Comments for Article 23 Roundtable

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1. **The Constitutional Duty**. As a matter of law, so long as Article 23 is in the present terms, national security legislation has to be enacted in Hong Kong covering the 7 matters. How to get them enacted is mainly a question of political judgment.

2. **Is there a legal vacuum?** The Crimes Ordinance (Cap 200) Parts I and II provide for some national security offences which are "laws previously in force" that have to be modified etc pursuant to s 2A of the Interpretation and General Clauses Ordinance (Cap 1) to ensure that they do not contravene the Basic Law and they be brought into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China. It is incumbent on the HKSAR Government to state (1) what the criminal offences are after the modification, etc (which would include adaptations to ensure conformity with the protection of fundamental rights under Chapter III of the Basic Law and the limitation provision in Art 39(2) of the Basic Law by reference to the ICCPR as applied to Hong Kong) and (2) to what extent are the criminal offences after modification inadequate in fulfilling the Constitutional Duty.

3. **Article 23 Legislation: Adaptation vs Incorporation**. What is the nature of the exercise involved in the enactment of Article 23 legislation? Is it to adapt the pre-existing national security offences formally to the status of Hong Kong as a Special Administrative Region of the People's Republic of China according to the general principle in Art 1 of the Basic Law and the designation in Art 12 of the Basic Law, to add the secession and subversion of CPG offences (which in substance can be sub-categories of treason), to supplement the Societies Ordinance (Cap 151) in respect of the prohibition of links and proscription of certain societies/ organizations requirements? Or is it now to go further and incorporate the wide ranging directives of national security in the National Security Law of the PRC enacted in 2015? It is noted that incorporation of these directives can proceed by separate local legislation for other legitimate security purposes.

4. **The Jurisprudence**. Freedom of expression, Right of peaceful assembly, Freedom of association are not absolute rights and can be restricted on legitimate aims including national security and public order (ordre public) by means that are proportionate to the achievement of the legitimate aims. The Flags case of *Ng Kung Siu* (1999) 2 HKCFAR 442 indicates clearly that the CFA had regarded as forming part of the general welfare and the interests of the collectivity as a whole and therefore within the concept of public order (ordre public) the following:

> 'As to the time, place and circumstances with which we are concerned, Hong Kong has a new constitutional order. On 1 July 1997, the People's Republic of

> China resumed the exercise of sovereignty over Hong Kong being an inalienable part of the People's Republic of China and established the Hong Kong Special Administrative Region under the principle of "one country, two systems". The resumption of the exercise of sovereignty is recited in the Preamble of the Basic Law, as "fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong". In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order (ordre public). As I have pointed out, the national flag is the unique symbol of the one country, the People's Republic of China, and the regional flag is the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China under the principle of "one country, two systems".' (per Li CJ).

The CFA under Ma CJ has declined to re-visit *Ng Kung Siu*; see *HKSAR v Koo Sze Yiu & Anor* (2014) 17 HKCFAR 811 (10 November 2014). The other relevant legitimate aim in the context of Article 23 legislation is national security.

In *Ng Kung Siu*, the CFA had indicated that it would give due weight to the choice or judgment of the legislature in criminalizing flag desecration, one mode of expression of one's idea. This approach of giving due weight has developed into an approach of according deference or margin of appreciation to the executive authorities and the legislature in socio-economic matters or policy choices involving allocation of limited public resources (see *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409). Another way of putting it is found in Ribeiro PJ's judgment in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950: "The Court then asks whether that restriction pursues a legitimate societal aim and, having identified that aim, it asks whether the impugned restriction is rationally connected with the accomplishment of that end. If such rational connection is established, the next question is whether the means employed are proportionate or whether, on the contrary, they make excessive inroads into the protected right" but where socio-economic policies are involved in the case, the judicial scrutiny would be concerned with whether the impugned measure is "manifestly without reasonable foundation".

Lately, in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] HKLRD, which concerned restrictions in election law to candidature in respect of a resigning legislative councilor, the CA applied the concept of margin of appreciation in the context of election law coming from *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 (which was over a very short time limit to lodge challenges to the result of a Chief Executive election), agreeing with the CFA that in elections, political and policy considerations are involved and in light of the different constitutional roles of the judicial and the executive and legislature, a due margin of appreciation should be accorded. The exact statement is of Lam VP for the CA at [45] is:

'In our judgment, as explained by the Chief Justice, the rationale for adopting different intensity in the court's review stems from the constitutional role of the judiciary vis-à-vis the roles of the executive and the legislature. We agree with the submission of Lord Pannick that the court will accord the appropriate weight to the judgment of the legislature if the particular question arisen from the application of the proportionality test in a particular case involves the exercise of a pre-eminently political judgment. Apart from *Fok Chun Wa* supra, and *Leung Chun Ying v Ho Chun Yan Albert*, supra, this proposition is well-supported by dictum in the English authorities. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 at paragraph 29, Lord Bingham said:

> " … I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. … As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called 'relative institutional competence'. The more purely political (in broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. …"'

It has to be noted that the *A v SSHD* (Belmarsh) case is concerned with detention for protection of national security and law and order. And this point has not escaped the consideration of Lam VP at [47]:

> "as illustrated by the facts of *A v Secretary of State for the Home Department*, supra, when fundamental rights are engaged and intensive review is called for, the courts were not precluded by any doctrine of deference or margin of appreciation from examining the proportionality of a restriction on such rights even though the restriction was imposed as a matter of political judgment."