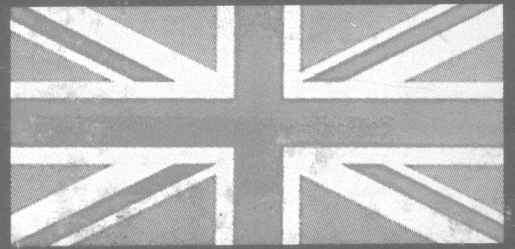




1997



HONG KONG
AND THE
IMPLEMENTATION
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Centre for Comparative and Public Law
Faculty of Law
University of Hong Kong
October 1995

**HONG KONG
AND THE IMPLEMENTATION OF THE
INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

**PREPARED FOR SUBMISSION TO THE
UNITED NATIONS HUMAN RIGHTS COMMITTEE
ON THE OCCASION OF ITS CONSIDERATION OF
THE UNITED KINGDOM'S FOURTH PERIODIC REPORT
IN RESPECT OF HONG KONG
REGARDING
THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

OCTOBER 1995

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**HONG KONG AND THE IMPLEMENTATION OF THE
INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

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THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE WORK OF THE HUMAN RIGHTS COMMITTEE

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Committee)**

**THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS AND THE WORK OF THE
HUMAN RIGHTS COMMITTEE**

BY

ANDREAS MAVROMMATIS¹

I would like to begin by expressing appreciation to the organisers of the Seminar for the honour bestowed on me to come here and talk about the Covenant. May I also congratulate them for organising for the second time such a seminar immediately prior to the consideration of Hong Kong's report by the mechanisms provided for by the Covenants.

The idea of holding such a seminar just before the consideration of a country's report by the Committee is excellent because it facilitates preparation and identifies issues that should be emphasised by NGOs to members of the Committee and helps test the veracity of the content of the report whilst exposing areas where it might be silent.

What I am not absolutely convinced about is, in normal circumstances, the presence of a member of the Committee. There are pros and cons and there would even be Committee members who might resent that another member pre-empts the consideration of a report by conducting an examination on his own in advance.

I hasten to say that this is definitely not the case here, today, because special circumstances make it essential to hold such a meeting as decided and if the Committee thinks after the consideration of the report and all information before it that another report should be forthcoming, I would say that another similar seminar would be in order.

When Hong Kong's report was examined last time I was quite adamant on the undesirability of considering reports such as the one from your country along either with others from dependent territories and/or with that of the United Kingdom. I am glad that we are now to examine the report on its own as it fully deserves.

I was asked to speak generally about the Covenant, the role of the Committee and its effectiveness. I do not think it is expected of me to analyse the Covenant Article by Article, or to comment on Hong Kong's latest report or its human rights record. Nor am I going to elaborate on the Committee's jurisprudence.

What I shall attempt to do, briefly, is speak about the contribution of the Covenant and the Committee towards global human rights but also in ensuring observance of its provision in each member state, sketch the evolutionary process followed by the Committee and answer the question: "how I assess the effectiveness of the Committee?"

Of the three tasks of the Committee considerable work has been done in respect of examination of reports with the Committee adding all the time to its work load (despite

¹ Transcribed from original; not reviewed by author before publication.

difficulties to which I shall refer presently) by moving to new fields (emergencies, concluding remarks, follow-up). The same applies to the consideration of communications (I prefer the term individual petitions) when again, despite difficulties, the Committee is doing a magnificent job.

Nothing has, as yet, been done under optional Article 41 of the Covenant as there were no interstate applications alleging non-fulfilment of obligations under the Covenant.

I do not expect any such applications in the foreseeable future given the globality of membership and the nature of UN affiliated or connected mechanisms. Interstate applications would remain few and far between and would be confined to regional arrangements such as the European and Latin-American ones.

Two of the biggest problems facing the Committee are: lack of time, which forces individual members to do a lot more inter-sessional volunteer work mostly at home, and lack of professional assistance of the level and in the numbers that are essential to perform the functions of the Committee, which increase daily on account of accession of new members, the global situation when aggressive nationalism and other similar phenomena demand more special reports, and constant follow-up.

I find it a lot more interesting to begin the substantive part of my speech by answering the questions, which was put to me so often in the last almost two decades. "How successful is the Committee? How do you assess its effectiveness?"

I did have a stock answer in the past, namely that the Committee is as effective as the consensus of the UN membership wanted it to be when drafting and later adopting the Covenant in 1966. Perhaps I could add that even today the same applies to the Meetings of the States Parties that pay scant attention to matters brought before it or by the Committee (which could improve effectiveness) and all that they concentrate on is elections. I would today alter my reply slightly by saying it has more effectiveness than it was meant to. I could perhaps mention a few examples that come to mind in support of the new version of my above reply.

Even during the earliest years of the Committee at least three countries that had one-party systems changed to multi-party ones (Tunis, Senegal, and Jordan) following the consideration of their reports by the Committee and members' comments. All informed us accordingly.

Many countries have in their subsequent reports informed us of changes to their legislation introduced as result of our consideration of their reports. Let me also mention my country which is either in the process of introducing or has completed amendments to its legislation in respect of a number of issues such as conscientious objectors, decriminalization of homosexual acts by consenting adults, imprisonment for debt (the legislation was the same as Hong Kong's), freedom of expression etc.

Similarly the landmark Lovelace and Zwaan-de Vries cases led to the introduction of a Bill of Rights in Canada and new legislation eliminating discrimination between men and women and married and unmarried women in the Netherlands in respect of what are really economic rights (Article 26).

I did say the above regarding effectiveness because the Covenant suffers considerably from the lack of direct and specific provisions imposing or ensuring implementation of the Committee's views, decisions and recommendations. I shall not say anything, I think, about the fact that it was also meant to apply to a bipolar world. Later I shall deal with what the Committee did to overcome, to the extent possible, the lack of such provisions.

I believe that the first, formative years of the Committee were fascinating. One should remember that by the time the Covenants secured, after a long delay, the necessary number (35) of ratifications or accessions and the first Committee was elected, the detente of the early seventies that led to the Helsinki Final Act had almost completely eclipsed and the chilling wind of the cold war had again begun blowing.

The Helsinki process had shown to the west that human rights were a potent weapon to score points in the East-West confrontation but little did they realise, at the time, that human rights would directly or indirectly account for the caving in of the systems prevailing in Eastern Europe and that once you open a window of opportunity to civil and political rights this would sooner than later open the flood gates.

Upon arrival for the first meeting of the Committee I realised that experts from the East had already come with "briefings" from capitals and held a meeting to plan strategy. Let me say straight away that I had more than many occasions to appreciate the fact that experts from these countries struggled hard to act independently although constantly watched by their Missions.

Western delegates came to the meeting after their ambassadors briefed them and they also held meetings. Only those of us from the 3rd world remained aloof, ready to help as necessary.

I was elected chairman at that first meeting and it became clear to me that unless measures were taken immediately it was not unlikely to have entrenched positions and confrontation leading as in the case of other human rights organs to erosion of credibility and effectiveness. The drafting by consensus of the rules of procedure including the rule of consensus offered the best opportunity to begin forging practical and very good working and personal relations. That coupled with hard work and the thoroughness and dedication of the first members created for the Committee the excellent reputation that it still enjoys and commands thanks to the fine contribution of new members.

This does not mean that we did not have occasional confrontations or that the rule of consensus and the positions of experts from socialist countries did not put the brakes on rapid development, which was achieved by leaps and bounds after the collapse of that bloc. But it should be said that the time was not then ripe for rush action, 2 decades ago.

It was not just the socialist countries that obstructed progress in the field of human rights. There was also the sizeable number of developing countries that had ratified human rights instruments because it became fashionable or would uplift the sagging prestige of leaders of countries with authoritarian regimes. Difficulties due to extrinsic causes were overcome to some extent by clever devices such as the general comments which were originally the consensual substitute for what are today the concluding remarks that follow the examination of state parties' reports. General comments have today become one of the most important

tasks of the committee and are tantamount to what may be called authoritative interpretation of the Covenant's provisions.

Similarly dissenting views were resorted to from the outset to overcome difficulties and delays caused by the rule of consensus which is also applicable to communications. There were times that there were so many and so frequent dissenting views by certain members (such views are always reflected in the texts under the name of the dissenter) that we jokingly said that it was done to see their name in print.

Probably the most important measure taken by the committee to overcome difficulties due to lack of certain direct provisions in the Covenant is the one on the follow-up to decisions of the Committee in respect of individual petitions or communications.

The Committee having observed that there were instances, (quite a few that would, if left unchecked, erode its credibility and effectiveness) when implementation of views was either considerably delayed or the intention not to do so was becoming apparent (such cases included people on death row). We discussed this issue time and again and concluded that we had do something about it.

As a result, the provisions of the Covenant and Optional Protocol that created the obligation to heed the views were spelled out and included in all views. A Special Rapporteur was appointed who after deadlines plus one reminder are over pursues the matter with direct contacts including with the Ambassadors of the country concerned in New York or Geneva to begin with, indirect contacts and as necessary visits to countries concerned and demands for implementation expressing, at the same time, readiness, to look into difficulties affecting compliance and suggesting methods of overcoming them.

Such difficulties are frequently lack of enabling legal provisions or mechanisms which in certain cases such as the payment of compensation, are usually overcome by ex gratia payments pending enabling legislation or where matters such as commutations of sentence or pardon are the responsibility of independent organs which do not take "orders" from governments this difficulty could be overcome by parole boards considering as an extremely important factor or consideration in discharging their duty the decisions or recommendation in the views of the Committee (again pending enabling legislation making our views directly enforceable). Even most, if not all, European states lack in one respect or another such enabling legislation, and the only country I have come across with such legislation, by way of a constitutional provision, is Peru.

I have dealt, in some detail, with effectiveness in general and particularly in respect of views under the Optional Protocol not only because I wish it were possible to extend its provisions to Honk Kong but because the Committee has almost completed the process of devising a similar follow-up in respect of the concluding remarks that follow the examination of each state party's report. Similar provisions would soon be, *mutatis mutandis*, operable.

I constantly have in mind the date of July 1, 1997 and the difficulties, probably enormous ones, that are likely to be encountered in the circumstances, concerning the continued protection of rights in accordance and in strict compliance with the Covenant's provisions, reporting obligations i.e. by whom and how is the report to be prepared and presented and eventually compliance with the Committee's concluding remarks. Such difficulties would only

be completely overcome of course, when China accedes to the Covenant as its declared intention was more than a decade ago.

On these issues I would like to hear more, to listen to what is being done, what are the ideas to overcome difficulties, to what an extent present arrangements are judged as sufficient and water-tight, what more needs to be done, and what can the Committee do to help in the circumstances.

Let me make clear my personal view that the United Kingdom has the duty, having extended the provisions of the Covenant to Hong Kong, to do everything possible to ensure its continued and effective applicability.

I know that it is doing so and has, although in respect of the United Kingdom itself it did not deem it necessary, incorporated the Covenants provisions through the Bill of Rights Ordinance into the legal system of Hong Kong. I do trust given the difficulties expected, that the provisions such as Article 39 of the Joint Declaration are sufficient to ensure to the Covenant effective continuation "as it now applies" (I hope this is not designed to carry on useless reservations or deficiencies whilst blocking evolution) and provides for remedies or measures if this is not done.

I also believe that the United Kingdom should utilise this interim period in order to ensure that there is in place before 1 July 1997 a complete and effective system of protection of human rights, that any existing gaps or lacunae are plugged and institutions such as ombudsmen and Commissions of Human Rights exist. The Committee has from the consideration of reports from dozens of countries come to the conclusion that such institutions are indispensable for the effective protection of human rights along with ratification or accession to the optional protocol which, unfortunately as the United Kingdom itself did not accede to and thus did not extend to Hong Kong.

One of the purposes of the consideration of the reports of States Parties is to identify new and successful institutions, mechanisms and ideas for the protection of human rights and make them available to others during the consideration of their report. What I have said above in respect of the United Kingdom and Hong Kong is standard advice we give to all countries that have as yet not introduced such methods of protection.

The above brings me to the unique contribution of the Committee towards global Human Rights and the pros and cons of global and regional arrangements. Let me say here and now that I do wish that all regions including Asia would have their own regional human rights organs patterned on those set up by other regions.

The composition of the Committee in view of the provisions of Article 31(2) of the ICCPR on equitable geographical distribution of membership and the reference to different forms of civilization and principal legal systems, and the fact that the Committee considers reports and examines cases from all over the world makes it a useful reservoir of experiences and permits it to transfer successful experiences or warn against pitfalls elsewhere. This is a distinct advantage especially now with the advent of fundamentalism, the resurgence of aggressive nationalism, and conservatism.

Some of the excesses and deviations that occur occasionally in what are ultra liberal regional

systems are more difficult to pursue when more forms of civilization are present. The same may apply to a tendency to employ the judicial fiat to where it does not belong or to legislate via decisions which is almost impossible in the case of a global organ.

Often useful experimentation is easier amongst like-minded states in the same region and I have already referred to the example of interstate applications. Also regional systems are more easily known, available and resorted to especially in respect of individual petitions, hence a richer jurisprudence.

Needless to say that self-respecting states should subscribe to both their regional as well as to global instruments because they compliment each other. The Covenants provisions under Article 26 are indeed unique and jurisprudence thereunder created new paths in respect of protection from discrimination and unequal treatment as the Europeans have already found out, even in respect of rights not protected by the Covenant such as economic rights.

Although from my long years as Chairman of the Committee I have inherited a soft spot for communications, due to the fact that as chairman you rarely intervene during the consideration of reports as you are there as an impartial co-ordinator ensuring propriety and equilibrium and thus prefer to talk about communication during the consideration of which I took very active part even when chairing the closed sessions that dealt with them, yet in the case of Hong Kong I feel forced by the special circumstances that obtain in Hong Kong now to refer to the consideration of reports time and again in order to explain or highlight certain matters. You might find it useful for the future.

Although every examination of a report is preceded by the stock phrase that it is really a friendly dialogue etc many of the government delegations coming before us do so in order to "defend the record" of their country and the more wide the berth that application in practice of rights gives to near perfect constitutional provisions the more adamant they are before us. When the reports of these countries refer to provisions in Constitutions that mean to them really nothing in everyday actual practice, mechanisms, if they exist, are there to justify and whitewash executive excesses.

So I would like to stress once again that our task even in the case of the worst culprits is to engage them in a dialogue the sole purpose of which is to improve enjoyment and protection of human rights and fundamental freedoms through ensuring -- via examination, suggestions, strictures and if necessary exposure -- compliance with the provisions of the Covenant that a state freely and voluntarily accepted. True, sometimes some of us give the wrong impression that what we hold is a holy or unholy inquisition to ensure condemnation of each country before us by adopting what is, wrongly, perceived to be an inquisitorial and accusatorial attitude and through statements such as there is no country that does not violate the provisions of the Covenant etc. What we really want from countries is to constantly monitor the de facto situation, compare it with Covenant provisions as explained by our general comments by our jurisprudence and by our specific to that country individual and collective concluding remarks, reflect the situation truly and faithfully in their new report and come before us candidly to explain, admit and declare their readiness to take home in order to implement suggestions in the concluding remarks.

Even countries where respect for human rights is well entrenched for decades stand to benefit from dialogue such as the one that they can have with our Committee.

In the case of these countries the consideration of the report is not limited to routine subjects but could explore new avenues, seek refinements or new mechanisms that could, when fully and successfully developed, be suggested, in appropriate circumstances, to other countries.

Reference should be made to cases of even developed industrialised and wealthy countries where there exists, in normal circumstances, a very healthy respect for individual rights but under the stresses and strains of difficult situations such as a sudden influx of immigrants or asylum seekers or when they face internal or external terrorism, they resort to measures that depart from the norms that they followed for so long, more often than not because Governments tend to yield to the pressures from public opinion. It is when meeting situations like that, that the litmus test of adherence to principles comes into play. Cases like that you find in the West, even among the group of seven. In such cases we do our utmost to counsel reverting to strict compliance.

A problem that we are plagued by is the one of the non-submission or delayed submission of reports. The main causes for that are lack of expertise especially in developing countries, coupled with the proliferation of reporting obligations imposed by several instruments. Sometimes there exists fear of the "unholy inquisition" by the Committee or inability to come and "defend their government's record." There are also the solitary one or two countries which not only ratified the Covenant but also the Optional Protocol and then promptly decided to forget all about both. The meetings of the State Parties to which we have referred such instances turned a deaf ear. Whatever the cause might be for non-reporting the Human Rights Committee is ready to lend a helping hand along with the appropriate sections of the Secretariat of the Centre for Human Rights by even dispatching one or more of its members to the countries concerned to identify the reasons and suggest remedial action.

I shall now refer to two other areas where the end of the cold war brought considerable improvements in conducting a more thorough and effective examination of reports. They are those of NGO assistance to our work and special reports.

Before mentioning NGOs, I would like to say Academia always, from the beginning, considerably helped our work through books, analyses, articles and suggestions. We always appreciated it and we are thankful as by now we have a considerable body of literature to which we turn for guidance all the time.

From the very establishment of the Committee we had the benefit of material on countries the reports of which we were to examine from such international NGOs as Amnesty, the International Commission of Jurists, the League of Human Rights, Helsinki Watch, etc. Now we have a most welcome increasing participation from national NGOs.

Members from Communist and even third world countries, on instruction I guess, objected at the beginning to the practice of citing them. I pointed out to them that without such reports our personal and thus limited knowledge of situations was totally insufficient to meet the demands of our task. So I struck a tacit agreement that what we were to avoid was only the name of our NGO source, something which with the indulgence of the chairman was often not heeded.

Today if we do not have reports not only from international NGOs like those referred to above and many more but also from local NGOs when such exist, we consider it to be a

serious matter to enquire into as evidence of the fact that the report was not appropriately circulated and published to allow for comments but also consider it as a sort of suppressio veri.

Also today the number of NGO and other information available to us (in the case of the consideration of the USA report it ran into several hundred pages plus pre-examination contacts with them in New York and through computer connection with others in Washington) is such as to create some problems namely that in most cases it reaches us a few short days or sometimes the very day of the consideration of a given report, the volume is such that it is impossible, in the limited time available, to even glance at everything.

The working group that meets pre-sessionally to prepare the examination of a report now meets with NGOs privately. This is indeed very useful and I hope it could lead to some practical ideas that, given the indispensability of NGO material for the appropriate consideration of report, would allow for maximum utilisation thereof. Ideas such as early dispatch of full reports to all members well before a session, summaries prepared in respect of large reports, consolidation of several reports by different NGOs to avoid duplication might solve the problem. But I do want to thank all NGOs for the wonderful job of work that they do for human rights and for human dignity and for us.

A bone of contention during the first formative, as I called them, years of the Committee was to establish the practice and the guidelines therefor, to call for special reports from countries where an emergency was invoked to suppress further fundamental freedoms in such countries. That would be under Article 401(b) of the Covenant. The first case we had in mind was the oppression in Poland following the Solidarity T.U. activity. The late T. Opsahl was one of the protagonists. There was fierce opposition and endless discussions. I remember even now the smirk on the faces of many of us when we drafted a request to Chile for such a report in such a way as to create a precedent.

Today such reports are asked for routinely in cases such as those of former Republics of either Yugoslavia or the USSR when aggressive nationalism has led to serious violations of human rights including ethnic cleansing.

I regret that time constraints did not permit us either to follow-up on previous considerations of such reports or to call in new ones such as Bosnia, Chechenya or Rwanda.

As far as the former socialist countries are concerned we are now in the process of considering the first or even second report after the collapse of communism, the first having come during the perestroika era. We are generally satisfied that there is a genuine will to democratize and change. A lot was done in the field of legislation but a lot more has to be done. Their biggest enemy is an appalling poverty plus retention of bankrupt or failed former institutions and systems and of course the fact of that old habits very slowly or never die especially when some of the same judges, politicians and high officials have simply had to put on a new hat to retain their positions. The Committee is doing a lot to help these countries.

I would like to single out and mention, as it might be of interest to Hong Kong, the fact that in the case of former Yugoslavia especially, the special reports were called for before some of the new republics decided to accede formally to the Covenant or submit a declaration of succession. The decision was unanimous and many of us during the discussion that

preceded the decision stressed the fact that because of the very nature of human rights treaties once applied or extended to a country there can be no way to renege as amply evidenced by the fact that the ICCPR does not have, as its First Optional Protocol does, a renunciation clause. The same thinking that was behind the request for a special report from new states that emerged from the break-up of larger entity in the totality of the area of which the Covenant applied, was also behind the general comment on reservations to the Covenant on Civil and Political Rights (to which the USA took exception).

I shall conclude by saying that the Covenant on Civil and Political rights, the quintessence of the International Bill of Rights creates obligations that have a direct and crucial impact on the lives of millions of people. These obligations are clearly and precisely defined therein and further elaborated and explained by the Committee through its work. Both Covenants are accepted by all as the most important global method of ensuring in practice acceptance and respect for freedom, equality, and the dignity of the human person. As a result, governments are accountable to each other and the international community for the way they comply with the international obligations they freely agreed to respect. This in no way impairs their sovereignty but, as it was put by Uruguay, on the contrary it was in the exercise of their sovereign rights that they established an international system designed to ensure respect for human rights, which are inherent in man and older than the state itself.

The Covenant is not static; general comments, concluding remarks, the committees views on communications, jurisprudence, and even declarations in the General Assembly are valuable sources of interpretation and point towards the direction in which the Covenant is developing now and in the future.

The above is important also in the peaceful settlements of disputes. Any attempt to settle any international or regional problem should not only be just fair and equitable but should also be based on international law, particularly human rights law. If proposals ignore, or worse, violate this law then not only do they attempt to create a paradox but create a moribund state of affairs that would sooner than later lead to an eruption far worse than the one it attempted to cure.

I would like to end by wishing Hong Kong every success in the future, especially as regards the experimentations of "One Country, Two Systems" or the Hong Kong Special Administrative Region. It is Special to most of us not so much because of economics but for its regime for the protection of human rights. I hope the Chinese authorities would study closely how the system worked with rather good results in respect of the Chinese people in Hong Kong and take the long delayed decision to accede to the Covenant and Optional Protocol and more effectively protect the human rights of all Chinese citizens.

In the mean time, I am sure, every member of the Committee and myself shall be watching developments in Hong Kong ready to proffer advice or take such action including the study of the possibility to request a special report on the protection of rights after 30 June 1997 if this appears to be necessary.

Again, my thanks and best wishes.

DOMESTIC MECHANISMS FOR IMPLEMENTING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

**BY: Mr P N Bhagwati
Vice-Chairman, United Nations Human
Rights Committee; Former Chief Justice of India**

DOMESTIC MECHANISMS FOR IMPLEMENTING THE COVENANT ON CIVIL AND POLITICAL RIGHTS

BY

P N BHAGWATI¹

I am deeply grateful to the Centre for Comparative and Public Law and the University of Hong Kong Law Faculty for inviting me to participate in this seminar. I must say that I have learned quite a lot from the first session this morning which I was privileged to attend.

Now, I am going to speak about the domestic mechanisms for implementation of the International Covenant on Civil and Political Rights.

It is difficult to find a period in the history of mankind when the question of human rights has had a greater moral significance in study and practice than the period from 1948 to date. There have been times when the issue of human rights held capital importance in one country or another, but never has it attracted such wide attention and engrossing interest throughout the world as at present, and particularly in this decade. And this is the case not only for intellectuals, but also for the large masses of people inhabiting the globe.

Today, human rights have become a subject of animated discussion, not only at the international level, but also in national jurisdictions. Every country, whether developed or developing, expresses concern for the promotion and realisation of human rights. Human rights are in fact becoming, slowly but progressively, one of the measuring rods of civilization. It is being increasingly realized that human rights are not the result of the efforts of the United Nations, but that they always existed because they are emanations from basic human dignity. Human rights were not born of men but with men. And this explains the great importance of the two Covenants: The International Covenant of Civil and Political Rights and the International Covenant of Social, Economic and Cultural Rights.

There are some countries where these international Covenants on ratification become part of domestic law. But in the Anglo-Saxon system of jurisprudence which we all follow, they do not automatically on ratification become part of domestic law. They have to be incorporated into the domestic law in order to be enforceable in the domestic courts. Fortunately, Hong Kong has a Bill of Rights which, by and large, includes the rights which are to be found in the ICCPR. And, therefore, the question of a domestic mechanism for enforcement is not very difficult. But there are certain things which have got to be kept in mind.

There are three issues to which I am going to devote some time. The first is judicial review, because ordinarily in all systems where there is a bill of rights there is always a provision for judicial review. Judicial review is one of the most important mechanisms for

¹ Transcribed from oral presentation; not reviewed by author before publication.

provision for judicial review. Judicial review is one of the most important mechanisms for the enforcement of fundamental rights, which are, for the most part, limitations on the power of the executive and the power of the legislature. There are certain rights which are guaranteed in order to curb executive arbitrariness and in order to control the legislature from enacting legislation which is inimical to those fundamental rights. Thus there have got to be mechanisms for ascertaining the contours and the parameters of the basic human rights embodied in the Covenant, and for enforcing these rights. The task of enforcing human rights is entrusted to the judiciary under all our constitutions. Therefore, the right of judicial review is an extremely important right and I am going to say a few words about it.

The second issue is what I would call a simple remedy of having a national human rights commission. Thirdly I am going to speak to you about legal aid, without which the right of judicial review becomes illusory.

In so far as the right of judicial review is concerned, it is necessary that judges should be in tune with the constitutional values, with the human rights values. They should be on the same wavelength. They should not only be sympathetic but they should themselves feel the necessity and importance of human rights. Unfortunately, it is the case in most parts of the Commonwealth that judges are not aware of the international human rights instruments and of the importance of human rights in the day to day lives of human beings. The result is that these judges treat cases which come before them as cases between two disputing parties arcanelly argued by lawyers. The resulting interpretation of human rights becomes mechanical. If you interpret human rights not in a broad and liberal manner but mechanically by only looking at the letter of the law, then the whole judicial process fails to achieve the purpose of human rights.

