

Seminar Comparative Constitutional Law Switzerland – China – Hong Kong

Freedom of Speech and Assembly in China, Hong Kong and Switzerland

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Abbreviations

AG	Aktiengesellschaft
art.	article
Asian Surv.	Asian Survey
BC	Before Christ
BGE	Bundesgerichtsentscheid
BRO	Hong Kong Bill of Rights Ordinance
Cardozo Stud. L. & Lit.	Cardozo Studies in Law and Literature
CECC	Congressional-Executive Commission on China
cf.	confer (compare)
China Quart.	The China Quarterly
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ed./eds.	editor/editors
e.g.	exempli gratia (for example)
etc.	et cetera
fn.	footnote
ICLQ	International and Comparative Law Quarterly
id.	idem (the same)
i.e.	id est (that is)
HKSAR	Hong Kong Special Administrative Region
H.R. Brief	Human Rights Brief
HRQ	Human Rights Quarterly
ICESCR	International Covenant on Economic, Social and Cultural Rights
J. Chinese L.	Journal of Chinese Law
J. Contemp. Asia	Journal of Contemporary Asia
f.	following (one page)
ff.	and following (pages)
MD	Maryland
NGO	Non-Governmental Organisation
No./no.	number
NPC	National People's Congress
NY	New York
par.	paragraph
PRC	People's Republic of China
SR	Systematische Sammlung des Bundesrechts
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States
Vol.	Volume
ZBl	Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht

Introduction

The purpose of this paper is to compare the two closely connected civil rights freedom of expression¹ and freedom of assembly in the People's Republic of China (PRC), in the Special Administrative Region Hong Kong (HKSAR) and in Switzerland. I will contrast the development of these freedoms by showing how they found their way into constitutional law, considering historical, social and cultural aspects. Then I will compare the legal sources. Besides domestic law, international law plays an important role – treaties on the one hand and international customary law on the other hand. Finally, I will have a look at the real situation: How are the theoretically guaranteed rights applied in practice? Do the governments effectively recognize and observe these freedoms?

The crux of the subject lies in the fact that the three “states” examined have completely different historical, social and cultural backgrounds: China is a socialist dictatorship, Hong Kong, a melting pot, was a British colony until 1997 and was then handed over to China as the HKSAR, enjoying a high degree of autonomy and remaining a capitalist system, following the common law tradition. Sitting in the middle of Europe, the federal state Switzerland was strongly influenced by European philosophy such as Enlightenment. Hong Kong was too, through the British colonial power, whereas China has not experienced a comparable movement.

Thus, although freedom of speech and assembly are recognized as universal and so are formally guaranteed for every subject of United Nations Community, the different treatment of human rights has to be regarded with caution, bearing in mind that our concept of human rights is the result of a long lasting history of development.

1. Freedom of Speech and Assembly in China

1.1 Development

As mentioned above, the notion of individual rights in western democratic societies differs very much from the one in Chinese culture. Therefore the roots of Chinese attitude towards individual rights have to be considered briefly. At least two factors are worthwhile to be pointed out: the Confucian heritage and Marxist-Leninist ideology.

1.1.1 Individual Rights in Traditional China

The concept of Confucianism² strongly influenced Chinese society during the two thousand years of imperial rule in China³, providing the basis for an extremely stable soci-

¹ The terms freedom of expression and freedom of speech are not always applied consistently. In this paper freedom of expression is used as an umbrella term for the freedoms of opinion, of speech and of the media including all their aspects.

² Simplified, Confucianism is a set of moral and ritualistic norms dealing with human relationships in order to achieve peace, harmony, and stability in society and in the universe. See Chen, 107f.

ety. Confucianism regards the state as an extended family, setting the duties of absolute obedience and loyalty on the part of the subjects and the obligation on the ruler to treat the subjects like a father should treat his children. Despite the emperor's responsibility to the people, however, he usually had an absolute right to rule his subjects. There was no conception of government powers being limited by law, just as there was no mechanism to enforce individual rights against the state authorities. The perception of law as a means to protect individual rights and interests was alien to traditional legal culture.⁴

1.1.2 Individual Rights in the PRC

Marxist ideology is rather antagonistic towards the tradition of natural law, saying that every human being shall be granted certain rights, simply derived from his or her existence. In socialist thinking, individual and collective rights are the same and not separable, because the individual is a product of social forces and can only exist as a member of the collective. As a consequence, the communist government, which took power in 1949, did not attach any importance whatsoever on passing a constitution containing basic individual rights, and it was not until 1954 that the first constitution was promulgated.⁵

The constitution of 1954 provided freedom of speech, of the press and publication as well as freedom of assembly (art. 87). The second constitution of 1978 was more restrictive on civil rights than its predecessor. Freedom of expression and freedom of assembly remained guaranteed though (art. 45). This didn't change in the third constitution of 1978 either.

The first step towards an (at least formal) involvement in the concept of universal human rights protection took place when China entered the United Nations in 1971.⁶

The now effective fourth Constitution of 1982, for the first time puts citizens' rights in chapter II and thus before the listing of state institutions. This is the general practice of constitutions in the world.⁷

³ Around 200 BC until the beginning of the 20th century.

⁴ Cf. Chen, 108.

⁵ Before, the Common Programme of the Chinese People's Political Consultative Conference served instead of a constitution for the new government, stating the abolition of all decrees and laws of the prior government. Still a number of acts and regulations circumscribing the civil freedoms of the people were adopted before the promulgation of the constitution. Cf. Kent, 53ff.; Copper, 10f.

⁶ In 1981 China was elected a member of the United Nations Human Rights Commission for the first time and formally participated in the next session (38th session). Action against China has been mooted in several sessions of the Human Rights Commission before the Tiananmen Square uprising. Yet, during the 40th session in August 1988 a draft resolution on the human rights situation in Tibet was withdrawn as a result of political pressure by China. See Brennan/Brody/Weissbrodt, HRQ 1989, 302.

⁷ Cf. Wan, HRQ 2007, 734.

During the 70s and 80s tremendous progress was made concerning human rights development in China.⁸ However, the famous Tiananmen Square massacre took place on June 4, 1989⁹ and obscured much of the progress. After the crackdown, the human rights record in China deteriorated significantly. To cope with the deepening ideological crisis in the aftermath of the Tiananmen crackdown, Marxist indoctrination was stepped up. The sweeping purge of the press, the publishing industry in general and persecution of intellectual dissidents resulted in serious violations of human rights.¹⁰

Following the suppression of its democracy movement, China became subject to investigation by the United Nations Human Rights Sub-Commission in its 41st session in 1989. The resolution proposed by the Sub-Commission was successful. Several further drafts of resolutions were presented in the following sessions, some adopted, others withdrawn.¹¹

1.2 Sources of Law

These days, rights to freedom of expression and assembly have different sources. They are provided through national and international law.

1.2.1 Domestic Law

On the national level, the PRC guarantees the Chinese citizens freedom of expression and assembly in the Constitution in art. 35.¹²

1.2.2 International Law

The Universal Declaration of Human Rights (UDHR), which was passed by the member states of the UN in 1948, guarantees freedom of expression in art. 19 and freedom of assembly in art. 20 no. 1.¹³ Originally the UDHR was conceived as a statement of objectives to be pursued by governments and therefore not part of binding international law. Nonetheless, by becoming customary international law, the UDHR has acquired a legally binding force, thus constituting an obligation for the members of the international community to protect and preserve the rights of its citizens.¹⁴

The most important binding convention in terms of civil rights is clearly the International Covenant on Civil and Political Rights (ICCPR). It turns the responsibility of

⁸ Cf. Young, *Asian Surv.* 1995, 658f.

⁹ For further information on the massacre: "Article 19" [an international human rights organisation], *The Year of the Lie: Censorship and Disinformation in the People's Republic of China 1989*, London 1989, 17ff.

¹⁰ Copper/Lee, 63f.

¹¹ Cf. Kent (Case Study), HRQ 1995, 18ff.

¹² 1982 Constitution of the People's Republic of China; adopted on December 4, 1982.

¹³ All important legal sources mentioned in the paper can be found in the appendix.

¹⁴ See Fact Sheet No. 2 of the Office of the High Commissioner for Human Rights.

