

Legal Malware: Hong Kong's National Anthem Ordinance

Kevin Carrico

HONG KONG
WATCH

“...criminal defamation laws may not be used to protect abstract or subjective notions or concepts, such as the State, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines. This is consistent with the view, sustained by the Special Rapporteur, that international human rights law protects individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism...”

Former United Nations Special Rapporteur on freedom of expression, Frank La Rue, in a 2010 United Nations report

INDEX

Executive Summary	4-5
Policy Recommendations	6
About the Author	7
The Context of the National Anthem Ordinance	8-10
The Text of the National Anthem Ordinance	10-11
The National Anthem Ordinance and International Human Rights Standards	12-14
Case Studies: How the National Anthem Ordinance might be abused	15-18
Conclusion	19
Endnotes	20-24

Executive Summary

Since the clearance of the Occupy protests in late 2014, the people of Hong Kong have employed a variety of novel modes of protest to voice dissatisfaction with Beijing's ever tightening grip on the city. Undoubtedly one of the most controversial modes of protest has been the booing of the national anthem of the People's Republic of China, which first emerged during football matches in 2015.

In late 2017, the National People's Congress of the People's Republic of China passed a National Anthem Law, dictating strict punishment for anyone who insulted "The March of the Volunteers" in the Mainland. Almost immediately thereafter, Beijing introduced the law, clearly drafted with Hong Kong in mind, into Annex III of the Basic Law, meaning that Hong Kong is required to legislate a similar law for implementation in the city. This intervention, which goes beyond Beijing's legally approved authority in matters of defence and diplomacy, highlights the central government's ability to indirectly legislate for Hong Kong via Annex III: a troubling prospect as Beijing continues to tighten its grip on the city.

After a year of work, the National Anthem Ordinance was presented to the Legislative Council for a first and second reading in January of 2019. This report, prepared in January and February of 2019, provides an alternative reading. Our main findings include:

- the amendment of Annex III of the Basic Law to force through the legislation of the National Anthem Ordinance is an unprecedented intervention against freedom of speech in the city, as it uses Annex III as a legislative backdoor for matters beyond Beijing's purview in defence and diplomacy, thereby shifting the status quo and critically undermining the city's promised "high degree of autonomy;"
- the proposed bill will curtail basic rights of free speech, expression, and demonstration guaranteed in the Basic Law and the International Covenant on Civil and Political Rights;
- the proposed bill is unlikely to bring an end to these protests against the PRC national anthem, but will likely only provoke further protests, intensifying tensions;
- the proposed bill incorporates untenably vague definitions of insult, while at the same time giving the authorities unreasonably extended time periods in which to pursue prosecution, along with excessive prison terms of up to three years for thought and speech crimes: this undermines the rule of law;
- the proposed bill is not only open to potential politicized abuse, but indeed seems almost designed for politicized prosecution, constituting a type of legal malware that will weaken Hong Kong's respected rule of law system.

The bill thus poses a threat not only to the Hong Kong people's basic freedoms, but also to the credibility of the territory's legal system and the entire idea of "one country, two systems." While Hong Kong Watch does not encourage disrespectful behaviour, we do not believe it should be criminalised and we hold that freedom of expression is a fundamental human right legally protected in Hong Kong.

What is in need of protection in Hong Kong today is not the national anthem, but rather such basic rights as freedom of opinion, expression, protest, and association. In the interest of protecting the ideal of “one country, two systems” and guaranteeing Hong Kong’s continued prosperity and stability, we recommend immediately dropping this legislation, and ensuring that no further legislation is forced on Hong Kong via Annex III of the Basic Law before genuine universal suffrage is achieved.

Policy Recommendations

The government of Hong Kong should:

- recognize that the National Anthem Ordinance fails to meet international human rights standards, threatens the city's rule of law system, and violates the idea of "one country, two systems"
- inform Beijing that the National Anthem Law's introduction into Annex III of the Basic Law violates the clear limits on Beijing's authority in Hong Kong, and halt legislation on the National Anthem Ordinance
- affirm clearly to both Beijing and the city's citizens that, as a society based on the rule of law, any legislation passed in Hong Kong must conform to the city's legal system and its human rights obligations, and thus cannot arbitrarily criminalize acts of speech
- halt the extra-legal monitoring and harassment of activists by Beijing-linked forces, as well as halting the growing trend of politicized prosecution
- reaffirm its support for the freedoms legally granted to the people of Hong Kong by the International Covenant on Civil and Political Rights, so as to reaffirm Hong Kong's status as a 21st century international financial centre with a rule of law system
- only propose additional legislation under Annex III of the Basic Law after Beijing has restarted consultations on political reform and fulfilled its promises on universal suffrage, such that a truly representative government can speak for the people of Hong Kong

The international community should:

- call on the government of Hong Kong to halt legislation of the National Anthem Ordinance
- use private and public diplomacy to raise questions about the use of Annex III of the Basic Law as a legislative backdoor beyond Beijing's authority in matters of defence and diplomacy.
- The UN Special Rapporteur on Freedom of Expression and the UN Committee on Civil and Political Rights should issue further guidance on whether it is permissible for states to use criminal defamation laws to penalise "insulting" a national anthem

About the author



Dr. Kevin Carrico is Senior Lecturer in Chinese Studies at Monash University in Melbourne, Australia. He is the author *The Great Han: Race, Nationalism, and Tradition in China Today* (University of California Press) and the translator of Tsering Woeser's *Tibet on Fire* (Verso). He is currently an Australia Research Council Discovery Early Career Research Fellow, researching the political and cultural manifestations of tensions between Hong Kong and the People's Republic of China.

