FALSE SECURITY

Hong Kong's national security laws pose a grave threat to freedom of expression

2003 ANNUAL REPORT

JOINT REPORT OF THE
HONG KONG JOURNALISTS ASSOCIATION
AND ARTICLE 19

JUNE 2003

Contents

Acknowledgements

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Research undertaken with the kind assistance of the School of Journalism and Communication of the Chinese University of Hong Kong

 ISBN 1 902598 60 1

Introduction

Hong Kong's political transition—from British colony to special administrative region of the People's Republic of China—while outwardly smooth, has seen several lamentable markers. As this year's annual report—the 11th joint report of the Hong Kong Journalists Association (HKJA) and ARTICLE 19—goes to press, we are readying ourselves for another; the likely passage, in mid-July, of laws to prohibit treason, sedition, secession, subversion and the theft of state secrets, as set down under article 23 of Hong Kong's constitution, the Basic Law.

Our 1993 inaugural report noted that "[T]he political nature of such offences will mean that legislation, even if there are checks and balances, must sit uncomfortably with the protection of certain rights, especially freedom of expression." The intervening years, indeed, have been a long and uncomfortable anticipation of legislation that we feared would mark the most serious assault on freedom of expression (and of assembly and association), and human rights generally, in Hong Kong's recent history. And so it is. The government's draft (blue) bill on article 23, now under consideration in the Legislative Council, seriously circumscribes, threatens and ultimately undermines the right to freedom of expression.

Article 23: the roots of autocratic rule

We are certainly not alone in this view. A chorus of groups—religious, legal, democratic, foreign (government and non-government)—see in this legislation the roots and mechanisms of autocratic rule, the signs that mainland legal concepts and political strategies are being transferred to the SAR, despite the "one country, two systems" formula. National security laws are, in all jurisdictions, and noticeably in China, the most frequently abused or misused to protect non-legitimate national security interests such as criticism of, or embarrassment to, the government.

Journalists, more than most, will find themselves at the sharp edge of article 23 legislation. In the wide language of sedition provisions, for example, or in the new offences relating to unauthorised disclosure of information, we will need a new set of sensitive antenna. Certainly the laws are an inducement to self-censorship; they may also irrevocably change the way we practice journalism in Hong Kong.

Article 23: utterly redundant, too

The HKJA and ARTICLE 19 have long argued that the proposed legislation is, in fact, redundant—that Hong Kong neither faces any national security threats nor poses any to the central government in Beijing, and that in any case existing legislation already provides explicit penalties for any actions against the state that threaten national security. For their part, the Hong Kong government argues it is bound under article 23 of the Basic Law to enact national security legislation.

Given therefore that a new law is inevitable, we have urged the administration at the very least to guarantee that international human rights standards—in the form of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information—be written into such legislation to ensure the narrowest possible restrictions on individual freedoms and the least possible ambiguity in the interpretation of the law. This has been to no avail.

A sword indeed hangs over our heads, as the secretary for justice inadvertently admitted. While there is still time, at this late hour, to build safeguards into the national security bill, this seems unlikely. Yet failure to do so will have serious consequences for Hong Kong—it will reinforce a culture of government secrecy and subservience to Beijing; it will breed greater self-censorship; and it will heighten considerably the threat that freedom of expression be curtailed, and that repression take its place. Much is at stake, not least Hong Kong's role as a vital regional information centre, and its aspirations to be a world-class city.

Mak Yin-ting, Chairperson, Hong Kong Journalists Association

Andrew Puddephatt, Executive Director, ARTICLE 19

Conclusions and recommendations

From a human rights, and most especially from a freedom of expression perspective, the past year under review has been dominated by one issue—the long-awaited tabling by the Hong Kong government of national security legislation, which is required under article 23 of the Basic Law, the Hong Kong constitution. Article 23 requires that laws be enacted to prohibit, *inter alia*, any act of treason, secession, sedition, subversion or theft of state secrets. This is despite existing legislation—notably the Official Secrets, Crimes, Criminal Procedure, Public Order, and Societies ordinances—which together provides a powerful (in our view too powerful) deterrent for any actions against the state that threaten national security.

Five years to begin the process...

The HKJA and ARTICLE 19 have for eleven years now, in our annual reports and elsewhere, been campaigning against this dangerous and threatening legislation—fearing the effect it will undoubtedly have on freedom of expression and media freedom. Last year, as we noted in our 2002 annual report, it had become clear that the Hong Kong government would soon move on its constitutional obligation to enact article 23 legislation. Senior mainland officials, as well as (certain) local legislators, had commented publicly that action was long overdue. And in a curious twist of logic, the government itself argued that since the Hong Kong SAR was five years into its new administration, and the situation was entirely calm, that this therefore was an appropriate time to introduce such legislation.

A consultation document was published in September 2002, followed not by a white bill (for which there had been widespread calls), but by a blue bill gazetted in the Legislative Council in February 2003. A white bill would have allowed a further stage of public consultation on the draft legal language. This would have been appropriate given the crucial nature of the legislation: indeed, the National Security (Legislative Provisions) Bill is one of the most important—if not *the* most important—pieces of legislation to be considered by Hong Kong's legislators.

...only to be undertaken in unseemly haste

The government's refusal to listen to very reasonable public demands has been fuelled probably by a desire to push through the law as quickly as possible, whether to minimise local dissent, contain international criticism or appease an increasingly impatient Beijing, or indeed all three. This unseemly haste, given the profound importance of such legislation to Hong Kong's existing freedoms and rights, means the bill has failed to receive the depth of public and legislative scrutiny it deserves. This is borne out by the last-minute cosmetic amendments put forward by the government in June 2003.

Despite widespread criticism of the consultation document, and particularly of the legal arguments and principles intimated therein, the final blue bill failed comprehensively to address the public's concerns about the excessive restrictions and wide (and often ambiguous) language of the proposed legislation, and the potential for abuse of such laws by the authorities. As Frances D'Souza, a former executive director of ARTICLE 19 and a consultant to the HKJA on article 23 laws, noted: "These concerns arise from the fact that national security laws are, in all jurisdictions, the most frequently abused and/or misused to protect non-legitimate national security interests such as criticism of, or embarrassment to, the government."

The government has confirmed that it will push for a vote before the end of the current Legislative Council session in July 2003. This is deeply regrettable. The HKJA and ARTICLE 19 have long argued that the proposed legislation is, in fact, redundant—that there is no pressing need for such laws: Hong Kong neither faces any national security threats nor poses any to the central government in Beijing, and in any case existing legislation (as we note above) already provides explicit penalties for genuine threats to national security. The Hong Kong government, on the other hand, argues it is bound under article 23 of the Basic Law to enact national security laws, and has reiterated time and again its determination to press ahead, and do so quickly.

This annual report focuses almost entirely on article 23 legislation, its passage, and the implications we believe it will have on freedom of expression, and in particular on the media and on journalists. We are particularly concerned about the offences of sedition and theft of state secrets, as new provisions on these laws pose the greatest threat to freedom of expression. However, other provisions are of serious concern to the HKJA and ARTICLE 19, including those relating to proscription, search and seizure, and the abolition of time limits to prosecutions.

A last-minute delay? No way

Many of the provisions set out in the bill are highly contentious, and still in need of thorough discussion and scrutiny. The HKJA and ARTICLE 19 thus urge the government and the Legislative Council bills committee, even at this eleventh hour, to allow sufficient time for this process to work itself through, without undue pressures. This will help ensure that the National Security (Legislative Provisions) Bill gives a greater degree of protection to the rights and freedoms of Hong Kong citizens, and that there are no margins of appreciation or ambiguities in the interpretation of national security laws that can be exploited for political purposes. Any attempt to rush the bill through the legislature will reflect badly on the government and its stated desire to protect individual rights and freedoms.

With this in mind, the HKJA and ARTICLE 19 strongly urge the government and the legislature to adopt the following recommendations:

Sedition law: no place in a modern society

1.1 Sedition. Delete all sedition offences, as they are archaic in nature and unused in most developed democracies. The offence of handling seditious publications is particularly abhorrent, given its potentially direct impact on the media industry and media workers. Its wording is sufficiently vague as to encourage self-censorship, not least among printers and retailers concerned that they may be handling seditious material.

1.2 If the sedition offences are to remain on the statute, then they must include principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information to make it clear that a person "has the intention to commit an offence only if, at the time of the alleged offence, his intention was to incite any other person to violence, the occurrence of which was likely or imminent, and there was a direct and immediate connection between the acts and such occurrence or likelihood of occurrence".

1.3 That a new provision be added, in line with principle 8 of the Johannesburg Principles, that "expression shall not be punished merely because it transmits information issued by or about an organisation that the government has declared threatens national security or a related interest."

1.4 That the harsh penalties set down for sedition be reduced to a reasonable level.

1.5 That a six-month time limit be restored for the offences of sedition and handling seditious publications, to ensure that an individual or group cannot be prosecuted for several years after an alleged offence has taken place.

2.1 **Theft of state secrets**. Serious consideration should be given either to scrapping or to narrowing the new offence of making an unauthorised disclosure of information related to Hong Kong affairs, which are within the responsibility of the Central Authorities under the Basic Law. The scope and language of this new clause is both wide and imprecise, and would subject journalists, for example, to prosecution for disclosure of information that is of legitimate concern to citizens of Hong Kong.

2.2 That serious consideration be given to scrapping the new offence of unauthorised disclosure of information obtained by "illegal access". This offence raises the possibility that someone could be prosecuted solely for possessing so-called unauthorised information, regardless of whether the information itself poses a threat to national security. It also places the burden of proof on journalists who come across such information; a journalist could be accused of obtaining information through

"illegal access" unless it originates through official channels, and thus may refrain from publishing the material.

2.3 That, in order to protect freedom of information and media freedom, a public interest defence be incorporated in the Official Secrets Ordinance along the following lines:
"It shall be a defence for a person charged with an offence under this Ordinance to prove that the disclosure or retention of the information, document or other article was in the public interest."

2.4 That, in order to protect freedom of information and media freedom, a prior publication defence be incorporated in the ordinance along the following lines:
"A person does not commit an offence under this Ordinance in respect of information which before the time of the alleged offence had become available to the public or a section of the public whether in Hong Kong or elsewhere."

A counterweight is needed

2.5 That a **Freedom of Information Ordinance** be enacted as soon as possible, to act as a counterweight to the onerous provisions of the Official Secrets Ordinance. Such legislation should be based on the principles of maximum disclosure, limited and narrowly drawn exemptions, and an effective appeal mechanism.

3.1 **Entry, search and seizure**. That proposals to give an assistant commissioner of police emergency entry, search and seizure powers, without recourse to the courts, should be scrapped. The present system of a court warrant is the proper safeguard.

4.1 **Proscription**. Serious consideration should be given to scrapping or amending the proposal to prohibit organisations in Hong Kong which are subordinate to banned mainland groups, given that the government could become hostage to mainland national security concepts in dealing with groups which it considers to be troublesome. Further, that provisions allowing appeal hearings to be closed to sections of the public, including the media, the appellant and his or her legal representative, be deleted as they are contrary to the principle of open justice.

SECTION 1

The passage of national security laws

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 (in Beijing), or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region (Hong Kong), and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies. Article 23 of the Basic Law

This section focuses on the chronology of the passage of article 23 laws; section 2 analyses their implications

The long wait for legislation under article 23 of the Basic Law ended in February 2003 when the government tabled the National Security (Legislative Provisions) Bill in the Legislative Council. This so-called blue bill followed the earlier publication, in September 2002, of a consultation paper on the controversial issue, followed itself by a three-month consultation period during which there was intense public debate on the proposed article 23 legislation, and through street marches and rallies considerable expression of dissent.

The warning signs were there in early 2002. Our annual report that year pointed to signals that the pressure was mounting on the Hong Kong government to enact national security legislation, as it is required to do under article 23 of the Basic Law, the Hong Kong constitution. In February last year, the vice-chairman of the Legislative Affairs Commission of the Standing Committee of China's National People's Congress (NPC), Qiao Xiaoyang, said publicly that the question of enacting national security laws should be dealt with as soon as possible. Local newspapers also reported that Hong Kong's secretary for justice, Elsie Leung, had discussed the issue—apparently for the first time—with the then chairman of the NPC, Li Peng.

Never itself comfortable with this issue, the Hong Kong government's response to such reports was standard—it was researching the laws and law reform proposals of other jurisdictions, as well as relevant human rights principles, and that there was no firm timetable for legislation. Yet this could not mask the fact that the SAR administration was feeling the pressure from the central government—five years after the 1997 handover from British rule—to enact security laws.

A "consensus" had been reached in Beijing

Unsurprisingly, of course, the two governments had already been talking to each other. The secretary for justice, Elsie Leung, admitted in October 2002 that consultations had taken place with Chinese officials. She told local newspaper executives "[T]he fact we had the opportunity to explain to the CPG [Central People's Government] the origin of the proposals, the aspirations of Hong Kong society, the laws of HKSAR [Hong Kong Special Administrative Region] and relevant international laws is exactly the reason why we were able to come to consensus with the CPG. It was not because we had to stand up against Beijing. Moreover, we consulted the CPG only on the major principles, not the detailed legal proposals." Ms Leung did not elaborate on what she meant by "major principles".

These "major principles", we assume, found a measure of expression in the publication on September 24th 2002 of a consultation paper setting out the government's proposals for implementing article 23 of the Basic Law. The public and interested organisations were given until Christmas Eve to submit their views.

THE GOVERNMENT'S PROPOSALS

The 74-page consultation document sets out the government's proposals for the seven offences under article 23 of the Basic Law—among them, treason, secession, sedition,

subversion and the theft of state secrets—as well as related issues such as investigation powers and procedural and miscellaneous matters including time limits and penalties.

The proposals likely to have the most direct impact on freedom of expression are those relating to sedition and the theft of state secrets, although all other offences would certainly have an important bearing on this crucial right in one way or another. The proposals are listed below:

1. Treason. The government argued that it was necessary to introduce a more tightly defined offence than that in the current version of the Crimes Ordinance. It should be an offence, the consultation paper said, for anyone to levy war by joining forces with a foreigner with the intent to overthrow the PRCG (the government of the People's Republic of China); compel the PRCG by force or constraint to change its policies or measures; put any force or constraint upon the PRCG; or intimidate or overawe the PRCG.

Taiwan, Tibet—ever such sensitive issues

2. Secession. This is a completely new offence, one which clearly answers China's sensitivities about the Taiwan question or calls for independence for regions such as Tibet or Xinjiang. For the central government, Taiwan's *de facto* independence is a particularly sensitive issue.

The consultation document proposed that legislation should outlaw any move to withdraw a part of the PRC from its sovereignty, or resist the PRC in its exercise of sovereignty over a part of China, by levying war, use of force, threat of force or by other serious unlawful means.

