

SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE ON
THE HONG KONG
SPECIAL ADMINISTRATIVE REGION'S IMPLEMENTATION OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

1. The Hong Kong Journalists Association (HKJA) notes that in January 1999, the People's Republic of China submitted to the United Nations the Hong Kong Special Administrative Region (SAR)'s report in the light of the International Covenant on Civil and Political Rights. The HKJA wishes to comment on this report, as it relates to freedom of expression and freedom of the press.

DETERIORATION IN THE JUDICIAL AND POLITICAL ENVIRONMENT

2. The HKJA notes a deterioration in both the judicial and the political environment in Hong Kong since the handover on July 1st, 1997. The HKJA is concerned about these developments, because of the potential impact they could have on the protection of freedom of expression by both the judiciary and the legislature.

3. On 26th June 1999, the Standing Committee of China's legislature, the National People's Congress (NPC) issued an unprecedented interpretation of two key provisions in Hong Kong's constitution, the Basic Law. The committee was acting on a request from the SAR government, which was dissatisfied with a Court of Final Appeal ruling on the immigration of mainland offspring of Hong Kong permanent residents. The re-interpretation in effect overturned the judgement of the SAR's highest court.

4. The re-interpretation, and the manner in which it was sought, threaten to transform Hong Kong's legal system and, in turn, greatly diminish the safeguards inherent in the protection of basic human rights, including that of freedom of expression. Indeed, this right may become the second casualty of re-interpretation, depending on the outcome of a court case involving the desecration of a Chinese and a Hong Kong flag. (See paragraphs 21-24 below for details.)

5. The HKJA also notes that there has been a significant erosion of democratic representation since the July 1997 handover. The current Legislative Council, elected

in May 1998, lacks the representativeness of its 1995 predecessor. The result is that the democratic camp - which is considered to have the greatest degree of support in the community - controls about one-third of the seats in the 60-member body, compared with about 50 percent in the 1995 council. New voting mechanisms and restrictions on the introduction of legislation and amendments by legislators have further strengthened the hand of the government, to the detriment of the Council and the frustration of the democratic camp.

SPECIFIC AREAS OF CONCERN

6. The HKJA now turns to specific issues of concern which have arisen over the period since the handover. Some are mentioned in the SAR government report; others are not. Where they are mentioned in the SAR report, we note the relevant paragraphs.

THE THREAT OF SUBVERSION LAWS (pp357-358)

7. Article 23 of the Basic Law stipulates that the SAR must enact laws prohibiting treason, sedition, subversion and secession. Hong Kong has treason and sedition laws in the existing Crimes Ordinance. The pre-handover government proposed changes to these provisions, plus the addition of clauses outlawing subversion and secession. In late June 1997, the Legislative Council endorsed more liberal treason and sedition provisions, but rejected the subversion and secession proposals.

8. The post-handover government failed to sign into effect the new treason and sedition provisions, which means that the broader pre-amendment clauses remain in force. This failure to allow the amended versions to come into effect is in itself regrettable.

9. The government says it is studying the issue, which appears to mean it will work on Basic Law article 23 proposals instead of bringing into effect the June 1997 amendments. This is a vital issue because onerous laws could prove a serious threat to media freedom.

10. The HKJA has in the past argued that the Basic Law should be amended to delete reference to subversion and secession laws, which are not common law concepts in Hong Kong. The HKJA maintains this stance. However, in the absence of such changes, the HKJA would argue for a liberal approach to the drafting of treason,

sedition, subversion and secession laws. They should be brought fully into line with international standards for the protection of freedom of expression.

11. This in particular means the application of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which state that national security may legitimately be invoked in order to restrict freedom of expression only if a government can demonstrate that the expression is intended to incite imminent violence; that it is likely to incite such violence; and that there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

12. There is one further serious concern among journalists about Basic Law article 23 laws. The chief executive, Tung Chee-hwa, has spoken of the need not just to enact laws against acts of subversion, but also to ban advocacy of such acts. These would take the article 23 offences one vital step further by outlawing, for example, the advocacy of independence for Hong Kong, Taiwan and Tibet.

