



# Freedom of the Media in Hong Kong

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## FREEDOM OF THE MEDIA IN HONG KONG

### INTRODUCTION

Hong Kong, now a British Crown Colony, reverts to the People's Republic of China (PRC) in July 1997. A Joint Declaration, a legally binding treaty, was signed by the United Kingdom and the PRC in 1984, and a Joint Liaison Group was established under the terms of the Joint Declaration, the members of which were to work on the practicalities of the transfer. The 1990 Basic Law was enacted by the National People's Congress of the PRC to provide a constitutional framework for the maintenance of the current legal system in the Hong Kong Special Administrative Region (HKSAR) as it will then be called.<sup>1</sup> However, Governor Chris Patten's reforms of the electoral process and the September 1995 election for four-year terms of the sixty members of the last Legislative Council (LegCo) under British rule, were roundly condemned by the Beijing Government, which threatened to abolish the LegCo and to form the first LegCo for the HKSAR in accordance with the relevant decision of the National People's Congress. Indeed, a China-backed Provisional Legislature was created in December 1996. It convened in January 1997 in Shenzhen and elected a President, Rita Fan. Tung Chee-hwa, a Hong Kong shipping magnate, has been designated Hong Kong's Chief Executive to succeed Governor Patten.

The Basic Law promises that the socialist system and policies shall not be practiced in the HKSAR and that the previous capitalist system and way of life shall remain unchanged for fifty years.<sup>2</sup> However, interpretation of the Basic Law is to be in the hands of the Standing Committee of the National People's Congress, which will also have the power to amend it.<sup>3</sup>

### CURRENT SITUATION

At present, the media in Hong Kong enjoy a high degree of freedom. Under the Hong Kong Bill of Rights Ordinance,<sup>4</sup> freedom of thought, conscience and religion, as well as freedom of opinion and expression are guaranteed. The Ordinance incorporated into the law of Hong Kong provisions of the International Covenant on Civil and Political Rights (ICCPR) and as it is applied to Hong Kong it is used for ancillary and connected matters.

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<sup>1</sup> The Basic Law was adopted by the Third Session of the Seventh National People's Congress of the People's Republic of China on April 4, 1990. It was drafted under the provisions of paragraph 3(12) of the Joint Declaration. For a English translation of the Basic Law, *see for example*, 83-172 THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (Beijing, Legal Press, 1990).

<sup>2</sup> *Id.* art. 5, at 86.

<sup>3</sup> *Id.* arts. 158 & 159, at 161-164.

<sup>4</sup> Ordinance No. 59 of 1991, Cap. 383 of the Laws of Hong Kong, Legal Supplement No. 1, HONG KONG GOVERNMENT GAZETTE (June 7, 1991), at A399.

Article 15 of the Hong Kong Bill of Rights, which forms Part II of the Hong Kong Bill of Rights Ordinance, states that everyone shall have the right to freedom of thought, conscience and religion. Article 16 states that everyone shall have the right to hold opinions without interference. Paragraph (2) of article 16 provides as follows:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Paragraph (3) of the same article continues thus:

The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities.

It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary--

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals.<sup>5</sup>

Newspapers in Hong Kong have been vociferous at times in their criticism of political events and political figures. The common law offenses of libel and defamation are part of the law of Hong Kong, and civil or criminal proceedings may be brought under the Defamation Ordinance, charging defamation. A number of cases have come before the courts of Hong Kong where the plaintiffs based their case on articles that had appeared in newspapers published in or with a circulation in Hong Kong.<sup>6</sup> The first libel case involving the Internet was filed in August 1996. Chris So was sued for disseminating allegedly defamatory statements on a global computer network. The plaintiffs, Asia On-line, an Internet service provider in Hong Kong with an estimated 15,000 subscribers in Hong Kong, accounting to about 20% of the market, claims So's article was maliciously and falsely published and disseminated and that by reason of the publication of the said statement, plaintiffs had been severely injured in their credit, reputation, and in the way of their business.<sup>7</sup>

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<sup>5</sup> *Id.* at A424.

<sup>6</sup> See for example, *Hsiang-hsi Kung (No. 2) v. Sing Tao Jih Pao Ltd.* [1959] HONG KONG LAW REPORTS, 65; *Chan Kwong-wai v. Lo Sau-king and others* [1963] HONG KONG LAW REPORTS 7; *Tsui-Man-Yeuk v. Ling Ai-ming and others* [1965] HONG KONG LAW REPORTS 7, 24.