The broad term "serious unlawful means" was defined as serious violence against a person, serious damage to property, endangering a person's life, creating a serious risk to the health or safety of the public, serious interference or serious disruption of an electronic system, or serious interference or serious disruption of an essential service, facility or system.

3. Sedition. Like treason, this offence already exists in the Crimes Ordinance. The consultation paper instead proposed a new offence of sedition (the government claimed a more tightly defined offence), that is when someone incites others to commit the substantive offences of treason, secession or subversion, or to cause violence or public disorder which seriously endangers the stability of the Chinese state or Hong Kong.

It also proposed a further offence of dealing with seditious publications. This would cover the whole range of publishing activities—printing, publishing, selling, offering for sale, distributing, displaying or reproducing, and importing and exporting. An element of knowledge and reasonable suspicion would be incorporated in the offence. A third offence would involve mere possession of seditious publications.

Hong Kong must not be a subversive base

4. Subversion. This is another new offence—one which was inserted into the final draft of the Basic Law in the wake of the 1989 pro-democracy protests. Unlike treason, which focuses on an external threat, subversion deals with threats from within the nation.

The government proposed to make it an offence for an individual or group to intimidate the PRCG, or to overthrow the PRCG or disestablish the basic system of the state as established by the constitution by levying war, use of force, threat of force, or other serious unlawful means.

5. Theft of state secrets. The proposals in the consultation document involve amendments to the Official Secrets Ordinance, which was enacted in Hong Kong in the run-up to the 1997 handover, and which is based on Britain's 1989 Official Secrets Act. This law deals with spying and the unauthorised disclosure of information in four major areas—security, defence, international relations, and the commission of offences and criminal investigations.

The government proposed two new offences, including the addition of a new category of protected information "relating to relations between the central authorities of the PRC and the HKSAR".

The other new offence deals with unauthorised and damaging disclosures of protected information that was obtained (directly or indirectly) by unauthorised access to it. The government argued that this would close a loophole, whereby, for example, a hacker may sell stolen information to a publisher, who may then publish it.

Taking aim at the Falun Gong, and the like?

6. Foreign political organisations. Perhaps one of the most contentious of the consultation proposals, the government sought to give the secretary for security the power to outlaw a Hong Kong organisation if he or she believed this was necessary in the interests of national security, public safety or public order. The government proposed in particular that an organisation could be banned if it was affiliated with a mainland organisation that had been proscribed on the mainland on the grounds that it endangered national security.

The Hong Kong government also should defer to Beijing on the question of whether a mainland organisation endangered national security.

7. Investigation powers. Here it was proposed to give the police emergency entry, search and seizure powers for most of the above national security offences—including sedition and dealing with seditious publications (although not for theft of state secrets). Such powers would be enforced without a court warrant.

8. Time limits and penalties. The government proposed to scrap time limits for prosecutions for various national security offences. At present, a prosecution must be brought within three years of an alleged offence for treason, and six months for sedition.

The government also proposed to increase penalties in several areas. For example, a person or group convicted of sedition or dealing with seditious publications would face a maximum jail term of seven years. At the moment, the maximum term is two years for a first offence and three years for a subsequent offence. The consultation document also proposed a tougher penalty for the unauthorised disclosure of protected information. The maximum sentence would rise from two to five years on conviction.

STREET BATTLES AND THE NUMBERS GAME

No white bill: no full debate

Initially, the reaction from the public and from interest groups was subdued. The government had been reassuring people that its proposals would safeguard freedom of expression and associated rights. But as the proposals were examined in greater detail, it became clear that the consultation document contained serious shortcomings. This was compounded by the fact that the consultation document did not offer the legal wording of the offences, prompting strong calls for a so-called "white bill" to be issued for further consultation before a formal "blue bill" was tabled in the Legislative Council.

Concerned groups prepared submissions to both the government and the Legislative Council, which invited views on the consultation document. Many seminars were held during the three-month consultation period, attended by government officials and critics. There was also a flurry of newspaper articles and editorials on the issue. However, not all comments came from the critics. Pro-Beijing groups rallied round in an effort to counter the view of critics that there was no pressing national security need for such laws; they argued that it was a constitutional duty under the Basic Law for Hong Kong to enact national security legislation.

The high point of this process was the staging of public rallies on consecutive Sundays—the first by critics and the second by supporters of the proposed national security legislation. The first—on December 15th—involved a march from Victoria Park to the government headquarters in the central business district. Taking part were activists—some indeed from groups newly formed to address this specific issue (the Civil Human Rights Front and the

Article 23 Concern Group)—members of religious groups and many ordinary people who were worried about the impact of the new legislation. The organisers put the number of participants at more than 60,000—twelve times more than originally expected.

On the following day, pro-Beijing newspapers criticised the organisers of the march. The *China Daily* alleged that "most of the participants were incited and misled by a handful of demagogues.... The anti-legislation protest was on all counts a muddled farce." *Wen Wei Po* said it "lamented the irrational behaviour of opposing for the sake of opposing." On the following Sunday, pro-Beijing and business groups organised their own counter-rally supporting the proposed legislation. Their organisers claimed that 40,000 attended.

On the whole government officials in Beijing would not be drawn into the debate. However, one noteworthy intervention in October 2002 by the then vice-premier, Qian Qichen (at the time responsible for Hong Kong matters) claimed there were more supporters than opponents of legislation. He also questioned whether some people had "devils in their hearts". This prompted a strong response from critics of the article 23 proposals. The head of Hong Kong's Catholic Church, Bishop Joseph Zen, called the remarks "very inappropriate". Another critic, then Bar Association chairman Alan Leong, called the remarks "unjustified".

THE HKJA'S RESPONSE

No pressing need...

In its own submission to the government, the HKJA first argued that there was no pressing need for the government to legislate on national security offences: Hong Kong neither faces any national security threats nor poses any to the central government in Beijing—indeed no such security threat to Beijing had arisen in the five years since the handover.

Recognising, however, that the government was determined to press ahead with article 23 legislation (arguing it had a constitutional obligation to do so), the HKJA submission addressed itself to the substantive issues in the consultation paper. To begin with, we believed, there was a real need for a further consultation exercise, this second round (a "white paper") to be based on the proposed wording of the laws, which had yet to be released.

...but many pressing concerns

The HKJA made clear, too, its concerns about almost all the principle elements and proposed offences in the proposed new legislation—on sedition and the theft of state secrets, which strike at the heart of media freedom; on the wide language used in the new offences of secession and subversion; on the proscription of local organisations which may fall foul of Beijing; on extensive and excessive powers of investigation for most national security offences; on the harsher regime of penalties accompanying some offences; and on the lifting of time limits on prosecutions, which could leave journalists at the mercy of the authorities years after an alleged offence had taken place.

Bring in the Jo'burg Principles, please

The HKJA argued in particular for the scrapping of the offence of sedition, quoting just such a recommendation by law reform commissions in England and Canada, as well as comments by leading British barristers that the offence now served no purpose in criminal law. At the very least, the association argued, sufficient safeguards should be incorporated in the sedition offence, in the form of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information; these internationally accepted guidelines were drawn up by a group of legal experts in October 1995 to ensure proper protection for freedom of expression in the context of the use of national security legislation. As a broad guideline, the HKJA called for the adoption of Principle 6, which states that expression can be punished only if there is an intention to incite violence, a strong likelihood of violence and a direct and immediate connection between the expression and the risk of violence. This is similar to the concept of "clear and present danger".

The government argued against such a provision, saying its incorporation into article 23 legislation would not allow adequate protection of national security interests. The HKJA countered that its inclusion was all the more important given the significant impact of the government's proposals on freedom of expression. We pointed out, too, that Hong Kong

suffered a democratic deficit, which added another layer of difficulty in guaranteeing the protection of human rights.

On the theft of state secrets, the HKJA called on the government to scrap its proposals for new offences, or at the very least to incorporate public interest and prior publication defences, again to comply with the Johannesburg Principles. The association said it should be legitimate to publish information or documents where public interest clearly outweighed harm. This should include instances where such information indicated the existence of crime, fraud, unlawful activity, abuse of authority, and neglect or serious misconduct by an official. As a separate measure, and to counter the potentially dangerous effects of the Official Secrets Ordinance, the HKJA also called for the enactment of freedom of information legislation.

The HKJA's response also addressed a number of other issues in the consultation paper. Notably we called on the government to scrap emergency police powers of search and seizure, and to drop proposals to do away with prosecution time limits and to increase penalties. We expressed concern, too, that the proposal to ban Hong Kong organisations connected to mainland Chinese groups could blur the distinction between the vastly different Hong Kong and Chinese legal systems.

NO MEANINGFUL CONCESSIONS

By the close of the consultation period, the government had received a record 97,097 submissions from groups and individuals. Officials subdivided the submissions into four categories: 81,027 standard letters containing 85,987 signatures; 9,846 submissions in the form of signature forms (involving 246,132 signatures); 5,157 individual submissions involving 8,394 signatures; and 1,067 submissions from organisations. The government was later to claim there were more than 100,000 submissions—although no breakdown was given.

Shamefully false claims

Indeed, its analysis of the responses to the consultation document would prove particularly contentious. Most of the submissions from groups and individuals (plus the standard letters) backed the proposed article 23 legislation, the government claimed, whereas most of those who signed signature forms opposed the new laws. Some groups and individuals which understood they had opposed the legislation found themselves, according to the official tally, in favour of the new law. Other groups, including the HKJA, had in the government's estimation not given explicit views supporting or opposing the legislation. This clearly was a deliberate misrepresentation.

There were equally confusing statistics on whether there was support for the publication of a white bill or whether respondents wished to move straight to the formal legislative process. This contrasted with the results of a poll conducted by the Democratic Party in October 2002, which found that an emphatic 70% of respondents wanted a white bill.

The government anyway simply ignored such concerns. It refused to publish a white bill, instead opting to press ahead with legislation. There were a few cosmetic concessions or, as the government termed them, "clarifications". Two relatively minor offences—possession of seditious publications and misprision of treason (failing to tell the authorities that an individual has committed an offence of treason)—for example, were struck off.

The definition of the state secrets offences was also tightened. First, information relating to relations between Beijing and Hong Kong would be limited to that within the responsibility of the Central Authorities under the Basic Law. Disclosure would also have to endanger or be likely to endanger national security, which is defined as the safeguarding of the territorial integrity and the independence of China. An accused person would also be able to argue in court that he or she did not know that disclosure would be damaging.

Second, the bill would limit prosecutions for unauthorised access to specified breaches of the law, namely theft, robbery, burglary, hacking and bribery. This would become known as "illegal access". A lack of knowledge on the part of the accused about the protected nature of the information or the fact that it had been stolen is provided as a defence.

A public interest defence, however, would not be part of the Official Secrets Ordinance—despite earlier indications from officials that such a move might be considered. The secretary for security, Regina Ip, said in November 2002 that the government could consider such a defence, although she also claimed that "there have been abuses over the use of public interest defence by some publications." The government later argued that such a defence was unnecessary because a judge would anyway take it into account in considering theft of state secrets cases. Also omitted from the draft law was a prior publication defence.

Beijing must have set the bottom line

On the proscription of Hong Kong organisations with links to banned groups in mainland China, the government's "clarifications" proposed that the local group should be "subordinate" to a mainland organisation, and not just connected with it. Further, a mainland group must be banned by "open decree" on national security grounds.

The government also proposed to tighten definitions under the treason, secession and sedition offences; to stipulate that the search for and seizure of journalistic material would be governed by existing procedures in the Interpretation and General Clauses Ordinance; and to allow those facing trial for treason, secession, sedition, subversion or unlawful disclosure of information to opt for a jury trial.

The government's many critics on the article 23 issue were far from happy with the concessions or "clarifications". In a letter to the secretary for security, the HKJA deplored the administration's failure to incorporate adequate safeguards, including principle 6 of the Johannesburg Principles and public interest and prior publication defences. It also asked for further clarification of offences, including those relating to unauthorised access to information, and made a final call for the publication of a white bill—only to be rejected several days later.

THE BLUE BILL

Minor tinkering: a little give, some take

On February 26th 2003 the government tabled the National Security (Legislative Provisions) Bill in the Legislative Council. The provisions of the bill were broadly similar to those set out in the government's "clarifications". There were some additions, however, including stipulations that the interpretation, application and enforcement of provisions implementing article 23 must be consistent with article 39 of the Basic Law, which enshrines the International Covenant on Civil and Political Rights (ICCPR) in Hong Kong's constitution. A provision allowing an individual to appeal to the Court of First Instance against an order banning a Hong Kong organisation was also included. Yet, at the same time, provisions are made too for the public, the appellant and his or her lawyer to be excluded from the hearing if information to be given to the court might prejudice national security.

The secretary for security, Regina Ip, told the Legislative Council that the timetable for passage of the bill would be in its hands. This has clearly not been the case. Indeed, previously officials had indicated that they wanted the legislation to be passed by the end of the current legislative session—that is by mid-July 2003—and that this is the preferred, and current, timetable. The HKJA, in its submission to the Legislative Council, nevertheless argued that sufficient time should be given to deliberations on the bill, to try to ensure that the law did not impose excessive restrictions on the media and journalists.

The HKJA also reiterated its call for safeguards to be incorporated in the bill. These should include a "clear and present danger" provision in the section dealing with sedition, as well as public interest and prior publication defences in the Official Secrets Ordinance. On public interest, we pointed out that this concept has been used in other jurisdictions, noting particularly the Public Interest Disclosure Act 1998 and the Freedom of Information Act 2000 in the UK.

The HKJA also argued that provisions pointing to the need to comply with article 39 of the Basic Law would not necessarily provide adequate protection given both that there is considerable latitude for interpretation of the ICCPR, and that the government has ignored the UN Human Rights Committee when the latter body has pointed to failures by the Hong Kong

administration to adhere to specific ICCPR obligations, as the UN body did most recently in November 1999.

The HKJA was not alone among journalist organisations in Hong Kong to express reservations and concerns about the blue bill. A survey conducted by the News Executives Association in April 2003 revealed that of 400 respondents some 80% thought the bill was problematic or unacceptable and that it would affect freedom of speech. Some 80%, too, found it unacceptable for the government to exclude public interest and prior publication defences or to allow the prosecution of individuals for sedition, irrespective of the effect of what was said or published.

Foreign governments would also not remain silent about the bill. The US, UK and the European Union all released statements expressing various degrees of concern. The EU, for example, was worried that "the broad definition of the offence of sedition could jeopardise the rights of free speech, freedom of association and freedom of assembly in Hong Kong." It also expressed concern that the proposed power to ban Hong Kong organisations "would blur the line between the Hong Kong and mainland legal systems and could undermine Hong Kong's autonomy."

