

II. Views of Professor C. Raj Kumar and Professor Michael C. Davis

(a) Views on whether Hong Kong's existing human rights framework is compliant with the Paris Principles

We believe that Hong Kong's existing human rights framework is not in compliance with the Paris Principles. Although Hong Kong has a few institutions in the form of the Equal Opportunities Commission, the Ombudsman and the Office of the Privacy Commissioner for Personal Data that are engaged in the task of protecting and promoting some aspects of human rights, these institutions are not best suited to provide a holistic approach to the protection and promotion of human rights, as envisaged in the Paris Principles.

The Paris Principles are important basic principles that inform our approach and understanding of the institutionalisation of human rights. They also provide guidelines on how national human rights institutions (NHRIs) can achieve the goals of protecting and promoting human rights. The Paris Principles are the first systematic effort to enumerate the role and functions of NHRIs. They are divided into sections comprising certain headings: competence and responsibilities, composition and guarantees of independence and pluralism,

methods of operation, and additional principles concerning the status of commissions with quasi-judicial competence.

Through the Paris Principles, efforts have been made to ensure that NHRIs have "as broad a mandate as possible" and that such mandate has either constitutional or legislative validity. Unfortunately, in the context of Hong Kong, the mandate that is given to the existing institutions is fairly limited and the powers that are exercised are narrow. The comprehensive section on NHRIs' competence and responsibilities in the Paris Principles suggest that the institutions be given sufficient scope to evolve according to socio-legal and political circumstances, and to include those functions that they deem appropriate. This guidance in the Paris Principles was advanced with the hope that countries would evolve a broader approach to institutional protection of human rights and not a limited approach. The section on the composition and guarantees of independence and pluralism under the Paris Principles aims to underline the need for measures to ensure the NHRIs' independence and institutional autonomy. Unfortunately, our historical experience with the working of existing institutions in Hong Kong demonstrates that functional autonomy and operational independence are neither protected through the legal structure nor

in practice. While establishing some of these institutions in Hong Kong, there was an opportunity to emphasise the basic philosophy underlying the establishment of such institutions worldwide, which is to ensure the protection and promotion of human rights and fundamental freedoms of people through the development of national institutions. However, this was not done and our institutions have been subject to different types of criticism. This is of particular concern when other institutions, including the judiciary and, to a certain extent, the administrative methods of grievance redress within the government departments may not always be able to afford "guarantees of independence and pluralism," as such guarantees are specifically mentioned in the sub-heading of the Paris Principles. The working of the existing institutions in Hong Kong does not demonstrate that these Principles have been duly followed.

As part of the responsibilities of NHRIs, the Paris Principles observe that NHRIs should "promote and ensure the harmonisation of national legislation regulations and practices with the international human rights instruments to which the State is a party, and ensure their effective implementation." This guideline aims at local NHRIs performing a comprehensive function in human rights development and education in the community. This is an important

principle in as much as it refers to the compatibility of international human rights law and national legislation. This Principles aim also to ensure that governments take efforts to ratify international human rights treaties. In the context of Hong Kong, since the existing institutions have limited mandate and have not had the powers to entertain human rights violations, including civil, political, economic, social and cultural rights, they have not been able to usefully perform these responsibilities. NHRIs are not the only institutions that have the task of ensuring compliance with treaty obligations; the Governments' law ministry and, to a certain extent, the judiciary could perform these tasks while NHRIs would then supplement the role of the other governmental departments in ensuring treaty compliance.

Setting standards in the area of human rights, ensuring treaty ratification, and promoting domestic law reform to elevate the status of international human rights treaties within the domestic law are important aspects of improved governance mechanisms in human rights matters that NHRIs ought to be performing. Unfortunately, the institutions in Hong Kong do not comply with the Paris Principles and hence, are not able to perform these responsibilities in an effective manner. This assumes significance in light of expanding notions of

human rights and the continuous and specialised development of international human rights Jurisprudence. The Copenhagen Declaration correctly summarises this aspect when it emphasises the need for NHRIs to ensure that "governments ratify international human rights treaties, remove reservations contrary to the object and purpose of the treaty and ensure consistency between domestic laws, programs and policies and international human rights standards".