<<http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>> (visited 02/09/08).

every signatory government stipulated in the UDHR into an obligation. China has signed this treaty on October 5, 1998 but ratification is still pending.¹⁵

1.3 Content

1.3.1 Subjects

Chapter II of the Constitution, which provides rights and freedoms, is entitled “The fundamental rights and duties of citizens”. It thus is applicable only to Chinese citizens. Art. 33 defines the term “citizen” as all individuals, holding the nationality of the PRC. Art. 35, which grants freedom of expression and assembly reiterates: “Citizens of the PRC enjoy freedom of speech, of the press, of assembly [...] and of demonstration.”¹⁶ The UDHR and the ICCPR protect everyone, without any exception or distinction.¹⁷ The ICCPR covers the same area of application.¹⁸

1.3.2 Scope

The Chinese Constitution guarantees freedom of expression and assembly in art. 35. The wording is kept short and simple: “Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” However, to understand the meaning and significance of the constitutional provision, the relationship between Constitution and ordinary law¹⁹ has to be considered here. The Constitution itself declares that there is a hierarchy of laws within the PRC: no statute, rule or regulation may conflict with the Constitution.²⁰ Ordinary law can strengthen and amplify constitutional provisions by providing a procedural or institutional framework. This is necessary in order to enforce and implement the constitutional rights. The absence of elaborating ordinary law might be equivalent to a lack of constitutional provisions, thus. Besides elaborating constitutional law, ordinary law can also limit or even abolish civil rights guaranteed in the Constitution.²¹

¹⁵ According to art. 18 of the Vienna Convention on the Law of Treaties of May 23, 1969 (entry into force on January 27, 1980), a state is obliged to refrain from acts which would defeat the object and purpose of a signed treaty subject to ratification. Thus the lack of ratification does not release China from its responsibilities stated in the covenant.

¹⁶ Foreigners are mentioned in a separate article, however: art. 32 of the PRC Constitution stipulates that the People’s Republic of China protects the lawful rights and interests of foreigners within Chinese territory, and while on Chinese territory foreigners must abide by the law of the PRC.

¹⁷ See preamble and art. 2 of the UDHR. Repeated in art. 19 and 20: “Everyone has the right to freedom of opinion and expression/of peaceful assembly [...]”.

¹⁸ Art. 2 ICCPR requires that all signatories respect and ensure the provisions of the ICCPR to all individuals in their territories and subject to their jurisdictions. Art. 19 reiterates the subjects: “Everyone [...]”.

¹⁹ Ordinary law includes e.g. the codes and statutes enacted by the NPC (art. 62 of the Constitution) or its Standing Committee (art. 67 of the Constitution) or the administrative rules and regulations made by the State Council (art. 89 of the Constitution).

²⁰ Art. 5 no. 3 of the Constitution.

²¹ See Chen, 123f.

1.3.3 Restrictions

Art. 51 of the Chinese Constitution explicitly states that constitutionally granted rights are subordinated to national interest. In addition, the “Four Basic Principles” provided in the preamble of the Constitution must be adhered to.²²

An elaborated web of regulations and laws reinforces state control. For instance, the Law of the PRC on Assemblies, Processions and Demonstrations²³ states that in exercising their right to assembly or demonstration, citizens must not oppose the cardinal principles specified in the Constitution etc.²⁴ It further states, the holding of demonstrations requires permission of competent authorities.²⁵ Permission will be denied if the demonstration involves opposition to the cardinal principles, if it harms the unity, sovereignty and integrity of the state, if it instigates division among the nationalities or if it endangers public security or seriously undermines public order.²⁶ Furthermore, citizens are not allowed to start, organize or participate in demonstrations in another place than their place of residence.²⁷

Another example for a regulation, which enforces the constitutional guaranteed right to freedom of expression, is the Publishing Regulation²⁸. Similar to the above mentioned law, it subordinates the exercise of the individual freedom to the cardinal principles.²⁹ Further legislation having a potential restrictive impact on freedom of speech and assembly is provided by the State Secrets Law³⁰, the State Security Law³¹ and many others.

Of course national interests are a legitimate purpose to restrict civil rights, but the problem is that not only the wording but also the content of the restrictive laws are vague and overly broad. PRC legislative bodies do not provide statutory guidance in order to

²² These Four Basic Principles are: (1) keeping to the socialist road, (2) upholding CCP leadership, (3) following Marxism-Leninism-Mao Zedong Thought, and (4) submitting to the people’s democratic dictatorship.

²³ Law of the People’s Republic of China on Assemblies, Processions and Demonstrations (No. 20 Order of the President of the PRC, adopted at the 10th meeting of the Standing Committee on October 31, 1989, entry into force on October 31, 1989).

²⁴ Id. Art. 4.

²⁵ Id. Art. 7.

²⁶ Id. Art. 12.

²⁷ Id. Art. 15.

²⁸ The Regulations on Publication Administration (No. 343 Order of the State Council of the PRC, adopted at the 50th executive meeting of the State Council on December 12, 2001, entry into force on February 1, 2002).

²⁹ Id. art. 5 and art. 24.

³⁰ Law of the People’s Republic of China on Guarding State Secrets (No. 6 Order of the President of the PRC, adopted at the 3rd Meeting of the Standing Committee on September 5, 1988, entry into force on May 1, 1989).

³¹ State Security Law of the People’s Republic of China (Order No. 68 of the President of the People’s Republic of China, adopted at the 30th Meeting of the Standing Committee of the Seventh National People’s Congress on February 22, 1993, entry into force on February 22, 1993).

substantiate abstract concepts such as “national interests”. Interpretation is up to Party-appointed courts according to the leaderships wishes. Thus the internationally recognized principle of legality, which says that interference on basic rights such as freedom of speech must be prescribed by law, is not met.³² Furthermore restrictions often lack the requirement of proportionality. Government agencies responsible for implementing and interpreting national security do not balance government interest against citizens’ individual rights, and instead consistently interpret laws in favour of the government.³³

1.4 Violations

Massive human rights violations, including breaches of civil rights have had a long tradition in China and still occur on a daily basis. Nevertheless, it is hard to find reliable and comprehensive information on the topic. Therefore, in the following I will mention only a few examples out of a broad range of violations.

Government censorship in China is very strong and pervasive. It denies Chinese citizens their right to freedom of expression and assembly in many ways. Freedom House, a US-based non-governmental organisation, evaluates press freedom (freedom of print, broadcast and internet) in every country on an annual basis. China is said to represent the “world’s largest poor performer”.³⁴ Its status is clearly not free.

However, despite the government’s effort to control Internet use, it is hardly possible to impede the more than 200 Million Chinese Internet users from benefiting from the powerful force of change.³⁵

Besides that, the Congressional-Executive Commission on China (CECC) criticises lack of free flow of information.³⁶ Over the last 5 years public access to government information has improved seemingly – but unfortunately only on paper. In 2007 the Chinese government passed a regulation seemingly providing a freer access to government information,³⁷ but major obstacles remain: freedom of information is subject to a “states

³² See Johannesburg Principles. The Johannesburg Principles, established in 1995 by international experts representing among others the UN and the Council of Europe, have gradually been accepted and cited as the standards for the protection of freedom of expression in the context of national security laws, although they are far from being legally binding. Cf. Coliver, HRQ 1998, 80.

³³ See 2006 Annual Report of the CECC, 25ff.

<<http://www.cecc.gov/pages/annualRpt/annualRpt06/FullReport.php>> (visited on 02/09/08).

³⁴ See <<http://www.freedomhouse.org/uploads/fop08/OverviewEssay2008.pdf>> (visited 26/08/08).

³⁵ See e.g. Fowler, Geoffrey A./Ye, Juliet, “Chinese Bloggers Score a Victory Against the Government”, The Wall Street Journal, July 7, 2008 <<http://online.wsj.com/article/SB121533126228630499.html>> (visited 04/09/08).

³⁶ See 2006 Annual Report of the CECC, 74ff.

<<http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCannRpt2007.pdf>> (visited 28/07/08).

³⁷ The Regulation of the People’s Republic of China on the Disclosure of Government Information (adopted at the 165th executive meeting of the State Council on January 17, 2007, entry into force May 1, 2008).

secret” exception, which gives the government broad latitude to withhold information thus allowing it to keep control over the press.

