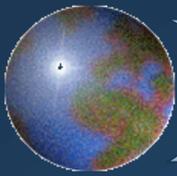


Academic Freedom in the Shadow of the National Security Law

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The Concept of Academic Freedom

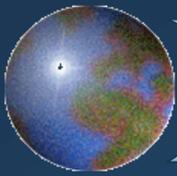
“The right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.” (UNESCO)

Key components: (1) freedom in teaching; (2) freedom to conduct research; (3) freedom of intramural expression (e.g. to critique one’s university and take part in its governance); (4) freedom of extramural expression (e.g. to share research outcomes).

AF is related to freedom of expression and other civil liberties. But AF is not simply an **individual** right. AF is essential to a university’s **public mission**: the provision of quality education, the pursuit of truth, and the production and dissemination of knowledge. (This is also true of a free press – it serves a public purpose, not just individual reporters.)

Thus the academic community AND government have a duty to promote and protect AF.

But AF is not an absolute concept and it includes duties as well as freedoms. Scope of AF is often contested – in democratic as well as authoritarian nations. See, e.g. Scholars at Risk “Free to Think” reports (at: www.scholarsatrisk.org).



AF is now grounded in International Human Rights Law

ICCPR: Freedoms of opinion, expression, association, thought, conscience. ICCPR is incorporated into HK domestic law (BORO; BL Art. 39).

AF is also crucial for many rights in the ICESCR (also referred to in BL Art. 39), including: Right to education (Art. 13); Right to enjoy benefits of scientific progress (Art. 18).

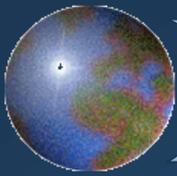
Committee on ESC Rights, General Comment 13 (para 38): “right to education can only be enjoyed if accompanied by academic freedom of staff and students” (1999).

Treaty-Monitoring Bodies are concerned by the NSL

Aug. 2020: UN Human Rights Committee asked HKG (in the list of issues for upcoming review) for information on reports that the NSL will interfere with AF (para. 22).

HKG's Replies: AF is protected by BL and we attach “great importance” to upholding academic freedom and institutional autonomy” (para 129). (Locally, HKG issued a similar statement in December 2020.)

April 2021: Committee on ESC Rights also requested information regarding AF in its List of Issues for upcoming review of HK under ICESCR. Awaiting HKG's replies.



Legal Protections for AF in HK

HK Basic Law

Art. 27: HK residents *shall have* freedom of speech, the press and publication

Art. 34: Freedom to engage in academic research, literary and artistic creation

Art. 39: ICCPR and ICESCR as applied to HK shall remain in force

Art. 136: HKG will formulate education policies “on its own” (part of HK’s autonomy)

Art. 137: **Educational institutions of all kinds may retain their autonomy and enjoy academic freedom.** They may continue to recruit staff and use teaching materials from outside the HKSAR. Schools run by religious organizations may continue to provide religious education, including courses on religion. Students may enjoy freedom of choice of educational institutions and freedom to pursue their education outside the HKSAR.

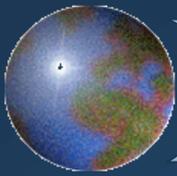
The fact that HK practices academic freedom (unlike the mainland) is one of the reasons that HK has so many universities ranked in the top 100 in the world, despite its tiny size.

But legal protections are not enough. Experience shows that AF also requires:

Institutional autonomy; strong university policies; academic tenure

A commitment that University will stand by academics who follow the policy

Appendix to Chapter suggests language for a policy (summarized in Slide 12)



Impact of university governance “reforms”

Robert Chung affair: demonstrated relationship between governance and academic freedom.

Chung disclosed that HKU’s VC pressured him to stop a research project that was embarrassing to HK’s Chief Executive, Tung Chee-hwa. The VC resigned but only after an independent investigation panel confirmed allegations and more than ½ of HKU’s academic staff signed a petition asking the HKU Council to accept the panel’s report.

HKU Council never took any formal action on the report.

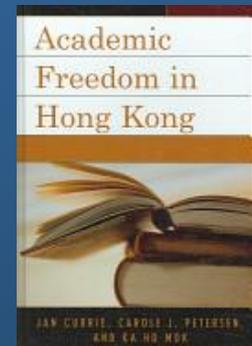
Council Chair (TL Yang) was in a difficult position because he was simultaneously serving as a member of Tung’s Executive Council.

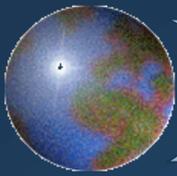
See *Academic Freedom in Hong Kong* (Currie, Petersen and Mok; 2006). We argued for greater separation between government and councils.