Therefore, it is essential that judges should be educated about human rights. That is why, as Professor Ghai mentioned, on behalf of the commonwealth secretariat I started a series of judicial colloquia called "Domestic Application of International Human Rights Norms". The idea was to familiarize the judges with human rights, to tell them how, by creative interpretation, they can incorporate international human rights norms into their domestic constitutions, because so many occasions arise when judges have to interpret, to liberalize, to expand the scope and reach of human rights.

I am going to give you a few examples of what we did in India by way of relating my own experience. There is an equality clause of the Indian Constitution similar to Article 26 of the ICCPR. It says that there shall be equality before the law and equal protection under the law. The question arose, "What is the true meaning and scope of this article?" This article also appears in the American Constitution, and the theory which has developed is the doctrine of classification. This doctrine says that you can make a classification provided that the basis of classification bears a rational relation to the object of the classification. But in the Supreme Court of India, we took the view that equality is antithetical to arbitrariness and that, therefore, when a constitution prescribes equality, it means that a state action must be rational and non-arbitrary.. So we intuited the whole concept of non-arbitrariness in state action by interpreting these words of the equality clause of the Constitution.

Another article in the Constitution reads as follows: "No person shall be deprived of life or

personal liberty except by procedure established by law. When this article was being debated in the Constituent Assembly, one of our constitutional advisors went to the United States and had discussions there with Justice Frankfurter, a great judge. Justice Frankfurter cautioned that the words "due process of law" would create a lot of difficulty with the judiciary. So, when our article was finally enacted, we dropped the words "due process of law" and substituted the words "except by procedure established by law". For 27 years the Supreme Court of India took the view that there must be a procedure prescribed by law before you can deprive a person of his life or personal liberty. But there was no limitation on the type of procedure; it could be any procedure. In a seminal decision which came before me, we took the view that the procedure must be "reasonable, fair and just." It can't be any procedure. Therefore, we intuited the concept of "reasonable, fair and just procedure" by a process of judicial interpretation, though these words were not there. The idea was to expand the protection of the citizen against state action.

We then followed this decision up by saying that a reasonable just and fair procedure requires principles of natural justice to be followed when you are depriving a person of his life or personal liberty. We had a case of a woman whose passport had been impounded because the government did not want her to leave the country. We said, "No, you can't do that. You have got to tell her why her passport is being impounded and you must give her a show cause notice, because you are depriving her of her personal liberty to go abroad, a fundamental right. You cannot deprive her of that fundamental right except by reasonable fair and just procedure. And such procedure requires that you give a show cause notice to the person whose passport is being impounded."

The issue of legal aid in criminal trials is a further example. The Government of India was dragging its feet as far as the legal aid program is concerned. So we said, in another decision, that a reasonable fair and just procedure requires that a poor accused must have legal representation before he is deprived of his life or personal liberty. When he is in jeopardy of losing his life or personal liberty, reasonable, fair and just procedure requires that he must be afforded, by the state, free-of-cost legal representation. Thus we established legal aid for an indigent accused in a criminal trial as a fundamental basic human right. In doing so, we relied upon the International Covenant on Civil and Political Rights. The right to legal aid in criminal cases was not in our Constitution, but in interpreting the Constitution we relied upon the provisions contained in the ICCPR. We also brought in the right to speedy trial, though it too was not there in the Constitution.

I am merely giving some examples to show how the whole process of judging becomes a subjective process. Of course, it is objective in one sense and subjective in another. When a constitutional case comes before the judge there are competing values clamouring for acceptance before him. He has to make a choice between those values, and the choice is dictated by the social philosophy of the judge. It is dictated by his own attitudes and, therefore, it is essential that a judge should be in tune with human rights values if judicial review is really to become an effective domestic mechanism for enforcement of human rights.

I have often said that a judge is not a mimic, he is not an imitator, he is a creative artist. He can mould the law as he likes provided he has judicial craftsmanship. But he must have the goal of where he wants to go. That is why I say that a judge is not a mason, he is an architect. He must have an architectural view of the constitution, of human rights,

and he must build up that edifice brick by brick as cases come before him. This is what I would like the judges to do if we want to have a really powerful domestic mechanism of judicial review for enforcement of fundamental rights.

It is also necessary to have an effective legal aid program, because I understand and I know that it is extremely expensive in Hong Kong to be able to approach the courts. The fees which are charged by lawyers are by any standard exorbitant. And how will an ordinary person be able to carry a civil rights case or a Bill of Rights case to the courts? It will be impossible for him, especially considering that, if he loses, he must pay the costs of the opposing side. Therefore, two things are absolutely necessary if we want a really powerful domestic mechanism. First, there must be legal aid given to any person who wants to bring a Bill of Rights Case before the courts. Second, legal aid must be given in cases where a person, apart from being a defendant, wants to challenge a piece of legislation, or the arbitrariness of an executive action. The services of a reasonably good lawyer are essential.

In India, very often these cases used to come before me. I used to entertain civil rights cases, i.e. human rights cases, by accepting letters from any social action group. An NGO would write a letter to me exposing the violations of human rights of the poor and the disadvantaged. On the letter I used to take action and then request a Senior Counsel, or what you call Queen's Counsel, to appear free of charge and he would do it. If the court requests him, then he owes a obligation to the court. And we developed the entire human rights jurisprudence through this procedure of entertaining letters from the NGO's for vindicating the human rights of the weaker sections of the community. But that is a long story, there is not time for that.

The point is, there must be an effective legal aid movement. And the dispensing of legal aid should be in the hands of an independent authority: the civil servants in the department of the government. In India before we had the regular legal aid program, whenever there was a case against the government the civil servants were very reluctant to grant legal aid. And in fact, after the legal aid movement was started in India by me I set up the first committee for legal aid, where funding was given by the government, but it was controlled entirely by non-governmental people. As the Chief Justice I was the head of that Committee. And many times the government officers complained that all these monies were being used for fighting cases against the government. Fortunately, I had a very good minister of justice. He said, what does it matter if we are wrong, let the judiciary correct us. Therefore, it should be in the hands of an independent agency to dispense legal aid. But of course it must be funded by the government.

It is also necessary to have a non-judicial body for the purpose of providing accessible, affordable speedy and effective human rights complaints system. It is most essential because Article 2 of the Covenant requires that in practice there must be effective remedies for all victims of violations of human rights. Professor Yash Ghai said in one of his writing, "litigation is extremely expensive in Hong Kong and shuts off a whole section of the community from the courts. There is a danger that the Bill of Rights will mean rights only for the rich." So also a member of the legislative council said, and I'm quoting her, "There will be conflicts between citizens and authorities under the Bill of Rights, if resolution of these conflicts is left entirely to litigation." With all the costs and delay involved, the average citizen with limited means and requiring quick relief, will be greatly

disadvantaged. Citizens need a cheap and speedy mechanism to air their grievances and seek redress. Hence the need for an independent, statutory Human Rights Commission to hear and decide complaints of violations of human rights.

The national Human Rights Commission could have statutory powers:

- (1) to receive and investigate complaints;
- (2) to advise individuals whose rights have been violated;
- (3) to recommend reform of laws conflicting with the Bill of Rights;
- (4) to take steps to create human rights awareness, develop human rights education, and promote human rights culture
- (5) to [ncourage] human rights movements and support Human Rights NGOs. And, also in appropriate cases, exercise an adjudicatory role, and apart from that, should be empowered to carry cases to the courts for judicial review where necessary, and such power should enable the national human rights commission to sue in the courts for judicial review in its own name. And,
- (6) to develop human rights information and documentation centres.

These are some of the things which a national Human Rights Commission should be able to do because then it can be a very effective domestic mechanism for enforcement of the rights in the Covenant.

The Vienna Conference Declaration adopted by consensus by 171 countries, including the United Kingdom and China, they emphasized the important role played by national human rights commissions particularly in remedying human rights violations in the dissemination of human rights informations, and education in human rights. And the Vienna Declaration encouraged the establishment and of such institutions, having regard to the UN principle relating to the status of national institutions.

We in India set up a statutory national human rights commission about one-and-a-half years ago. And it is doing excellent work. It is calling upon the government and officials to account for their actions where the actions appear to be violating human rights. And there are a large number of complaints pouring in from different parts of the country. And they are tending to those complaints.

So far as access to judicial review is concerned, I will repeat, both for the national human rights commission and for judicial review, it is essential to have an effective legal aid program run by an independent authority statutorily established.

Now these are some of the suggestions I would like to make in order to ensure effective mechanisms for enforcement of the rights set out in the Covenant. But ultimately, as I said, everything will depend upon the people. Nothing can take the place of peoples organizations, peoples movements, which can be promoted by human rights groups. That again requires human rights training, human rights education, and human rights information.

These are some of the things which are so essential if we really want human rights not to remain merely paper documents, not merely exhortatory declarations. Otherwise they will become a teasing illusion and a promise of unreality. If we really want human rights to be

implemented, we have got to take effective measures to enforce human rights, and that can be accomplished by an aware and alert judiciary in tune with human rights values, by an independent national human rights commission, and by an effective legal aid program. These are some of the things which I would commend for your acceptance

Thank you very much.

REPORTING UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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**REPORTING UNDER THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

BY

NIHAL JAYAWICKRAMA

It was November 1978 when the first report on Hong Kong was submitted to the Human Rights Committee. It was part of a longer report on 12 dependent territories. It merely set out in bland form the domestic law, if any, that corresponded to each article of the Covenant. I was not in Hong Kong then, but anecdotal evidence suggests that no publicity was given to the fact that a report had been submitted and that, naturally, the event passed unnoticed in the territory. In fact, a comprehensive report from a non-governmental organization, entitled "Putting Justice and Human Rights in Focus", documenting several alleged violations of the Covenant in the application of domestic law was addressed to the Committee nearly two years later, in August 1980.

Starved of information other than that formally tendered by the government, the Committee based its investigation entirely on the official document when it examined, in August 1979, the implementation of the Covenant in the dependent territories. Nevertheless, members did raise several issues of relevance to Hong Kong. For example, they asked:

- what positive steps had been taken to enable the people of Hong Kong to determine their political status in accordance with Article 1?
- why had corporal punishment not been abolished?
- what were the restrictions prescribed by law on the exercise of the right of peaceful assembly?
- what were "blasphemous" statements which were prohibited by law?
- why was it considered necessary to make reservations in respect of Articles 13 and 25, and will the government consider withdrawing them?
- did the government not consider that it had a responsibility to amend any Hong Kong law which was not consistent with the obligations in the Covenant?
- what steps had been taken to publicise the Covenant in the territory?

The Committee stressed it was extremely important that fundamental rights should be written into the constitutions of dependent territories, and pointed out that it was the responsibility of the United Kingdom to ensure that the rights recognized in the covenant were given effect in law; it should not be left to the discretion of local legislators.

Hong Kong on that occasion was represented by Sir Michael Hogan, a former Chief Justice. Obviously, the distinction between the judicial and the executive branches of government was rather blurred at that time as, indeed, it appears to be, from time to time, even now. Questions relating to Hong Kong were brushed aside on the ground that "for various geographical and historical reasons, the situation in Hong Kong was special". That was the reason why political parties were not permitted to operate in the territory. When a member intervened to express his regret that questions concerning the future of Hong Kong had not been satisfactorily answered, the response once more was that "the situation in Hong Kong is complex". However, in regard to legislation, Sir Michael Hogan was quite emphatic that before adhering to the Covenant, the government had satisfied itself that the laws in force [in Hong Kong] were perfectly consistent with the provisions of the Covenant.

According to the rules of the Human Rights Committee, the second report on Hong Kong was due in November 1983. It was not submitted by that date. In fact, it was ten years later, in May 1988, that the second report found its way to Geneva. Although no publicity was given in Hong Kong to that report either, or even to the fact that it had been submitted, several non-governmental organizations which had waited expectantly for it were quick to respond. Among them, JUSTICE (the Hong Kong section of the International Commission of Jurists, with which I am associated), the Hong Kong Journalists Association, and the Professional Lobby Group (which comprised embryonic legislators such as Emily Lau, Anna Woo and Christine Loh, and also included Frank Ching and Winston Poon) not only forwarded their own comments on the report to the members of the Committee, but even sent their own representatives to Geneva to personally brief the members individually and attend the sessions.

I recall how distressed the Mexican Ambassador was when several strange faces appeared in the public gallery as the report on Mexico was about to be examined. He probably thought that some dissidents in disguise from his country were about to reveal some dark secrets which his government had withheld from the Committee. In fact, it was the Hong Kong group of "subversives", comprising Ian MacCallum, Frank Ching, Emily Lau, Wong Kwok-Wah, Winston Poon, Johannes Chan, Kevin Lau and me, who had arrived ahead of schedule and was attempting to get the feel of the Committee proceedings. Several members of the committee very kindly agreed to meet us during tea and lunch breaks at the Palais de Nations, and we were able to brief them orally and in writing on the actual human rights situation in the territory. Consequently, it was a very well-informed 18-member group of human rights experts that met in November 1988 to examine the Hong Kong report.

Under pressure of increasing NGO interest in the Human Rights Committee, the government took the unprecedented step of submitting, on the eve of the scheduled meeting, a supplementary report on matters relating to Hong Kong. Although the report before the Committee concerned ten dependent territories, the discussions were almost exclusively directed on Hong Kong. This was probably due to two factors: the impending transfer of sovereignty, under the Joint Declaration, to

a state which did not subscribe to the human rights Covenants; and the fact that very little had been done in the 12 years since the Covenant was ratified to fulfil the obligations undertaken in respect of Hong Kong. The report was deafeningly silent on current human rights controversies which had been brought to the notice of the Committee by NGOs, and the deputy solicitor-general, Eric Martin, was subjected to intensive questioning on a large number of matters which had been omitted from the report.

In the course of a three-session review, the Committee identified several areas of concern which suggested that the United Kingdom may not be fulfilling its treaty obligations in respect of Hong Kong. For instance:

- no Bill of Rights had been enacted to incorporate the rights recognized in the Covenant in the domestic law of Hong Kong;
- the death penalty still remained on the statute book;
- corporal punishment was permitted under three statutes;
- the offence of "loitering" under the Crimes Ordinance, and the power of the police to "stop and search" under the Police Force Ordinance;
- the power of the police discriminately to stop an individual in the street to examine his identity card, and thereafter obtain personal computerized information relating to him;
- the offence of publishing "false news" under the Public Order Ordinance, particularly if applied to news published negligently;
- the stringent provisions of the Societies Ordinance, particularly if applied to political parties and trade unions;
- the Film Censorship Ordinance which required the censor to "take account" of the relevant provision of the Civil Covenant, rather than "to comply" with it;
- the Official Secrets Act which imposed a blanket prohibition on access to public information;
- the offence of blasphemy, when applied to predominantly non-Christian Hong Kong;
- the Immigration Ordinance which drew distinctions on racial lines;
- the prohibition on teaching in schools of matters of a political nature;
- the wide discretionary powers of the Commissioner of Police under the Public Order Ordinance for the control of public meetings and demonstrations;
- the rights of illegitimate children in comparison to those of legitimate children;

- the treatment of persons of Vietnamese origin;
- the inadequate participation by the people in the affairs of the territory;
- the complicated and abstruse questionnaires used in opinion polls on political reform which were not designed to ascertain accurately the views and aspirations of the population.

The Human Rights Committee also raised several issues relating to the future Basic Law of the Hong Kong Special Administrative Region. It was concerned that the population of Hong Kong had not been properly consulted before the Joint Declaration was signed, particularly since Hong Kong comprised several territories which did not all have the same legal status. It was concerned that in the consultation process on the draft Basic Law, the population had not been permitted to express its approval by means of a vote. It wished to know how the Covenant will "remain in force", as provided for in the Joint Declaration, when the People's Republic of China was not a signatory to it. It asked whether the words "as applied to Hong Kong" with reference to the Covenant meant that the reservations entered by the United Kingdom in 1976 were expected to remain in force until the middle of the next century.

The answers given by the United Kingdom representatives were generally evasive and unhelpful. Indeed, the Committee not only requested written replies to their unanswered queries, but also required the third periodic report to be submitted within the year, by 18 August 1989. The proceedings of the Committee did not receive adequate publicity either in the United Kingdom or in Hong Kong. But the measure of the effectiveness of the supervisory role of the Committee is evident from the fact that, in anticipation of its third appearance before the Committee, the Hong Kong government abolished corporal punishment, repealed the "false news" provision, relaxed the prohibition on the teaching of matters of a political nature in schools, released from detention all Vietnamese classified as refugees, announced the decriminalization of homosexuality, began a review of police powers, and presented a draft Bill of Rights to the legislature: a series of very significant but long overdue reforms hastily undertaken and sandwiched into a matter of months.

When the third report of the United Kingdom and its ten dependent territories came up for consideration by the Human Rights Committee in New York: in April 1991, it was evident from the outset that attention would be focussed almost exclusively on Hong Kong. The United Kingdom team included several officials of the Hong Kong government led by Frank Stock QC, Solicitor General. Voluminous submissions had been received by the Committee from several Hong Kong based non-governmental organizations such as the Hong Kong Bar Association, the Hong Kong Journalists Association, the Hong Kong Human Rights Commission, the Hong Kong Council of Women, the United Democrats of Hong Kong, and Amnesty International. JUSTICE submitted a 342-page "comment" which included contemporaneous newspaper reports of alleged human rights violations. And, in what is believed to have been an unprecedented move, the members of the Committee agreed to jointly meet with unofficial representatives from Hong Kong at an informal luncheon to be briefed by them on issues of concern to the territory. It is interesting to note that on that occasion, the NGO contingent from Hong Kong included not only "subversives" such as Emily Lau, Charles Goddard, Daisy Li and Johannes Chan, but also Daniel Fung QC.

Although the Committee raised with the government a number of questions relating to recent controversial human rights issues, such as the prosecutions for using loud hailers, telephone tapping, the death penalty, the lack of access to government information, the refugee screening process, and the proposed enactment of a Bill of Rights that would not be entrenched, it was apparent that its main concerns related to the post-1997 period. It did not fail, however, to express once more its disappointment that the people of Hong Kong had not yet been afforded an opportunity of exercising their right of self-determination. One member pointed out that the consultations said to have taken place on the Joint Declaration and the Basic Law were grossly inadequate; "Hong Kong consists not only of businessmen and industrialists", he said, "but also of nearly 6 million ordinary people". Nor did the Committee fail to stress that democracy as an "ultimate goal" as stated in the Basic Law was not good enough, and that the "functional constituency" was unacceptable in a colony which was more highly developed, socially, economically and industrially, than many others which were then self-governing or independent.

There was a consensus within the Committee that the government should take steps to ensure that prior to 1997 all reservations to the Covenant, in so far as they related to Hong Kong, should be withdrawn; that the Optional Protocol should be ratified immediately; and that discussions should begin with the Chinese government to devise a method by which the Committee would continue to monitor human rights in Hong Kong after the transfer of sovereignty. The Committee understood the phrase "as applied to Hong Kong", used in the Joint Declaration with reference to the Covenant, to mean "as applied in 1997". It was its unanimous view that by 1997 the Covenant and its two protocols should be applied to Hong Kong not partially but in full.

The fourth report on Hong Kong was due on 18 August 1994, but was submitted nearly an year later. It is expected to be examined by the Human Rights Committee in October. On this occasion the report is a very comprehensive document, but NGOs are no doubt scrutinizing it and the tendentious portions of it will, I am sure, be identified, highlighted, and brought to the attention of the Committee in due course. But the forthcoming meeting is particularly significant in another respect. The time has probably been reached when the Human Rights Committee will have to determine whether the protective umbrella of the Covenant will continue to be held over the territory of Hong Kong and its inhabitants.

On the one hand, the Joint Declaration and the Basic Law state quite explicitly that the Covenant "shall remain in force". These statements have been generally understood to mean that China will, by acceding to the Covenant, ensure that it continues to "remain in force". Thereby, China will accept the reporting obligation in respect of Hong Kong. This was the interpretation offered by the representative of the United Kingdom when he was questioned on this subject by the Human Rights Committee in 1991. But China has not done so yet, nor given any indication that it intends to do so. Instead, senior Chinese officials have stated quite categorically that China does not propose either to accede to the Covenant or to accept the reporting obligation under it in respect of Hong Kong. It has hitherto been believed that accession by China was an essential pre-requisite for the Covenant to "remain in force" in Hong Kong. But recent developments in international law suggest that the reporting obligation in respect of Hong Kong will continue whether or not China accedes to the Covenant.

State succession, particularly in respect of treaties, is an area of much uncertainty and controversy. But it is generally recognized that when part of the territory of a state becomes part of the territory of another state, treaties of the predecessor state cease to be in force in respect of that territory; and the treaty obligations of a predecessor state do not necessarily become the obligations of the successor state. Hitherto, except for treaties concerning boundaries and other territorial regimes, a new state was not obliged to assume its predecessor's rights and obligations under multilateral treaties. It would appear that there is now a third exception to this rule: the provisions of human rights treaties will apply, on a continuing basis, to the inhabitants of new territorial units which had previously been constituent parts of states parties to such treaties. This is the outcome of the action taken by the Human Rights Committee following the disintegration of Yugoslavia, which was a party to the Covenant, and the emergence in its place of several distinct and separate units, each claiming to exercise exclusive jurisdiction over the people living on its own separate portion of the territory.

On 7 October 1992, the Human Rights Committee requested the Governments of the Republic of Croatia, the Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Bosnia-Herzegovina to each submit a report as soon as possible and not later than 30 October 1992 on certain specified issues in respect of persons and events coming under their jurisdiction. Under the Covenant, only a state party is required to report. On 7 October 1992, none of the states to whom the Committee's formal request to report was forwarded had acceded to the Covenant. But the request was based on the premise that "all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant". The members of the Committee were of the view that the international instruments relating to human rights, besides being inter-state instruments, conferred rights on individuals, who could not be deprived of those rights in the event of state succession. The obligation to respect human rights was a universal one that transcended treaties. And state succession should be viewed as a matter of the acquired rights of the population of the state that had ratified the Covenant, which were not diluted when a state was divided.

All these governments responded by the prescribed date, resolving not only the question of state succession, but also establishing a precedent under international law. The practice in the Human Rights Committee suggests that where the inhabitants of a territorial unit have been brought within the protective jurisdiction of the Committee, they continue to enjoy such protection notwithstanding any change of sovereignty over that territorial unit. In other words, state succession will be implied in respect of the principal human rights treaties and, at least in respect of the Covenants, the obligations of the predecessor state will be deemed to have devolved upon the successor state. Such a rule of international law is consistent with the view that human rights are inherent and inalienable. Once it is formally acknowledged by multilateral treaty that the inhabitants of a particular territorial unit are entitled to enjoy certain defined rights and freedoms, that enjoyment cannot be interrupted, suspended, or terminated by reason of new arrangements that may be made in relation to the governance of that territory. Human rights treaties now devolve with the territory.

This view was confirmed by the chairpersons of human rights treaty bodies who, at a meeting held in September 1994, emphasized that successor states were automatically bound by obligations under international human rights instruments from the respective date of independence, and that observance of the obligations should not depend on a declaration of confirmation made by the

government of the successor state.

Hong Kong will, of course, not be an independent state. But if human rights treaties devolve with the territory and continue to provide a protective umbrella to the inhabitants of this territory, the legal status of Hong Kong within the international community does not appear to be relevant. However, since Hong Kong will be an integral part of another sovereign state, which is not a party to the Covenant, the question arises whether the territory of Hong Kong and its inhabitants can, substantively, be distinguished from the rest of China and its inhabitants. The answer to this question lies in the provisions of the Basic Law.

The Hong Kong Special Administrative Region has been conceived of as an autonomous entity with its own legislature, executive and judiciary. Its exclusive legislative competence extends over every subject, whether civil, political, economic, social or cultural in nature, encompassed by the two Covenants. Beyond the autonomy usually enjoyed by the constituent unit of a federal state, the Hong Kong SAR will have its own convertible currency, and an independent taxation system with its financial revenues being used exclusively for its own purposes. It will be a separate customs territory, and will issue its own certificates of origin for its products. It will maintain its own shipping and aircraft registers. It will issue its own passports and other travel documents, and apply immigration controls to persons of foreign states as well as from other regions of China. It may also conclude visa abolition agreements with foreign states.

While matters relating to defence and foreign affairs will be handled by the Chinese Government, the SAR is authorised, using the name "Hong Kong, China" to participate on its own in maintaining and developing relations, and in concluding and implementing agreements, with foreign states and "relevant international organizations in the appropriate fields". The Hong Kong SAR is authorized to establish official economic and trade missions in foreign countries, while foreign states may establish consular and other official missions in the SAR. Its representatives may participate in international organizations and conferences not limited to states. The SAR may retain its status and be separately represented in those international organizations in which Hong Kong had previously participated, notwithstanding China's membership of such organizations. In particular, the Basic Law provides specifically that:

152. The Chinese Government shall, where necessary, facilitate the continued participation of the Hong Kong SAR in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which China is not a member.
153. International agreements to which China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong SAR.

The statements of the Chinese Government in the Joint Declaration, and of the Chinese Legislature in the Basic Law, that the Covenant "shall remain in force" in the Hong Kong SAR, read with the provision in the Basic Law that contemplates international agreements which had been previously implemented in Hong Kong but to which China is not a party continuing to be implemented in the SAR, suggest unequivocally an intention to enable the Hong Kong SAR to succeed to the Covenant.

When the Hong Kong SAR succeeds to the Covenant, who will assume the reporting obligation? The separate, autonomous identity that is envisaged for the Hong Kong SAR and its exclusive legislative authority in respect of domestic affairs suggest that it is the SAR Government that should undertake the obligation of reporting to the Human Rights Committee. Indeed, to require the Chinese Government to do so, even in the event of China acceding to the Covenant, is likely to conflict with the terms of the Joint Declaration and the Basic Law which have guaranteed a unique degree of autonomy for the Region. Since China will not be responsible for any of the matters dealt with in the Covenant, the obligation to implement its provisions and to report periodically on progress made in securing the relevant rights ought to rest solely with the Government of the Hong Kong Special Administrative Region.

This new development in international law will not only enable the Human Rights Committee to prevent any erosion of the authority of the Covenant, but will also help to end the unnecessarily acrimonious debate on whether or not China should accede to the Covenant. In the spirit of the Joint Declaration and the concept of "one country: two systems", that decision can now be left entirely to the judgment of the Chinese Government since it will not be relevant to, and will no longer determine, the continued applicability of the Covenant in Hong Kong.

