

Moving Beyond Constitutionalization and Judicial Protection of Human Rights – Building on the Hong Kong Experience of Civil Society Empowerment

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I. INTRODUCTION

The development of human rights as a language for global governance sets the tone for civil society¹ empowerment in many societies. Most human rights have been recognized by constitutions. In fact, international human rights law has increasingly been developed as a part of domestic constitutional law so that protection and promotion of human rights become part of the judicial function.² Thus, the judicial protection of human rights³ and constitutionalization of human rights may be two

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1. Mary H. Kaldor, *The Ideas of 1989: The Origins of the Concept of Global Civil Society*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 475, 475-88 (1999).

2. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1021 (2nd ed. 2000).

3. See generally Michael J. Perry, *Protecting Human Rights In A Democracy: What Role For The Courts?*, 38 *WAKE FOREST L. REV.* 635, 635 (2003) (discussing the role of the courts as enforcers of human rights).

important objectives by which the rule of law⁴ can be preserved and which may govern future human rights work. While there are limitations in confining the human rights movement to both of these formal mechanisms of protecting human rights, it will be extremely valuable to critically analyze the nature, functions, effectiveness, and limitations of both of these approaches to the protection of human rights. For enlightened constitutional theorists, "constitutionalism" is as broad a concept as democracy itself (even broader in institutional terms), while judicial review is somewhat narrower, but also encompasses an interactive process with democratic politics in the Bickelian sense.

So far as the legal, political and judicial system of the Hong Kong Special Administrative Region (HKSAR) is concerned, it continues to change dramatically since the handover to the People's Republic of China in 1997. While the rule of law and social fabric of Hong Kong society has by and large been sustained, there are enough indications to suggest that the protection of human rights and fundamental freedoms that are enshrined in the constitutional framework in the HKSAR have come under threat due to recent developments relating to the proposed national security legislation.⁵ The national security bill that is being currently debated, known as the "anti-subversion law," has brought in sharp focus rather familiar issues relating to freedom versus security and above all, the role of government in curtailing human rights and to what extent the twin objectives of security and liberty are balanced.⁶ This debate is especially relevant in the wake of global counter-terrorism laws enacted by states after September 11, 2001 and allegations by civil society groups that these laws curtail liberties.

Hong Kong's Basic Law has a robust framework for the protection of human rights and fundamental freedoms, which is further supported by the entrenchment of the International Covenant on Civil and Political Rights (ICCPR) within the Basic Law. The Bill of Rights Ordinance (BORO) underlines the

4. Richard H. Fallon, Jr., *The "Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 39-41 (1997).

5. See Hong Kong Government, *Proposals to Implement Article 23 of the Basic Law: Myths and Facts*, available at http://www.basiclaw23.gov.hk/english/resources/legco/legco_article/article9.htm (last visited Oct. 23, 2004).

6. Albert H. Y. Chen, *How Hong Kong Law Will Change When Article 23 of the Basic Law is Implemented*, 33 HONG KONG L. J. 1, 7 (2003).

HKSAR's commitment to human rights and the rule of law and empowers the judiciary to ensure that the government of the HKSAR fulfills these commitments.⁷ However, constitutionalization of human rights, or for that matter, judicialization of human rights, as opposed to the development of constitutionalism within the framework of human rights may not be sufficient for Hong Kong. Given the fact that the concept of "One Country, Two Systems" has been debated both within the HKSAR and Mainland China as to what should be the right balance, Hong Kong society needs to steadfastly safeguard human rights and fundamental freedoms.⁸

Hong Kong civil society should maintain a constant vigil and be empowered to ensure that human rights when demanded must be enforced not just by judges and courts, but also through people's movements. The challenge lies in the process of increasing awareness about democratic governance with a view toward sharpening and mobilizing public vigilance. The mass mobilization and people's movement in Hong Kong in protesting against the passing of the national security legislation demonstrates the power of the people to engineer good constitutional governance.⁹

Part I of this Article presents an overview of the principles of constitutionalization of human rights and the role of judiciaries generally in protecting human rights. Part II critically examines the legal and constitutional framework in Hong Kong for the protection and promotion of human rights. It also evaluates the institutional mechanisms in Hong Kong that would ensure the protection and promotion of human rights.

Part III analyzes the role of the judiciary in Hong Kong in protecting and promoting human rights with specific reference to the development of international human rights law in national judicial decision-making. Part IV discusses the relationship between civil society, constitutionalism, and human rights. It argues that the present system of placing complete trust in the

7. International Covenant of Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

8. John K. Kwok, *The Hong Kong Special Administrative Region under "One Country, Two Systems": Design for Prosperity or Recipe for Disaster* 15 N.Y.L. SCH. J. INT'L & COMP. L. 107, 107 (1994).

9. Liam Fitzpatrick, *The Long March*, TIME ASIA, July 7, 2003, at <http://www.time.com/time/asia/covers/501030714/story.html> (last visited Oct. 23 2004).

formal mechanisms like the Basic Law, the Bill of Rights Ordinance, and the independent judiciary in Hong Kong to ensure the protection and promotion of human rights is not sufficient and does not do complete justice to the needs and demands of Hong Kong society. The process of democratization and development of constitutionalism is indeed an assertion of the human rights of the people of Hong Kong to ensure a society that provides for transparency and accountability in governance.¹⁰ It needs to be noted that constitutional institutions are a core part of this process of education.