China is still the country which jails the largest number of journalists, cyber-dissidents, Internet users and freedom of expression campaigners according to Reporters without Borders.³⁸

Recently, a number of events have drawn particular attention to China’s human rights policies. One of those happenings was the Tibetan people’s initially peaceful and later violent protests, which broke out in March 2008 and ended in a bloody clash with Chinese security forces and the imposition of martial law. Though Tibet has been the scene of periodic strife ever since it was annexed with military force by China in 1951, this was the largest uprising since 1989. Dozens of activists were injured or killed, hundreds arrested and imprisoned. As a consequence of the uprising, the Chinese government tightened restrictions on freedom of expression, especially by increasing control and censorship on the Internet and foreign media access to sensitive areas of the country.

A further recent event drawing attention to China’s handling of civil rights were the 2008 Summer Olympic Games. To fulfill the commitment to give journalist complete freedom to report on China, new regulations were signed into law, eliminating the requirement that foreign journalists must obtain government permission before conducting interviews.³⁹ While some journalists noticed an improvement on China’s reporting environment, others claim that harassment, intimidation, and detention of foreign journalists and the Chinese citizens remain.⁴⁰

Another recent event showing the tensions is the earthquake in Sichuan province on May 12, 2008, which killed 10’000s of people. In the days immediately after the earthquake, reporters and volunteers were allowed to travel freely in the disaster zone. It looked a bit like the dawning of China’s human rights record. But with the Olympic Games approaching, protesting parents of students who had died in collapsed school-

³⁸ See of Reporters without Borders 2008 Annual Report, 79 <http://www.rsf.org/IMG/pdf/rapport_en-2.pdf> (visited 30/08/08).

³⁹ Provisions on the Reporting Activities in China Conducted by Foreign Journalists during the Beijing Olympic Games and the Preparatory Period (Order No. 477 of the State Council of the PRC, entry into force January 1, 2007 and in effect until October 17, 2008).

⁴⁰ See Web site of Human Rights Watch <http://china.hrw.org/press/review/summary_of_china_rights_developments> (visited 02/09/08); “Welcome to a (rather dour) party”, *The Economist*, August 2, 2008, 26-28; cf. 2007 Annual Report of the CECC, 73ff.; see also a special Report of the CECC (“The Impact of the 2008 Olympic Games on Human Rights and the Rule of Law in China”), February 27, 2008, 46.

houses⁴¹ seemed to look like a time bomb for government authorities.⁴² Riot police officers broke up the protests and tried to keep the parents quiet by making them sign a contract, which promised them some money for keeping silent.⁴³

2. Freedom of Speech and Assembly in Hong Kong

2.1 Development

2.1.1 Civil Rights in Hong Kong before 1997

Before 1997, Hong Kong did not have the freedoms of expression and assembly codified. As a colony of the United Kingdom, its constitutional arrangements were defined by the Letters Patent, Royal Instructions and Acts of Parliament of the UK, and also by Hong Kong statute law.⁴⁴ Under Hong Kong's colonial government, legally there had not been a formal provision of civil liberties or any form of individual rights until 1991 when a Bill of Rights⁴⁵ modelled on the ICCPR was passed. The city's inhabitants enjoyed a relatively broad range of freedoms though due to the lack of prohibition under the British rule of law. When the UK ratified the ICCPR in 1976, it extended the provisions of the treaty with some reservations to the citizens of Hong Kong but no legislation gave effect to these provisions locally.⁴⁶ People's attitude towards a Bill of Rights seemed to be rather indifferent until 1989 when the traumatic Tiananmen event awakened the people's interest in a formal codification of human rights, fearing predictable future infringements under Chinese sovereignty. Thus, in preparation for returning Hong Kong to the PRC, the colonial government of Hong Kong moved towards a formalisation and codification of civil and political rights.

⁴¹ See e.g. "Parents' Grief Turns to Rage at Chinese Officials", The New York Times, May 28, 2008.

<<http://www.nytimes.com/2008/05/28/world/asia/28quake.html?pagewanted=2&sq=sichuan%20earthquake%20chinese%20officials&st=cse&scp=6#>> (visited 04/09/08).

⁴² See e.g. "Voice Seeking Answer for Parents About a School Collapse Is Silenced", The New York Times, July 11, 2008

<<http://www.nytimes.com/2008/07/11/world/asia/11china.html?pagewanted=1&sq=sichuan%20earthquake%20government%20response&st=nyt&scp=3>> (visited 04/09/08).

⁴³ See e.g. "China Presses Hush Money on Grieving Parents", The New York Times, July 24, 2008

<<http://www.nytimes.com/2008/07/24/world/asia/24quake.html?scp=1&sq=sichuan+earthquake+parents+protest&st=nyt>> (visited 04/09/08); "Grieving Chinese Parents Protest School Collapse", The New York Times, July 17, 2008

<<http://www.nytimes.com/2008/07/17/world/asia/17china.html?scp=5&sq=sichuan+earthquake+parents+protest&st=nyt>> (visited 04/09/08).

⁴⁴ Cf. Wesley-Smith, 15ff.; Hutchings, Cardozo Stud. L. & Lit. 1996, 268.

⁴⁵ Hong Kong Bill of Rights Ordinance, Chapter 383; entry into force June 8, 1991. For further information on the Hong Kong Bill of Rights: Chan (1998), ICLQ 1998, 306ff.

⁴⁶ Cf. Lai, J. Contemp. Asia 2008, 300ff.

2.1.2 Civil Rights in Hong Kong after 1997

In 1997, the HKSAR was established when Hong Kong was handed over from British to Chinese rule. This had a significant impact on its legal system, especially on the constitutional framework.

Although Hong Kong forms a part of the PRC now, it enjoys a great degree of autonomy. The socialist system and socialist politics are not practised in the HKSAR. This principle is called “one country, two systems”. All laws previously in force (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained except for any that contravene the Basic Law.

2.2 Sources of Law

2.2.1 Domestic Law

Following the agreements in the Joint Declaration⁴⁷, the Basic Law of the HKSAR was adopted on April 4, 1990 by the 7th National People’s Congress of the PRC and came into effect on July 1, 1997. It is the constitutional document for the HKSAR and protects rights through three different modalities.⁴⁸ Firstly, it enshrines fundamental rights and duties of the Hong Kong residents, mainly in chapter III, though not entirely. Secondly, it guarantees the rights protected by the ICCPR. Art. 39 states that the ICCPR (as well as the ICESCR) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. This is very important, because in Hong Kong treaties are not automatically incorporated into domestic law as is the case in Switzerland. Thirdly, the Basic Law protects previous laws, which are consistent with the Basic Law by preserving them, mainly through the Bill of Rights Ordinance (BOR). This Ordinance assures that the provisions of the ICCPR are incorporated into Hong Kong Basic Law. It mirrors the provisions of international law in domestic law.⁴⁹

Other sources of law are the common law and the rules of equity, to be found primarily in the judgements of superior courts.

2.2.2 International Law

Hong Kong is a signatory of the ICCPR, although China has not acceded to the treaty yet. The treaty was ratified on June 20, 1997 and became effective on July 1, 1997.⁵⁰

⁴⁷ The Sino-British Joint Declaration, signed on December 19, 1984 by the Prime Ministers of Britain and China.

⁴⁸ Cf. Ghai/Van Dale, 305ff.

⁴⁹ For further reading on the role of the ICCPR in Hong Kong: Petersen, 34ff.

⁵⁰ As mentioned above (2.1.1), the covenant had already been applicable to a certain extent through the UK before 1997.

2.3 Content

2.3.1 Subjects

Chapter III of the Basic Law is entitled “Fundamental Rights and Duties of the Residents”. Art. 24 of the Basic Law characterizes the subjects who shall be affected by the rights and duties provided. These are the residents of Hong Kong, permanent and non-permanent. Par. 2 defines the people considered as Hong Kong residents. Non-Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in chapter III of the Hong Kong Basic Law.⁵¹ Thus, non-residents enjoy the same rights as Hong Kong residents unless otherwise provided by law.⁵²

Since the BRO is supposed to give full effect to the rights guaranteed by the ICCPR, the rights provided in the BRO should be available to any person within the jurisdiction of Hong Kong too.⁵³

2.3.2 Scope

Art. 27 of the Basic Law guarantees all Hong Kong residents freedom of speech, of the press and of publication, as well as freedom of assembly, procession and demonstration.⁵⁴ The article is kept short, simply stating that these freedoms are granted without substantiating them.