The "farce" of public consultation

The Legislative Council set up a bills committee in March 2003, comprising a record 50 councillors. The committee immediately courted controversy following the election of government supporters to the vital positions of chair and deputy chair; traditionally, if the chair comes from the pro-government camp, then the deputy position goes to a legislator from the opposition camp. Further controversy arose after the bills committee decided to hold just two meetings to hear public views. Under pressure, it allowed two more sessions—attracting more than 50 mainly pro-democracy organisations. Each group was given just five minutes to present its case—prompting a former chairman of the Bar Association, Ronny Tong, to call the process "an absolute farce".

Critics, indeed, argue that the bills committee is simply going through the motions in considering the bill; after all, the government and its supporters know that they have sufficient votes to endorse the draft law. This was borne out when the pro-democracy camp brought forward a motion condemning the deliberately obfuscating manner in which the government had compiled its compendium of public submissions; the motion was rejected by 35 votes to 22—reflecting the split between pro-government and pro-democracy members.

There was also not the same intense public scrutiny that was evident in the latter part of 2002 over the consultation document, because of concern over the outbreak in March of severe acute respiratory syndrome (SARS). Coverage of the debate was relegated to inside pages of newspapers, and was at times ignored altogether by the electronic media, as interest shifted to the health crisis. This prompted a Chinese University of Hong Kong law professor, Michael Davis, to call for debate to be deferred until the SARS crisis had receded. The solicitor-general, Robert Allcock, turned down the request.

THE END GAME

A few last-minute, cosmetic changes

At the eleventh hour, in June 2003, the government published 12 amendments to the national security bill. The most significant concerned the offences of sedition and handling seditious publications. The government strengthened the intent element in the offence, and stated that "the nature of the incitement and the circumstances in which the incitement is made" must be such "that another person is likely to be induced" to commit treason, subversion or secession, or to engage in violent public disorder. The amendment also imposed a three-year time limit on prosecutions for the handling of seditious publications, but not for the actual offence of sedition. This time limit falls far short of the six months currently stipulated for the offence of sedition in the Crimes Ordinance.

In other changes, the government proposed that the interpretation, application and enforcement of relevant provisions should be made in accordance with chapter 3 of the Basic Law, and not just the constitution's article 39. Chapter 3 deals broadly with the rights and obligations of Hong Kong residents, whereas article 39 specifically enshrines the ICCPR.

On emergency entry, search and seizure, the government proposed that authorisation for such action (without a court warrant) has to come from an assistant police commissioner, and not as originally intended a chief superintendent, who is of a lower rank.

On the banning of local organisations, the government's latest proposal would allow a prosecution for an act carried out only after a group was proscribed. Further, the power to make court regulations for an appeal against a ban was transferred from the chief justice to the secretary for security. The Legislative Council would have the power to vet the regulations.

A better "balance"? Certainly not

The government argued that these last-minute changes would strike a balance between the need to protect national security and safeguard human rights. But pro-democracy members of the Legislative Council called them "purely cosmetic". Indeed, the amendments fail to bring about the kind of changes needed to provide effective protection for freedom of expression and other rights. While the change to the sedition offence adds an element of "intention", it fails to provide the safeguards set out in principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. The government also once again rejected the HKJA's calls for public interest and prior publication defences for the Official Secrets Ordinance.

Indeed, officials made it clear that there would not be further changes of substance. The solicitor-general, Robert Allcock, told the Legislative Council: "There may be some other minor fine-tuning, but not really of any policy significance." Officials also made it clear that they wanted the bill to be endorsed within the current legislative year—paving the way for a vote at the final meeting of the Legislative Council starting on July 9th.

SECTION 2

The implications of national security laws

The proverbial sword...

"A sword has in fact been hanging over your heads. Yet nobody has ever bothered to find out what it looks like. Our duty is to make you understand this sword has nothing to do with you, but that you need to know about it, i.e., to know the scope of the law." These were the words of the secretary for justice, Elsie Leung, soon after the Hong Kong government published its consultation document on proposals to implement article 23 of the Basic Law.

...of which (Ms Leung) we've long been aware

This frank analogy of a sword hanging over the heads of Hong Kong journalists and media outlets caused an immediate uproar. Yet this remark is far from accurate. To begin with, the HKJA and others groups have always known about this sword, and indeed have been campaigning for years to repeal laws which pose severe threats to freedom of expression. Moreover, the current article 23 legislative process goes far beyond a familiarisation exercise. It has revived old fears and introduced new ones—all with the potential of producing a harmful and chilling effect on freedom of expression.

SEDITION OFFENCES SET TO CHILL FREEDOMS

Among the various proposals for legislation, the HKJA is particularly concerned about offences relating to sedition and theft of state secrets. (Other proposed offences *inter alia* of subversion and secession, which have freedom of expression implications of their own, and which may be linked closely to sedition offences, are also of grave concern to the HKJA and ARTICLE 19. However, we chose here to focus mainly on sedition and theft of state secrets offences which are of direct and immediate concern to journalists.)

An element of intention, certainly, yes, but...

Clause 6 of the National Security (Legislative Provisions) Bill introduces two new offences—sedition and the handling of seditious publications. A new section 9A of the Crimes Ordinance defines sedition as inciting others: a) to commit treason, subversion or secession; or b) to engage, in Hong Kong or elsewhere, in violent public disorder that would seriously endanger the stability of the People's Republic of China (PRC). A last-minute amendment proposed in June 2003 added an element of intention to the offence and stipulated that "the nature of the incitement and the circumstances in which the incitement is made" must be such that "another person is likely to be induced" to commit treason, subversion or secession or to engage in violent public disorder.

A new section 9C stipulates the offence of handling seditious publications. A person who publishes, sells, offers for sale, distributes, displays, prints, reproduces, imports or exports any seditious publication with the intent to incite others, by means of the publication, to commit treason, subversion or secession is guilty of an offence. "Seditious publication" is defined as a publication that is likely to induce a person to commit treason, subversion or secession.

The two new offences will replace the existing sections 9 and 10 of the Crimes Ordinance. Section 9 defines a "seditious intention" in an extremely broad manner, which includes "an intention to raise discontent or disaffection among Her Majesty's subjects or inhabitants of Hong Kong", or "to counsel disobedience to law or to any lawful order".

The consultation document proposed a more focused offence of sedition. The bill itself has narrowed the offence further, by dropping the phrase "stability of the HKSAR". Concessions have also been made in the offence of handling seditious publications. First, possession of seditious publications will no longer be an offence. Second, a requirement of intent to incite others has been added. Government officials repeatedly maintained that these new provisions were narrower in scope and would only be applicable to serious cases.

But the reality is that these amendments and the accompanying assurances cannot allay fears among journalists and others concerned about the right to freedom of expression. To begin with, the proposed penalties are much harsher than the existing ones. Under the current Crimes Ordinance, a conviction for a sedition-related offence attracts at most imprisonment for three

years and a fine of HK$5,000. There is also a six-month time limit for prosecutions to be initiated.

There'll be heavy punishments

Under the bill, by contrast, a conviction for inciting others to commit treason, subversion or secession can attract a life sentence, while an individual can be jailed for up to seven years for inciting others to violent public disorder that would seriously endanger the stability of the PRC. A person convicted of handling seditious publications is liable to a fine of HK$500,000 and to imprisonment for seven years. The bill also removes the prosecution time limit of six months, though the latest amendments in June 2003 have reimposed a limit. This was set at three years, far longer than the six months in the current Crimes Ordinance; indeed it allows the authorities to take action long after an alleged offence has taken place.

A closer look at the two proposed offences causes further alarm. Several features are noteworthy. First, the offences use vague and ambiguous terms such as "violent public disorder" and "stability". The bill provides no clarification of what such terms mean. Offences of treason, subversion and secession are also defined in broad and vague terms. Subversion, for instance, includes the concepts of disestablishing the basic system of the PRC or intimidating the Central People's Government by using serious criminal means that seriously endanger the stability of the PRC. Again no definition is given for the terms "disestablish" or "intimidate". The phrase "serious criminal means", though defined, covers a wide variety of activities.

Such vague and ill-defined words and phrases have made the proposed offences of sedition and handling seditious publications all-encompassing. They fail to meet the basic requirements of criminal legislation—that provisions must be narrowly and precisely drawn so that members of the public can reasonably foresee which activities will be punished by law. Instead, the wording used in the bill would allow wide latitude in any future interpretation of what constitutes the offences and whether certain acts will be illegal or not.

More importantly, such wording carries heavy political overtones. It can readily be used to criminalise politically sensitive speeches and expression. This is especially worrying as the Hong Kong government has demonstrated a tendency to overemphasise national security needs throughout the article 23 process. In the consultation document, it maintains that the "fundamental national security interests of the state and the stability of the state may sometimes be seriously endangered by verbal or written communications, including those conveyed electronically."

This mentality has led to over-legislation and the introduction of all-encompassing offences. There exists considerable potential for abuse and the danger that the authorities might easily resort to prosecution action under the pretext of "protecting national security and maintaining stability of the state".

Be careful what you say about China

Another alarming aspect of the proposed sedition offences is that they have heightened enormously the risks inherent in making speeches in Hong Kong against the PRC. Previously, if a person made any speeches against the PRC, be it an incitement to treason, subversion, secession or violent public disorder, then he would be in immediate danger only if he was in mainland China at the time, or if he crossed the border into the mainland after making the speech.

Since the handover, the Hong Kong authorities have ignored any incitement against mainland China. This is despite the fact that sections 9 and 10 of the Crimes Ordinance may well have been applicable to such speeches since 1997. Most people would regard such speeches to be protected under the concept of "one country, two systems". Yet the two new sedition offences have been worded in such a way that they solely target speeches that threaten the PRC. They would increase considerably the likelihood that such speeches would attract prosecution action, thereby turning "one country, two systems" into "one country, one system" as it applies to freedom of expression. This process will be exacerbated by the extension of the prosecution time limit for the sedition offence, and the imposition of much harsher penalties.

Journalists have expressed special concern about the new offence of handling seditious publications. Any reporting, publishing, printing or distribution of speeches, comments or other forms of expression would land media workers in trouble if the expression was deemed by the

authorities to be seditious. Furthermore, with an intent element added, the new offence of handling seditious publications as stipulated in the new section 9C would become redundant and could be subsumed under the more serious offence of sedition in the new section 9A.

It is worth noting that the export of seditious publications, other than through the post, is not an offence under existing laws. Those who export seditious publications to China, personally or through the Internet, can only now face prosecution by the Chinese authorities. In enacting a new section 9C, however, the Hong Kong government will adopt a new role of halting the export of seditious publications to China, and could even jail the exporter on China's behalf.

Landmines for journalists

Our political values are different; but the law says not

Given the current political situation and human rights record of China, the fundamental differences that exist between Hong Kong and China in the protection and exercise of rights and freedoms, and the many divisive issues (Taiwan, Tibet, Xinjiang) that China is facing, the two proposed sedition offences will undoubtedly create uncertainties and landmines for local journalists in their daily work. Furthermore, the offences are likely to stifle dissent and discourage frank and unreserved political discussion in Hong Kong on important but controversial issues. This would be particularly likely at times of dispute and crisis.

Upon enactment of the two sedition offences, any calls from Hong Kong for uprisings to topple the existing regime in China or any advocacy of violent action to bring about independence for Taiwan or Tibet, and any reporting or coverage of such calls would risk violating the law. Those making such statements—and journalists reporting them—could face arrest and prosecution.

Many Chinese dissidents living overseas are currently barred from entering Hong Kong because of their sensitive background. Yet the territory's media have been free to interview them and publish their opinions, even if they called for violent actions. But once the national security bill is passed, any reporting of such speeches and ideas in Hong Kong could land journalists in serious trouble.

Journalists, moreover, if prosecuted, would face an uphill battle proving that they did not have an intent to incite. Indeed, the editor and publisher of *Ta Kung Pao* failed in 1952 to convince a court that the publication in their newspaper of a *People's Daily* article which contained severe criticism of the then colonial government was a journalistic activity, and not an act of incitement.

An anachronistic offence

Sedition law: potent tool for some, China included

It is indeed very much against the tide of history to enact sedition-related offences at the start of the 21st century, even in the name of protecting national security. First, the offence of sedition punishes mere speech and expression—regardless of whether such expression leads to any action. Second, history clearly shows that sedition has almost always been a politicised offence, its key purpose being to discourage and suppress dissenting political expression. Third, there have been very few prosecutions in developed democracies since the end of World War II; this is due mainly to advances in democracy and in the protection of human rights.

Indeed, the offence of sedition has virtually become a dead letter in developed democracies. The prevailing view is that it is an archaic offence which has no place in a modern democratic society. However, it should be noted that the offence of sedition has readily and regularly been employed in less progressive jurisdictions, including Malaysia and China, to silence criticism and opposition.

In Hong Kong the last prosecution for sedition (outside of an emergency) took place half a century ago. The publisher and editor of *Ta Kung Pao* were convicted in 1952 for publishing a seditious publication under the 1938 Sedition Ordinance, the provisions of which have since been absorbed into the Crimes Ordinance. The statutory offence of sedition was first introduced in Hong Kong by the colonial regime in the early 20th century through the passage in 1907 of

the Chinese Publications (Prevention) Ordinance, the forerunner of the 1914 Sedition Ordinance.

A sedition law among our existing civil liberties?

Given the nature of the sedition offence and the political background under which it was introduced to Hong Kong, it is no surprise that the existing statutory provisions are extremely repressive and draconian. Yet this anachronistic offence has fallen into disuse in Hong Kong, while at the same time the territory has made significant strides in the protection of civil liberties.

The right to freedom of expression and of the press is now expressly guaranteed by both the Basic Law and the Hong Kong Bill of Rights Ordinance, which have either incorporated or been modelled on Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It is doubtful whether the existing sections 9 and 10 of the Crimes Ordinance can withstand the scrutiny of these freedom of expression provisions. The bill is thus turning the clock back by giving new life to sedition offences, which seemed to have vanished long ago. Indeed, the bill will make the sword hanging over the head of journalists sharper and more effective.

THEFT OF STATE SECRETS PROPOSALS BREED UNCERTAINTY

Legislation against the theft of state secrets is another major area of concern for Hong Kong journalists. Part III of the national security bill proposes to amend the Official Secrets Ordinance by introducing two new offences. A new section 16A would provide for a new category of protected information that "relates to any affairs concerning the HKSAR which are, under the Basic Law, within the responsibility of the Central Authorities". It would be an offence to make an unlawful and damaging disclosure of any such information. A disclosure would be damaging if it endangered national security or the information was such that its unauthorised disclosure would be likely to endanger national security. National security is defined as the safeguarding of the territorial integrity and independence of the PRC.