The matter rests entirely in the hands of the Human Rights Committee. To expect the Hong Kong or British Governments to do anything about it would be as futile as waiting for Godot. During the past three years the Governor has overwhelmed this territory with an outpouring of human rights rhetoric, the like of which had not been heard or seen before. But this same period is conspicuous for the total absence of any progress in the promotion or protection of human rights in the territory. Attempts by independent legislators to secure access to government information and to effectively outlaw discrimination have been stifled or aborted. The demand for a Human Rights Commission has been summarily dismissed, and the Bill of Rights remains a mere criminals' charter, rarely accessible to others. The Optional Protocol has not been extended to Hong Kong, and the 30-year old reservations continue to deny this territory the full application of the Covenant. In our prisons, witnesses continue to rot, and in our refugee camps, children move from infancy into childhood without ever experiencing the beauty of nature that lies beyond the barbed wire and the corrugated iron.

The Human Rights Committee has been a very innovative body. It has succeeded in stretching and expanding a rather limited mandate. It has succeeded in calling for and obtaining reports from states that had not acceded to the Covenant. It has devised follow-up procedures that enable it to enforce its own decisions in spite of the Covenant denying it that power. It is succeeding in equating its opinions in respect of individual communications to the standard and calibre of judgments delivered by the highest international tribunals. It is, therefore, not beyond the ingenuity of the Committee to find a solution to what may be described as the Hong Kong issue. I would urge Ambassador Mavrommatis, Chief Justice Bhagwati, and their colleagues on the Human Rights Committee to consider the issue in the context of the unique autonomous character of the future Hong Kong SAR, and then to discuss the modalities of the reporting obligation with the representatives of the Government of the People's Republic of China. The time is opportune for an authoritative pronouncement that would enable this territory and its people to continue to enjoy the protection of international human rights law.

KILLING IT SOFTLY?
THE HONG KONG COURTS AND THE SLOW
DEMISE OF THE HONG KONG BILL OF RIGHTS

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KILLING IT SOFTLY? THE HONG KONG COURTS AND THE SLOW DEMISE OF THE HONG KONG BILL OF RIGHTS

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THE GENERAL APPROACH TO INTERPRETATION OF THE BILL OF RIGHTS

- Conservative and cautious overall
- Tendency to reduce reference to and reliance upon “foreign” jurisprudence
- Reasons: common law parochialism and general conservatism

RECEPTIVENESS TO INTERNATIONAL STANDARDS: THE FLOW AND EBB OF ENTHUSIASM

- measuring the impact of international standards: rhetoric, absence, analysis and application
- the high-water mark: *R v Sin Yau-ming* (1991) 1 HKPLR 88 (CA) (see p 3)
- the tide begins to turn? *Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man* (1993) 3 HKPLR 72 (PC)
- low-tide: *R v Town Planning Board, ex parte Kwan Kwong Co Ltd* (HCt, 1995) (see pp 3-4); *R v Ming Pao Newspapers* (CA, 1995)

FACTORS INFLUENCING THE REFERENCE TO AND RELIANCE ON INTERNATIONAL AND COMPARATIVE JURISPRUDENCE

- the terminology of the Bill of Rights Ordinance
- the background, disposition and general views of judges (including prior and continuing exposure to international source material and their commitment to the Bill of Rights)
- openness of the judiciary to new influences, including receptiveness to international law
- common law chauvinism
- the contribution of counsel and the material before the court
- the usefulness of the international material to the resolution of a concrete case before the court

- pure chance

THE IMPACT OF THE STANDARDS OF THE ICCPR

- the very existence of the Bill of Rights Ordinance and its application to declared repealed laws or to impugn practices or decisions which could not have been challenged prior to 1991 is of considerable significance
- the track record a mixed record of efforts to understand and apply the international standards as would an international body, some courts more enthusiastically than others -- some of the best analysis has occurred in the magistrates courts and District Court (with decisions upholding Bill of Rights claims often being overturned on appeal)
- in a number of major areas, such as the presumption of innocence, in which the international jurisprudence has little to offer, while in other areas (such as the right to a fair trial), there is a wealth of existing common law material
- many cases in which the courts have construed the Bill of Rights as an international body would have, but this may not have been determinative for the outcome
- many cases in which the court failed to interpret or apply the Bill of Rights as an international body would have, with potentially different outcomes ad this been done
- the attitude of the Court of Appeal, the predominant effect of which has now begun to be the undermining of the Bill of Rights and the resurgence of a parsimonious parochialism

POSSIBILITIES FOR CHANGE

- is there a need to improve the situation?
- judicial interest and continuing education -- the narrative and the reality
- the need for a formal system of amicus curiae briefs

THE FUTURE

30 September 1995

APPROACHES TO INTERPRETATION

HIGH TIDE

“In my judgement, the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant. We are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give ‘full recognition and effect’ to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred

...

While this court is, in effect, required to make new Hong Kong law relating to the manner of interpretation of the Hong Kong Bill and consequentially the tests to be applied to those laws now existing and, when asked, those laws yet to be enacted, we are not without guidance in our task. This can be derived from decisions taken in common law jurisdictions which contain a constitutionally entrenched Bill of Rights. We can also be guided by decisions of the European Court of Human Rights -- ‘the European Court’ -- and the European Human Rights Commission -- “the Commission”. Further, we can bear in mind the comments and decisions of the United Nations Human Rights Committee -- ‘the Committee’. I would hold none of these to be binding upon us though in so far as they reflect the interpretation of articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest assistance and give to them considerable weight”¹

LOW TIDE?

“I should be guided by my approach to the interpretation of the Hong Kong Bill of Rights under the Ordinance, by the following considerations

(3) The Court should interpret this Ordinance in the same way as it interprets any other ordinance of Hong Kong, namely with established rules of interpretation

¹ *R v Sin Yau-ming* (1991) 1 HKPLR 87 at 107-108, per Silke VP

(4) The proper and primary judicial interpretation of the Ordinance is by concentrating on the text of the Ordinance and the language of the text

(9) Even if the court should have resort to foreign jurisprudence, the Court would not be justified in importing foreign autonomous meaning interpretation so as to contradict or arrive at an interpretation substantially different, from the normal common law interpretation”²

“In my view therefore, unless something overwhelming and compelling can be shown in any particular European authority, the Hong Kong Court should very wisely decline to be seduced by the seemingly inexhaustible literature from the European Court of Human Rights”³

² *R v Town Planning Board, ex parte Kwan Kwong Co Ltd* (1995) HCt, MP No 1675 of 1994, 31 July 1995, Waung J at pp 23-24

³ *Id.* at 34

SELECTED CASES

CASES IN WHICH THE BILL OF RIGHTS/LETTERS PATENT HAVE BEEN GIVEN A MEANING CONSISTENT WITH THAT IN THE INTERNATIONAL JURISPRUDENCE

Whether the guarantee against “arbitrary” deprivation of liberty permits substantive review of the law under which a person is so deprived (Article 5(1), Bill of Rights; Article 9(1), ICCPR)

R v Wong Lai-shing (1993) 3 HKPLR 766 (Mag) (citation to *travaux* of European Convention and European case law, as well to the decision of the Human Rights Committee in *Van Alphen v Netherlands*)

R v Lau Kwok-hing and others (1993) DCt, DC Case No 1225 of 1991, 12 March 1993, Judge Beeson (only note of ruling available) (court appeared to accept that imprisonment for an offence which did not require fault to be shown might conflict with article 5(1))

What constitutes a “criminal charge”

R v Wong Ma-tai (No 1) (1992) 2 HKPLR 490 (DCt)

Held: Power to make confiscation order following a conviction for drug trafficking did involve the “determination of a criminal charge” within the meaning of article 11 of the Bill of Rights.⁴

R v Chan Suen-hay [1995] 1 HKC 847 (DCt)

Held: A disqualification order under Companies Ordinance which was triggered by a prior criminal conviction involving fraud or dishonesty was a “criminal penalty” within the meaning of article 12 of the Bill of Rights (following *Welch v United Kingdom*)

When a person has been “charged” with a criminal offence

R v William Hung (1992) 2 HKPLR 49; [1992] 2 HKCLR 90 (HCt) (following European Convention case law on when time began to run under article 5(3) of the Bill of Rights and finding a violation)

⁴ In *R v Wong Ma-tai (No 2)* (1992) 2 HKPLR 508 the District Court held that the provisions of the Ordinance which were challenged were consistent with the presumption of innocence in article 11(1) of the Bill of Rights. No point was taken that the provisions of the Ordinance had a retrospective operation in relation to some of the charges, thus giving rise to a violation of article 12(1) of the Bill of Rights (as was held by the European Court of Human Rights in *Welch* in relation to the UK legislation on which the Hong Kong legislation was based)

R v Lam Tak-ming (1991) 1 HKPLR 222 (following European Convention case law on when time began to run under article 11(2)(c) of the Bill of Rights and finding a violation, but finding no violation)

Right of person charged with criminal offence to examine witnesses against him or her (articles 10 and 11(2)(e) of the Bill of Rights; articles 14(2) and (3)(e) of the ICCPR)

***R v Purkayastha* (1992) 2 HKPLR 371 (DCt)**

Held: The court held that the deponent to an affidavit verifying the contents of banker's records were "witnesses" against the defendant, and were therefore liable to be called for cross-examination if the defendant showed that this was likely to assist in the ascertainment of the truth.

Right of access to court in the determination of rights and obligations in a suit at law

***R v Town Planning Board, ex p Auburntown Ltd* (1994) 4 HKPLR 194**

Held: Decision on rights to use land involves article 10 and requires access to a court, while holding that the acts in question were legislative in question and that therefore not the guarantee was not engaged

***Commissioner of Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141**

Held: Power to issue stop order under Inland Revenue Ordinance was inconsistent with article 10 of the Bill of Rights, because the stop order involved the plaintiff's "rights and obligations in a suit at law" and there was available to her no independent and impartial tribunal that could review all issues of fact and law relevant to the matter in dispute. Also, held, relying on international case law, that the determination of an individual taxpayer's liability to tax was an "administrative matter" and did not involve the determination of a "right or obligation in a suit at law"

***R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Limited* (1995) 5 HKPLR (CA)**

Held: The availability of a review by way of rehearing before the High Court of a decision of the Lift Contractors' Disciplinary Board satisfied the requirement of access to an independent and impartial tribunal, even if the composition of the Board did not meet those requirements (referring to European Court authority)

Presumption of innocence

***R v Wong Hiu-chor* (1992) 2 HKPLR 288, at 307 per Mortimer J**

Held: "according to law" in article 11(1) of the Bill of Rights (article 14(2) of the ICCPR) had a substantive content, which meant that it was not satisfied merely by showing that there was a domestic law permitting the restriction on the presumption, but it must also be shown that such restriction was fair and not unreasonable.

Privacy

Re Reid (1991) 1 HKPLR 83 (HCt)

Held: ICAC's actions in intercepting, photocopying and retaining letters of person in their custody held to be a violation of his right to privacy under article 14 of the Bill of Rights (no reference to international materials)

R v Yu Yem-kin (1994) 4 HKPLR 75 (HCt)

Held: Power of police to conduct warrantless search without having to show that the exigencies of the situation made obtaining a warrant difficult inconsistent with right to privacy. However, the court refused to grant any remedy, including the one sought by the defendant, viz the exclusion of the evidence

Right to vote and to be elected to public office

Lee Miu-ling v Attorney General (No 1) (1995) 5 HKPLR (HCt)(see below also)

Held: The right to participate in the public affairs of Hong Kong guaranteed by article 21(a) of the Bill of Rights and the right of universal suffrage guaranteed by article 21(b) require every permanent resident of Hong Kong to be entitled to vote in elections of member of the Legislative Council and to be effectively represented by the members elected in their constituencies. The right of equal suffrage guaranteed by article 21(b) requires every permanent resident of Hong Kong to have the same voting power and to be accorded votes of equal weight in such elections

Discrimination

R v Man Wai-keung (No 2) (1992) 2 HKPLR 164; [1992] 2 HKCLR 207 (CA) (referring to Human Rights Committee general comments)

L v C (1994) 4 HKPLR 388, [1994] 2 HKLR 93, [1994] 3 HKC 304 (HCt)

Held (obiter): The time-bar limiting the period for an application by an illegitimate child's mother to 12 months after the child's birth was discriminatory against an illegitimate child and inconsistent with the Bill of Rights (no reference by the court to any international material).

**CASES IN WHICH THE BILL OF RIGHTS/LETTERS PATENT
HAVE BEEN GIVEN AN INTERPRETATION THAT IS
INCONSISTENT WITH THE INTERNATIONAL JURISPRUDENCE**

WHEN THE RELEVANT JURISPRUDENCE IS APPARENTLY NOT CONSIDERED
BY THE COURT OR REFERRED TO BY COUNSEL

*Whether the Bill of Rights Ordinance has any application to legal relations
between private parties*

Tam Hing-ye v Wu Tai-wai (1991) 1 HKPLR 261, [1992] 1 HKLR 185;
[1992] LRC (Const) 596 (CA), reversing *Tam Hing-ye v Wu Tai-wai* (1991) 1
HKPLR 1 (DCt)

Held: Bill of Rights had no application to legislation regulating private legal relations. No reference to the obligations under the Covenant (which the Ordinance was expressly intended to implement, no reference to actual drafting history of the Ordinance)

*Whether the guarantee against “arbitrary” deprivation of liberty permits
substantive review of the law under which a person is so deprived*

R v Hui Lan-chak (1992) 2 HKPLR 423 (DCt)

Held: There is nothing in the *Bill of Rights*, in particular in article 5(1), which empowers the courts to determine generally whether a law creating and offence and authorising a person to be imprisoned for that offence is "fair", "reasonable" or "equitable". The Court made no reference to the relevant *travaux préparatoires*.

Similar conclusions were reached in *R v Hui Kwok-fai* (1993) 3 HKPLR 752 (DCt) and *R v Chong Ka-man* (1993) 3 HKPLR 789 (Mag)

What constitutes a “criminal charge”

R v Securities and Futures Commission, ex parte Lee Kwok-hung (1993) 3
HKPLR 1 (HCt)

Held: Proceedings under the Securities (Insider Dealing) Ordinance, which could result in the imposition of a treble penalty on a person or in a person's being rendered ineligible for certain offices are not "criminal" proceedings within the meaning of article 11 of the *Bill of Rights*.

R v Ko Chi-yuen (1994) 4 HKPLR 152, [1994] 2 HKCLR 65 (CA)

Held: Power to make confiscation order following a conviction for drug trafficking did not involve the “determination of a criminal charge” within the meaning of article 11 of the Bill of Rights. No reference made to the report of the European Commission of Human Rights in the *Welch* case, involving a challenge to similar UK legislation on the ground that it involved the retrospective imposition of a “criminal penalty” under article 7 of the European Convention on Human Rights.

The Court of Appeal upheld the decision of Leonard J in *R v Ko Chi-yuen* (1992) 2 HKPLR 310, but no reference was made in the judgment to any European Convention materials, or to the decision in *R v Wong Ma-tai (No 1)* (1992) 2 HKPLR 490 (DCt).

The European Court finally held, unanimously, that confiscation orders of this kind involved the imposition of a criminal penalty *Welch v U.K.* (1995) 20 EHRR 247

***R v Crawley* (1994) 4 HKPLR 62 (HCt, Keith J)**

Held: Fixed penalty “offence” not a “criminal charge” within the meaning of article 11 of the Bill of Rights, appellant appearing for himself, no reference made to decision of European Court of Human Rights in *Ozturk*, where the Court held that regulatory traffic offences punishable by fines are “criminal” within the meaning of article 6 of the European Convention on Human Rights *Ozturk v Federal Republic of Germany*, (1984) 6 EHRR 409

Crawley is to the same effect as *R v Wan Kit-man* (1992) 2 HKPLR 728 (HCt) (in which no international authorities were considered)

Right to the benefit of a lesser penalty

Failure in the string of cases before the Court of Appeal to refer to any of the international materials (Bill of Rights Bulletin, See now *R v Chan Chi-hung* [1995] 2 HKC 721 (PC)

Privacy

***R v Yu Yem-kin* (1994) 4 HKPLR 75 (HCt)**

Considers, without reference to the European or ICCPR jurisprudence, the meaning of the term of “law” in articles 8 and 17 of the Bill of Rights

***R v Allen, ex parte Ronald Tse Chu-fai* (1992) 2 HKPLR 266 (HCt)**

Held: The guarantee of privacy in article 14 (article 17) did not apply in relation to business affairs (On appeal, one and possibly two members of the Court of Appeal tended to accepting this view (1992) 2 HKPLR 282)

Right to vote and to be elected to public office

***Lee Miu-ling v Attorney General (No 1)* (1995) 5 HKPLR**

Held: It was not appropriate to seek to read article VII (3) of the Letters Patent (permitting the establishment of functional constituencies) consistently with article VII(5) and the provisions of the ICCPR, so as to permit the establishment only of functional constituencies based on “reasonable” criteria

CASES IN WHICH THE COURTS DO NOT EVEN SEEM TO REALISE THAT THERE IS A BILL OF RIGHTS ISSUE INVOLVED

***R v Tsang Yuk-kiu* (1995) CA, Civ App No 162, Litton VP, Liu and Ching JJA (in chambers)**

In this case the Court of Appeal upheld a decision by a High Court judge to order that an application for judicial review of the conduct of *criminal*

proceedings in the District Court to be heard by the High Court in chambers. The Court of Appeal itself sat in chambers to hear the appeal. The question of article 10 of the Bill of Rights was, it seems, raised neither by the parties nor by the court.

The result in this case flowed from the problematic O 53 r 5, which provides for the hearing of applications for judicial review to be in chambers as a matter of course. Despite public criticism of this practice as inconsistent with article 10, the judiciary has failed to amend the rule to bring it into line with the provisions of the Bill of Rights Ordinance.

CASES OF CONFUSION/ERROR

Right to trial within a reasonable time or to release (Article 5(3), Bill of Rights; article 9(3), ICCPR)

R v Lau Ting-fan (1992) 2 HKPLR 1 (HCt)

The court expressed its uncertainty as to whether the omission of the words “pending trial” from article 5(3) of the Bill of Rights, when they were included in the corresponding article of the European Convention, meant that the court was faced with the choice of ensuring a trial within a reasonable time or setting an accused free unconditionally. No reference was made to the *travaux* of the ICCPR, which would have clarified the issue.

Relationship between Bill of Rights Ordinance and ICCPR/European Convention

R v Yu Yem-kin (1994) 4 HKPLR 75 (HCt)

GENERAL APPROACH TO INTERPRETATION

Choosing a narrower interpretation when a broader interpretation, open on the wording of the statute, would have more effectively promoted the rights or implemented the obligations in the Covenant

Re Sin Hoi (1992) 2 HKPLR 18; [1992] 1 HKLR 408 (CA)

APPROACH TO THE JUSTIFIABILITY OF RESTRICTIONS ON THE ENJOYMENT OF RIGHTS

Depreciation of the international analytical framework

Tam Hing-ye v Wu Tai-wai (1991) 1 HKPLR 261 (CA)

R v Ming Pao Newspapers (1995) (CA)

REJECTION OF AUTONOMOUS MEANING IN FAVOUR OF THE ORDINARY MEANING UNDER DOMESTIC LAW

R v Town Planning Board, ex parte Kwan Kwong Co Ltd (1995) HCt, MP No 1675 of 1994, 31 July 1995, Waung J

Arguing that the Bill of Rights Ordinance should be interpreted in the same way as any other Hong Kong ordinance, in accordance with established rules of interpretation and concentrating primarily on the text of the Ordinance and the language of the text. The courts should not import “foreign autonomous” meanings of terms “so as to contradict or arrive at an interpretation substantially different from, the normal common law interpretation” The court held that article 10 of the Bill of Rights did not give rise to the right of access to a court, but provides guarantees in relation to proceedings already before a court or which may be brought before a court under national law The case has been recently followed in a decision of the District Court: *Commissioner of Inland Revenue v Eekon Enterprises Ltd* (1995), DCt, Case No 3665 of 1995, 27 September 1995, Judge Kwan.

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NON-JUDICIAL DOMESTIC MECHANISMS IN HONG KONG FOR THE ENFORCEMENT OF CIVIL AND POLITICAL RIGHTS

**BY: Ms Anna Wu
Former Legislative Councillor**

NON-JUDICIAL DOMESTIC MECHANISMS IN HONG KONG FOR THE ENFORCEMENT OF CIVIL AND POLITICAL RIGHTS

BY

ANNA WU

Not long after I became a Legislative Councillor in 1993 I asked the Hong Kong Government whether it would consult the public and hold public hearings prior to filing human rights reports with the United Nations Human Rights Committee. Mr Michael Sze, the policy secretary in charge of the area at the time, replied that it was an apple pie and motherhood issue. He declined to reply, and evaded the question.

Our attorney general was asked one time on a human right's issue if he could sleep at night. He said he had not ever lost a night's sleep.

Well, this is the government for you, government does not dispense truth or justice, government evades them. And government does not lose any sleep over it.

Two other questions of mine during my term of office, however, drew unambiguous negative responses from the Hong Kong Government. These were whether the government would provide legislators with an advance copy of the human rights report before it was submitted to the United Nations Human Rights Committee and whether the government would allow legislators to attend hearings before the Committee as members of the Britain/Hong Kong Government team.

Reports to the United Nations Human Rights Committee have typically represented the Hong Kong Government's selection of only those facts that present the government in a favourable light.

The 1988 report was more notable for what was left out than for what it actually said. It made no mention of newly enacted legislation in Hong Kong promoting political censorship of films, of the then recently introduced criminal sanctions for the publication of news regarded as false, or of the prohibition against the use of loudhailers.

The 1995 report does not explain that the final right of interpretation of the Basic Law vests with the National People's Congress of the People's Republic of China -- a body that has judicial, legislative and executive powers. It does not say that acts of state are excluded from the jurisdiction of the Final Court of Appeal. It does not tell us how the obligation under the Joint Declaration on the continued application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) after 1997 will be fulfilled. Indeed, it does not tell us why a proposal for the setting up of an independent human rights commission was rejected by both the British and Hong Kong Governments in 1994.

The rejection of the commission's establishment was based on the two governments' judgment that it would not be durable and that a commission with an unspecified remit would make matters too uncertain.

The British Government extended to Hong Kong in 1976 both the ICESCR and the ICCPR. However, it was not until the 1984 signing of the Joint Declaration by Britain and China that the Hong Kong public first became widely aware of the existence of these covenants. Despite the importance of these covenants the British and Hong Kong Governments did nothing to promote Hong Kong people's awareness of these rights.

In so far as the Hong Kong Government was concerned -- ignorance on the part of the public is bliss for the government and knowledge is dangerous.

In 1988, at a hearing of the United Nations Human Rights Committee, Britain was asked what had been done to promote awareness of the rights under the International Covenant on Civil and Political Rights in Hong Kong -- its response: nothing.

Under the ICCPR, a member territory has a responsibility to provide for a process to determine the occurrence of human rights violations, to develop remedies for breaches of human rights, to implement these remedies, and to enforce them. They require a government to commit itself to take active steps to advance the cause of human rights and to give these rights substantive content.

It was not until after the 4 June 1989 tragedy that Hong Kong received a Bill of Rights (HKBOR), the domestic legislation making the ICCPR obligations justiciable in the court of Hong Kong.

When the HKBOR was enacted, legislators and the Hong Kong Government recognised that there were prior laws in Hong Kong which were inconsistent with the ICCPR obligations and these would require amendment. It was also recognised that areas of rights such as protection against discrimination would require additional legislation. Indeed the government undertook at the time that it would legislate against discrimination.

In the event many of the necessary measures were only adopted by Hong Kong Government most grudgingly and under extreme pressure brought by the public and legislators' private initiatives. A glossary of these include:

1. The power to censor films for political reasons removed by a law initiated by Mr Martin Lee (1994).
2. The prohibition against inheritance of rural land by New Territories indigenous women removed by an amendment spearheaded by Ms Christine Loh (1994).
3. The legal requirement that all New Territories indigenous persons male and female should enjoy equal rights to vote and to stand for rural elections enacted through an amendment proposed by myself (1994).

4. The Sex Discrimination Bill and the Disability Discrimination Bill and the setting up of an Equal Opportunities Commission with limited jurisdiction proposed by the Hong Kong Government and enacted as a result of the threat posed by my comprehensive Private Member's Bills on equal opportunities and for the setting up of a human rights and equal opportunities commission (1995).

In so far as the Hong Kong Government's track record goes, it is a history of neglect and abandonment in the area of human rights protection in Hong Kong.

The fact of the matter is that there is no one to perform an audit of the performance of the Hong Kong Government and to assess whether the government has presented a fair and accurate picture of the human rights situation in Hong Kong. This problem is made particularly severe when there is no elected government.

Flaws in our human rights protection become even more obvious when we look at some outrageous and notorious cases and review our system of redress.

A government case concerning the presumption of possession of drugs was thrown out of court for violating the HKBOR. This case tarnished the image and credibility of our police. The police have imposed upon themselves a moratorium on a number of laws which they fear to be unenforceable. The government should actively be reviewing these laws and looking for more palatable substitutes.

Where existing laws are in conflict with the HKBOR, these laws, until amended, remain on the statute books causing a lot of uncertainty. They also represent areas of potential abuse of power by the government which exercises its discretion in deciding what the interpretation should be. Where the government is unwilling to state its position on a law, its solution has been to leave it to the courts. The question is: how many cases calling these laws into question will ever get to court, and how long will the process take?

Let's look at the detention of illegal immigrants from China, some of whom are kept in prison to act as witnesses against others awaiting trial in Hong Kong. There have been cases of detainees kept in prisons without access to legal representation or family contact. In some cases these involved young women. These cases were only brought to light by the press.

Another case of concern involved a young boy, Hai Ho-tak, whose parents and 2 siblings were permanent residents of Hong Kong. His birth in Hong Kong could not be verified and he was thus regarded as an illegal immigrant. He was detained and deported at age 6 to China without verification of his residency right in China. This occurred at the same time as the Governor's announcement of the extension to Hong Kong of the covenant to protect the rights of children.

