

Speech by Secretary for Justice

Following is the speech (English translation) by Secretary for Justice, Mr Wong Yan Lung, SC, on the relationship between the law and the freedom and professional conduct of the press at 5th Anniversary of the Hong Kong Press Council today (February 21):

Professor Edward Chen, Members of the Council, Distinguished guests,

Introduction

I am pleased to be amongst you on this special occasion, celebrating the 5th Anniversary of the Hong Kong Press Council. The Council was an important initiative which has made a significant contribution as a professional and self-regulatory body for the newspaper industry in Hong Kong.

The cornerstone of a democratic society is a free and independent press. It plays a vital role in disseminating information to and from the public, in providing a forum for the exchange of views and opinions on relevant issues and in ensuring that matters of public interest are subject to appropriate scrutiny and accountability. As important is the role played by the press, so too is the role played by the people who perform its very important function. As you know, those in the media are expected to abide by both ethical and legal standards.

Professional standards

As members of a profession, journalists are subject to rules of ethical conduct that are promulgated by their own professional body. Four local journalist bodies have laid down a common set of rules in the Journalists' Code of Professional Ethics. As you are familiar with these ethical rules, I do not think I need to dwell on them. I have heard that the Council has been instrumental in promoting ethical conduct. For example, I heard that the Press Council has recently urged journalists to observe these rules when handling news on suicides.

Observance of these principles helps to ensure the highest standards of journalism. But a breach of them does not lead to legal sanctions. Since I am here in my capacity

as a lawyer, I will speak on the issue of press freedom from a legal perspective.

The common law

First, I would like to speak about the relationship between the common law and press freedom. Legal standards do, of course, lead to legal sanctions. But the common law system always approached the media from the angle of liberty. Common law judges decided, hundreds of years ago, that a person is free to make any statement unless the law prohibits that statement. Because of this approach, the concept of 'freedom of speech', as one aspect of 'civil liberties', developed as a fundamental part of the common law.

The downside to this approach was that there was no constitutional restriction on the restraints that could be imposed on freedom of speech. The judges themselves developed some restraints, including the law of defamation, contempt of court, blasphemy and, more recently, privacy. But, in the past, a greater threat to freedom of speech came from legislative action. Most, if not all, jurisdictions in the past enacted laws that would, by today's standards, be regarded as unjustifiable restrictions on press freedom. That is not to say that all legislative intervention in this area was restrictive. A number of landmark statutes were passed that gave the media greater freedom to publish material than members of the public.

Constitutional protection

The way to secure press freedom was to provide constitutional guarantees in respect of it. In the United States, the first amendment of the Constitution, enacted in 1791, stated that 'Congress shall make no law ... abridging freedom of speech.' Other common law jurisdictions were rather slow in following suit. The process was, however, speeded up when independence was granted to many former British colonies, and their new constitutions guaranteed press freedom.

Other factors stimulating change were international treaties on human rights, which were a response to the horrors of the Second World War. The European Convention on Human Rights came into force in September 1953. A very similar treaty, the International Convention on Civil and Political Rights ('the ICCPR'), was extended by the UK to Hong Kong, subject to certain reservations and declarations, in 1976.

Those treaties were binding as a matter of international law but, under the common law system, they did not provide remedies under domestic law unless and until they were incorporated in local law.

Constitutional protection in Hong Kong

The process of incorporating the ICCPR into Hong Kong's laws took place in Hong Kong in 1991. In that year, the Hong Kong Bill of Rights Ordinance was passed, and the UK's constitutional instrument relating to Hong Kong, the Letters Patent, was amended to entrench the rights in that Ordinance.

When Reunification took place, the Basic Law gave constitutional status to the rights in the ICCPR, and also created a specific constitutional guarantee of freedom of the press under Article 27. As a result of these guarantees, anyone who considers that freedom of the press has been contravened, whether by legislation, government action, or private action, can seek a remedy through Hong Kong's independent courts.

Areas in Dispute

Given these constitutional guarantees, why is press freedom still a controversial subject from time to time, not only in Hong Kong but elsewhere? The answer, I think, is that press freedom is not absolute and there is always room for disagreement as to where press freedom should end and other legitimate interests should prevail. For example, in the UK there is currently a lively debate over whether a new offence of inciting religious hatred should be enacted, and whether the offence of blasphemy should be abolished.

In Hong Kong, the constitutional guarantees only permit restrictions on press freedom that are provided by law and are necessary-

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

(b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

But how does one balance press freedom against such interests? In the final analysis, it is for the courts to do this. And so the attitude of the courts is crucial. The courts in Hong Kong have generally followed European jurisprudence in dealing with

this issue and, as a result, I believe that press freedom is being fairly protected in Hong Kong. The courts have, on numerous occasions, emphasised that the freedoms guaranteed by the Basic Law are to be given a generous interpretation, whereas the restrictions on those freedoms are to be narrowly construed.