13. This development is of particular concern because the line between reporting advocacy of such acts and the actual act of advocacy is blurred. SAR government officials have accepted that this is a difficult area. The HKJA believes it could be disastrous for the media, and has urged the government to resist the temptation to introduce this new concept into local law. Further, advocacy laws would go well beyond the permissible limits on free expression allowed under article 19 of the ICCPR.

14. This concern was heightened in August 1999, when a dispute arose over comments made on government-owned Radio Television Hong Kong by a representative of Taiwan, Cheng An-kuo, about the state of relations between Taiwan and the People's Republic of China. The comments infuriated Hong Kong politicians who are close to Beijing. A Hong Kong member of the Standing Committee of China's National People's Congress, Tsang Hin-chi, was quoted as saying: "Stability is necessary for Hong Kong. As a government-funded station, it ought to have self-control. (Otherwise) discussion on drafting of article 23 has to start sooner....Mass media should not advocate secession." A Chinese vice-premier, Qian Qichen, was later reported as warning people in Hong Kong not to promote calls for Taiwan to have a separate status. Mr Qian did not mention the media, although some analysts believe his call would also cover newspapers and broadcasters.

15. The HKJA urges the Human Rights Committee (HRC) to highlight the importance, in drafting laws relating to treason, sedition, subversion and secession, that they comply fully with article 19 of the ICCPR, and that they incorporate relevant provisions in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Further, that for the sake of freedom of expression, no restrictions should be placed on the advocacy of controversial ideas, or their reporting.

THE NEED FOR LAW REFORM TO BE BROUGHT BACK ON TRACK

16. The HKJA has for several years been urging the SAR government to press ahead with reform of Hong Kong laws as they relate to freedom of expression and press freedom. The aim of the exercise is to ensure that all Hong Kong laws are in full and unambiguous compliance with provisions in the ICCPR.

17. To the HKJA's great regret, little seems to have been achieved since the handover in July 1997. Indeed, it can be argued that there has been a regression in the legal framework for the protection of media freedoms. In this regard, the HKJA would highlight the failure of the SAR government to consider changes to laws which were reviewed before the handover but not amended to comply fully with the ICCPR.

18. The HKJA in particular has called on the administration to add public interest and prior publication defences to the Official Secrets Act (pp359-360) and legislative checks on the ability of the executive to proclaim an emergency under the Emergency Regulations Ordinance (pp88-92). The government should also amend the Interpretation and General Clauses Ordinance to ensure that the police cannot search for and seize journalistic material gathered in confidence, and scrap the remaining criminal libel provision in the Defamation Ordinance.

19. The HKJA also notes the government's failure to put into effect the Interception of Communications Ordinance passed by the pre-handover Legislative Council. This failure has meant that section 33 of the Telecommunication Ordinance remains in force, even though the government has accepted the need to delete this onerous provision, which gives it wide powers to ban messages. It is to be regretted that the government remains unable to give a timetable for the scrapping of section 33 and for the introduction of new legislation on the interception of communications (pp315-317).

20. The HKJA believes the failure of the government to take decisive action in these areas calls into question its commitment to implement article 19 of the ICCPR in full. We therefore urge the Human Rights Committee to impress upon the SAR government the importance of ensuring that all laws comply fully with the ICCPR.

THE FLAG DESECRATION CASE (pp364-370)

21. Freedom of expression in its broader meaning has been tested by provisions in the National Flag and National Emblem and Regional Flag and Regional Emblem ordinances. These laws make it an offence for a person to desecrate the Chinese and Hong Kong flags and emblems by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it. In the case of the national flag, an accused could be liable to a three-year jail term and a fine of HK\$50,000.

22. In May 1998, the Court of First Instance found two men guilty of desecrating the Chinese and Hong Kong flags, during a demonstration held outside the SAR government headquarters in January 1998. The court of appeal overturned the ruling in March 1999, arguing that the desecration offences were an unnecessary restriction on freedom of expression when measured against article 19 of the ICCPR. The court went on to argue that since the relevant sections were inconsistent with the ICCPR, they were also in breach of section 39 of the Basic Law (which enshrines the ICCPR), and therefore unconstitutional.

