National Security (Legislative Provisions) Bill 2003: Administrative Law aspects

Dr Christopher Forsyth
Director of the Centre for Public Law
Reader in Public Law
University of Cambridge

National Security (Legislative Provisions) Bill 2003:
Administrative Law aspects

Introduction: the Importance of Discretion and the Purpose of the Bill

ON the pediment of the Supreme Court in Washington will be found engraved the words: "Where law ends tyranny begins". Yet the true position is that where law ends discretion begins. And whether the exercise of that discretion is tyranny or not depends upon whether the exercise of discretion is controlled, confined and made accountable by the rules and principles of administrative law. Discretion uncontrolled turns every official, great or small, into a tyrant. But administrative law reaching from the highest to the lowest official and into practically every nook and cranny of the government machine can bring a benign influence to bear, turning tyranny into good government.

How does this relate to the National Security (Legislative Provisions) Bill 2003? Well clause 8A(1) adds a section to the Societies Ordinance and that section provides that "the Secretary for Security may by order proscribe any local organization to which this section applies if he reasonably believes that the proscription is necessary in the interests of national security and proportionate for such purpose." When an organization is proscribed it becomes a criminal offence to act as an office bearer or a member of the organization. Clause 8A is thus the most prominent introduction of an administrative discretion into the 2003 Bill. We are now going to analyse this clause but first there are some general comments to be made.

Article 23 of the Basic Law imposes upon the HKSAR a duty to enact laws against treason, succession, sedition and subversion. And while criticisms may be made of the Bill in being overbroad or insufficiently clear, there can be no objection in principle to the introduction of such legislation – the HKSAR has a duty to enact legislation. But Article 23 plainly does not impose any duty to enact legislation enabling the proscription of local organizations. Article 23 only goes so far as to require legislation which prohibits foreign political organizations in Hong Kong from operating in Hong Kong and prohibiting local political organisations from establishing

ties with foreign political organisations. There is nothing in Article 23 requiring the enactment of legislation - as the Bill proposes- providing for the proscription of local organizations that have no links with foreign political organizations but whose proscription is considered necessary to protect national security. Later in this paper we will talk in more detail about national security. But once more there can be no objection in principle – whatever doubts one may have about the detail - to the enactment of legislation to protect national security. *Salus reipublicae supreme lex est* (the safety of the state is the supreme law) said the Roman and it is the same today. No state will foreswear responsibility for national security. And it is foolish to suppose that it will. However, in the context of clause 8A, there is a special consideration. There already exist provisions in the law of the HKSAR that provide for the proscription of local organisations that threaten national security. Section 8 of the Societies Ordinance already provides, omitting unnecessary words, that "(1) The Societies Officer may recommend to the Secretary for Security to make an order prohibiting the operation or continued operation of [a] society …(a) if he reasonably believes that the prohibition of the operation or continued operation of [that] society is necessary in the interests of national security …(2) On the recommendation by the Societies Officer under subsection (1), the Secretary for Security may by order published in the Gazette prohibit the operation or continued operation of the society … in Hong Kong." There are further provisions ensuring the fairness of the procedure whereby the decision to prohibit the operation of the society in question – including in the end the right of appeal to the Chief Executive. Moreover, in the modern world terrorism, alas, is a threat to the security of most states. But here again there are strong provisions already in place in the United Nations (Anti-Terrorism Measures) Ordinance that allow appropriate action to be taken where threats come from that quarter.

Given all this the question it must be asked why this legislation is being introduced? It surely cannot be because of some minor procedural difference between section 8 and clause 8A for if that were the case an amendment to section 8 would be the way forward. It may be thought that the current provisions – particularly the fact that they culminate in an appeal to

the Chief Executive - fall foul of human rights considerations – but in that case the proper course would be to repeal section 8. The Legislative Council brief on the Bill contains no hint why Clause 8A is being proposed – simply a bland, and erroneous, statement that clause 8A is required by Article 23 (see the LegCo web-site). There has to be some substantive difference between the two provisions justifying the new clause. Let us then turn to clause 8A to look at the detail.

