

# HONG KONG

## Human Rights One Year On: No Room for Complacency

The anniversary of China's resumption of sovereignty over Hong Kong provides a good opportunity to reflect on human rights developments in the Hong Kong Special Administrative Region.

Last year, Amnesty International welcomed the "one country two systems" model as a bold experiment in law and autonomy. Since June it has stood up well to a host of challenges from the economic crisis which has beset the region to a series of major public health concerns including the "bird flu" scare.

Whilst on the surface it has been "business as usual" this has masked the persistence of long-standing problems and a process of more subtle and creeping change

Elections to a new legislature proceeded as planned, although on the basis of a greatly reduced franchise and curtailed powers for elected legislators. Legal uncertainties surrounding the Provisional Legislative Council (PLC), appointed as part of the transition, generated controversy throughout the year. Court cases challenging both its validity and whether laws that it enacted violated the Basic Law raised crucial questions about the solidity of key Basic Law principles, including human rights guarantees. Frequently at issue was how far rights expressed in apparently clear language were safeguarded against encroachment for administrative expediency. It is still early days for the new constitutional order, and crucial issues of the jurisdiction of courts, and the role of new institutions in interpreting the Basic Law remain unresolved. In coming to their decisions, judges have admitted being hampered by a lack of knowledge of Chinese law. Their colleagues in the legal profession have at times pointed to their indifference or hostility to international human rights treaties.

The past year has seen controversial legal changes which the government terms "purely technical", the true impact of which will only become apparent in the longer term if and when tested in the courts. Amendments to the Public Order and Societies Ordinances, while paying lip service to Hong Kong's commitments under the International Covenant on Civil and Political Rights (ICCPR), expanded the grounds for intervention in legitimate peaceful political activity and protest. This does not auger well for the forthcoming debate on national security laws under article 23 of the Basic Law. Meanwhile, public demonstrations continued, including the massive annual commemoration of the 1989 June 4 massacre, but peaceful protestors also faced arbitrary interference and disproportionate application of the law.

One of the people of Hong Kong's abiding concerns is respect for the rule of law, and that no-one may be above the law. As Chief Secretary Anson Chan has put it:

“Hong Kong people know that the rule of law cannot be taken for granted, that they must protect it themselves. Believe me, the rule of law is not something that Hong Kong people will allow to be taken away from them, by stealth or otherwise.” (12 January 1998).

It is not surprising therefore that several decisions of the department of justice have generated alarm. This includes the decision not to prosecute Xinhua newsagency for breaching privacy laws, and the re-definition of the “State” so that Xinhua and other state organs are exempt from laws, undermining the apparent meaning of the Basic Law

It has not just been the content of change, but the decision-making process and the way issues are presented that has been significant. In sensitive areas, such as national security, the government has failed to explain convincingly to the public why changes are needed, especially given Hong Kong’s stable social and political environment. Consultation processes, while welcome, have seemed rushed and disingenuous.

Government figures have often sent mixed signals on sensitive issues, generating community concern and suspicion. In March, for example, the Chief Executive’s handling of harsh criticism of the government Radio Television Hong Kong’s editorial independence prompted a wide-ranging community backlash. This highlighted the importance Hong Kong people place on basic freedoms, and the importance of continued vigilance.

Ultimately, the real measure of developments in Hong Kong over the past year should not be what has changed, but what has improved. The baseline of 30 June 1997 may initially be useful, but if achievement continues to be measured only by how far the government has preserved the colonial legacy, warts and all, this makes a mockery of many of the promises of reunification, embodied in the Basic Law and the guiding principle of “Hong Kong people ruling Hong Kong”.

Hong Kong people have been promised a fresh start. In his first policy address, Chief Executive Tung Chee-Hwa said: “Hong Kong has finally broken free from psychological constraints brought about by the colonial era. We should have the courage to set aside past modes of thought and plan Hong Kong’s long-term future with new vision”. But on some key issues the Hong Kong leadership has shown signs of a deeply conservative second-guessing of Beijing. This sells Hong Kong short, it erodes the autonomy model and constrains the climate for debates which are crucial for Hong Kong’s future.

The system which brought opportunity and prosperity to millions needs to be robust and flexible in a fast changing regional environment. The Asian crisis has shown that resilient human rights protection, the rule of law, government transparency and accountability, community participation and the free flow of information are crucial to the stability and prosperity of Hong Kong.

**Amnesty International urges the HK SAR Government to:**

**Look afresh at all outstanding recommendations and comments of the Human Rights Committee on Hong Kong's compliance with the ICCPR.** The Central Government in Beijing agreed that reports on Hong Kong should continue to be submitted to the UN on the implementation of the International Covenant on Civil and Political Rights (ICCPR). However, there has been little sign of a new approach to longstanding concerns of the UN Human Rights Committee such as the need for independent investigation of complaints against the police.

**Establish an independent human rights commission.** Consolidating existing redress mechanisms, this would make an important contribution to the reinforcement of respect for, and awareness of, human rights in Hong Kong.