23. The Court of Final Appeal is scheduled to hear the case in October 1999. The fear among human rights advocates is that the SAR government may once again seek a re-interpretation from the Standing Committee of the National People's Congress, as it did in the immigration case cited above. Indeed, one Basic Law Committee member from Hong Kong, Albert Chen, has noted: "This is a constitutional issue relating to the balance of power between the national (Chinese) government and the SAR government."

24. Given the importance of this case, the HKJA would urge the Human Rights Committee to impress upon the SAR government the importance of respecting the decision of the Court of Final Appeal. The SAR government should also bring the National Flag and National Emblem and Regional Flag and Regional Emblem ordinances fully into line with article 19 of the ICCPR.

THREATS TO RTHK'S EDITORIAL INDEPENDENCE (pp344-345)

25. Another threat to media freedoms has emerged in the form of criticism of RTHK. The government-owned broadcaster enjoys editorial independence as provided in a framework agreement between it and its government policy bureau. A new two-year agreement reaffirming this principle was signed in mid-1999.

26. In March 1998, a Hong Kong member of the Chinese People's Political Consultative Conference, Xu Simin, accused RTHK of making programmes which are critical of the government. He said the station as a government department using government funding should support government policies.

27. Mr Xu's remarks in Beijing prompted a lukewarm response from the chief executive Tung Chee-hwa, who suggested that a review of RTHK's role may be necessary. One day later, the chief secretary for administration, Anson Chan, made a more forceful defence of the station. Mr Tung also followed up with a stronger statement in favour of RTHK.

28. The controversy over RTHK's role subsided over the following year, but re-emerged again in August 1999, following comments on an RTHK opinion programme by a Taiwanese representative, Cheng An-kuo, about the nature of relations with the People's Republic (see paragraph 14 above). A Hong Kong member of the Standing Committee of the National People's Congress, Tsang Hin-chi, urged the broadcaster to exercise "self-control" and not to provide a channel for "splittist views" (those advocating independence for Taiwan). RTHK has insisted that it provides fair and balanced coverage.

29. RTHK staff believe the controversy over their role will continue. Both management and staff support the maintenance of editorial independence and believe the government should do more to protect its unique role as a public broadcaster. The HKJA also shares this view, and has called on the government to take immediate steps to formalise RTHK's framework agreement through legislation, so that its durability and function is not open to administrative discretion.

30. The HKJA urges the Human Rights Committee to stress to the SAR government the importance of refraining from any action that might curtail RTHK's editorial independence, or prevent it from carrying out its task to present programmes which are fair and impartial.

DOUBTS OVER COMMITMENT TO OPEN GOVERNMENT (pp330-340)

31. Since the handover, many journalists have noted that the government has become less open than its predecessor. The HKJA carried out a survey of its members in January 1998 to determine how strongly they felt about this issue.

32. The survey showed that 69 percent of respondents believed the government was now less open than before the handover. The Chief Executive's office came under heavy criticism, with 80 percent of those expressing an opinion saying it was either "not very open" or "not at all open". Asked about ways to improve government openness, 72 percent said legislation was needed. A significant proportion also called for the opening up of many government committees and advisory bodies that are at present not open to the media.

33. The government denies that it is less open than its predecessor, arguing that it is fully committed to transparency in its operations. It points to the success of its code on access to information, which was extended to all government departments in December 1996.

34. The HKJA tested the code in late 1997 by seeking access to 81 government reports and documents mentioned in the government's October 1997 progress report. The result was that only 35 percent of the requested documents were made available in full.

35. The SAR government has devoted considerable space to this issue in its progress report on the ICCPR. During the progress of the HKJA's survey, the SAR government attempted to "rig" the results by circulating a memo to all government departments telling them to give requests from the HKJA member conducting the survey - and only that person - special treatment. When this attempt to "rig" the survey was uncovered by a newspaper, it attempted to cover up the issue by refusing to release the original instructions.

36. With this background, it is not surprising that the SAR government is attempting to challenge the statistics produced by the HKJA by arguing over detailed issues. The HKJA stands by its survey results, which it believes show a woeful lack of public accountability.

