



# Human Rights Now

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4F Suzuki Bldg., 335 Yamabukicho,  
Shinjuku-ku, Tokyo 162-0801 JAPAN

Tel : +81-3-6228-1528

Website: <http://hrn.or.jp/eng>

Email: [info@hrn.or.jp](mailto:info@hrn.or.jp)

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## **The Government of China Cannot Pass National Security Legislation for Hong Kong Violating the Basic Law and Fundamental Human Rights**

Human Rights Now (HRN), a Tokyo-based international human rights NGO, is deeply concerned with the decision of China's National People's Congress (NPC) to unilaterally pass national security legislation for Hong Kong in a Draft Decision which already indicates that it will likely violate fundamental human rights and permit Chinese national agencies to openly act inside of Hong Kong in violation of Hong Kong's Basic Law. As noted by the Hong Kong Bar Association, unambiguous text of the Basic Law holds that the NPC does not have authority to pass national security legislation for Hong Kong, and HRN calls on the government of China to recognize this fact and nullify the Draft Decision accordingly.

### **1. Indications of Likely Human Rights Violations in the Draft Decision for the New Laws**

On 28 May 2020, the NPC approved a Draft Decision to create national security laws for Hong Kong to be drafted by the NPC's Standing Committee (NPCSC) through a process called promulgation, which does not permit debate, amendment, or approval by the Hong Kong government to ensure that it complies with Hong Kong's human rights obligations, and it requires Hong Kong to apply the law verbatim. Basic Law Article 39 and the Sino-British Joint Declaration require that human rights protections under the International Covenant on Civil and Political Rights (ICCPR) remain in force in Hong Kong. These include the rights to freedom of expression, assembly, association, and privacy; freedom from arbitrary detention; and fair trial standards which all protect activities of peaceful dissent. While the new laws remain to be drafted, the Draft Decision text already indicates significant abuses may occur inconsistent with the Basic Law and ICCPR, including unjustified arrests for protected activities with heavy sentences and Chinese national agencies legally operating in Hong Kong and committing unchecked abuses. Importantly, no assurances are made in the Draft Decision that the laws will comply with the ICCPR.

#### **a) Threat of Unjustified Arrests for Protected Activities**

The May 28 Draft Decision for the proposed laws states that they will criminalize any activities that endanger China's national security, including separatism, subversion, terrorism, and foreign interference in Hong Kong's affairs. It does not define these terms or specify what activities they apply to. As mentioned above, Hong Kong is required to implement the laws verbatim, with no ability to challenge the laws even if they violate the Basic Law or ICCPR guarantees. Hong Kong's Chief Executive Carrie Lam has already stated that she will "comply fully" with the NPC's decisions.<sup>1</sup>

<sup>1</sup> <https://www.info.gov.hk/gia/general/202005/22/P2020052200485.htm> (Chinese).

The Draft Decision's terms and lack of definitions mirror China's national security laws, which are regularly used in China to arrest and detain human rights defenders for statements, assemblies, associations, and activities of peaceful dissent with crimes like subversion, which carries a 10 year prison sentence.<sup>2</sup> This occurs because the terms are undefined, overbroad, vague, or imprecise and do not specify or give criteria for which actions are prohibited, allowing state agents to label any statements or actions expressing dissent as a crime under the law. The UN High Commissioner of Human Rights, UN Human Rights Committee, and multiple UN Special Rapporteurs have explicitly stated that undefined, overbroad and vague terms in penal laws must be avoided for this reason,<sup>3</sup> including in reference to Chinese national security legislation.<sup>4</sup> Ms. Lam appeared to acknowledge that peaceful dissent may soon be criminalized in Hong Kong when she admitted, responding to the possibility of peaceful dissent being punished, "We are a very free society, so for the time being, people have the freedom to say whatever they want to say."<sup>5</sup>

## **b) Threat of Chinese National Agencies Committing Abuses Inside Hong Kong**

The Draft Decision also states that Chinese national agencies will legally operate in Hong Kong to enforce the law "when needed" without indicating if they will follow Hong Kong or Chinese law. The Hong Kong Bar Association issued a statement noting that, under Basic Law Article 22(1), Chinese national agencies have no authority to operate on their own in Hong Kong.<sup>6</sup> Aside from this violation, it raises the credible threat that these agencies will operate in Hong Kong like comparable Chinese agencies, such as the Ministry of State Security and the National Security Bureau of the Ministry of Public Security which regularly use abusive methods, or they move suspects to China where they will be subject to such methods. Once in police custody, China's national penal practices include arbitrary detentions, forced disappearances, long-term incommunicado detentions before arrests, no access to a lawyer of one's own choosing, televised forced confessions, unfair trial practices including convictions with insufficient evidence, consistent reports of torture while in detention, and constant unjustified surveillance before and after detentions.<sup>7</sup> If a Chinese national agency acting in Hong Kong commits such abuses, the Hong Kong government may not have power to stop it in clear violation of the Basic Law and ICCPR.