**Ensure the widest possible public consultation and debate on any proposals to legislate under Article 23 of the Basic Law, including full discussion of the objective necessity for any provision.**

**Ensure that any legislation on national security issues, including states of emergency, is fully consistent with the ICCPR in not restricting the exercise of fundamental rights.**

**Promote the widest possible public consultation and debate on any legislative proposals of constitutional significance.** To ensure transparency of decision-making in institutions responsible for interpreting and advising on the Basic Law, and ensure full resourcing of all parties in legal challenges under the Basic Law.

**Ensure that police handling of demonstrations is proportionate to public order concerns and does not undermine public confidence in guarantees of freedom of expression and association.**

**Pursue humane and durable solutions for Vietnamese refugees remaining in Hong Kong and to ensure that any new arrivals are treated in accordance with international standards, in particular the principle of non-refoulement.**

### **Key Freedoms in Practice**

Peaceful demonstrations over a wide range of domestic and international issues, including robust criticism of the Chinese government, have continued throughout the year.<sup>1</sup> Hong Kong's established commemoration of the Tiananmen Massacre was attended by approximately 40,000 people in heavy rain on 4 June 1998. Expanded grounds for police to prohibit demonstrations and societies passed into law on 1 July (see below) have not yet been tested, as the police have not prohibited or objected to any demonstration and no societies have been refused registration. Groups reporting on human rights violations in China continue to operate from Hong Kong. Several dissidents will need to renew residence papers this summer. Whilst exiled Chinese dissident Bao Ge made a low-key visit to Hong Kong in June, other dissidents traveling to Macau have encountered technical difficulties crossing into Hong Kong. Such issues have been covered sporadically in the press.

Other developments demonstrate the need for continuing scrutiny. Behind the statistics, there have been persistent complaints about the handling of demonstrations, including allegations of particularly restrictive measures being used against those voicing criticism of the authorities in Beijing. Since 1 July, organizers of demonstrations have been required to obtain "notification of no objection" from the police before a demonstration may proceed. Organizers may appeal any restrictions set out in the notification, but have complained that any real chance of appeal is undermined by the police practice of communicating restrictions on the permitted area not in the notification, but verbally at the last minute. Others have been shocked at being asked what slogans they will be using, claiming such questioning was only previously common in the 1960s and 1970s.

Harshest criticism has been leveled at the handling of demonstrations during visits by senior members of the Beijing leadership. It has been common practice for protestors to be required to remain in "demonstration areas" sometimes far out of sight and earshot of the target of their protests. Confrontations between police and demonstrators have occurred on several occasions when such measures were enforced in a heavy handed manner, including during the annual meeting of the World Bank and International Monetary Fund held in Hong Kong in September. On 23 September one group of approximately 10 demonstrators were surrounded by over 150 uniformed and plain clothed police officers forming a human wall around them as they marched to and from the designated protest site. Journalists complained at being cordoned off from protestors, with access to them arbitrarily controlled.

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<sup>1</sup> HKSAR government officials frequently quote demonstration statistics (1,260 as of March 31) as an indicator that civil liberties protections remain intact in Hong Kong.

Five demonstrators were charged following scuffles with police on 21 September at the end of a 200 strong march protesting IMF policies. Some of the demonstrators had objected to being restricted to the designated area some way from the conference venue and had been blocked by a police cordon when they attempted to rejoin other members of the public on a walkway to the venue. The Director of Public Prosecutions reportedly commented that the police action, captured on film, was “a bit inappropriate”. Nonetheless, three demonstrators were charged with “disorderly conduct” and two with assaulting the police. Tam Waiping was acquitted of disorderly conduct when one policeman withdrew his evidence after a video showed it to be incorrect. Thereafter the prosecution was allowed to amend the remaining disorderly conduct charges to lesser offences of obstructing the police. In convicting Tam Chun-yin and Wang Shiu-ying of obstructing the police, for refusing to leave the protest when ordered to do so, the magistrate accepted that some of the police



Protestors surrounded and outnumbered by police, September 1997 (c) Apple Daily [AI use]

officers giving evidence had exaggerated events. He stated that these were the least serious examples of the least serious offences that came before his court. It is difficult to understand why it was considered to be in the public interest to pursue these prosecutions. Both protestors plan to appeal, together with Wong Shui-hung and Chan Siu-ping who were convicted of assaulting the police. Wong Shui-hung testified she had been groped in the chest by a police officer during the incident.

Members of the April 5 Action group, were charged with 18 offences under the Legco (Powers and Privileges) ordinance, including “creating a disturbance”, displaying a banner, and resisting and obstructing officers, over protests staged in the public gallery of the Legco chamber in July and September. The group were protesting at the PLC’s freezing of labour rights legislation

passed shortly before the handover. The combined charges attracted a maximum penalty of HK\$10,000 and 12 months imprisonment. The court passed the most lenient sentence available: conditional discharge for 6 months. The group persistently reported being kept far away from the objects of their protests. When their spokesperson Leung Kwok-hung reported that he was being subjected to surveillance before and after demonstrations, the police sought to justify their action on public security grounds.