The Major Provision of Clause 8A

Clause 8A – in a relatively recent version – reads as follows:

"Proscription of organizations endangering national security

(1) The Secretary for Security may by order proscribe any local organization to which this section applies if he reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose.

(2) This section applies to any local organization---

(a) the objective, or one of the objectives, of which is to engage in treason, subversion, secession or sedition or commit an offence of spying;
(b) which has committed or is attempting to commit treason, subversion, secession or sedition or an offence of spying; or
(c) which is subordinate to a mainland organization the operation of which has been prohibited on the ground of protecting the security of the People's Republic of China, as officially proclaimed by means of an open decree, by the Central Authorities under the law of the People's Republic of China."

Now the novelty is becoming clearer. It lies in clause 8A(2)(c) which brings within the scope of proscription under clause 8A(1), local organisations which are subordinate to a mainland organizations which have been prohibited in the PRC on the ground that they are a threat to the security of the PRC. Local organisations who are, or may be, prohibited in the PRC are the organisations which are in the sights of this legislation. Which are these organisations? It is an undeniable fact that any threat to freedom is felt first

in the restriction of the freedoms of those on the margins of society. There are churches and trade unions who may find themselves in difficulty with the authorities in mainland China who will, if this Bill becomes law, find their freedoms in Hong Kong threatened. But it seems to me from my knowledge that it is Falun Gong that will have the most to fear if this Bill becomes law. This organisation is already prohibited in the PRC. There is some uncertainty whether its prohibition is on the grounds of it being a threat to security or not. Others may be better informed than I. But the Washington Post of October 31, 1999 seems relatively unequivocal that security was the reasons for the prohibition.

One can readily see how the Government of the PRC could be greatly irked to find that an organization that has, for what seemed to the PRC Government to be good grounds, been prohibited in the PRC, is, none the less, able to operate freely in Hong Kong. At the same time it is inherent within the "one country, two systems system" that is such an important part of Deng Xiaoping's legacy that the PRC would need to tolerate such situations for otherwise the "high degree of autonomy" enshrined in Article 2 of the Basic Law would be at an end. If that is forgotten either by the PRC Government or by the Government of the HKSAR the consequences could be very grave. Given the fact that the proscription legislation is not required by Article 23 and given the fact that there already exist more than adequate provisions for the proscription of organisations in the law of the HKSAR, it seems to me that there is a real danger that this has been forgotten.

The Benefits of Administrative Law

There is a world of difference between being ruled by law and being ruled by arbitrary discretion. That seems a trite remark but it hides within it a vital truth – that a harsh law applied in accordance with the rule of law (which we may take to include the principles of modern administrative law) may be tolerable but that same law applied in an arbitrary way is intolerable. Now whatever else may be thought about the purposes underlying clause 8A, the clause has been drafted with respect to those administrative law principles

and – save in regard to the appeal to the Court of First Instance dealt with below - there are several ways in which it is possible to ensure that the power is fairly exercised and will not have the deleterious affect upon liberty in Hong Kong that might otherwise have been feared. This is the benefit of administrative law. But its success requires judicial co-operation and foreshadows what will be the major conclusion of this part of my paper: the vital role that it is necessary for the judiciary to play in securing the continued vindication of the rule of law in Hong Kong. Let us deal with some of these benefits in turn.

(a) Powers to be exercised upon reasonable belief

The power to proscribe requires that the Secretary for Security "reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose". Statutory provisions that require reasonableness in the decision-maker have often been subject to interpretation before the courts in England. The most notorious case is, of course, *Liversidge v Anderson* [1942] AC 206. In this wartime case the Secretary of State was empowered to order the detention without trial of any person whom "he has reasonable cause to believe any person to be of hostile origin". One might have expected that these words would be held to mean that the Secretary of State had to show cause for his belief, i.e. provide the evidence on which his belief rested, but the House of Lords in a much criticised decision held that there could be no judicial review of the resonableness of the Secretary of State's belief. It was for the Secretary of State to judge whether his belief was reasonable or not. This enabled the Home Secretary's power to be exercised without judicial control – with the result that many completely innocent people, clearly not of "hostile origin", were detained for long periods. (See A W B Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (1992).)

