Who Defines National Security?
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By Michael C. Davis

How reliable are government assurances not to oust the courts from Article 23 cases respecting the banning of groups on national security grounds?

Solicitor-General Robert Allcock assures us that such bans would never be automatic. The Secretary for Security must first confirm that the local group is affiliated with the banned mainland group and then she must "reasonably believe" that it is necessary to ban the Hong Kong group in the interest of national security. The power must be exercised "under Hong Kong law, applying the test under the human rights guarantees." "It will be subject to appeal and judicial review." He assures us that if the Secretary for Security "uses a sledgehammer to crack a nut, the courts will strike it down."

The consultation report already acknowledges that the new proposals reach way beyond the coverage of the existing Societies Ordinance, which merely allows denial of registration on national security grounds. Clearly the notion of national security and its enforcement in the proposal is much more expansive and the Solicitor-Generals claims must be evaluated in this light.

Will the court inevitably be empowered to review all aspects of such a national security claim? There are a number of potholes on the way to judicial review. Some obstacles may be cleared by appropriately worded statutes, while others may be more problematic. What we need are not government assurances of good will but laws that on their face do not allow the government to undermine our freedoms or the rule of law.

Does a power in the Secretary for Security to ban a group based on a reasonable belief provide such assurance? If she bans a group and such group appeals what will be the power of the court? Will the court be able to determine whether the group does indeed represent a threat to national security? Or will the court have to accept the Secretary for Security's reasonable belief that there is a threat? Is such a reasonable belief a subjective belief of the Secretary for Security or is it something to be objectively reviewed by the court? Can the government withhold evidence of such threat claiming its exposure represents a threat to national security? Will the government argue the court is not competent to judge a threat to national security? And if a group is successfully banned will there be tangental effects in respect of prosecutions of its members under other Article 23 legislation. The consultation proposals on their face do not answer these questions.

A recent case in Malaysia, under which five defendants are still held in jail under the Internal Security Act (ISA), raised precisely these questions. In that case, rather than just banning groups, the statute provides for detention without trial for national security reasons. Under section 73 of the Malaysia ISA the police could do this for up to 60 days, while under section 8 a minister could do it for up to 2 years. The Malaysia Court of Appeal overturned the police detention under section 73, saying it was subject to objective judicial review, but allowed continued detention under section 8. While the Hong Kong proposals do not allow for

detention, but only banning of a group, the two sets of laws share the component of basing the decision on the reasonable belief of an official that there is a threat to national security.

In Malaysia the government argued vigorously that it did not have to even provide evidence to the court on its national security claim. It claimed that the court was not qualified to judge national security threats. Only the executive branch possessed this expertise. Considerable common law precedent was cited. In refusing the government's claim, the court distinguished section 73 police detention from section 8 ministerial detention. But in doing so it seemingly accepted the claim that it could not objectively question the minister's national security claim under section 8.

The Malaysian government is certainly not alone in claiming such special expertise. In at least two areas the US government has in the past made similar claims of expertise. This was done in a roundabout way not directly on national security grounds when President Nixon invoked executive privilege concerning confidential advise during the Watergate scandal and again in the famous Pentagon Papers case, a case of prior restraint respecting the publication of sensitive facts concerning the Vietnam War. In both cases the US Supreme Court insisted the ultimate power to view the evidence and review security claims must be left to the court.

When the Solicitor-General claims that the courts would be allowed review under human rights guarantees, does he mean that there will be no claim of special local or national government expertise concerning national security? Is there to be a special provision in the proposed statute that makes this clear?

If full judicial review is to prevail, the language of the statute must clearly state that all facts respecting the reasonable belief in a threat to national security must be presented to the court on review and that it will be for the court alone to judge whether such a threat objectively exist. It should be clear that if the government fails to make out its case on the facts then the ban must be overturned. There should be no presumption in favor of the determinations of either the central government or the local Secretary for Security.

Even if the statutory language is cleaned up we are not home free on the question of judicial review. Current statements that the government will not seek to bar judicial review as an act of state are clearly not binding on a future government. In this regard, since this is a constitutional requirement, it is not even clear that the above suggested statutory language would secure the court's power. It would still be open to a future Secretary for Security to challenge such statutory language limiting her power as violating the Basic Law.

And it would be open to a future government to request an Article 158 referral to the NPC Standing Committee for review of any court action that may flow from an appeal. No wording in an ordinary statute could prohibit this constitutional move. Given the now established right of the government to make such referrals, as a consequence of the right of abode case, the government could go directly to the NPSSC if it was not satisfied with the court's ruling on its requested referral. The only statutory option to avoid these two potholes is to make sure that the statute does not give the Secretary for Security the power to ban groups based on the reasonable belief that they pose a threat to security.

All of these concerns highlight the way the devil is in the details. The Legislative Council has its hands full on virtually every section of this proposal. It seems that if the government truly

wants to achieve what the Solicitor-General claims the government's proposals have already achieved that the government would certainly enjoy the benefit of a further consultation on a white bill. It seems that there are many potholes that even the government is not aware of.

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