The BRO guarantees freedom of opinion and expression in art. 16. Compared to the Basic Law, the wording is very detailed and elaborated. Par. 1 provides freedom of opinion without interference. Par. 2 deals with the right to freedom of expression, which includes freedom to seek, receive and impart information of all kinds regardless of frontiers.⁵⁵ The forms of expression include all types of communication such as speech, writing, print, as well as all kinds of art and media. The BRO repeats the wording of the ICCPR verbatim.⁵⁶

Other than the Basic law, the BRO stipulates the right to freedom of assembly in a separate article, art. 17.

⁵¹ Art. 41 of the Basic Law.

⁵² Cf. Shuwen, J. Chinese L.1988, 129.

⁵³ Cf. Chan/Ghai, 21ff.

⁵⁴ Additionally art. 32 and art. 34 of the Basic law provide freedom of conscience, religion and academic and artistic freedom.

⁵⁵ Cf. Boyle, 316ff.

⁵⁶ On the scope of the ICCPR: CCPR General Comment No. 10: Freedom of Expression (art. 19): 29/06/83.

2.3.3 Restrictions

The exercise of the civil rights of freedom of expression and assembly entails special duties and responsibilities. It may therefore be subject to certain restrictions. However, if the fundamental rights freedom of expression and assembly are restricted, they must meet certain requirements. On the national level, Art. 39 par. 2 of the Basic Law provides the conditions. The BRO provides restrictions on freedom of expression in par. 3 of art. 16. In accordance with the ICCPR, restrictions shall only be made as provided by law and necessary (a) for respect of the rights or reputation of others or (b) for the protection of national security or of public order (ordre public) or of public health or morals. The same applies to freedom of assembly.⁵⁷

The legal provisions permitting restrictions on constitutional rights are numerous. First of all, there is a general clause in the Basic Law, which allows the Standing Committee of the NPC to declare a state of emergency if there is turmoil in the HKSAR which endangers national security or unity and is beyond the control of the local government (art. 18 of the Basic Law). In this case the Central People's Government may issue an order applying the relevant national laws on Hong Kong. Then, there are some laws that potentially allow limits on speech and press freedom. The Public Order Ordinance⁵⁸ empowers the police to object to demonstrations on national security or public safety grounds or the protection of the rights and freedoms of others. The law requires notification for assemblies and demonstrations in certain cases. However, permissions are hardly ever denied.⁵⁹

Another possible source of assault on freedom of expression and assembly are several ordinances, such as the Emergency Regulations Ordinance⁶⁰ or the Crime Ordinance⁶¹. Yet, one of the most dangerous threats on freedom of expression and assembly in Hong Kong seems to be art. 23 of the Basic Law⁶², which imposes on the HKSAR the duty to enact laws that prohibit acts of treason, secession, sedition or subversion against the

⁵⁷ For the requirements of restrictions on art. 19 of the ICCPR: Jong-Kyu Sohn v. Republic of Korea; CCPR/C/54/D/518/1992, decision of July 19, 1995.

⁵⁸ Public Order Ordinance, Chapter 245.

⁵⁹ US-Department of State Report 2008 <http://hongkong.usconsulate.gov/ushk_hr_2008031101.html> (visited 04/09/08).

⁶⁰ Emergency Regulations Ordinance, Chapter 241.

⁶¹ In its 67th Session (see Document CCPR/C/79/Add.117) of November 1999 the Human Rights Committee expressed severe concern on the Crime Ordinance (Chapter 200), because the terms treason and sedition are defined in "overly broad terms", endangering freedom of expression.

⁶² See Weisenhaus, 289ff.; Sansani, H.R. Brief 2003, 28ff.

PRC Government. This article led e.g. to the introduction of the Official Secrets Ordinance⁶³.

A general clause for restrictions on fundamental freedoms can be found in art. 4 of the ICCPR too. The conditions established by the Committee are strict though.⁶⁴

2.4 Violations

The most recent report of the US-Department of State on Hong Kong⁶⁵ does not imply harsh criticism on the human rights situation in Hong Kong. The Hong Kong government generally respects the rights of freedom provided by its laws.⁶⁶

The most sensitive area seems to be freedom of press. One of the points objected in the US-report of 2008 is self-censorship by the media.⁶⁷ According to a survey on press freedom in Hong Kong undertaken by the Hong Kong Journalists Association⁶⁸, more than half of the surveyed Hong Kong journalists think press freedom has deteriorated since the handover, mainly as a result of self-censorship.⁶⁹ The reason for this self-censorship is the fact that most media outlets are owned by businesses with interest on the mainland. Interestingly, the general public does not seem to feel constrained by the huge impact of self-censorship claimed by journalists.

Freedom House considers self-censorship a threat on freedom of expression too. However, Hong Kong received 30 points on the scale⁷⁰, and therefore the status “free”.⁷¹

Summarizing these points the press can largely be considered free from state prosecution and repression but political and economic pressures have led to intensified self-censorship and an increasingly dependent press.

Freedom of assembly provided by law has been respected in practice by the government. It routinely issued the permits required for demonstrations and assemblies. Falun Gong practitioners regularly conducted protests against the crackdown on fellow practi-

⁶³ Official Secrets Ordinance, Chapter 521.

⁶⁴ Cf. Evatt, 99ff.

⁶⁵ Cf. US-Department of State Report 2007 on Human Rights Practices for Hong Kong <http://hongkong.usconsulate.gov/ushk_hr_2008031101.html> (visited: 25/08/08).

⁶⁶ Of different opinion: Hong Kong Human Rights Monitor, Submission to the UN Human Rights Committee regarding the SAR Government’s ICCPR Report 1999 (chapter 7 of 1999 Report) <<http://www.hkhrm.org.hk/english/reports/99ICCPR.html#7>> (visited 29/08/08).

⁶⁷ For further reading on self-censorship in Hong Kong: Cheung, 15ff.; Ngok, China Quart. 2007, 960ff.

⁶⁸ The Hong Kong Journalists Association (HKJA) is an internationally recognized voice on freedom of expression in Hong Kong. It publishes annual reports on press freedom. <<http://www.hkja.org.hk/portal/Site.aspx?id=H1-190&lang=en-US>> (visited 30/08/08).

⁶⁹ See <http://www.hkja.org.hk/Host/hkja/UserFiles/File/survey/PressFreedomSurvey2007_eng.pdf> (visited 30/08/08).

⁷⁰ For explanation on methodology etc. see <<http://www.freedomhouse.org/uploads/fop08/OverviewEssay2008.pdf>> (visited 30/08/08).

⁷¹ Freedom of the Press 2008 Draft Country Reports by Freedom House. <<http://www.freedomhouse.org/uploads/fop08/CountryReportsFOTP2008.pdf>> (visited 30/08/08).

tioners in the mainland. Every June 4, 10'000s gather in Hong Kong's Victoria Park to commemorate the Beijing Tiananmen Square massacre of 1989.⁷²

3. Freedom of Speech and Assembly in Switzerland

3.1 Development

3.1.1 Federal Constitution of 1848

The first Swiss Federal constitution was promulgated in 1848. It provided only very few fundamental rights. Freedom of speech and assembly were not among them, but freedom of press was.⁷³ This does not mean that the lacking fundamental rights did not exist, since the cantonal constitutions already implemented further fundamental rights.⁷⁴

3.1.2 Federal Constitution of 1874

In a referendum in April 1874, the Swiss adopted the proposal for a new constitution after it had rejected the precedent draft bill two years earlier. Fundamental rights were extended, but neither freedom of assembly nor freedom of speech (apart from freedom of the press in art. 55) were implemented in the new constitution. Art. 55 was kept short, simply stating that freedom of press was guaranteed. It was later extended by the addition of art. 55^{bis} which concerns independence, responsibility and tasks of radio and television.

3.1.3 Recognition of Unwritten Fundamental Rights

In 1961 the Swiss Federal Court explicitly stated in a decision that freedom of speech shall be acknowledged as an unwritten fundamental law.⁷⁵ In a later judgement the Federal Court determined that the freedom to receive information be part of freedom of speech and of the press.⁷⁶ Freedom of assembly was admitted unwritten constitutional law in 1970.⁷⁷

3.1.4 Federal Constitution of 1999

The current Constitution provides a quite detailed catalogue of basic human rights. For the first time in Swiss history, freedom of speech including all its aspects was implemented in the Constitution as written law. The same applies to freedom of assembly.