<sup>7</sup> *Internet Firm Files Territory's First Cyberspace Libel Case*, Agence France Presse dispatch dated Aug. 1996 retrieved from the News file of the Lexis-Nexis database.

Participants in a Hong Kong seminar on the use of libel laws to curb press freedom generally thought that Hong Kong had "done better than most of Asia in avoiding abuse of libel laws to crimp people's freedoms," but on the other hand, were fearful that the situation may change after the handover to China.<sup>8</sup> The same article states that the number of defamation actions which have been brought in Hong Kong is very small, but newspapers are concerned that after 1997, the libel laws might be utilized in such a way as to stifle their freedom to report on sensitive issues. It was remarked that libel laws could be used to "silence or punish journalists who are trying to perform their duties" and "to mute reporting of misconduct and criticism of public policy."<sup>9</sup>

## CURRENT SUBSTANTIVE LAW

The Defamation Ordinance, originally passed as Ordinance No. 5 of 1887 and amended from time to time, now Chapter 21 of the Laws of Hong Kong, and the provisions of the former Seditious Ordinance, which in 1972 was incorporated into the Crimes Ordinance, Chapter 200 of the Laws of Hong Kong, together with the common law that is part of the law of Hong Kong, will govern cases of libel, defamation, and offenses against the Crown will determine whether writings of members of the U.S. media published or circulated in Hong Kong violate these laws. If they write anything that can be alleged to be defamatory of Hong Kong residents, they may be sued in the courts of Hong Kong under these laws.

The Defamation Ordinance contains a number of sections that could be applied to broadcasts or to newspaper articles. As noted above, both civil and criminal proceedings may be conducted under this ordinance. What constitutes defamation is not defined; the reported cases of the Hong Kong courts based on defamation rely on English common law.

The sections of the Crimes Ordinance pertaining to offenses against the Crown would be applied to any writings against Her Majesty the Queen. Subsection (1) of section 9 defines a seditious intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong. However subsection 9 (2) makes certain exceptions: as for example, an act, speech or publication is not seditious if it only intends (a) to show that Her Majesty has been misled or mistaken in any of her measures, or to point out errors or defects in the Government or Constitution of Hong Kong. However, a person who is found to have done, or attempted to do, an act with a seditious intention, or who prints, publishes, sells, distributes, etc., a seditious publication, or who imports a seditious publication, unless he has no reason to believe that the publication is seditious, may be fined HK\$5,000 for a first offense, plus imprisonment for two years. For a subsequent offense, the penalty is imprisonment for three years.

Furthermore, the Public Order Ordinance, Chapter 245 of the Laws of Hong Kong, has also been used to charge publishers with having published *false news*.

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<sup>8</sup> C. Lee, *Future Uncertain for HK Libel Laws, Expert Says*, Reuters Dispatch dated Dec. 18, 1996, retrieved from the News file of the Lexis-Nexis database.

<sup>9</sup> *Id.*

The situation under the common law regarding such rights as freedom of the press has been described thus:

Under the common law, rights and freedoms are residual. According to Halsbury, the concept of liberty is expressed in two separate principles:

(a) the subject may say or do what he pleases, provided he does not transgress the substantive law or infringe the legal rights of others; and

(b) public authorities (including the Crown) may do nothing but what they are authorized to do by some rule of common law (including the royal prerogative) or statute.<sup>10</sup>

## **SITUATION AFTER REVERSION TO THE PEOPLE'S REPUBLIC OF CHINA**

More than half a year ago, Hong Kong journalists were already worrying about press freedom. The Hong Kong Journalists Association issued a report in June 1996 highlighting the *climate of fear* in the territory's media and said it would get worse in the year leading up to the takeover by China on July 1, 1997. The report said that China already had a *blacklist of unfriendly* journalists, and was ready to "isolate and punish those in the media deemed enemies." This was viewed as interference with and threatening behavior towards the free expression of the Hong Kong media, resulting in a climate of fear among journalists which in itself is "an inducement to self censorship."<sup>11</sup>

The 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong guaranteed that

...rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, or movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region.<sup>12</sup>

## **ISSUES OF POTENTIAL CONCERN TO THE MEDIA**

One commentator pointed out that in seeking to protect freedom of speech, of the press and of publication, the Basic Law has selectively identified only one aspect of the freedom of expression and has omitted the freedom to *seek*, and to *receive*, information and ideas of all kinds, regardless of

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<sup>10</sup> 8 HALSBURY'S LAWS OF ENGLAND (4th ed., London, Butterworths, 1974), at ¶ 828.