Section 18 of the ordinance is to be amended to prevent any unlawful and damaging disclosure of protected information that is acquired by means of illegal access, whether by the accused or by some other person.

Government secrecy will increase hugely

These draft provisions are improvements on the consultation paper, which proposed the wording "information relating to relations between the Central Authorities of the PRC and the HKSAR" and "unauthorised access". Yet the two proposed offences will still pose severe threats to media freedom. The new section 16A is likely to increase government secrecy enormously. Moreover, it breeds considerable uncertainty over the exact nature of the information to be covered. Numerous Hong Kong activities, according to the Basic Law, are within the responsibility of the Central Authorities: is all such information protected from unauthorised disclosure? If yes, what are the legitimate reasons for extending the net of secrecy so wide? If no, how can journalists or other members of the public know exactly what is covered by the new provision and what is not? Further, if the damaging effect of such a disclosure is judged solely by whether it is or is likely to endanger national security, there seems to be much overlap with existing categories of protected information, including defence, intelligence and security information.

The amended section 18 confines "illegal access" to criminal acts such as theft, burglary or computer hacking. Yet journalists could still be trapped directly or indirectly. Theft has a very wide legal definition. A journalist, who picked up some government files on the street and did not return them as soon as possible, might be liable for theft and could fall foul of the "illegal access" offence if he or she went on to disclose the contents without authorisation and such a disclosure was considered by the authorities to be damaging.

A journalist could also be held liable if the protected information had been obtained in the first place by someone else through illegal access. Journalists are under a professional duty to alert the public about government cover-ups. They should not be penalised for third-party disclosure even if the sender of the information has obtained it through illegal means.

According to section 18, a person would be liable only if he or she knew or had reasonable cause to believe the information was protected against unauthorised disclosure and it had come into his or her possession via the various means stipulated in the section. Yet this defence, in most cases, is of very little assistance to journalists. Put simply, government information may be leaked because the authorities have denied authorisation for disclosure.

The purpose: to control official information?

Whenever a journalist receives sensitive government information through a non-official channel, regardless of whether the source is anonymous, it is reasonable for him or her to suspect the information has not been authorised for disclosure and may even have been obtained by illegal means. Moreover, if he or she goes ahead to verify the authenticity of the information, the journalist would most likely be warned by the authorities about the protected nature of the information.

On the eve of the 1997 handover, the Hong Kong government through a localisation process adapted most of the UK's 1989 Official Secrets Act, which became the current Official Secrets Ordinance. The UK Act has for many years been subject to criticism for being too secretive and for having an inhibiting effect on media freedom. The Official Secrets Ordinance, being a duplicate of the UK Act, has the same effect. Worse still, the two new offences have been framed in such a way that they go far beyond the stated purpose of legislating against the theft of state secrets. As such, they would further deter potential whistleblowers and jeopardise media efforts to expose any wrongdoing and mistakes committed by government officials.

DRACONIAN POWERS OF SEARCH AND SEIZURE

Other proposals in the national security bill will also be threatening to freedom of expression. A new section 18B to be added to the Crimes Ordinance authorises emergency entry, search and seizure without a warrant in police investigations of treason, subversion, secession, sedition and the handling of seditious publications. This proposed power has the effect of waiving judicial scrutiny, and widening police discretion, thus increasing the danger of arbitrariness and abuse of power by law enforcement agencies. It will remove one of the most essential protections enjoyed by Hong Kong citizens—security of their property from arbitrary entry and search, as guaranteed in article 29 of the Basic Law and article 17 of the ICCPR.

A court warrant is the only safeguard

This proposed widening of police powers prompted strong criticism during the consultation period. The government reacted by making two changes. First, the bill stipulates that such a power can be exercised only by a chief superintendent or an officer of a higher rank, not by a superintendent as initially proposed in the consultation paper. This threshold was raised again in June 2003—to the rank of assistant police commissioner. Second, the bill has incorporated provisions of the Interpretation and General Clauses Ordinance relating to the protection of journalistic material. Under this ordinance, a court order must be obtained before journalistic material can be produced to law enforcement units. The same applies to search and seizure. Moreover, following a seizure, journalistic material must be sealed to allow an opportunity for the owner to appeal against the police action, unless the judge is satisfied that there may be serious prejudice to the investigation if the applicant is not permitted to have immediate access to the material."

However, despite these changes, it is far from clear whether homes of journalists, and the journalistic material they have at home, will enjoy the same degree of protection enjoyed by media organisations. Further, so long as the offices and homes of non-journalists are subject to possible emergency entry and search by the police on the pretext of an investigation into a national security offence, there would be a general chilling effect on freedom of expression. Individual citizens and groups may be reluctant to speak out or talk to the press. This would in turn have an adverse impact on newsgathering and other journalistic activities.

SECTION 3

Judicial protection for the media

How well-disposed are courts to freedom of expression issues?

Since the 1997 handover, Hong Kong has enjoyed constitutional protection for freedom of the press and freedom of expression under articles 27 and 39 of the Basic Law. Yet these could well be empty rights unless judges are willing to uphold them. In the first analysis of its kind, this section will examine court cases concerning freedom of expression and the press where members of the media are directly involved, as well as court cases on freedom of expression where members of the public are involved. Our analysis reveals that in cases where the government is not involved as a party, the courts are most eager to forward new grounds to protect the media. Stepping outside the realm of civil disputes, however, the courts are reluctant to engage fully in constitutional arguments. This latter inclination may bode ill for any future cases related to national security offences.

GAINS IN DEFAMATION CASES

Defamation actions in Hong Kong have been lively and colourful. Amongst others, lawsuits against freelance presenter Claudio Mo and Commercial Radio talkshow host Albert Cheng are well known. Their outcomes have been hailed as constitutional victories for the protection of free speech.

1. The case of Eastern Express Publisher versus Claudia Mo

The dispute started when Claudia Mo Man Ching, a freelance presenter, remarked in an RTHK television programme on the litigious nature of the Oriental Press Group. Ms Mo made the statement that "if every time other people mention about you only accidentally you then say you are not satisfied and want to sue, this is akin to frightening people into keeping their mouth shut."

At trial, Mr Justice Yuen ruled in favour of the defendants. She considered the statement was a fair comment based on sufficient facts that an honest person could have made. However, the Court of Appeal reversed the decision and ordered the defendants to pay a sum of HK$100,000 to the plaintiffs. In the opinion of the appellate court, the defendants had failed to establish that "every time" the plaintiffs were mentioned "accidentally" by others, they threatened to sue.

Public interest: no "narrow approach"

The Court of Final Appeal ruled otherwise. Mr Justice Litton condemned the literal approach adopted by the Court of Appeal in its interpretation on what constituted "every time" and "accidentally". In addition, Sir Anthony Mason, an overseas non-permanent judge in the Court of Final Appeal, relying on constitutional protection, pronounced that "in a society in which there is a constitutional guarantee of freedom of expression, no narrow approach should be taken in the scope of fair comment on a matter of public interest as a defence to an action of defamation."

The media embraced the judgment as a judicial endorsement of the value of free speech and a free press.

2. The case of Paul Tse versus Albert Cheng/Lam Yuk-wah

A similar victory was won in this equally important case. The dispute arose out of a rescue mission in 1991. The plaintiff, Paul Tse, was a solicitor and a political advocate. Albert Cheng, one of the defendants, was a well-known radio host and political commentator. Both of them were involved in a campaign seeking the release of a tour guide (Mr Au) of Select Tours and a member of the tour group (Mr Wong), who were sentenced to life imprisonment in the Philippines in 1991 for alleged drug trafficking. Eventually, after many petitions, the pair were released in 1996. After Mr Au returned to Hong Kong, the issue then became whether he should bring an action against his former employer since Select Tours had dismissed him

during his confinement in the Philippines. The plaintiff had allegedly advised Mr Au not to do so.

Albert Cheng and his co-host Lam Yuk-wah criticised the plaintiff in a radio programme for acting unprofessionally and unethically in discouraging Mr Au from claiming compensation from his former employer. Later, it was revealed that the plaintiff had indirectly held 10% of the issued shares of Select Tours and was an honorary adviser to the Tour Industry Rescue Group. As a result of the defendants' comments, the plaintiff brought a defamation action against the radio station and the two hosts. The defendants pleaded that the statements were not defamatory as they were true and were expressions of opinion on a matter of public interest. The thrust of the case turned on whether the defence of fair comment could be defeated by "malice," which the plaintiff counter-argued.

It is well established in the law of defamation that fair comment is only a valid defence if the facts on which the comments are based are true and if it is an honest expression of opinion, not inspired by malice. The orthodox understanding has been that malice referred to any "ulterior motive" on the part of the defendant.

A new test of malice: honest comment

The Court of Final Appeal ordered a retrial in the case based on a new test of malice. Lord Nicholls—another overseas non-permanent judge—made a bold and radical move in redefining the test from "fair comment" to "honest comment". He stipulated that fair comment must be in accord with the constitutional guarantee of freedom of expression and must facilitate freedom of expression which is honestly held. He expressly held that the presence of an ulterior motive was not a reason for excluding the defence of fair comment and that commentators were fully entitled to "have their own agenda". Lord Nicholls went so far as to say that "disinterestedness" could not always be expected in political life. Honesty of belief, therefore, became the touchstone for fair comment.

THE PRESS VERSUS THE STATE

In contrast to civil disputes, the courts have been less sympathetic to the press when the government is a party to the dispute. To a large extent, the press has been to blame, yet the reasoning of the courts was troubling too.

1. Contempt of court: scandalising the court

Not well reasoned

In the case of secretary for justice versus the Oriental Press Group, the latter was prosecuted for contempt of court on the grounds that it had committed the offences of scandalising the court and interfering with the administration of justice. The action arose from a previous case in which the ruling by Mr Justice Godfrey went against the Oriental Press Group. The press group then launched a campaign attacking the judge, criticising him harshly in its newspapers. It also sent a team of reporters to keep him under 24-hour surveillance for three days. The activities of the press group were certainly unjustifiable. Nevertheless, the reasoning of the court in this case is perhaps troubling.

Scandalising the court is a common law offence that prohibits the publication of material or doing an act "calculated to lower the repute of the court or judge, and so undermine public confidence in the due administration of justice". Due to the vagueness of the term, many common law countries have abandoned this action or limited its scope.

However, the Hong Kong court in this case adopted a strict-liability approach and ruled that the intention to commit the offence was irrelevant because it was vital to the rule of law to respect the judiciary and to maintain public confidence in the courts and the judges. It refused to accept any free-press arguments raised by the defence.

When the defence counsel pleaded that "scandalising the court" was in fact an exercise of freedom of expression, the court replied that even if the defendant's actions fell within the protection of freedom of expression, it was justified to restrict this freedom under article 16(3) of the Bill of Rights Ordinance because it was an offence provided by the common law.

This reasoning is an over-simplification and a misleading interpretation of the requirement that such restrictions must be "provided by law" as stated in article 16(3). When the definition of "scandalising the court" is extremely vague and broad, and the concept of undermining confidence in the judiciary is equally subjective and abstract, it is difficult to conclude that this common law offence is precise and predictable enough to satisfy international standards of human rights.

As a last attempt, the defence counsel turned to article 27 of the Basic Law—the free-press clause—but the court rejected this argument on the grounds that article 27 merely identified a particular group of rights and did not prevent enactment of restrictions. What the court emphasised was that if "freedom of expression is to be respected, it must be exercised fairly, reasonably and in good faith. This must be the guiding principle of a responsible and respectable press."

Press freedom: a conditional privilege?

This "guiding principle" can be a highly risky test, as it can easily become the first step towards regulation of speech content. The court had essentially reduced press freedom to a highly qualified and conditional privilege. Freedom of the press is something to be earned, instead of an inherent right of the media.

Clearly in this case the *Oriental Daily News* had abused press freedom. What it advocated against the judge seemed to be totally indefensible and entirely irrelevant to free-press rationality. Nevertheless, this case raised the general issues of protection of freedom of the press and freedom of speech. The failure of one particular press member to fulfil its mission is not a reason to deny or confine the institutional right of press freedom.

It would have been better if the court had drawn a clear distinction between verbal comment and the physical harassment of Mr Justice Godfrey. The more ludicrous the comments made by the press, the less the court has to worry about public confidence in the judiciary being undermined.

2. Search and seizure of journalistic material

Old safeguards easily bypassed

The pre-handover Hong Kong government amended the Interpretation and General Clauses Ordinance in 1995 so that the press would have better procedural safeguards against executive search and seizure of journalistic material. However, the case of *Apple Daily* versus the commissioner of the Independent Commission Against Corruption (ICAC) proves that the executive authorities can easily bypass these protective hurdles.

The case concerned an allegation that an *Apple Daily* reporter bribed police officers to receive confidential documents about police investigations and operations. The issue is whether officers of the ICAC could search the newspaper's office and seize various documents, reporters' notebooks and computer files. After the raid, *Apple Daily* sought an interlocutory injunction to halt the process of investigation by challenging the validity of the search warrants. It argued that the search warrants that the ICAC relied on were defective due to their nature.

The first warrant was issued under section 17A of the Prevention of Bribery Ordinance, which only authorised the officer to enter and search the premises, but did not specify any authority to seize journalistic materials. The second warrant was issued under section 85 of the Interpretation and General Clauses Ordinance, which allowed the entry of premises, and search and seizure of journalistic material, provided that there were "reasonable grounds" for believing the premises contained evidence.

The problem arose from the fact that a judge—Mr Justice Gall—granted the warrants authorising the ICAC officers to "search, seize and retain" any record which was "likely to be relevant" to the investigation, despite doubts about whether there were grounds for doing so. *Apple Daily* argued that section 17A of the Prevention of Bribery Ordinance did not allow the officer to seize journalistic material, whereas section 85 specifically required the presence of reasonable grounds for belief that evidence might be found on the premises to justify the issue of warrants.

Despite the mistakes, the Court of Appeal ruled that there was merely "trivial excess of power", which caused "little or no prejudice". The court concluded that first, though section 17A of the Prevention of Bribery Ordinance was the wrong provision to rely on, the ICAC officer always had the power to search for and detain evidence which he had reason to believe to be connected with the investigation under section 10 of the ICAC Ordinance.

Second, the Court of Appeal ruled that the distinction between the two standards concerning the material that the ICAC officers could seize was rhetorically different but practically the same. In the court's opinion, unless the officers could get hold of the material, it was not possible to distinguish the two standards of "having reasons to believe" and materials "likely to be relevant"..

The court was unwilling to limit police powers

What is disappointing with the judgment was not the final decision reached by the court but the failure of the defence counsel to rely on the constitutional free-press clause, and the court's unwillingness to limit the state's police power. Mr Justice Keith pointed out the significance of fostering the development of a free and independent press as a public watchdog. Nevertheless, he considered that Mr Justice Gall had rightly issued the search warrant under section 84(3)(a) of the Interpretation and General Clauses Ordinance—despite the fact that Mr Justice Gall did not specify what grounds he had relied on nor the reasons.