⁷² "Eternal Vigilance", *The Economist*, June 30, 2007.

⁷³ Art. 45 of the Constitution of 1848.

⁷⁴ Kley, 158f.

⁷⁵ "[...] la liberté d'expression, qui constitue un principe fondamental du droit fédéral et cantonal, écrit ou non, et une extension de la protection assurée par la liberté de la presse." (BGE 87 I 114, 177).

⁷⁶ BGE 104 Ia 88, 94 and 97.

⁷⁷ BGE 96 I 219, 223f.

3.2 Sources of Law

3.2.1 Domestic Law

On the national level, freedom of expression is provided in art. 16 and 17, freedom of assembly in art. 22 of the Federal Constitution.⁷⁸

3.2.2 International Law

As Switzerland is a member state of the Council of Europe and has been a signatory state of the Convention for the Protection of Human Rights and Fundamental Freedoms⁷⁹ (ECHR) since 1974, the rights provided in this covenant are directly applicable in Switzerland and have direct effect on Swiss citizens. The rights to freedom of expression and assembly are to be found in art. 10 and 11.

Moreover, Switzerland has signed the ICCPR⁸⁰ and the Convention on the Rights of the Child.⁸¹ The ICCPR and the ECHR are certainly the most important international conventions for Switzerland in terms of civil rights.⁸²

3.3 Content

According to prevailing theory neither the European Convention nor the ICCPR provide wider protection on civil rights than the Swiss Constitution⁸³, although the wording of ICCPR art. 19 is much more detailed than the corresponding articles of the Swiss Constitution and the European Convention.⁸⁴ Since the relevant aspects of the ICCPR have already been discussed in the chapter concerning Hong Kong, I will concentrate on the scope of the Swiss Federal Constitution in the following part.

3.3.1 Subjects

The subjects protected by art. 16 of the Swiss Constitution and the corresponding provisions of signed treaties are any human beings including minors and foreign people as well as legal entities.⁸⁵

⁷⁸ Swiss Federal Constitution (=Bundesverfassung der Schweizerischen Eidgenossenschaft [BV]) of April 18, 1999. Entry into force January 1, 2000. SR 101.

⁷⁹ Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. Entry into force for Switzerland November 28, 1974. SR 0.101.

⁸⁰ International Covenant on Civil and Political Rights of December 16, 1966. Entry into force for Switzerland September 18, 1992. SR 0.103.2.

⁸¹ Convention on the Rights of the Child of November 20, 1989. Entry into force for Switzerland March 26, 1997. SR 0.107. Art. 13 repeats almost verbatim art. 19 of the ICCPR.

⁸² However, there is an important difference concerning implementation: Supervision provided by the ICCPR is very weak. Disregarding of provisions does not cause juridical consequences or impose enforceable sanctions on the state breaching the contract (cf. Bundesblatt of April 2, 1991, 1195). Compared to the ICCPR, the European Convention is supported by a strong checking system: the European Court of Human Rights in Strasbourg. The European's Court for Human Rights influences Swiss legislation and jurisdiction significantly. Its decisions are highly considered.

⁸³ BGE 130 I 369, 375.

⁸⁴ E.g. it explicitly states that the right to freedom of expression shall be applicable regardless of frontiers.

⁸⁵ Cf. Kley/Tophinke, Kommentar, Art. 16, No. 12.

Art. 17 protects everybody working in the range of media such as journalists or cameramen, media enterprises but also the audience.⁸⁶

First and foremost, freedom of assembly entitles natural persons irrespective of their nationality, though further restrictions can be made on foreign people's right to freedom of assembly. Legal entities are at least to a certain extent protected too.⁸⁷

3.3.2 Scope

Art. 10 par. 1 of the ECHR and art. 16 of the Swiss Constitution almost coincide, covering the freedoms to hold opinion and to receive and impart information. Art. 10 of the ECHR implies freedom of the media, which in the Swiss Constitution is provided in a separate article, emphasizing the outstanding function of media in spreading information and opinions in a democratic society.

Art. 16 of the Swiss Constitution could be described as an "absorbing law". It is only applicable as long as all specific communication rights are excluded.⁸⁸

To determine the ambit of freedom of expression in Switzerland, first of all the term "opinion" has to be defined. Jurisdiction and the message of the Federal Council concerning the Constitution of 1999⁸⁹ show that the terminology of "opinion" is very broad. All results of mental activity such as emotional expressions, personal or rational statements, considerations and observations are considered "opinions". The Constitution protects not only opinions and information consistent with state ideologies or suiting the majority's conviction. Pluralism, tolerance and broadmindedness, without which there is no democratic society, demand that opinions and information do not have to be received favourably or regarded as inoffensive. They might be shocking, provocative, worrying or disturbing.⁹⁰

The Swiss Federal Court states that art. 16 and 17 only protect expressions of idealistic content.⁹¹ Materialistic statements such as commercials are guarded by art. 27 of the Swiss Constitution. The European Court of Human Rights came to another decision concerning art. 10 of the European Convention. It decided that commercials are guarded

⁸⁶ Biaggini, Kommentar, Art. 17, No. 6; BGE 121 III 359, 367.

⁸⁷ BGE 92 I 24, 29; of other opinion: Ruesch, 185ff.

⁸⁸ These are in particular art. 15 (freedom of religion), art. 17 (freedom of media), art. 20 (freedom of scientific research), art. 21 (freedom of art), art. 22 (freedom of assembly), art. 23 (freedom of association) or art. 27 (economic liberty).

⁸⁹ Cf. Message of the Federal Council concerning the draft of the Constitution (=Botschaft über eine neue Bundesverfassung of November 20, 1996), 157f.

⁹⁰ See the case of Handyside v. the United Kingdom, Series A, No. 24, judgement of December 7, 1976, in particular No. 49.

⁹¹ BGE 125 I 417, 420f.; of different opinion: cf. Burkert, Kommentar, Art. 17, No. 16.

by the right to freedom of expression.⁹² In the end this doesn't really matter as long as economic liberty is provided similar to art. 10 of the European Convention, a criterion, which art. 27 of the Federal Constitution fulfills.⁹³

Par. 1 of art. 16 ensures freedom of opinion and information shall be granted.

Par. 2 of art. 16 mentions two activities, that shall be protected: the freedom to form an opinion and to share this opinion with others without public interference. Although it is not explicitly listed in art. 16, the right to hold an opinion as a basis is granted too; otherwise the exercise of the two named activities wouldn't be possible.⁹⁴

The liberty to disperse opinions protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed⁹⁵, in particular spoken and written words, sound records, films⁹⁶ but also symbolic means of expressions like banners⁹⁷ or flags⁹⁸.

Par. 3 of art. 16 provides the freedom to receive, to actively seek information of public sources and impart it. The right to search for information is limited to publicly accessible sources though.⁹⁹

Art. 17 par. 1 guarantees freedom of media. This provision has to be seen in context with art. 93 of the Swiss Constitution, which grants independence of radio and television.¹⁰⁰ The term press encompasses every kind of print and reproduction media, irrespective of their origin, appearance and distribution.¹⁰¹

Par. 2 prohibits censorship. This applies to all sorts of systemic controlling, and is hence not limited to pre-censorship. An exception has to satisfy the prerequisites of art. 36 of the Federal Constitution.

⁹² „L'article 10 ne joue pas seulement pour certains types de renseignements, d'idées ou des modes d'expression [...] il englobe aussi [...] des informations à caractère commercial [...] (Case of Casado Coca v. Spain, Series A, No. 285-A, judgement of February 24, 1994, No. 35ff.). The Human Rights Committee shares the opinion of the European Court: ICCPR art. 19 no. 2 “must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with art. 20 [prohibition of war propaganda and incitement to discrimination, hostility or violence], of news and information, of commercial expression and advertising, of works of art etc. It should not be confined to means of political, cultural or artistic expression.” (John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada, CCPR/C/47/D/359/1989; judgement of May 5, 1993).

⁹³ Cf. Kley/Tophinke, Kommentar, Art. 16, No. 7.

⁹⁴ Cf. Message of the Federal Council (supra fn. 89), 158; Peduzzi, 205.

⁹⁵ BGE 107 Ia 226, 229.

⁹⁶ BGE 120 Ia 190, 192.

⁹⁷ BGE 111 Ia 322, 322.

⁹⁸ BGE 107 Ia 59, 62.

