

# HKSAR Government strongly objects to unfair criticisms from UN Human Rights Committee

A spokesman for the Constitutional and Mainland Affairs Bureau said today (July 27) that the United Nations Human Rights Committee (the Committee) has issued its concluding observations on the fourth report of the Hong Kong Special Administrative Region (HKSAR) in the light of the International Covenant on Civil and Political Rights (ICCPR).

"We are pleased that the Committee appreciates the constructive dialogue it has had with the delegation and welcomes the detailed replies given by the delegation during and after the meetings. However, we are completely dismayed that the Committee continues to express unsubstantiated criticisms towards the HKSAR despite the delegation's efforts in addressing members' concerns and clarifying the misunderstandings of the human rights situation in the HKSAR," the spokesman said.

The concluding observations were published on July 27 (Geneva time), after the Committee's consideration of the HKSAR's fourth report on July 7, 8 and 12. A nine-member delegation led by the Secretary for Constitutional and Mainland Affairs, Mr Erick Tsang Kwok-wai, attended the meetings by videoconferencing.

"In the concluding observations, the Committee commended the HKSAR Government in a number of areas, including the enhancements of legal protection from discrimination and harassment under the four anti-discrimination ordinances in 2020 and 2021; the establishment of a Commission on Children in 2018 to formulate long-term targets and strategic directions concerning holistic development and important growth stages of children; the introduction of statutory paternity leave in 2015; and the launch of the Unified Screening Mechanism in 2014. The Committee has also raised a number of concerns and recommendations without giving due weight to the unique circumstances of Hong Kong which were explained by the delegation time and again," the spokesman said.

## The National Security Law

The Committee should view the enactment and implementation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the National Security Law) in the proper context with due regard to the background of the violent social unrests preceding the enactment of the Law, and the actual operation and effect of the Law.

"Hong Kong is a local administrative region of the People's Republic of China (PRC) that comes directly under the Central People's Government. As national security always falls within the purview of the Central Authorities,

our country has the right to legislate for the matter under the 'one country, two systems' principle. By the same token, while the National Security Law provides that the HKSAR shall have jurisdiction over cases concerning offences under the Law, it also specifies three situations under which the Central Authorities retain jurisdiction to be exercised by the Office for Safeguarding National Security of the Central People's Government in the HKSAR, with clear procedural requirements and safeguards on human rights and fair trial.

"It should be stressed that during the adoption of the National Security Law, the relevant contents of, inter alia, the ICCPR were fully taken into consideration in the legislative process, with an emphasis placed on the fact that principles of human rights protection must be observed when safeguarding national security. In particular, Article 4 of the National Security Law provides that human rights shall be respected and protected in safeguarding national security in the HKSAR, while Article 5 of the Law affirms adherence to the principle of the rule of law while enforcing the law against offences endangering national security. The Hong Kong Court of Final Appeal (CFA) (Note) has pointed out that these two Articles are centrally important to the interpretation of the National Security Law generally.

"As regards the clarity of offences under the National Security Law, the Law clearly stipulates the four categories of offences that endanger national security. Such offences are clearly defined and are similar to those in the national security laws of other jurisdictions; their extraterritorial application is also squarely in line with international practice.

"As to whether a particular act constitutes an offence, it would depend on the facts and circumstances of each case, and hence over-generalisation is neither possible nor appropriate. That said, it should be stressed again that the National Security Law does not seek to prevent, suppress and punish normal interactions with other countries, regions or relevant international organisations; nor should it be overlooked that the HKSAR Government proactively consulted the Legislative Council, non-governmental organisations and members of the public in compiling the fourth report, and its implementation of the ICCPR provisions as applied to Hong Kong remains open to public examination and scrutiny by individuals and organisations alike.

"On law enforcement, the Committee should duly recognise, as the Government had emphasised during the meetings, that any law enforcement actions taken by Hong Kong law enforcement agencies are based on evidence, strictly according to the law, for the acts of the persons or entities concerned, and have nothing to do with their background. Moreover, most of the provisions of the Implementation Rules are formulated with reference to existing Ordinances of the HKSAR, and the Implementation Rules set out in detail the stringent procedural requirements for the law enforcement agencies to follow. It would also be contrary to the rule of law to suggest that people of certain sectors or background could be above the law."

