Roundtable discussion

ARTICLE 23 LEGISLATION: 13 YEARS ON

Submissions by Margaret Ng

Part I - Overview

1. The Roundtable takes as starting point the National Security Bill up-dated to its 10 July 2003 proposed amendments. This is the wrong starting point.
2. First, for legal and drafting reasons. The haphazard amendments resulted in a bill which is unacceptable on those grounds alone, apart from the desirability or otherwise of the criminal offences created.
3. Secondly, the bill as first gazette on 14 February 2003 was in the wrong shape and based on an inherently wrong approach: it was piecemeal amendments of several Ordinances lumped together in an omnibus bill.
4. Thirdly, the dynamics that forced the Government to modify its legislative proposals and bring in the amendments were tremendous. There were massive efforts by numerous professional and civil society institutions and individuals, against a context of an administration with which such institutions and persons commanded respect and attention. Because of the way these forces had to be marshaled and were met, the amendments were not the considered outcome of a rational process.
5. Fourthly, and most importantly, since then the world has changed drastically. If not the institutions then their force has all but disappeared. The administration no longer pays heed to them. Civil society has changed. To state the obvious, the march of 1.7.2003 cannot be repeated.
6. If anything, we have to start afresh, taking a lesson from the past.
7. We have to understand how the bill had come about and how it had gone wrong, both in substance and in procedure.
8. We must examine, what would events in the last 13 years have been like, if the bill as amended were passed. And what had happened even without the bill having been passed.
9. We have to ask, realistically, what can the future Art 23 legislation look like, at best.
10. And then, perhaps, we have to ask, what can be done to prevent the worst from happening. And, perhaps, what is the worst?

Can the concerns against Art 23 be mitigated by (i) drafting techniques; (ii) continued constitutional entrenchment of international human rights by the courts; (iii) universal suffrage of the CE and LegCo elections

Concerns then

11. The deep concern came about because of: (a) mistrust - The public was keenly aware of Communist China's use of "anti-revolutionary" crimes and crimes threatening "national security" to silence opposition. They feared that art. 23 legislation would be used in the same way in Hong Kong to silence criticism of the CCP and CPG. China's recent human rights records are not reassuring; (b) drafting - fear was aggravated by the broad language used setting out the legislative proposals in the consultation document; (c) unseemly haste despite opposition - the high-handed and aggressive manner in which the Government pushed for the law to be passed in July lent justification to the fear.
12. David Pannick QC's opinion[1] for the Government was telling: the contents of the legislative proposals were not inconsistent with human rights law. The application of the law, if enacted, to particular factual circumstances is ccrucial.
13. The Hong Kong public did not trust the law because they did not trust the people applying it. Much worse if the law was itself Draconian. Therefore, although improvement in each of the above 3 aspects will help, if the fundamental reason for mistrust remains, then art.23 legislation will be and should be resisted.

Future improvement: (i) drafting

14. Good drafting setting out in comprehensible language the *actus reus* and *mens rea*, narrowly defined, which constitute each crime will certainly help. However, the problems with the 2003 drafting was not just a matter of drafting technique. They were inherent in the whole approach of piecemeal amendment to existing legislations which were ahistorical. The prime example was treason. As pointed out by a detailed opinion of the English Bar, the old treason law centred around the protection of a person: the sovereign. This had ceased to have relevance even in the UK, let alone the HKSAR. Grafting the new treason law on

[1] Available from the Government website on proposals to implement Article 23 of the Basic Law

the ancient treason law was bound to be confusing and incomprehensible. The archaic language made everything worse. Likewise the colonial law of sedition. Sedition is just incompatible with the right to freedom of speech. The demand for secession can be a legitimate exercise, and so on.

15. The law draftsman was not ignorant. Behind the mission impossible could have been the political need both to accommodate the Bar's view that any art.23 legislation must be build on common law concepts and Chinese security law should not be imported. It might have been considered that the "de minimis" approach was to amend existing statute to satisfy the requirements of BL 23. But what seemed attractive as short cut became a labyrinth, especially in the Chinese translation.

16. That was why the Article 23 Concern Group advised, in our pamphlet "*The Proper Way Forward*"[2], a holistic approach by way of law reform. As acknowledged in Petersen (2005)[3], some of the amendments in the bill were genuine modernization and liberalization of the law. They were lost in the overwhelming tide of aggression and resistance. In my view, the proper way forward is the *only* way forward.