But the opposite occurred: university councils became less representative of academics; now dominated by appointed external members.

Elected Deans were also abolished. See: Petersen & Currie, “Higher Education Restructuring and Academic Freedom in HK” 6(5) *Policy Futures in Education* (2008).

HKU also did not fully implemented proposals from its Task Force on Academic Freedom





Increased tensions between campuses and HK Government

HKG has come to view university campuses as threats. Blames academics and students for opposition to national education proposals and for Occupy Central.

Even before the NSL, academics were reporting increased interference (retribution for OC?)

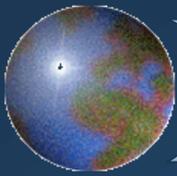
HKG now arguably has a “mandate” to interfere in the educational sector:

- ❖ NSL Art. 9: strengthen regulation of matters concerning national security in schools and universities
- ❖ NSL Art. 10: promote national security education in schools and universities
- ❖ HKG is clearly mandating more national security education in the curriculum
- ❖ Yet affirmed that AF is protected by BL; tertiary education may enjoy more autonomy?
- ❖ But in Nov. 2020 students were arrested after march through CUHK campus
- ❖ Universities have also started cutting ties with student unions

Question: this is an important time to clarify the importance of AF and scope of BL articles.

Are administrators drafting policies to protect AF in post-NSL HK?

If not, why not? Have they been told not to do so?



Any good news? Yes, Articles 4 and 5 of the NSL

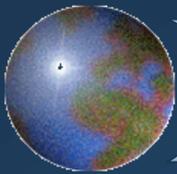
Art. 4: Human rights shall be respected and protected in safeguarding national security in the HKSAR. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the HKSAR and the provisions of the **ICCPR** and the **ICESCR** as applied to HK, shall be protected in accordance with the law.

In *HKSAR v. Lai Chee Ying* (2021), the Court of Final Appeal stated that Articles 4 and 5 are “centrally important to the interpretation” of the NSL.

Para 42: “. . . NSL 4 and NSL 5 expressly stipulate that those rights, freedoms and values are to be protected and adhered to in applying the NSL. They provide the context in which NSL 42(2) must be construed and applied. As far as possible, NSL 42(2) is to be given a meaning and effect compatible with those rights, freedoms and values.”

If this principle is applied to all of the vague language in the NSL, then it may be possible to adopt interpretations that comply with the ICCPR and the ICESCR.

But Art. 62 states that the NSL prevails over “inconsistent” local law. So any express provisions will likely be enforced despite the fact that they conflict with the ICCPR.



Example: Secession - NSL Arts 20 and 21

Art. 20: A person who organizes, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession **or undermining national unification**:

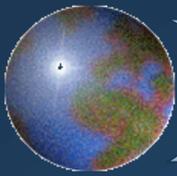
- (1) separating the HK SAR or any other part of the PRC from the PRC;
- (2) altering by unlawful means the legal status of HK SAR or any other part of the PRC; or
- (3) surrendering the HK SAR or any other part of the PRC to a foreign country.

Art. 21: A person who incites, assists in, abets or provides assistance can also be guilty.

If Arts 20 and 21 are interpreted to comply with the ICCPR, then academic discussion and research regarding China's territorial disputes, self-determination and related issues should NOT be prohibited.

But what happens if a student learns about the right to self-determination (in class or from an academic's article) and then advocates for a right to self-determination for HK?

Note: the European Court of Human Rights has confirmed that peaceful advocacy for constitutional change should not be viewed as a threat to national security. See, e.g. *Stankov and the United Macedonian Organization Ilinden v. Bulgaria* (2001).



Subversion - NSL Articles 22-23

The list of prohibited acts in Art. 22 is extremely vague, including:

“undermining the basic system” of the PRC and “seriously interfering in, disrupting, or undermining the performance of duties and functions” of the local & central governments.

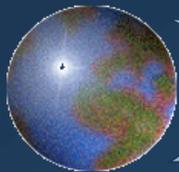
Art. 23 also exposes to criminal liability a person who: “incites, assists in, abets or provides pecuniary or other assistance” for the commission of an offense under Art. 22.

Fortunately, Art. 22 requires proof that the defendant organized, planned, committed or participated in a prohibited act **“by force or threat of force or other unlawful means”**.

Thus, Art. 22 is narrower than Art. 20. But how will “unlawful means” be interpreted? (What was the “unlawful means” in the pan-democrats’ unofficial primary?)