A serious consideration of section 84 would, at least, have required Mr Justice Gall to consider fully whether there were alternative ways that the ICAC could have legitimately taken to discover the same evidence, and why they were not taken. Similarly, a serious reconsideration of Mr Justice Gall's decision by the Court of Appeal should have involved an interpretation of the Interpretation and General Clauses Ordinance in the light of the values recognised by the Basic Law.

When *Apple Daily* further appealed to the Court of Final Appeal, Mr Justice Litton concluded that the intention of the Interpretation and General Clauses Ordinance was to give officers greater latitude in the conduct of their duties. Mr Justice Litton's judgment was in direct contradiction to the original intention of the ordinance and it made a complete mockery of the 1995 amendments.

Press immunity from search and seizure of journalistic material has always been a controversial topic. Arguments in favour of granting immunity are premised on the belief that government searches would deter newsgathering by reporters and inhibit third parties from supplying information to the press. Counter arguments include that the executive authorities also have a legitimate interest in investigating and detecting crime.

A lost opportunity to define protection of the media

The difficulty in this case was that the newspaper was directly involved in crime. It thus lost public sympathy. Even if article 27 of the Basic Law were invoked, it probably would not have rescued the *Apple Daily*. What is regrettable, though, is that the court lost a valuable opportunity to lay down principles for the protection of the press and to provide guidance on the social duties and responsibilities of the media. Had press rights been taken seriously by the court, the judges would have gone beyond the mechanical interpretation of statutes to examine how various provisions could have complied with the spirit of the Basic Law.

As an addendum, in May 2003 the ICAC once again used the Prevention of Bribery Ordinance and the Interpretation and General Clauses Ordinance to search the office of *Sudden Weekly* magazine, which is owned by Next Media, as well as the home of one of the magazine's reporters, who was arrested for allegedly bribing a security officer to gain entry to a film location. Next Media, which also owns *Apple Daily*, this time did not challenge the court warrants.

THE PEOPLE VERSUS THE STATE

On a different but related front where the media is not a party but freedom of expression for individuals nevertheless remains a burning issue, courts are equally conservative and cautious. The flag desecration cases and the case on the right of demonstration involving Falun Gong members cited below reflect how Hong Kong courts position themselves on sensitive issues

affecting relations with the mainland—the kind of issues that may arise in future national security cases.

1. Flag desecration

Flag burning earns a suspended term

At the time of writing, Hong Kong has a record of four prosecutions for flag desecration. Two of them involved veteran activist Leung Kwok-hung. (The convictions of Mr Leung in 2001 and 2002 was discussed in the previous two HKJA annual reports.) In the latest case in March 2003, a political activist, Ng Kwok-hung, was given a suspended three-month prison term for burning a national flag during a protest on China's National Day, October 1st 2002. This was the toughest penalty handed down under controversial laws aimed at protecting the national and regional flags and emblems. Previously, protesters had been bound over or fined for defacing a flag or emblem.

The magistrate, Adriana Ching, called the case serious. She noted that the national flag "symbolises the whole nation, the Chinese people and their dignity". She told the defendant: "Everybody has freedom of expression, but you should use other, legal, means to express your opinions."

The principle against flag desecration as an acceptable form of freedom of expression was laid down in the prosecution of Ng Kung-siu and a co-defendant in 1999.

On January 1st 1998, the two defendants took part in a demonstration, in which they carried defaced national and regional flags. Both defendants were convicted of desecrating the national and regional flags contrary to section 7 of the National Flag and National Emblem Ordinance and section 7 of the Regional Flag and Regional Emblem Ordinance. They were sentenced to be bound over to keep the peace in their own recognisance of HK$2,000 for a period of 12 months. The issue before the court was whether the relevant statutory provisions constituted justified infringement of the constitutional right of freedom of expression.

Patriotic sentiment guided magistrate

The magistrate first convicted the defendants largely because they had insulted a "sacred symbol respected by all Chinese" and their conduct was likely to cause a breach of the peace. The magistrate's decision was full of patriotic sentiment, quoting from lyrics of patriotic songs. In reality, in none of the flag desecration cases was public order or peace ever threatened.

Although the defendant successfully appealed to the Court of Appeal, this was overturned by the Court of Final Appeal. The chief justice, Andrew Li, agreed that restriction of freedom of expression must be narrowly interpreted. But he argued that the statutory provisions were justified as necessary and proportionate protection for public order under article 16(3) of the Bill of Rights Ordinance. Public order broadly referred to the general interest and common welfare of collective needs. Echoing similar sentiments as the magistrate, the chief justice held that as national and regional flags were unique symbols in Hong Kong society, there was "legitimate societal and community interest" in protecting them. In his opinion, the defendants could express the same message using other methods.

Again, the reasoning is flawed

Flag desecration has always posed a difficult challenge for ruling regimes world-wide. As in previous decisions, what is disappointing is not the outcome of the case but the reasoning process. From the outset of his judgment, the chief justice emphasised the unique and intrinsic symbolic value of the national flag. He quoted the speech of the then president Jiang Zemin at Hong Kong's handover ceremony to illustrate the "legitimate interest" in protecting the national and regional flag.

A much-discussed and preferred opinion is the judgment delivered by Mr Justice Bokhary, in which he reminded the court and reassured the Hong Kong community that the case should be seen as lying just "within the outer limits of constitution" and should not be seen as a general trend in restricting the right to freedom of expression.

Despite this positive note, the flag desecration case still falls short of a vigorous debate to define the contours of freedom of expression in the face of the vague concept of "public order".

Whether this should be seen as an isolated case is difficult to tell. Subsequent flag desecration cases did not go beyond the magistracy level.

2. The Falun Gong case

Another equally difficult and sensitive case is the first prosecution of Falun Gong members in Hong Kong. (See also section 5.) The spiritual group was banned on the mainland in July 1999, but remains a legal entity in Hong Kong. However, it has come under increasing scrutiny from the Hong Kong government.

Falun Gong finally had its day in court in August 2002. The prosecution related to a peaceful and small-scale demonstration staged by the activists outside the building housing Beijing's Liaison Office on March 14th. The protesters were forcibly removed after refusing to move to a nearby location. Sixteen were charged and convicted for causing obstruction to a public place, obstructing the police or assaulting police officers. The magistrate, Symon Wong, imposed fines ranging from HK$1,300 to HK$3,800 on the 16 defendants.

Was the right of demonstration curtailed?

In delivering his judgement, the magistrate dismissed the allegation that the trial was politically motivated. He said that had the obstruction been caused by a group of *taichi* practitioners, the issue would remain the same. Although Mr Wong stressed that a balance had to be struck between the right of demonstration and the need not to cause obstruction to the public, it was unclear how he reached his balance. It is inevitable that any demonstration would cause some inconvenience and obstruction to the public.

The Falun Gong activists plan to appeal to the High Court in September 2003. It is to be hoped that the appeal will provide an opportunity for detailed legal analysis of constitutional and rule of law issues on the right to hold demonstrations.

SECTION 4

National security: the lessons from SARS

Amid the havoc and death wreaked by the outbreak of severe acute respiratory syndrome (SARS), many commentators called for the controversial national security bill to be shelved so that the community could set aside its internal divisions and concentrate on battling the disease. The administration of the chief executive, Tung Chee-hwa, had remained unyielding as of the writing of this report in late May 2003. It reflects, in some people's view, a lack of political sensitivity which goes to the heart of the administration's unpopularity.

Suppressing press freedom can itself be a national security threat

There is yet another troubling dimension to the official intransigence. The bill's stated purpose is to enable Hong Kong, as a special administrative region of China, to protect national security. But one of its likely effects is to damage press freedom. In refusing to reconsider the legislation, the administration is disregarding important lessons about China's tragic mishandling of the virus.

The first known case of SARS showed up in Guangdong province in November 2002. Over the ensuing five months, China stuck to the claim, since proved false, that it had the virus under control. Compelled to toe the official line, the state-controlled media told the world little about the virus' virulent nature and its heavy toll on healthcare workers who came into contact with infected patients. The lack of early warning enabled the disease to spread virtually unimpeded.

By April 20th 2003, when the central government bowed to international demands for fuller disclosure, SARS had raged out of control beyond mainland China, hitting Hong Kong, Singapore and Canada especially hard. (Taiwan joined the list later.) Hundreds had fallen seriously ill, quite a few losing their lives, including doctors and nurses who lacked sufficient information on how to protect themselves. Loss of business income ran into billions of US dollars as panicked populations curtailed travel and thought twice about patronising shopping malls, even walking down the street. In a lengthy—and very belated—report dated April 22th 2003, the official Xinhua News Agency declared China to be in crisis. It is hard to disagree with this assessment. It is equally hard to dismiss the widely held belief that the damage to China and others might have been far less serious had Xinhua and the rest of the Chinese media been free to report on early outbreaks.

China, of course, is a socialist paradise

Concealing bad news is a time-honoured media practice in the People's Republic of China. A classic example is the Great Leap Forward. An estimated 30m people starved to death in this 1959-61 experiment in collectivisation. Newspapers boasted of bountiful harvests all the while, causing grain to be squandered in some regions in a misguided show of bravado even as the famine was cutting a wide swathe through the countryside.

The present-day Chinese media is no longer purely a propaganda tool. It offers varied content and even glimpses of the seamier side of life under communist rule. But aspects of the bad old days remain. Many issues—from AIDS to labour unrest to suggestions of corruption of senior leaders and their kin—are off limits. Reasons for turning a blind eye vary. Sometimes it is to avoid embarrassing the country or individual leaders. Sometimes it is mere habit. To be sure, though, the heavy hand of the censor—backed by punishment under state security laws (or other trumped-up charges)—usually awaits those who overstep the unwritten boundary.

One relatively recent example is Wan Yanhai, a Chinese AIDS activist who operated a website aimed at educating the public about the disease. He was arrested around September 2002 for leaking state secrets. After an outcry by international health organisations, he was released supposedly for showing remorse, according to Chinese media reports. At about the same time, a mass poisoning in Nanjing in which dozens died provided another revealing glimpse of the censor's mentality. A Hong Kong television crew that tried to interview the next of kin was confronted by a local official who heatedly declared on camera: "Even Xinhua News Agency cannot release any information [about the poisoning] without the approval of the propaganda authorities of the central government." Cases like these cause Chinese journalists to liken their

partial freedom to a caged bird. In the case of SARS, this half-free press failed the public just when it was needed the most.

Mr Tung, no doubt, will not learn...

The Tung administration's national security bill would push the Hong Kong media down a path towards the failed mainland model. The bill is loaded with fuzzy language, draconian enforcement powers and disproportionately heavy penalties similar to China's media-suppressing laws. Ostensibly aimed at China's enemies, the bill would have the more likely effect of chilling expression and independent-minded inquiry by the press, academia and individuals. It flies in the face of lessons learned—at the cost of the many lives—from the SARS crisis. Among them:

Lesson one. China may have enemies, but it is hard to name one that has been sufficiently threatening in recent decades to cause Xinhua to declare the country in crisis. Rather, it is the lack of accountability and transparency in government that poses the more imminent threat to the well-being of Chinese citizens.

...that a free media safeguards the public interest

Lesson two. In the absence of strong democratic checks and balances, a freer media can help safeguard the public interest. The Chinese media having failed to do so in the SARS crisis, it was the international media that took the lead in exposing the official cover-up.

Lesson three. For Hong Kong, having a free press has been a distinct advantage in the SARS crisis. Sydney Chung, dean of the Faculty of Medicine at the Chinese University of Hong Kong, noted that the local media—by keeping the public informed and by scrutinising official actions—had played a vital role in helping to contain the virus.

None of these lessons seems to have registered with the Tung administration. With the public preoccupation with SARS providing an ideal distraction, administration officials have sought to hurry the national security bill through the Legislative Council. They gave clear signals that they meant to secure passage before the current legislative session ends in July while continuing to deny that there is a firm deadline. (Normally restrained in its criticism of the administration, the *South China Morning Post*, in a May 7th 2003 analysis, characterised the official posturing over the non-timetable as "bordering on hypocrisy".)

Article 23: "business as usual", despite SARS

The dominance of pro-government friends in the legislature makes it hard for the community to reject poorly thought-out administration initiatives. And the national security bill is unlikely to be an exception. Speaking without any apparent sense of irony, Cheng Yiu-tong, a member of Mr Tung's policymaking Executive Council, stated that speedy passage of this highly unpopular bill would help demonstrate to the world that despite SARS, it is business as usual in Hong Kong.

It seems business as usual as well for Beijing, a behind-the-scenes driving force for the bill. Speaking on May 4th 2003 at the same public function as Mr Cheng, Gao Siren, director of the central government's liaison office in Hong Kong, blithely asserted that the bill reflected the priorities of society's mainstream. His statement is contradicted by numerous opinion surveys which show the bill has little public support. So much for the era of honesty and openness that supposedly has dawned with Beijing's breast-beating over the SARS cover-up. Indeed, SARS offers a rare opportunity for Beijing to re-examine its outdated fixation on controlling information flows. There is no better place to start than Hong Kong, where a free press already exists and is protected (supposedly) by law. All Beijing has to do to demonstrate a willingness to move with the times is to leave this free press alone.

The pressure on Hong Kong's media did not start with the national security bill. Since British colonial rule ended and was replaced by Chinese sovereignty in 1997, Chinese leaders have lashed out at Hong Kong journalists for asking sharp questions. Many pro-Beijing figures in Hong Kong have made plain their belief that the media should serve the interests of the ruling authorities rather than of the public. Mr Tung himself has demonstrated a low tolerance for criticism.

The sum of these pressures has taken a toll. Although the Hong Kong media, as a whole, still strives to perform its watchdog function, some of its pre-handover punch is gone, a fact often obscured by the defiance of a couple of newspapers. (Hong Kong has 14 daily newspapers,

three of which are decidedly pro-Beijing and, by extension, pro-Tung. At the opposite end of the spectrum, the mass-circulation *Apple Daily* and the more elite *Hong Kong Economic Journal* pull few punches.)

Recently, the HKJA documented a case of self-censorship at one of Hong Kong's radio stations. (See section 5.) Newspaper coverage of the national security bill offers another case in point. Despite strong opposition to the bill by the public as well as many respected legal experts, the majority of the mainstream press has been at pains to stay even-handed. An analysis by the Chinese University of Hong Kong showed that, over one 52-day period, *Apple Daily* stood out with 87% of its articles on the bill being critical. The closest any competitor came was 53%.