<sup>11</sup> *Hong Kong Journalists Worry About Press Freedom*, Agence France Presse dispatch dated June 30, 1996, retrieved from the News file of the Lexis-Nexis database.

<sup>12</sup> For English text of the Joint Declaration, *see for example*, A. P. Blaustein & P. M. Blaustein, *eds.*, 3 CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES 101 (Dobbs Ferry, Oceana, 1988).

frontiers, either orally, in writing, or in print, in the form of art, or through any other media.<sup>13</sup> So that even if the guarantees of free speech, freedom of the press, and freedom of publication, incorporated in the Joint Declaration, the Basic Law of the HKSAR were to remain intact, unchanged and unmodified, it is asserted that the people of Hong Kong would still have only a truncated freedom, a limited protection of a one-way flow of information and ideas.<sup>14</sup>

- *Repeal or amendment of Hong Kong laws:*

It seems that it will not be long before the existing laws of Hong Kong are repealed or significantly amended. In January 1997, a subcommittee (the Legal Sub-Group) of the Preparatory Council meeting in Beijing examined all 624 Hong Kong laws, and recommended that 25 of them be repealed, in full or in part, including the rolling back of a number of laws guaranteeing Hong Kong citizens certain rights and freedoms.<sup>15</sup> Although the proposals are subject to approval by the National People's Congress, if passed they would, *inter alia*, repeal such legislation in the human rights area as portions of the Hong Kong Bill of Rights. Tung Chee-hwa, the Chief Executive-designate, has already defended the proposals, and the Provisional Legislature, which has already convened, is set to begin drafting legislation for Hong Kong.<sup>16</sup>

On the specific question of freedom of the press, Chinese Foreign Minister Qian Qichen said in October that Hong Kong people could not mock Chinese leaders, nor commemorate the June 4 Tiananmen massacre. Tung Chee-hwa, on the other hand, has said that both would be allowed--though only with the bounds of "the law." As that law will from July 1, 1997 be law made by a legislature appointed by Beijing, questions have been raised regarding what it will say about the wearing of masks caricaturing Chinese President Jiang Zemin, like those sported by Halloween revellers in recent years, or how it will determine the legality of the annual Tiananmen commemoration in Hong Kong.<sup>17</sup>

- *Changes in the structure of the judicial system:*

After the reversion of Hong Kong, there will be changes in the hierarchy of the courts, and appeals from the Court of Appeal to the Judicial Committee of the Privy Council in London will no longer be allowed. Instead, a Court of Final Appeal is to be created after July 1, 1997. It will become the highest appellate court for HKSAR cases. After negotiations spanning a period of several years, Great Britain and China finally reached agreement in June 1995 on the establishment of the Court

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<sup>13</sup> N. Jayawickrama, *Human Rights in the Draft Basic Law - A Critique*, 18, Pt. 3 HONG KONG LAW JOURNAL 377 [1988].

<sup>14</sup> *Id.* at 371.

<sup>15</sup> BUSINESS TIMES (Jan. 29, 1997), retrieved from the Curnws file of the Lexis-Nexis database.

<sup>16</sup> *Id.*

<sup>17</sup> B. Gilley, *Man on the Spot*, FAR EASTERN ECONOMIC REVIEW 15 (Dec. 19, 1996).

of Final Appeal. In July of the same year, the bill creating the Court of Final Appeal was passed in Hong Kong.

It has since been announced that March 1, 1997, has been set as the date of which London's Privy Council will cease to accept cases from Hong Kong. After the Court has been established, where the Privy Council in London or the Court of Appeal in Hong Kong had granted conditional, final, or special leave for appeal but has not heard the case, the appeal will be lodged with the Court of Final Appeal.<sup>18</sup>

- *Localization of the Hong Kong Bench*

About a quarter of the present higher court judges in Hong Kong, most of whom are expatriates, are due to retire soon. Four have indicated that they will quit, while eleven more are close to retirement; also, twelve magistrates' positions are vacant and five magistrates will reach early retirement age by the date of the takeover.<sup>19</sup> Those who are recruited to take their place may not have the benefit of experience. The Basic Law provides that HKSAR judges will be appointed by the Chief Executive "acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession, and other eminent persons."<sup>20</sup> Under the present system, the Governor delegates his power of appointment to the Chief Justice, who is Chairman of the Judicial Services Commission, an advisory body whose membership includes the Attorney General.