The Context of the National Anthem Ordinance

The evolution of the National Anthem Ordinance from a concept to a bill over the past year and a half provides two significant insights into Beijing's rule over Hong Kong. First, as a response to repeated booing of the PRC national anthem at football matches in recent years, the ordinance is symptomatic of a misguided, hard-line approach to handling escalating tensions in Hong Kong. Second, the decision to force a National Anthem Law on Hong Kong via Annex III of the Basic Law reveals a legislative backdoor for Beijing to essentially draft laws for Hong Kong: a troubling situation as Beijing continues to tighten its grip on the city in violation of the high degree of autonomy promised and legally guaranteed under "one country, two systems."

The roots of the National Anthem Ordinance extend back to the 2014 Occupy protests, which emerged in response to the National People's Congress Standing Committee's August 31 decision denying the people of Hong Kong the genuine universal suffrage that they had been awaiting for decades.¹ The protests brought central areas of the city, including Admiralty, Mongkok, and Causeway Bay, to a standstill from late September until mid-December, with protestors demanding the withdrawal of the NPCSC's decision and resumption of the political reform consultation process.² Although the scale and length of the protests were unprecedented, as the government cleared the occupation sites in mid-December, Beijing's hard-line stance on political reforms remained unchanged.

In the post-Occupy era, Hong Kong has not again seen the type of large scale and long-term protests that engulfed the city and captured the world's attention in 2014. Instead, members of the Hong Kong public have expressed their dissatisfaction with Beijing and the Hong Kong government's policies in a variety of novel and generally more small-scale ways. One of the most controversial new means of protest has been the booing of the national anthem of the People's Republic of China at football matches.³ Since 2015, while the anthem is played, spectators have booed, unleashed torrents of curse words, turned their backs to the field, raised their middle fingers, held up signs reading "BOO," and waved flags with motifs such as "Hong Kong is not China."⁴

Such small-scale and spontaneous acts of protest are just one of the many ways in which residents of the city have voiced their growing dissatisfaction with increasingly heavy-handed rule: what Beijing calls its "comprehensive jurisdiction."⁵ The booing of the national anthem, however, has generated the most heated response of any form of protest. Inside the stadiums, security guards have made futile attempts to halt the booing. FIFA, having commenced disciplinary proceedings and given a number of warnings, issued fines against the Hong Kong Football Association for the booing in 2015⁶ and 2016,⁷ and the Asian Football Federation fined the association in 2017.⁸

The strongest denunciations of these protests, however, came from the PRC government and its allies in Hong Kong. In 2015, the editor of Beijing's Global Times Hu Xijin (writing as Shan Renping) appealed to FIFA to impose even heavier fines on the Hong Kong Football Association for the booing.⁹ In October 2017, former director of the State Council's Hong Kong and Macau Affairs Office Wang Guangya pre-emptively imposed criminal penalties for booing the anthem, telling the Beijing-controlled Hong Kong paper Ta Kung Po that "Hong Kong is part of China, so of course booing the national anthem is a serious criminal act."¹⁰ Following their lead, Hong Kong Chief Executive Carrie Lam has furthermore emphasized that "it is the responsibility of every person, every citizen, to respect the nation's symbols,"¹¹ and that "any behaviour that disrespects the national anthem should not be tolerated in Hong Kong."¹²

Then, in September of 2017, Beijing took action. The National People's Congress passed the National Anthem Law, making it illegal to alter or insult the national anthem of the People's Republic of China. The law came into effect on National Day, October 1, 2017, with sentences of up to three years for disrespect to the song. Because the National Anthem Law is a PRC law, it is not implemented in Hong Kong, in accordance with Article 18 of the Basic Law, which states:

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.¹³

However, Mainland China was clearly not the National Anthem Law's primary target: the political situation in China already ensures that anyone who publicly disrespected the national anthem would be punished by the authorities, regardless of the laws in place. The context of the law's emergence instead indicates that its real target was in fact always Hong Kong.

Accordingly, soon after its passage in Beijing, the National Anthem Law was incorporated into Annex III of the Basic Law, which means that, according to Article 18, the Hong Kong government is required to pass the law locally. The National Anthem Ordinance is thus the product of Beijing indirectly legislating for Hong Kong, far beyond its legally authorized purview of defence and foreign affairs.

In its attempt to silence dissent by forcing legislation onto Hong Kong, the ordinance currently under debate brings into focus two particularly vexing issues in Beijing's rule over Hong Kong. First, the legislation reflects Beijing's imprudent and provocative approach to rising tensions in the city. Rather than reflecting on the reasons for the emergence of this new form of protest in post-Occupy politics and seeking dialogue to understand the sources of people's rising discontent so as to develop better policies, the government has instead chosen to simply make such protests illegal. Abandoning winning over hearts and minds, Beijing has taken an approach that is solely punitive and indeed cosmetic: for even if the National Anthem Ordinance succeeds in silencing this channel for voicing discontent (a highly unlikely possibility) through the threat of imprisonment, it will not have resolved the root causes of people's discontent. Instead, the proposed legislation will likely only increase tensions, and may thus have the unintended counter-effect of producing even more vocal protests against the anthem.

Second, the legislation reflects the growing political and legal contradictions undermining "one country, two systems" and the rule of law in Hong Kong. The passage of a law in Beijing clearly intended to silence dissent in Hong Kong, followed by its incorporation into Annex III under Article 18, highlights a legal backdoor through which Beijing can essentially legislate for Hong Kong, in direct contradiction to the city's promised "high degree of autonomy" and self-rule. Most of the preceding applications of Annex III of the Basic Law were made in the 1990s and related to such clearly diplomatic or military matters as consular privileges and immunities, or the garrisoning of PLA forces in the Special Administrative Region.¹⁴ Such applications were understandable, considering that as stated in the Basic Law, the People's Republic of China is responsible for Hong Kong's foreign affairs and defence. However, by employing Annex III to legislate away rights guaranteed in the Basic Law that are unrelated to the central government's purview of defence and foreign affairs, Beijing is essentially creating a new precedent to force whatever legislation it pleases on Hong Kong: a particularly dangerous situation as Beijing seeks ever greater control over the city.

