香 港 記 者 協 會
HONG KONG JOURNALISTS ASSOCIATION

LAW ON SEARCH AND SEIZURE NEEDS URGENT OVERHAUL

Free flow of information - as underlined by a free press - is one of the most important pillars of Hong Kong's success. It is so important that protection for press freedom is enshrined in article 27 of the Basic Law. However, provisions in Part XII of the Interpretation and General Clauses Ordinance relating to the search and seizure of journalistic material do not fully comply with the spirit of article 27.

The recent raids against several newspapers by the Independent Commission Against Corruption (ICAC) demonstrate that the law can be manipulated by the authorities, and therefore needs to be strengthened to better protect press freedom in Hong Kong.

The Hong Kong Journalists Association (HKJA) urges the government to amend Part XII to ensure that production orders and search warrants can be sought and granted in only rare cases and where serious offences are involved. All such applications should be made in inter partes hearings, so that media organisations and journalists can make their case in open court prior to the execution of a warrant, and appeal mechanisms should be strengthened to allow journalists to challenge all search and seizure operations after execution.

Without such improvements, the HKJA believes that Hong Kong's status as an information hub may be placed in jeopardy.

1. BACKGROUND

On July 24th 2004, the Independent Commission Against Corruption (ICAC) executed 14 search warrants against seven newspapers and the offices or homes of several journalists. The searches were conducted under section 85 of the Interpretation and General Clauses Ordinance. Part XII of this ordinance pertains to the search and seizure of journalistic material, which is defined as "any material acquired or created for the purposes of journalism." The newspapers concerned were the Sing Tao Daily, Apple Daily, Oriental Daily News, The Sun, South China Morning Post, Hong Kong Economic Journal and Ta Kung Pao.

The search and seizure operations created a storm of controversy, leading to one of the newspapers involved, Sing Tao Daily, challenging the issue of the search warrants in the Court of First Instance. Mr. Justice Hartmann ruled on August 10th that "the ICAC was wrong in fact and in law in seeking the issue of search warrants when, in terms of the statutory scheme contained within Part XII of the Ordinance, it could equally have

achieved its legitimate aim by less intrusive measures." In his judgement, Mr. Justice Hartmann tightened up the threshold for the application of the law by setting out a three-tier approach before an application for a search warrant could be made. He also laid down several considerations before a judge could issue such a warrant.

The ICAC lodged an appeal against Mr. Justice Hartmann's ruling. On October 11th, the Court of Appeal dismissed the appeal on technical grounds, rather than on its merits. However, it also stated that the Court of First Instance did not have the jurisdiction to quash the search warrants issued by the ICAC. In incidental remarks (the obiter), the Court of Appeal rejected the more stringent criteria set down by Mr. Justice Hartmann, thereby reinstating the previous far from satisfactory framework for the search and seizure of journalistic material.

The question of search and seizure operations against media organizations and individual journalists has troubled the HKJA ever since Part XII was enacted in 1995. The HKJA at that time expressed concern that the provisions, which are based on those in Britain's Police and Criminal Evidence Act of 1984, would not be able to protect journalistic material adequately, in particular as they relate to confidential material and the possibility that journalistic sources may be revealed.

2. THE APPLICATION OF THE LAW IN HONG KONG

The HKJA knows of three cases in which the ICAC has launched raids against newspapers since the enactment of Part XII of the Interpretation and General Clauses Ordinance. Apparently, no other law enforcement authority has used the powers contained in Part XII. The HKJA is also not aware that the authorities have ever resorted to an application for a production order.

Rather, the law enforcement authorities have by-passed this procedure, applying directly for a search warrant. This implies that they have taken the easy path - in contravention of the spirit of the law, which states that the authorities, in most circumstances, must use other means to seek journalistic material, before resorting to a search warrant.

Brief details of the three ICAC cases are given below.

A) In November 1999, ICAC officers raided the Apple Daily newspaper in connection with allegations that a reporter had bribed police officers to gain details of ongoing cases. Apple Daily challenged the validity of the search warrants. The case went all the way to the Court of Final Appeal, which rejected the newspaper's arguments. Mr. Justice Litton reaffirmed the validity of the warrants, arguing that the intention of the Interpretation and General Clauses Ordinance was to give officers great latitude in the conduct of their duties.

B) In May 2003, the ICAC raided the office of Sudden Weekly and the home of

one of its journalists, in connection with an allegation that a reporter had bribed a security guard to obtain access to a film site. Apple Daily did not challenge the use of search warrants in this case, and the journalist was later convicted. However, the HKJA believes this case is an example of Part XII powers being used for a relatively minor case involving a bribe of only a few hundred dollars. Again, we doubt whether the authorities were acting within the spirit of the law.

