

**Statement of Hong Kong Bar Association
on proposal of National People’s Congress
to enact National Security Law in Hong Kong**

The National People’s Congress (NPC) is currently deliberating a draft decision (“**Draft Decision**”) aimed at authorizing the Standing Committee of the NPC (“**NPCSC**”) to formulate laws (“**HK National Security Law**”) to penalise acts of secession, subverting state power, organising and carrying out terrorist activities and other behaviours that seriously endanger national security, as well as activities interfering with the HKSAR’s internal affairs by foreign or external forces.¹ It is intended that the National Security Law as formulated will be added to Annex III of the Basic Law as part of the national laws which apply in Hong Kong, and take effect in the HKSAR by way of promulgation by the Chief Executive.²

The contents of the proposed HK National Security Law are yet to be publicised. The HKBA however observes that the Draft Decision discloses a number of worrying and problematic features pertaining to the proposed HK National Security Law.

Firstly, under Article 18(3) of the Basic Law the laws added to Annex III of the Basic Law by the NPCSC “shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the [HKSAR] as specified by this Law”. Under Article 23 of the Basic Law the HKSAR shall enact laws “on its own” to prohibit “any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the [HKSAR], and to prohibit political organizations or bodies of the [HKSAR] from establishing ties with foreign political organizations or bodies”. The HK National Security Law as proposed in the Draft Decision would appear to contain matters covered by Article 23 of the Basic Law and it is within the autonomy of the HKSAR to enact the relevant laws. In that regard, under Article 66 of the Basic Law, the Legislative Council (“**LegCo**”) of the HKSAR “shall be the legislature of the [HKSAR]”; under Article 73(1) of the Basic Law, the LegCo of the HKSAR “shall enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures”. It would therefore appear that the NPCSC has no power to add the HK National Security Law under Annex III of the Basic Law via the mechanism provided under Article 18 of the Basic Law.

Secondly, there is no assurance that the HK National Security Law as proposed will, being a national law, comply or be required to comply with provisions of the International Covenant on Civil and Political Rights, which is entrenched in the Basic Law. The United Nations Security Council, of which the People’s Republic of China is a permanent member, has repeatedly emphasised that all measures adopted in aid of national security, including counter-terrorism, must be fully compliant with international human rights law³. When the HKSAR Government sought to introduce the National Security (Legislative Provisions) Bill 2003 to LegCo to implement Article 23 of the Basic Law in 2003, there were genuine and widespread concerns that the proposed legislation would infringe upon the HKSAR residents’ civil and political rights, including freedom of speech and freedom of the press. In 2003, an extensive consultation exercise on Article 23 legislation was undertaken, and the relevant bill

¹ Article 6(2) of Draft Decision

² Article 6(3) of Draft Decision

³ See e.g. UN Security Council Resolution 1624 (2005), 14 September 2005, and Resolution 2178 (2014), on 24 September 2014, both adopted unanimously

was withdrawn after vehement public opposition. In the current exercise, the HK National Security Law is intended to be enacted by promulgation by the HKSAR Government rather than legislation by the LegCo. There is no assurance that public consultation will take place at all on this vastly important legislation prior to promulgation. This is unprecedented. The public must be allowed the opportunity to properly consider and debate about proposed laws which affect their personal rights and obligations.

Thirdly, Article 4 of the Draft Decision stipulates that “when needed, relevant national security organs of the Central People’s Government will set up agencies in the HKSAR to fulfil relevant duties to safeguard national security in accordance with the [HK National Security Law]”. It is entirely unclear how the proposed agencies set up in the HKSAR will operate under the laws of the HKSAR, whether they will be bound by the laws of the HKSAR, whether they have power of enforcement, and whether such powers as exercised will be limited by the laws currently in force in the HKSAR. It is also entirely unclear how this arrangement would comply with Article 22(1) of the Basic Law, which provides that “No department of the Central People’s Government ... may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law”.

Fourthly, Article 3 of the Draft Decision provides that “the HKSAR’s administrative, legislative and judicial organs must, in accordance with relevant laws and regulations, effectively prevent, stop and punish acts endangering national security”. The reference to “judicial organs” gives rise to perceptions that the Judiciary of the HKSAR is being or will be instructed to act in a particular way. Independence of the Judiciary is the cornerstone of the success of the HKSAR and should not be undermined in any way.

News of the imminent enactment of proposed HK National Security Law by the NPCSC and promulgation of the same by the HKSAR Government in the HKSAR has caused deep unease in the local and international community. We note that the Chief Executive stated on 22 May 2020 that the Government will fully cooperate with the NPCSC in the enactment of the HK National Security Law, and further stated that the new legislation would not affect the legitimate rights and freedoms presently enjoyed by the people of HKSAR and that the independence of the Judiciary would remain unchanged. In light of those assertions which were made without further explanations, the HKBA calls upon the HKSAR Government to address the fundamental constitutional and legal concerns raised above as a matter of urgency. HKBA may make further observations when details of the HK National Security Law are disclosed.

HONG KONG BAR ASSOCIATION

Dated: 25 May 2020