The Basic Law is ideally supposed to serve as a check on Beijing's powers in the SAR, and protect the idea of "one country, two systems." Unfortunately, there appears to be no effective check on Beijing's use and misuse of the law, insofar as Articles 158 and 159 grant the final rights of interpretation and

amendment to the National People’s Congress: precisely the political body whose interventions in Hong Kong should be restrained by the Basic Law. The recent acceleration of increasingly far-fetched interpretations of the Basic Law by this congress,¹⁵ combined with its misuse of Annex III to force national anthem legislation on Hong Kong, indicates that there are no effective checks on Beijing’s aspirations to tighten its control over Hong Kong. If the National Anthem Ordinance becomes law, this legislation will threaten the very foundations of the idea of “one country, two systems,” as well as setting a dangerous precedent for potential future “national security” legislation under Article 23.

The Text of the National Anthem Ordinance

Examining the text of the ordinance as presented to the Legislative Council in January of 2019, the bill is deeply flawed: it proposes an overly vague definition of offenses, alongside unreasonably extensive timeframes for prosecution and lengthy criminal sentences, opening the way for politicized prosecution. By incorporating these vague and arbitrary charges into Hong Kong’s legal system, the bill could constitute a type of legal malware, employing Hong Kong’s rightly highly respected rule of law system to undermine the rule of law.

The National Anthem Bill lists the following offences under the heading “offence of insulting behaviour.”

- (1)** A person commits an offense if, with intent to insult the national anthem, the person publicly and intentionally-
 - (a)** alters the lyrics or score of the national anthem; or
 - (b)** plays and sings the national anthem in a distorted or disrespectful way
- (2)** A person commits an offence if the person publicly and intentionally insults the national anthem in any way.
- (3)** A person commits an offence if, with intent to insult the national anthem, the person intentionally publishes-
 - (a)** altered lyrics or an altered score of the national anthem; or
 - (b)** the national anthem played and sung in a distorted or disrespectful way.
- (4)** A person commits an offence if, with intent to insult the national anthem, the person intentionally publishes the insulting in any way of the national anthem.¹⁶

The text of the bill is very much open to interpretation. One clause, for example, simply states that “a person commits an offence if the person publicly and intentionally insults the national anthem in any way.” Yet how does one define “insult,” much less insulting “in any way?” In a definition that, in its vagueness, somehow manages only to complicate matters further, the bill defines “insult” as “undermin[ing] the dignity of the national anthem as a symbol and sign of the People’s Republic of China.”¹⁷

Countless acts, ranging from booing, to failing to stand, to not singing along, to yawning during the anthem, could all potentially be read as acts of insult: the law provides no further clarification of which specific behaviours may be illegal. This may seem like a shocking omission, but it is at the

same time an admission of the weak legal foundations of the ordinance. Insult is by nature in the eye of the beholder: what may seem outrageous or disrespectful to some may seem unworthy of comment to others. Since the national anthem is not a sentient being capable of communicating with us and telling us when it feels insulted, the Hong Kong government will be left to determine and specify that which they have not yet been able to determine or specify. There is little reassurance to be found in Chief Executive Carrie Lam's acknowledgement, in a moment of jarring honesty, that it is "difficult" to define precisely what constitutes an insult to the anthem.¹⁸

The language of "intent" used in other sections of this article further complicates matters. The politicized deciphering of intent only recently became the purview of the Hong Kong government through Election Officers' curiously expanded powers to disqualify candidates for office based in doubts about the perceived sincerity of their forced declarations of support for the Basic Law. These measures have had grave implications for Hong Kong's electoral system and citizens' basic rights.¹⁹ The National Anthem Ordinance institutes an expansion of these flawed practices, legally compelling citizens to perform their respect for a symbol, while granting the government the powers to decipher the intent and sincerity of their declared respect, parsing what would otherwise be non-criminal behaviour as criminal behaviour simply because it happened while the PRC national anthem was playing.

The messiness of the definition of these crimes is further acknowledged in the time limit for prosecution under this bill, which reads:

- (7)** Proceedings may only be commenced for an offence under this section before whichever is the earlier of the following-
- (a)** the end of the period of 1 year after the date on which the offence is discovered by, or comes to the notice of, the Commissioner of Police;
 - (b)** the end of the period of 2 years after the date on which the offence is committed.²⁰

Unlike other crimes under the Magistrates Ordinance, which have a six month time limit for prosecution, the Hong Kong government is essentially granting itself a period four times longer, two whole years, to prosecute perceived offenders.²¹ Whereas the incoherence of this flawed ordinance should be grounds for restraint, discouraging prosecution, the government is instead exercising the opposite of restraint, using the excuse of the difficulty of prosecuting "a large crowd of unidentified culprits" to grant itself a considerably extended time limit for prosecution.

In contrast to the vague definition of supposed crimes in this bill, punishments are delineated clearly:

A person who commits an offence under this section is liable on conviction to a fine at level 5 and to imprisonment for 3 years.²²

This means that someone could spend three years of his or her life in prison for a perceived "insult" to the anthem: a disproportionate punishment given that even Carrie Lam admits the crime is difficult to define.

Lord Bingham of Cornhill commented in his seminal lecture on the rule of law that this concept relies on a number of key principles. Among these were the requirement that the law must be "accessible and so far as possible intelligible, clear and predictable,"²³ that "legal rights and liability should ... not be the exercise of discretion," and that the "law must afford adequate protection of fundamental human rights." The vagueness of the definitions of "insult" and "intent" in the National Anthem Ordinance, along with the extended timelines for investigation and the disproportionate sentencing guidelines, all fail to meet these standards. The National Anthem Ordinance will do significant damage to rule of law in Hong Kong, and should therefore be dropped.