C) The July 2004 case, as summarised above. The raids were prompted by the naming of a woman who was under the ICAC's witness protection programme, and appeared to be aimed at finding out the source or sources for the relevant reports. The newspapers and journalists were not directly involved in the case, except insofar as they named the woman in question - for which prosecution action would require only the presentation in court of the articles involved. As detailed above, the Court of First Instance took a robust approach to the protection of press freedom in this case - a position later overturned by the obiter issued by the Court of Appeal.

Given the unsatisfactory state of jurisprudence on this issue, the question arises as to whether Part XII of the Interpretation and General Clauses Ordinance should be amended. This paper argues for such change, especially in light of experience in the European Union.

3. OVERSEAS EXPERIENCE

A) European Experience

Hong Kong's law relating to the search and seizure of journalistic material, namely sections 81 to 90 of the Interpretation and General Clauses Ordinance, is based mainly on Britain's 1984 Police and Criminal Evidence Act (PACE). This law created special procedures for the search and seizure of journalistic material. It created two special categories of journalistic material, which are defined in the law:

i) Excluded material, which includes journalistic material held subject to an undertaking, restriction or obligation of confidence. Such material is in most circumstances not subject to search and seizure. No such category exists in Hong Kong.

ii) Special procedure material, which is defined as "journalistic material, other than excluded material." This is open to search and seizure provisions similar to those in Hong Kong.

The Court of Appeal argued that media organizations in Hong Kong are in a better position than in Britain because Part XII allows the media to apply for the return of seized journalistic material. Such a remedy does not exist in Britain.

The HKJA cannot agree. Better protection for press freedom should lie with the imposition of a higher threshold for the granting of production orders and search warrants. Journalists are in particular concerned that the law enforcement authorities may uncover confidential material during search and seizure operations. Such material may include the names of confidential sources. Mr. Justice Hartmann made reference to this possibility in his recent judgement, when he stated that the ICAC was seeking the names of those "who had disclosed forbidden information to those journalists".

The protection of journalistic sources is considered to be essential to the integrity of journalism as a profession. In Austria, France, Germany, the Netherlands, Norway and Sweden, courts have rarely compelled journalists to identify confidential sources. The media tend to be afforded greater protection than are private individuals because they are seen to play a crucial role in safeguarding the right of the public to information and ideas on matters of public interest.

Indeed, the European Court of Human Rights, in its judgement in *Goodwin v. United Kingdom (1996)* stated that the protection of journalistic sources "is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of (European) Contracting States and is affirmed in several international instruments on journalistic freedoms."

The case concerned an attempt to force a journalist to reveal his source for a news story. The European Court of Human Rights ruled by a vote of eleven to seven that an attempt to force a journalist to reveal his source for a news story violated Article 10 of the European Convention on Human Rights, which relates to freedom of expression. It ruled that such a warrant can be justified only by an overriding requirement in the public interest.

Another more recent case, *Roemens and Schmit v. Luxembourg*, dealt with actual search and seizure operations. The judgement, issued in February 2003, states:

"(T)here is a fundamental difference between this case and Goodwin. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant's home and workplace. The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates: 'limitations on

the confidentiality of journalistic sources calls for the most careful scrutiny by the Court'. It thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in Goodwin."

B) Canada

The question of the seriousness of search and seizure operations against media organisations came up in a Canadian case in March 2004. The Ontario Superior Court of Justice quashed a warrant issued against the National Post newspaper. The law enforcement authorities issued a warrant and an assistance order to compel the production of an allegedly forged document relating to a story accusing the Canadian prime minister of conflict of interest. Benotto S.J. quashed the warrant on the ground that the issuing judge, proceeding on an ex parte basis, had not fully considered the balance of competing interests, and in particular the way that the media could be forced indirectly to identify a confidential source.

Benotto S.J. stated that: "The evidence establishes that sources may 'dry-up' if their identities were revealed. Without confidential sources, many important stories of considerable public interest would not have been published. Confidential sources are essential to the effective functioning of the media in a free and democratic society."

The judge also quoted Lord Denning as stating in the 1981 case - British *Steel Corp. v. Granada Television Ltd* - why newspapers should not be compelled to disclose sources:

"Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known."

Benotto S.J. also makes reference in his judgement to the importance of allowing an inter partes hearing. He stated that: "The issuing justice was not alive to these complex issues (protecting confidential sources) and thus not able to perform the balancing required. By proceeding on an ex parte basis, he precluded a complete analysis of the confidentiality issue. I find that he failed to give adequate consideration to the pertinent factor of confidential sources. This would have affected his decision to issue the warrant and results in a finding that the warrant was invalid and should not have been issued."