For example, in the case of Ng Kung Siu (otherwise known as the Flag case) the Court of Final Appeal emphasised that:

"Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials."

However, the Court also stated that:

"Freedom of expression is not an absolute. The Preamble to the ICCPR recognises that the individual has duties to other individuals and to the community to which he belongs. Article 19(3) itself recognises that the exercise of the right to freedom of expression carries with it special duties and responsibilities and it may therefore be subject to certain restrictions."

The flag case turned on whether or not it was 'necessary' for the protection of 'public order (ordre public)' to prohibit the desecration of the national and regional flags. The Court held that the concept of ordre public is not limited to public order in terms of law and order. It is wider and includes whatever is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. The Court held that the word "necessary" should be given its ordinary meaning. As a result, due weight should be given to the choices the legislature has made in enacting the laws which restrict the freedom. The Court must also consider whether the restriction on the guaranteed right is proportionate to the aims sought to be achieved by it. You should not use a sledge hammer to crack a nut.

It is clear that freedoms and rights do not exist in a vacuum. They must be balanced in the public interest to take account of the rights of others and of the interests of the whole community.

The law and the press

As I said earlier, I believe that freedom of the press has been fairly protected in Hong Kong. However, there is no denying that a few events have occurred that raised concern in the media.

One controversy last year was over the search and seizure of certain journalistic materials. That action was authorised by a court under specific provisions dealing with journalistic materials, contained in Part XII of the Interpretation and General Clauses Ordinance (Cap 1).

The action was challenged in further court proceedings, where the Court of Appeal has this to say.

"The rationale underlying Pt.XII, I believe, relates to the important role played by a free and independent press as public watchdog. The press should be able to speak out on matters of public interest without fear of reprisal, and journalists need to protect the confidentiality of the sources of the information they receive. On the other hand, the legitimate requirements of law enforcement agencies may in exceptional cases make it necessary for journalistic materials to be the subject of seizure and inspection. In this sensitive area, Pt.XII of the IGCO requires a judge of the Court of First Instance or the District Court to hold the balance between these competing interests."

The importance of freedom of the press was emphasised again in the case of *So Wing Keung v Sing Tao Ltd. & Anor* [2005] 2 HKLRD 11. There the Court of Appeal, which was also dealing with the issue of search warrants under Part XII, stressed the importance of freedom of the press. It noted that fundamental rights were to be broadly construed and respected but said that, on occasions, the enjoyment of such rights had to be balanced against the rights and interests of other persons or society as a whole.

Comparable overseas jurisdictions have dealt with the issue of access by law enforcement agencies to journalistic material in different ways. However, it is commonly recognised by them that access to journalistic material by a law enforcement agency will sometimes be necessary and justified by an overriding requirement in the public interest.

Another legitimate restriction on freedom of expression is found in the law of contempt of court. That law has itself been relaxed in recent years in order to give due recognition to freedom of speech. However, there are limits on that freedom. In *Wong Yeung Ng v Secretary for Justice*, the Court of Appeal noted that the contempt of scandalising the court was a necessary restriction on the fundamental rights under the Basic Law. However, in order to establish such a contempt, it was necessary to prove-

(a) that the statement or conduct was calculated to interfere with the administration of justice in the widest sense;

(b) that it involved a real risk that the due administration of justice would be interfered with; and

(c) that there was an intention to interfere with the administration of justice, or recklessness by appreciating this possible consequence and ignoring it.

These conditions are relatively strict, and journalists cannot accidentally fall foul of them. However, journalists should be careful not to commit another contempt of court by publishing any materials which will cause a real risk of interference with the administration of justice or seriously prejudicing a fair trial. Mere carelessness is not a defence. Further, you will all be familiar with the law of defamation and we do not have time today to go into it.

Foundations of a free society

Although I have mentioned a few exceptional situations where freedom of the press is limited, I would like to conclude this address by emphasising the general rule i.e. journalists can generally say whatever they wish, however unpalatable that may be to those they may criticise. The reasons for this were admirably set out by the European Court of Human Rights in the case of *Roemen and Schmit v Luxembourg* (Application no. 51772/99) when dealing with journalistic sources.

"46. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to

provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. Limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court. The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

Conclusion

Finally, let me assure you that the government fully accepts that, in a free society, there have to be checks and balances. The press is an important check to the workings of government and provides a means of accountability. The Hong Kong SAR is committed to protecting press freedom, as guaranteed by the Basic Law. My department will continue to vet all new legislative proposals to ensure that they are consistent with that constitutional right. Both the local and international media in Hong Kong can rest assured that Hong Kong will continue to respect their freedom of expression. Freedom of the press is fully respected in Hong Kong.

Thank You.

Ends/Tuesday, February 21, 2006

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