The National Anthem Ordinance and International Human Rights Standards

In addition to the challenge that this flawed legislation poses to the city's rule of law, the National Anthem Ordinance conflicts with fundamental rights guaranteed in the Basic Law and the International Covenant on Civil and Political Rights. If the ordinance becomes law, it will undermine the freedom of expression and demonstration that are guaranteed under the Sino-British Joint Declaration, the city's laws and the ideal of "one country, two systems."

An official brief on the National Anthem Ordinance states that the ordinance's intention is to "preserve the dignity of the national anthem and promote respect for the national anthem,"²⁴ while the bill itself includes the promotion of patriotism among its intentions.²⁵ This ordinance attempts to enforce this in the following clauses:

All individuals and organizations should respect the national anthem, preserve the dignity of the national anthem, and play and sing the national anthem on appropriate occasions.²⁶

The national anthem must be played and sung in a way that is in keeping with its dignity.²⁷

While the national anthem is being played and sung, the etiquette to be followed by the persons who take part in or attend the occasion is-

- (a) To stand solemnly and deport themselves with dignity; and
- (b) To not behave in a way disrespectful to the national anthem.²⁸

Should the bill become law, these clauses will clearly render illegal any perceived sign of "disrespect" or "insults" to the national anthem. However, setting aside the vagueness of the definitions of these terms, insofar as Hong Kong is a society based in the rule of law, one must ask: do the Basic Law and the International Covenant on Civil and Political Rights included in the Basic Law even allow for making such "disrespect" illegal?

Article 27 of the Basic Law states:

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.²⁹

Article 27, in its brevity and directness, encapsulates the full and increasingly unrealized potential of the ideal of "one country, two systems," insofar as it guarantees Hong Kong residents various freedoms denied elsewhere in the People's Republic of China, including freedom of speech and demonstration. There is no legal exception, of course, for "insults" to a song.

The International Covenant on Civil and Political Rights also remains in effect in the city according to Article 39 of the Basic Law. Article 19 of this covenant clearly states that "Everyone shall have the right to hold opinions without interference," and continues as follows:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.³⁰

The right to hold opinions without interference guarantees the right to not respect the National Anthem of the People's Republic of China: one's opinions about the PRC, its government, and its anthem are one's own business, which brooks no interference by the state. The right to freedom of expression furthermore protects one's freedom to express this opinion or any other opinion as one pleases, including by booing or otherwise disrespecting the national anthem.

The legal protections for free speech thus guarantee that even "disrespectful" speech is protected. However, in recent years officials in the Hong Kong government have repeatedly claimed, without legal basis, that there are all kinds of "limits" to freedom of speech.³¹ Advocates for the legislation have also at times argued that the importance of the national anthem as a symbol of the People's Republic of China means that the protection of the anthem's "dignity" overrides the rights guaranteed in "two systems."³² These arguments fail to withstand scrutiny. Although the International Covenant on Civil and Political Rights does sanction some limits in cases of grave national security threats or public disorder, there is a broad consensus in international jurisprudence that the stated importance of a particular symbol does not in any way exempt it from criticism.

The former United Nations' Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, clearly stated in 2010 that "any attempt to criminalize freedom of expression as a means of limiting or censoring that freedom must be resisted."³³ Of particular relevance to the current legislation, he commented on the protection of national symbols as follows:

...criminal defamation laws may not be used to protect abstract or subjective notions or concepts, such as the State, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines. This is consistent with the view, sustained by the Special Rapporteur, that international human rights law protects individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism.³⁴

This view, from the world's leading authority on the interpretation of the right to freedom of expression in international law, was echoed by the UN Human Rights Committee, which has called for the abolishment of criminal penalties for "defamation of the state."³⁵ These clear rebuttals to the very foundations of this ordinance undercut the Hong Kong government's claim, provided without any supporting evidence, that "the legislative proposal is in conformity with the Basic Law, including the provisions concerning human rights."³⁶ These findings also undercut the arguments of those who have used international comparisons to justify the law: international jurisprudence states that international human rights law is for the protection of individuals and not abstract notions, and so the malpractice of other states is irrelevant.³⁷ Defenders of the law have pointed to the fact that a number of European nations have criminal defamation laws which protect national anthems,³⁸ however the Council of Europe has raised concerns about the compatibility with Article 10 of the European Convention of Human Rights.³⁹ For example, the OSCE Rapporteur on Freedom of the Media, along with the UN Special Rapporteur on Freedom of Opinion and Expression, issued a joint declaration in 2000 which stated that the "State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions."⁴⁰

This has led the OSCE to call out various states for violations of common standards.⁴¹ In Germany, the national symbols legislation must be understood in light of case law, which has been consistently interpreted in view of the state's obligations to uphold freedom of expression and commitments under Article 5 and Article 10 of the European Convention of Human Rights.⁴² Booing the national anthem in Germany would not lead to censure and certainly not imprisonment.

The Council of Europe now calls for the decriminalisation of defamation in view of human rights concerns, in line with jurisprudence which argues that the laws should not privilege abstract principles above human rights.⁴³ The fact that some European nations have unreasonable national anthem laws, which have been criticised by the Council of Europe for breaching human rights, does not provide the Hong Kong government justification to legislate along the same lines. In sum, there are no legal grounds in the Basic Law, the International Covenant on Civil and Political Rights, or broader international discussions on freedom of opinion and expression to justify the restrictions proposed in the National Anthem Ordinance.

Case Studies: How the National Anthem Ordinance might be abused

In this section, we turn our analysis to a few case studies of potential abuse of this ordinance. Although real examples are used, it is important to clearly emphasize that, particularly in light of the preceding analyses, none of the cases examined below should be prosecuted: any common sense reading of any of these situations will acknowledge that all have simply exercised their right to freedom of speech guaranteed under the Basic Law. Rather, these examples are provided to highlight the very real risks to this city and its legal system should this ordinance be passed.

Collective Booing

The most likely cause for prosecution under the National Anthem Ordinance remains collective acts of booing the anthem at football matches. Although the ordinance is designed to silence these protests, it instead seems most likely to inspire ever more provocative means of voicing opposition to the PRC.