Protestors have accused the police of operating beyond their duty to prevent a breach of public order and unlawfully restricting freedom of expression. Lau Shan-ching, one of the organizers of a demonstration conducted in a designated area during the early hours of 1 July made an official complaint to the police after they drowned out his speech and the crowd's chants of "Down with Li Peng and Jiang Zemin" by broadcasting very loud classical music. The police initially claimed that the music had been played to "relieve" the atmosphere, but internal investigations confirmed the deliberate intention was to drown out the chanting. When the Independent Police Complaints Council substantiated the complaint, concluding police actions were "an unnecessary use of authority", the commissioner of police disagreed, arguing "no fault" on the part of the assistant commissioner involved. He cited<sup>2</sup> Justice Department advice that under international conventions the police, in the circumstances, were "not only entitled, but were obliged to take action to protect the dignity of Internationally Protected Persons attending the function", that the action was "entirely appropriate" to "prevent embarrassment to these International Protected Persons" and the only other option would have been to "remove the demonstrators and risk violence". Whilst governments do have obligations to protect the security of Internationally Protected Persons, this does not justify invoking the convention as an excuse to interfere with peaceful expressions of protest directed at them.<sup>3</sup>

The commissioner of police did "accept the general tenets" of the IPCC's recommendations on the policing of future demonstrations, which included:

"Police should normally act under the presumption that demonstrators are doing no more than exercising their freedom of expression protected under the Basic Law and the Bill of Rights unless there is very specific and reliable information to the contrary;

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<sup>2</sup> In letter to the chairman of the IPCC leaked to the press.

<sup>3</sup> Article 2.3 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. The relevant Hong Kong ordinance states that an Internationally Protected Person is "entitled under international law to special protection from attack on his person, freedom or dignity".

... police procedures and measures should be commensurate with the actual behavior shown by the demonstrators, in terms of any direct threat to public order, rather than imagined possible motives or possible actions of demonstrators;

Police should avoid tactics which have the effect of or which may reasonably give rise to the perception that the rights and freedoms of expression and of assembly and demonstration are being unnecessarily curtailed”.

These recommendations are equally relevant for those in regional and local councils who are responsible for approving the use of public spaces. Their decisions have frequently been controversial, attracting allegations of censorship.

Whilst controversial additions to the Public Order ordinance have not yet been used to prohibit or control demonstrations, demonstrators have been convicted under two other new laws which have a potential impact on freedom of expression. The National Flag and National Emblem Ordinance and a regional equivalent were passed by the PLC on the basis that under Annex III of the Basic Law, a precursor of the relevant national law was to be applicable to Hong Kong. In passing the laws, the PLC does not appear to have examined whether they were in compliance with the ICCPR .

Section 7 states: “a person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years”.

During a peaceful pro-democracy demonstration on 1 January, two protestors waved three mini flags, a Taiwan flag and defaced national and regional flags. The police reportedly asked them to stop but did not interfere, videoing the incident instead. Later in the march the two protestors fixed the



Lee Kin-yun (19) and Ng Kung-siu (25) set up their mutilated flags outside the Central Government Offices, January 1997 (c) Apple Daily [AI Use]

flags to a barricade at the entrance to the Central Government Offices. They were charged on 5 February and convicted on 18 May. In sentencing them, the magistrate dismissed defense arguments that the relevant sections of the laws were unconstitutional as they ran counter to ICCPR guarantees of freedom of expression applicable to Hong Kong through Article 39 of the Basic Law. The prosecutor argued that the laws sought only to restrict a very narrow mode of expression and was justifiable under paragraph 3 of Article 19 of the ICCPR. The laws did not prohibit expression of dissent "at most they prohibit only one means of expression... all the things said and done by the defendants could be easily and permissibly expressed in other ways". The magistrate ruled that the restrictions on the freedom of expression of Section 7 could be justified as necessary for the protection of public order<sup>4</sup>. The defendants were conditionally discharge to keep the peace or forfeit HK \$4,000. They have lodged an appeal.

It is clear the incident in question posed no threat to public order. Regardless of the minimal penalty imposed, the case illustrates the capacity for this legislation to be used to curb legitimate, non violent expressions of protest.

## **Significant Legal Changes**

### **Constitutional Provisions**

On 23 February 1997, the PRC's National People's Congress (NPC) Standing Committee resolved that certain sections of the Bill of Rights Ordinance (BORO), the Societies Ordinance (SO) and the Public Order Ordinance (POO) contradicted the Basic Law and should therefore not be adopted as laws of the SAR. To Amnesty International's knowledge, there was no detailed official explanation of *why* the provisions concerned were seen to be in contravention of the Basic Law.<sup>5</sup> This failure calls into question the integrity of Hong Kong's legislation as a whole, and the autonomy of Hong Kong's institutions as protected in the Basic Law. Moreover, the legislation in question covered the protection of fundamental freedoms, and issues of compliance with the ICCPR. The greatest possible transparency would have been sensible at such a critical juncture.