This comment by the Canadian judge reinforces the danger - certainly present in Hong Kong - that a judge may overlook crucial freedom of expression

considerations if he or she hears only the side of the law enforcement authorities, and not that of the media organisation or journalist.

4. STATUTORY PROTECTION FOR JOURNALISTIC SOURCES

Several jurisdictions have legislated to protect journalistic sources, although the protection is never absolute and in certain jurisdictions, as indicated below, the standard of protection falls short of the expectations of freedom of expression advocates, including the HKJA.

In the United States, Australia, Canada and Britain, there is no explicit constitutional protection for journalists' sources. However, the issue has received some judicial or legislative attention in all of them.

A) USA

In the United States, the Supreme Court held that the US Constitution's First Amendment protection of free speech does not grant journalists the privilege to refuse to divulge names of confidential sources in the context of a grand jury trial. However, courts concluded that qualified privilege was permitted in some cases. By early 1996, nine of the twelve circuits had established a qualified First Amendment privilege for journalists against forced disclosure. Significantly, the privilege has been applied to both civil and criminal proceedings.

These courts have balanced the freedom of expression interest against the interests of those seeking disclosure. The balancing tests tend to resemble the three-part test proposed by Justice Stewart in his dissenting view expressed in the case *Branzburg v. Hayes.* This test requires the party seeking disclosure to show:

(i) that there is probable cause to believe that the reporter has information that is clearly relevant;
(ii) that the information cannot be obtained by alternative means less destructive of First Amendment rights; and
(iii) that there is a compelling and overriding interest in the information.

A number of states have also passed press-shield laws, which are statutes granting journalists a privilege to protect the confidentiality of their sources. However, there are differences in such laws over whether the privilege is absolute or qualified, who benefits from the protection and whether confidential information should be protected.

B) Australia

The law regarding the protection of journalists' sources in Australia is

derived from common law. There are currently no controlling federal or state statutory provisions. Nevertheless, Australian law does provide some protection for journalists' sources, for example through the relevance requirement contained in the law of evidence. Likewise, Australian courts accept that the public interest in the protection of sources may allow the exclusion of such evidence, and the High Court of Australia accepted in *John Fairfax & Sons v. Cojuangco* that it should not require disclosure of sources, unless it was "necessary in the interests of justice."

A further protection is offered in limited circumstances through the "newspaper rule", which allows journalists to refuse to disclose their sources at the interlocutory stage of defamation actions unless disclosure is necessary to do justice between the parties.

C) Canada

Even though section 2(b) of the Canadian Charter of Rights and Freedoms protects journalists from being forced to reveal their sources, there is no statutory protection for journalists in Canada. And it is questionable whether the charter has yet been directly addressed in case law. However, a limited privilege not to testify at a trial has been recognised as part of the law of evidence. In *Slavutych v. Baker*, the Supreme Court of Canada held that courts might recognise a qualified privilege not to testify where four criteria were satisfied:

1) The communication must originate in a confidence of non-disclosure;
2) This confidentiality must be essential to the ongoing relationship between the parties;
3) The relationship must be one which ought to be fostered; and
4) The injury to the relationship from disclosure must be greater than the benefit it would bring to the litigation.

D) Europe

European countries tend to be more robust in protecting journalistic sources. The European Parliament passed an important resolution on the issue in 1993. The Resolution of the European Parliament on Confidentiality of Journalists' Sources and the Right of Civil Servants to Disclose Information stated that the Parliament:

[B]elieves that the right of confidentiality for journalists' sources is an important factor in improving and increasing the supply of information to the public, and that this right in practice also increases the transparency of decision-making procedure, strengthening the democratization of the Community institutions and governmental bodies in the Member States, and is inextricably linked to the freedom of information and the freedom of the

press in the broadest sense, lending substance to the fundamental right to freedom of expression, as defined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Inter-government organisations followed suit afterwards. In December 1994, the 4th European Ministerial Conference on Mass Media Policy of the Council of Europe adopted a Resolution on Journalistic Freedoms and Human Rights. Principle 3(d) provides that the protection of the confidentiality of journalists' sources enables journalists to contribute to the maintenance and development of genuine democracy. Principle 4 notes that any interference with journalism must be necessary in a democratic society, respond to a pressing social need, be laid down by law, be formulated in clear and precise terms, be narrowly interpreted and be proportionate to the aim pursued. Principle 8 provides that public authorities should exercise self-restraint in exercising their power.