Considering the likely effect of enflaming further anti-anthem protests as exercises of free expression, a question that the Hong Kong government must answer is: in today's Hong Kong, is scanning video from football matches and attempting to identify hundreds or even thousands of people booing the national anthem really the best use of police resources? And if this is not how the ordinance will be implemented, so as to avoid an excessive drain on resources, will prosecution instead more “practically” focus in on particular individuals?

For example, when Hong Kong football fans booed, extended their middle fingers, and turned their backs while the Chinese national anthem played before a match against the Lebanese team in November 2017, hundreds of local fans joined in.⁴⁴ In a situation like this, it would be a massive waste of police resources in a modern city with other very real crime issues to scan photos and videos in an attempt to identify everyone who booed or turned their backs during the anthem. That November day, however, the Beijing-owned paper *Ta Kung Pao* focused its sights on Ernie Chow, a former leader of the Chinese University of Hong Kong Student Union. Chow was thus in the sights of the Beijing media, and a series of Beijing-owned or pro-Beijing media published images of him from the match with his mouth open.⁴⁵ Although such images



Source: [Dot.com](#)

do not provide any clear evidence that Chow was in fact booing the anthem, pro-Beijing media in the city pre-emptively declared him guilty, long before this ordinance had even been drafted.

A practically unenforceable law, combined with the recent targeting of activists, makes the National Anthem Ordinance ripe for unjust implementation and politicized prosecution.

Contacted by Hong Kong Watch to share his thoughts on the national anthem ordinance, Ernie Chow responded: “The national anthem ordinance is undoubtedly a blunt violation of the freedom of expression in Hong Kong... Respect must be earned and not forced. People boo the anthem not because the law allows it and will not suddenly respect the anthem when the law requires it.”



[Source: Youtube](#)

The Lowmays are a local hip-hop group who have released a series of mixtapes and albums spanning musical genres in recent years. Their 2017 mixtape entitled “Triadism” plays on the overlap in the characters for “triads” (hei shehui) and “socialism” (shehui zhuyi) to promote an idea of “triadism” as “dark socialism.”

The first song on the mixtape is simply entitled “National Anthem (*Guo ge*).”⁴⁶ Once “National Anthem” begins, the song is immediately recognizable as “The March of the Volunteers,” its familiar tune played through a drum machine. And yet, listeners cannot help but notice that something is not quite right: a horn playing along with the song is jarringly off-key and off-tune, prone to awkward bursts of unmelodious notes. As the pace of the music increases and the song builds toward a crescendo, the horn becomes increasingly sporadic, until finally, in a torrent of rapid drums, crashing cymbals, and hilariously awkward horns, the song comes to an abrupt end. The recording is very much open to interpretation: any listener attempting to decipher the “meaning” or “intent” of the song, if there is indeed any such intent, will likely be left puzzled.

The potential passage of the National Anthem Ordinance, however, raises the possibility that this recording could be interpreted as an “insult” by the authorities, and could thereby be deemed illegal. As ridiculous as it may seem, such an unreasonable situation seems well within the realm of possibility in the political climate in Hong Kong today. The prospect of a banned recording in Hong Kong raises a number of troubling quandaries that highlight what a legal quagmire this ordinance will inevitably become. Would CDs with the song need to be destroyed? What about hard drives? Would it be enough to put the MP3 in one’s digital recycle bin, or would one only be safe from prosecution after emptying the bin? Would Soundcloud and Youtube be requested to remove the song, or would these sites be blocked from Hong Kong until the song was removed?

Would people playing this 2017 recording in public be subject to prosecution? What if it is played loudly on earphones in the MTR, such that a fellow passenger might hear hints of it? What if it is played in the privacy of one’s home? What if it is played in the privacy of one’s home, but with the window open on a hot summer day? What if one played the song with all windows and doors closed, but one’s neighbour hears the song through thin walls - could the neighbour report a listener to police?

Would people posting links to the video on social media applications be subject to prosecution? What if someone hacked someone else’s account and posted the song? What if someone did not choose to play the song, but it simply played via auto-play on Youtube after another video, and was overheard in public? Whereas current law is crystal clear, namely that the performance is completely legal, there are by contrast endless possibilities for legal crises emerging from this deeply flawed legislation.

Cheung Sin Ying

In the spring of 2018, the Hong Kong government claimed to be seeking the public’s opinion on drafting the National Anthem Ordinance. At a public hearing in the Legislative Council building, Cheung Sin Ying, a 21-year-old university student and chairperson of the Hong Kong Federation of Students, presented a statement that was likely far more honest than expected.⁴⁷

“I want to vomit whenever I hear the national anthem,” Cheung said. “When I was young, I would lower my head and mourn whenever the national anthem was played at school.” She continued, “every time the national anthem is played, it is proof that this regime that kills people still exists and holds power.”⁴⁸

Cheung shared her honest and legally protected opinion in response to the government’s open call for feedback. Nevertheless, another citizen at this hearing immediately told Cheung to “leave Hong Kong.”⁴⁹ China Central Television, the official voice of the Chinese state, furthermore published an article explicitly criticizing Cheung, calling her “the enemy of the Chinese people” and “a joke for the history books.”⁵⁰ The behaviour of Cheung and other young activists, CCTV claimed, “hurt the prosperity and stability of Hong Kong, and damaged the people’s interests. We must strike back hard against such behaviour.”⁵¹

Such harassment has continued for months on end. A video clip released in January 2019 on a pro-CCP Facebook group went so far as to suggest that feeling sick during the national anthem should be grounds for imprisonment. The video begins with Cheung’s comments in the Legislative Council, alongside captions that read “the National Anthem Ordinance is finally on its way. Anyone who violates this law could be imprisoned for three years. Thumbs up to heavy punishments for any insults to the National Anthem!” Soon, the background of the Legislative Council fades away to show

Cheung behind bars, with the following caption: “Cheung Sin Ying, we hope that from now on you don’t want to vomit when you hear the National Anthem. Because if you do, you may go to prison!”



