

Committee on the Application of Standards

Date: 8 June 2021

Governments appearing on the preliminary list of individual cases have the opportunity, if they so wish, to supply written information to the Committee

▶ Information on the application of ratified Conventions supplied by governments on the list of individual cases

China – Hong Kong Special Administrative Region (notification: 1997)

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

The Government has provided the following written information, as well as copies of the relevant judgments.

Information provided on 20 May 2021

Hong Kong has been applying the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) with modifications in respect of Articles 3, 5 and 6 since 1963. The Hong Kong Special Administrative Region (HKSAR) Government has taken note of the observations of the Committee of Experts in 2019 and 2020 (the observations).

Freedom of Association and Right to Organise

As explained in the previous reports of the HKSAR on the application of Convention No. 87, the right and freedom of association, and the right and freedom to form trade unions in the HKSAR are guaranteed under the Basic Law of the HKSAR of the People's Republic of China (Basic Law). The Hong Kong Bill of Rights Ordinance (Chapter 383 of the Laws of Hong Kong) also provides for such rights.

Under the Trade Unions Ordinance (TUO) (Chapter 332 of the Laws of Hong Kong), any group of seven persons can apply to form a trade union. The number of trade unions registered under the TUO in the HKSAR increased over the years. Specifically, the number of registered employee unions increased by 56.5 per cent from 866 as at 31 December 2019 to 1,355 as at 31 December 2020. Except for dissolution by or at the request of trade unions, no trade union has been deregistered. In the HKSAR, trade union members and officers enjoy a range of rights under the TUO, including the immunity from civil suits for certain acts done in contemplation or furtherance of a trade dispute.

Sufficient safeguards against anti-union discrimination are accorded to employees under the Employment Ordinance (EO) (Chapter 57 of the Laws of Hong Kong). The EO stipulates that every employee has the right to be or to become a member or an officer of a trade union, to take part in the activities of the trade union at any appropriate time, and to associate with other persons for the purpose of forming a trade union. Employers must not prevent or deter employees from exercising these rights. Otherwise, they may incur criminal sanction.

On the International Trade Union Confederation (ITUC)'s observation in September 2016 alleging a group of coach drivers were all dismissed by the employer before a strike, the Labour Department of the HKSAR Government carried out a prompt investigation after the concerned coach drivers had lodged complaints on alleged anti-union discriminatory acts. While there was insufficient evidence to substantiate an anti-union discriminatory offence, the HKSAR Government took out prosecution against their employer on late payment of wages and conviction was secured.

The HKSAR Government is fully committed to protecting the trade union rights of employees. As always, we will not tolerate abuses of the law by employers. Subject to sufficiency of evidence, prosecution will be taken out against employers and/or persons acting on employers' behalf.

Right of peaceful assembly of trade union leaders

Every person must observe the law in force in exercising his or her right of peaceful assembly. As pronounced by one of the judges at the Hong Kong Court of Appeal in the judgment of a sentencing case:¹

The basic freedoms conferred on Hong Kong residents are comprehensive and in no way lesser than the freedoms enjoyed by people of other advanced and free societies. However, [the freedoms of assembly, speech, procession, demonstration and expression of opinions] are not absolute or unrestricted; they are subject to the supervision of the law. Hong Kong residents are obliged to observe the laws that are in force in Hong Kong, and the exercise of the rights conferred by law is by no means a reason or excuse for doing illegal acts. Any act of protest or demonstration for which the police have not issued a Notice of No Objection, or in which violence or the threat of violence is used to express one's opinions, crosses the boundary of the peaceful exercise of the rights and enters the territory of unlawful activities; it becomes an unlawful act which interferes with the rights and freedoms of others.

With regard to the alleged "repression" of protests by the Hong Kong Police Force (the police) in 2019, the accusation has completely ignored the violent and illegal nature of the acts by the rioters, as well as the unprecedented damage caused to society. The police have stringent guidelines on the use of force that are consistent with international human rights norms and standards. The use of force by the police are conscious decisions made having regard to actual circumstances and needs with due considerations.

In respect of the arrests of trade union leaders, any arrest and prosecution is directed against the criminal act and has nothing to do with the political stance, background or occupation of the person(s) concerned. It is a hypocritical argument of politics overriding justice for anyone advocating privilege for certain groups of people, such as labour representatives, to contend that their law-breaking acts could evade

¹ Per Hon. Yeung VP, in *Secretary for Justice v Wong Chi Fung* [2017] 5 HKC 116, at paras 2–3.

justice. The accused also has the right to a fair and open trial before an independent and impartial court.