While not formally binding, this Resolution represents the understanding of participating states as to the implications of the guarantee of freedom of expression found in Article 10 of the European Convention on Human Rights.

By contrast, the British law lags far behind such standards. Under Britain's Contempt of Court Act 1981, journalists cannot be forced to disclose their sources unless the court is satisfied "that it is necessary in the interests of justice or national security or for the prevention of disorder or crime."

In 1986, Hong Kong's Law Reform Commission recommended the enactment of a similar provision. However, the provision was never enacted. The HKJA argued that these exceptions were far too wide to give adequate protection to the media.

It should be noted that many European countries have since developed stringent rules aim at safeguarding the confidentiality of sources. In March 2000, the Committee of Ministers of the Council of Europe adopted a recommendation elaborating on when disclosure can be forced. It states that disclosure can be ordered only if "there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature."

Several rigorous conditions are also imposed before disclosure can be ordered. They have to be applied at all stages of any proceedings where the right of non-disclosure might be invoked. These conditions are as follows:

1) Reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure;
2) The legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind the following:

a) An over-riding requirement of the need for disclosure is proved.

b) The circumstances are of a sufficiently vital and serious nature.

c) The necessity of the disclosure is identified as responding to a pressing social need.

d) European Union member states enjoy a certain margin of appreciation in assessing this need, but the margin goes hand in hand with supervision by the European Court of Human Rights.

The recommendation goes on to state that if disclosure is ordered, then the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure and by themselves respecting the confidentiality of such a disclosure.

The group of specialists that prepared the recommendation stated that public interest in disclosure might outweigh the interest in non-disclosure only where the information would be necessary to protect human life, prevent major crime or in defense of a person accused of having committed a major crime.

It should be noted that this recommendation plus European Court of Human Rights case law became the basis for the protection of journalistic sources in a new press law adopted in Luxembourg in May 2004. The Belgian parliament has also adopted a draft law on the protection of sources, although it includes an exception for anti-terrorism laws.

5. PROPOSALS FOR CHANGE

In many jurisdictions, the party seeking disclosure will have to demonstrate not only the presence of a countervailing interest but also that the information sought is of sufficient importance to warrant a disclosure order. This means that the courts will weigh the harm of disclosure to freedom of expression against the countervailing interest. Given the importance of the former, the latter is only occasionally deemed dominant. In addition, in a number of jurisdictions, if the information may be obtained by other means, or if the goal served by disclosure has substantially been satisfied in another way, courts will not order disclosure.

Given that Part XII of the Interpretation and General Clauses Ordinance fails in many significant ways to fully reflect contemporary legal thinking on the need to adequately protect press freedom, the HKJA would make the following recommendations for change.

1) That adequate and proper protection be given to journalistic material held in confidence. This means that the law enforcement authorities should in most circumstances be barred from searching for and seizing such material. Search and seizure should be permissible only in the most exceptional of circumstances. Further, information should be accessed only by those who are directly involved in such cases, and they should themselves respect the confidentiality of any disclosure.

2) That hearings to consider an application for a search warrant should be held inter partes, as in section 84, to allow newspapers and journalists an opportunity to put their case to a judge. As the quote from a Canadian judge above shows, a judge may easily overlook freedom of expression considerations if he or she hears only one side of the story - that of the law enforcement authorities, to the exclusion of the media organisation or journalist. An inter partes hearing would redress this imbalance.

3) That the circumstances under which journalistic material may be seized should be limited further. An additional condition should be added to section 84(3), such that a judge would have to be satisfied, in considering whether to issue a production order, that "the public interest in obtaining the journalistic material clearly overrides the public interest in protecting press freedom and that the circumstances are of a sufficiently vital and serious nature." This condition should also be taken into account in considering whether to issue a search warrant under section 85.

4) That the threshold for considering whether "an arrestable offence has been committed" in section 84(3)(a)(i) should be raised to "a serious arrestable offence", to bring it into line with British legislation. This would ensure that potentially damaging action could not be taken against a media organisation merely because a minor arrestable offence was involved.

5) That adequate appeal mechanisms should be incorporated in legislation. In particular, seized journalistic material should be sealed in ALL cases, to allow for news organisations and journalists to launch an appeal. This would require the scrapping of section 85(7), which allows the authorities immediate access to material. This provision runs contrary to the principle that all parties to a case should be allowed the right to launch a judicial appeal before the material in question is viewed.

6) That judges, in considering applications for production orders and search warrants relating to journalistic material, should consider the interests of innocent third party sources.