

The Association of the Bar of the City of New York

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The Clerk of the Bills Committee
National Security (Legislative Provisions) Bill
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Sir:

I am writing on behalf of The Association of the Bar of the City of New York (the “Association”) to express our concerns regarding certain provisions of the proposed National Security (Legislative Provisions) Bill (the “Bill”).

At the outset, let me state that we can appreciate your Government’s efforts to accommodate national security concerns with the preservation of fundamental human rights, challenges with which we in the United States have had to struggle for more than 200 years, often with questionable results, from the Alien and Sedition Acts of 1798 to the USA PATRIOT Act of 2001. We further appreciate the effort by the Hong Kong government to publish the Consultation Document for public comment and its responsiveness to recommendations and suggestions not only from the Hong Kong community but from organizations in other common law jurisdictions.

The Association is an independent, non-governmental organization with a membership of more than 22,000 lawyers, judges, prosecutors, law professors and government officials, principally from New York City but also from throughout the United States and from 40 other countries. Founded in 1870 to combat corruption in the judiciary, the Association has a

long history of dedication to human rights, notably through its Committee on International Human Rights, which investigates and reports on human rights conditions around the world.

The Association has also had a long and ongoing interest in supporting Hong Kong as a democratic society with checks and balances among its three branches of government, with particular interest in the maintenance of a qualified and independent judiciary, the protection of fundamental human rights, and the adherence to the Rule of Law in the common law tradition.

This interest is not only one of principle but of self-interest. For many years, numerous New York law firms and hundreds of our members have been working as lawyers in their Hong Kong regional offices, and many are permanent residents. We believe they contribute significantly to the economic, commercial, and financial life of Hong Kong. In addition, many hundreds of our clients have regional headquarters in Hong Kong or do extensive business in Hong Kong and often seek our advice regarding the benefits of locating in, relocating from, or doing business in Hong Kong. Over the years, we have been enthusiastic supporters of Hong Kong as a place to do business and to live due to its open and free society, its independent and highly qualified judiciary, its free press, its active lawyers' associations, its conditions of transparency, its absence of corruption and its adherence to the Rule of Law and common law principles that protect civil, political and commercial rights.

Prior to and following the return of sovereignty to the People's Republic of China on July 1, 1997, we, together with the Joseph R. Crowley Program in International Human Rights at Fordham Law School, have carefully followed legal and political developments in Hong Kong through missions, reports and symposia.¹ Through the Joint Declaration, the United

¹"Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry: The Association of the Bar of the City of New York: The Committee on International Human Rights," 51 Record of The Association of The Bar of The City of New York 357-90 (1996).

Symposium on Right of Abode Decision of Court of Final Appeals, May 25, 1999, Great Hall of the Association of the Bar of the City of New York sponsored by the Asian Affairs Committee.

"One Country, Two Legal Systems?," 23 Fordham Int'l L.J. 1 (Nov. 1999).

"One Country, Two Legal Systems? The Rule of Law, Democracy, and the Protection of Fundamental Human Rights in Post-Handover Hong Kong," 55

Kingdom and the People's Republic of China entered into a solemn compact: the return of sovereignty to China in exchange for continued maintenance of Hong Kong's political, social, economic, and legal institutions enjoyed by Hong Kong accompanied by a high degree of autonomy. Observing this compact is incumbent on both parties. Inherent in the Basic Law that implemented China's obligations under the Joint Declaration is the commitment by China and the Hong Kong Special Administrative Region Government ("H.K.S.A.R.G.") that the fundamental rights of free speech, free press, freedom of assembly, freedom of association and freedom of religion, as well as due process, would not only continue but flourish. The benefits of such freedom would accrue not only to the people of Hong Kong but to the people of China who would be exposed to a new diversity of views. It is therefore incumbent on all interested parties, China, Hong Kong and the United Kingdom, to maintain these basic principles in action as well as words. We have been gratified that Hong Kong and the People's Republic of China generally have fulfilled their obligations under both the Joint Declaration and the Basic Law. However, the Association is particularly concerned with the Bill published by the H.K.S.A.R.G. on February 13, 2003, and currently being considered by the Legislative Council.

With the introduction of the Bill intended to implement Article 23 of the Basic Law, Hong Kong faces the most significant challenge to its democratic principles so far, unless certain of its provisions are more clearly defined or eliminated.