⁹⁹ BGE 127 I 145, 156; cf. Peduzzi, 214f. Since the Law concerning Publicity of the Federal Administration (=Bundesgesetz über das Öffentlichkeitsprinzip der Verwaltung [BGÖ]) of December 17, 2004 (SR 152.3) became effective on July 1, 2006, the principle holds, that administrative information is open to public access and may just exceptionally be subject to government secrecy.

¹⁰⁰ Cf. Biagini, Kommentar, Art. 17, No. 4.

¹⁰¹ BGE 96 I 586, 588.

Par. 3 finally ensures the editorial confidentiality, which is a constitutive element of freedom of expression and keeps the state from compelling people working in the media to reveal a confidential source.

Art. 22 par. 1 of the Swiss Constitution¹⁰² states the guarantee of freedom of assembly. Par. 2 circumscribes the content of this provision, which is the right to organize, join or abstain from assemblies. This listing is not exhaustive.¹⁰³ The right to freedom of assembly protects the individual in summoning, organising, conducting and programming meetings. The term assembly is defined as a gathering of several (at least two) persons, having a common purpose. So the collective goal of an assembly must be some kind of forming, sharing or exchange of opinions.¹⁰⁴ In contrast to associations, assemblies are not meant to be durable. To distinguish an assembly from coincidentally crowding of people, a certain level of organization is required.¹⁰⁵

Unlike the international covenants the Swiss Constitution does not explicitly say that assemblies have to be peaceful. The jurisdiction confirms this condition though.¹⁰⁶

Neither the Swiss Constitution, nor the ECHR or the ICCPR provide the right to demonstration like the Constitution of the PRC and the Hong Kong Basic Law. The Swiss Constitution does not even provide the right to demonstration as unwritten law according to the jurisdiction of the Federal Court.¹⁰⁷ This does not mean, that there is no right to demonstrate in Switzerland. Demonstrations are defined as assemblies with a pronounced and specific function to appeal to the public. The combination of freedom of expression and freedom of speech already covers the main aspects of demonstrations.¹⁰⁸ An additional article would be superfluous.¹⁰⁹

Since demonstrations make use of public ground in a particularly pronounced way¹¹⁰, there is only a conditional right to demonstrations. Demonstrations may be subject to permission.¹¹¹ The granting of a demonstration permit must not be depending on the authority's discretion though. Denial or restraint must be justified by the need in a de-

¹⁰² The corresponding articles in the treaties are art. 21 of the ICCPR and art. 11 of the ECHR.

¹⁰³ Message of the Federal Council (supra fn. 89), 166.

¹⁰⁴ BGE 132 I 49, 56.

¹⁰⁵ BGE 127 I 164, 168; of different opinion: Ruesch, 88ff.

¹⁰⁶ BGE 111 Ia 322, 322; cf. Rohner, Kommentar, Art. 22, No. 10.

¹⁰⁷ BGE 100 Ia 392, 399f.; BGE 127 I 164, 168f.

¹⁰⁸ "En ce qui concerne la liberté de manifestation, le Tribunal fédéral a jugé qu'elle n'était ni une condition nécessaire à l'exercice d'autres libertés, ni un élément indispensable de l'ordre démocratique fondé sur le droit. Elle n'est, par conséquent, pas garantie par le droit constitutionnel non écrit. [...] l'organisation d'une marche populaire [...] relève sans équivoque de la liberté de réunion et [...] dépend également de la liberté d'opinion." (BGE 107 Ia 226, 230).

¹⁰⁹ Rohner, Kommentar, Art. 22, No. 19; of different opinion: Ruesch, 115ff.

¹¹⁰ BGE 124 I 267, 268.

¹¹¹ BGE 127 I 164, 169.

mocratic society.¹¹² The responsible authorities are supposed to cooperate with the applicants. Rather than completely refuse the permission sued, they shall impose restraints concerning the route or time of the meeting.¹¹³

3.3.3 Restrictions

In cases where the exercise of rights guaranteed by the Federal Constitution or an international treaty is interfered, restrictions have to meet the requirements of art. 36 of the Swiss Constitution or the provision of the covenant respectively.¹¹⁴ Legislation and jurisdiction have established the following criteria:

(A) Interferences must be “prescribed by law”, which means that there must be some legal basis for the restriction. “Firstly the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision [clear and unambiguous] to enable the citizen to regulate his conduct: he must be able [...] to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not to be foreseeable with absolute certainty [...]”¹¹⁵

In Switzerland the norm must be a law in the formal sense if the restriction is significant, whereas a regulation may be sufficient in lighter cases.¹¹⁶ An exception can only be made in the case of an emergency, i.e. if a threatening danger is severe, imminent and can not be anticipated otherwise (art. 36 par. 1 of the Swiss Constitution).

(B) Furthermore restrictions must be of public interest or justified by fundamental rights of third parties. There must be a genuine purpose. All necessary arrangements made by the state in order to fulfill its obligations to ensure public welfare belong to these public interests. These can be police interests such as public order, peace, security, health, or morality but also interests of environmental concern or urban and regional planning.¹¹⁷

¹¹² BGE 100 Ia 392, 402.

¹¹³ Cf. Hangartner/Kley, ZBl 1995, 105.

¹¹⁴ The European Convention provides a very similar protection. Restrictions are justified if they are prescribed by law, pursue a legitimate aim specified in par. 2 of art. 10 (which is an exhaustive list) and are necessary in a democratic society thus meet a pressing social need. In addition the principle of proportionality has to be preserved. (See e.g. Case of Autronic AG v. Switzerland, Series A, No. 178, judgement of May 22, 1990, No. 49ff.).

¹¹⁵ See Case of the Sunday Times v. the United Kingdom, judgement of April 26, 1979.

¹¹⁶ The Strasbourg Commission and Court have established in their case law the principle that the law concerned may also be unwritten law, such as common law. Additionally the domestic law must be compatible with the minimum standard of the rule of law (see the Case of Malone v. the United Kingdom, Judgement of August 2, 1984, Series A, No. 82, No. 67).

¹¹⁷ Biaggini, Kommentar, Art. 36, No. 19.

(C) There must be a “necessity in a democratic society”. In Swiss jurisdiction, this point implies three criteria: Primarily, the measure taken to restrict the constitutional right must be qualified to reach the aim pursued in public interest. It has to be of demonstrable effect. Secondly, the measure taken must be required in *ratione materiae, loci, personae* and *temporis*. Thus, the measure should be the lightest possible. Thirdly, the interfering measure taken must be proportionate. The ratio between public interest and private interest has to be at the appropriate rate. According to the European Court “necessary” in a democratic society implies the existence of a pressing social need, which gives the contracting states a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with the European supervision, embracing legislation and decisions applying it.¹¹⁸

(D) Finally, every fundamental right has an inviolable core, that can never ever be jeopardized. It makes sure human dignity cannot be infringed upon by public authorities under any circumstance.¹¹⁹ For example, the prohibition of pre-censorship, i.e. a general, methodical check in advance of intended expressions of opinions, forms part of the core of the right to freedom of expression, according to prevailing theory¹²⁰. Although the prohibition of censorship is solely constituted in par. 2 of art. 17, it is applicable to all fundamental rights of communication.¹²¹

Art. 15 ECHR permits suspension of freedoms guaranteed in the convention in the interest of national security in time of war or public emergency. The consequence however, is not liberty for the state from review by the Strasbourg Commission and Court. A number of strict conditions has to be met.¹²²

First, the public emergency must “threaten the life of the nation”. Second, the derogation must not go beyond “the extent strictly required by the exigencies of the situation”. Third, the measure must not be “inconsistent with other obligations under international law”. Fourth, prior notification of the measure must be given to the Secretary General of the Council of Europe.

3.4 Violations

NGOs such as Human Rights Watch or Freedom House don’t blame Switzerland for violating freedom of expression or freedom of assembly.

¹¹⁸ See Case *Handyside v. UK* (supra fn. 90), No. 24.

¹¹⁹ For further reading: Peduzzi, 238ff.

¹²⁰ See Biaggini, Kommentar, Art. 17, No. 16; Kley/Tophinke, Kommentar, Art. 16, No. 17.

¹²¹ Message of the Federal Council (supra fn. 89), 160.

¹²² See Mahoney/Early, 121f.