All of the above occurred in the last two years or so. And if we delve into the late '70s and early '80s, we will see political surveillance of individuals and groups as evidenced by the reports of a secret committee called Standing Committee on Pressure Groups (SCOPG). These secret reports reflected concern over possible subversive activities and suggested, e.g. in the case of Society for Community Organisation (SOCO), to withhold subvention to control SOCO's activities. SOCO in

A subsequent complaint brought by a group called the Hong Kong Observers (of which I was a member) to the Office of Members of Executive and Legislative Council (OMELCO) on smear tactics applied by the Government against the group's members drew the conclusion that there was no ground to support the charge and OMELCO went on to say that, "in monitoring the public activities of local interest groups, the Hong Kong Government does not act in any sense improperly." OMELCO was then completely unelected and it conducted an investigation without asking for any government files. The office lacked investigative skills if not investigative powers.

I was informed recently that had the right question been asked, evidence was there corroborating smear tactics being applied by a senior government official.

The moral behind these stories is simple: the Hong Kong Government remains passive in amending laws which are inconsistent with the ICCPR obligations; there are many helpless people caught in the system desperately requiring help; there are many skeletons in the cupboard that we are not yet aware of. These are familiar stories and only an independent, powerful and generously endowed guardian of rights can provide that help.

Next, let's look at the redress channels and see how these work.

The shortcomings of the current judicial system can be summarised as follows:

1. You need deep pockets.
2. You need a lot of time.
3. You need to get through a lot of hurdles.
4. It is adversarial and sometimes quite hostile.

Between June 1991 (when the HKBOR came into effect) and 30 November 1993, over 92 per cent of applications for legal aid in HKBOR civil cases (excluding immigration cases) were rejected under the 'merit test' of the Legal Aid Department.

Currently, there is no channel to test the validity of laws, even if a significant point of human rights is involved, before damage is done, and legal aid may not always be available to the victim due to stringent merit tests in place. The law, even where it provides redress, is beyond the reach of the average person, especially when one considers the potential risk of the 'loser-pays-all' system which tends to discourage claims.

Our Legal Aid Ordinance was recently amended to allow the Director of Legal Aid to waive means testing regarding meritorious HKBOR cases, this power does not apply to violations of rights, in the area of discrimination for instance, in the private sector.

Further, our legal aid is currently a government department and the staff is part of the civil service. Legislative proposal has been made for a statutory council to be formed to oversee the work of the department. This Council, however, will only have power to advise the government on policies and

will not have power to review the day-to-day operation of the department. This does not really make the department independent, the Council should at least have the powers of disciplining, firing and hiring staff of the Legal Aid Department.

Our ombudsman system in the form of the Commissioner for Complaint Against Mal-Administration can only make recommendations to government and the police and the Independent Commission Against Corruption (ICAC) are outside its jurisdiction. The office would be far more effective and credible if it could be given the resources to litigate against the government on behalf of complainants or in its own name or have its recommendations enforced through the courts.

In June and July this year, the Hong Kong Government enacted laws to set up an Equal Opportunities Commission with limited jurisdiction to investigate and conciliate complaints and to provide assistance in legal proceedings. Its jurisdiction is limited to the sex and disability discrimination laws. Its ability to undertake formal investigations and enforcement of its own directives is restricted.

I would now like to turn to the position of the Attorney General (AG). The AG is currently a civil servant. His client is the Hong Kong Government. He is also supposed to keep the government in line and defend the legal system against encroachment of rights by government. Currently he does not have the protection of tenure or specified immunity equivalent to those offered to a judge. The AG is the first line of defence against encroachment of our rights in terms of legal advice to the government and drafting of laws.

Some years ago, the AG's Chamber advised the Hong Kong Government that it had no legal power to censor films on political grounds. The government ignored the advice. One must ask, who in government should be made accountable for ignoring the AG's advice? Perhaps the AG should be able to take the government to court when, in his view, the government is in breach of the law.

Given this background, there are compelling reasons why there should be an independent human rights commission established to promote awareness, to prevent bad laws remaining on the statute books or creeping into them and to provide protection and redress in an accessible and affordable way. It must undertake promotion, prevention and protection. It must be pro-active.

The ideal mechanism to deal with the development of human rights would be to establish a human rights commission outside the government.

Under a draft Human Rights and Equal Opportunities Commission Bill my colleagues and I drafted in 1994, we proposed that complaints should be lodged with an independent commission for investigation and reconciliation. Failing conciliation, the matter would be referred to a specialist tribunal complementing the commission for adjudication, with appeal on questions of law to the higher courts.

The more informal procedure and congenial environment of the commission are more conducive to resolving human rights claims.

The effective implementation of human rights guarantees in Hong Kong also requires an independent commission to undertake a broad range of functions including education, research, and community liaison, as well as review of government programmes and of existing and proposed legislation, and advising the government.

The proposed commission should also have the power to initiate proceedings in certain circumstances and to intervene in proceedings in which important human rights issues are being considered.

The current approach of the Hong Kong Government is to split up a human rights problem and distribute it across a variety of organisations, none of which is dedicated to human rights issues as its principal concern. Thus, complaints handling is severed from education about human rights. Protection of human rights should not be a peripheral or a fragmented exercise.

One of the most important aspects of the development of human rights in any territory is the development of standards, both of implementation and interpretation. These standards should be set by a body outside the government. The standard-setting function can help Hong Kong to build up jurisprudence consistent with international norms. It also can help Hong Kong to legislate more precisely to meet such standards.

Given the track record of the Hong Kong Government in the area of human rights development, it should not be at all difficult to conclude that what Hong Kong needs is an authoritative and independent human rights commission.

SEXUAL ORIENTATION AND THE LAW

**BY: Mr Barrie Brandon
Gay Rights Activist; Editor, Contacts Magazine;
Founder, Horizons**

SEXUAL ORIENTATION AND THE LAW

BY

BARRIE BRANDON

Heterosexuality is not normal, just common.

Derek Jarman

It is of little comfort to the Gay population of Hong Kong to know that the Government supports equal opportunities, in principal, for all (ICCPR Report Page 93 Paragraph 354) when the only mention of Gays in the 98 page 40,000 word document talks about sexual “preference”.

This is somewhat in the face of the body of scientific and medical opinion that underpins the Gay population thinking and focus—in Hong Kong as well as the rest of the world—as being “sexual orientation”. It must be emphasised that it is much more than a question of semantics. Preference means one has a choice; therefore one can accept or reject at will. Orientation on the other hand indicates one does not have a choice. One is either born Gay or becomes Gay due to the environment.

So in its only paragraph on the Gay population of Hong Kong the Government appears to be undermining and belittling Gay people.

The law regarding homosexuality in Hong Kong is based on UK law. What the law says is: Sex between two males over the age of 21 in private is legal. Note :

- Over 21 (in the UK the law is now over 18)
- In private means (in UK law) in a private residence. It does not mean hotels, bath houses or other places which would normally be construed as ‘private’.
- If any third (or 4th or 5th person) is present then they all break the law.

All of these pints are direct discrimination against Gay people; they do not apply to people of any other sexual orientation.

According to popular estimates (based on the Kinsey Report published in 1948) there are over 300,000 Gay people in Hong Kong. How do we reach that figure?

Kinsey said that 10% of the male population will have some homosexual experience in their lives. “At least 37% of the male population has some homosexual experience between the beginning of adolescence and old age. This is more than one male in three of the persons that one may meet as he passes along a city street. In addition, 13% of males

react erotically to other males without having overt homosexual contacts after the onset of adolescence.” (This 13 percent, coupled with the 37 percent who do have overt homosexual experience, means that a full 50 percent of males have at least some sexual response to other males after adolescence—and conversely, that only the other 50 percent of the male population is entirely heterosexual throughout life.) (See also appendix One)

Hong Kong has an approximate population of 6 million people, 10% of that figure is 600,000. It would be reasonable to assume that half of the 600,000 is sexually in-active due to extreme youth or old age. That brings us to the figure of 300,000 Gay people, almost all of whom are probably wage earners (and therefore by extension tax payers) and voters.

What then is the Government doing or proposing to do about equal—not Gay—rights for the Gay population?

Prisons

In August of this year a senior Correctional Services Department (CSD) Officer said in a newspaper article “Learning” that most Gay prisoners are automatically segregated to one person cells. He went on to say that this breach of human rights is outrageous and is dangerous for those people who are isolated. The CSD maintains that they need to segregate people to prevent them from having sex.

But by segregating Gay prisoners, the CSD is pointing out to all other inmates that they are Gay. Lu Chan, a CSD senior psychologist who currently deals with less than 10 people, said “We do have some prisoners who like to kiss and grab other men”. Perhaps they should watch a football match and see what the players do to each other when a goal is scored.

Although they remain adamant, in the face of a considerable body of medical knowledge and public opinion, that sex does not take place in Hong Kong prisons the facts fail to back up its statements.

As far back as August 1994, Chris Cheng, the Assistant Commissioner, CSD, refusing to allow condoms in prisons said “Only a very small percentage of the penal population shows these type of tendencies, and they are closely watched. I cannot accept that it [gay sex] happens.”

An ex-prisoner I spoke to told me “Of course sex goes on between inmates. What do you think happens? We’re there for long periods of time, it’s the only outlet [for sex] there is. Even so called straights do it sometimes, it just seems natural.”

But sex in prisons is not a new issue. Many countries have had to face the same problems. One eminent Hong Kong doctor I spoke to told me “We should ask the CSD to undertake

a study to find out exactly how big the problem is and how many people are involved in sex in our prisons.”

During the last week I asked as many people as I could wherever I went two questions. Do you think sex happens between prison inmates? Should condoms be available to prisoners? The sample of 157 people was drawn from all walks of life, ranging from young and old, male and female, Lesbian and Gay, heterosexual, professionals as well as blue collar workers. Priests, doctors, police officers, journalists, office and shop workers as well as manual workers were included; nobody escaped.

The results were overwhelming. The reply was 100% yes to both questions. That's 157 people who understand that sex does happen in our prisons and 157 people who want to do something about it by giving prisoners condoms. It does not take a great deal of imagination to project that most sensible sane people would support giving prisoners condoms.

I believe the CSD is acting irresponsibly by continuing to (A) deny that sex takes place in our prisons and (B) refuse to allow the free distribution of condoms. A lawyer friend told me she thought there was a strong case for someone who contracted HIV whilst in prison to sue the CSD and its officials, in a court of law, for criminal negligence.

Although Lu Chan denied that the CSD is discriminating against Gay people, she said, “We are not singling them out. We are targeting those with a particular sexual preferences [sic] which will lead to misbehaviour.” That, Lu Chan, is discrimination; because someone is gay does not mean they will automatically ‘misbehave’, does it?

This policy does not take account of the many prisoners who identify themselves as heterosexual, outside of the prison system, have sex with other men (without identifying or defining the sexual acts as homosexual) in same sex environments. There are many other examples we could look at to substantiate this statement: navies, armies, police, boarding schools, etc.

AIDS is a killer disease, one that we all need to guard against. A simple sure way of helping to contain the spread of this deadly virus is to use condoms. Why aren't we giving Hong Kong prisoners the chance to avoid contracting the virus?

For Gay prisoners the Government is doing nothing to help them but is doing a great deal to alienate them from other prisoners.

Hospitals

Queen Mary Hospital in Kowloon still has a unit that uses aversion therapy (electric shock) even though the doctor in charge admits that not one person receiving treatment has ever, according to their records, changed their sexual orientation.

The practice was abandoned decades ago both in the UK and US as being totally unsuccessful. Several years ago the practice was described by Amnesty International as inhumane.

Recruitment

The Government is still subjecting Gay employees to “Integrity Checks”. According to the Government, being Gay makes them susceptible to blackmail.

There is a very clear answer to that—just make it clear and widely known that Gay people are welcome in the civil service.

Education

The Education Department has recently announced that it will overhaul the curriculum to include where appropriate sex education. In its press release it failed to mention homosexuality once.

Given that young people are growing up Gay, why doesn't the Education Department take adequate steps to ensure that ALL sexual orientations are openly discussed and understood.

Family Planning Association (FPA)

The FPA is an organisation with a degree of autonomy. But as a Government funded group, it has a responsibility to the whole community.

In late 1994 an extremely homophobic document came into my hands. As a result of intense public pressure, via the media, the FPA withdrew the offending and offensive document.

The director of the FPA promised to review the materials they had on homosexuality and include positive statements in future.

As a matter of courtesy and support, several suitably qualified Gay people offered to help the FPA ensure that their materials were free of homophobia. The FPA publicly accepted the offer but even after frequent reminders failed to invite one single Gay person or group to sit either on their working parties or committees.

The FPA as a publicly funded organisation should represent the whole community. Gay people have the same parental instincts as other sections of the community. We must not be ignored.

Survey

This week, it emerged that a draft survey was circulated to Non-Government Organisations (NGO's) for consultation. The timetable for responding was a ludicrous

short time—5 days, with a weekend in between--making it very difficult for NGO's to give more than a cursory glance at the 6 page document.

What is amazing, apart from the question why do we need a survey, was that none of the Gay Rights Activists or Government registered Gay groups had even been asked for their opinions on either the survey as a whole or the individual questions.

Questions urgently need to be asked: Why do we need a survey? What is the target group? How will the target group be selected? What will happen to the information after the process is complete? How will the information be collated?

Do we need a survey?

With the abundant materials available to the Government from the submissions made this year by Gay people who have actually experienced discrimination to the Bills Committee on Anti-discrimination it is difficult to see what the aims of this survey are.

One thing that the survey achieves is delay, something the Gay population cannot afford with 1997 and the return to Chinese sovereignty less than 2 years away.

Why haven't Gay people in the shape of activists and Gay groups been included in the consultation process between Government and NGO's?

Why is the Government seemingly intent on asking people who will be largely unaffected by any Equal Opportunities legislation for Gay people what they think and feel about Gay people?

The Equal Opportunities Bill and the Anti Discrimination Bill both sought to give Gay people, among others, equal rights under the law. Areas covered included housing, travel, clubs, and the workplace, all of which would have little or no effect on the general populace.

The whole tone of the draft Survey is negative, and may even prove harmful to Gay people. In some cases, the Survey seems to encourage homophobic attitudes. (See appendix 2)

Among the questions in the Survey are the following:

Are you willing or unwilling to:

- Shake hands with them?
- Sing Karaoke with them?
- Go swimming with them?

Do you agree or disagree that:

- Homosexuality/bisexuality corrupts young people?
- Only heterosexuality is normal?

Will you accept or not accept the following situations:

- A homosexual/bisexual works as a teacher in a primary/secondary school?
- A homosexual/bisexual occupies an important position in public service?
- A Lesbian adopts a child?
- Two Gays get married?

The underlying tone to the questions implies that Gay people are somehow a threat to the rest of society. The way in which the questions are framed leaves no doubt that the Government is suggesting opinions to the respondents.

It is a sad but indisputable fact that faced with the status quo or the fear of the unknown people will, understandably, choose that which they know and trust and take the safer choice. And who can blame them? The Survey must, we insist, be scrapped in its present form and not recommenced until proper consultation with Gay people has taken place and the general populace has been educated about homosexuality. In the event of the latter, equal opportunities will certainly be delayed by several decades.

It is important to remember that the UK, North America, Europe and Australia have been through the same type of discussions, arguments and deliberations that we now face. It would be a great pity if we, as a society, do not learn from them.

I am not advocating that we simply lift discussions and decisions taken elsewhere and impose them on Hong Kong. We are a different culture and people. There are however bound to be things that we could learn from other places that would be useful for Hong Kong to investigate.

Conclusions

- The Government must stop segregating or identifying Gay prisoners.
- The Queen Mary aversion clinic should be closed—immediately.
- The Education Department should consult qualified Gay people when planning the sex education curriculum.
- The FPA should ensure that there is appropriate representation on its board and committees.
- The Home Affairs Branch should scrap the proposed Opinion Survey.
- The Home Affairs Branch should consult Gay people at all levels of the revised Opinion Survey.

- The discriminatory provisions regarding sex between consenting Gay adults should be abolished: the age of consent should be lowered to 16 (in line with the rest of the population) and the “two-person only” limitation should be dropped. Furthermore, “in private” should be clearly defined, and should be in line with restrictions applied to the rest of the population.
-

Appendix 1

It is interesting that the Kinsey scale has been adopted by a lot of people as an easy way of quickly identifying one's sexual orientation. Kinsey was not researching sexual orientation, only behaviour; this jibes pretty well with the general idea about sexuality at the time (the notion that someone is gay or lesbian was not as prevalent as the notion that someone has gay or lesbian sex). If you really want to apply this scale to sexual orientation, orientation would have to be defined in a behavioural way.

So what is the Kinsey scale?

In the 1948 book Sexual Behaviour in the Human Male, the Kinsey researchers made the (then) startling assertion that homosexual behaviour was not restricted to identified homosexuals. (The book was based on an in-depth survey of thousands of men.) The authors said that it made more sense to look at a person's behaviour and psychological response as being at some point on a spectrum or scale:

0 = entirely heterosexual

1 = largely heterosexual, but with incidental homosexual history

2 = largely heterosexual, but with a distinct homosexual history

3 = equally heterosexual and homosexual

4 = largely homosexual, but with a distinct heterosexual history

5 = largely homosexual, but with incidental heterosexual history

6 = entirely homosexual

A common mistake in describing Kinsey's scale is that most people think that it's a bell/normal curve centring at 3, making 3 the most popular descriptor. The curve is actually bimodal—that is, most people are either close to 1.5 (mostly heterosexual) or 4.5 (mostly heterosexual). In other words, the distribution is actually two mini bell curves.

The origin of the much quoted "10% gay" figure also comes from the Kinsey report. Kinsey published survey results that over the past three years 4% of the men were Kinsey 6's (exclusively homosexual experiences) and 6% were Kinsey 5's (homosexual with only incidental heterosexual experience); 4% + 6% = 10%. The parallel statistic for women in the same studies is 3 to 8% (scale 4 to 6). Like any sociological study, Kinsey's has been challenged on a number of grounds. More recent studies have generated statistics far above or below these numbers (especially for women), but nothing more authoritative has been published.

The key difficulty with the 10% figure has proven to be how researchers define "gay". Since there is no agreement in the scientific community on what characteristic(s) make people gay, these studies have very little meaning or impact outside the popular media coverage they generate.

Kinsey wrote two whole books on the findings. Here are a few numerical excerpts. "At least 37% of the male population has some homosexual experience between the beginning of adolescence and old age. This is more than one male in three of the persons that one may meet as he passes along a city street. In addition, 13% of males react erotically to other males without having overt homosexual contacts after the onset of adolescence." (This 13 percent, coupled with the 37 percent who do have overt homosexual experience, means that a full 50 percent of males have at least some sexual response to other males after adolescence—and conversely, that only the other 50 percent of the male population is entirely heterosexual throughout life.)

- 4% of males are exclusively homosexual throughout their lives after the onset of adolescence.

- 8% of males are exclusively homosexual (scale 6) for at least three years between the ages of 16 and 55.

- 13% of males have more homo- than heterosexual experience (scale 4-6) for at least three years between the ages of 16 and 55.

- 18% percent of males have at least as much homo- as heterosexual experience in their histories (scale 3-6) for at least three years between ages 16 and 55.

- 25% percent of the male population has more than incidental homosexual experience or reactions (scale 2-6) for at least three years between the ages of 16 and 55.

On the other hand, these Kinsey findings are beside the point in a way. Even if the figure were 1%, or a fraction of a percent, discrimination would still be wrong.

(Equivalent figures are not available for women because "equivalent female data often cannot be understood without extensive additional explanation", according to Tripp's article.) (excerpts from "Incidence, Frequency, and the Kinsey 0-6 Scale" by C A Tripp, from *The Encyclopaedia of Homosexuality*.)

Appendix 2

Draft of the Hong Kong Government's Opinion Survey on the Issue of Discrimination on the Ground of Sexuality

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Urgent by fax : 6 pages

22 September 1995

Ms. Carole Petersen
c/o School of Professional and
Continuing Education
The University of Hong Kong
(Your faxline: 2546 0295)

**Opinion Survey on the Issue of
Discrimination on the Ground of Sexuality**

As discussed earlier, I enclose a translation of the questionnaire which we distributed after our meeting with the NGOs yesterday. This translation is a draft produced to facilitate your consideration. It may have to be fine-tuned after the pilot study. I would appreciate it if you could let me have any of your comments as soon as possible before Wednesday 27 September 1995.

With best regards,

(Mrs. Erika HUI)
for Secretary for Home Affairs

DRAFT

Opinion Survey on the Issue of Discrimination on the Ground of Sexuality

(Questionnaire)

I

1. Do you know what is meant by:

	Yes	No
a. Heterosexuality	1	2
b. Homosexuality	1	2
c. Bisexuality	1	2

(According to our definitions, heterosexuality means sexually attracted to people of the opposite sex; homosexuality means sexually attracted to people of the same sex; and bisexuality means sexually attracted to both people of the opposite and the same sex.)

II

2. The following are the views some people have regarding homosexuality and bisexuality. Do you agree or disagree with their views? (You can choose any score between 0 to 10 to represent your views, with "0" meaning *Totally disagree* and "10" *Totally agree*)

- a. homosexuality/bisexuality are acceptable _____
- b. only heterosexuality is normal _____
- c. homosexual/bisexual behaviour are behaviour of personal choice _____
- d. homosexual/bisexual behaviour affects other people _____
- e. the behaviour of homosexuals/bisexuals are the same as ordinary people _____
- f. homosexuality/bisexuality corrupts young people _____

3 Please tell me whether you are willing or unwilling to :

	Willing	Unwilling	Depends	Don't know
a. shake hands with homosexuals/ bisexuals	1	2	3	4
b. make friends with them	1	2	3	4
c. dine out with them	1	2	3	4
d. watch movies with them	1	2	3	4
go swimming with them	1	2	3	4
i. sing Karaoke with them	1	2	3	4

4. Are you willing or unwilling to :

	Willing	Unwilling	Depends	Don't know
a. sublet a room in your apartment to a homosexual/bisexual	1	2	3	4
b. let your apartment to a homosexual/bisexual	1	2	3	4
c. stay at a hotel which would also accommodate guests who are homosexual/bisexual	1	2	3	4
d. employ a homosexual/bisexual as a domestic helper	1	2	3	4
e. be a member of a club which would also allow homosexuals/bisexuals as members of the club	1	2	3	4

5. Please tell me whether you would mind or wouldn't mind:

	Yes	No	Depends	Don't know
a. working in the same office with a homosexual/bisexual	1	2	3	4
b. working in the same team with a homosexual/bisexual	1	2	3	4
c. sharing the tenancy of an apartment with a homosexual/bisexual	1	2	3	4
d. being in the same class with a homosexual/bisexual at school	1	2	3	4

6. Will you accept or not the following situations? You can choose any score between 0 to 10 to represent your views, with "0" means *Totally unacceptable* while "10" means *Totally acceptable*.

- a. a homosexual/ bisexual works as a teacher in primary/secondary school _____
- b. a homosexual/ bisexual works as a lecturer in tertiary education institute _____
- c. a homosexual/ bisexual occupies an important position in public service _____
- d. a lesbian adopts a child _____
- e. a gay adopts a child _____
- f. gay makes use of reproductive technology _____
- g. lesbian makes use of reproductive technology _____
- h. two lesbians get married _____
- i. two gays get married _____

III.

7a. Do you think the following measures are effective or not in lessening discrimination on the ground of sexuality? You can choose any score between 0 to 10 to represent your views, with "0" means *Very ineffective* and "10" means *Very effective*.

a. strengthen the school curriculum of civic education in this respect _____

b. enhance public's knowledge of the different kinds of sexual orientation _____

c. the government sets up a responsible department to handle complaints for people who are of different sexual orientations _____

d. the government sets up a responsible department to take into account the needs of people who are of different sexual orientations _____

e. introduce legislation to outlaw discrimination on the ground of sexual orientation _____

f. strengthen public's concept of equal opportunities for all _____

7b. Are there any other measures you can think of?

Respondent's background

8. Could you please tell me your age?

15-19	1	40-44	6
20-24	2	45-49	7
25-29	3	50-54	8
30-34	4	55-59	9
35-39	5	60-64	10

9. Could you please tell me your marital status?

Single	1
Married	2
Others (including divorced, separated etc.)	3

10. Have you had any formal education? If yes, up to what level?

No formal education (including private tuition)	1
Primary education	2
Lower secondary (F.1 to 3 or Middle 1 to 3)	3
Upper secondary (F.4 to 7 or Middle 4 to 6)	4
Post-secondary or above	5
Refuse to answer	0

11. What is your occupation?

12. What is your monthly income?

HK\$3,999 and below	1	HK\$15,000 - \$19,999	6
HK\$4,000 - \$5,999	2	HK\$20,000 - \$24,999	7
HK\$6,000 - \$7,999	3	HK\$25,000 - \$29,999	8
HK\$8,000 - \$9,999	4	HK\$30,000 and above	9
HK\$10,000 - \$14,999	5	No income	10

13. Record sex

male	1
female	2

Discrimination

*Presentation to Bills Committee
Equal Opportunities Bill*

Thursday 13th April 1995

By Barrie Brandon

are:

- The paper that introduces the Equal Opportunities Bill says on sexual discrimination that sexual preference (rather than sexual orientation) should be illegal. When this was questioned the answer came back “that this model had been copied from Australia”, as if that in some magic way exonerated them from responsibility.
- A local English language newspaper report on Sunday 9th April 1995 headline said “gay, a common word...has been given a new sinister meaning”. The same report went onto say that “you should at least be able to pronounce the name of your vice”.
- On March 11th 1995 in a letter to the editor of another local English language newspaper the writer said “I find the idea of sex between two men disgusting, abhorrent and totally unnatural”.
- A recent letter on equal opportunities started Dear Sir...
- A news item about Elton John the pop singer says “he is very happy with his companion, who he wants to spend the rest of his life with”. Compare this with the rest of the report that talks about the fulfilment his lyricists found with his wife and step-children.

About me

I am an out gay man who has been in Hong Kong for a number of years. In 1991 I founded Horizons, the Lesbian & Gay phone line, who I understand will be addressing you next this evening.