The Basic Law stipulates that the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the HKSAR are to be Chinese citizens who are "permanent residents of the Region with no right of abode in any foreign country."<sup>21</sup> This is qualified by another article which states that judges and other members of the judiciary of the HKSAR shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common-law jurisdictions.<sup>22</sup>

- *Use of Chinese as the language of the law and the courts*

Somewhat related to the issue outlined above, the composition of the Hong Kong judiciary, is the provision in the Basic Law that Chinese as well as English may be used as an official language in the government as well as in the legislature and the courts of the HKSAR.<sup>23</sup> The common-law

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<sup>18</sup> *Hong Kong Sets Cut-Off Date for Appeals to Privy Council in London*, Agence France Presse dispatch dated Jan. 15, 1997, retrieved from the Curnws file of the Lexis-Nexis database.

<sup>19</sup> *HK's Last Legal Year Under British Rule Begins Amid Exodus of Judges*, Agence France Press dispatch dated Jan. 13, 1997, retrieved from the News file of the Lexis-Nexis database.

<sup>20</sup> *Supra* note 1, art. 88, at 126.

<sup>21</sup> *Id.*, art. 90, at 127.

<sup>22</sup> *Id.* art. 92, at 128.

<sup>23</sup> *Id.* art. 9, at 87.

tradition in Hong Kong has of course been developed while using the medium of English, but since the vast majority of Hong Kong residents speak Cantonese, and less than half of them are bilingual, statutes must be translated into Chinese.<sup>24</sup> Some believe that, pushed to the extreme, the promotion of bilingualism may have a deleterious effect on Hong Kong's legal system and that the very foundation of the common law may become weakened.<sup>25</sup>

- *Loss of judicial independence*

One would hope that the HKSAR, vested as it is with legislative and judicial power, including the power of final adjudication, would be insulated from national law. But since state power in China is regarded as an indivisible whole, based on the same ideological foundation as law in the former Soviet Union and other countries in Eastern Europe, certain concepts can be ruled out. One scenario seen as possible is the rejection of judicial independence on the grounds that it is a fiction of *bourgeois law*, and espousal in its stead of the view that state power is an indivisible unity that can only be shared in work by the legislature, the executive, the procuracy, and courts, with none of these organs of state being vested with independent powers, but rather only exercising particular functions of state power. Judicial functions, then, would be exercised, not independently by individual judges, but through collective decision-making.<sup>26</sup>

- *Possible influence of socialist Chinese law on the HKSAR*

The Basic Law states that the judicial system previously practiced in Hong Kong is to be maintained except for those changes consequent upon the establishment of the Court of Final Appeal.<sup>27</sup>

It also provides that mainland legislation relating to defense and foreign affairs, and other mainland laws "relating to the realization of national unity and territorial integrity which are outside the scope of the high degree of autonomy of the HKSAR" will be applied to the HKSAR. Also, it should be kept in mind that the Basic Law itself was passed by the National People's Congress of the PRC, which can extend or restrict the application of the Chinese legal system to Hong Kong as it sees fit. The National People's Congress may also amend, or even repeal, the Basic Law itself.

Although the Preamble to the Basic Law mentions the principle of "one country, two systems," and vouchsafes that the socialist system and policies will not be practiced in Hong Kong,<sup>28</sup> the Standing Committee of the National People's Congress is invested with the power to interpret the Basic Law, in consultation with its Committee for the Basic Law of the HKSAR. As the ultimate interpreter

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<sup>24</sup> J. Karp, *Torting in Tongues: Translating Law into Chinese Proves a Massive Task*, FAR EASTERN ECONOMIC REVIEW 18 (July 8, 1993).

<sup>25</sup> *Id.*

<sup>26</sup> E. J. Epstein, *China and Hong Kong: Law Ideology, and the Future Interaction of the Legal Systems*, in R. Wacks, ed., THE FUTURE OF THE LAW IN HONG KONG 46 (Hong Kong, Oxford University Press, 1989).

<sup>27</sup> *Supra* note 1, art. 81, at 124-125.

<sup>28</sup> *Id.* at 84.

of the Basic Law, the Standing Committee may change the relationship between the Basic Law and English common law.

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