"In particular, for enforcement actions in respect of the sedition offence to which the Committee has made specific reference, due regard should be given to the 'soft resistance' acts, hate speeches and publications which

have radicalised the general public since 2019. It should be reiterated that the offence is not meant to silence expression of any opinion that is only genuine criticisms against the Government based on objective facts, with relevant defence clearly stipulated under the Crimes Ordinance (Cap. 200).

"On the Committee's comments on various procedures provided under the National Security Law, it should be stressed that none of them would undermine judicial independence or right to a fair hearing under Article 14 of the ICCPR. In particular, the designation of judges by the Chief Executive (CE) to handle cases involving offences endangering national security only involves designating a list of judges from existing judges, rather than choosing a particular judge to preside over a specific case, and the assignment of cases to individual designated judges remains to be the independent decisions of the Judiciary, not the CE. Trial by a panel of three judges instead of by a jury under specified circumstances, seeks to safeguard rather than undermine the defendants' right to a fair trial, and judges will deliver the reasons for the verdicts to ensure open justice. And while the CE certifies evidence involving State secrets, the burden remains on the prosecution to establish all elements of the offence.

"On the bail arrangement, it was stressed that the cardinal importance of safeguarding national security and preventing and suppressing acts endangering national security explains why the National Security Law introduces more stringent conditions to the grant of bail in relation to offences endangering national security. It is disappointing that the Committee has made unfounded statements on the implementation of the arrangement, and mischaracterised the CFA's decision on the same.

"It should be stressed that the National Security Law was enacted to restore the enjoyment of rights and freedoms which many people in the HKSAR had been unable to enjoy during the period of serious violence between June 2019 and early 2020. The Law has indeed achieved the intended effect, and has swiftly and effectively restored stability and security. These are incontrovertible facts shared by the experiences of people living and businesses operating here in Hong Kong, who are relieved and happy to see Hong Kong now continues to be an open, safe, vibrant and business-friendly metropolis."

#### The Emergency Regulations Ordinance

"The HKSAR Government reiterates that the powers under the Emergency Regulations Ordinance (Cap. 241) can only be exercised in accordance with the Hong Kong Bill of Rights Ordinance (Cap. 383), including the safeguards concerning derogation in times of public emergency, and is thus fully compliant with Article 4 of the ICCPR. The Committee's concerns are based on a misunderstanding of the law. In fact, the Prohibition on Face Covering Regulation (Cap. 241K) made under the Emergency Regulations Ordinance did not involve any derogations, was scrutinised by the Legislative Council, and the constitutionality of the prohibition on the use of facial coverings at certain assemblies, meetings and processions was thoroughly considered and upheld by the CFA."

## Use of force by the Police and Police oversight mechanism

"The HKSAR Government would like to reiterate that the Committee's remarks that excessive force had been used by the Police have disregarded the extreme violence inflicted by the rioters. The demonstrations during 2019 were not peaceful as falsely claimed by the rioters, rather they were marred by serious violence and had gone beyond the constitutionally guaranteed bounds. Police's actions were responsive and no more than necessary to restore law and order. The concluding observations have failed to give a fair and balanced account of the situation. Police have stringent guidelines on the use of force, which are consistent with the international human rights norms and standards. According to the Police's guidelines, the level of force must be proportionate, reasonable and responsive to the threat facing the officer. In any event, the Police's use of force is subject to the scrutiny of various independent gatekeeping institutions, including the Independent Police Complaints Council (IPCC) and the courts in Hong Kong. The IPCC is independent and effective in discharging the wide-ranging statutory powers conferred by the IPCC Ordinance (Cap. 604) and in ensuring that complaints against the Police are handled promptly, thoroughly, fairly and impartially."

## Legal Aid Service

The Committee's concern that the recent legal aid reform has restricted the rights to access to legal aid and to Counsel of one's choice, is unsubstantiated and factually incorrect.

"The right to choose lawyers is not absolute. It is not a right to have a specific legal representative of one's choice. A fair trial does not necessarily mean that a party must be legally represented by a lawyer of his/her own choice.

"In assigning lawyers in criminal legal aid cases, the Legal Aid Department (LAD) takes into account the aided persons' interest and only the most suitable lawyers are selected according to their level of experience and expertise, the type and complexity of the particular cases.

"In relation to the new assignment limits in judicial review related cases imposed on assigned lawyers, LAD has addressed the public's concern about over-concentration of cases among certain assigned lawyers with the aim of striking a balance between distributing cases more evenly to equally qualified lawyers and allowing the aided persons to nominate their lawyers. LAD is of the view that more assigned lawyers who have such experience will in the long run be beneficial to both the aided persons and the legal aid system.