A false sense of security

In the SARS crisis, the Hong Kong media missed early opportunities to poke through the veil of deceit in China. It was wary, too, about criticising Beijing's mishandling of the virus. However, it was aggressive when pursuing SARS news on the home front, an effort that played an important role in alerting the public and awakening the Tung administration from its lethargy. The strengths and handicaps of this free press under stress are amply demonstrated in the following survey, below, of SARS coverage. Our analysis shows, above all, that without a dynamic and independent-minded media, claims about protecting the nation's interests will offer only a false sense of security.

A VIRUS SPREADS, AND SO DO THE LIES

The first recorded case of SARS surfaced on November 16th 2002 in the city of Foshan, Guangdong province. Provincial health authorities publicly acknowledged the existence of the illness for the first time in a news conference on February 11th 2003, some three months later.

The Hong Kong media, which had been chasing rumoured outbreaks of this mysterious disease for a couple of days, jumped on the story. Of Hong Kong's press, staunchly pro-Beijing *Wen Wei Po* must be considered one of the most authoritative on official matters. Quoting Guangdong officials, the paper reported the following day that the cumulative number of SARS victims from November 16th 2002 to February 9th 2003 totalled 305, including 105 healthcare workers. Five victims had died, and 59 had recovered and been discharged from hospital.

Why had the announcement not come earlier? One reason, according to officials, was that SARS, then known as atypical pneumonia, was not among the diseases whose disclosure was required by law. Another reason, they said, was to avoid causing a public panic. Hospital infections had ceased with the wearing of masks and improvements in room ventilation, the officials claimed. They also claimed that no SARS infection had been exported from Guangdong.

Yet little or no information was forthcoming on many basic questions. Among them: what caused the infection and what treatment methods were used? What was the incubation period? How was the infection transmitted? And if that was not clear, how was it possible to confine the outbreak within Guangdong?

The irresponsible pro-Beijing media

Wen Wei Po seemed to be content with the official explanation, conveying without any hint of scepticism the official line that all was under control. Its editorial of the day was a lecture aimed at other local media to act responsibly and stick to reporting "the most authoritative, the most accurate information" being provided by the Guangzhou city government.

The lecture notwithstanding, the mainstream Hong Kong media focused their news-gathering efforts on the rumour-driven panic that had fanned out across Guangdong before the news about SARS had been officially confirmed. There were graphic reports about the panic buying of food and items deemed useful for fighting infection, such as vinegar. Many reporters poked around Guangzhou hospitals but turned up little of significance.

Questions were asked in Hong Kong about precautions. Dr Yeoh Eng-kiong, secretary for health, welfare and food, said he saw no signs of the illness crossing the border from

Guangdong. Dr Margaret Chan, the director of health, said she was keeping contact with Guangdong health authorities. Several newspapers indicated concern about Hong Kong's readiness to cope with an outbreak. But if there was a reason for worry, it was not obvious: Guangdong provided no further update of the situation, and SARS news from the province largely dried up by February 21st. Only 10 days had passed since the disease's first official confirmation.

Was Guangdong incubating a killer disease? Who could tell?

One report, although little noticed in Hong Kong, was noteworthy. Addressing one of those previously unanswered questions, Chinese health authorities fingered chlamydia, a sort of bacterium, as the cause of the atypical pneumonia. The finding was politically significant for China because it freed the country from the stigma of being the possible incubator of a new killer disease, as was widely suspected at the time. It was medically significant as well. Chlamydia being treatable with antibiotics, doctors in Hong Kong said they thought there was little to fear about the Guangdong pneumonia.

Scientists in Hong Kong and elsewhere eventually would come up with the finding that China preferred to avoid—that SARS indeed was caused by a previously unknown virus which belonged to the coronavirus family. (China would continue to stick to its claim long after the discovery of the new virus.) Worse, there was, and still is, no known cure. Recovery depends on a patient's immune system being able to fight back without overreacting—a significant cause of death for SARS victims. But back when the outbreak was still confined to Guangdong, it was hard for the Hong Kong media to get to the bottom of the chlamydia story even with the best effort. A brief *Sing Tao Daily* report on February 19th tried to provide some balance with the quizzical observations of a University of Hong Kong microbiologist.

PROTECTING WHOSE SAFETY?

A blackout ordered

Other than the chlamydia twist, what little SARS news there was from February 13th onwards was mostly about a campaign against rumour-mongering. Guangdong officials asserted that the panic over SARS had been caused by rumours spread by troublemakers and profiteers. It ordered a crackdown. Telecommunications operators were made to filter out unspecified Chinese characters transmitted via text messages on pagers and on mobile phones, according to a February 22th *Wen Wei Po* report.

To justify the censorship, *Wen Wei Po* cited a regulation applicable to Internet service providers which prohibits content that "opposes the fundamental principles of the constitution, endangers national security, discloses state secrets, subverts the authority of the state, spreads rumours, disturbs the social order, undermines the stability of society." The report further stated that, with the National People's Congress and the Chinese People's Political Consultative Conference soon to convene, there was a need to step up regulation to ensure "the safety of telecommunications".

The rest of the Hong Kong media also reported the crackdown. Most relied on reports supplied by China's state-controlled media which reflected the official point of view. That included the anti-establishment *Apple Daily*. The paper observed in a February 23rd report that the censorship might have the downside of hindering information flows. But otherwise, the report was largely uncritical.

The censorship raised crucial questions which the news reports did not address. To start with, was the panic really started by the rumour-mill, or should the lack of transparency on the part of the authorities take more of the blame? Also, if terms such as pneumonia or emergency were censored from a pager service, would that not present a hazard in the case of a true emergency?

Subsequent events indicated that the telecommunications censorship was part of a tightening blackout imposed by Guangdong on SARS-related information. The blackout also contributed to a purge at the Guangzhou-based Nanfang Daily Group, publisher of several popular newspapers. Its journalists had upset the authorities by trying to break stories about SARS, according to several press accounts that emerged in May, including one in *The Washington Post* and another in Hong Kong's *Open Magazine*.

The news blackout, which received scant attention in the Hong Kong media, led to a strange anomaly. SARS started erupting in Hong Kong in early March as a result of infections of Guangdong origin. Oddly, there was a dearth of SARS news out of the province in the midst of the brewing crisis in Hong Kong.

WEEK ONE: WHAT YOU DON'T KNOW CAN KILL YOU

The disease hits home...

March 10th-16th was a dark week. The World Health Organization issued a global SARS alert, naming China, Hong Kong and Vietnam. In Hong Kong, dozens of doctors and nurses had fallen ill, most of them at Prince of Wales Hospital. The most frightening aspect was the still-fuzzy nature of the illness, including the cause (the early cases were not consistent with chlamydia infection), means of treatment and method of transmission. One early assumption was that transmission took place via droplets. The mass infection of healthcare workers—despite protection by surgical masks—fanned worries that a hard-to-stop airborne germ was at work, not a comforting thought for densely populated Hong Kong.

Information about China's experience with SARS might have saved lives at that point. *Ming Pao Daily News* revisited Guangzhou in search of answers but came away empty-handed. At hospital after hospital, a reporter got little besides assurances that there were few cases and that the Guangdong outbreak was tailing off, according to a March 12th report.
Back in Hong Kong, Dr Yeoh, the secretary for health, welfare and food, asserted that the hospital infections posed no threat to the community. But since he himself could offer few convincing answers, the public grew more jittery. On top of an already full-blown medical crisis, a credibility crisis loomed.

WEEK TWO: ALL QUIET IN GUANGDONG

...but government complacency reigns

The medical crisis worsened through the week of March 17th-23rd. The Department of Health confirmed for the first time that five people had died so far from SARS. A school was closed after a student joined the confirmed cases. There was a case of an office worker apparently becoming infected in the workplace, not to mention the growing list of casualties among doctors and nurses. By most measures it was a lost week in the sense of active prevention. The government continued to resist pressures to take strong measures.

On March 17th, Professor Chung of the Chinese University medical faculty called a news conference to challenge the government line. He had been at the centre of the crisis from the start because hard-hit Prince of Wales was his university's teaching hospital. The infected doctors included his former and present students. Convinced that the problem was no longer containable within hospitals, he urged the government to begin tracing people who had contacted SARS patients, and isolating them. The media listened. "Chinese University exposes government cover-up of the SARS situation," said the front-page headline of normally pro-government *Sing Tao Daily* on March 18th.

Dr Yeoh was certainly not impressed. His reaction was summed up in a *Ming Pao Daily News* headline dated March 19th: "If you want a risk-free existence you might as well not live."

The Guangdong connection hit the headlines again on March 20th. Fatal infections in several countries had been traced to encounters in Hong Kong's Metropole Hotel with Liu Jianlan, a visiting medical professor who came from Guangzhou in late February and died of SARS about 10 days later. But in Guangdong, the silence continued. Most Hong Kong newspapers carried one medical-related story in their China news sections on that day. It was about Guangzhou pet owners' growing concern over rabies.

In Hong Kong to receive an academic honour, China's health minister Zhang Wenkang spoke to journalists on March 22nd. He admitted the Hong Kong contagion probably was of Guangdong origin. Asked about the true picture of SARS there, he demurred. Too much was still unclear, therefore nothing would be disclosed for the time being, he said. Hong Kong's

Dr Yeoh backed him up, reassuring the media that he had seen no evidence to indicate China was hiding anything.

WEEK THREE: ANXIETIES, MORE ANXIETIES

March 24th-30th was a week of anxieties, dramatic reversal and yet more anxieties. It started with a renewed effort by *Ming Pao Daily News* to lift the veil over Guangzhou hospitals. The paper visited six hospitals accompanied by a Chinese University medical professor and counted more than 100 SARS cases. Though not a definitive picture, this March 24th report suggested that SARS, under cover of the official news blackout, was spreading in Guangdong.

The biggest headlines on March 24th were devoted to one of SARS' newest casualties, Hospital Authority chief executive William Ho. He had had the protection of the highly secure N95 face mask during daily rounds of the worst-hit hospitals. That apparently was not enough. The airborne infection theory gained new life. (Medical staff speculated that he was infected through the eyes.)

Was Guangdong, or Beijing, to blame?

On March 26th, Guangdong yielded to pressures for disclosure. The figures published—792 cumulative cases, including 31 fatalities, as of the end of February—were outdated and widely regarded as understated. *Ming Pao Daily News* criticised the province the following day in an editorial titled: "Guangdong caused great harm by delaying disclosure." However, by not addressing the central government's complicity, the editorial begged the question: could the province have been acting on its own in a matter that affected the nation's image abroad, not to mention the health and security of the entire population?

A U-turn, but Hong Kong acted too late

Pressure for action was growing on Hong Kong. After vigorously arguing against such exceptional steps as closing schools, the government made a U-turn on March 27th and produced a set of measures to combat the spread of SARS. People who had had contact with SARS patients were compelled to isolate themselves; tracing of such individuals was initiated; hospital SARS wards were closed to public visits; schools were given a holiday; and arriving travellers were required to declare their state of health.

It was not enough to quell rising public anger. The March 28th *Apple Daily* lashed out at the chief executive Tung Chee-hwa on the front page, noting, among other things, that the decision to close schools came after dozens of schools had already done so on their own. "The public is critical of the government for being slow to respond. But Tung Chee-hwa, who is forever behind the situation, asserts: 'Our direction is right.'"

Were lives less important than image?

Others were not as blunt. But the March 28th *Sing Tao Daily* provided a tougher indictment of Hong Kong's lack of haste by making comparisons with Singapore, which had taken some of the same actions three weeks earlier. The headline over this inside-page feature read: "Lives more important than international image."

Also on March 28th, most Hong Kong media gave prominent treatment to two mainland-related developments. A Chinese foreign ministry spokesman said that there were SARS patients in Beijing, but they had come to the capital to seek treatment and were not local infections. In Hong Kong, a visiting senior mainland official, Long Yongtu, accused the Hong Kong media of exaggerating the seriousness of the SARS situation.

Apple Daily on March 29th came back with a fiery rebuttal. Under the headline "Beijing officials' shameless lies exposed", the newspaper devoted its front page to a report about growing international scepticism over China's SARS disclosures. It also characterised Mr Long's comments of the previous day as "rubbish".

The week ended on yet another disturbing development. On March 30th, Hong Kong added 60 new SARS cases—a daily record. Of that total, 36 came from the same housing estate, Amoy Gardens. The cumulative Amoy Gardens toll by then stood at 121, which equalled 23% of the total number of cases in Hong Kong.

WEEK FOUR: "SAVE US PLEASE. WE ARE EXHAUSTED"

Over the March 31st-April 6th period Amoy Gardens blew up into a crisis within a crisis. The government was at a loss as to how this mass infection of hundreds of people took place. On other fronts, SARS claimed the life of a doctor in private practice—the first local medical practitioner to die of the illness. The World Health Organization issued an advisory against travel to Guangdong and Hong Kong. A false rumour on the Internet triggered the panic buying of food and basic staples. The blind fear that struck Guangdong in February was being replayed.

The media: channel for healthcare workers' grievances

As pressure on hospitals grew, the media became a channel for the venting of healthcare workers' fears and frustrations. United Christian Hospital staff faxed a letter to a phone-in programme at Radio Television Hong Kong on April 2nd. At the hospital, which received many Amoy Gardens' residents, doctors and nurses were succumbing en masse as their colleagues did earlier at Prince of Wales. An excerpt in *Ming Pao Daily News* described their working conditions:

"United Christian Hospital is not an infectious disease hospital. But it received an influx of SARS patients in the last few days. [Healthcare workers] are exhausted in body and spirit. They have to tend to emergency patients. Yet they are short of materials. Each worker receives a daily allocation of three surgical masks. N95 masks are not available. Even those who have to care for patients from Intensive Care have no access to N95. Nor are protective garments available. The workload has surged. We are all afraid to go home." The letter was titled "Save us please. We are exhausted."

WEEK FIVE: A DOCTOR IS ANGRY

The public doing the government's work

Four young computer buffs started an Internet listing of buildings known to have been frequented by SARS patients, another example of the public taking into its own hands what the government refused to do. At the end of this week, April 7th-13th, the government yielded to public pressure and began providing a similar listing. The hospital situation continued to deteriorate. Meanwhile, a storm was brewing in Beijing.

There, a semi-retired Chinese surgeon, Jiang Yanyong, issued a statement to the media accusing the health minister Zhang Wenkang of lying about the SARS situation. *Time* magazine published the statement in an article dated April 8th. Its main content: after Mr Zhang announced a week earlier that Beijing had 12 cases of SARS, three of whom died, Dr Jiang spoke to nurses and doctors at three military hospitals, all of whom expressed surprise and anger at the announcement. At one hospital alone, doctors told Dr Jiang they were treating 60 SARS patients and that seven patients had died of SARS.