Over the years, most of the statutes adopted by the United States dealing domestically with national security issues, such as the Alien and Sedition Acts of 1798, the suspension of habeas corpus during the Civil War, the Espionage Act of 1917, the Smith Act of 1940, the War Relocation Authority of 1942, the McCarran Act of 1950, and the anti-terrorist legislation (the "USA PATRIOT" Act of 2001) adopted after the September 11, 2001 terrorist attack, have occurred during times of perceived national crises with little deliberation or concern for civil rights. With the passage of time, our nation has generally repudiated such legislation as needlessly tipping the balance in favor of security over liberty in a manner inconsistent with both

our own tradition and with international law. We respectfully suggest that today the threat to Hong Kong or China's security through Hong Kong is remote. It is all the more disconcerting, therefore, that the Bill reflects the type of overreaction that we associate with flawed measures that we have taken during times of crisis. We would therefore urge our friends in Hong Kong to approach this area with caution and careful deliberation to avoid adverse impact on fundamental civil and political rights of Hong Kong citizens.

As currently crafted, the proposed ordinances undermine civil liberties more than is necessary to achieve the stated purposes of the Bill. Moreover, neither in the Consultation Document nor in any of the government's publications or statements which we have reviewed has there been any reference to the real or potential security risks that would justify the broad legislative restrictions contained in the proposed legislation.² We would hope that the Legislative Council, as a deliberative body, would address these issues in a meaningful manner. It would be a major setback to Hong Kong's status as a free and open society, with its own democratic institutions, if it did not adopt a more measured or restrained approach in implementing Article 23 of the Basic Law.

Although Article 23 requires the adoption of legislation covering the activities enumerated therein, there is no date fixed for the adoption of such legislation. We respectfully suggest that it would be more appropriate to defer such legislation until rules and regulations have been promulgated permitting universal suffrage and the election of a Chief Executive and a representative Legislative Council as required by the Basic Law. A balanced approach would be for the government to move forward with a Consultation Document on its program for universal suffrage followed by a proposed suffrage Bill to be considered at the same time as the national security Bill. It is not too late. This parallel approach would allay concerns regarding Hong Kong's commitment to implementing all of its obligations under the Basic Law and the

²The only justification we have found is a March 27, 2003 press release, in which a "government spokesman" stated that the power of proscription "was necessary to deal with organized crimes threatening national security."

International Covenant on Civil and Political Rights (the “ICCPR”) and the strengthening of its democratic institutions.

One further reason to defer action on the Bill is the SARS epidemic which has understandably diverted public attention from the Bill and discouraged the comprehensive dialogue which is required to give final passage of any Bill full credibility.

Short of that, the Legislative Council should carefully consider those legitimate national security concerns that are real and immediate, and draft legislation carefully calibrated to address those concerns with deference to the protection of fundamental human rights.

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The annexed Legal Analysis of the Bill, prepared by the Association’s Committee on International Human Rights in cooperation with the Joseph R. Crowley Program in International Human Rights at Fordham Law School in New York City sets forth our views on the sections of the proposed Bill that we believe will undermine democratic institutions in Hong Kong. In presenting our views, we rely on our more than 200 years of experience as a constitutional democracy during which we have dealt - sometimes unsuccessfully - with treason, sedition, publication of state secrets, prohibiting membership in certain organizations, and national security measures. We trust that our response will be relevant to your deliberations. In this regard, we note that the H.K.S.A.R.G. has itself deemed the experience of such common law jurisdictions as the United Kingdom, Canada, and the United States relevant.

We are not commenting on whether the proposed legislation complies with the ICCPR or the Johannesburg Principles, as these issues have been adequately addressed by other organizations. Nor is our analysis exhaustive, rather it reflects our principal concerns.

Finally, as noted earlier, the concerns we have expressed are not academic, but reflect matters that have an immediate impact on Hong Kong’s economic prospects. Foreign investors with whom our members work as legal advisors - both those investors with a long history in Hong Kong and those just now entering the Asian markets - are unsettled by the implications of the Bill, both for the security of business information and data maintained in Hong Kong, which is of critical importance for their businesses and, more generally, for the

relative attractiveness of Hong Kong as a regional business and financial center in a free and open environment.

If it is decided to proceed with the proposed legislation, we respectfully suggest that the various ordinances be reviewed in their entirety to ensure compliance and consistency with the rights granted to Hong Kong residents under the Basic Law.

Very truly yours,

E. Leo Milonas, President

cc: Honorable Ip Kwok-him, Chairman
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