(b) Views on whether a human rights commission should be established in Hong Kong

We believe that an independent human rights commission should be established in Hong Kong as soon as possible. The institutional approach to handling human rights issues has proven to be one of most commonly developed strategies to facilitate domestic protection and promotion of human rights. Hong Kong needs an independent human rights commission (IHRC) that should specifically be mandated to investigate allegations of human rights violations that come before it or those cases in which it decides to take *suo motu* jurisdiction. The need for creating an IHRC is demonstrated by the fact

that human rights issues have once again come to the forefront of political discourse in Hong Kong in view of controversies surrounding the Article 23 legislation and other matters. Various interest groups had to engage with the government of the HKSAR for several months in vain to convince it of the need for examining the Article 23 legislation due to its negative impact on human rights and civil liberties.

Moreover, Hong Kong courts, by their nature, cannot pass any opinion on the legality or otherwise of a future legislation. Hence, the much needed human rights scrutiny of the Article 23 legislation was not available. However, the human rights consequences of this legislation were publicised through academic writings, independent opinions, consultations, media opinions, NGOs and professional organisations like bar associations. But these opinions tend to fundamentally differ from the kind of opinion that would typically come from an IHRC, if there were such an institution in Hong Kong.

NHRIs perform a variety of functions, including investigating alleged human rights violations, conducting public inquiries, exercising advisory jurisdiction, enforcement of human rights in prisons and other custodial institutions, providing advice and assistance to governments, promoting human rights

education and awareness, promoting interaction, exchange, and better coordination among other NHRIs in the region and worldwide, promoting interaction and exchange with NGOs, and publication of annual reports

To this list may be added a few more specific functions for the IHRC of Hong Kong: the IHRC should engage and collaborate with NGOs in Hong Kong to tackle human rights problems and to promote and develop a vibrant civil society culture in Hong Kong; the IHRC of Hong Kong should also collaborate, share information with other HRCs in the Asia-Pacific region and other parts of the world and be willing to learn from best practices and experiences of HRCs that have been successful in handling human rights issues in other jurisdictions; the IHRC should involve itself in the task of prioritising the promotion of human rights education in Hong Kong that respects human dignity and cherishes human values like equality, non-discrimination, and tolerance.

In this regard, the IHRC can usefully refer to the work of the Independent Commission against Corruption (ICAC) in Hong Kong and how it was successful in developing a culture of integrity and corruption-free governance

in Hong Kong. Hong Kong has successfully developed a system of corruption-free governance and a governmental administrative system that is largely based upon integrity and efficiency. Hong Kong's ICAC is known to be one of the most successful institutional approaches to tackle corruption. The Global Corruption Report of 2006, prepared by Transparency International, ranks Hong Kong to be one of the least corrupt cities in the world. However, efforts to tackle corruption through the ICAC and endeavours to protect and promote human rights through the proposed IHRC are quite different processes. Much will depend on political consensus and the commitment of the government of the HKSAR to provide the institutional autonomy and functional independence for an IHRC. Undoubtedly, it would also involve political bargaining with the Mainland that brings into question the autonomy that HKSAR is supposed to enjoy while being a part of the PRC. The autonomy of an IHRC will in a way mirror the larger question of how politically autonomous Hong Kong itself can be.

Besides the earlier mentioned justifications for the creation of an IHRC in Hong Kong, it is also worth noting that an IHRC in Hong Kong can help provide direction to the human rights discourse in its dialogue with power

structures of the state. There is great governmental apathy relating to human rights and this can, to a large extent, be overcome if the government starts to think seriously about human rights as a development and governance issue, rather than a purely political issue on which they have to disagree with critics of the administration. The presence of an IHRC can ensure that numerous matters in which the government has not acted in accordance with the rights and freedoms guaranteed to the people of Hong Kong can be averted from tedious court cases. The IHRC will be able to engage with the particular victims of human rights violations and can potentially serve as an impartial arbiter between the government and the victims of human rights violations. Unnecessary time, money and resources spent for litigation can thus be better utilised for other development activities. The IHRC can provide greater impetus through its research and development department in understanding the relationship between human rights, democracy and development.