The modern history of unending dictatorship and arbitrary violence perpetuated by the Communist Party in the People’s Republic of China, as well as Beijing’s handling of Hong Kong affairs in recent years, undoubtedly shape people’s understandings of and responses to such political symbols as the anthem. Any attempt to legislate meaning to enforce the supposed “dignity” of the anthem is then nothing more than an extension of the arbitrary dictatorship which elicited the original strong negative reaction. Legislating how people feel about the national anthem is not only a breach of rights, but is also destined to fail, as it essentially provides new grounds for such disgust.

Hong Kong Watch reached out to Cheung Sin Ying for comment on the proposed ordinance. She responded as follows: “An important feature of totalitarianism is that the government controls as many aspects of people’s daily life as possible. This bill aims to restrict our expression toward a certain song. It opens up opportunities for a lot of other restrictions on Hongkongers’ daily expressions. So I think no one should simply support the bill for the sake of ‘loving the country.’”

Finally, commenting on perceived apathy or resignation among fellow citizens toward this dangerous legislation, Cheung commented: “it also concerns me that lots of Hongkongers don’t feel threatened by the bill because they think that the bill only aims at troublemakers like me. It seems that it will only get harder for us to gather forces of objection in the future as people care less when it happens more and more frequently.” If the National Anthem Ordinance does pass, as Cheung predicts, the repercussions for Hong Kong’s freedoms, civil society, and rule of law - the city’s strengths relative to the rest of China - will be dire and lasting.

Conclusion

The proposed National Anthem Ordinance strips Hong Kong residents of their rights to free expression and protest, in direct violation of the Basic Law, the International Covenant on Civil and Political Rights, and the promises of “one country, two systems.” If passed, the ordinance will produce social tensions and legal conundrums, casting a dark shadow over the vision of Hong Kong as “Asia’s global city.”

The bill will open the door to politicized prosecution on the flimsiest of ascribed motives, irreparably damaging Hong Kong’s longstanding and respected tradition of the rule of law. By violating the Sino-British Joint Declaration and the International Covenant on Civil and Political Rights, the bill demonstrates growing disregard for international agreements and standards. Instead, the bill highlights the Hong Kong government’s eagerness to please Beijing, as well as its willingness to ignore local public opinion in doing so. The proposed bill thus reflects very poorly on the Hong Kong government’s ability to protect the city’s rule of law, continue to abide by international standards, and at a fundamental level to defend the interests of the local population in relations with Beijing.

The National Anthem Ordinance also highlights deep and growing issues in Beijing’s approach to Hong Kong affairs in the era of “comprehensive jurisdiction.” Beijing’s decision to incorporate this law, unrelated to diplomatic or defence matters, into Annex III of the Basic Law sets a chilling precedent for the legislative removal of legally protected rights in Hong Kong. At a deeper level, the bill is symptomatic of Beijing’s desire for ever greater control over the city of Hong Kong, producing a vicious cycle in which increasingly heavy-handed rule is rationalized in response to protests over Beijing’s already quite heavy-handed rule: this response not only violates the high degree of autonomy promised in the “one country, two systems” model, but is also likely to only provoke ever further protests and tensions.

The National Anthem Ordinance, in sum, is legal malware that will escalate tensions in Hong Kong society and damage rule of law in the city. In the interest of facilitating reconciliation and protecting Hong Kong’s rule of law, the National Anthem Ordinance should be dropped from further consideration. And in the interest of protecting the ideal of “one country, two systems” and guaranteeing Hong Kong’s continued prosperity and stability, no further legislation should be forced on Hong Kong via Annex III until genuine universal suffrage is realized.

What is truly in need of protection in Hong Kong today is not the national anthem, but rather the fundamental rights of freedom of opinion, expression, protest, and association. The governments of both Hong Kong and the People’s Republic of China need to recognize that “respect” cannot be legislated, but must be earned, and should draft all future legislation with this in mind.

ENDNOTES

¹ Chris Buckley and Michael Forsythe. “China restricts voting reforms for Hong Kong.” *The New York Times*. August 31, 2014. <https://www.nytimes.com/2014/09/01/world/asia/hong-kong-elections.html>

² Kong Tsung-gan. *Umbrella: A Political Tale from Hong Kong*. Minneapolis: Pema Press, 2017.

³ Ting-fai Yu. “Contextualizing the National Anthem Law in Mainland China and Hong Kong: Football as a Field of Political Contention.” *China Perspectives*. 2018: 3, 79-82.

⁴ Accounts of these protests can be read in Chan Kin-wa, “Fans again boo national anthem as Hong Kong down Cambodia 4-2 in friendly at Hong Kong stadium,” *South China Morning Post*, September 2, 2016 <https://www.scmp.com/sport/hong-kong/article/2012932/fans-again-boo-china-national-anthem-hong-kong-down-cambodia-4-2>; Benjamin Haas, “Defiant Hong Kong football fans boo China’s national anthem,” *The Guardian*, November 10, 2017, <https://www.theguardian.com/world/2017/nov/09/defiant-hong-kong-football-fans-boo-china-national-anthem>; Christy Leung, “No let up in Hong Kong soccer fans booing national anthem,” *South China Morning Post*, November 14, 2017, <https://www.scmp.com/news/hong-kong/politics/article/2119909/hong-kong-soccer-fans-grow-bolder-they-boo-chinese-national>; and James Porteous, “Hong Kong Football Association fined again by FIFA for booing China national anthem,” *South China Morning Post*, January 14, 2016 <https://www.scmp.com/sport/hong-kong/article/1901082/hong-kong-football-association-fined-again-fifa-booing-china>;