With regard to Mr Lee Cheuk-yan, he was prosecuted in connection with unauthorized assemblies on 18 August 2019, 31 August 2019, 1 October 2019 and 4 June 2020. In respect of the first two cases, the court, which enjoys independent judicial power, has made a ruling and convicted the defendants. This proves that the prosecution actions were fully justified. The arrested persons were from diverse backgrounds, and the suspected unlawful acts had nothing to do with the activities of trade unions. The relevant judgments (in English only) are attached. As the judicial proceedings of the other cases are ongoing, it is inappropriate for us to comment further.

In respect of the alleged arrest of Mr Yu Chi-hang by the police in December 2015, we are unable to locate the alleged case based on the information provided. However, it should be emphasised that any arrest by the police is based on facts and evidence, and conducted in strict accordance with the law.

The HKSAR Government will continue to handle every case in a fair, just and impartial manner in accordance with the law.

The Law of the People's Republic of China on Safeguarding National Security in the HKSAR

Safeguarding national security through legislation is in line with international practice. Western countries have also enacted laws to safeguard their respective national security, and established relevant legal systems and enforcement mechanisms. The HKSAR Government has a duty to enact laws for safeguarding national security under article 23 of the Basic Law, but despite a lapse of over 23 years since reunification, it has failed to legislate to prohibit acts and activities endangering national security as required under the Basic Law. Given the political situation in Hong Kong at that time, this task could not be completed in the foreseeable future.

As the HKSAR Government has detailed in the response to the observations of ITUC and the Hong Kong Confederation of Trade Unions in November 2020, this legal vacuum exposed the serious threats to national security faced by Hong Kong at the series of riots since June 2019. In view of the severe situation in Hong Kong at the time, with protestors becoming increasingly violent, there were growing signs of separatism and terrorism, seriously affecting the lawful rights and interests of Hong Kong residents. It is therefore necessary for the Central Authorities to take immediate steps to introduce measures for safeguarding national security in the HKSAR. Against this background, the Standing Committee of the National People's Congress adopted the Law of the People's Republic of China on Safeguarding National Security in the HKSAR (Hong Kong National Security Law) on 30 June 2020. The HKSAR Government promulgated the Hong Kong National Security Law for implementation on the same day.

The Hong Kong National Security Law clearly stipulates that human rights shall be respected and protected in safeguarding national security in the HKSAR; the rights and freedoms, including freedom of speech, of the press, of publication; of association, of assembly, of procession and of demonstration, which the HKSAR residents enjoy under the Basic Law and the provisions of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall be protected in accordance with law. Any measures or enforcement actions taken under the Hong Kong National Security Law must be in line with the above principle. All persons shall observe the requirements under the law, shall not contravene

the fundamental provisions of the Basic Law, and shall not endanger national security or public safety, public order or the rights and freedoms of others, etc. in exercising their rights.

The Hong Kong National Security Law further lays down many legal principles for the protection of defendants, including the presumption of innocence, the prohibition of double jeopardy, the right to defend and other rights in judicial proceedings that parties in judicial proceedings are entitled to. Any measures or enforcement actions taken under the Hong Kong National Security Law must observe these principles. The above features have put the Hong Kong National Security Law on a par with, if not superior to, similar national security laws in other jurisdictions.

As a matter of fact, the implementation of the Hong Kong National Security Law has delivered immediate results, and Hong Kong has emerged from chaos into stability, with a significant reduction in violent acts: the number of people arrested for offences in public order incidents in the first six months after the implementation of the Hong Kong National Security Law dropped by around 85 per cent year-on-year; the number of cases for arson and criminal damage also dropped by around 75 per cent and 40 per cent respectively. Activists endangering national security either fled or announced their withdrawal; advocacy of “Hong Kong independence” subsided substantially; the community largely resumed normal, and people’s lawful rights are protected. Our economy and people’s livelihood could revive.

Legislation on article 23 of the Basic Law

As aforementioned, the HKSAR has the constitutional responsibility for enacting legislation on article 23 of the Basic Law. Article 7 of the Hong Kong National Security Law also clearly stipulates that “(t)he Hong Kong Special Administrative Region shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law of the Hong Kong Special Administrative Region and shall refine relevant laws”.

In this regard, apart from drawing up effective and pragmatic proposals and provisions, the HKSAR Government will also conduct public consultation properly, formulate appropriate publicity and explanation strategies, as well as communicate more with members of the public, with a view to explaining clearly the legislative principles and details and avoiding misunderstanding.