In 1993, together with my business partners started Contacts Magazine [more to follow].

In 1994 I started Gay Asia Pacific Conference that will in 1996 bring the first Gay conference in the region to Hong Kong.

During the time I have been in Hong Kong I have experienced many instances of discrimination due solely to my sexual orientation. A few examples:

- A month ago my life partner and I went to stay at a hotel on one of the outlying islands. I had previously booked a double room, that is a room with a double bed. I had written confirmation from the hotel that this was the status of my booking, as I have had many experiences where this request has been ignored.
- When we arrived at the hotel we found that they had allocated us a twin bedded room. Our complaint was met with “Oh, but I thought as you were two men, you would want twin beds”. This caused great embarrassment to the staff as we insisted on having a double bed.
- At the invitation of the bank, I applied for a second credit card for my life partner. The application was rejected on the grounds that he wasn't a blood relative and that we weren't married! After a very lengthy and heated discussion with bank officials they agreed to issue the card.
- I recently attended a job interview with a very well known management recruiting company. On learning that I am a gay man and qualified teacher and youth and community worker the interviewer asked me “Had I ever had any problems in being

the vast majority of paedophiles are straight men abusing girls and young women.

- I used to attend a local gym. When the owner discovered I was Gay he asked me not to continue using his gym as I might upset the other users. There was no question that my behaviour at the gym was anything less than exemplary; he had just read an article in a magazine where my photo and name featured.

Contacts Magazine

Contacts Magazine is the only Lesbian and Gay magazine in Hong Kong. The magazine was founded in February 1993. It is monthly, A4 size with 32 pages of news, stories, articles and personal adverts. The magazine is on sale at a number of Gay bars and clubs throughout the territory. It is also available on subscription. From a circulation of 1,000 at our start-up we now have an average of 2,000 readers every month.

The magazine is, due to an Obscene Tribunal ruling, only available to people over the age of 18.

The aims of the magazine are (in addition to making a profit!):

- To promote a sense of well being by using positive role models.
- To encourage self awareness.
- To ensure that information both local and world-wide is available to Lesbians & Gays in Hong Kong.
- To foster and nurture the concept of a Gay community.

From our yet unpublished survey of late 1993 we know that 95% of our readers are Chinese between the ages of 24 – 29. They are most likely to be living at home, either in the New Territories or Kowloon and earning between \$12,000 –\$15,000 per month. There was approximately a 25% Lesbian and 75% Gay split. Of the remaining 5%, 3/4 were expatriates and 1/4 overseas subscribers.

This pattern has not changed since the survey, which we expect to update later this year.

Since its inception Contacts Magazine has faced discrimination:

Our first printer said--after printing three issues--that his company could not continue to take the risk of putting their name, as the printers, in the magazine because of the sensitive nature of the contents. When challenged he said he could continue to print the magazine provided all contents were submitted to their solicitors for approval. This was a service which we would have to pay for and a process that would take some three weeks.

The second printer declined to print the magazine after completing only two issues when he discovered that we were a Lesbian & Gay company (why it took so long, when it is clearly stated on the front cover is unclear). His main reason was that he feared the bank would stop his account if they discovered he was printing "this type of magazine".

The third printer also said, after three issues, that he was unable to continue due to the vast amount of work that had suddenly come in from other sources. Subsequent visits to the company showed idle machines at all times of the day.

charge (not credit) card company's card. Their sales manager visited and told me that it was unlikely that approval would be given as "The magazine deals with very sensitive issues" and "My company doesn't want to be associated with you kind of people". Later, after a lot of pressure, the charge card company responded by refusing us permission to accept their card. It was ironic that the very week the charge card company refused our application an article appeared about prostitution in Hong Kong showing the same card being accepted by prostitutes.

As part of our strategy to make the magazine widely available we earlier this year approached 15 news stalls asking them to sell the magazine. All refused, the main reason we were told was that they did not want to sell 'such things'.

The same reason, presented a little differently, was given by two leading bookshops.

There are many more instances that could be related. However, I think that the above will give an indication of how both Lesbian & Gay companies and individuals are discriminated against.

I hope, on behalf of all Lesbians & Gay men in Hong Kong, that the Bill will be supported and passed into law in as short a time as possible.

**SEXUAL BIAS IN THE HONG KONG
LEGAL SYSTEM:
REPORT OF THE HONG KONG COUNCIL OF
WOMEN**

**BY: Ms Ann Jordan
Department of Government and Public
Administration, Chinese University of Hong Kong**

**Report of the
HONG KONG COUNCIL OF WOMEN**

**On Compliance by the British and Hong Kong Governments
with their obligations under**

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

with respect to the

RIGHTS OF WOMEN IN HONG KONG

October 2, 1995

Submitted by:

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INTRODUCTION

Legislative action required before July 1, 1997.

It is essential that the British and Hong Kong governments enact legislation implementing their responsibilities under the ICCPR before the handover of Hong Kong to the Chinese government in 1997. The only way that women in Hong Kong are going to achieve legal equality is through legislation. Courts have only begun to deal with human rights issues since enactment of the Bill of Rights Ordinance and we believe that members of the judiciary cannot be convinced to look beyond this Ordinance to the ICCPR or any other international legal instrument as a source of domestic law. Additionally, barristers in Hong Kong are among the most expensive in the world, rendering impossible any challenge unless the government agrees to provide legal aid. However, there is virtually no chance that the government would approve a legal aid applicant who wants to challenge existing legislation (or lack thereof) with international instruments.

After 1997, Hong Kong women may no longer be able to rely upon the ICCPR and the Human Rights Committee (the "Committee") for support in their struggle for equality. Further, the British government has not yet extended the Convention on the Elimination of All Forms of Discrimination Against Women (the "Women's Convention") to Hong Kong and so we do not not what reservations they will make. The Hong Kong Council of Women (the "Council") is particularly concerned about whether the post-1997 government will continue to report to the Committee and whether or not the Chinese government will allow Hong Kong to implement legislation in compliance with the ICCPR, an instrument that it refuses to sign. Thus, this Committee's review and recommendations come at a critical period for human rights in Hong Kong. On the other hand, we realize that the closer it gets to 1997, the less time and energy anyone in government will have for women's concerns (or any concerns apart from the transition to Chinese rule). Nonetheless, we request the Committee to urge the British and Hong Kong governments to adopt the legislative reforms and to investigate the discriminatory practices discussed in this Report.

The British government has failed fully to support women's rights in Hong Kong

Despite the willingness of the Hong Kong government to enter into a dialogue with women's groups, the British and Hong Kong governments have left themselves open to criticism for their years of neglecting women's rights in the Territory and for their continued reluctance to grant Hong Kong women all of the rights guaranteed by the ICCPR. Even more disturbing is the fact that the British government's treatment of women in Hong Kong is very different from its treatment of women in Britain. Under the guise of cultural sensitivity, the British colonial administrators have implemented fewer of the gender-related rights enumerated in the ICCPR in Hong Kong than have been implemented in Britain. It is apparent that the 'culture' to which the British is being sensitive consists of the entrenched male-dominated culture in Hong Kong. If the government had asked Hong Kong women which parts of Chinese culture they wished to maintain, it would have learned that the majority of Hong Kong women would not intentionally choose to deprive themselves of any of the rights (or privileges) that the government has accorded to men.

The government has never fully implemented women's ICCPR rights and there is no reason to believe that it will implement women's rights under the Women's Convention. In fact, the Council is concerned that the government believes that the Sex Discrimination Ordinance (thoroughly discussed in the Council's other submission to the Committee) is all that is required by the Women's Convention. The Ordinance is, in fact, only the first of many steps it should take. The Attorney

General should be undertaking a thorough examination of laws, police and practices affecting women in order to bring them into compliance with the Women's Convention. At present, we know of no government plan to do so.

China is also willing to support discriminatory laws in Hong Kong

Hong Kong's post-1997 mainland Chinese masters have also expressed their approval of the second-class status of Hong Kong women. In the heated battle between the Heung Yee Kuk (the male-only political organization controlling the indigenous villages in Hong Kong's New Territories) and indigenous women and women's groups over the issue of the right of indigenous women to inherit property, China supported the Heung Yee Kuk. It opposed a legislative proposal to grant indigenous women equal rights to inherit property, despite the fact that discriminatory property rights were repealed in China shortly after the communists took over in 1949.

Ironically, the Heung Yee Kuk successfully pleaded its case to China on the basis of preserving Chinese 'culture and tradition' in this one small part of China. This very same Chinese 'culture and tradition' were central targets of communist attack during the revolution. The real reason for opposition is much simpler: these privileges are worth billions of Hong Kong dollars. Fortunately, the discriminatory inheritance law was amended despite China's disapproval.

Unfortunately, though, New Territories indigenous women continue to be deprived of other property rights that are accorded to New Territories indigenous men. The Chinese government has already expressed its willingness to uphold these discriminatory property rights. (See discussion 4.) Thus, the best solution would be for a legislative amendment, prior to 1997, extending to indigenous women the special privileges now granted solely to indigenous men.

ARTICLE 2:

UNDERTAKING TO RESPECT AND ENSURE RIGHTS WITHOUT REGARD TO SEX AND TO ADOPT EFFECTIVE LEGISLATION

The Bill of Rights Ordinance ("BORO") only partially implements Article 2 of the ICCPR.

The Hong Kong government's Report to the Committee (the "Hong Kong Report") mentions the passage of the BORO. It should be noted that BORO only partially implements the ICCPR as the BORO is restricted to the public sector. It has no effect upon discrimination in the private sector. Nor does it provide any ground for challenging any law that permits a private party to violate someone's ICCPR rights in the private sector. In other words, while people may use the BORO to challenge discriminatory treatment by the government, they cannot challenge the government's ability to pass discriminatory legislation permitting discrimination in the private sector. The original draft of the BORO had included a provision extending application to the private sector, but that was dropped just prior to enactment.

In this manner, the British and Hong Kong governments have failed fully to implement the ICCPR in Hong Kong despite the fact that Article 39 of the Basic Law preserves the application of the ICCPR in Hong Kong after 1997. Both governments have rejected calls for full equality in favor of vested businesses interests that demand the right to discriminate against women (and others) for what they allege is the greater good - the economy. However, the traditional rulers-behind-the-scenes, the leaders of the business community, have never submitted any evidence to support this claim, presumably because it has never been shown in any society that the greater good of society

can be obtained by suppressing the rights of a segment of that society (which segment, it should be noted, is also a part of the greater society supposedly benefiting from economic development).

We urge the Committee to recommend that the Hong Kong government amend the BORO to extend its effect to the private sector.

ARTICLE 3:

UNDERTAKING TO ENSURE EQUAL RIGHT OF MEN AND WOMEN TO THE RIGHTS CONTAINED IN THE ICCPR

Proposed reservations to the Women's Convention violate Article 26 of the ICCPR.

The Hong Kong Report notes that the Hong Kong and British governments agreed last year to the extension of the Women's Convention to Hong Kong. Extension has been delayed for almost a year now and the British government still has not decided which reservations it will make. Furthermore, it has said that it will discuss the matter with the Chinese government so it is unclear, at this time, how much longer this process will take. Thus, we ask the Committee to urge the British government to make a speedier and concerted effort to conclude the process as soon as possible so that work can begin on drafting implementing domestic legislation.

The British government has stated that the following two reservations, at a minimum, will apply: one which permits indigenous men (but not women) to build small houses in or near their villages (the Small House Policy) and another which exempts indigenous males from paying market rents on certain property in the New Territories (the Rent Concessions Policy).¹ Both of these reservations will continue the present discriminatory policy of granting indigenous men a special economic right not extended to indigenous women. The Rent Concessions Policy also has the effect of inducing men to draft wills to pass on the property subject to the low rent to male members of their family because those men will be able to continue to pay the lower rent. If female relatives were to inherit such property, they would have to pay a higher, perhaps even a market, rent. This is in direct violation of Article 26 of the ICCPR which states that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...sex...."

These reservations are supported by Articles 22 and 40 of the Basic Law of the Hong Kong Special Administrative Region ("Basic Law"), Hong Kong's constitution after 1997. These provisions constitute a clear expression of the Chinese government's support of this discriminatory policy and means that, unless these policies are overturned before 1997, they will be extremely difficult, if not impossible, to overturn afterwards. Thus, the British and Hong Kong governments' claims that the extension of the Women's Convention will ensure women equal rights in Hong Kong ring particularly hollow for indigenous women. For these women, the extension of the Women's Convention to Hong Kong will do the opposite; it will perpetuate and codify the discriminatory status quo.

Therefore, the Hong Kong Council of Women urges the Committee to ask the British government to drop these two reservations and to extend the Women's Convention to Hong Kong without any reservations.

¹Hong Kong Report, sec. B, art. 29.

ARTICLE 23:

The 'Family'

Government policies are biased against single-parent families, which are predominately female headed

Until the Hong Kong government recognizes that the definition of "family" encompasses more than the traditional heterosexual, male-dominated nuclear or extended 'family,' the entitlement of all families to the protections called for under Article 23(1) will continue to be extended on a discriminatory basis. Present governmental policies are constructed to protect the 'family unit' that consists of a working father, non-working (or working only for 'extra' money) wife, dependent children and, perhaps, an aging parent or two.

The Hong Kong Report speaks of the "extended family," the "nuclear family" and single parents.² The choice of words is telling. They express the view that single-parent families, which are predominantly female-headed³, are 'problematic' aberrations of 'normal' family life because they consist of one parent rather than two. Thus, they are not 'families.' Consequently, the government's objective is to prevent the creation of female-headed households rather than to support all families, whether two-parent or one-parent. While we do not advocate divorce for its own sake, neither do we support the institution of marriage for its own sake, especially if a member of the family is being psychologically or physically harmed. We recognize that divorce is inevitable in many cases. The government apparently does not share this view. For example, battered women report that government social workers urge them to return home to their battering husbands rather than advising them that they have an alternative - to apply for financial aid and housing and move temporarily into a battered women's shelter. The reason is simple: the government policy is to 'maintain the male-headed family unit' at all costs.⁴

We ask the Committee to urge the government to extend Article 23 protections to all types of families, whether they are single-parent, two-parent (married or cohabiting), heterosexual or homosexual.

ARTICLE 25:

RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS, TO VOTE AND TO BE ELECTED

Equal voting rights denied to housewives (as well as retired persons, the unemployed and students)

Pursuant to Hong Kong's colonial form of government, elections have traditionally been reserved for members of the ruling elite by a system of 'functional constituencies' in which a few had

²*Supra*, sec. B, arts. 271-272.

³In 1991, there were 34,538 single parent families in Hong Kong, of which 23,059 were female-headed families. The large number of male-headed single parent families in Hong Kong is due, in large part, to the forced separation of Hong Kong men from their mainland Chinese wives who must wait years for an entry visa into Hong Kong.

⁴The government's belief that male-headed households are the norm is also reflected in the government's analysis of 'heads of household by sex.' (Annexe, Section a, Part I.1.1.) It reports that 74.3% are male and 25.7% are female. Even if these figures are self-reported, the mere asking of the question - "who is the head of your household" - presumes that families are based on an unequal relationship with a traditional male head.

the right to elect some representatives to the Legislative Council and the government had the right to appoint all the other representatives. The system has changed dramatically over the last few years in that there is now a system of general elections in which people directly elect representatives to the Legislative Council. The functional constituencies have also been 'democratized' in that each worker within each constituency now can vote for the constituency's representative. This means that all 'working' people in Hong Kong now have two votes - one for their directly-elected representatives and one for their functional constituency representatives.

However, as women who work at home are not considered to be 'working' in the capitalist sense, they do not have a functional constituency vote. The government refused to create a new functional constituency seat for voters who do not receive a salary. As of the 1991 population census, there were over 621,000 housewives, almost all of whom are ethnic Chinese women. (About 97% of the population is ethnic Chinese.) It is ironic that these women are denied the right to a second vote while thousands of foreigners, who have much less at stake in the future of Hong Kong than do these Hong Kong women, are able to vote twice simply because they have lived here seven years and are employed in salaried jobs.

Admittedly, there are thousands of other Hong Kong residents (students, unemployed and retired) who are similarly deprived of the right to vote, but the disproportionate effect of the law is upon women. Ironically, many of those who are categorized as 'housewives' are actually women who have been forced out of the job market by employers who refuse to hire women over the age of 30-35 and by a government that continues to refuse to legislate against this blatantly discriminatory practice.

We ask the Committee to urge the government to develop a mechanism that would grant a functional constituency vote to persons such as housewives, the unemployed and retired and students who are otherwise eligible to vote in Hong Kong.

Differential treatment of men and women in the jury system

Juries are used only for serious criminal cases in Hong Kong. Under Hong Kong law, both the prosecution and the defense are entitled to request an all-male or all-female jury.⁵ The reason for this law are unclear. Not only does the law fail to comply with the non-discrimination provisions of the ICCPR, but it also has the potential of denying defendants of a right to a trial before their peers as single-gender juries would only represent 50% of the community-at-large.

The law further discriminates between men and women as it permits women to withdraw from jury duty on the ground that they are unable to hear certain types of evidence or deal with certain types of cases ("the nature of the evidence to be given or the issues to be tried").⁶ No explanation or justification is given, but the rationale is obvious: women are weak creatures who need to be protected from the harsher side of life and men are the only gender that is inherently capable of fully fulfilling this civic duty.

We ask the Committee to recommend the repeal of these provisions.

ARTICLE 26:

EQUALITY BEFORE THE LAW AND EQUAL PROTECTION OF THE LAW

⁵Cap. 3, 20(a).

⁶Cap 3, art. 20(b).

Hong Kong women's legal status is inferior to that of their British sisters and fails to satisfy Article 26.

When the British colonial administration leaves in 1997, it will leave behind a legal system of which it can be proud. But this is not to say that further significant improvements cannot be made, especially with regards to women. The Hong Kong Report is correct when it states that women's status and situation has improved tremendously over the last decade. Nonetheless, the British government will leave behind a legal system in which all women are accorded a second-class legal status. At a minimum, it should extend to Hong Kong women the same legal protections and rights that it has extended to women in Britain. The following contain some examples of these differences, as well of areas in which the present law, rules and practices fall far short of the requirements of the ICCPR (as well as the Women's Convention). The list is not exhaustive, merely illustrative of the work that needs to be done.

Legal discrimination in employment violates Article 26 and contributes to working-class women's unemployment

Hong Kong's bubble of prosperity has burst for working-class women. Over the last 25 years, Hong Kong's dynamic economy has provided opportunities for many women to advance. However, recently, the economy has experienced a slowdown, which has been precipitated by a massive shift of Hong Kong's manufacturing base to China. Working class women have been the group most adversely affected by this move because their factory jobs have disappeared. A large percentage of these women are over 30 and unable to find new employment. They eventually give up looking and stay home. Their unemployment is not reflected in Hong Kong's comparatively low unemployment rate, because unemployment statistics do not include people who have given up looking. Women who are consistently told that they cannot even be considered for a job because of their age do finally give up. At that point, they fall off the unemployment statistics and into the 'housewife' category. Thus, the government's claim that "unemployment and underemployment rates for women are lower than those for men"⁷ is misleading, if not disingenuous. Official rates are low because of the methodology used; they do not reflect the real situation of unemployed middle-aged working-class women.

The real rate of women's increasing unemployment rate is reflected elsewhere: the labor participation rate of women aged 35-39 dropped from 57% in 1986 to 52% in 1994 and aged 40-44 from 60% in 1986 to 53% in 1994.⁸ The government would have us believe it is because women voluntarily choose to stay home but our (admittedly anecdotal) experience with grassroots women's organizations leads us to believe otherwise. Women stay home because there are fewer jobs available for working class women once they turn 30 or 35.

It is important to note here that poverty, in general, has increased dramatically in Hong Kong since so much of the manufacturing industry has moved across the border. In fact, poverty has now increased to such an extent in Hong Kong that Oxfam has commissioned a study on the subject.⁹ As noted by Dr. Lui Tai-lok, the academic hired by Oxfam to conduct the study, middle-aged women comprise one of the categories of people who are "primarily affected by poverty" in Hong Kong.¹⁰ Unemployment certainly is a factor contributing to their poverty.

⁷The Hong Kong Report, sec. B, art. 47.

⁸Sunday Morning Post (Hong Kong), June 4, 1995, p. 9, col. 1.

⁹Eastern Express (Hong Kong), May 15, 1995, p. 4 col. 1.

¹⁰Id.

Lawful age discrimination primarily affects women. Age discrimination is one of the main sources of women's unemployment, notwithstanding the government's contentions to the contrary. It is legal for employers to discriminate against workers on the basis of age. Indeed, the majority of job advertisements that openly state that candidates must be a certain age, normally under 30 or 35, are directed at women, not men. Not only does this work to depress women's wages and deprive working women of the ability to work, but it also perpetuates the sexist notion that women should be valued for their youth and appearance, rather than for their work-related qualifications.

The government has said that it will undertake a study to determine "the extent of discrimination based on...age."¹¹ However, the outcome of that study is predetermined by the government's view that the problem is caused by women's "lack of qualifications or skills" or "family responsibilities"¹² and that employers' responses are a market choice ("[e]mployers...are free to make employment choices that most suit their individual needs"¹³). The government thus has decided to reject the possibility that women's unemployment is exacerbated by age discrimination and that employers' choices are often arbitrary and sexist, rather than based on the market.

The Council finds the very notion of conducting a study to determine the extent to which people's human rights are being violated to be curious. If there is no problem, then there should be no opposition to legislation to prevent it from becoming a problem. If there is a problem, then legislation should be drafted to solve the problem. Either way, legislation results. However, the government is asking a different question: how much hardship will we allow people to suffer as a result of lawful discriminatory behavior before we will step in? In their view, the denial of human rights is acceptable in order to protect business interests, but only up to an undetermined and unarticulated point. This is the real purpose of the study -- to determine whether a sufficient number of women are being harmed to warrant the government's intervention.

We ask the Committee to support the demands of Hong Kong women for legal recognition of their right to non-discriminatory labor laws and to enforcement of sanctions against employers who discriminate against women on the basis of gender or age.

The criminal justice system's sexist underpinnings

Hong Kong's criminal justice system, while deserving of respect and admiration, has yet to address the sexist assumptions that are inherent in many of its rules and practices. Particularly troublesome is the fact that sex discrimination is reflected in the criminal justice system and that there is no effort presently being made to address the issue. In fact, the sex bias in the law is so deeply entrenched and accepted as fact that there is little understanding on the part of members of the legal establishment that many of their views are biased. From the vantagepoint of women, until this problem of institutional bias is addressed, the legal system will fail to satisfy Article 26's requirement that "[a]ll persons are equal before the law and are entitled, without any discrimination to the equal protection of the law." Article 26 applies, not only to defendants, but also to victims and to complainants, of which women are a significant number.

Juries are given the antiquated warning that sexual assault victims (who are overwhelmingly women) are prone to lying. While the Council is concerned with many discriminatory and harmful aspects of law, practices and procedures relating to sexual offense crimes, we will only focus on one rule because it is indicative of the degree to which the system is

¹¹The Hong Kong Report, sec. B, art. 353.

¹²*Supra*, sec. B, art. 47.

¹³*Id.*

biased against female victims. This is the outdated and humiliating rule of practice that, in 'cases of a sexual nature,' judges must give the following type of warning to the jury:

Members of the jury, in dealing with sexual offences such as rape, you have to be extremely cautious before returning a verdict of guilty. Human experience has shown that people who allege that a sexual offence has been committed against them do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. They sometimes tell lies for a variety of reasons such as indulging in a fantasy to exercising spite or malice, or for some neurosis or some psychological disorder, or for no reason at all. Therefore, I must warn you that in the present case, it is dangerous to convict on the offence of rape on the evidence of the victim alone in the absence of corroboration.

Failure to give such a warning is grounds for an appeal and could result in a guilty verdict being quashed. This warning is given in cases of gang rape, stranger rape, and rapes involving robberies where no corroboration is required from the same victim regarding the robbery. Although the warning refers to 'people,' the meaning of 'people' in the context of sexual offense overwhelmingly refers to women as women are the overwhelming majority of the sexual offense victims. The rule, then, was created specifically for application in cases involving female victims and male defendants.

The warning expresses a view of women that was prevalent in the 1600s when it was developed; such a view is unacceptable in any modern society, as witnessed by the fact that numerous common law jurisdictions have already abolished it. It is an insult to all women and is highly prejudicial to a victim's credibility in the trial as it is a direct and unproven attack upon her motivations and character. There is not now, and there never has been, any statistical or other evidence to support the charges made in the warning. Rather, the language is based upon prejudicial sexual stereotypes about women's behavior that have become part of the entire mythology surrounding the crime of rape. Stereotypes and myths have no place in a court of law.

The British, who brought the warning to Hong Kong, have already abolished the requirement.¹⁴ Hong Kong should do the same in order to assure women "equal protection of the law." We urge the Committee to request the Hong Kong government to enact legislation abolishing this rule of practice. In addition, we believe that the entire set of laws, rules and practices surrounding sexual assault offenses, from the time of reporting to the police to conviction, should be studied for bias. The Council has, unfortunately, seen evidence of rape myths and sexual stereotypes used and reinforced throughout the entire process.

Women's right to expect justice thwarted by police misconduct in coercing confessions from rape suspects. Rape and sexual assault cases suffer from a low rate of prosecution and convictions. There are many reasons, legal as well as cultural, for this phenomenon. However, one possible, and disturbing, reason for a low rate of conviction can be traced to the fact that a number of defendants' confessions are thrown out by the judge because they had been coerced, or otherwise been improperly obtained, by the police. It is not possible, until statistics are gathered and analyzed, to know just how many confessions have been declared inadmissible because of police misconduct. However, the author was surprised to discover, in a study of rape cases in 1993, that a larger-than-expected number of cases involved coerced confessions. Until statistics are gathered, it is impossible to know whether 1993 is representative of all years.

¹⁴Criminal Justice and Public Order Act 1994.

Nonetheless, it is possible to make the general observation that more convictions could probably have been obtained if those confessions had not been coerced and had been entered as evidence. It is also highly likely that there could have been some innocent defendants who were convicted by the use of coerced confessions. A double miscarriage of justice may thus be occurring victims and potential victims are not protected when the wrong person is convicted or the right person is set free and innocent defendants suffer significant human rights violations if prosecuted and convicted by the use of coerced confessions.