Legal opinion over the significance of the relevant sections of the BORO was mixed, with some arguing the ordinance was undermined and others that the articles simply embodied common law

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<sup>4</sup> In fact, common law and existing provisions of the Public Order Ordinance would have provided ample basis for police intervention had any threat or potential threat to public order been an issue.

<sup>5</sup> In fact, a review of the compatibility of Hong Kong laws with the Basic Law was begun by the Preliminary Working Committee in 1994, that committee recommended 26 ordinances be repealed entirely and 12 in part - again no reasons were given .

principles of statutory interpretation which would survive the revision.<sup>6</sup> There was some consensus that the revisions added confusion to an already complex constitutional position. Now the standards of the ICCPR are embodied both in the Bill of Rights and Article 39 of the Basic Law. Only time will tell how solidly Hong Kong's new detailed written constitution has enshrined ICCPR rights, but the expectations are high.<sup>7</sup> Legal appeals are still in progress challenging amendments to immigration laws for undermining the right of abode as set out in the Basic Law. The Court of Appeal was accused of voluntarily surrendering its jurisdiction when judges opined that their powers to interpret the Basic Law did not extend to challenging the validity of the NPC's decisions. At least one of them has subsequently changed his mind.

Perhaps the most worrying signal so far has been the PLC's hasty enactment during its final days of existence, of a wideranging interpretive amendment which means that where ordinances previously did not bind the Crown they will not now bind the State which is defined to include the HKSAR government and the Central authorities including many subordinate state organs such as the Xinhua News Agency. This has been presented as a "technical amendment" but for many commentators it undermines a key article of the Basic Law<sup>8</sup>, undermining promises about the new constitutional order.

The PLC also suspended and eventually repealed several private member's bills passed by the previous elected legislature which involved human rights protections. One was an amendment to the BORO which sought to reverse an anomaly in case law created by a Court of Appeal decision.<sup>9</sup> The court had adopted a narrow view of the effect of the BORO on pre-existing legislation<sup>10</sup> concluding that the BORO repealed incompatible legislation only in so far as the

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<sup>6</sup> The Bill of Rights came into force in June 1991 with the purpose of incorporating ICCPR provisions (with some important limitations) into domestic legislation, as a means to strengthen rights protections in the aftermath of the Tianamen square massacre. It was viewed with hostility by the Beijing authorities from its inception.

<sup>7</sup> "The fact that these rights are set out in the Basic Law is significant for two reasons. First the rights become fully justiciable and not simply moral aspirations or international norms. Secondly by being in the Basic Law, the rights are elevated to constitutional rights which cannot be restricted at the whim of the executive or legislature". Secretary for Justice 20 November 1997.

<sup>8</sup> Article 22 "all government offices set up in the HKSAR by departments of the Central Government or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region".

<sup>9</sup> in the case of **Tam Hing-yeec v. Wu Tai-wai** (1991) 1 HKPLR 261, [1992] 1 HKLR 185).

<sup>10</sup> Relevant sections of the BORO are 3(2) and 7:

legislation was relied upon by the government or public authorities but not when it is invoked by a private person. Relevant government officials reportedly indicated at the time that the Court's interpretation created confusion and was contrary to the legislative intent of the BORO<sup>11</sup>. Moreover, the Court had also recognized that the judgement would fail to give full effect to the ICCPR.

The Department of Justice argued that the amendment might introduce a cause of action contrary to the legislative intent of the BORO, that the amendment was unnecessary and created so much confusion that the only remedy was a repeal. It appears that none of the legal advice known to have been sought outside the department concurred with this view. There was some agreement that the drafting may not have been sufficiently scrutinized by the previous legislature and could be improved. The Bar Association and others argued that amendment was the correct procedure, offering several alternative drafts. Others argued that repealing the amendment went beyond the limited remit of the PLC, and any perceived confusion should be left to the courts to clarify.

Insiders questioned the Secretary for Justice's sincerity in considering any alternatives to repeal, and allegations were made that the decision was influenced more by the Beijing authorities known hostility to the Bill of Rights, than the merits of the legal argument.

The repeal removed a measure which sought to reinforce compliance with the ICCPR<sup>12</sup> and therefore presumably is in line with the Basic Law (Article 39). Members of the administration and PLC exaggerated the impact, insisting it opened the floodgates to "frivolous litigation" enabling citizens to challenge any actions of other citizens for their compliance with the Bill of Rights. In fact the intention of the amendment was only to reverse the effect of a specific court case so as to ensure that when private citizens used powers conferred on them by legislation to interfere with the freedoms of other citizens, the courts would be able to review that legislation's compatibility with the Bill of Rights. It is difficult to understand why the government found this so objectionable that it was imperative to overturn the will of an elected legislature by freezing and then repealing the amendment. Nor why they rejected the argument that it was

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<sup>11</sup> This was said to be two fold: a) to provide a cause of action and legal remedies only to those whose rights were violated or threatened by the government or public authorities (section 3 (2)); b) to remove all pre-existing legislation inconsistent with the BORO no matter whether it was invoked by the government or private individuals (section 7).