Part V discusses the civil society in Hong Kong and its relevance for human rights activism.¹¹ Civil society in Hong Kong needs to be educated and empowered to ensure that they assert their rights and freedoms.¹² The past experience of mass mobilization in Hong Kong for resisting the actions of the government of the HKSAR to pass national security legislation will be used to identify the threats to the human rights and fundamental freedoms of the people of Hong Kong and highlight the weaknesses and insufficiency of formal mechanisms in resisting such threats. In this context, it is useful to recall the maxim of John Stuart Mill, the nineteenth century English political theorist—"eternal vigilance is the price of liberty." Civil society can be usefully engaged in the process of constitutional empowerment so that the government of HKSAR is subjected to a certain degree of direct accountability. The direct accountability of the government of the HKSAR to the people is the first step towards achieving democratization in the HKSAR, which is necessary to ensure that other democratic institutions in Hong Kong perform their roles and functions in an effective manner.

Part VI discusses the need for a Human Rights Commission to strengthen civil society and social empowerment. This section underlines the need for institutionalisation of human rights in Hong Kong. Part VII discusses how democratic dissent and the

10. See Yash P. Ghai, *The Rule of Law, Legitimacy and Governance*, 14 INT'L J. SOCIOLOGY OF L. 179, 179-208 (1986).

11. See Christine Loh, *Civil Society and Democratic Development in Hong Kong*, in BUILDING DEMOCRACY - CREATING GOOD GOVERNMENT FOR HONG KONG 127 (Christine Loh & Civil Exchange eds., 2003).

12. See generally G.B. Madison, *The Political Economy of Civil Society and Human Rights*, in ROUTLEDGE STUDIES IN SOCIAL AND POLITICAL THOUGHT x (1998) (discussing the necessity of education in the creation of civil society).

right to protest have implications for human rights. Part VIII concludes with a discussion on the impact of civil society empowerment on democratisation.

II. CONSTITUTIONALIZATION AND JUDICIAL PROTECTION OF HUMAN RIGHTS

Constitutions provide an elaborate framework for the protection and promotion of human rights and fundamental freedoms.¹³ Conventional wisdom states that when rights and freedoms are written into the constitutions of different countries, they are given a higher legal status and become central to the political discourse in a society. Constitutions at their best may provide the political and institutional venue for this discourse. Constitutions are also written at a time when momentous political changes take place in a country or society and the framers of the constitution objectively attempt to transform the society. Constitutional guarantees of human rights cannot successfully ensure that these rights are protected, however, unless they succeed in engaging the democratic processes in the society, an empowering function that should be the goal of constitutionalism.¹⁴ It is important that there are independent democratic institutions that function effectively in ensuring that the governance system adheres to the principle of the rule of law and the constitution.¹⁵

Constitutionalism should be understood to encompass all such institutions. The judicial system ought to ensure that the human rights and fundamental freedoms guaranteed under the constitution are vigorously protected and any violation is duly redressed. Independence of the judiciary is expected to overcome any intrusions upon individual rights by other branches of the government.¹⁶ The fact that the judiciary has to protect the rights of the people and also protect against infringement by other branches of the government means that it has to be given a certain degree of independence and autonomy in its functioning.

13. L.W.H. Ackermann, *Constitutional Protection of Human Rights: Judicial Process*, 21 COLUM. HUM. RTS. L. REV. 59, 59-71 (1989).

14. See Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 125 (1998).

15. William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 724 (2000).

16. Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, JUDICATURE, Jan.-Feb. 2002, Vol. 85, No. 4, at 195-200.

The international human rights framework has underlined the relationship between the need for maintaining an independent judiciary and the protection of human rights. The Universal Declaration of Human Rights (UDHR) and the ICCPR observe that an independent judiciary is one of the safeguards for protecting human rights.¹⁷ The United Nations has formulated standards for achieving an independent judiciary in its "Basic Principles on the Independence of the Judiciary", which were adopted by the United Nations General Assembly in 1985.¹⁸ While these standards do not have the status of law, the UN has held this to be a model to encourage states to adopt them in their constitutions.¹⁹ Furthermore, the UN Human Rights Commission has appointed a Special Rapporteur to help monitor the progress and problems in implementing these principles.²⁰ Constitutionalization of human rights alone is not sufficient. It must be supplemented with guarantees for providing independence of the judiciary.

Constitutionalization of human rights creates a theoretical framework for the protection of human rights and from it flows the various legal, judicial, democratic and institutional mechanisms that ensure the protection and promotion of human rights. When rights are guaranteed within the national constitutional framework of various countries, there are numerous implications for such guarantees.²¹ The provision of such rights within the constitution demonstrates the state's acceptance of the importance of protecting these rights at a conceptual level.