We, therefore, urge the Committee to ask the Hong Kong government to commission a study to investigate police practices in dealing with rape and sexual offense defendants and to gather statistics on the prevalence of defendant allegations of, and court findings of, coerced confessions in rape and other sexual offense trials.

Although now recognized in English law as a crime, marital rape remains legal in Hong Kong. Both traditional Chinese law and traditional British law assumed that married women cannot be raped because wives do not have a right to say no to sexual relations with their husbands. This assumption has been abolished by an Act of Parliament in Britain, which means that women in Britain have been able to regain legal control over their own bodies. Hong Kong women, unfortunately, remain without any recourse to this type of sexual violence simply because of their status as wives.

Marital rape is a serious problem. Battered women in Hong Kong cite marital rape as one of the forms of abuse used by their battering husbands to humiliate, frighten and control them. They know that the law will not protect them. If these battered woman had been raped by a friend or stranger, or if the husbands had raped someone other than their wives, the law would protect the women and punish the men. Thus, the only difference between the two situations is the status of the women as a wife. The harm to the women is the same; they have been deprived of their right to control their bodies and have been subjected to an humiliating and degrading experience in the process.

The only justifications raised in support of the continued exception for this type of rape is 'tradition,' 'family' privacy and 'Chinese culture.' Ironically, this legal rule comes out of the British tradition and culture, not the Chinese. In any event, legal support for this male privilege is in direct violation of Article 26 of the ICCPR and, arguably, Article 7 as a form of government-sanctioned, privately-implemented torture or cruel, inhuman or degrading treatment.

It is theoretically possible for a woman to file a complaint of marital rape with the police and for the Legal Department to prosecute the husband based on a House of Lords ruling in the United Kingdom. That ruling is not binding precedent in Hong Kong, but would be persuasive authority for the Hong Kong courts. In fact, two members of the Legal Department have informed the author that they would be willing to prosecute a marital rape case based on this House of Lords precedent. However, Hong Kong women are not aware of this ruling in a foreign court and so cannot be expected to bring such a case. Anyway, the police are probably not aware of it either and would reject the woman's complaint.

For this reason, we ask the Committee to recommend that the Hong Kong government enact a legislation criminalizing rape in marriage.

Battered women are deprived of equal protection of the law.

Police fail to treat battered women the same as other assault victims. A frequent complaint of battered women in Hong Kong is that, when they report the abuse to the police, the police simply

tell them to return home and try to be careful not to anger their husbands again. The message given by the police to the women is 'don't bother us with your personal matters.' This helps to explain the extremely low number of reported cases of domestic violence in police records. The women's complaints simply are never registered.

Statistics from Harmony House (a battered women's shelter) raise questions about police handling of women's complaints. Among the women seen at Harmony House in 1991-92, 52% had reported the abuse to the police, 89% had suffered from physical abuse for over 3 years and 60% had received medical treatment as a result of the physical abuse. The questions these statistics raise is why, if so many of these women reported the abuse to the police (many more than once) and had had serious enough injuries to have to seek medical attention, did they end up in Harmony House? Women who suffer so much violence for such a long period and who report the violence to the police are obviously not being provided with equal protection under the laws by the police or legal system.

Women's right to "equal protection of the law" includes the right to expect the police to take seriously their complaints of assault by husbands or partners. Women who are unable to resort to the legal system for protection from battery simply because the batterer is their husband or partner rather than a stranger or an acquaintance are deprived of their rights under Article 26.

Thus, we would like the Committee to recommend that the government require the police to record all reports of domestic battery and institute training courses for all police officers (not just a select few in each precinct) for the purpose of changing the police officers' attitudes towards, and methods of dealing with, domestic violence cases.

The Legal Department appears to differentiate between prosecution of cases involving battered women and other cases of battery. Recent events have shown that the Legal Department does not take wife abuse seriously. Its attitude effectively denies battered women their right to legal protection and to any expectation of receiving justice.

In 1994, the Attorney General charged a man with unlawfully wounding his wife with a knife. The charges were based upon the testimony of the wife and a medical report. Nonetheless, when the case went to court, the Attorney General intervened in the matter and offered no evidence against the defendant, thereby obtaining an acquittal. The magistrate expressed surprise that the charges were being dropped and public reaction was immediate surprise and outrage. Police too were concerned because the evidence was sufficient to go to trial while women's groups were outraged because this could affect battered women's attitudes towards the judicial system and deter more women from reporting cases of violence. Private lawyers were so amazed at the inaction of the Legal Department that some even offered to assist the victim in a private prosecution against her husband. One stated that there was 'a prima-facie case' against the defendant.

The Hong Kong Legislature summoned the Attorney General to appear and explain to them why the prosecution had been dropped. He refused to give any explanation, other than to say that the Legal Department had taken "into account the interests of the victim, those of the accused and the wider public interest." A legal expert, Nihal Jayawickrama, pointed out that the only ground upon which the government could plausibly base its decision to drop the charges was 'public interest' as there was a witness willing to testify and adequate evidence to proceed. He states "it is incomprehensible how the public interest can possibly require a domestic violence prosecution to be suppressed."¹⁵

¹⁵24(2) H.K.L.J. 166, 171 (1994)

We question whether the government has failed to fulfill its Article 26 duty to deliver equal justice to all in this case. The Council urges the Committee to ask the government what standards it applies in determining whether or not to prosecute battering husbands and whether those standards differ from the ones applied to non-marital cases of physical assault. For example, would this case have been dropped if the same man had used a knife to physically assault a stranger? If different standards exist, the government should be asked to eliminate the distinctions. Violence is violence, whether in or out of the home.

Commercial sex workers are also denied equal treatment under the law and equal protection of the laws. Prostitution itself is not illegal in Hong Kong but soliciting for the purposes of prostitution is a chargeable offense. The word 'soliciting' has been interpreted by the police to apply only to women and, thus, men who solicit commercial sex workers are not arrested, but the women who are solicited are arrested. Also, men who solicit other women and even school girls are not arrested. In fact, commercial sex workers are blamed by the police for the men's solicitation of non-sex workers because, it is argued, the men would not be in the area if it were not for the sex workers.

Additionally, women who were arrested for 'soliciting,' until recently, could not obtain free legal representation because the duty lawyer scheme for the provision of lawyers in Magistrates Courts does not include the offense of 'soliciting'. Through the intervention of an organization working with commercial sex workers, women arrested for soliciting can now obtain legal representation. However, 'soliciting' is still not officially included in the list of offenses covered by the duty lawyer scheme, which means that legal representation is only a privilege, not a right. This privilege should be codified as a right.

The same organization working has also recently complained to the Legislative Council Secretariat that commercial sex workers suffer even further discriminatory legal treatment. Their complaint notes that "the police entrap women into agreeing to have sex for a fee, or the police merely ask to see the I.D. cards of women waiting inside doorways or walking along the streets of Sham Shui Po, then call the police car and arrest them for soliciting." They note that arrest details are "rarely accurate and there is usually pressure placed on the women to sign the charge sheet" even though they have a right not to sign. They are not usually given a copy of the report. Several cases of physical and/or verbal abuse by police are reported but the women do not report it "because of fear of repercussions against them on the street."

Members of the organization have observed that "magistrates, on knowing that the women work as prostitutes, appear, for the most part, to have decided they are guilty" and "some magistrates regularly refer to them, in the hearing of the public in the gallery, by using the Cantonese slang for prostitute - 'chicken'." (Emphasis added.) Lastly, police testimony is always given more weight than the testimony of the women because magistrates "state that they believe...police...are 'credible witnesses,'" thereby implying that all commercial sex workers are inherently not credible.

The Council is deeply concerned about these allegations, which, if true, demonstrate a marked insensitivity and lack of understanding of basic human rights principles and a willingness to treat some of society's most vulnerable citizens, persons who have been marginalized socially and economically, as less deserving of human dignity and basic rights than other citizens. We urge the Committee to seek answers from the Hong Kong government to these allegations, to ask the government to launch an investigation into police and magistracy practices regarding arrests and trials involving commercial sex workers, and to codify the right of free legal representation for the offense of soliciting.

Contract law's discriminatory treatment of family contracts

The law of contracts presumes that contracts in the private sphere are not meant to be enforceable, despite the existence of all the objective elements necessary to establish a contract in the public sphere. Traditionally, this rule served to protect men from having to fulfill their promises to the wives even if wives had kept their promises and had suffered a loss as a result. The only conditions under which women (or any family member) can enforce a contract made within the family is if the contract is made while the spouses are separated and on hostile terms, or if the terms of the contract are contained in a formal document. For example, in a not unusual case, a husband and wife agree that the wife will work for four years to support the husband while he studies and the husband agrees to do likewise after he has been graduated. After graduation, the husband abandons the wife and refuses to keep his promise. Under existing law, the wife cannot enforce the agreement because it was not in writing and was made when they were happily married. The law fails to recognize the fact that happy couples will not find it necessary to resort to the courts to solve their problems but couples in trouble often do.

Of course, in a truly equal world, the effect of the rule would be the same for men and women; however, the rule was created at a time when women had no wealth or income and relied heavily on their husbands for support and it was intended to protect those men and their wealth from claims made by their wives. The rule is simply outdated. In the modern world, husbands and wives should be able to contract in the same manner that close friends and distant businesses can and should be able to expect courts to enforce contractual obligations when called upon to do so. The law should not presume that it has no authority to uphold a contract simply because it is deemed to belong to the 'private' sphere rather than the public realm.

We request the Committee to ask the Hong Kong government to overturn this common law rule with appropriate legislation.

THE ICCPR AND VIETNAMESE MIGRANTS IN HONG KONG

**BY: Mr Paul Harris
Barrister; Chairperson, Hong Kong Human
Rights Monitor**

THE ICCPR AND VIETNAMESE MIGRANTS IN HONG KONG

BY

PAUL HARRIS

1. Since June 1988 the Hong Kong Government has operated a policy under which Vietnamese people arriving in the territory and claiming refugee status are detained in closed camps pending consideration of their applications for refugee status. If the applications are accepted they are permitted to transfer to an open camp. If they are refused they must remain in the closed camp until they are returned to Vietnam, either under voluntary arrangements or compulsorily.

2. The process of considering the applications of these Vietnamese migrants is a 2 stage one, with an initial decision by officials acting for the Director of Immigration, and a right of appeal to a specially created tribunal, the Refugee Status Appeal Board (RSRB). In addition an applicant can apply direct to the United Nations High Commissioner for Refugees to exercise power under his mandate to determine that the individual concerned is a refugee. The 2 stage procedure operated by the Hong Kong Government is known as screening. Successful applicants are "screened in", unsuccessful ones are "screened out".

3. The screening process is extremely slow. So, after screening procedures have been completed, is the making of arrangements for repatriation to Vietnam. Those to be repatriated must be individually approved by the Vietnamese Government, which has in the past made plain its disapproval of compulsory repatriation.

4. Although the number of new arrivals of Vietnamese people seeking refugee status is now very small the result of the delays mentioned above and of the large number of arrivals in the late 1980s and early 1990s is that there are today about 21,000 Vietnamese people detained in closed camps. All of these people have now been screened out, the screening process having been completed (save for any later new arrivals) in December 1994. Many of them have been in the camps since 1988 or 1989. In addition many children have been born in the camps.

5. The closed camps - officially known as detention centres - are prisons in all but name, save for the fact that the prisoners are not subject to prison disciplinary regulations, and so are not locked in cells, but are free to circulate within the wired in and heavily guarded compound or camp section within which they are detained. Accommodation is provided by barrack-like dormitories where one family normally shares a large bunk bed known as a bed space. In the largest detention centre, Whitehead, the showers are located in the open directly above the open drain type latrines. In relation to both sleeping accommodation and washing facilities, conditions are worse than in Hong Kong's designated prisons for convicted criminals. Many of the detainees, including young children, have been detained in these conditions for up to 7 years - a period longer than the Second World War, and coincidentally the period of the maximum sentence of imprisonment which can be imposed

by the Hong Kong District Court for the most serious offences which it is permitted to try. The periods of years for which one group of detainees had been held were recently described by one Hong Kong High Court judge as "At first blush an affront to the standards of the civilised society which Hong Kong aspires to be." (Keith J. in Re Chung Tu Ouan & Ors 1995 1 HKC 566).

6. The question arises whether this detention of these people in these conditions for so long is in conformity with international human rights law and in particular with the International Covenant on Civil and Political Rights (ICCPR).

7. However, before tackling this question it may be helpful first to outline the position of these detainees and their rights under Hong Kong law.

8. Powers relating to the detention of Vietnamese refugees are contained in Part IIIA of the Immigration Ordinance (Cap. 115) as amended Section 13 D of the Ordinance provides that as from 2 July 1982 any resident or former resident of Vietnam who arrives in Hong Kong without a visa or visa exemption may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director [of Immigration] in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong, and any child of such a person, whether or not he was born in Hong Kong and whether or not he has requested permission to remain in Hong Kong, may also be detained, unless that child holds a travel document with such a visa or has been granted such an exemption."

9. Section 13D(1A) of the Ordinance goes on to provide that:

"The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person's detention, including:

(a) in the case of a person being detained pending a decision under Section 13A(1) to grant or refuse him permission to remain in Hong Kong as a refugee -

(i) the number of persons being detained pending decisions... whether to grant or refuse them such permission; and

(ii) the manpower and resources allocated to carry out the work involved in making all such decisions;

(b) in the case of a person being detained pending his removal from Hong Kong -

(i) the extent to which it is possible to make arrangements to effect his removal; and

(ii) whether or not the person has declined arrangements made or proposed for his removal.

10. These provisions not only give explicit statutory authority for the detention of Vietnamese asylum seekers. They also appear to restrict severely the scope for challenges to the continued detention of individuals on the basis that the detention is unreasonable because it is of excessive length. If Section 13D1A had not been enacted the relevant provision with regard to the permitted

length of detention would, in the absence of any specific statutory time limits, have been Section 70 of the Interpretation and General Clauses Ordinance, which provides that "where no time is prescribed or allowed within which any thing shall be done, such thing shall be done without unreasonable delay".

11. The case of Re Chung Tu Ouan & Ors (above) is a challenge to the reasonableness, and thus the lawfulness, of the continued detention of a group of detainees whom it was claimed would never in fact be accepted back by Vietnam because they held or were deemed by Vietnam to hold other nationalities, in several cases so-called Taiwanese passports which did not in fact give them the right to enter Taiwan. The challenges were brought by way of writs of habeas corpus, which are available in Hong Kong on the same basis as in the United Kingdom under the provisions of the Application of English Laws Ordinance (Cap 88) which applies to Hong Kong the English Habeas Corpus Acts of 1679 and 1815. In 3 cases Keith J held at first instance that the continued detention was unlawful. He held that a power of detention which is not expressed to be limited in duration is nevertheless to be regarded as impliedly limited to (a) such period as was reasonably necessary to achieve the purpose for which the power was granted and (b) those cases in which that purpose could be achieved within a reasonable time. He held that it was for the court and not the person in whom the power of detention was vested to determine what period was reasonably necessary to achieve the purpose for which the power was granted and whether that purpose could be achieved within a reasonable time. In the 3 cases concerned he held: that on the balance of probabilities it was likely that the Vietnamese authorities would refuse to accept them for repatriation; that there was therefore no reasonable prospect of their being removed from Hong Kong in the foreseeable future and that their continued detention was therefore unlawful.

12. This decision has been reversed by the Hong Kong Court of Appeal (Power VP, Litton VP and Mortimer JA: 1995 Civil Appeal No 31). Litton VP stated that once it was shown that attempts were still being made to repatriate the applicants that was conclusive proof that their detention was lawful. This decision is being appealed to the Judicial Committee of the Privy Council.

13. Whatever the ultimate outcome of the Chung Tu Ouan case it will primarily affect the relatively small proportion of detainees for whom there is an obvious impediment to repatriation such as an issue of nationality

14. Other legal challenges to the procedures for dealing with Vietnamese refugees have been applications for judicial review based on the procedural correctness of the screening procedure, an issue which potentially affects every one of the detainees. Underlying these challenges is a widespread concern among lawyers and aid agency officials who have worked with the refugees that the operation of the screening procedure is tainted with bias against the applicants and that there are a substantial number of people who are genuine refugees and who have been wrongly screened out. (A useful survey which concluded that there was such bias is "Hong Kong's Refugee Status Review Board: Problems in Status Determination for Vietnamese Asylum Seekers" ; Lawyers Committee for Human Rights, New York, March 1992).

15. The first of these challenges was made in R. v Director of Immigration and Refugee Status Review Board ex parte Do Giau & Others (1992) 1 HKLR 287. In that case Mortimer J. held that the decisions of the Immigration Department and of the Refugee Status Review Board were flawed on grounds of procedural irregularity and should be quashed. The particular facts of the case involved an erroneous record by the Immigration Officer that the applicant had once worked in a state-owned rice mill. Working in the state sector would be a significant adverse finding in relation to screening as a refugee. In fact the applicant had not worked in such a place and the recording was an error, but this was not discovered until after the hearing before the Refugee Status Review Board.

16. In Re Le Tu Phuong & Ors (1992) MP No. 2368 Liu J. held that the procedures employed in a particular case were flawed in that they did not provide for the interviewing Immigration Officer to read back his notes to the interviewee to ensure that they were an accurate record of what had been said. This decision was however again reversed by the Court of Appeal (1993 Civil Appeal No. 164). The Court of Appeal stated that generally speaking as a matter of good practice read-back of notes taken by an interviewer was desirable, but that it was not required in order to comply with the procedural requirements of natural justice.

17. A further challenge by way of judicial review was brought in Tran Quoc Cuong and Khuc The Loc 1991 2 HKLR 312. This was based on the failure to assess detainees' cases individually before the initial act of detention on arrival, and on the transfer of some detainees to Stanley Prison, which was alleged, but denied by the Government, to be for punitive reasons, Stanley Prison having been designated as a detention centre shortly before the applicants were transferred there. The case was dismissed in strong terms by Jones J., who suggested that the grant of legal aid to the applicants to bring it was close to being an abuse of process.

18. For completeness I also mention 2 other cases. Pham Van Ngo and 110 others ((1991) 1 HKLR 499) concerned the detention, found to be illegal, of 111 Vietnamese boat people who had entered Hong Kong and requested assistance in continuing their journey to Japan, where at that date all Vietnamese boat people were automatically accepted as refugees. In that case the High Court stated that the detention was inter alia a contravention of Article 9 of the ICCPR which provides that no one shall be deprived of their liberty save by law. The detention was also unlawful under Hong Kong domestic law, as it was made on the basis of a blanket detention order applying to all 111 persons, the persons in question were not seeking re-settlement as refugees from Hong Kong, and the 18 month period of the detention was entirely unreasonable. The Japanese Government no longer automatically accepts Vietnamese boat people as being refugees and the circumstances which gave rise to this case are therefore unlikely to recur. Finally in Nguyen Dang Vu & Aor (Unrep. Miscellaneous Proceedings 4257 of 1993 (5.1.1994)) an attempt was made to use the wardship jurisdiction to make a Vietnamese child in one of the detention centres a ward of court with a view to securing his adoption by relatives in California. Kaplan J. held that while in some circumstances the wardship jurisdiction might be exercisable in relation to a child in a detention centre in that case it was being used as a device to delay the child's return to Vietnam and was therefore not a proper use of the jurisdiction and the wardship would be discharged.

19. It will be noted that there are no challenges in the Hong Kong courts based on alleged contraventions of Hong Kong's own Bill of Rights. This is mainly because Section 11 of the Bill of Rights Ordinance (Cap. 383) provides that "as regards persons not having the right to enter and remain in Hong Kong this Ordinance does not affect any immigration legislation governing entry into, stay and departure from Hong Kong or the application of any such legislation". The detention of the Vietnamese migrants is therefore substantially excluded from the ambit of the Bill of Rights. It should be noted however that Section 11 of the Bill of Rights applies to only the part of the immigration legislation governing entry stay or deportation of people with no right to remain in Hong Kong (see Hai Ho Tak v Attorney-General Civil Appeal No 64 of 1943 (8.4.1994). Thus it does not appear to exclude issues involving the Vietnamese detainees which relate not to the fact of their detention but to such matters as whether the particular conditions of detention breach articles such as Article 3 prohibiting any person from being subjected to degrading treatment or Article 6 which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person. The applicability of these articles and the possibility that the conditions in the detention centres breach them does not however appear to have been tested yet in the courts.

20. I now turn to the question of whether Hong Kong Government policy in this area or its application breach any of the provisions either of the ICCPR or of other international human rights instruments.

21. Article 2(1) of the ICCPR provides that each state party to the Covenant undertakes to ensure to all individuals within its territory the rights recognised in the 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. The exclusion of persons not having the right to remain in Hong Kong from the ambit of Hong Kong's Bill of Rights - which is explicitly intended to make the provisions of the ICCPR part of Hong Kong's domestic law - would normally in itself be a breach of the ICCPR. However when the ICCPR was extended to Hong Kong by the United Kingdom's ratification on 20 July 1976 a reservation was entered in the following terms:

" The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12 (4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in relation to each of its dependent territories."

22. This reservation would appear to permit the Hong Kong Government to disapply the Bill of Rights insofar as it conflicts with Hong Kong's immigration law. However the limitation in Section 11 of the Bill of Rights Ordinance quoted above (paragraph 19) appears to go further in that it states that the Bill of Rights is inapplicable not only to immigration legislation but to " the application of such legislation". If the application is taken to mean merely the direct application of the terms of the relevant legislation that would appear consistent with the reservation. If however it were held in domestic law to have a wider meaning i.e so as to exclude all responsibility for breaches of the ICCPR which have occurred in relation to persons subject to immigration control, whatever the

breach and however indirect the connection with that person's immigration status, it is submitted that such an interpretation would be outside the terms of the 1976 reservation and would itself amount to a breach of Article 2 of the ICCPR.

23. The Hong Kong Government in its Fourth Periodic Report to the UN Human Rights Committee deals with the situation of the Vietnamese migrants at some length in its report on Article 9 of the ICCPR, which, as mentioned, deals with the right to liberty. Article 9(1) states that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 9(4) states that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

24. As explained above the detention of the Vietnamese detainees does appear to be in accordance with established laws. Such detentions are open to challenge in court, and a number have been challenged although generally with little success. It appears therefore difficult to argue that the detention constitutes a breach of Article 9.

25. The Hong Kong Government is however on very much weaker ground in relation to the conditions of detention. It is significant that as compared with the lengthy exposition of the situation with regard to the Vietnamese which is set out in relation to Article 9 the Government's report is wholly silent about the Vietnamese in those sections of the report which deal with Article 7 and Article 10 of the ICCPR, which I deal with below. Moreover, as already explained (para. 22 above), the conditions under which detainees are held, save insofar as these are specified in immigration legislation, are not removed from the ambit of the Hong Kong Government's obligations under the ICCPR by the 1976 reservation set out above.

26. Article 7 is sometimes loosely referred to as the article dealing with torture. However its ambit is considerably wider. Its first sentence states that "no one shall be subjected to torture, or to cruel inhuman or degrading treatment or punishment." It seems difficult to deny that locking people up for years in grossly overcrowded conditions, where the only showers are in the open above an open latrine, constitutes cruel and degrading treatment.

27. Article 10 provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Again the conditions in the detention centres would appear to be a clear and serious breach of Article 10. The case law on the application of these articles indicates that the threshold for a violation of Article 10 is lower than that for Article 7 in that the requirement of humane treatment goes beyond the mere prohibition of inhuman treatment under Article 7 with regard to the extent of the necessary "respect for the inherent dignity of the human person" (See Manfred Nowak: ICCPR Commentary, p. 189). The case for a breach of Article 10 is therefore even stronger than for a breach of Article 7. I very much hope that the United Nations Human Rights Committee will condemn the United Kingdom Government for breaches of Article 7 and Article 10 in this context.

28. What of other United Nations instruments with a bearing on the treatment of refugees or persons claiming refugee status? Those most directly relevant are the United Nations Convention on the Status of Refugees 1951 and the 1967 Protocol thereto. These have been signed and ratified by the United Kingdom, but have not been extended to Hong Kong. It is not clear why this has not been done. The United Kingdom and the United Nations High Commissioner for Refugees signed a Statement of Understanding in 1988 whereby the Hong Kong Government agreed to apply the "appropriate humanitarian criteria for determining refugee status" in relation to Vietnamese asylum seekers. These criteria are applied in theory in so far as those involved in the screening process draw on the guidance published by the UNHCR entitled "Handbook on procedures and criteria for determining refugee status". As already explained doubts have been expressed by many of those who have assisted asylum seekers as to whether these criteria have in fact been applied fairly. The official UNHCR position is that all those who have been screened out have been screened out correctly.

29. Apart from the Statement of Understanding international refugee law is not part of the law of Hong Kong. This issue is outside the scope of this lecture but it should be noted that while UNHCR in Hong Kong does informally advise the Hong Kong Government in relation to some applications for refugee status from other countries, such persons have no legal right to UNHCR assistance or to the application of international refugee determination criteria to them. At any one time UNHCR are handling about 10 such cases. However it is not certain that all such cases are correctly identified and referred to them.

30. It is noteworthy that the United Kingdom has recently extended to Hong Kong another international human rights instrument with implications for those detained in the detention centres, namely the United Nations Convention on the Rights of the Child. Article 22 of the Convention deals specifically with children who are refugees or seeking refugee status. It states that:

" States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

31. However in extending the Convention to Hong Kong the United Kingdom Government has entered a reservation which reads as follows:

"The United Kingdom, in respect of Hong Kong...will seek to apply the Convention to the fullest extent to children seeking asylum in those territories except in so far as conditions and resources make full implementation impracticable. In particular, in relation to Article 22, the United Kingdom reserves the right to continue to apply any legislation in those territories governing the detention of children seeking refugee status, the determination of their status and their entry into, stay in and departure from those territories."

32. Two points arise in relation to this reservation. Firstly, it is expressly linked to practicability as affected by conditions and resources. It seems very implausible to suggest that there are conditions or resource constraints which make it necessary to detain children in the types of conditions referred

to above. It follows that notwithstanding the reservation the conditions of children held in the detention centres still breach the Convention, although the intention behind the reservation was clearly to avoid this.