<sup>12</sup> "Under the Covenant a State party does not only have an obligation to protect individuals against violations by Government officials but also by private parties. It thus notes with deep concern the absence of legislation providing effective protection against violations of covenant rights by non-governmental actors". Human Rights Committee, concluding observations (Hong Kong) CCPR/c/79/Add.57, 9 November 1995.

a useful alternative safeguard to their own attempts to review all legislation and legislate on select areas. Their argument that it is unnecessary because of Basic Law Article 39 has yet to be tested.

Other private members bills controversially suspended and then substantially repealed by the PLC included amendments to laws on employment and trade unions. Unionists have submitted a complaint to the ILO that the PLC's repeal of provisions on collective bargaining, the reinstatement of workers dismissed for union affiliation, and the use of union funds for political purposes violate ILO conventions (87&98) on freedom of association and the right to organize.

### **National Security: the forthcoming debate**

Article 23 of the Basic Law stipulates that :

“The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”<sup>13</sup>

Legislation under article 23 has the potential to limit and undermine the exercise of fundamental human rights in Hong Kong. The issue is particularly sensitive against the backdrop of the draconian state secrets and national security legislation in operation in the rest of China, which has been used to punish legitimate journalism and peaceful criticism of the government.<sup>14</sup> As a result, few issues have generated as much controversy during the transition period.

The British and Chinese governments had agreed on the contents of a bill passed in June 1997 localizing the UK 1911 and 1988 Official Secrets Acts. Hong Kong legislators were thwarted<sup>15</sup> in their attempts to modify clauses on espionage and unlawful disclosure which have been much criticized for restricting freedom of information. Legislators were concerned that the offence of approaching a “prohibited place” for “a purpose prejudicial to the safety and interests of the UK or HK” could be used against peaceful demonstrations. They also wanted to add “public interest” and “prior publication” defences against the offence of unlawful disclosure of

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<sup>13</sup> The clauses on foreign political organizations and regional bodies establishing ties with them were added to the draft Basic Law after the events of 1989.

<sup>14</sup> See “China: State Secrets - A Pretext for Repression” AI index ASA 17/42/96 (May, 1996)

<sup>15</sup> The administration timed the crucial vote to coincide with the beginning of the June 4 commemorations, a priority for many sympathetic legislators.

information. This problematic legislation survived the handover. Proponents of the reforms who have been re-elected into the new legislature may want to revisit the issues, but with their limited powers to introduce legislation, it may prove impossible if it is not on the government's agenda. It is not clear whether the government intends to initiate new legislation as part of the Article 23 exercise.

Through the Crimes (Amendment) Bill passed on 24 June 1997, the colonial government belatedly revised the existing definition of "sedition" by adding the common law necessity of a threat of force or incitement to violence. It also sought to introduce "subversion" and "secession" into the law for the first time, but legislators voted down these provisions on the basis they did not exist in other common law jurisdictions. Legislators also rejected the government's minor amendments to treasonable offences, choosing instead to cut them from the law entirely. A spokesman for the Chief Executive immediately announced "we will not accept these amendments which are themselves confusing and we will take necessary action to rectify the situation."<sup>16</sup> The amendments have not been signed into operation.

Initially, members of the Provisional Legislative Council suggested they should initiate the full range of legislation under Article 23, but the Chief Executive responded that this would be the task of the first elected legislature. After a year of conflicting signals, alarm and uncertainty, the Secretary for Justice now maintains legislation on treason, secession, sedition or subversion will not be introduced for at least another year, and not before extensive public consultation.

In the meantime, loose definitions of national security, have already been introduced into law through highly controversial amendments to existing Societies and Public Order Ordinances enacted by the PLC on 1 July. Proposed amendments were initially published by the Chief Executive designate in a consultation document in April 1997. These gravely threatened civil liberties protected under the ICCPR<sup>17</sup> and provoked an outcry.

The proposals were substantially modified, but the amendments finally enacted still reintroduced registration for societies, and the need to apply for permission (through a "notice of no objection") to hold demonstrations. They introduce certain restrictions on connections between local and foreign political organizations. Under the amendments the Commissioner of Police is empowered to de-register or prohibit societies, or prohibit peaceful public gatherings or processions not just on public safety and public order grounds but also where he "reasonably

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<sup>16</sup> 25 June, Hong Kong Standard

<sup>17</sup>See Amnesty International: "Hong Kong: Basic Rights at Risk: Comments on the HKSAR Consultation Document of April 1997" (ASA 19/06/97) for the full arguments.

considers [it] necessary” “in the interest of national security” and “the protection of the rights and freedoms of others”<sup>18</sup>.