Conclusion

The HKSAR Government trusts that the above information will further clarify the concerns put forth in the Observations. The HKSAR Government has all along attached great importance to fulfilling all the obligations of International Labour Conventions applied to the HKSAR. We would like to assure the Committee of Experts that there is no infringement of or incompliance with the Convention. The HKSAR Government will continue to observe all the applied International Labour Conventions.

Additional information provided on 8 June 2021

Unauthorized assembly

Under section 17A(2) of the Public Order Ordinance (POO), where any public meeting or public procession takes place in contravention of the Commissioner of Police’s (the Commissioner) prohibition or objection, or where three or more persons taking part in a public gathering refuse or wilfully neglect to obey an order given by a

police officer under the Ordinance, the public gathering shall be an “unauthorized assembly” in law.

Any public meeting with participants of more than 50 persons or any public procession with participants of more than 30 persons that are regulated under POO may be conducted only if a notice has been given to the Commissioner who gives no prohibition or objection. The Commissioner (or his delegated officers) has to carefully examine each case based on all the relevant facts and circumstances. By law, the Commissioner may only prohibit or object a public meeting or public procession if it is necessary in the interests of national security, public safety, public order or the protection of the rights and freedoms of others, and when those interests could not be met by the imposition of conditions.

There is also a proper appeal system in place under POO. If a person is aggrieved by the decision of the Commissioner to prohibit a public meeting, to object a public procession or to impose conditions on the holding of a public meeting or procession, he may lodge an appeal to the independent statutory Appeal Board on Public Meetings and Processions (Appeal Board). The Appeal Board is chaired by a retired judge. It may confirm, reverse or vary the prohibition, objection or condition imposed by the Commissioner. The decision of the Appeal Board is also amenable to the challenge of judicial review.

The Hong Kong Court of Final Appeal has held that the statutory requirement for notification under POO is constitutional.² It is required to enable the police to fulfil the proactive duty resting on Government to take reasonable and appropriate measures to allow lawful demonstrations to take place peacefully. A legal requirement for notification is in fact common in jurisdictions around the world.

POO regulates matters in relation to assemblies and processions. The restrictions therein are consistent with the provisions of the International Covenant on Civil and Political Rights.

The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

According to article 1 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Hong Kong National Security Law), the Law is enacted for the purpose of:

- (a) ensuring the resolute, full and faithful implementation of the policy of One Country, Two Systems under which the people of Hong Kong administer Hong Kong with a high degree of autonomy;
 - (b) safeguarding national security;
 - (c) preventing, suppressing and imposing punishment for the offences of secession, subversion, organization and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security in relation to the Hong Kong Special Administrative Region;
 - (d) maintaining prosperity and stability of the Hong Kong Special Administrative Region;
- and

² *Leung Kwok Hung and Others v HKSAR* [2005] 3 HKLRD 164.

- (e) protecting the lawful rights and interests of the residents of the Hong Kong Special Administrative Region.

It can be seen that the purpose of the enactment of the Hong Kong National Security Law has no direct relationship with labour issues.

The Hong Kong National Security Law has also clearly stipulated four categories of offences that endanger national security, namely secession, subversion of state power, terrorist activities, and collusion with a foreign country or with external elements to endanger national security. Such offences are clearly defined in the Hong Kong National Security Law and are similar to those in the national security laws of other jurisdictions. The elements, penalties, mitigation factors and other consequences of the offences are clearly prescribed in Chapter III of the Hong Kong National Security Law. The prosecution has the burden to prove beyond reasonable doubt that the defendant has the actus reus and mens rea of the offence before the defendant may be convicted by the court. Law-abiding people, including Hong Kong residents/labours and overseas tourists/investors, will not unwittingly violate the law.

Legislation on article 23 of the Basic Law

The HKSAR has the constitutional responsibility for enacting legislation on article 23 of the Basic Law to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets; to prohibit foreign political organisations or bodies from conducting political activities in the HKSAR; and to prohibit political organizations or bodies of the HKSAR from establishing ties with foreign political organizations or bodies. The HKSAR Government has failed for the past 23 years since reunification to enact its national security laws as required by article 23 of the Basic Law to safeguard national security.

Article 7 of the Hong Kong National Security Law also clearly stipulates that "(t)he Hong Kong Special Administrative Region shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law of the Hong Kong Special Administrative Region and shall refine relevant laws".