While drafting a suitable legislation for establishing an IHRC in Hong Kong, it is possible to borrow the practice of the Court of Final Appeal (CFA) in Hong Kong: to have some members of the IHRC come from outside Hong Kong and, in particular, from other common law jurisdictions and other HRCs to sit on the IHRC in Hong Kong and thus contribute to the development of best practices

for the protection and promotion of human rights. There are other countries in which HRCs are functioning effectively and they have started to take capacity-building initiative and training programs to promote the establishment of HRCs worldwide. The proposed IHRC of Hong Kong could very well use these experiences and indeed engage and interact with other countries where HRCs have been successfully protecting and promoting human rights. The proposed IHRC should also be empowered to handle violations of economic, social and cultural rights, besides civil and political rights. The experience of HRCs that have been established in other parts of the world also demonstrate that even the successful HRCs have not been effective in the area of economic and social rights and have been subject to criticism on this account. In this context, it is important to recognise that the mandate of the IHRC in Hong Kong should specifically include powers to investigate allegations of violations of ESC rights and provide remedies for the victims. Since the ICCPR and ICESCR are both entrenched in the HKSAR, the proposed IHRC will have a legal and constitutional framework to ensure the proper protection and promotion of all human rights.

The need for establishing an IHRC in Hong Kong can be justified on the basis of human rights advocacy and an independent institutional mechanism designed to protect and promote human rights. This would pave way for the development of democratic institutions in Hong Kong with a view to improve the quality of governance and effectiveness of public administration. However, it is possible that the establishment of an IHRC can be opposed on several grounds. The fact that the present government of the HKSAR and the authorities in Mainland China are deeply concerned about the agitation against the Article 23 legislation and the dynamic movement towards deepening of democracy has made the case of establishing an IHRC difficult. The government of the HKSAR may be of the opinion that creating an IHRC is nothing short of opening a Pandora's Box or a slippery slope that will end up openly challenging its authority. A vibrant civil society, leading political opposition groups, media and other members of the Hong Kong society are already exerting enormous pressure on the government to reform and truly promote greater transparency in its decision-making process, particularly on all matters relating to the Article 23 legislation. This also translates into demands that the government allow genuine public consultation and receive feedback, in addition to being ready and willing to listen to the views of the

people of Hong Kong and if necessary, make amendments to the legislation.

The government of the HKSAR has demonstrated little sincerity in its handling of the Article 23 episode and if at all, it has only widened the distance between the government and the people of Hong Kong.

Under these circumstances, the creation of an IHRC would send the right signals to all concerned people that the government is ready and willing to handle the human rights implications of not only the Article 23 legislation, but also other possible acts in the future. The recent Article 23 debate has engendered some mistrust of the government that needs to be repaired. Moreover, the creation of an IHRC would only underscore the government's pre-existing commitments to international human rights obligations to which Hong Kong is a party. The mandate of the IHRC ought to be wider so as to include both civil and political rights and economic, social and cultural rights. Unlike the courts of Hong Kong, the IHRC need not be restricted by domestic legislation and should be able to handle issues relating to human rights in a much more creative manner. In this regard, it is useful to refer to the objection that there may be a case of functional duplication prevailing in the concept of

a human rights commission in Hong Kong due to the fact that the HKSAR already has an EOC.

It is important to note that the formation of EOC in Hong Kong was preceded by initial efforts to create a human rights commission. These efforts did not come to fruition and what ultimately came about was not an IHRC but an EOC. Equality and non-discrimination, albeit a very important human rights issue, is only one of the various human rights issues that need an institutional response. EOC has jurisdictional limitations to pursue matters that are violations of the anti-discrimination law. This means that many of the other human rights violations that take place in Hong Kong will have to be dealt with by the courts of the HKSAR or some other administrative tribunal with little relief to the survivors. A recent controversy over the appointment of a new Director of the EOC and his comments on his predecessor has damaged the reputation of the institution, and there is now an investigation in this respect in the Legislative Council. There was some public speculation that the earlier Director was let go because she was fiercely independent and forceful in her mandate. This only underscores the argument that was earlier made about

the need for the proposed IHRC to have its autonomy and independence and should not have any governmental interference in its functioning.

