

Comments on Article 23 Legislation

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Constitutional Politics

1. The central issue of Article 23 legislation is not technical but political.
2. Even if the legislation follows the principle of minimum legislation as I suggested 13 years ago, the enactment will still not be welcomed by a lot of people in Hong Kong out of the distrust in the Chinese Communist regime.
3. Several years ago, I have suggested two arrangements on the process of enactment which might deal with the lack of mutual trust between Hong Kong people and the Chinese Communist regime.
4. The first arrangement is to enact only a part of Article 23 (like the less controversial part on treason) first to demonstrate good faith from the side of Hong Kong. After the introduction of universal suffrage, the remaining parts can then be enacted.
5. An alternative arrangement is to enact Article 23 following the principle of minimum legislation but the legislation will not be put into effect immediately. The effective day is linked with the election of the chief executive by universal suffrage.
6. If either arrangement could be implemented before the “831 Decision” of the Standing Committee of the NPC, there might still be chance to complete the constitutional tasks of enacting Article 23 and election of the chief executive by universal suffrage.
7. However, after the Umbrella Occupation, both arrangements would not be feasible.

Self-determination and Independence of Hong Kong

8. The controversy over self-determination and independence of Hong Kong may provide an additional reason for the Chinese Communist regime to quicken the process of Article 23 legislation to stop the spread of these ideas in Hong Kong.
9. However, even if the legislation follows the shelved version, it cannot prohibit speeches concerning self-determination and independence of Hong Kong in Hong Kong.
10. Any attempt to enact Article 23 out of this reason may generate even more distrust and fear among Hong Kong people. More social unrest can be expected. The legislation will be even more difficult to be enacted and implemented.

Mainland National Security Law

11. There is no requirement on the timing of the enactment of Article 23 in the HKSAR. Unlike Article 45 and 68, the introduction of universal suffrage has to follow the principle of gradual and orderly progress.
12. If the Chinese Communist regime applies mainland national security law to Hong Kong skipping the Article 23 process, this is a clear breach of the Basic Law and “One Country Two Systems.”
13. Even though Article 18(3) covers laws “outside the limits of the autonomy of the HKSAR” and reading this phrase by itself may cover matters on national security, the phrase cannot be read in such a standalone manner.
14. The matter must be “outside the limits of the autonomy of the HKSAR” as *prescribed by the Basic Law*. Since Article 23 has authorized the HKSAR to enact a list of matters

concerning national security by itself, the Standing Committee has no authority under the Basic Law to add national security law to Annex III.

15. Article 18(4) provides that “[i]n the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.”
16. A factual condition must be satisfied. Either China is in a state war or the turmoil within the HKSAR which endangers national unity or security and is beyond the control of the government of the HKSAR.