(ii) Constitutional entrenchment of international human rights

17. Since 2003, there have been major judgments from the Court of Final Appeal giving effect to fundamental rights under the Basic Law. This is certainly encouraging. But in the meantime, the reality of NPCSC interpretation of the Basic Law has also grown. There is nothing the Hong Kong courts can do about it. On the contrary, in ***Lau Kong Yung and Others v Director of Immigration***[4], the CFA held that under Art 158 (1), the NPCSC has a free-standing power of interpretation of any provision of the Basic Law. If and when an interpretation is issued, it is binding on the Hong Kong courts. Thus even if the "Pannick clauses" incorporating articles 27 and 39 into the bill were accepted, it would give no additional safeguard or comfort.

18. Confidence would increase only if human rights condition in China itself improves, or the increase of confidence in "one country, two systems". Neither has happened in the intervening years.

(iii) Universal suffrage of CE and LegCo elections

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[2] Published in August, 2003: Item 9 in the Roundtable Brief

[3] Item 7, Roundtable Brief

[4] (1999) 2 HKCFAR 300

19. With the failure of the 8.31 political reform package in 2014, progress is not a realistic expectation in the near future. However, what is possible is to build up the strength of Hong Kong's civil society and its institutions, to make the public better informed and so have greater strengthen confidence in themselves. This movement has already started following the dissolution of the Umbrella Movement which had awoken awareness, and given people the incentive to explore new ways of social participating and empowerment.

Part II – Hong Kong in China's security order

20. There is need to make abundantly clear that a person cannot be prosecuted in China for doing in Hong Kong what is lawful under the Hong Kong legal system. There were lively learned discussion about this in the early years of 1998-1999, triggered off by the trial in the mainland of the "Big Spender" whose crime of kidnapping was committed in Hong Kong. The question then was whether the Chinese criminal code, which had extraterritorial effect, was applicable to Hong Kong. Questions were asked in LegCo and officials of the Department of Justice struggled to give the right answer. They were corrected by academics including Professor Albert Chen and China law experts who pointed out that Article 7 of the Criminal Code did not apply in Hong Kong by reason of Artile 18 of the Basic Law.[5]

21. It seems this had been largely forgotten. In the Causeway Bay Bookstore incident, there were views that the Chinese criminal code has jurisdiction over Hong Kong, so that a Chinese national can commit offences against it in Hong Kong, and tried for it in China if he happens to be in China. If so, the only thing which saves Hong Kong persons from being tried for offences under the Chinese criminal code is the absence of rendition arrangements between the SAR and the Mainland. And, as the case of Li Po forcefully demonstrates, even that is no protection.

22. Since 2003, we have also seen the arrest, conviction and imprisonment of senior journalist Ching Cheong for offences against Chinese security law on the basis of acts done in Hong Kong. His case and the Causeway Bookstore cases suggest that Chinese authorities are already applying national security laws in Hong Kong without article 23 legislation being passed.

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[5] See Hansard for LegCo sitting on 18 November 1999, and various articles and commentaries in the HKEJ of 9, 12 and 14 1999

23. It has been repeatedly suggested that the enacting of art.23 laws in Hong Kong would curb or discourage or render unnecessary the application of Chinese national security law on Hong Kong residents. This is based on the unfounded assumption that China is or will be compelled to resort to prevent crimes against national security in Hong Kong by applying Chinese law because Hong Kong has not enacted national security laws on its own. Whereas the plain facts are that Chinese national security laws and criminal procedure had little regard for fundamental rights and freedoms and are much more efficient tools of silencing opposition.

24. If Hong Kong passes national security laws which give full effect to speech and other freedoms, they would not be good enough for the political purposed for which Chinese national security laws are invoked. China will not be content with that, although it would prefer not to open itself to criticisms of interference if it is not necessary. What this means is that, if Art 23 is implemented, then in so far as the case can be prosecuted under Hong Kong's art 23 law, Hong Kong will be left to do so, with China interfering only when Hong Kong law seems not to be able to bring the desired results. It is simply unrealistic to hope to prevent China will from enforcing its own national security law against Hong Kong people simply by implementing art 23 in a way which gives full effect to rights and freedoms safeguarding by international covenants.

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