"LAD ensures that all those who comply with the requirements of the Legal Aid Ordinance (Cap. 91) and have reasonable grounds for pursuing or defending legal action in the courts of Hong Kong will not be denied access to justice due to a lack of means. Those who satisfy both the means test and merits test as stipulated in the Ordinance will be granted legal aid.

"The financial eligibility limits of legal aid are reviewed and

appropriately adjusted periodically. The recent adjustments took effect on June 20, 2020. LAD also timely considers any necessary adjustments to the scope of legal aid services. In 2012 and 2020, the scope of the Supplementary Legal Aid Scheme was widened substantially and as a result, legal services/assistance are more accessible to members of the public."

#### Judicial independence

On the National Security Law being an alleged obstacle to judicial independence in Hong Kong, the spokesman reiterated, "the Judiciary is committed to upholding the rule of law and judicial independence in Hong Kong guaranteed under the Basic Law. All judges and judicial officers will continue to abide by the Judicial Oath and administer justice in full accordance with the law, without fear or favour, self-interest or deceit."

#### Improved electoral system

"Further, the Committee's concluding observations concerning the HKSAR's improved electoral system are misguided and based on ungrounded accusations. It also defies the precise clarifications made by the HKSAR Government at the meetings. There is no cure-all in respect of electoral system and how it should be improved. The development of democracy in the HKSAR must be consistent with Hong Kong's constitutional order under the Constitution of the PRC, the Basic Law and the 'one country, two systems' principle. The political, economic, social, cultural and historical circumstances of the HKSAR must also be taken into account.

"Democracy has taken a quantum leap forward in the HKSAR since its return to the motherland in July 1997. As a matter of fact, the democratic process of Hong Kong has really started only after China's, our motherland, resumption of the exercise of sovereignty in 1997. The recently improved electoral system of the HKSAR puts in place solid institutional safeguards to ensure full implementation of the principle of 'patriots administering Hong Kong'. The statutory Candidate Eligibility Review Committee aims to ensure that, candidates in the Chief Executive, Election Committee and Legislative Council elections would uphold the Basic Law and swear allegiance to the HKSAR. It is a universal rule in the world that political power must be in the hands of patriots. No country or region in the world will allow unpatriotic or even traitorous or treasonous forces and figures to seize power. As long as the person meets the requirements of patriots, one can participate in elections in accordance with the law, and serve the public by entering into the governance structure of the HKSAR.

"The overarching approach for improving the electoral system of the HKSAR is to enhance the balanced and orderly political participation and ensure broader representation in the political structure. And the prime objective is to ensure the full implementation of 'patriots administering Hong Kong', thereby enhancing the effective governance and achieving long-term stability and safety of the HKSAR. It is therefore a good democratic system and most suitable for the HKSAR.

"HKSAR residents' rights to vote and to stand for election are well

enshrined in the Basic Law. It is important to note that the Decision of the National People's Congress of the PRC in March 2021 did not revise the ultimate aim of attaining universal suffrage provided for in Articles 45 and 68 of the Basic Law. We strongly believe that improving the electoral system, ensuring 'patriots administering Hong Kong' and safeguarding the overall interests of society are conducive to the stable development of the HKSAR's democracy."

#### Freedoms of press and expression

In response to the Committee's concerns regarding Hong Kong people's freedoms of the press and expression, the spokesman refuted and pointed out that "the HKSAR Government is firmly committed to safeguarding and respecting the freedoms of the press and expression, both of which are protected under the Basic Law and the Hong Kong Bill of Rights. Freedoms of the press and expression are not absolute, and may be restricted for reasons including the protection of national security and public order. As always, the press and the public may discuss and monitor the HKSAR Government's work, and they may continue to exercise their freedom of expression to comment on or even criticise government policies in accordance with the law."

"Further, in suspending the lending and other services of any public library material which is suspected of breaching the laws of Hong Kong or being contrary to the interests of national security, the HKSAR Government is discharging its constitutional duties and there is no issue of any violation of freedom of expression."

#### Freedom of assembly

"On the notification requirement under the Public Order Ordinance (Cap. 245), it should be emphasised that the constitutionality of the notification requirement has been upheld by the CFA. A legal requirement for notification is in fact widespread in jurisdictions around the world.