The proposed IHRC will not supplant the EOC. The EOC will function on the same lines in which it is presently functioning. However, there are arguments for its reform, and the need for guarantees of its greater transparency and independence is significant. The IHRC will be an independent stand-alone institution that will be broadly mandated and will have jurisdiction to investigate allegations of human rights violations. The functions of the IHRC will be determined based upon numerous factors, including the needs and human rights aspirations of the people of Hong Kong, the structure of human rights law in the BL and the BORO, the Paris Principles and other international human rights principles that are relevant for the establishment of human rights commissions. The IHRC will also draw upon comparative experiences in terms of the functions of the HRCs that have been established and functioning in other countries in the South East Asian region and other parts of the world.

Further, the enabling legislation that establishes the IHRC will have to ensure that there is no functional duplication in terms of the role of the EOC and hence, those matters that come before the IHRC, which are directly or indirectly related to equality and non-discrimination, need to be handed over to the EOC. This will ensure that both the IHRC and the EOC do not function in opposing directions or enter into a turf war, but rather complement each other's unique roles.

The role of the ICAC in Hong Kong is also very important to understand institutionalisation of transparency in governance. Corruption is a violation of human rights. While in the case of developing countries, there is a stronger case of corruption to be a violation of human rights, in developed countries and advanced economies also there are enough instances to demonstrate that corruption violates human rights and rights-based approaches to corruption can more effectively handle the problem. In this regard, the IHRC will benefit significantly from the work of the ICAC as corruption in administration clearly leads to abuse of power and potential human rights violations. The IHRC can be the sheet-anchor institution on the basis of which other human rights work can be conducted.

The governance discourse in Hong Kong can be significantly transformed if the IHRC remains the focal point for good governance. Close interaction and engagement of the IHRC with the EOC and the ICAC would benefit these institutions in evolving suitable policies and practices that, in totality, ensure good governance. Human rights support good governance, and any system of administration that does not respect human rights cannot promote good governance. Hong Kong has the potential to take the lead in this area, as there are numerous possible linkages between the human rights discourse of the IHRC, which could be supported by the good governance discourse of the ICAC and the anti-discrimination discourse of the EOC. All these aspects are indeed human rights issues and it is in the best interests of the HKSAR's growth and development that the IHRC is established so that rule of law, protection of rights and freedoms, and promotion of good governance and achievement of sustainable social and economic development becomes a true reality.

A survey of Hong Kong's legal institutions and laws has revealed the presence of a theoretical foundation upon which a culture of human rights can

be nurtured. There is indeed a conceptual basis for deepening rule of law, good governance and tolerant society already exists in Hong Kong. Nevertheless, the latent potential for a comprehensive human rights culture can only be realised through human rights education that galvanises and enters the political and social psyche of Hong Kong residents. The incapacity of the Hong Kong courts to deal with all human rights problems and the unwillingness of the HKSAR government to allow participatory democracy means that the community's demand for preservation of liberties has no proper recourse at the moment. This was demonstrated in the weak and non-transparent response of HKSAR administration to the Article 23 agitation.

For meeting the gap in human rights protection that Hong Kong is facing, establishment of an Independent Human Rights Commission (IHRC) is essential. The word "independent" is so important in the political context of Hong Kong that it was considered appropriate to add it to the acronym "IHRC". An autonomous human rights institution in the form of an IHRC will be capable of meeting the expectations of Hong Kong society and promoting a culture of human rights. It is important to recognise that there will be no duplication or clash of jurisdiction of the IHRC with other entities that deal with

particular human rights issues, which are covered by the EOC and the ICAC. The arguments for an IHRC outweigh those against it. A model IHRC that can accommodate various concerns and still be effective has been proposed for consideration of the legal community and political authorities. This framework can go a long way in bringing Hong Kong closer to the liberal rights-respecting paradise that it has always aspired to be.