The government’s arguments in presenting these and other changes in the law have dwelt largely on “permissible restrictions” to rights. Under international law and relevant jurisprudence, limitations on human rights enshrined in the covenant are seen as the exception.<sup>19</sup> They are construed strictly, and any doubt is resolved in favour of allowing the right to be exercised. Legislation restricting rights therefore cannot be said to be in compliance with the ICCPR simply because the justifications for restrictions are copied verbatim from those listed in the covenant. Such legislation could still be used to justify arbitrary and unreasonable limitations while paying lip-service to human rights principles. This makes it even more important to ensure that the grounds on which limitations can be imposed are tightly drawn, are limited to the most serious of situations, and that the authorities are required to justify in detail why the law is used in each case. There must also be a process for appealing to an independent judicial body.

In the Public Order and Societies ordinances, “National Security” is loosely defined as “safeguarding of the territorial integrity and independence of the People’s Republic of China”. Administrative guidelines issued to the police specified that intervention on national security grounds might be appropriate if any participant in a meeting or procession was “advocating separation from the People’s Republic of China including advocacy of the independence of Taiwan or Tibet”.

Although “national security”, is not very well defined in the covenant, international law and jurisprudence does not grant States an unfettered discretion to define such issues. The UN Special Rapporteur on freedom of opinion and expression has stated in this respect:

“For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation”.

Furthermore, it is also well established in international law that the “threat” must implicitly relate to a threat of the use of force or violence, or to matters concerning the state’s ability to respond to such a threat.

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<sup>18</sup> Before the amendments, grounds for police intervention in public gatherings under the law were limited to “public safety and public order”. Societies could also be prohibited if their continued operation was reasonably believed to be” prejudicial to the security of Hong Kong”.

<sup>19</sup> See appendix for an analysis

“Only in highly exceptional cases can a nation’s security be directly threatened by a person’s exercise of the right of freedom of expression. Such a threat would require, at the very least, the clear establishment of the person’s ability and intention to cause the taking of actions directly threatening national security, in particular by propagating or inciting the use of violence”<sup>20</sup>

The HKSAR government has not been convincing over the objective necessity for any further restriction of fundamental rights in the name of national security. It is hard to conceive how actions encompassed by the sweeping definition would constitute a most serious threat to the entire nation.

The manner in which these measures were introduced, their justification, and the brief consultation that took place also generated justifiable criticism and suspicion of the administration. The full consultation promised for the next stage will have to be far more open-ended, substantial and transparent to inspire confidence. Situations where “national security” concerns may be used to justify curtailing citizens freedoms go far beyond the issues covered in Article 23. Emergency legislation, including National Martial Law legislation, national laws relied on by the army, long criticized legislation concerning telecommunications surveillance all have a legitimate place in the debate.

## **Longstanding Issues**

### **Police Brutality**

There have been longstanding allegations that brutality is common among the police in Hong Kong. The police force has been very slow to implement reforms of the treatment of arrested suspects first suggested in a 1992 Law Reform Commission report as safeguards against such abuse. Only in June 1997 was a target date of 2000 set to implement clarification of powers of stop and search, clear limits to and review of detention without charge, and progressive introduction of video interviewing of suspects.

In August and November 1997 court cases collapsed on evidence that the police had extracted confessions by torture or ill-treatment. The cases involved Kowloon East Regional Crime Squad, with medical evidence reportedly substantiating allegations of beatings and water torture.

In May 1998 four police officers were convicted of assault and sentenced to between four and six months imprisonment for the torture of a drug suspect in a refuse room. The four, who have appealed, were said to have stuffed a sports shoe into Yiu So-man’s mouth, poured water into his nose and ears until he fainted, and threatened to throw him off a balcony in an attempt to

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<sup>20</sup> See “Report of the special Rapporteur, Mr Abid Hussein, pursuant to the Commission on Human Rights Resolution 1993/45” Reference E/CN.4/1995/32, 14 December 1995, para 48.

force him to admit to possessing 56 grams of heroin. The Security Panel of the PLC began scrutinizing measures to safeguard against fabrication of evidence after several similar allegations.

In November, Chan Kwok-keung was shot dead at Aberdeen Police Station by an officer who had taken him there for failing to provide an identity card during a routine inspection. The officer was charged with murder. The police revealed the officer had received psychological counseling from 1994-6 and in 1998 reported on a review of the management of "health-impaired officers".

The police force has steadfastly opposed the involvement of civilians in investigating complaints made against them. Confidence is particularly undermined by the small percentage of complaints against the police that are ever substantiated or upheld. In 1997 the police conceded that "balance of probability" should be the standard of proof in less serious cases rather than "beyond all reasonable doubt".

On 23 June 1997, the government withdrew a bill in its final stages which was to provide a statutory basis for the Independent Police Complaints Council (IPCC), an appointed civilian body which monitors and reviews police investigations of complaints against themselves. The government deemed that legislators' amendments were "unacceptable and impractical" and would "seriously undermine morale". These amendments would have given the Council the power to initiate an independent investigation if they were not satisfied with the police's own internal investigation. This is a reform which Amnesty International has advocated for many years and which was specifically recommended for Hong Kong by the UN Human Rights Committee in 1995.