33. Secondly, there is no equivalent reservation to that relating to the Convention on the Rights of the Child in relation to Articles 7 or 10 of the ICCPR as applied to Hong Kong, despite the fact that Articles 7 and 10 are very similar in their wording to articles in the Convention on the Rights of the Child. For example, Article 37 (a) of the Convention on the rights of the child states that “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” This is an exact equivalent of Article 7 of the ICCPR. Article 37 (e) of the Convention on the Rights of the Child states that “Every child deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person”, very similar wording to Article 10 of the ICCPR. The fact that the UK Government felt it necessary or appropriate to enter a reservation covering inter alia Articles 37(a) and (e) of the Rights of the Child Convention in relation to the treatment of the Vietnamese migrants strongly supports the contention that that treatment is in breach both of the Rights of the Child Convention and of the equivalent provisions in the ICCPR

34. What should the Hong Kong Government do to remedy its breaches of Articles 7 and 10 and of the Convention on the Rights of the Child? Government officials have been quoted as saying that it is doubtful whether even with forced repatriations it will be possible to return all those in the Vietnamese detention centres to Vietnam before the transfer of sovereignty 21 months away. The detainees are therefore in many cases going to be in Hong Kong for a considerable further period beyond that for which they have already been held. The question arises whether after a certain period the mere length of detention in the case of a person who had not committed a crime or been charged with one is capable of constituting lack of respect for the inherent dignity of the human person. There do not appear to be any cases on this point. The majority of cases considered so far by the United Nations Human Rights Committee in relation to Article 10 (1) appear to have involved imprisonment or detention linked to an allegation of wrongdoing (see e.g. Larrosa Bequiro No 88/1981 and other cases involving the period of military dictatorship in Uruguay; Marais No. 49/1979; Luyeye Magana ex Philibert No/1981; and Kelly v Jamaica No. 253/1987.). However in principle there must come a point when indefinite detention, even if lawful under domestic law, becomes a breach of Article 10, *a fortiori* in relation to detention of a child. Indeed it could be argued that if international human rights law does not prevent a child from being deprived of liberty for 7 years for no crime it has failed in its primary objectives. Determining at what point length of detention alone becomes cruel and degrading is difficult as individual circumstances vary. However I would suggest that a starting point would be the length of sentence normally imposed in the Hong Kong courts under Section 38 (1) of the Immigration Ordinance on a person who is convicted of entering Hong Kong illegally. The tariff for a typical case of this kind without either mitigating or aggravating factors is currently 15 months. An alternative starting point, more severe to the detainee, would be 3 years, which is the maximum sentence which can be imposed under Section 38 (1). It would seem wrong in principle that people who have arrived by boat from Vietnam can be held in administrative detention for a longer period than people from elsewhere who are imprisoned after conviction by a court.

35. Leaving aside the issue of length of detention much assistance as to what are acceptable conditions of detention for children can be obtained from the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by United Nations General Assembly resolution 45/113 of 14 December 1990. These rules are not accompanied by enforcement machinery such as that incorporated in the ICCPR. Nevertheless as the United Nations approved statement of rules on this subject they carry great weight and are a helpful indication as the matters which would give rise to a breach of Article 10 of the ICCPR. The rules are mainly drafted with juveniles charged with crimes in mind. However Rule 11 makes it clear that they apply to "any form of detention ... from which [the juvenile] is not permitted to leave at will, by order of any judicial, administrative or other public authority". The Rules therefore clearly apply to children held by administrative decision in the Vietnamese detention centres.

36. Rule 33 states that "Sleeping accommodation should normally consist of small group dormitories or individual bedrooms, while bearing in mind local standards". Rule 38 states that "Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facilities in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs." (This is a level of schooling far beyond the rudimentary elementary schooling at present provided in the detention centres). Rule 39 states that "Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes". Rule 94 states that "Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner."

37. All of these rules are being broken in the detention centres. This reinforces the view that conditions there are in breach of Article 10 of the ICCPR. I would suggest that there is no possibility that the breaches of Article 10 can be said to be remedied even in relation to more recent arrivals in the centres until all the breaches of the United Nations Rules for the Protection of Juveniles have been put right.

38. It may be that the Hong Kong authorities conclude that the extra funds required to bring the detention centres up to the standard required to comply with international law are such as to make the whole cost of running the detention centres prohibitive and that in the circumstances there is no need to keep the detainees in closed camps any longer. The original purpose of the closed camps was to deter further arrivals from Vietnam. It may be that this could now be achieved in other ways, e.g. by an abolition of the 2 tier screening process and the immediate repatriation of new arrivals unless they can show compelling evidence of persecution. In such circumstances there is no need to retain expensive and dehumanising guarded camps for people who are not criminals.

39. The suspicion among lawyers and aid workers with the refugees is that conditions in the camps are being deliberately kept bad in order to encourage people to volunteer for repatriation. If this is the case the breaches of Article 10 become much more serious, in that they would then be an instrument of Government policy, rather than solely due to shortcomings at a local level. If it wishes to dispel these suspicions the Hong Kong Government should urgently embark on a programme of improvements. The plea of lack of resources is unconvincing in one of the world's richest territories, and toleration of these abuses in Hong Kong damages the territory's international reputation and will reduce sympathy for any difficulties Hong Kong people may face in the near future as the territory's status changes.

FREEDOM OF EXPRESSION

BY: Mr Kevin Lau
Vice-Chairman, Hong Kong Journalists' Association

FREEDOM OF EXPRESSION

BY

KEVIN LAU¹

1) The Hong Kong Journalists Association (HKJA) notes the British government's fourth periodic report on Hong Kong's implementation of its obligations under the International Covenant on Civil and Political Rights (ICCPR).

2) This fourth periodic report gives more extensive coverage than its predecessor to freedom of expression issues, which are the major concern of the HKJA. However, while the Hong Kong government has addressed a number of these issues since the last report, there remain serious shortcomings - failings even - in the protection of this essential right. These the Association wishes to cover in this submission. They include post-1997 implementation of the ICCPR, the government law reform programme under article 19 and access to information.

POST-1997 REPORTING ON THE ICCPR

3) The fourth periodic report notes, in paragraphs 372-4, that Britain believes that China has an obligation, under the Joint Declaration and the Basic Law, to report on Hong Kong's behalf after 1997. It also states that the British government has made known to China its views as to how Beijing may fulfill its reporting obligations, and will continue to work for a satisfactory resolution of this important question.

4) The report, however, fails to report Chinese comments disputing this obligation. China is not a signatory to the ICCPR, and Chinese sources have been quoted as saying that Beijing would not accept a reporting obligation, because this would mean China itself becoming a signatory to the covenant.

5) The issue of post-1997 reporting is vital to both the protection of human rights in Hong Kong and the proper monitoring of the territory's human rights record. This is particularly important in the light of the possibility that existing laws affecting freedom of expression, including press freedom, may be changed after 1997, if comments about proposals made by a sub-group of China's preliminary working committee (PWC) are to be implemented.

6) The PWC sub-group, which comprises both Chinese and Hong Kong members, has been vetting Hong Kong laws, to determine whether they are compatible with the Basic Law, which will be Hong Kong's post-1997 constitution. They have, in particular, argued that

¹This comprises the text of the submission to the UN Human Rights Committee by the Hong Kong Journalists Association.

recent amendments to the Societies and Public Order Ordinances should be reversed. Further, Chinese officials have expressed concern about the repeal of subsidiary legislation under the Emergency Regulations Ordinance. (See section below on the government's law reform process.)

7) A further concern for the HKJA is the possibility that China will order the repeal or the weakening of the Hong Kong Bill of Rights Ordinance, which mirrors the ICCPR. Shortly after its enactment in June 1991, Chinese officials said they reserved the right to amend or scrap it in 1997. Recently, however, they have been silent on this issue, although there have been suggestions that officials may be ready to tolerate the Bill, albeit without its apparent supremacy over other Hong Kong laws.

8) The HKJA is also concerned about the extent to which the Basic Law could curtail press freedom once the constitution comes into effect on July 1st, 1997. Although article 27 provides for press freedom, albeit in a less comprehensive manner than in the ICCPR, another provision could curtail the operation of the media to an alarming extent. Article 23 stipulates that the post-1997 Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government in Beijing or theft of state secrets.

9) Further, article 158 states that the Standing Committee of China's National People's Congress - which is essentially a political, not a judicial organ - shall have the power to interpret the areas of the Basic Law which fall outside the limits of Hong Kong's autonomy. Article 23 clearly falls within the Standing Committee's jurisdiction.

10) Against the background of these provisions of the Basic Law, the PWC's intimations that amendments to laws may be reversed, and the possibility that the Bill of Rights may be scrapped or amended, are alarming developments, and make the need for adequate monitoring of Hong Kong's human rights record all the more vital.

11) The United Nations Human Rights Committee has discussed this issue during hearings in both 1988 and 1991. On both occasions, the HKJA proposed that Hong Kong should be allowed, under article 48 of the ICCPR, to become a signatory to the covenant, on the basis that it is a member of specialised United Nations agencies, such as the General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organisation.

12) The HKJA notes, in this respect, that article 151 of the Basic Law allows Hong Kong to conclude and implement agreements with relevant international organisations. Further, article 152 stipulates that Hong Kong may participate in international organisations or conferences as may be permitted by China, using the name Hong Kong, China.

13) To our knowledge, there has been little serious consideration given by the United Nations or Britain about the precise mechanism required for the submission of reports on Hong Kong's implementation of the ICCPR. On the other hand, Chinese officials have made their stance on this issue clear - that is they do not believe they have any reporting

obligations. Further, there is very little likelihood that China will become a signatory to the ICCPR, given its extreme defensiveness over its own human rights record.

14) There are now less than two years before China resumes sovereignty over Hong Kong. It is vital, therefore, for the British and Hong Kong governments to take urgent action to ensure that a viable mechanism can be found to ensure post-1997 reporting, either through China or Hong Kong becoming a signatory to the ICCPR.

15) The UN Human Rights Committee should also explore this issue in depth at its forthcoming hearing in Geneva, given that this will be the last chance for its members to consider the Hong Kong question before the 1997 handover, and there are serious doubts over whether there will be any reporting at all after 1997.

THE GOVERNMENT'S LAW REFORM PROGRAMME

16) In August 1992, the HKJA met the Governor, Chris Patten, to press for changes to draconian laws potentially in breach of article 16 of the Hong Kong Bill of Rights Ordinance (which mirrors article 19 of the ICCPR) and which might threaten freedom of expression in Hong Kong. In September 1992, the HKJA submitted a list of 17 laws which breached article 19 or threatened freedom of expression.

17) In March 1993, the government announced the findings of its review, and pledged to repeal or amend some problematic provisions, although it refused to deal with other pressing issues. The HKJA also became deeply concerned about serious delays in the reform process, and wrote on several occasions to the Governor, questioning whether the administration was sincere in wishing to bring about meaningful change.

18) In the period from April to July 1995 - two years after the completion of the review - the government tabled draft legislation bringing about changes to the following laws: Places of Public Entertainment Ordinance; Defamation Ordinance; Judicial Proceedings (Regulation of Reports) Ordinance; Criminal Procedure Ordinance; Complex Commercial Crimes Ordinance; Interpretation and General Clauses Ordinance; and subsidiary legislation under the Registration of Local Newspapers Ordinance, the Television Ordinance and the Emergency Regulations Ordinance.

19) This legislative programme was completed by the end of July 1995, together with article 19-related amendments to the Public Order Ordinance and Summary Offences Ordinance, which had been tabled in the legislature in April 1994. The government also announced that it had submitted proposals to China in relation to Britain's 1989 Official Secrets Act, which applies to Hong Kong, and the Crimes Ordinance, as it relates to treason and sedition. Officials refused to give any details.

20) The HKJA recognises that the government has gone some way towards reforming Hong Kong's antiquated freedom of expression-related legislation. We will not dwell on these laws. However, on much of the most contentious and critical legislation that is most threatening

to freedom of expression, we feel strongly that there remains considerable work to do - on an urgent basis - to bring Hong Kong's laws into line with the ICCPR and to ensure that freedom of expression is protected to the maximum extent possible.

21) In our view, the government is interpreting article 19 in an overly conservative manner, possibly because of innate civil service conservatism and fear of offending China in the final two years before the handover, and this is hindering the law reform process. This is particularly true for potentially harmful security-related laws, which the government seems most reluctant to liberalise. There is a clear need for officials to take a more liberal approach towards interpretation. In view of the possibility that repressive provisions in these laws may carry over into the post-1997 statute book, presenting an open invitation to abuse.

22) Our list of demands for action by the Hong Kong government is set out below, with cross-references to the relevant sections in the Fourth Periodic Report:

OFFICIAL SECRETS ACT 1989 (PARAGRAPH 228)

23) The Official Secrets Act 1989 is a British law applied to Hong Kong. It sets out six specific secrecy provisions, covering for example security and intelligence, defence and international relations. Since it is a British law, it will no longer be valid after 1997.

24) The Hong Kong government announced in July 1995 that it had submitted proposals to the Chinese side which it says will balance the need to protect freedom of expression and the individual with the need to protect public order and security, in line with the Bill of Rights Ordinance and the Basic Law.

25) Government officials have refused to reveal details of the proposals put to China, citing Joint Liaison Group confidentiality rules. The HKJA fears that the government may be proposing to localise the Official Secrets Act, without seeking much-needed liberalisation.

26) The HKJA has demanded reform in several key areas. These include, at the very least, the inclusion of public interest and prior publication defences. The absolute nature of some of the six offences contained in the law is also highly questionable, in particular if there is no need to prove damage to state interests.

27) Without knowing details of the government package, the HKJA finds it very difficult to say whether the Official Secrets Act will be amended in a manner compatible with media expectations. The government has a public interest obligation to outline how it proposes to reform the law, and ensure that proper safeguards are incorporated.

CRIMES ORDINANCE (PARAGRAPH 229)

28) The Hong Kong government has also put proposals to the Chinese side on the treason and sedition provisions in the Crimes Ordinance and the related section 32(1)(h) in the Post Office Ordinance, which prohibits the mailing of any seditious publication.

29) The government again refuses to give details, except to say that the aim is to have legislation which can continue in force after 1997 and which is consistent with the Bill of Rights Ordinance and the Basic Law.

30) The treason and sedition offences in the Crimes Ordinance are both wide-ranging in nature and contain references to the Queen and Britain, which need to be localised upon the handover.

31) The HKJA believes in particular that section 9, which defines the offence of seditious intention, must be liberalised. The definition is so wide that it almost certainly breaches article 19 of the ICCPR. This may also be true for the offence of uttering seditious words, in section 10.

32) The HKJA would also point out that sections 9 and 10 have not been used for many years, and have therefore in many ways become obsolete.

EMERGENCY REGULATIONS ORDINANCE (PARAGRAPHS 51 AND 230)

33) In June 1995, the government gazetted the repeal of subsidiary legislation under the Emergency Regulations Ordinance. However, this left the principal Ordinance in place. This law provides the Governor in Council with wide-ranging and ill-defined powers to declare an emergency and to make regulations providing for censorship and the control and suppression of publications. A government spokesman has admitted that, despite the repeal of all existing regulations, "fresh, modern regulations could be introduced quickly in the unlikely event of an emergency."

34) The removal of the subsidiary legislation fails to address the central issue - the arbitrary nature of the Emergency Regulations Ordinance itself. The HKJA continues to call for the provision of safeguards, including an explicit recognition of the limits placed on the declaration of an emergency by section 5 of the Bill of Rights Ordinance, and provision for strict legislative scrutiny and judicial review of both the duration and the limit of powers exercised during an emergency.

PREVENTION OF BRIBERY ORDINANCE (PARAGRAPH 234)

35) In February 1995, a magistrate ruled that section 30 of the Prevention of Bribery Ordinance was inconsistent with the Bill of Rights. This section bars journalists from reporting Independent Commission Against Corruption (ICAC) investigations without lawful authority or reasonable excuse, unless an arrest has been made.

36) The Court of Appeal overturned the magistrate's ruling in July 1995. The Ming Pao newspaper group is expected to take the matter to the Privy Council for a final ruling.

37) Irrespective of the final court judgment, the HKJA calls for the repeal of section 30, on the basis that it allows the ICAC Commissioner blanket powers to prevent publication of details of investigations, even if there are strong public interest reasons for doing so. The government should either repeal section 30 in its entirety or replace it with an alternative provision limiting the Commissioner's powers in ordering non-disclosure.

BROADCASTING LEGISLATION

38) The government has pledged to bring forward omnibus legislation in the 1995/96 Legislative Council session, amalgamating three major broadcasting laws - the Television, Telecommunication and Broadcasting ordinances. It should ensure that no more slippage takes place on this important matter. It should also take the opportunity to narrow the criteria whereby the High Court may issue an injunction prohibiting the broadcasting of certain programmes (PARAGRAPH 216).

39) These criteria should limit censorship to expression which constitutes incitement to violence or to such hatred against a group of persons that violence is likely to result, or which is likely to directly and seriously harm public health or the morals of children under 18 years of age.

40) The government should also take the opportunity to scrap the following sections in the Telecommunication Ordinance: 13C on the prohibition of programmes (PARAGRAPH 220), 28 on the transmission of false messages (PARAGRAPHS 232-3), and 33 on the interception of telecommunications (PARAGRAPHS 199-200, 232-3).

41) The government should also move quickly to impose cross-media ownership provisions in broadcasting legislation, to ensure that a single media owner is unable to control both a television or radio station and a newspaper (PARAGRAPH 239). This is essential to safeguard media diversity.

42) The HKJA notes that the government is awaiting proposals from the Law Reform Commission on the interception of telecommunications (see above under broadcasting legislation) and the interception of mail, in section 13 of the Post Office Ordinance. The HKJA calls on the government to bring forward changes as soon as possible.

DEFAMATION ORDINANCE (PARAGRAPH 227)

43) In July 1995, the Legislative Council endorsed the scrapping of section 6 of the Defamation Ordinance, which makes it an offence to maliciously publish any defamatory libel. However, section 5 remains on the statute book.

44) This provision provides for a two-year prison term and an unlimited fine for those found guilty of maliciously publishing libel known to be false. The government has pledged to discuss the issue further in the Legislative Council's panel on administration of justice and legal services.

45) The HKJA believes that aggrieved parties intent on protecting their reputations should have resort only to the civil courts, and that the retention of a criminal libel offence could be misused for political purposes. Further, provision for a two-year jail term and an unlimited fine is excessive.

PLACES OF PUBLIC ENTERTAINMENT ORDINANCE (PARAGRAPH 223)

46) In July 1995, the Legislative Council endorsed changes to the Places of Public Entertainment Ordinance, scrapping the permit system for public performances and stipulating that the police may close a place of public entertainment only on safety and public disorder grounds.

47) The government has pledged to bring forward consequential amendments to subsidiary legislation. The HKJA calls on the government to amend regulations 173 and 174, by scrapping provisions allowing the police to close a performance on peace and good order and morality grounds.

PRISON RULES (PARAGRAPHS 131, 206 AND 225)

48) The government has pledged for more than two years to liberalise prison rules 76(a) and (b) and 239(1)(e)(i), (ii) and (iii), on the disclosure of information by prison officers. Officials have pledged to introduce changes later this year. They should move quickly to implement this promise.

ACCESS TO INFORMATION (PARAGRAPHS 242-4)

49) The government is obliged, under article 19 of the ICCPR, to ensure that everyone shall have the right to seek and receive information. This, in the HKJA's view, involves legislating a right to seek and obtain information from the government and public bodies.

50) The HKJA has campaigned for several years for freedom of information legislation. Since March 1994, legislative councillor Christine Loh has sought to table her own access to information bill in the legislature. However, the government successfully blocked it, by arguing that it would have cost implications, and therefore could not be tabled without the Governor's consent. This was not forthcoming.

51) The government has instead introduced a non-binding administrative code on access to information. It came into effect in March 1995. It sets out criteria for the release of government-held information, as well as criteria for exemptions. However, it does not apply to information held by public agencies, and the appeal mechanism is flawed. Applicants may appeal to the existing ombudsman - the Commissioner for Administrative Complaints - but his rulings are not binding.

52) The HKJA and other freedom of information advocates have called on the Governor to allow the Legislative Council to debate a bill that would:

- a) entrench the right to freedom of information;
- b) enumerate clearly and narrowly defined exemptions;
- c) ensure that enforcement mechanisms were binding in law; and
- d) subject administrative decisions refusing disclosure to judicial review.

PUBLIC ACCESS TELEVISION (PARAGRAPH 240)

53) The government has blocked another move in the public access arena. In May 1995, it gave up options to establish public access and public broadcasting channels on the Wharf Cable television network. The government's explanation for not taking up these options, which are laid down in Wharf's license, was that such services involved difficult questions about quality control and censorship. It feared that public access broadcasting would become a battleground for different political forces and, in the event such access was perceived to be

misused, and the government thereby felt compelled to intervene, this would inevitably be seen as a violation of freedom of expression.

54) The short-sighted decision not to proceed with public access and public broadcasting services should be seen also in the light of the government's continuing refusal to give further consideration to the strengthening of the editorial independence of the government broadcaster, Radio Television Hong Kong (RTHK). The government had originally planned to corporatise RTHK, but this plan was shelved under intense pressure from China.

55) The government should move quickly to provide a bulwark for RTHK's editorial independence and reverse its decision not to pursue public access and public broadcasting channels.

SELF-CENSORSHIP AND THE CASE OF XI YANG (PARAGRAPHS 245-7)

56) The government points to the considerable concern among journalists about the growing problem of self-censorship. The HKJA has documented many alarming examples in its 1994 and 1995 annual reports on freedom of expression in Hong Kong.

57) The government has a significant role to play in highlighting the problem, and condemning in particular the censorship by government departments and agencies of opinions and information sensitive to China. Public authorities should also issue guidelines to their respective organisations to refrain from self-censorship.

58) The British and Hong Kong governments should also continue their efforts to seek the release of the Ming Pao journalist, Xi Yang, who has served two years of a twelve-year jail term in Beijing, for allegedly "probing into and stealing state financial secrets".

CONCLUSIONS

59) The HKJA calls on the British and Hong Kong governments to take the following action to strengthen freedom of expression and of the press in Hong Kong in the remaining two years before the handover:

a) A reporting mechanism should be devised on an urgent basis, to ensure full post-1997 implementation of the ICCPR. This could involve reporting either by Hong Kong or China;

b) The nine outdated colonial laws listed above should be amended or deleted by July 1996 at the very latest. This is a matter of particular urgency for security-related laws, including the 1989 Official Secrets Act, Crimes Ordinance, Emergency Regulations Ordinance and Prevention of Bribery Ordinance;

c) The Hong Kong Governor should allow an access to information bill to be tabled in the Legislative Council, to ensure full and proper public debate of this vital issue; and

d) The decision not to proceed with public access and public broadcasting television channels should be reversed, and moves should be made to strengthen the editorial independence of the government-funded Radio Television Hong Kong.

EXECUTIVE COMMITTEE OF THE HONG KONG JOURNALISTS' ASSOCIATION
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THE FAILURE OF THE HONG KONG GOVERNMENT TO IMPLEMENT THE RIGHT TO EQUALITY UNDER THE ICCPR:

**AN ANALYSIS OF THE SEX DISCRIMINATION ORDINANCE AND
THE GOVERNMENT'S OPPOSITION TO BROADER LEGISLATION**

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HONG KONG AND THE IMPLEMENTATION OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Seminar, The University of Hong Kong, 30 September 1995

The Failure of the Hong Kong Government to Implement
the Right to Equality Under the ICCPR:
An Analysis of the Sex Discrimination Ordinance and the
Government's Opposition to Broader Legislation¹

Carole J. Petersen²

Summary of Submission

Women's organizations request the Human Rights Committee to question the Hong Kong Government regarding the following facts, many of which are not fully disclosed in the Government's Fourth Periodic Report on Hong Kong:

(1) CEDAW still is not ratified in Hong Kong (almost three years after the public endorsed it in the Green Paper consultation) (see p. 4 and note 13).

(2) Although the Sex Discrimination Ordinance has been enacted, the Government has not brought it into force and has made no firm commitment as to when it will be brought into force. Certain provisions (such as the employment provisions) will be particularly delayed (see pp. 4-7).

(3) Even when brought into force, the Sex Discrimination Ordinance provides such inadequate remedies that women will be unlikely to sue, permitting discrimination to continue with impunity (see pp 7-8).

(4) The Sex Discrimination Ordinance is full of exemptions, many of which exempt discrimination by the Government itself (see pp. 8-9).

(5) The Government continues to oppose broader anti-discrimination legislation and to delay meaningful consultation on such legislation (see pp. 9-14).

I. Introduction

The International Covenant on Civil and Political Rights (the ICCPR) clearly articulates an obligation of State Parties to ensure equal treatment under the law and to provide legal protection against discrimination. Articles 2 and 3 require

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State Parties to ensure the equal enjoyment of the rights recognized in the Covenant. Article 26 further provides that State Parties have an obligation not only to ensure equal enjoyment of the rights stated in the Covenant, but also to provide their citizens with effective legal protection against discrimination:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this regard, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground (Emphasis added.)

The Human Rights Committee has noted that while "[i]t is for State Parties to determine appropriate measures to implement the relevant provisions", the "Committee wishes to be informed about the nature of such measures and their conformity with the principles of nondiscrimination."³ The Committee should be informed not only as to the relevant provisions of law, but also as to whether "there remain any problems of discrimination in fact, which may be practised by public authorities, by the community, or by private persons or bodies."⁴

Despite these obligations, the Hong Kong and UK Governments have traditionally said as little as possible to the Committee on the issue of sex discrimination in Hong Kong. Past reports simply glossed over the issue, with vague assurances that the Government was "considering" the application of CEDAW to Hong Kong and "reviewing" existing policies and legislation relevant to sexual equality.⁵ Anyone reading these reports without further information would have assumed that sex discrimination was not a significant issue in Hong Kong. Women's organizations rightly objected to the Government's failure to disclose the true extent of discrimination in Hong Kong⁶, particularly as there were at that time so many obvious examples of sex discrimination,

³Human Rights Committee General Comment 18(37) (Non-Discrimination), adopted by the Committee at its 948th meeting, on 9 November 1989, at par. 4 (reproduced in Andrew Byrnes and Johannes Chan, eds, Public Law and Human Rights: A Hong Kong Sourcebook (Butterworths 1993), pp 374-6).