Fortunately, *Liversidge v Anderson* has long been recognised to be erroneous and Lord Atkin's great dissenting speech is a clear expression of the true position. If the reasonableness of the Secretary for Security's belief was to be judged by him, then the value of the intended restraint on the

operation of the discretion would be worthless. But this is plainly no longer the law in the UK (see Wade and Forsyth, *Administrative Law* (8th ed, 2000) at 427-429)) or in Hong Kong. Thus it will be for the court to judge the reasonableness of the Secretary of Security's belief.

(b) National Security and Proportionality

It was long thought that the principles of administrative law had to give way to considerations of national security. Many years ago in *The Zamora* [1916] 2 AC 77 at 107 it was said by Lord Parker that "those who are responsible for the national security must be the sole judges of what national security requires". Literally interpreted this is a warrant for executive lawlessness. Once the words "national security" were uttered the courts gave way and did not intrude further.

This was most unfortunate. As pointed out above the executive authorities have the responsibility for national security and will not give that up. On the other hand, executive authorities act on imperfect information so errors do occur; and need to be corrected. Moreover, the authorities have an inherent and inevitable tendency to equate national security with their own interests. In a free society where all activities of government should be open to scrutiny, a national security blanket becomes the only place where wrongdoing or embarrassment can be easily hidden. Hence once more the need for judicial scrutiny of claims based upon national security.

Fortunately, *The Zamora* does no represent current practice in the UK. The State – or in the UK's case, the Crown – must satisfy the court that national security is in fact at risk. Thus the courts will, rightly, insist upon evidence that an issue of national security arises. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 where Lord Scarman said "[In national security cases] there is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable". It is plain therefore that the words "national security" in clause 8A will not preclude judicial consideration whether there is appropriate evidence of national security considerations before the Secretary for Security.

The whole question of issues of national security coming before the courts has been recast in the context of the current cutting edge issue of proportionality in *R v Shayler* [2002]2 WLR 754 at 774 (32) which deserves to be cited at length. This is of particular significance in the context of Clause 8A which specifically links national security and proportionality. (Although note this curiosity: the words of Clause 8A(1) may be read as requiring no more than the Secretary for Security has, in addition to his belief about proscription being necessary in the interests of national security, a reasonable belief that proscription is a proportionate response. Proportionality is, of course, not a matter of belief but of objective judicial assessment.) In any event in *Shayler* Lord Bingham was actually addressing the argument that judicial reluctance to address such issues meant that the availability of judicial review was not sufficient or any safeguard of human rights where national security was in issue (*in casu* the disclosure of information by an ex-member of the security services):

> "to intervene in matters concerning national security [because] the threshold of showing a decision to be irrational was so high as to give the applicant little chance of crossing it. Reliance was placed on the cases of *Chahal v United Kingdom* (1996) 23 EHRR 413 and *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, in each of which the European Court was critical of the effectiveness of the judicial review carried out. There are in my opinion two answers to this submission. First the court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different. Usually, a proposed disclosure will fall between these two extremes and the court must exercise its judgment, informed by article 10 [of the European Convention on Human rights and Fundamental Freedoms] considerations. The second answer is that in any application for judicial review alleging an alleged violation of a convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible. The change was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 546 where after referring to the standards of review reflected in *Associated*

Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 and *R v Ministry of Defence, Ex p Smith* [1996] QB 517, he said:

> "26. . . . There is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.
> 27. The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'
>
> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671; Professor Paul Craig, *Administrative Law*, 4th ed (1999), pp 561-563; Professor David Feldman, 'Proportionality and the Human Rights Act 1998', essay in *The Principle of Proportionality in the Laws of Europe* edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the

> protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138:
>
> 'the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention.'
>
> In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. ….