### **Vietnamese Refugees - the end of the story?**

In January 1998, the HKSAR government announced it would abolish the port of first asylum policy for Vietnamese people.<sup>21</sup> The PLC had passed a motion in August calling for this move after a dramatic increase in Vietnamese illegal immigration. The end of the policy meant that from then on Vietnamese would face repatriation in the same way as all other illegal arrivals. In fact, this reflected reality, as only 5 Vietnamese had requested asylum in 1997. The government rejected some provisional legislators demands that the change in policy be implemented by sending future arrivals back out to sea. They will be kept in detention, for a predicted minimum of 4-6 months, whilst repatriation is negotiated with the Vietnamese government.

The last detention centre specifically for Vietnamese was closed in May 1998, with 32 remaining detainees, including several asylum seekers, moved to mainstream prisons.

As of May 1998 1,200 Vietnamese refugees remain in Hong Kong waiting resettlement in a third country. Many have been in Hong Kong for many years having made numerous unsuccessful applications for resettlement. Only 47 have been resettled through UNHCR efforts this year. It is highly unrealistic to maintain that third country resettlement is the long-term solution for this group. However the government will only concede that it will be a "long drawn out process", "in the meantime Vietnamese refugees should be encouraged to become self-reliant and lead a normal life in Hong Kong as far as is possible". They are permitted to work, but do not enjoy the other benefits of permanent residence or citizenship. This interim solution means that they, and the children born to them in Hong Kong, will remain in effect a stateless community in Hong Kong.

These refugees include 278 who initially fled from Vietnam to China before seeking asylum in Hong Kong. They have mounted several successful legal challenges. These reversed their exclusion from the refugee screening program, and eventually ended their illegal detention, which for some lasted over 7 years. The Government finally accepted the group were refugees in June 1997, but kept the majority in detention for another 6 months, fighting habeus corpus proceedings. The government argues that the group's refugee claim was satisfied in China, where they should return, and the "interests of good administration" demand their continued detention during judicial review of the decision to remove them to the mainland. The refugees maintained that in China they lived as illegal immigrants, not Chinese nationals, and were denied registration papers for access to education and other benefits of permanent settlement. Some had also been imprisoned in labour camps. Details of the agreement between the HKSAR

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<sup>21</sup> The port of first asylum policy was a key element in Hong Kong's participation in the Comprehensive Plan of Action on Vietnamese migrants agreed by more than 70 governments in June 1989.

government and their mainland counterparts<sup>22</sup> have not been revealed. The authorities must provide guarantees that any returning refugees would be granted full convention rights, and not be left once more in limbo.

Among those who have been refused refugee status are several groups who remain in limbo through circumstances beyond their control. 525 ethnic Chinese people barred from repatriation by the Vietnamese government successfully challenged their continuing detention. They also remain defacto stateless in Hong Kong, and attempts to persuade the Vietnamese government to reconsider have been unsuccessful. Others are the parents of closest relatives of chronically ill children and young adults whose lives would be put at risk if they were repatriated to Vietnam. They won release from detention after a campaign on their behalf this year, but have been refused local resettlement.

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<sup>22</sup>The Hong Kong SAR is not a party to the Refugee Convention, although China is.

## Appendix: International Standards

### Restrictions on rights must be exceptional and narrow

It is important to understand what permitted restrictions in the ICCPR mean, including those under Article 21 and 22, and in what situations they are meant to apply. Only then can legislation be assessed as to whether it is true to the letter and spirit of the ICCPR.

Some rights in the ICCPR, such as the right not to be tortured, the right not to be arbitrarily deprived of life and the right to freedom of thought, conscience and religion, can **never be restricted** or suspended. Not even war or dire threat to the nation can justify ignoring these most basic rights. However, during times of officially declared public emergency which threatens the survival of the nation (Article 4), other **rights can be temporarily suspended** only to the extent strictly required to deal with the situation. There are rigorous principles which guide what states are allowed to do and such measures have to be carefully justified by the state.

The ICCPR also allows **limited restrictions** on some other rights. Article 22 of the ICCPR says that no restrictions may be placed on the exercise of the right to freedom of association

*"...other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."*

The permissible restrictions on the right to freedom of assembly (Article 21) are in almost exactly the same terms. Article 19, ICCPR, on freedom of expression, is similar, saying that the exercise of this right "carries with it special duties and responsibilities" and lists the permissible restrictions as those which are provided by law and are "necessary" "for respect of the rights or reputations of others... for the protection of national security or of public order (*ordre public*), or of public health or morals". **No other limitations are allowed. A state cannot just impose restrictions in general terms and say they are allowed by the ICCPR. The burden is on the state to show that any restrictions on the rights to freedom of association or assembly comply with the ICCPR**

The strict way in which the permissible restrictions are interpreted, which is summarized in the following paragraphs, is set out in: (i) *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, developed by a conference of 31 international law experts in 1984; (ii) *Freedom of the Individual under Law*, a 1980 UN-commissioned study by Erica-Irene A. Daes, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN, New York, 1990 and (iii) *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, developed by a meeting of experts in 1995 convened by the non-governmental organization 'Article 19'. The restrictions must be:

- *prescribed by law*;
- imposed only for *one of the purposes* set out in Articles 21 and 22, ICCPR;
- *necessary in a democratic society*.