37. Given the shortcomings of the code, the HKJA would urge the Human Rights

Committee to impress upon the government the urgency of enacting freedom of information legislation, to provide the fullest implementation of article 19 on this issue. Legislation should set out clear principles on maximum disclosure of documents and information, minimal exceptions, and an effective appeal mechanism. Such a law would be vital in ensuring good governance and promoting stronger democracy and accountability.

38. The HKJA also urges the SAR government to open its advisory committees to the public. As a first step it should open its transport, town planning, broadcasting, education and environment panels to full public scrutiny.

THE THREAT OF MEDIA REGULATION (pp312-314)

39. The latest threat to press freedom has emerged in the form of two reports issued by the privacy sub-committee of the Law Reform Commission in August 1999. The first calls for the creation of two new civil torts covering invasion of privacy. The second focusses on the regulation of media intrusion. The latter is the most worrying, insofar as it calls for the creation of a statutory body called the Press Council for the Protection of Privacy. This council would draw up a code of practice for the press, consider violations of privacy allegedly committed by newspapers and magazines, and would have the power to fine publications up to HK\$1 million. The members of the committee would be directly and indirectly appointed by the chief executive, who is himself not subject to any democratic control.

40. The media industry has condemned the proposal, and expressed the fear that the government could use the council to harass publications. The HKJA has pointed out that it would be dangerous to set up such a body when there is a considerable democratic deficit, and that the media should exercise self-regulation through the creation of better mechanisms of accountability within the industry.

41. There are other privacy-related threats to press freedom. The Privacy Commission is working on a code of conduct which would regulate when photographers could take pictures of individuals in a public area. The presumption appears to be that such photographs could not be taken without the consent of the individual, unless there were public interest reasons for doing so, for example where the individual is a public figure or where he or she has behaved in such a way as to invite the taking of photographs.

42. The HKJA does not belittle the importance of protecting the privacy of individuals, and has indeed supported the enactment of the government's Personal Data (Privacy) Ordinance. But it worries that government officials and those involved in the law reform process might now be approaching the subject with excessive zeal, and might thereby harm freedom of expression.

43. The HKJA therefore urges the Human Rights Committee to impress upon the SAR government the importance of caution in tackling privacy issues, and the vital importance of allowing media professionals, and not public servants, to involve themselves in regulating Hong Kong's newspapers and magazines.

CONCLUSION

44. The government argues that press freedom is very much alive in Hong Kong (paragraph 329). However, the Hong Kong Journalists Association (HKJA) argues that two years after the handover, it is now clear that the outlook for freedom of expression and press freedom is darkening. The HKJA would therefore urge the Human Rights Committee to impress upon the Special Administrative Region (SAR) government the need to make the following policy commitments:

1) That it will do nothing to endanger media freedom in implementing article 23 of the Basic Law, which states that the SAR government must enact laws prohibiting treason, sedition, secession and subversion against the government of the People's Republic of China. In particular, that it must drop plans to enact laws prohibiting advocacy of any of these offences.

2) That it will commit itself to further reform to ensure that all Hong Kong laws are in full compliance with the International Covenant on Civil and Political Rights. In particular, that it will bring into effect amendments to the Crimes Ordinance provisions on treason and sedition, scrap section 33 of the Telecommunication Ordinance and the remaining criminal libel provision, liberalise the Official Secrets and the Emergency Regulations ordinances, and give better protection to confidential journalistic material in the Interpretation and General Clauses Ordinance.

3) That it will respect the Court of Final Appeal's judgement in the forthcoming court case on whether individuals have the right, as an expression of opinion, to desecrate Chinese and Hong Kong flags, and that it will bring the relevant legislation

into full compliance with article 19 of the ICCPR.

4) That it will do everything possible to uphold the editorial independence of Radio Television Hong Kong (RTHK) - the government-owned broadcaster that now operates independently of government control. In particular, that it must enact legislation enshrining editorial independence in law.

5) That it will reassert its commitment to open government by enacting access to information legislation and opening advisory committees to the public and the media.

6) That it will refrain from interfering in the running of the media, by rejecting a proposal for the creation of a statutory Press Council for the Protection of Privacy.

HKJA Executive Committee

September 4th, 1999