⁴Ibid, par 9.

⁵See, for example, Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights (1989), par 26; and Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights: An Update (March 1991), par 89.

⁶See, for example, Howarth, Jones, Petersen and Samuels, "Report by the Hong Kong Council of Women on the Third Periodic Report by Hong Kong Under Article 40 of the International Covenant on Civil and Political Rights" (1991, unpublished).

including a legal prohibition on female inheritance of most New Territories land⁷, restrictions on women's rights to participate in village elections⁸, the Government's refusal to extend the benefits of the Small House Policy⁹ to women, and pervasive (and entirely legal) sex discrimination in the private employment market.

Had the Hong Kong Government had its way, it would almost certainly have continued to ignore -- and perpetuate -- sex discrimination. This is clear from the fact that even after the Bill of Rights Ordinance was enacted, the Government took no steps to review the laws and policies that violated it. Instead, the Government sat back, knowing that the victims of sex discrimination did not have the resources to mount a legal challenge to these laws and policies.¹⁰

Two developments finally forced the Government to change (at least publicly) its approach to sex discrimination. First, in December 1992, the Legislative Council voted unanimously in favour of a motion calling for the extension of CEDAW to Hong Kong. Although the Government refused to act upon this vote, it

⁷This prohibition was finally repealed by the New Territories Land (Exemption) Ordinance, enacted in June 1994. As originally introduced by the Government, the bill would only have exempted urban New Territories land from the prohibition. However, a private member of the Legislature, Ms Christine Loh, successfully proposed an amendment to the bill to exempt all land from the prohibition on female inheritance. Of course, landowners may still make a will leaving their land to only their sons. The Heung Yee Kuk continues to oppose the legality of women inheriting land and may try to reinstate the prohibition after 1997.

⁸As of August 1993, approximately one third of the 690 villages did not permit women to stand for election as Village Representative. Some villages also prohibited women from voting, while others permitted only the "head of household" to vote, effectively excluding most women. When pressured to take action against this obvious discrimination, the Government agreed only to institute "voluntary guidelines" calling for adherence to the "one person one vote" principle.

⁹The Small House Policy is a government policy that provides valuable building rights and land grants only to male villagers who have descended through the male line from an indigenous resident in 1898.

¹⁰For a more detailed discussion of the failure of the Bill of Rights Ordinance to have any direct impact upon sex discrimination in Hong Kong, see Petersen, "Hong Kong's Bill of Rights and Women: A Bait and Switch?", in Fong, Byrnes and Edwards, eds, Hong Kong Bill of Rights: Two Years On (Faculty of Law, University of Hong Kong 1993).

did compel the Government to initiate its first formal consultation on the question of sex discrimination. The Government issued its Green Paper on Equal Rights for Men and Women in August 1993 and although it was quite biased (repeatedly underestimating the extent of discrimination), the public responded with a clear call for action. In December 1993, at the end of the consultation period, the Government was forced to admit that the vast majority of the 1,161 submissions (and 52,610 signatures)¹¹ were in favour of ratifying CEDAW.¹² It thus agreed to take steps to have CEDAW extended to Hong Kong by the UK Government. Nonetheless, two years and nine months later, this still has not been accomplished and no firm date for CEDAW's ratification has yet been announced.¹³

The second significant development occurred in July 1994, when Anna Wu, an independent member of the Legislative Council, introduced her Equal Opportunities Bill (the "EOB"), which was intended to prohibit discrimination on a wide range of grounds (including sex, race, disability, sexuality, and religious and political conviction). Fearing that the EOB would be enacted, the Hong Kong Government felt compelled to introduce a more conservative alternative bill. And so the Government hastily drafted the Sex Discrimination Bill (the "SDB"), which was enacted on 28 June 1995, but still has not been brought into force.

II. The Failure of the Sex Discrimination Ordinance to Implement the ICCPR in Hong Kong

Delays in Bringing the SDO into Force

Having been compelled to finally enact the Sex Discrimination Ordinance, (the "SDO") the Government has been quick to point to it as its "answer" to its obligation under the Covenant to provide women with effective protection against discrimination. Indeed, the Government's Fourth Periodic Report to the Committee devotes several paragraphs to the virtues of the SDO (giving it more space than the Government devoted in past reports to the entire issue of sexual equality). For example, the Government has assured the Committee that the SDO "became law in June 1995" and that its purpose is to outlaw sex discrimination in "employment, education, provision of goods and

¹¹Hong Kong Government, Green Paper on Equal Opportunities for Men and Women Compendium of Submissions (May 1994).

¹²South China Morning Post, 31 December 1993, p.2.

¹³The Hong Kong and UK Governments are apparently "still considering" the reservations that will be made when (and if) CEDAW is extended to Hong Kong. It will also be necessary to consult with the Chinese Government, which could mean that CEDAW's extension to Hong Kong will not be accomplished prior to 1997. See Fourth Periodic Report of Hong Kong, p. 54, pars 29-30.

services, and the disposal and management of premises."¹⁴

But the Government has failed to disclose to the Committee one of the most important facts about the SDO -- the fact that it is not yet in force anywhere in Hong Kong. Moreover, the Government has not announced any certain date by which the new law will be brought into force. Thus, although the SDO did indeed become law in June 1995, it is not yet protecting any women from discrimination.

This delay in the implementation of the SDO occurred because the Government inserted a clause that gives the Secretary of Home Affairs the discretion to decide when to bring the Ordinance into force. The Bills Committee that studied the SDB objected to this unlimited discretion and proposed an amendment that would have required the new law to be brought into force no later than January 1, 1996 (a full six months after the law was enacted). This amendment was supported by the Democratic Party (which holds most of the directly elected seats in the Legislative Council). However, the Government lobbied hard against the amendment and succeeded in defeating it. Thus, the Secretary for Home Affairs now has absolute discretion to delay the enforcement of the SDO for as long as he wishes.

Since the enactment of the SDO, women's organizations have repeatedly asked the Secretary for Home Affairs to announce a firm date when the SDO will be brought into force. The only information that has been forthcoming is that the Government will not implement the SDO until after the Equal Opportunities Commission has been established (which is unlikely to be until the Spring of 1996).¹⁵ This is very unfortunate, not only because the law is needed now, but also because the delay makes it likely that Hong Kong will receive its first anti-discrimination legislation with only one year remaining before the transfer to China. Clearly it would be better for Hong Kong to develop experience with the SDO prior to 1997.

The SDO also provides that the Secretary for Home Affairs has the discretion to bring different provisions into effect at different times. Women's organizations have asked that this discretion be used to bring immediately into effect at least those provisions that are unlikely to require the assistance of the Equal Opportunities Commission. The Secretary for Home

¹⁴Fourth Periodic Report by Hong Kong Under Article 40 of the International Covenant on Civil and Political Rights" (Government Printer, Hong Kong 1995), p. 55, par 32 (hereinafter, the "Fourth Periodic Report by Hong Kong").

¹⁵This statement was made by the Secretary for Home Affairs at a meeting with women's organizations which I attended, on 21 September 1995 (hereinafter, "Meeting with Secretary for Home Affairs, 21 September 1995").

Affairs has only agreed to "consider" this request.¹⁶

Moreover, the Secretary for Home Affairs flatly rejected a suggestion that the clause prohibiting discrimination in village elections in the New Territories (which specifically provides for enforcement by the Secretary of Home Affairs) was an example of a provision that could be implemented without the Equal Opportunities Commission. The Secretary's stated reason for so refusing was that he believed that the provision is too unclear for him to enforce. (Indeed he indicated that he would have to seek "legal advice" as to its meaning.) The Secretary for Home Affairs also repeatedly reminded the women's organizations present at the meeting that the Government "does not run" the village elections, implying that it could not promise to ever successfully enforce the new prohibition on discrimination in these elections.

In fact, it is likely that the Government's reluctance to bring this provision of the SDO into force is based upon the simple fact that the provision was not in the SDB as originally proposed by the Government. Rather, it was added when the Legislative Council approved an amendment recommended by the Bills Committee -- despite strong opposition from Government, which has long opposed taking any action beyond "voluntary guidelines" against villages that discriminate against women in their right to stand for office or to vote in village elections.

In any event, the Government's unwillingness to enforce this provision of the SDO contrasts sharply with the statements made to the Committee in the Fourth Periodic Report by Hong Kong. For example, in its Report the Government acknowledges the history of discrimination in these elections, but assures the Committee that "[t]he Sex Discrimination Ordinance provides that the Government shall not recognize village representatives who have not been elected or otherwise chosen on a 'one-person one-vote' basis" and that the Government "will explain the new law to the villagers and persuade the remaining villages to comply with it."¹⁷ How can the Government confidently assure the Committee of its ability to explain and enforce this provision while the Secretary of Home Affairs (the Government official charged with its enforcement) refuses to bring the provision into immediate force and has claimed (as recently as September 1995) that the provision is too vague to understand and too difficult to enforce?

The women of Hong Kong will likely have to wait until at least mid-1996 before any of the provisions of the SDO are brought into effect. And they will have to wait even longer for the employment provisions (one of the most important areas of the law) to be fully implemented. The Government has already announced that it will not bring into force the provisions

¹⁶Meeting with Secretary for Home Affairs, 21 September 1995.

¹⁷Fourth Periodic Report by Hong Kong, p.58, par, 42.

prohibiting discrimination in employment until after the Equal Opportunities Commission (which has yet to be established) has promulgated detailed "codes of practice". In addition, small businesses have been given a three-year exemption from the law (the Government originally proposed a five-year exemption). This long delay is entirely unjustified, as the SDO does not require employers to practise "affirmative action" or to employ a minimum number of women. It only requires employers to stop discriminating against women in their future hiring and promotion decisions.

Inadequate Remedies

The Government's Report to the Committee also provides no information as to the remedies available under the SDO. In fact, the remedies are wholly inadequate for victims of sex discrimination. For example, there is no express provision in the SDO authorizing a court to order the reinstatement of a woman who loses her job as the result of discrimination. The Bills Committee that studied the SDB recommended that the remedy of reinstatement be added to the SDO and proposed an amendment to that effect. Unfortunately, the Government opposed this amendment and succeeded in defeating it.

The Government also has not disclosed to the Committee the fact that the SDO limits the damages that can be awarded to a victim of discrimination to HK \$150,000 (less than US \$20,000), regardless of the amount of actual damages she has suffered. This artificial and unrealistic restriction on damages is particularly unfair given that the legal costs of an action under the SDO will normally not be recovered by the winner of the lawsuit (the opposite of the standard procedure in Hong Kong). Thus women who are contemplating suing will have to consider the facts that: (1) they will not recover their actual damages if they exceed \$150,000; and (2) they may not even recover enough in damages to pay for their legal expenses. Given the high cost of litigation in Hong Kong, this will prevent many victims from even commencing a lawsuit -- thus permitting the discriminators to violate the law with impunity.

It should be noted that this limitation on damages was not inserted into the recently enacted Disability Discrimination Ordinance (the DDO). The DDO is also superior in that it expressly provides for the remedy of reinstatement for victims who lose their jobs as the result of discrimination. Thus, a woman who is fired as the result of sex discrimination and suffers \$300,000 in lost wages will receive at most \$150,000 in compensation and will not get her job back. In contrast, a victim of disability discrimination who suffers the same amount of damages can obtain an order of reinstatement (if the court finds that appropriate) and can be fully compensated for his or her lost wages. This inequality clearly violates Articles 2 and 26 of the ICCPR.

The Secretary for Home Affairs was recently asked whether the Government would introduce an amendment to the SDO to provide

women with remedies that are equivalent to those available under the DDO. He stated that it had no plans to do so. Indeed, he would not even promise that the Government would not oppose such amendments if they were introduced by means of a private member's bill.¹⁸

Exemptions

The Government also inserted into the SDO several exemptions, many of which will perpetuate discrimination by the Government itself. For example, the SDO contains a special exemption for the Small House Policy, a government policy under which only indigenous male villagers (who have descended through the male line from an indigenous resident of the New Territories in 1898) are eligible for valuable land grants and building rights. Unlike the former ban on female inheritance of land, the Small House Policy is not a remnant of Chinese customary law, but rather is a government welfare policy which gives men a significant economic advantage over women.

The Government has informed the Committee that it has exempted the Small House Policy from the SDO to enable the Government to complete its "review" of the policy in light of "present day circumstances".¹⁹ What the Government does not reveal is that it has been claiming for years now that it needs "time to review" the discriminatory application of this policy. But to date, no results of any review have been forthcoming. Moreover, when the Bills Committee studying the SDB asked Government whether it would agree to any time limit (eg, one or two years) on the exemption for the Small House Policy in the SDO, the Secretary for Home Affairs refused to do so. This indicates that the Government may well use the exemption to delay for several years before reforming this clearly discriminatory policy. Moreover, Government representatives have indicated that it plans to conduct an entirely "in-house" review, with little or no opportunity for public hearings on the issue.²⁰

Exemptions Not Disclosed By the Government

There are a number of other significant exemptions in the SDO which are not disclosed in the Government's Report to the Committee. For example, the SDO exempts discrimination as to height, weight, uniforms and equipment with respect to positions in several Government departments (the Police Force, the Immigration Services, the Fire Services Department, the Correctional Services Department, and the Customs and Excise Department). The Government refused to agree to an amendment to the SDO that would have required that such discrimination be "reasonably necessary under the circumstances of the job".

¹⁸Meeting with Secretary for Home Affairs, 21 September 1995.

¹⁹Fourth Periodic Report by Hong Kong, p. 177, par. 359.

²⁰Meeting with Secretary for Home Affairs, 21 September 1995.

Granted, differential treatment of male and female employees may be justified in some circumstances. But this exemption is much too broad, permitting Government departments to discriminate even where it is not justified. Moreover, this insistence on retaining such wide discretion to discriminate when Government is the employer sets a poor example for private employers.

When Government drafted the Sex Discrimination Bill, it also inserted a wide exemption for almost all of the so-called "protective regulations", which limit women's right to work at night and in certain occupations. Fortunately, an amendment was passed by the Legislative Council limiting this exemption to one year. This will compel the Government to finally examine these outdated regulations, as it will have to justify to the Legislative Council any regulation it wishes to continue beyond one year. The Government should be urged not to attempt to preserve these sexist regulations. Safety regulations should be applied equally to men and women unless there is clear evidence that a particular risk affects women differently than men (such as certain risks to women's reproductive capabilities).

The exemptions noted here are by no means an exhaustive list. Indeed, given the Government's long opposition to anti-discrimination legislation, it is not surprising that when it was finally forced to draft the SDB, it took every opportunity to make the bill a weak one, full of delays and exemptions. The Bills Committee that studied the SDB noted this and proposed numerous amendments that would have strengthened the bill and eliminated (or limited the duration of) many of the exemptions. These amendments were also wholeheartedly supported by the Democratic Party. Unfortunately, only a few of the amendments were ultimately passed by the Legislative Council. This was largely due to fierce lobbying by the Government and the business community of the Legislative Council (which in June 1995 still included a large number of appointed members and members chosen by elitist functional constituencies).

Women's organizations hope that the Human Rights Committee will urge the Hong Kong Government to bring the SDO into force as soon as possible and to amend it so as to eliminate some of the more outrageous exemptions -- particularly the exemption for the Small House Policy and the three-year exemption for small businesses.

III Government Opposition to Broader Discrimination Legislation

The Equal Opportunities Bill introduced by Anna Wu would have prohibited discrimination on a wide range of grounds, including not only sex and disability, but also family status, sexuality, race, and political and religious conviction. The EOB also contained far fewer exemptions than the Government's reluctantly introduced SDO. The EOB was endorsed by a large number of women's and other organizations, by the Bills Committee that studied it (together with the Government's SDO and DDO), and by the Democratic Party (which held and continues to hold by far

the largest number of directly elected seats in the Legislative Council).

Unfortunately, the Government succeeded in defeating the EOB, after relentless lobbying of the Legislative Council (particularly of the appointed members and members who represented business interests). In the last few weeks before the EOB was voted upon, the Government used this lobbying effort to make many inaccurate or misleading claims about the impact that the EOB would have on Hong Kong. Government had not previously made these claims in the Bills Committee meetings (where they could have been responded to and, if necessary, dealt with by amendments to the EOB).

Women's organizations were particularly disappointed that the EOB provisions prohibiting age discrimination were not enacted this year. There is a large body of evidence showing that women in Hong Kong suffer disproportionately from age discrimination. Indeed, this is readily apparent from the job advertisements, which are often restricted to women under 30 or 35. Age discrimination is also particularly relevant to women in that it perpetuates the sexist notion that women should be valued for their appearance, rather than for their qualifications.

In the course of lobbying against the EOB, the Government promised to commence its own study of the need for broader anti-discrimination legislation. When women's organizations recently asked the Secretary for Home Affairs to report on this effort, they were told that the Government hopes to commence its study of sexuality discrimination within the next month, and its study of age discrimination by the end of 1995.

But women fear that these studies will primarily be a delaying tactic. The Bills Committee that studied the EOB already has a large number of submissions on file regarding the extent of age discrimination (and its disproportionate impact upon women) and sexuality discrimination. But instead of using this material, the Government insists on conducting its own studies. Moreover, Government has stated that it will not proceed directly to a formal consultation (in the nature of the Green Paper on sex discrimination) but rather intends to conduct its consultation on each additional area of discrimination in two stages: (1) a small scale telephone "survey"; followed by (2) a formal full-scale public consultation exercise. Given the time required to prepare surveys, collect data, analyze the results and make policy decisions, this two-staged process will almost certainly make it impossible to draft and enact broader anti-discrimination laws prior to 1 July 1997.

Moreover, women have good reason to suspect that the Government's "survey" on age discrimination will be biased against the very concept of broader anti-discrimination legislation. The Green Paper was certainly biased, tending to minimize the extent of discrimination and to emphasize the

difficulties of enforcing anti-discrimination legislation.²¹ Moreover, the Government has often indicated that it does not believe that age discrimination is a significant problem in Hong Kong, claiming that "[t]here is no strong evidence that unemployment amongst middle-aged women is due to age-discrimination. Rather the root of the problem appears to be a lack of qualifications or skills."²² Interestingly, the Government has never been able to cite any real evidence for this position. Nor has it explained how a middle-aged woman is supposed to demonstrate her qualifications in the face of repeated job advertisements that exclude women above a certain age (often as low as 30 or 35). Indeed, up until very recently, even the Government posted advertisements that discriminated on the basis of age.²³ Yet the Government insists that age discrimination is not a significant problem.

Hong Kong women are also concerned about the approach that the Government will take when it "studies" whether there is a need for broader anti-discrimination legislation. A good example of what can be expected can be found in the Government's draft of a questionnaire that it is using as the basis for its survey on sexuality discrimination (the "Draft Survey"), which women's organizations obtained at a meeting with the Secretary for Home Affairs in September 1995.²⁴

It should be noted that when the Government gave the Draft Survey to women's organizations it had not given (and apparently had no plans to give) it to gay and lesbian organizations for their comments. This is difficult to understand, since the questionnaire was obviously not confidential. When asked why the

²¹For a more detailed analysis of the biased nature of the Green Paper, see Carole Petersen, "The Green Paper on Equal Opportunities for Women and Men: An Exercise in Consultation or Evasion?", (1994) Hong Kong Law Journal 8. Many of the submissions made in response to the Green Paper also pointed out that it was biased. See Green Paper on Equal Opportunities for Women and Men Compendium of Submissions (May 1994).

²²Fourth Periodic Report by Hong Kong, p. 60, par. 47.

²³In late 1993, an assistant from the office of Legislative Councillor Anna Wu photographed advertisements for temporary clerical positions in Government departments. Some of these advertisements specified a maximum age for applicants, such as 40, 35, 30, and even 24 years of age. Copies of these photographs were shown to the Secretary for Home Affairs. Copies were also given to the Governor of Hong Kong (in a meeting with women's organizations held in December 1993).

²⁴Home Affairs distributed the Chinese version of the draft "Opinion Survey on the Issue of Discrimination on the Ground of Sexuality" (the "Draft Survey") at its meeting on September 21. We also requested an English version, which Home Affairs provided me on Friday, September 22.

Draft Survey was not given to the groups who would be most interested in making comments, the officer in charge of the exercise responded that it was because this survey is not intended to ascertain the views of gays and lesbians (which she assured me will be separately consulted), but the views of the general community.²⁵ But this is no excuse for refusing to consult gay and lesbian groups on the nature of the questions, which can obviously affect the results and the integrity of the survey.

The failure to consult gay and lesbian groups is particularly serious given the nature of the questions on the Draft Survey. Many of the questions could easily be interpreted by the respondents as implying that homosexuals pose some sort of special threat to society -- in other words, the questions themselves seem to suggest that discrimination on the ground of sexuality may be justified in some circumstances. While some people in Hong Kong may feel this way, the Government clearly should not suggest such opinions to them by means of a "survey".

For example, the Draft Survey asks whether respondents would be willing to "go swimming with" homosexuals/bisexuals. A respondent who has gay friends and acquaintances will have no difficulty answering this question. But consider the situation of a respondent who does not have (or thinks she does not have) any gay friends and knows very little about homosexuality or bisexuality. She probably has never given any thought to whether the people who swim at her favourite beach or pool are gay or straight. But suddenly a Government questionnaire asks her whether she would be willing to swim with a gay person. The very existence of this question may suggest to her that there is some reason why she should not be willing to swim with such a person.

The Draft Survey contains several questions of this nature and thus may actually tend to increase prejudice in our society. For example, I have never heard anyone in Hong Kong say that they would not want to patronize a hotel that admits homosexuals. But Question 4(c) of the Government's draft survey actually puts this at issue -- to what end?

This approach is in marked contrast to the 1993 Green Paper consultation on sex discrimination. In the Green Paper the Government clearly stated that sexual equality was the goal. The primary purpose of the consultation exercise was to determine the extent to which Hong Kong had not achieved that goal and how it could be better achieved. Granted, women's organizations felt that the Green Paper was biased in its tone. But at least the Green Paper did endorse the basic value of equality. Thus the Government did not deem it necessary to ask the public such questions as: "is it acceptable for a woman to occupy an important position in public service"? Yet the Government asks precisely that question with regard to homosexuals (at Question

²⁵Telephone conversation with Ms Erica Hui, Principal Assistant Secretary for Home Affairs, 29 September 1995.

6(c) on the Government's Draft Survey). The Government did not ask such questions in the Green Paper because it had already pledged to support the basic value of equal opportunities for women -- regardless of the fact that many people in Hong Kong may still oppose that value.

The other problem with the Draft Survey is that many of its questions are extremely vague. For example, Question 4(e) asks whether the respondent would be willing to "be a member of a club that would also allow homosexuals/bisexuals as members". This question could be interpreted as referring to a large social club (such as the Hong Kong Club) in which most members barely know each other and need not socialize together. Or it could refer to a very small and truly private club. The difference is a significant one, as anti-discrimination legislation might prohibit discrimination by large social clubs, but would have no impact on individuals' choice of the people with whom they socialize. And it would likely have no affect on the membership policies of small private clubs. But since the questions do not make this clear, the respondents may think that the legislation will have far more impact on their personal and social lives than is actually the case. This will not only influence their responses to these particular questions, but may also make the respondents (as well as any others who learn about the survey) unduly worried about the impact that such legislation could have on their personal lives.

I recently spoke to the officer in charge of this Draft Survey and asked her whether the Government would agree to our suggestion that it abandon this survey and proceed directly to a formal consultation. She indicated that the Government will stick to its position that it must first ascertain how the public feels-- not only about legislation to prohibit discrimination against gays and lesbians, but about gays and lesbians themselves. She also indicated that the Draft Survey will probably not be significantly changed in light of the comments received by gay and women's organizations.²⁶

The Government's insistence on using this informal and biased survey poses a real danger. If the results of the survey reveal that a substantial portion of the Hong Kong public fear homosexuals and oppose sexuality discrimination legislation (which is quite likely given the vague and leading nature of the questions contained in the Draft Survey), the Government may use this as an excuse to delay even further the more formal (and hopefully more objective) consultation process on sexuality

²⁶Ibid. After this paper was first presented, I received a letter from Mrs Hui (dated 6 October 1995) stating that the survey has been finalized and commenced. The letter also stated that the Government has "taken into consideration the comments received from various groups and individuals" on the Draft Survey. However, the letter did not enclose the final version of the survey or state whether any actual changes had been made to it in light of these comments.

discrimination legislation.²⁷ This could also affect the campaign for legislation against other grounds of discrimination, as the Government may use any negative results to justify its "go slow" approach to the entire question of broader anti-discrimination legislation. Indeed, this may be why the Government has chosen to begin with the topic of sexuality discrimination instead of age discrimination. The Government already knows that there is strong support for legislation against age discrimination and that this support comes from a broad cross-section of Hong Kong society. But instead it is starting its consultation with an area that is likely to be a good deal more controversial than age discrimination -- perhaps hoping to use any negative responses that are obtained as an excuse to delay further legislation in all areas of discrimination.

Conclusion

As the Human Rights Committee has noted, State Parties' reports under the ICCPR should go beyond the "glossy" assurances that the Hong Kong Government will continue to make regarding equality in Hong Kong. The Hong Kong and UK Governments should be held accountable for the following facts: (1) CEDAW still is not ratified in Hong Kong (almost three years after the public endorsed it in the Green Paper consultation exercise); (2) there is still no sex discrimination legislation in force in Hong Kong and no certain date as to when it will be in force; (3) the SDO provides inadequate remedies and is therefore unlikely to deter discrimination; (4) the SDO is full of exemptions, many of which exempt discrimination by the Government itself; and (4) the Government continues to oppose broader anti-discrimination legislation and to delay any meaningful consultation on whether it should abandon that opposition.

We hope that the Human Rights Committee will remind the Hong Kong Government of these facts and of its obligation to take real action to ensure equality for its people.

²⁷Mrs Hui's letter of 6 October 1995 stated that the Government's present intention is to issue a formal consultative document on sexuality discrimination in early 1996.

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