Head of HK police wants a law prohibiting “fake news” (which he blames for poor image).

What if academic research is relied upon by a group of persons who seek to delay or “disrupt” the HKG from implementing a government policy?



Foreign Collusion: NSL Art. 29

Art. 29 is extremely long and broadly drafted. (Just a few clauses are highlighted below.)

It is an offense to request or to directly or indirectly receive any support or instructions from a foreign country, institution, organization or individual to commit any of the following acts

...

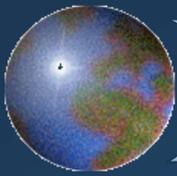
Seriously disrupting the formulation & implementation of laws or policies by the Government of the HKSAR or by the Central People's Government, which is likely to cause serious consequences.

The challenge for academics and university leaders:

Academic research is often critical and relied upon to pressure HKG to change policies (e.g. housing; environmental policies; treatment of migrant workers; COVID-19 policies).

It is also common for HK academics to collaborate with foreign researchers. Indeed, the UGC encourages international collaboration. But unless academics are reassured that Art. 29 will not be interpreted overly broadly, these cross-border activities may be impaired.

HK universities also organize international conferences and invite foreign academics to speak. They may be concerned by Art. 29 and the extra-territorial provisions in Arts 36-38.



The HKG may have an interest in chilling critical speech

Unelected governments lack a mandate and are often overly sensitive to criticisms.

Example: In September 2020, academics specializing in epidemiology and microbiology critiqued the HKG's testing scheme for COVID-19.

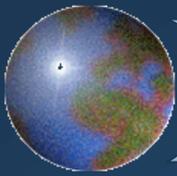
Carrie Lam reacted very strongly (perhaps because the testing program was being conducted with assistance from the Mainland).

Lam did not just disagree with the scientists' analysis. She attacked their motivations, implying that they were deliberately "smearing" the central government and trying to sever HK's relations with the central government.

Recall Art. 23 (which prohibits providing assistance for a violation of Art. 22):

What if academic research is relied upon by a group of persons who seek to delay or "disrupt" the HKG from implementing a government policy?

But if academics stop critiquing government policies and actions then it is not just the academics who suffer; the community will lose access to research and expertise.



Summary of Appendix – Suggested AF Policy

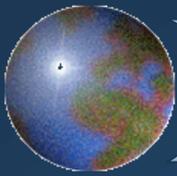
Para 1: Defines Academic Freedom

Para 2: Summarizes legal framework (BL, ICCPR, ICESCR, Arts 4 -5 of NSL)

Para 3: Quotes HKG's Dec. 2020 statement affirming commitment to academic freedom.

Para 4: Members of the faculty and students are, therefore, entitled to full freedom to engage in research, scholarship, and creative work and to publish or produce the results, subject to responsible performance of these and other academic duties. A faculty member is likewise entitled to freedom in teaching and discussing the subject matter, which are essential to our students' right to obtain a quality education. A concomitant of these freedoms is a commitment to accuracy and integrity. Controversy is a normal aspect of free academic inquiry and teaching, and it is proper to incorporate both the knowledge and the beliefs of the faculty member into that which is taught; however, the freedom to teach must be joined by a constant effort to distinguish between knowledge and belief.

Para 5: Every university faculty member is a citizen, a member of a learned profession and an officer of an educational institution. When the faculty member speaks or writes as a citizen, he or she should be free from institutional censorship or discipline. However, the faculty member's special position in the community imposes certain obligations. As a person of learning and an educator, a faculty member should remember that the public may judge the profession and institution by the faculty member's utterances. Hence the faculty member should be at all times accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that the faculty member is not speaking for the institution



Conclusion: some steps to consider . . .

Every university needs a robust policy affirming academic freedom, even in the shadow of the NSL. A university must also commit to defending academics who follow the policy.

It is worrying that HK university leaders seem reluctant to publish such policies (especially as the HKG has publicly affirmed that AF continues, despite the NSL).

Academics lobbying for robust policies should emphasize the importance of research and knowledge sharing to universities' missions (and rankings). Cite RAE criteria.

There should be regular training on AF and at least two tenured members in each department to receive complaints. (Comparable to a policy against sexual harassment.)

We also need to collect data on: complaints of interference; evidence of surveillance; self-censorship; **impact on recruitment, and opportunities for collaboration with foreign institutions**. Academic freedom does enhance a university's reputation. Eventually, failure to affirm and protect it will negatively affect recruitment of students and faculty.

See, e.g.: Karran & Mallinson, "Academic Freedom and World Class Universities: A Virtuous Circle?" 2018 *Higher Education Policy*