Because limitations on human rights are seen as the exception, they are construed strictly and any doubt is resolved in favor of allowing the right to be exercised. Domestic authorities have to apply the ICCPR, but it is a question of international law whether national laws and practice comply with the ICCPR and states do not have unfettered discretion. Most importantly, as stated by the Human Rights Committee, the **restrictions “may not put in jeopardy the right itself”**. [Human Rights Committee, General Comment No.10, 19th Session, 1983] . This is reinforced by Article 5, ICCPR, which says that the ICCPR cannot be “interpreted as implying” any right to engage in any activity “aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent that is provided for in the present Covenant”. Finally, any restriction **cannot be imposed in a way that discriminates against people** on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### **“Prescribed by law”**

The restrictions must not only be set out in legislation, but must be accessible and unambiguous. They must be precise and clear enough to allow the individual to know in advance whether a particular action is unlawful.

#### **The only purposes for which restrictions may be imposed**

The six purposes for which restrictions may be imposed on freedom of association and assembly are not very well defined: national security, public safety, public order (*ordre public*), public health, public morals and protecting the rights and freedoms of others. Merely repeating these phrases in legislation may or may not uphold the rule of law, depending on how they are applied in practice. They could still be used to justify arbitrary and unreasonable limitations while paying lip-service to human rights principles. This makes it even more important to ensure that the grounds on which limitations can be imposed are tightly drawn, are limited to the most serious of situations, and that the authorities are required to justify in detail why the law is used in each case. There must also be a process for appealing to an independent judicial body.

Nevertheless, there is enough guidance in international jurisprudence to show that there must be a significant threat or issue at stake before restrictions can be justified for one of the six purposes. “**National security**”, for example, cannot be invoked to justify restrictions unless to protect a state’s existence or territorial integrity against the use or threat of force, whether external threat or a threat from within the state, such as an incitement to violent overthrow of the government. Local or relatively isolated law and order disturbances are not enough. The UN Special Rapporteur on freedom of expression, speaking about the closely related right to freedom of expression, has written that:

“Only in highly exceptional cases can a nation’s security be directly threatened by a person’s exercise of the right to freedom of expression. Such a threat would require, at the very least, the clear establishment of

the person's ability and intention to cause the taking of actions directly threatening national security, in particular by propagating or inciting the use of violence." [ Report of the Special Rapporteur, Mr Abid Hussein, UN Doc: E/CN.4/1995/32, 14 December 1995.]

**"Public safety"** relates mainly to restrictions on public assemblies and aims at ensuring the safety of people's lives, bodily integrity or health. **"Public order"** (or the French **"ordre public"**) refers to the functioning of basic public institutions necessary to keep a society together and the basic rules on which a society are founded. Respect for human rights is part of public order or *ordre public*. Protecting the **"rights and freedoms of others"** is limited to the rights recognized as human rights by international law. **"Public health"** relates to the need to prevent epidemics or other diseases, or other serious threat to the health of the population or parts of it.

**"Necessary in a democratic society"**

The term "necessary" requires that even when a restriction is allowed on one of the six grounds, the actual restriction imposed must be *proportionate* to the threat being addressed. The restriction must be the least restrictive means of protecting the interest. For example, in regulating public demonstrations to limit disruption of traffic or public order, reasonable restrictions could be placed on how the demonstration is to be carried out. But only in very rare and exceptional cases would it be justified to prohibit the demonstration taking place.

What is a "democratic society"? The definition of such a concept falls outside the mandate of Amnesty International, and there is no single or prescriptive model of a democratic society. However there are some common values that bind states parties to the ICCPR and are accepted by legal experts and non-governmental organizations as underlying a democracy for the purposes of interpreting and implementing the ICCPR. A democratic society for the purposes of the ICCPR is a society that respects the rights in the Universal Declaration of Human Rights and the two international human rights Covenants. It is a society in which the citizens are able to participate in public affairs and the will of the people is expressed through genuine, periodic elections (Article 25, ICCPR). As explained in a landmark case in the European Court of Human Rights, a democratic society values the ideals of pluralism, tolerance and broad mindedness [*Handyside v United Kingdom* Judgment of 7 December 1976, *Handyside*, Series A no.24, p.22]. It is in the context of such an ideal society that the necessity of the actual restriction is judged.

As the *Siracusa Principles* state, the burden is on the state to show that the restrictions would not impair "the democratic functioning of the state" (Principle 20).