

# Reflections on the Article 23 Legislation

Johannes Chan points out problems with both process and content

The Government published its Consultation Document on the Proposals to Implement Article 23 of the Basic Law in September 2002. In response, a unanimous voice from the community called for the publication of a White Bill, for it was said that the devils were in the details. The call was rejected, as the Government argued that the Blue Bill was good enough for consultation. At the same time, the Government concluded (erroneously) that the responses to the Consultation Document showed overwhelming support for the introduction of the proposed legislation, and barged ahead.

The National Security (Legislative Provisions) Bill was introduced to the Legislative Council in February 2003. How does the legislative process work as a 'consultation process'?

## A Mockery of Consultation

From the very beginning, the Government made it clear that the Bill has to be enacted into law before the summer of 2003. A large number of bodies that wished to make representations to the Bills Committee, including the Hong Kong

Bar Association and the Article 23 Concern Group (which comprises 5 past chairpersons of the Bar) and many other human rights groups, were each allotted a mere 5 minutes for their presentation. The Government produced no less than 90 papers, and between 5-9 June 2003 alone, 36 documents of great complexity were dumped onto the Bills Committee. Even experienced lawyers have difficulty digesting this huge volume of materials within such a short period of time, and the most ardent followers have lost their way on the number of amendments and amendments to amendments that have been introduced by the Government since the Committee Stage began.

In mid-June 2003, Dr Robert Chung of the University of Hong Kong and his team published their analysis of the responses to the Government Consultation Document based on the data compiled by the Government, and concluded that the responses did not support the conclusion of the Government. When confronted with this academic analysis, the Secretary for Security said that the Government had only a month to

analyse the data whereas Dr Chung's team had 3 months to do the job. So, the Secretary argued, it is expected that the Government could not do a thorough job! It is difficult to have a more ridiculous answer from a senior government official. After all, who set the 1-month deadline when there is absolutely no urgency to legislate?

Many critics have accused the Government of not being sincere in its consultation. The Government has only itself to blame for such criticism. No civilized country would rush through its national security law in peacetime with such haste. There is absolutely no urgency to pass the law. Yet, the Government insists that the Bill has to be enacted into law on 9 July 2003.

## Proposals with Far-reaching Consequences

The Bill proposes to introduce legislation of far-reaching consequences. While the Government has introduced various amendments to its original proposal, it has made little changes to the most controversial aspects – namely, handling seditious publications, prejudicial disclosure of official

secrets, the proscription mechanism and police power.

### Seditious Publications

While mere possession of seditious publications is no longer an offence, it remains a criminal offence to handle any seditious publication. Sedition is an offence to incite someone to commit certain defined offences. Incitement can take many forms. If handling seditious publication constitutes an incitement, it is already an offence of sedition. If handling does not constitute an incitement, it is wrong to make handling a separate offence. The retention of the offence of handling seditious publication does not add anything further that is not covered by the offence of sedition, but its retention provides ample incentive for self-censorship as printers, publishers and distributors are unlikely to print, publish or distribute anything which may even be remotely regarded as seditious.

### State Secrets

'State secrets' is an extremely fluid concept on the Mainland. Consider this: It was reported that a lawyer who acted for some residents whose property was demolished in a law suit against the 'richest man in Shanghai' and some government officials for conspiracy and corruption to deprive private property was arrested on 18 June 2003 for an offence of unauthorised access to state secrets, *Ming Pao*, 22 June 2003, p A14. Under the Bill, 'state secrets' remains a rather vague concept and the only safeguard is that there is only an offence if the disclosure is damaging. Note, however, that there is no requirement that the damage be real, substantial and imminent. In

considering whether there is a damaging disclosure of official secrets, it must be relevant to consider the reason for the disclosure. Is it done for private gain; is it to expose an abuse of power or government misconduct; or would the disclosure be in the public interest – such as the disclosure of SARS to prevent spreading the infection? Thus, it is inherent in any consideration of the damaging disclosure of state secrets to take into account the public interest, if any, in

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the disclosure. So far, no convincing reason has been put forward to reject the inclusion of a public interest defence.