If *Shayler* is followed in Hong Kong, as I would expect that it would be. Apart from anything else the linking of national security and proportionality in Clause 8A, opens the way for a substantial deployment of the concept of proportionality as a tool for prising a way into a decision where the Secretary for Security asserts that he acted on a reasonable belief that "proscription [was] necessary in the interests of national security and is proportionate for such purpose".

In practice what is this likely to mean? Where the organization proscribed falls within Clause 8A(1) because of Clause 8A(2)(a) (treasonable, seditious etc objective) or Clause 8A(2)(b) (commission or attempted commission of treason, sedition etc) it seems to me that it will be difficult to quash the Secretary for Security's decision on a judicial review or an appeal under Clause 8D. Consider the position: before the Secretary for Security can proscribe under Clause 8A(1) it must be established that the organization in question had treason, etc an objective or was committing or attempting to commit treason. There will doubtless be cases where because of the breadth

and vagueness of these concepts – which others will address – it will be successfully argued that while Clause 8A(2)(a) or (b) is satisfied, the Secretary for Security could not have a reasonable belief that "proscription is necessary in the interests of national security and is proportionate for such purpose." But these surely will be rare and far-fetched cases. However, it is in regard to the cases where the Secretary for Security proscribes an organization which satisfies Clause 8A(2)(c) (prohibited in mainland China on security grounds) that the question of reasonable belief and the proportionality of the response will become vital. For it is surely obvious that mainland China may act or purport to act on security grounds against organizations that are in no objective sense a threat to national security as that phrase is understood in the law of the HKSAR. The slightest hint of the rubberstamping of a mainland decision in the exercise of Clause 8A powers will render the decision open to quashing – at any rate if the judges are alert to their task.

Appeal Procedures

Clause 8D creates a right of appeal from a decision of the Secretary for Security to proscribe an organisation to the Court of First Instance. The CFA may set aside the proscription if "not satisfied" that (i) the Secretary for Security has "correctly applied the law in the proscription", (ii) "the evidence is insufficient" that one of the jurisdictional requirements (treasonable or seditious etc objective, commission or attempted commission of such crimes, prohibited in the mainland on security grounds); or (iii) "the evidence is insufficient" is insufficient to justify a reasonable belief that the proscription is (a) "is necessary in the interests of national security"; and (b) is "proportionate for such purpose".

The only comment this prompts is that this right of appeal, as formally set out here, is not in fact a true appeal but more like a species of judicial review. The appeal court does not address the merits of the Secretary for Security's decision, it only addresses its lawfulness and, which is the same thing, whether it has acted within its jurisdiction. This comment is not meant as criticism. The decision to proscribe is a political decision and

responsibility therefore should be borne by the political authorities not by the courts; and the courts should be reluctant to share responsibility with the political authorities.

After all it is equally plain that although these are proceedings in a court they are rather strange proceedings. First, on the application of the Secretary for Justice, the Court may exclude the public on the ground that "any statement to be made in the course of the proceedings might prejudice national security" (clause 8D (5)). This is not objectionable. Even in the absence of a statute the court, and it is the court that acts, could decide to sit *in camera*. Of course, one must trust the court to ensure that such provisions will not be used to create an engine for injustice. But, secondly, it is specifically provided (in the Committee stage amendments to the Bill) that the Secretary for *Security* (note not Justice) shall make the Rules governing these appeals. These rules govern the "admissibility of evidence" (clause 8E (1)(d)) and, moreover, the Rules may make provision (a) for proceedings to take place "without the appellant being given full particulars of the reasons for the proscription in question"; (b) for the holding of the proceedings in the absence of the appellant (and his legal representative); (c) and for the court to give the appellant a summary of the evidence given in his absence (Clause 8E(3)) Where proceedings take place in the appellant's absence or in the absence of his legal representative then there the court may appoint a legal representative to act in his interests (clause 8E(4)).