Even if a law's provisions are vague, Hong Kong courts are supposed to follow the common law principle that criminal statutes must be interpreted strictly and not extended by analogy, and any ambiguity must be

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<sup>2</sup> See our previous statements on arbitrary arrests in China of human rights lawyers and their treatment:

<https://hrn.or.jp/eng/news/2019/02/13/hrc40-statement-china/>, <https://hrn.or.jp/eng/news/2018/09/03/hrc39-china-lawyers-written-statement/>, <https://hrn.or.jp/eng/news/2016/08/30/china-detained-statement/>.

<sup>3</sup> "Report of the High Commissioner for Human Rights", UN Doc. A/HRC/8/13, para. 20-23, <https://undocs.org/A/HRC/8/13>; Human Rights Committee, General Comment (G.C.) 29, para. 7; G.C. 34, para. 46, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11).

<sup>4</sup> Joint Letter of UN Special Rapporteurs to the government of China, 1 Nov. 2019, [https://www.ohchr.org/Documents/Issues/Terrorism/SR/OL\\_CHN\\_18\\_2019.pdf](https://www.ohchr.org/Documents/Issues/Terrorism/SR/OL_CHN_18_2019.pdf).

<sup>5</sup> "China's Military Vows to Defend the Country's Interests in Hong Kong", New York Times, 28 May 2020, <https://www.nytimes.com/2020/05/26/world/asia/china-military-hong-kong.html> (emphasis added). Ms. Lam also refused to answer if the proposed laws will be implemented retroactively, which, if it occurs, would violate one of the most fundamental human rights protections in penal law. "China's military says it is prepared to protect security in Hong Kong, as protests grow", Guardian, 26 May 2020, <https://www.theguardian.com/world/2020/may/26/chinas-military-says-it-is-prepared-to-protect-security-in-hong-kong-as-protests-grow>.

<sup>6</sup> Hong Kong Bar Association Statement, 25 May 2020, <https://www.hkba.org/sites/default/files/20200525%20-%20Proposal%20of%20National%20People%27s%20Congress%20to%20enact%20National%20Security%20Law%20in%20Hong%20Kong%20%28E%29.pdf>.

<sup>7</sup> Each of these is described in our previous reports, *above*, note 2.

interpreted narrowly in favor of the accused. However, it cannot be expected that a Chinese national agency will respect such common law protections they have never implemented before, and Article 3 of the Draft Decision states that Hong Kong’s “judicial organs must” act “in accordance with relevant laws”, which may be used to command the behavior of Hong Kong’s judiciary, an outcome the Hong Kong Bar Association warns would violate the Basic Law’s requirement of judicial independence in Hong Kong.<sup>8</sup>

## **2. Fears, Protests, and Crackdowns in Hong Kong and Criticism Abroad**

With unprecedented measures, Hongkongers are taking seriously the threat that peaceful expressions, assemblies, and associations of dissent will soon be criminalized with harsh penalties and possibly enforced by Chinese agencies in Hong Kong. Civil society groups that advocate for human rights are deleting their websites and social media. The UK is offering a citizenship path (and Taiwan working on similar measures) for Hong Kong residents to emigrate to avoid abusive arrests.<sup>9</sup> A common statement made during this year’s annual Tiananmen Square commemoration was that this may be the last year such a commemoration may be held without participation being a serious crime.<sup>10</sup> In large numbers Hongkongers protested the Draft Decision, and Hong Kong police arrested at least 360 of the protesters.<sup>11</sup> There have been reports that China’s People’s Liberation Army has recently moved extra troops into Hong Kong and the Hong Kong garrison commander has stated the troops are prepared to “safeguard” the city.<sup>12</sup> This occurs at the same time Hong Kong is passing a law to punish criticism of China’s anthem.

The international community has also widely condemned the Draft Decision, including a joint statement by Canada, US, UK, and Australia expressing their deep concern over the proposed law; an open letter condemning the move signed by 233 parliamentarians from 26 countries; and a statement from Japan’s foreign ministry expressing its serious concern and longstanding policy upholding a free and open system in Hong Kong.<sup>13</sup> All of these circumstances emphasize the unprecedented seriousness of the threat against Hong Kong civil society posed by the new national security laws.

