interests in protecting the national anthem and preserving its dignity.<sup>6</sup> The Bill has struck a reasonable balance between the societal interests of protecting the national anthem and the inroads made into the right to freedom of expression. As the restriction

---

<sup>3</sup> Kiss, “Permissible Limitations on Rights”, in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), p. 301; quoted in *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 923.

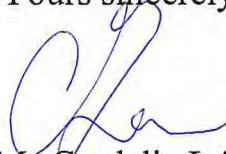
<sup>4</sup> *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 924-925.

<sup>5</sup> *HKSAR v Ng King Siu*, [1999] 3 HKLRD 907 at 921 and 925-926.

<sup>6</sup> In *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, the Court held that a four-step analysis should be applied in determining whether a restriction of fundamental right is justified: (a) whether the restriction pursues a legitimate aim; (b) whether it is rationally connected with achieving that aim; (c) whether the restriction is no more than necessary for that purpose; and (d) whether a reasonable balance has been struck between the societal benefits of the restriction and the inroads made into the fundamental rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

on freedom of expression is limited, the burden on the individual is not unacceptably harsh.

Yours sincerely,



(Ms Cordelia LAM)

for Secretary for Constitutional and Mainland Affairs

c.c. Secretary for Justice

(Attn: Mr Lawrence PENG, Fax no.: 3918 4613

Mr Jonathan LUK, Fax no.: 3918 4613

Ms Heidi LEE, Fax no.: 3918 4799

Ms Cecilia SIU, Fax no.: 3918 4521

Mr Derek LAU, Fax no.: 2845 1609)