### The Proscription Mechanism

It is further proposed that any local organization that is subordinated to a Mainland organization may be proscribed if the Mainland organization is proscribed by an open decree by the Central authorities on the ground of protecting the security (not national security) of the PRC. It is only after the Government introduced its committee stage amendments that it was discovered

that there is no mechanism for proscribing a Mainland organization by an open decree on the Mainland! It will be a shame if the Hong Kong legislation inadvertently provides an excuse for the Mainland to enact a law to clamp down on dissident organizations on the Mainland.

In the Consultation Document, it was proposed that an office bearer or a member of a proscribed organization may appeal to a specially constituted tribunal. This proposal was met with strong opposition. Under the Bill, the appeal is to be determined by the Court of First Instance. However, it is also provided that the Chief Justice may make rules for appeals, and such rules may include provisions allowing trial in absentia and the admission of evidence that is otherwise inadmissible. The Chief Justice declined to be involved in making such rules. As a result, the Government proposed that such rules be made by the Secretary for Security, the very party who will be a Respondent in any appeal against proscription. It is further proposed that regulations may be made to provide for the appointment of a legal practitioner to act for the absent appellant. When the Government was pressed for details before the Bills Committee, it was disclosed that a panel of legal practitioners would be appointed for such purpose.

### Police Power

Sweeping powers of entry, search and seizure are conferred on the police, which can be authorized by a Police Superintendent without any judicial authorization. The justification is that such power is required in times of urgency. However, the Government has failed to articulate

such emergency situation. Hong Kong is a small place. Judges are practically next door. It is hardly convincing to say that it is not possible to obtain a judicial warrant before such sweeping powers are to be exercised.

### Separation of Power

The principle of separation of power lies at the heart of our system, under which the judiciary is independent of the executive government. It is dangerous to tinker with our judicial system. The system is endangered if the court is to act in accordance with regulations to be made by the very party whose decision on proscription is being challenged.

Another aspect of the principle of separation of power is that the Legislature should play a role distinct from that of the executive government. The duty of the Legislature is not only to make good law but also to stop bad law. It is a dereliction of duty if it fails to properly scrutinize any bill or if it allows itself to be dictated to by the executive. Short of an emergency, it must be for the Legislature to decide how much time it needs to properly scrutinize a bill, and not for the Secretary for Security to dictate when to complete the process and pass the law. In this regard, it is disappointing to see that the Bills Committee not only refused to reschedule its meeting on a Saturday morning when many members wished to attend an international conference on Article 23, but instead extended the meeting to the afternoon. A number of Legislators who are critical of the Bill decided to take part in the Conference. By the end of that Saturday, the Bills Committee, in the absence of the critical members, completed its

clause-by-clause deliberation on the Bill.

### Disappointing Responses

The English Bar, the New York City Bar and the Canadian Bar have expressed concern on various aspects of the Bill. The amount of time and effort they put into their preparation and the depths of their analyses are most impressive. The Government's response is only that Article 23 legislation is a domestic matter and it is not for foreigners to interfere

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with Hong Kong's domestic affairs. Hong Kong prides itself as being an international city. It is only right for the international community to be concerned. A responsible Government should deal with the criticism – not walk away from it.

The Government argued that many of the criticisms on the Bill are in fact directed at the existing law, yet there is no sign of freedom being suppressed under the existing law. This is misleading. One has to ask whether freedom is enjoyed because it is protected by law, or whether freedom is enjoyed because existing law is not enforced. For example, the

number of public demonstrations held in Hong Kong does not by itself show that the freedom of public demonstration is protected by the law of Hong Kong. In fact, many demonstrators who failed or refused to comply with the requirements of the Public Order Ordinance were tolerated because the Public Order Ordinance was not strictly enforced. To make it worse, the existence of the harsh regulatory regime enables the police to apply and enforce the law discriminatorily or selectively.

Finally, the Government argued that there is a strong legal profession and an independent judiciary, which can act as the safeguard for human rights. It is reassuring that the legal profession is strong and the judiciary remains independent. Yet if we cannot rely on our law to protect our freedom, and if the protection of fundamental freedom has to rest on the self-restraint of the Government and the vigilance of the judiciary and the legal profession, that freedom is too fragile.

The Government knows that the debates have divided and polarized the community. It may wish to rush through the legislation so that it can be put aside and the Government can get on with its business. The legislation will no doubt be pushed through, but the scar will remain for a much longer period after the Government has lost its credibility.

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