Freedom House gives Switzerland a score of 13 points and thus the status free.¹²³ Media freedom guaranteed in the Constitution is respected. Although broadcast media are dominated by the Swiss Broadcasting Corporation dependent on the government for financing, its news reporting is politically neutral.

The European Court of Human Rights however has condemned Switzerland several times for breach of art. 10 of the European Convention.¹²⁴ Art. 11 has not been violated so far.

4. Comparison

Chinese understanding of human rights is in general substantially different from that in western democratic states like Switzerland (and by virtue of its British influenced background also Hong Kong). Although the constitutional wording might be very similar, the interpretation is not identical.¹²⁵ For Chinese people, social and economic development, as well as prosperity are the basis for full enjoyment of human rights. They carry much more importance than civil freedoms.

PRC jurists criticise, that only capitalists benefit from constitutional guarantees of human rights and liberties, because they hold political power as well as means of production and so exploit the masses rather than protect them.¹²⁶

Moreover, in western thinking the notion of human rights is mainly judicial and procedural. Each person naturally possesses the right to life, liberty, and property simply because he or she is a person, regardless of citizens' duties.¹²⁷ Claims to freedom ultimately supersede any state-made law, unless the state can justify the restriction on it. The government can be held liable for abusing or violating individual rights. Individual rights are seen as a limit to the state's exercise of power. This is unacquainted with Chinese culture. China has no tradition of natural law.¹²⁸ It's the majority's interest that shall be protected, not the individual's. Citizens' duties to the state are more accentuated than individual freedoms from the state and the state has the right to abolish the freedoms it created.¹²⁹ Thus, the PRC Constitution stipulates lots of duties for the PRC citi-

¹²³ See <<http://www.freedomhouse.org/uploads/fop08/CountryReportsFOTP2008.pdf>> (visited 01/09/08).

¹²⁴ See Case of Autronic AG v. Switzerland, judgment of May 22, 1990; Case of Foglia v. Switzerland, judgment of December 13, 2007; Case of Verein gegen Tierfabriken (VgT) v. Switzerland, judgement of June 28, 2001; Case of Monnat v. Switzerland, judgment of September 21, 2006; Case of Dammann v. Switzerland, judgment of April 25, 2006; Case of Stoll v. Switzerland, judgment of April 25, 2006; Case of Hertel v. Switzerland, judgement of August 25, 1998.

¹²⁵ Cf. Bai, 266ff.

¹²⁶ Chen, 121.

¹²⁷ Cf. Spénlé, Jusletter 2002, No. 2f.

¹²⁸ For further reading on the conception of human rights in the West and in China: Svensson, 21ff.

¹²⁹ Cf. Kent, 6-18.

zens among which are the duties to safeguard the unity of the country and all the nationalities, to abide by the Constitution and the law, to protect state secrets and public property, to observe labour discipline and public order, to respect social ethics, to safeguard security, honour and interests of the state, to defend the motherland and resist aggressions, perform military service and pay taxes.¹³⁰ In contrast the Hong Kong Basic Law only requires that residents and non-residents must abide by the law of the HKSAR (art. 42).

The Swiss Constitution does not state citizens' duties positively in the section of the fundamental rights and freedoms. The only provision slightly pointing in the direction of duties is art. 6: It states that every person is responsible for him- or herself and shall help to undertake tasks of state and society as good as he or she can. This article does not provide duties that can be sanctioned, though.¹³¹

Besides, a notable difference lies in the application of civil rights: Even for the recognized constitutional freedoms, China lacks the enactment of administrative regulations to have them enforced in reality. Chinese citizens have virtually no recourse in cases, in which their constitutional rights are violated. Much less do they know about their liberties at all. The highest organs of state power, the NPC and its Standing Committee, are in charge of enforcing the Constitution (art. 62) but no formal mechanism has been established for them to carry this out.¹³² It can be said therefore, that constitutional rights in China are not self-enforcing whereas constitutional rights in Switzerland and in Hong Kong are.¹³³ Consequently, unless propped up by legislation, freedoms provided in the Chinese Constitution do not have any effect.

Another important aspect is the function of civil liberties: In western legal thinking, the freedoms of expression and assembly fulfill two general functions. On the one hand, these freedoms are indispensable for social communication, which is a basic human need and a prerequisite for personal development. "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment."¹³⁴ On the other hand they meet a demand of society. An efficient democracy cannot do without freedom of expression and assembly to provide the individuals the possibility to interchange opinions and

¹³⁰ Art. 52-56 of the PRC Constitution.

¹³¹ Biaggini, Kommentar, Art. 6, No. 1f.

¹³² Woodman/Ping, 227.

¹³³ Cf. Ghai/Van Dale, 305ff.

¹³⁴ Case Hertel v. Switzerland, published in Reports 1998-VI, judgement of August 25, 1998 (Application No. 25181/94), §46.

make up their minds.¹³⁵ The second function of freedom of assembly and expression becomes clear if we compare these fundamental rights in a democratic and in a totalitarian system. In totalitarian systems, these freedoms are only guaranteed, as far as they coincide with state ideology. Every action against the interests of the state is strictly prohibited and does not deserve protection. Beneficiaries of constitutional liberties in totalitarian systems are thus not the citizens, but the state.¹³⁶

In communist systems such as China, civil rights like law in general are perceived as a state instrument, a means of state social control. The legitimacy depends on the Communist Party, not on mass support. Thus, it seems in dictatorships, rights have the two following functions. Firstly, they have to carry out the predetermined policies and secondly to act as an ideology to secure submission to power and to command obedience.¹³⁷

Conclusion

Generally speaking, recognition and respect for human rights have improved a great deal in the last decades. Remarkable progress has been made in China, in particular concerning individual economic rights. However, important differences in terms of implementation of civil rights remain, although China, Hong Kong and Switzerland are – at least partly – submitted to the same laws.

¹³⁵ “[...] mais la liberté d’expression n’est pas seulement [...] une condition de l’exercice de la liberté individuelle et un élément indispensable à l’épanouissement de la personne humaine; elle est encore le fondement de tout Etat démocratique [...]” (BGE 96 I 586, 592).

¹³⁶ Cf. Rüesch, 69ff.

¹³⁷ Epstein, 19f.

Appendix

Sources of Law:

1. International Law

1.1 Universal Declaration of Human Rights (UDHR)

Article 2

¹ Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

² Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

1.2 International Covenant on Civil and Political Rights (ICCPR)

Article 2

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

(3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 4

(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

(3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 19

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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

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

Article 20

(1) Any propaganda for war shall be prohibited by law.

(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

1.3 Convention on the Rights of the Child

Article 13

(1) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

(2) The exercise of this right may be subject to certain restrictions, but these shall only be such as 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.

1.4 European Convention (ECHR)

Article 10

[Freedom of expression]

¹ Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

² The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, terri-

torial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

[Freedom of assembly and association]

¹ Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

² No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall

not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 15

[Derogation in time of emergency]

¹ In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

² No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

³ Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention

are again being fully executed.

1.5 Vienna Convention on the Law of Treaties

Article 18

[Obligation not to defeat the object and purpose of a treaty prior to its entry into force]

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. Law of the PRC

2.1 Constitution of the People's Republic of China

Article 5

[Socialist Legal System, Rule of Law]

(1) The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.

(2) The state upholds the uniformity and dignity of the socialist legal system.

(3) No law or administrative or local rules and regulations shall contravene the Constitution.

(4) All state organs, the armed forces, all political parties and public organizations, and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be looked into.

(5) No organization or individual may enjoy the privilege of being above the Constitution and the law.

Article 32

[Rights of Foreigners]

The People's Republic of China protects the lawful rights and interests of foreigners within Chinese territory, and while on Chinese territory foreigners must abide by the law of the People's Republic of China. The People's Republic of China may grant asylum to foreigners who request it for political reasons.

Article 33

[Citizenship, Equality]

All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. All citizens of the People's Republic of China are equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.

Article 35

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

Article 51

[Interest of the State]

The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society, and of the collective, or upon the lawful freedoms and rights of other citizens.

Article 52

[Unity]

It is the duty of citizens of the People's Republic of China to safeguard the unity of the country and the unity of all its nationalities.

Article 53

[Obedience to the Constitution]

Citizens of the People's Republic of China must abide by the Constitution and the law, keep state secrets, protect public property, and observe labor discipline and public order and respect social ethics.