These provisions are, it seems to me, inspired by UK law. The UK has a Special Immigration Appeals Commission (established under the Special Immigration Appeals Commission Act 1997) which hears appeals against decisions to deport persons on the grounds that their presence in the UK is "not conducive to the public good on grounds of national security" and appeals against detention without trial of suspected terrorists who cannot be deported under the Anti-Terrorism, Crime and Security Act 2001 (see *A v Secretary of State for the Home Department* [2003]2 WLR 564 for a case holding these provisions human rights compliant - in a situation of public emergency where terrorist attacks were threatened, even if not imminent). Clause 8E(3) is plainly inspired by section 5(3) of the 1997 Act which grants to the Lord Chancellor similar powers to make Rules denying the appellant

the full evidence etc. (Inspiration may also have been found in the later but similar provisions in Proscribed Organisations Appeal Commission established under the Terrorism Act 2000.) (See in this context *Secretary of State for the Home Department v Rehman* [2000] 3 WLR 1240, 1250-1251, where it was held that were it necessary for the court to examine material said to be too sensitive to be disclosed to the former member's legal advisers, special arrangements could be made for the appointment of counsel to represent the applicant's interests. This was approved in *R v Shayler* [2002]2 WLR 754 (HL), para 35.) So there are similar provisions in the law of the UK.

There are three points to be made about this. First, the UK provisions take effect in the context of terrorism – or partially in the field of the security services. But the Hong Kong provisions do not take effect in that context. As we have seen there is other legislation to take action where terrorism is threatened. If the case had been made for this legislation on the ground of a fear of terrorist attack, and if it could be plausibly so made, then the position might be different. But that is not the basis on which clause 8A is put forward.

Secondly, it may be noted that the UK provisions establish not courts but Appeal Commissions. Although headed by eminent judges these Commissions are not courts and are quite separate from the ordinary court system. This is in recognition of the fact that they adopt non-judicial procedures that are different from the normal judicial process in which the game is played with all cards face up on the table. There is a genuine striving for a fair procedure that does not compromise national security, but coupled with a recognition that the resulting compromise must take place outside a court. In clause 8E, on the other hand, the compromise takes place in the Court – and worse, the rules that make this possible are made not by a judicial authority but by the Secretary for Security.

Thirdly, the power to determine the admissibility of evidence in the Rules – especially being vested in an executive not a judicial officer – is remarkable. We will have to wait and see what the Rules say if Clause 8E is enacted in its present form. (And the Rules will, of course, be subject to judicial review on grounds of irrationality etc in the normal way.) However,

if the Rules are such as fundamentally to undermine the fairness of the Clause 8D appeal. Then the difficult question will have to be asked whether it is possible to abandon the appeal and proceed by way of judicial review in which only the standard rules of public interest immunity will restrict what has to be disclosed to the court. (See Wade and Forsyth, pp. 691-699 on the question of whether the existence of one remedy excludes another.)

Concluding Remarks

As adumbrated the crucial conclusion that I have reached in my studies of Clause 8A-E are two fold. First, I remain puzzled about why the Government of the HKSAR is seeking to enact this legislation. It is not required by Article 23. There already exist procedures for the proscription of organizations that threaten national security (and these procedures are not being amended). There is no apparent terrorist threat, not already addressed by other legislation, that might justify this legislation. It is not for me to speculate on what the reason might be for Clause 8A-E, but I think that I can say that I am not persuaded that it is necessary.

My second conclusion is more positive. The constitutional traditions of Hong Kong are robust and ingrained in them are the principles of administrative law drawn from Hong Kong's common law heritage. As I have shown these place real limitations on the power of the executive and prevent, should this be considered, any attempt to turn this legislation into an engine of injustice. And, moreover, the Bill itself builds several of these principles into the structure of the proposed legislation. There is much here on which the judiciary can seize in order to ensure that the discretions inherent in Clause 8A are fairly exercised. However, all of this underlines a fundamental point: the vital role of the judiciary. The concern of the constitutionalist must be that the judiciary is being asked to bear too heavy a burden.

Dr Christopher Forsyth

Director of the Centre for Public Law
Reader in Public Law
University of Cambridge

10 June 2003