"Similar to many overseas jurisdictions, the HKSAR Government has put in place restrictions on group gatherings in public places so as to reduce the risks of spreading COVID-19 in the community, which poses serious threat to lives and health of the public. The Government will adjust the social distancing measures from time to time, taking account of the latest developments of the pandemic."

#### Freedom of association

"It should be stressed that the right to freedom of association is fully protected by the Basic Law and the Hong Kong Bill of Rights. However, like any other jurisdictions, such right is not absolute or unrestricted.

In response to the Committee's accusation on the retrogression of trade union rights, the spokesman said, "The rights of Hong Kong residents to form trade unions and organise trade union activities are adequately protected by the Basic Law and domestic legislation. There is absolutely no retrogression or infringement of trade union rights following the enactment of the National

Security Law. The marked increase of 62 per cent in the number of registered trade unions from 917 to 1 486 during end 2019 to June 2022 bears testimony to Hong Kong residents' free exercise of the rights to freedom of association and to organise."

#### Protection of privacy

The Committee has expressed concerns on the enactment of the Personal Data (Privacy) (Amendment) Ordinance 2021. On this, the spokesman explained, "The only objective of the Personal Data (Privacy) (Amendment) Ordinance 2021 is to combat doxxing acts that intrude into personal data privacy and do harm to the data subjects as well as the people around them. By empowering the Privacy Commissioner to serve cessation notices, the Amendment Ordinance aims to facilitate prompt removal of messages that disclose a person's personal data without their consent, and to prevent the continuous dissemination of the personal data of victims and their family members.

"Allegations of failure to provide information on the criteria used for cessation and the risk of abuse of such power are totally unfounded. The truth is exactly the opposite: the scope of unlawful doxxing acts is clearly defined under the law, i.e. there has been a disclosure of personal data without consent, and the discloser has an intent or is being reckless as to the causing of specified harm to the data subject or any family member of the data subject by that disclosure. Relevant laws in other jurisdictions, such as New Zealand's Harmful Digital Communications Act and Australia's Online Safety Act, also have provisions similar to cessation notices.

"The HKSAR Government emphasises that the interception of communications and covert surveillance for prevention and detection of serious crimes and protection of public security by law enforcement agencies is subject to the stringent regime under the Interception of Communications and Surveillance Ordinance (Cap. 589). The Ordinance has been thoroughly scrutinised by the Legislative Council and the legislative regime is in full compliance with the Basic Law and the Hong Kong Bill of Rights."

#### Establishment of an independent national human rights institution

In response to the Committee's repeated recommendation for establishing an independent human rights institution in accordance with the Paris Principles, the spokesman said, "Human rights are guaranteed constitutionally by both the Constitution of the PRC, and the Basic Law, and is underpinned by the rule of law and an independent judiciary. The constitutional framework provides a solid protection of human rights in Hong Kong. This is buttressed by the existing statutory organisations of the Equal Opportunities Commission, the Office of the Privacy Commissioner for Personal Data and The Ombudsman, as well as legal aid services. The Government will ensure that the existing mechanism continues to effectively protect fundamental rights and freedoms in Hong Kong, and does not see any need for the establishment of an additional human rights institution."

#### Anti-discrimination ordinance

Regarding the Committee's recommendation for a comprehensive anti-discrimination ordinance, the spokesman said, "Through the four anti-discrimination ordinances, i.e. the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487), Family Status Discrimination Ordinance (Cap. 527) and Race Discrimination Ordinance (Cap. 602), people of the HKSAR are protected from the most common discrimination and harassment on the grounds of sex, marital status, pregnancy, breastfeeding, disability, family status and race. At the same time, the Government regularly reviews existing anti-discrimination ordinances to ensure that they meet changing social needs and will introduce legislative proposals to address social mischiefs as necessary in the light of local circumstances. This is evident in the recent amendments made to the four anti-discrimination ordinances pursuant to the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 and the Sex Discrimination (Amendment) Ordinance 2021 to implement various recommendations to enhance protection from discrimination and harassment. The need for consolidating a comprehensive anti-discrimination ordinance is considered not pressing."