Article 54

[Integrity of the Motherland]

It is the duty of citizens of the People's Republic of China to safeguard the security, honor, and interests of the motherland; they must not commit acts detrimental to the security, honor and interests of the motherland.

Article 55

[Defence]

(1) It is the sacred obligation of every citizen of the People's Republic of China to defend the motherland and resist aggression.

(2) It is the honorable duty of citizens of the People's Republic of China to perform military service and join the militia in accordance with the law.

Article 56

[Taxation]

It is the duty of citizens of the People's Republic of China to pay taxes in accordance with the law.

Article 62

The National People's Congress exercises the following functions and powers:

[...]

(3) To enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters

[...]

Article 67

The Standing Committee of the National People's Congress exercises the following functions and powers:

[...]

(2) To enact and amend statutes with the exception of those which should be enacted by the National People's Congress

[...]

Article 89

The State Council exercises the following functions and powers:

(1) To adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes

[...]

2.2 Law of the PRC on Assemblies, Processions and Demonstrations

Article 4

In exercising their right to assembly, procession and demonstration, citizens must abide by the Constitution and the laws, shall not oppose the cardinal principles specified in the Constitution and shall not impair state, public or collective interests or the lawful freedoms and rights of other citizens.

Article 7

For the holding of an assembly, a procession or a demonstration, application must be made to and permission obtained from the competent authorities in accordance with the provisions of this Law.

It shall not be necessary to apply for the following activities:

(1) celebrations or commemorative activities held by the state or by state decisions; and

(2) assemblies held by state organs, political parties, public organizations, enterprises or institutions in accordance with law or the relevant articles of association.

Article 12

No permission shall be granted for an application for an assembly, a procession or a demonstration which involves one of the following circumstances:

(1) opposition to the cardinal principles specified in the Constitution;

(2) harming the unity, sovereignty and territorial integrity of the state;

(3) instigation of division among the nationalities; or

(4) the belief, based on sufficient evidence, that the holding of the assembly, procession or demonstration that is being applied for will directly endanger public security or seriously undermine public order.

Article 15

No citizens shall, in a city other than his place of residence, start, organize or participate in an assembly, a procession or a demonstration of local citizens.

2.3 Regulations on Publication Administration

Article 5

¹ Where a citizen exercises the right of freedom of the press according to law, the people's governments at all levels shall provide protection and safeguard.

² A citizen, when exercising the right of freedom of the press, shall abide by the Constitution and the law, and shall not oppose the basic principles established by the Constitution or damage the interests of the State, the society or the collective, or the lawful freedom and rights of other citizens.

Article 24

¹ A citizen may, in accordance with the provisions of these Regulations, freely express in publications his or her own views and wishes regarding State affairs, economic and cultural developments and freely publish the results of his or her scientific research, literary and artistic creation, and of other cultural activities.

² Lawful publications shall be protected by law. No organization or individual shall illegally interfere with, prevent or disrupt the publishing of publications.

3. Law of the HKSAR

3.1 Basic Law

Article 18

¹ The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

² National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

³ The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

⁴ In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.

Article 23

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, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or

bodies of the Region from establishing ties with foreign political organizations or bodies.

Article 24

¹ Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent residents and non-permanent residents.

² The permanent residents of the Hong Kong Special Administrative Region shall be

³ (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

⁴ The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

⁵ The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.

Article 27

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

Article 32

¹ Hong Kong residents shall have freedom of conscience.

² Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public.

Article 34

Hong Kong residents shall have freedom to engage in academic research, literary and artistic creation, and other cultural activities.

Article 39

¹ The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

² The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Article 41

Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.

Article 42

Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the Hong Kong Special Administrative Region.

3.2 Hong Kong Bill of Rights Ordinance (BRO)

Article 16

[Freedom of opinion and expression]

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as 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.

[cf. ICCPR Art. 19]

Article 17

[Right of peaceful assembly]

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

[cf. ICCPR Art 21]

4. Law of Switzerland

4.1 Federal Constitution (BV)

Art. 6

[Individuelle und gesellschaftliche Verantwortung]

Jede Person nimmt Verantwortung für sich selber wahr und trägt nach ihren Kräften zur Bewältigung der Aufgaben in Staat und Gesellschaft bei.

Art. 15

[Glaubens- und Gewissensfreiheit]

¹ Die Glaubens- und Gewissensfreiheit ist gewährleistet.

² Jede Person hat das Recht, ihre Religion und ihre weltanschauliche Überzeugung frei zu wählen und allein oder in Gemeinschaft mit anderen zu bekennen.

³ Jede Person hat das Recht, einer Religionsgemeinschaft beizutreten oder anzugehören und religiösem Unterricht zu folgen.

⁴ Niemand darf gezwungen werden, einer Religionsgemeinschaft beizutreten oder anzugehören, eine religiöse Handlung vorzunehmen oder religiösem Unterricht zu folgen.

Art. 16

[Meinungs- und Informationsfreiheit]

¹ Die Meinungs- und Informationsfreiheit ist gewährleistet.

² Jede Person hat das Recht, ihre Meinung frei zu bilden und sie ungehindert zu äussern und zu verbreiten.

³ Jede Person hat das Recht, Informationen frei zu empfangen, aus allgemein zugänglichen

Quellen zu beschaffen und zu verbreiten.

Art. 17

[Medienfreiheit]

¹ Die Freiheit von Presse, Radio und Fernsehen sowie anderer Formen der öffentlichen fernmeldetechnischen Verbreitung von Darbietungen und Informationen ist gewährleistet.

² Zensur ist verboten.

³ Das Redaktionsgeheimnis ist gewährleistet.

Art. 20

[Wissenschaftsfreiheit]

Die Freiheit der wissenschaftlichen Lehre und Forschung ist gewährleistet.

Art. 21

[Kunstfreiheit]

Die Freiheit der Kunst ist gewährleistet.

Art. 22

[Versammlungsfreiheit]

¹ Die Versammlungsfreiheit ist gewährleistet.

² Jede Person hat das Recht, Versammlungen zu organisieren, an Versammlungen teilzunehmen oder Versammlungen fernzubleiben.

Art. 23

[Vereinigungsfreiheit]

¹ Die Vereinigungsfreiheit ist gewährleistet.

² Jede Person hat das Recht, Vereinigungen zu bilden, Vereinigungen beizutreten oder anzugehören und sich an den Tätigkeiten von Vereinigungen zu beteiligen.

³ Niemand darf gezwungen werden, einer Vereinigung beizutreten oder anzugehören.

Art. 27

[Wirtschaftsfreiheit]

¹ Die Wirtschaftsfreiheit ist gewährleistet.

² Sie umfasst insbesondere die freie Wahl des Berufes sowie den freien Zugang zu einer privatwirtschaftlichen Erwerbstätigkeit und deren freie Ausübung.

Art. 36

[Einschränkungen von Grundrechten]

¹ Einschränkungen von Grundrechten bedürfen einer gesetzlichen Grundlage.

Schwerwiegende Einschränkungen müssen im Gesetz selbst vorgesehen sein. Ausgenommen

sind Fälle ernster, unmittelbarer und nicht anders abwendbarer Gefahr.

² Einschränkungen von Grundrechten müssen durch ein öffentliches Interesse oder durch den Schutz von Grundrechten Dritter gerechtfertigt sein.

³ Einschränkungen von Grundrechten müssen verhältnismässig sein.

⁴ Der Kerngehalt der Grundrechte ist unantastbar.

Art. 93

[Radio und Fernsehen]

¹ Die Gesetzgebung über Radio und Fernsehen sowie über andere Formen der öffentlichen

fernmeldetechnischen Verbreitung von Darbietungen und Informationen ist Sache des Bundes.

² Radio und Fernsehen tragen zur Bildung und kulturellen Entfaltung, zur freien Meinungsbildung und zur Unterhaltung bei. Sie berücksichtigen die Besonderheiten des Landes und die Bedürfnisse der Kantone. Sie stellen die Ereignisse sachgerecht dar und bringen die Vielfalt der Ansichten angemessen zum Ausdruck.

³ Die Unabhängigkeit von Radio und Fernsehen sowie die Autonomie in der Programmgestaltung sind gewährleistet.

⁴ Auf die Stellung und die Aufgabe anderer Medien, vor allem der Presse, ist Rücksicht zu nehmen.

⁵ Programmbeschwerden können einer unabhängigen Beschwerdeinstanz vorgelegt werden.

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Zürich, 15. September 2008