Under normal circumstances Dr Jiang probably would have been locked up for revealing state secrets, *Time* would have been accused of slandering China out of ulterior motives, and that would have been the end of the matter. But SARS was different. It had already caused trade shows, conferences and sports tournaments to be cancelled or shifted out of China. Handled badly, and it could deal the country an enduring and devastating blow. Dr Jiang had placed his government in a rare dilemma. (For the country, knowing the truth at last about SARS could not have been anything but a good thing.)

The government had an assortment of fumbling responses. A foreign ministry spokesman said the outside world should view China's SARS situation with greater sympathy. A health ministry official said he knew nothing about what was going on in military hospitals. The vice premier Wu Yi said she would look into Dr Jiang's allegation. But no one would confirm or deny the lying allegation.

Dr Jiang's allegation also received varied treatment in the Hong Kong media. Initially, he had sent copies of his statement to Chinese state-run television and to Hong Kong's Phoenix Satellite Television, according to later reports in *Sing Tao Daily* and the *South China Morning Post*. When none had shown interest, he then offered it to *Time*.

In Hong Kong, *Wen Wei Po* gave Dr Jiang arm's-length treatment by publishing a wire-service report of the *Time* story. For the purposes of this piece, the paper performed a backward translation of his name from the English-language wire-service version. That yielded same-sound characters that were completely different from his actual name, an apparently deliberate demonstration that *Wen Wei Po* had not spoken to him directly and was not even certain that he existed. Other Hong Kong media had no trouble getting the name right.

Ming Pao Daily News' version emphasised not the allegation, but Vice Premier Wu's promise of a thorough investigation. *Sing Tao Daily* highlighted the health ministry's disclaiming of responsibility for military hospitals, an effective means of raising the question: so whose numbers are we to believe?

WEEK SIX: THE REAL TRUTH, MORE OR LESS

The daily SARS death toll in Hong Kong hit a high of nine during April 14th-20th, before settling back to around five. A government investigation suggested the Amoy Gardens outbreak was caused by virus-carrying vapours and droplets drawn out of household sewage drainage by ventilation fans. It was an important step towards understanding how the mass infection had happened. Hospital Authority chief executive Mr Ho recovered from SARS and was discharged from hospital. But again, it was a Beijing event that took centre stage.

Beijing was as bad as people feared

On April 20th, the central government took steps to remove health minister Zhang and Beijing mayor Meng Xuenong from their posts. There was also an admission that SARS in the national capital was much worse than previously disclosed.

WEEK SEVEN & BEYOND: DON'T CELEBRATE YET

The Hong Kong media applauded the firing of the Chinese officials. It was not because they were particularly disliked or that many people believed they really were responsible for the SARS cover-up. It was more a celebration of truth's triumph.

There was no celebration at *Wen Wei Po*. It was as adaptable as ever to the changing political wind. Shifting from self-congratulation over how effectively SARS had been contained in China, it ran accounts of heroic struggles against the growing menace of the virus. On March 23rd, it published a call to arms issued by Xinhua News Agency. The headline read: "The Chinese people are at a moment of crisis."

Press freedom and national security are not incompatible

Some see SARS as an important turning point for the Chinese government towards greater accountability and transparency. Excessive official secrecy, a desire to control information and events, and an emphasis on national security were major factors in contributing to the spread of SARS in China and beyond. The resulting severe restrictions on press freedom deprived the public of the legitimate right to know, and fostered malfeasance and lack of accountability. If China has indeed reached a turning point over SARS, then it should take the very basic first step of freeing the nation's media so it can do a proper job. The Tung administration, correspondingly, should withdraw its national security bill and work on a substitute that would truly enhance the nation's security. In short, it should safeguard press freedom, not diminish it.

SECTION 5

Other media developments

The media industry has not faced the same kind of economic pummelling that it suffered at the height of the economic downturn in the period July 2001 to June 2002, with mass layoffs and closures. However, the gloomy atmosphere has continued, in particular as the outbreak of severe acute respiratory syndrome (SARS) took hold from March 2003. This prompted almost blanket coverage of the outbreak, with many newspapers questioning the capacity of the government and in particular the chief executive, Tung Chee-hwa, to handle the crisis.

Self-censorship persists, the public believes

Despite outspokenness over this issue, the public perception that self-censorship continues to be a problem persists. A Chinese University of Hong Kong survey released in October 2002 revealed that 82% of respondents thought the media was subject to varying levels of government intervention. More than a third of respondents rated the local media as "not adequately critical" of the Hong Kong government and 49% thought publications and broadcasters were not critical of China. But they still gave local press freedom a rating of 6.1 on a ten-point scale.

A SACKING AND SELF-CENSORSHIP

One particular case epitomised the problem of self-censorship. In August 2002, the managing editor of Metro Finance, Paul Cheung Chung-wah, said he was sacked after he was ordered to tone down reports on the chief executive, Tung Chee-hwa, the Falun Gong spiritual movement, pro-democracy activists and the businesses of the station's owner, tycoon Li Ka-shing. A group of 12 pro-democracy activists staged a protest outside the station's office in Central. However, a spokeswoman for Metro Broadcast said the sacking was not related to editorial policy. Rather, she insisted, it was done for financial reasons.

Mr Cheung made a formal complaint to the HKJA about his sacking. The HKJA set up an ad hoc group to investigate whether there were grounds for Mr Cheung's allegations of self-censorship, and if there were, whether his conflicts with his superiors over the acts of self-censorship resulted in his dismissal. The ad hoc group interviewed several witnesses in person. Management representatives refused to be interviewed in person, although they did submit written views.

The HKJA released its findings in May 2003. It found that self-censorship was a problem at Metro Finance: "Self-censorship can be a matter of one journalist holding back information, or it can involve many. The present case involved multiple individuals in one organisation, and those most responsible for ensuring the best journalistic practices were themselves a source of the pressure that led to this state of affairs. Considering the potential impact on the morale and professionalism of the journalists affected, the Ad Hoc Group considered this to be a much more serious case of self-censorship than that of one individual acting alone."

However, the HKJA was unable to determine whether self-censorship was a factor in Mr Cheung's sacking. The report noted: "The second part of the complaint alleged that Mr Cheung was dismissed because he had refused to go along with the self-censorship. Such a possibility could not be ruled out. However, Metro Broadcast was known to be under financial pressure, and a number of layoffs had occurred over the previous two years. The employer said Mr Cheung's case was no different. Lacking evidence to the contrary, the Ad Hoc Group felt that the allegation in respect of the cause of dismissal could not be substantiated."

The HKJA called for greater discussion about the problem of self-censorship. The report said: "Self-censorship will always be a contentious subject but practising journalists, at the very least, should develop an informed view about its essential properties. Media industry groups owe it to the public to consider how best to address this issue." It suggested in particular that

such groups may wish to study the issue and take further action in the form of workshops for news executives and a code of practice for the industry.

One way forward proposed in the report would be for owners of publications or broadcasters to make a written commitment to editorial independence. It cited the case of the chief executive officer of AOL Time Warner making such a pledge for Time Inc. publications.

Metro Broadcast said it did not plan to comment on the report.

REWARDS FOR MEDIA OWNERS

In January 2003, China announced the appointment of 122 Hong Kong personalities to its largely symbolic advisory body—the Chinese People's Political Consultative Conference (CPPCC). Among the names were seven owners or top figures in media organisations. They include representatives of both the print and electronic media, as well as the Chinese and English language media.

The seven are Ma Ching-kwan of the Oriental Press Group; the chief executive of Asia Television, Chan Wing-kee; the owner of the Sing Tao group, Charles Ho Tsu-kwok; Lee Cho-jat of Sino United Press (owner of the *Hong Kong Commercial Daily*); Ng Kwong-ching of the Wheelock group, which owns Cable Television; Wang Guohua of *Ta Kung Pao*; and Yang Lan—the chairwoman of the Sun Media Group (the owner of Sing Pao).

United front policies behind the scenes

Beijing has long eyed media owners in its united front programme. Indeed, moves to co-opt major media owners were documented by a former chief editor of the pro-Beijing newspaper, *Wen Wei Po*, in articles he wrote for a pro-Taiwan newspaper in 1993. Kam Yiu-yu stated then that Beijing was increasing pressure on publications, with a view to making them more sympathetic to its policies.

Perhaps the most striking appointment to the CPPCC was that of Ma Ching-kwan, of the Oriental Press Group, which owns two of the top three selling newspapers in Hong Kong—the *Oriental Daily News* and the *Sun*. Indeed, the apparent co-opting of Mr Ma can date back to August 1993, when he was invited to meet with the then Chinese propaganda chief, Ding Guangen.

Be co-opted, or be marginalised

This kind of elite co-opting is not unknown in other parts of the world. The person co-opted into the ruling circle can channel his or her influence inside the hierarchy, while the ruling party can assert its influence on the public through the co-opted person. While it is difficult to ascertain what influence is involved in this case, media analysts have noted that there have been changes in the way that the *Oriental Daily News* has handled certain types of news.

While its coverage of Hong Kong news has not been radically different from that of other newspapers, analysts point to a more cautious approach towards news which is considered to be sensitive to the authorities in Beijing. They point in particular to news about the enactment of national security laws in Hong Kong and the outbreak of SARS on the mainland.
A study of 140 news reports published between July 2002 and early May 2003 on the national security laws shows that while most are neutral, some show low-key coverage of news which is critical of the proposed laws. For example, an article published on December 9th 2002 reported in its headline that "[T]he Bar Association principally supports Article 23 laws." The Bar Association was in fact highly critical of the government's proposals.

On SARS in mainland China, there was little investigative reporting on efforts by the mainland to cover-up the true extent of the outbreak there. For example, when a retired military doctor revealed that there were far more SARS cases in Beijing than the authorities were then prepared to admit, there was no follow-up by the *Oriental Daily News*. Indeed, the newspaper quoted only what other media outlets had reported.

Media analysts note, however, that the low-key handling of news which is sensitive to the mainland Chinese authorities is not unknown in other media outlets in Hong Kong. They point to this as being a trend, in particular among those organisations which have been co-opted by

the authorities in Beijing. The greater worry, they say, is that this process will become more prevalent, to the extent of becoming institutionalised self-censorship.

ETHICS DISPUTE PROMPTS PRESSURE FOR MODERATION

Ethical problems continued to plague the newspaper industry throughout the period under review. The most serious incident happened in October 2002, when the tabloid-style magazine *Eastweek* published a front-page photograph of a semi-naked actress. It had been taken about 12 years earlier, when she was held by a kidnap gang. The actress was clearly in distress. Two days later, the same photograph was published in another magazine, *Three Weekly*.

Poor ethical standards still a key issue

The publication of the photograph prompted a strong response from the film industry, the media and political parties. The HKJA condemned *Eastweek*, saying the media should not just focus on short-term interests and fail to observe professional ethics. A coalition of eight political parties urged the government to take action, saying the *Eastweek* coverage was a "serious infringement of privacy" and breached media ethics. Artists and film directors appealed to the public to boycott *Eastweek*. Canto-pop singer Anita Mui called the photograph "an insult to all women in Hong Kong".

Eastweek said in a statement: "When our editorial department received the naked photo, we undertook repeated debates on whether we should cover up the truth... The decision is based on the spirit and principle of revealing the truth and exercising public monitoring on society." However, within days, the magazine's publisher, Albert Yeung, closed the publication, saying the group was wrong to publish the photo. In March 2003, the magazine was sold to the Sing Tao group, which plans to relaunch it in August or September.

The government also reacted strongly. The secretary for commerce, industry and technology, Henry Tang, said: "The government has expressed grave concern over this incident. We consider that such an act has damaged our social and moral values. This is not acceptable and should be condemned by the society and subject to legal sanction."

This was to come in the following months. The government's Obscene Articles Tribunal classified the photographs in both *Eastweek* and *Three Weekly* as obscene. Both publications appealed to the tribunal; both lost and then appealed to the High Court. The police took action against both publications, arresting 11 former employees of *Eastweek* in March 2003, and three at *Three Weekly*. Three former *Eastweek* managers and two *Three Weekly* employees were later charged with publishing an obscene article. The others were released unconditionally.

Sensationalism boosts sales

This case is significant because it once again highlights the sensitivity of the activities of tabloid-style newspapers and magazines. Such cases have led to calls for the media to do more to ensure that sensationalist journalism is curtailed. Indeed, the Chinese-language newspaper *Ming Pao Daily News* said it was time for the press to exercise self-discipline before such discipline was forced upon it. An ironic aside, though: sales figures of tabloid magazines soared following the controversy.

This was not the first time that the entertainment industry had expressed concern about the activities of the tabloid-style media. In July 2002, the vice-president of the Hong Kong Performing Artistes Guild, Eric Tsang, spoke about determining whether there was a need to enact a law banning acts like "intruding into an artiste's home". He said they were targeting acts such as infringing on the privacy of an artiste or disturbing his or her life.

Mr Tsang said the group, which represents about 800 Hong Kong performers, was collecting examples about intrusion by photographers into the lives of artistes. This, he said, would be submitted to the Law Reform Commission sub-committee examining the regulation of media intrusion.

This long-awaited report could pave the way for government action on media intrusion. In August 1999, the sub-committee released a report calling for the creation of a statutory press council to handle complaints against media intrusion. It would have the power to fine newspapers up to HK$1m. It also proposed, in a second report, the creation of several new civil torts on privacy.

The sub-committee has completed deliberations on both reports. The Law Reform Commission has endorsed the report favouring the creation of civil torts, and is in the process of considering whether to endorse the sub-committee's final report on media intrusion. Both reports are expected to be published in autumn 2003—much later than originally scheduled. The government will then have to consider whether to accept the various recommendations and bring forward the necessary legislation.

The government has on several occasions expressed concern over the state of media ethics. In November 2002, the secretary for home affairs, Patrick Ho, hit out at certain Chinese-language publications during a function organised by the World Chinese Newspapers Association. Dr Ho said publications had become too commercialised, and some had violated media ethics and reported news in ways that could jeopardise public morals, in order to boost sales. He called for the sector to exercise self-discipline and uphold press freedom. In a similar tone, the chief executive, Tung Chee-hwa, has in the past called for newspapers to exercise social responsibility.

Is the government looking to regulate the media?

The HKJA said the speech was a threat to freedom of expression and that any effort to exert control over the media was not a blessing for Hong Kong. Newspapers reacted in different ways. The *Apple Daily*—which is one of the foremost tabloid-style newspapers—criticised Dr Ho's comments, saying that the government was threatening press freedom, and not so-called "vulgarisation" by the media. *Apple Daily*'s major rival, the Oriental Daily News, put the blame on Next Media for starting the trend, while *Sing Tao Daily* called on the media to consider what more it could do to help safeguard press freedom.