#### Discrimination against LGBTI

On the Committee's recommendations on enacting anti-discrimination legislation to protect the LGBTI community, "the HKSAR Government is committed to promoting the message of inclusiveness, mutual respect and non-discrimination for people of different sexual orientations and transgenders through various channels, including broadcasting promotional videos on different media platforms, providing funding support to worthwhile community projects which aim at promoting equal opportunities on grounds of sexual orientation or gender identity via the Equal Opportunities (Sexual Orientation) Funding Scheme, and setting up a 24-hour hotline to provide support particularly for sexual minorities and their families and to raise the public's understanding towards sexual minorities. As regards introduction of legislation to prohibit discrimination on grounds of sexual orientation and gender identity, different parts of the world formulate relevant policies according to their local social contexts. Hong Kong society is divided on the issue and given the complex and controversial nature of the matter, the HKSAR Government has to listen to opinions from all quarters and fully consider the actual situation of the Hong Kong society."

#### Treatment of persons in custody

"The Correctional Services Department (CSD) is committed to providing a secure, safe, humane, decent and healthy custodial environment for persons in custody (PICs). The rights of PICs are safeguarded through a system of regular visits by independent visitors, namely Justices of the Peace (JPs), who are vested with the statutory duties to inspect the prisons once or twice every month. PICs may approach visiting JPs or lodge complaints through other channels including the CSD's Complaints Investigation Unit, The Ombudsman who handles complaints about maladministration in the public sector, members of the Legislative Council, or other law enforcement agencies. All complaints by PICs will be handled in an open, fair and just manner."

#### Handling of non-refoulement claims



"The HKSAR Government maintains a firm policy of not granting asylum and not determining or recognising refugee status of any person. A Unified Screening Mechanism (USM) has been put in place to screen non-refoulement claims on all applicable grounds in one go. The procedures of the USM meet the high standards of fairness as required by law and compare most favourably with those adopted in other common law jurisdictions.

"Non-refoulement claimants have no lawful status to stay in Hong Kong. Regardless of the outcome of their non-refoulement claims, claimants are not permitted to remain legally in Hong Kong and they have no right to work in Hong Kong. In those circumstances where it is necessary to detain non-refoulement claimants, they are provided with adequate facilities and reasonable arrangements for their comfort are also made. The Government also provides humanitarian assistance to them for sustaining their livelihood in Hong Kong."

#### Trafficking-in-person

"All-out and multi-pronged efforts have been made to combat trafficking-in-persons (TIP) and to enhance the protection and well-being of foreign domestic helpers (FDHs) in Hong Kong. Our current legislative framework provides a comprehensive package of safeguards comparable to composite TIP laws in other jurisdictions. The very small number and percentage of victims identified thus far has reinforced our observation that TIP has never been a prevalent problem in Hong Kong and that there has never been any sign that Hong Kong is being actively used by syndicates as a destination or transit point for TIP. It is unfair and groundless to cast doubt on the quality of our screenings and discredit our screening procedure merely because of the low number of victims so identified."

#### Safeguarding rights of foreign domestics helpers working in Hong Kong

On the Committee's recommendation on measures to safeguard rights of FDHs, the spokesman reiterated, "Through multi-pronged strategies of enforcement, publicity and provision of supporting measures, the HKSAR Government attaches great importance to safeguarding the rights of FDHs working in Hong Kong, so as to maintain Hong Kong as an attractive place for FDHs to work. We do not tolerate any exploitation or abuse of FDHs. FDHs who have been ill-treated by employers and employment agencies are encouraged to report to law enforcement agencies and/or the Labour Department promptly so that appropriate support and assistance can be provided to them."

As for the Committee's recommendation on repealing the "two-week rule" and the "live-in requirement" applicable to FDHs, the spokesman reiterated that "the 'two-week rule' is essential for maintaining effective immigration control (including illegal employment). It does not preclude FDHs from applying to work in Hong Kong again after returning to their places of origin and has allowed sufficient flexibility to cater for exceptional circumstances." As for the "live-in requirement", it underpins the long-established Government policy that priority in employment should be given to the local workforce and importation of workers should only be allowed when there is proven manpower shortage in specific trades that cannot be filled by

local workers. It is along this policy objective that live-in FDHs have been imported since the 1970s to meet the shortage of local live-in domestic helpers.

The HKSAR's fifth report in the light of the ICCPR is due in July 2028. It will contain the Government's detailed response to the Committee's recommendations. "In the interim, we will as requested by the Committee provide information on a number of areas by July 2025," the spokesman said.

Note: In the case of HKSAR v Lai Chee Ying (2021) 24 HKCFAR 67.