⁵ On the origins of the concept of “comprehensive jurisdiction (*quanmian guan zhi*)” see Information Office of the State Council. “The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region.” June 10, 2014. <http://www.fmco-prc.gov.hk/eng/xwdt/gsxw/t1164057.htm>; *BBC News*. “China: white paper on Hong Kong.” *BBC News*. June 11, 2014. <https://www.bbc.com/news/world-asia-china-27790302>

⁶ Hong Kong Football Association, “HKFA fined by FIFA and warned about further conduct,” October 5, 2015, https://www.hkfa.com/news_details/13207

⁷ Hong Kong Football Association, “HKFA fined by FIFA and warned about further conduct,” January 14, 2016, https://www.hkfa.com/news_details/13531

⁸ RTHK, “HKFA fined over national anthem booing,” December 20, 2017, <http://news.rthk.hk/rthk/en/component/k2/1371023-20171220.htm>

⁹ Shan Renping, “Xianggang jijin qingnian xu gouge kanlai nan jie jue (There seems to be no easy solutions to radical Hong Kong youth booing the national anthem),” *Global Times*, November 18, 2015, <http://opinion.huanqiu.com/shanrenping/2015-11/8000275.html>

¹⁰ Ta Kung Pao, “Wang Guangya: Xu guoge shu yanzhong feifa xingwei (Wang Guangya: booing the national anthem is a serious criminal act),” *Ta Kung Pao*, October 18, 2017, http://news.takungpao.com/paper/q/2017/1018/3504014_wap.html

¹¹ Kris Cheng, “Respect the nation’s symbols: National Anthem Law unlikely to be applied retroactively, says Hong Kong leader Carrie Lam,” *Hong Kong Free Press*, November 7, 2017 <https://www.hongkongfp.com/2017/11/07/respect-nations-symbols-anthem-law-unlikely-applied-retroactively-says-hong-kong-leader-carrie-lam/>

- ¹² Karen Cheung, “Carrie Lam praises schools that kicked students out of graduation ceremony for ‘disrespecting’ national anthem,” *Hong Kong Free Press*, December 19, 2017, <https://www.hongkongfp.com/2017/12/19/carrie-lam-praises-school-kicked-students-graduation-ceremony-disrespecting-national-anthem/>
- ¹³ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China. https://www.basiclaw.gov.hk/pda/en/basiclawtext/chapter_2.html
- ¹⁴ Annex III of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China. https://www.basiclaw.gov.hk/en/basiclawtext/annex_3.html
- ¹⁵ The Five Cases of HKSAR Basic Law Interpretations by the PRC NPCSC in 1999, 2004, 2005, 2011 and 2016. *Chinese Law & Government*, 50:1 (2018), 10-18, <https://www.tandfonline.com/doi/abs/10.1080/00094609.2018.1445342?journalCode=mclg20>
- ¹⁶ National Anthem Bill. January 2019. Part 3, Clause 7. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>
- ¹⁷ National Anthem Bill. January 2019. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>
- ¹⁸ Kris Cheng, ‘Carrie Lam: It is difficult to state what counts as an insult to the National Anthem.’ *Hong Kong Free Press*. 15 January 2019. <https://www.hongkongfp.com/2019/01/15/difficult-state-counts-insult-national-anthem-says-hong-kong-leader-carrie-lam/>
- ¹⁹ For further reading on this topic, please refer to the Hong Kong Watch report “Political screening in Hong Kong: the disqualification of candidates and lawmakers ahead of the March by-elections.” March 2018. <https://www.hongkongwatch.org/all-posts/2018/3/7/political-screening-in-hong-kong-a-report-on-the-disqualification-of-candidates-and-lawmakers>
- ²⁰ National Anthem Bill. January 2019. Part 3, Clause 7. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>
- ²¹ Kimmy Chung and Tony Cheung. “New law will give authorities two years to prosecute anyone in Hong Kong who insults the Chinese national anthem- and doing so could land you in jail for three.” *South China Morning Post*. January 9, 2019. <https://www.scmp.com/news/hong-kong/politics/article/2181373/new-law-will-give-authorities-two-years-prosecute-anyone>
- ²² National Anthem Bill. January 2019. Part 3, Clause 7. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>
- ²³ Tom Bingham. 2007. “Rule of Law.” *The Cambridge Law Journal*. Vol. 66(1), pp.67-85
- ²⁴ Legislative Council Brief on the National Anthem Bill. January 2019. Pg. 2 https://www.legco.gov.hk/yr18-19/english/bills/brief/b201901111_brf.pdf
- ²⁵ National Anthem Bill. January 2019. Preamble. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>
- ²⁶ National Anthem Bill. January 2019. Preamble. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>