However, just one day before his critical comments to the World Chinese Newspapers Association, Dr Ho told legislative councillors that the government believed that "the professional ethics of the press would be best assured by self-regulatory measures. The government is committed to upholding freedom of the press... Nevertheless, we would distance ourselves from the subject of a self-regulatory mechanism by the industry in order to pre-empt unnecessary speculation that the Government is trying to influence the industry or interfere with press freedom."

LAW REFORM ISSUES

The big law reform issue of the past year has involved debate over laws to implement article 23 of the Basic Law. Previous sections of this report focus on this vital issue, the HKJA's position on whether such laws should be enacted, and how they should be amended.

Anti-terrorism law threatens press freedom

The only other law reform issue during the year under review has been the endorsement, in July 2002, of the United Nations (Anti-Terrorism Measures) Bill. The HKJA was concerned about the effect the law might have on journalists who refuse to give up information relating to possible terrorists or their activities. It felt there were insufficient safeguards in the bill to protect journalists in the event that they were asked to reveal names of sources or information given in confidence.

The Legislative Council endorsed the bill by 32 votes to 18, at the end of an 11-hour debate over two days. Most of those who opposed the law were worried about powers to freeze terrorist funds and force individuals to report suspected terrorist properties. They argued that such powers could trap innocent parties.

The secretary for security, Regina Ip, denied that the bill would curb human rights. However, she admitted that the law was not perfect. Officials also denied that the bill had been rushed through the legislature—despite calls by human rights groups for the draft law to be withdrawn for further consultation. Officials said there was no need for further consultation—a position strikingly similar to that taken over Basic Law article 23 offences.

The anti-terror law empowers the chief executive to publish the names of terrorists, terrorist associates and terrorist property, and the secretary for security to freeze funds linked to

terrorists. Those affected may take their case to the Court of Appeal. They can also apply for compensation if they are wrongly named as terrorists.

In May 2003, the government published amendments to the anti-terrorism bill, to implement a United Nations resolution on the freezing of property belonging to terrorists and terrorist organisations, as well as conventions targeting terrorist bombings and acts at sea. The new bill will also amend a provision on the recruitment of members for terrorist organisations, which failed to pass in July 2002.

FURTHER PRESSURE ON RTHK

Pro-Beijing protests over Annette Lu

In August 2002, pro-Beijing critics rounded on government-owned Radio Television Hong Kong (RTHK) over plans by an announcer to interview Taiwan's vice-president, Annette Lu, about the early release of a Hong Kong singer from a Taiwan drug rehabilitation centre. The singer had taken part in a karaoke show during a visit to the centre by Ms Lu, well known for her strong views on independence for Taiwan. The announcer was in the end unable to arrange the interview.

The station is routinely criticised by pro-Beijing individuals or publications for allegedly taking a hostile approach towards mainland China. On this occasion, a Beijing adviser, Xu Simin, accused RTHK of pushing "two Chinas", because of Ms Lu's advocacy of independence for Taiwan. A pro-Beijing trade unionist and executive councillor, Cheng Yiu-tong, expressed "shock" over the planned interview.

The government official responsible for RTHK, secretary for commerce, industry and technology Henry Tang, said he contacted RTHK's director, Chu Pui-hing, over the incident. Mr Tang said he wanted to find out more about the incident, and that the issue was now over. However, a pro-democracy legislator, Cyd Ho, said such an intervention "would have created pressure on RTHK". The station's director of broadcasting said as a government-run radio station, it was inevitable "there will be contacts between RTHK and the government on operational issues". But he maintained that the station still enjoyed editorial autonomy.

A government pledge: that's not enough

Mr Tang, for his part, has on several occasions pledged not to interfere with RTHK's editorial independence. In July 2002, shortly after his appointment to the post, Mr Tang said he would not "influence the freedom of RTHK even though it is funded by the government". He also expressed the hope that the station would represent different voices and balance different interests in the community.

The HKJA has long maintained that despite such assurances, there is a pressing need to bolster RTHK's editorial independence. It has called for the enactment of legislation guaranteeing the station's autonomy and editorial independence in clear and unambiguous terms. The HKJA has also called on the government to refrain from taking any action that might be perceived as threatening to the station's existing status as an independent public broadcaster.

DISSIDENTS FACE PROSECUTION OVER PROTESTS

The HKJA's 2002 annual report documented the adoption of a tougher approach towards protesters. The year under review has seen several successful prosecutions following on from this new approach. However, in one piece of good news, the police substantiated a complaint against an officer for handcuffing a journalist during an operation to remove right of abode claimants.

In November 2002, three activists were found guilty of staging an unauthorised rally in the central business district. This was the first time that demonstrators had been convicted under the controversial Public Order Ordinance. The trio—April Fifth Action Group member Leung Kwok-hung and students Christopher Fung and Chris Lo—were arrested after they participated in a rally in February 2002. They were bound over for three months. The trio are planning to appeal against their convictions.

In an unusual move, the case was presided over by the chief magistrate, Patrick Li, who questioned whether a case of a "political nature" should have been handled by his court. He also noted that the protest had been peaceful. However, at the same time, Mr Li rejected the defence submission that the Public Order Ordinance had breached the Basic Law and the Bill of Rights Ordinance.

The ordinance requires protesters to obtain police permission seven days before a rally is held, as long as it involves more than 30 people. Legislators, human rights groups and academics said the convictions represented suppression of peaceful assembly and an exercise in selective prosecution.

Selective prosecution, on political grounds?

However, the secretary for justice, Elsie Leung, defended the prosecution, saying the law was there to be enforced. She said: "The main problem is not whether it is political, but whether a crime has been committed." The prosecution had noted during the trial that 344 unauthorised rallies had been held since the July 1997 handover. The February 2002 protest is the only one to have prompted a prosecution.

The decision to prosecute prompted the Bar Association to call for a review of the Public Order Ordinance. The HKJA supports such a review—with the aim of reverting to pre-1997 provisions whereby protesters merely have to notify the police of planned demonstrations and rallies.

As mentioned in Section 3, 16 members of the Falun Gong spiritual movement were convicted for obstruction and other offences in connection with a protest held outside Beijing's liaison office in March 2002. The convictions were recorded in August 2002. And in March 2003, a political activist, Ng Kwok-hung, was given a suspended three-month prison term for burning a national flag during a protest on China's National Day—October 1st 2002.

Police admit wrong use of handcuffs

The one piece of good news concerned police action taken against journalists during an operation in April 2002 to clear Chater Garden in Central of right of abode claimants. Two journalists were led away in handcuffs after they allegedly refused to move to an area specially designated for journalists. The force substantiated a complaint from one of the journalists against the use of handcuffs, although not until the Independent Police Complaints Council had rejected the results of an earlier investigation, which found the allegation could not be proved.

Police informed the independent council in April 2003 that only the improper use of handcuffs could be proven. A senior assistant police commissioner, Yam Tat-wing, said the officer involved in the handcuffing would face disciplinary action. The police also pledged to review their internal guidelines on the use of handcuffs and brief frontline officers on the importance of working with the media.

Designated media zones must go

The April 2002 incident prompted an angry response from the media. The HKJA expressed concern about the increasing use of designated media zones, and said their use was unacceptable except in special circumstances such as the visit of high-risk dignitaries or when an event takes place inside a closed area.

CHANGES AT THE *SOUTH CHINA MORNING POST*

The dominant English-language newspaper in Hong Kong, the *South China Morning Post*, has come in for considerable criticism over the past few years over the sacking or the forced resignation of several top-level writers—some of them highly critical of Chinese leadership policies.

In a shock move in August 2002, it was the turn of the newspaper's editor, Thomas Abraham, to resign. This came a day after one of his deputies, Robin Bowman, was sacked. A spokesman for the newspaper said Mr Abraham, who had been editor since June 2001, resigned "for purely personal reasons". He was not initially replaced: a former banker, Thaddeus Beczak, assumed the role of publisher, taking over all operations, including news and advertising. Mr Beczak also retained his post as deputy chairman of the SCMP Group.

In his short stint as editor, Mr Abraham had been involved in the sacking of the newspaper's Beijing bureau chief, Jasper Becker, who accused the newspaper of appearing to steer clear of controversial mainland stories. Mr Abraham denied the charge, saying the SCMP's reporters had not been told to avoid certain issues. The newspaper insisted that Mr Becker was sacked for insubordination.

At the time of Mr Abraham's sacking, there were reports of dissatisfaction over moves to revamp the newspaper. Indeed, in March 2003, the newspaper was relaunched with a new emphasis on Greater China and business. The publication was divided into three sections—the main section including several pages devoted to "national" news; city (Hong Kong) news; and business. The re-launch was timed to coincide with the newspaper's 100th anniversary.

A "new" editor for the SCMP

One month later, in April 2003, a new editor-in-chief, David Armstrong, took up his post. Mr Armstrong is no stranger to the newspaper. He was editor from 1994 to 1996. During his previous tenure, he was involved in dropping a controversial cartoon—The World of Lily Wong. The cartoonist, Larry Feign, questioned whether the strip had been dropped because of the content, which at times could be highly critical of the mainland Chinese leadership. Mr Armstrong denied this, saying the decision had been taken for "purely financial" reasons.

MONOPOLY WORRIES OVER BID FOR BROADCASTER

There were significant moves on the broadcasting front during the year under review. In July 2002, one of Hong Kong's largest and most influential business conglomerates announced that it planned to buy a 32.75% stake in one of two terrestrial broadcasters, Asia Television (ATV). Tom.com—which is part of tycoon Li Ka-shing's stable of companies—said it had entered into a memorandum of understanding with Lai Sun Development to buy its ATV stake in exchange for 87.2m new Tom.com shares worth a total of HK$290m.

The move—which would need government approval—prompted worries that Mr Li could become a dominant player in the broadcasting field. He already controls one commercial radio station, Metro Broadcast, through his flagship companies—Hutchison Whampoa and Cheung Kong Holdings. (These two firms together hold 43.3% of Tom.com). A successful sale would make Tom.com the second largest shareholder in ATV. Mr Li acknowledged that the firm might seek a larger holding.

Tom.com and ATV were not to be

However, the deal was not to be—apparently for financial reasons. Tom.com announced that it would investigate ATV's prospects for profitability. The television company is the poor cousin of the dominant broadcaster Television Broadcasts (TVB) in the terrestrial TV market. Then in August 2002, the firm announced that the purchase would not proceed, because it was "unable to conduct any meaningful due diligence investigation". At the same time, there were reports that Tom.com had earlier tried to buy into the television market through the purchase of a stake in the satellite broadcaster, Phoenix Satellite Television. There was considerable unease about the prospect of Tom.com acquiring a stake in ATV, given that Li Ka-shing's companies already controlled one broadcaster. If the purchase had gone ahead, then an application would have had to have been made to the government's Broadcasting Authority for an exemption from cross-media ownership restrictions. There were indications that the authority would have looked at such an application with sympathy. Its then chairman, Norman Leung, raised the possibility that approval might have been given if a firewall was erected between ATV and Metro Broadcast.

There is a precedent for such action. In July 2000, the dominant terrestrial broadcaster, TVB, was granted an exemption to win a pay TV license. In exchange for the license, TVB agreed to limit its stake in Galaxy Satellite Broadcasting to less than 50%, offer open programme bidding and set up separate management teams. (See below.)

Cross-media ownership: is government really serious?

Legislators and academics expressed concern about the Tom.com move, citing Mr Li's strong economic presence and the government's failure to respect ownership restrictions. One legislator, Emily Lau, urged the government to block the purchase. The HKJA, for its part, questioned whether an exemption would undermine the credibility of the Broadcasting Ordinance and its regulatory authority, and whether public hearings should be held to deal with any application.

In the end, no application was submitted because Tom.com withdrew from the deal. But as if to highlight the way the government tended to accommodate applications, the Broadcasting Authority granted an exemption for an ownership change at ATV that preceded Tom.com's announcement that it was seeking a stake in the broadcaster. In July 2002—at the height of the Tom.com controversy—the authority approved the application for a former propaganda official in the Chinese People's Liberation Army, Liu Changle, to take a 46% stake in ATV—even though he had not been ordinarily resident in Hong Kong for at least seven years, as required by law.

In making its decision, the Broadcasting Authority cited the need to encourage investment in the industry and its confidence that the station would remain under the control of people and companies which were "sensitive to Hong Kong viewers' taste and interests".

In May 2003, ATV announced that its chief executeve, Chan Wing-kee, had increased his stake in the broadcaster to about 45%, by agreeing to buy Lai Sun Development's stake for less than HK$300m. Mr Chan—a Hong Kong permanent resident—now becomes the second largest shareholder—just behind Mr Liu.

DOMINANT BROADCASTER PURSUES PAY-TV INTEREST

In February 2003, the dominant terrestrial broadcaster, TVB, announced that it was pursuing its ambition to become a pay TV player, through the sale of a 51% stake in Galaxy Satellite Broadcasting to the American satellite services provider Intelsat. Prior to the sale, there had been speculation that TVB might drop its plans to become involved in the pay TV market, which at the moment is dominated by Hong Kong Cable Television (run by the Wharf Group).

In July 2000, the government awarded licenses to five pay TV operators. Two of them—Star TV and Hong Kong Network TV—later pulled out. The government insisted that TVB had to sell its majority stake in Galaxy, in order to be qualified to run a pay TV service. Initially, TVB had hoped to involve Astro Broadcasting in the venture, but the Malaysia-based firm withdrew in June 2001.

TVB sought permission from the government to extend the deadline for it to sell its majority stake in Galaxy until the end of February 2003. The government agreed, and just a few days before the deadline, TVB announced the deal to sell a 51% stake to Intelsat for HK$542m, including satellite transponder capacity. The company said it hoped to begin providing a service via an Intelsat satellite within 12 months of the deal.

It is uncertain how much of an impact the new service will have on the broadcasting market. TVB's advantage is that it owns a formidable amount of Chinese-language programme content. But analysts warned that the venture might not make money for at least three years. They also questioned the depth of Intelsat's experience in television.

ARTICLE 19, the Global Campaign for Free Expression

ARTICLE 19 takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which proclaims the fundamental right to freedom of expression. ARTICLE 19 works impartially and systematically with local partners, organisations and individuals to identify and oppose censorship in its many forms, to defend victims of censorship and to promote strengthened national and international standards for the protection of freedom of expression.

ARTICLE 19 monitors individual countries' compliance with international standards protecting freedom of expression, and regularly makes submissions to inter-governmental organizations such as the United Nations Human Rights Commission and Committee and the European Court of Human Rights.

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HONG KONG JOURNALISTS ASSOCIATION

The Hong Kong Journalists Association (HKJA) is the only industry-wide union of journalists in Hong Kong. The HKJA promotes the right to freedom of expression and actively focuses on a range of press freedom and ethics concerns. As a trade union, the HKJA focuses on labour rights, pay issues, health and safety, and training.

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ISBN 1 902598 60 1