## **3. China Does not have Authority to Pass National Security Legislation for Hong Kong**

It is important to note that, as the Hong Kong Bar Association emphasizes in its statement,<sup>14</sup> the government of China does not have authority to pass national security legislation of any kind for Hong

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<sup>8</sup> *Above*, note 6. There are also proposals that special courts be set up for national security cases that bar foreign judges, or that such cases bar foreign judges, although the Basic Law allows for no such discriminations, and again it risks that common law protections may not be applied, “Beijing has approved a national security law for Hong Kong, but what will it mean and what are the concerns”, SCMP, 29 May 2020, <https://www.scmp.com/news/hong-kong/politics/article/3086585/explainer-beijing-has-approved-national-security-law-hong>.

<sup>9</sup> “Boris Johnson offers refuge, British citizenship path for nearly 3 million Hong Kongers”, Wash. Post, 3 June 2020, [https://www.washingtonpost.com/world/asia\\_pacific/boris-johnson-hong-kong-national-security-law-bno-passport/2020/06/03/3ec6ddf0-a545-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/world/asia_pacific/boris-johnson-hong-kong-national-security-law-bno-passport/2020/06/03/3ec6ddf0-a545-11ea-b619-3f9133bbb482_story.html).

<sup>10</sup> “Hong Kong protesters hold banned Tiananmen vigil as anthem law is passed”, Guardian, 4 June 2020, <https://www.theguardian.com/world/2020/jun/04/hong-kong-tiananmen-vigil-ban-china-national-anthem-bill-protest>.

<sup>11</sup> “Hong Kong crisis: at least 360 arrested as China protests grow”, Guardian, 27 May 2020, <https://www.theguardian.com/world/2020/may/27/hong-kong-trump-china-security-crackdown-protests>.

<sup>12</sup> Guardian, *above*, note 5.

<sup>13</sup> “World leaders react to China’s controversial national security bill in Hong Kong”, CNBC, 29 May 2020, <https://www.cnbc.com/2020/05/29/world-leaders-react-to-chinas-controversial-national-security-bill-in-hong-kong.html>.

<sup>14</sup> *Above*, note 6.

Kong, and the passage of any such laws, no matter what their content is, violates unambiguous text of the Basic Law, is a grave attack on Hong Kong's autonomous status in China, and does not have legal status.

Under the Sino-British Joint Declaration, China obligated itself to respect a “one country, two system” principle by permitting Hong Kong to retain a high level of autonomy, rights, and freedoms, embodied by Hong Kong's Basic Law Article 18, which states that Chinese national law does not apply in Hong Kong unless it is listed in Annex III. However, Article 18 requires Annex III-listed laws to “be confined to those relating to defense and foreign affairs as well as other matters outside the limits of the autonomy of the Region.” A national security law that applies *only* to Hong Kong is *ipso facto* not related to defense or foreign affairs.<sup>15</sup> As for “outside the limits of the autonomy of the [Hong Kong] Region”, Article 23 of the Basic Law expressly states that the Hong Kong government “shall enact laws on its own” on national security (emphasis added), placing it constitutionally within the autonomy of the Region. China itself has set a precedent by never having added a law into Annex III with criminal penalties by promulgation. It is also worth noting that Hong Kong's delay in passing its own national security legislation does not give China any extra authority under articles 18 or 23 to do it for them.

#### **4. The Government of China Must Recognize that it has No Authority to Pass National Security Legislation for Hong Kong**

Human Rights Now shares the concern of Hongkongers and the international community about the threats to fundamental rights that the proposed national security laws pose, and we call on the government of China to recognize, as emphasized by the Hong Kong Bar Association, that it does not have legal authority to pass any national security legislation for Hong Kong, and any such laws passed will not have legal status.

Furthermore, any national security legislation passed in Hong Kong must explicitly respect ICCPR rights, use precise and unambiguous definitions that clearly specify their criteria and the acts they criminalize to ensure that rights are not unnecessarily or disproportionately restricted, be strictly interpreted with any ambiguity resolved in favor of the accused consistent with Hong Kong's commitment to common law protections, and recognize that Chinese agencies have no power to operate on their own inside Hong Kong.

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<sup>15</sup> When China's UN Ambassador, Zhang Jun, rejected the authority of the UN Security Council to convene a meeting on the issue, he affirmed both points by tweeting that the national security legislation was a purely internal matter for China (i.e., not about foreign affairs) that "has nothing to do with the mandate of the Security Council", which covers threats to international peace (i.e., not about defense).