- ²⁷ National Anthem Bill. January 2019. Part 2, Clause 3. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>
- ²⁸ National Anthem Bill. January 2019. Part 2, Clause 4. <https://www.legco.gov.hk/yr18-19/english/bills/b201901111.pdf>
- ²⁹ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. https://www.basiclaw.gov.hk/pda/en/basiclawtext/chapter_3.html
- ³⁰ International Covenant on Civil and Political Rights. Part III, Article 19. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- ³¹ Willa Wu and Tommy Yuen. "Lam: separatism advocacy not a free speech issue." China Daily. September 13, 2017. <https://www.chinadailyhk.com/articles/74/160/67/1505235338944.html>; "Lam accused of undermining freedom of expression in Hong Kong by 13 universities, academic institutions." *The Straits Times*. September 11, 2017. <https://www.straitstimes.com/asia/east-asia/lam-accused-of-undermining-freedom-of-expression-in-hong-kong-by-13-universities> ; Kris Cheng. "I heard Benny Tai remarks and approved government statement condemning him, says Carrie Lam." *Hong Kong Free Press*. April 6, 2018. <https://www.hongkongfp.com/2018/04/06/i-heard-benny-tais-independence-remarks-approved-govt-statement-condemning-says-chief-exec-carrie-lam/> ; Cindy Wan. "We followed law on Mallet, says Lam." *The Standard*. October 22, 2018. <http://www.thestandard.com.hk/section-news.php?id=201370&sid=4>
- ³² See, for example, Carrie Lam's legally groundless statement that "it is the responsibility of every person, every citizen, to respect the nation's symbols." Kris Cheng. "'Respect the nation's symbols': Anthem law unlikely to applied retroactively, says Hong Kong leader Carrie Lam." *Hong Kong Free Press*. November 7, 2017. <https://www.hongkongfp.com/2017/11/07/respect-nations-symbols-anthem-law-unlikely-applied-retroactively-says-hong-kong-leader-carrie-lam/>
- ³³ United Nations General Assembly Human Rights Council, Seventeenth Session. "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank Larue." A/HRC/17/27. May 16, 2011. https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf
- ³⁴ United Nations General Assembly Human Rights Council, Seventeenth Session. "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank Larue." A/HRC/17/27. May 16, 2011. https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf
- ³⁵ See for example, Concluding observations of the Human Rights Committee on Mexico, CCPR/C/79/Add.109, 27 July 1999, available at http://www.univie.ac.at/bimtor/dateien/mexico_ccpr_1999_concob.pdf.
- ³⁶ Legislative Council Brief on the National Anthem Bill. January 2019. Pg. 6-7. https://www.legco.gov.hk/yr18-19/english/bills/brief/b201901111_brf.pdf
- ³⁷ Article 19, "Defining Defamation: Principles on Freedom of Expression and Protection of Reputation", 23 February 2017, <https://www.article19.org/resources/defining-defamation-principles-on-freedom-of-expression-and-protection-of-reputation/>
- ³⁸ Patrick Nip. "Hong Kong's national anthem law is entirely appropriate." *Financial Times*. Letters. January 14, 2019. <https://www.ft.com/content/7a0fdb3c-15ae-11e9-a581-4ff78404524e>

- ³⁹ Council of Europe, “Defamation and Freedom of Expression: Selected Documents”, H/ATCM (2003), <https://rm.coe.int/1680483b2d>
- ⁴⁰ UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, “Joint Declaration about Censorship by Killing and Defamation”, 2000, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=142&IID=1>
- ⁴¹ “Poland should abolish criminal defamation, says OSCE media freedom representative following conviction of editor”, OSCE, 17 September 2012, <http://www.osce.org/fom/93797>
- ⁴² See e.g. Translation by the University of Texas at Austin School of Law of Bavarian High Court decision, “BVerfGE 81, 298 1 BvR 1215/87 German National Anthem -decision”, 7 March 1990, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=631>
- ⁴³ Council of Europe, “Defamation”, Accessed 18 February 2019: <https://www.coe.int/en/web/freedom-expression/defamation#%2234629839%22:0>
- ⁴⁴ Christy Leung. “No let-up in Hong Kong soccer fans booing the national anthem.” *South China Morning Post*. November 14, 2017 <https://www.scmp.com/news/hong-kong/politics/article/2119909/hong-kong-soccer-fans-grow-bolder-they-boo-chinese-national>; Donny Kwok. “Hong Kong soccer fans defy Beijing by booing the national anthem.” *Reuters*. November 15, 2017. <https://www.reuters.com/article/us-china-hongkong-anthem/hong-kong-soccer-fans-defy-beijing-by-booing-chinese-national-anthem-idUSKBN1DE1PE>
- ⁴⁵ Ta Kung Pao. “Independence activists infiltrate Asian Cup; Ernie Chow takes the lead in booing the national anthem [‘Du’qin Yabei; Zhou Jianfeng qinao xu guoge].” *Ta Kung Pao*. November 15, 2017. <http://news.takungpao.com/hk/paper/q/2017/1115/3514995.html>
- ⁴⁶ “National anthem (Guo ge),” along with the entire “Triadism” mixtape, can be heard on Soundcloud <https://soundcloud.com/the-low-mays> or on Youtube https://www.youtube.com/watch?v=tAna0_hv380.
- ⁴⁷ Cheung’s testimony can be viewed here: “Hong Kong citizen Cheung Sin Ying: every time I hear the national anthem, I want to vomit [Shimin Cheung Sin Ying: wo meici tingdao guoge, wo dou xiang ou].” <https://www.youtube.com/watch?v=ZuK4bWWQx5w>
- ⁴⁸ Vicky Xiuzhong Xu and Xiaoning Mo. “Hong Kong student slammed by Chinese press for saying the national anthem makes her ‘vomit.’” *ABC News (Australia)*. May 9, 2018. <https://www.abc.net.au/news/2018-05-09/china-imposes-national-anthem-law-on-hong-kong/9739240>
- ⁴⁹ Tai Shan. “Facing the dignity of the nation, we should make a tough legal strike against the Hong Kong independence advocates.” *China Central Television Opinion*. May 7, 2018. <http://opinion.cctv.com/2018/05/07/ARTISrKJzLMFrPNVpbwyB9ic180507.shtml>
- ⁵⁰ Tai Shan. “Facing the dignity of the nation, we should make a tough legal strike against the Hong Kong independence advocates.” *China Central Television Opinion*. May 7, 2018. <http://opinion.cctv.com/2018/05/07/ARTISrKJzLMFrPNVpbwyB9ic180507.shtml>; translation by Vicky Xiuzhong Xu and Xiaoning Mo. “Hong Kong student slammed by Chinese press for saying the national anthem makes her ‘vomit.’” *ABC News (Australia)*. May 9, 2018. <https://www.abc.net.au/news/2018-05-09/china-imposes-national-anthem-law-on-hong-kong/9739240>

⁵¹ Tai Shan. “Facing the dignity of the nation, we should make a tough legal strike against the Hong Kong independence advocates.” *China Central Television Opinion*. May 7, 2018. <http://opinion.cctv.com/2018/05/07/ARTISrKJzLMFrPNVpbwyB9ic180507.shtml>



www.hongkongwatch.org

© Hong Kong Watch, 2019
All rights reserved