It is possible that such rights, even after being constitutionally provided, may not be protected in practice. Under those circumstances, the other democratic institutions in a country may intervene. It is in this context that the judiciaries of various countries have started to interpret the constitution in exercising

17. Universal Declaration of Human Rights, art. 10, G.A. Res. 217A, U.N. Doc. A/80, at 73 (1948) [hereinafter UDHR]; ICCPR, *supra* note 7, art. 2, at 52.

18. Kaldor, *supra* note 1, at 475-88.

19. *Id.*

20. *Id.*

21. See generally Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000) (discussing the incorporation of international human rights in a few selected constitutions of certain countries).

their powers of judicial review.²² The history of the recognition of the basic principle of judicial review, from United States Supreme Court Chief Justice John Marshall's opinion in *Marbury v. Madison*,²³ down to the contemporary and progressive formulations in the courts of India and South Africa²⁴ that recognize economic and social rights for citizenry, has been a long and arduous journey.²⁵

The role of the constitution and the judiciary to protect and promote human rights, while extremely important and undoubtedly necessary, needs to be understood in different political contexts. The judiciary is able to best perform its constitutional functions only when the independence of democratic institutions is guaranteed and the government of the country is adhering to certain principles of constitutional governance. Human rights and constitutional freedoms are too important for the judiciary to be the exclusive custodian of their protection and promotion, and most liberal constitutions typically do not envision that.

Further, the formal mechanism of protection of human rights through the constitutional apparatus and the enforcement of human rights by the judiciary may fail, particularly when these institutions operate under limitations. There should be further space provided for democratic dissent and resistance to intrusions on human rights. This space is also typically addressed by liberal constitutions both in rights guarantees and democratic commitments. It should be an autonomous space for the citizenry to take upon themselves the task of protecting and promoting human rights and fundamental freedoms. It is possible that resistance from the citizenry can actually serve as a check upon the democratic branches of the government to ensure that the human rights of people are duly protected and that violations of any nature would be met with serious criticism in the form of

22. See Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 499-532 (2000).

23. See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 459 (2000). See also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360 (1997).

24. See Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809, 837 (2001).

25. See McCrudden, *supra* note 22, at 499-532.

democratic dissent. Importantly, people's resistance and movements to ensure the protection and promotion of human rights empower the judiciary in performing its constitutional obligations of protecting the rights and freedoms of the citizenry.²⁶ Organized people's movements to ensure the protection and promotion of human rights can actually educate the branches of the government in lessons of true democratic governance so that people's views are heard and listened to while formulating policies relating to good governance.²⁷

III. LEGAL AND CONSTITUTIONAL FRAMEWORK FOR PROTECTING HUMAN RIGHTS

The 1984 Sino-British Joint Declaration (Joint Declaration)²⁸ provided for the return of Hong Kong to China in 1997.²⁹ The Joint Declaration also promised a liberal and autonomous constitutional framework in the Basic Law within China's "one country, two systems" formula.³⁰ Michael C. Davis observes that the basic structural elements of liberal constitutionalism are thought to include (1) democracy with multi-party competition, (2) liberal human rights protection, including freedom of speech, and (3) the rule of law, including adherence to principles of legality.³¹ He has further observed that with the exception of some limitations on the level of democracy, the Joint Declaration promises all of these elements in a liberal constitutional order.³² With regard to the human rights framework, the Joint Declaration provided for a

26. See Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, *supra* note 14, at 109.

27. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52 (1992).

28. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, UK-PRC, 23 I.L.M. 1371 [hereinafter Joint Declaration]. The promises of the Joint Declaration were stipulated in Article 3(12) to be included in the HKSAR's constitution, the Basic Law.

29. Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 275 (1999).

30. Huang Jin and Andrew X. Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China*, 5 DUKE J. COMP. & INT'L L. 289, 294-95 (1995).

31. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 223 (Yale University Press 1989).

32. See MICHAEL C. DAVIS, *CONSTITUTIONAL CONFRONTATION IN HONG KONG, ISSUES AND IMPLICATIONS OF THE BASIC LAW* 28-29 (1989).

comprehensive set of rights, of which more than half relate to freedom of expression.³³ It also guaranteed the application of the international human rights covenants.³⁴ The rule of law was preserved by the application of the principles of common law, the independence³⁵ and finality of the local courts in the HKSAR, the supremacy of the Basic Law, and the right to challenge executive actions in the courts. This may be interpreted to include the right to challenge an action's legal basis under the Basic Law.³⁶ Davis has thus correctly observed that by "implication, this promised nothing less than a full system of constitutional judicial review to enforce a substantial bill of rights. In tandem with a degree of democracy and a high degree of autonomy, the Joint Declaration committed China to liberal constitutional government in Hong Kong."³⁷ Another significant basic policy of the joint declaration was the retention of the existing social and economic systems in Hong Kong, under which:

Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law. . . . Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.³⁸

These rights were repeated in Annex I (section XIII), with the addition of, *inter alia*, "inviolability of the home, the freedom

33. Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 308 (2001).

34. See generally Johannes Chan, *Hong Kong's Bill of Rights 1991-1995: A Statistical Overview in HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997*, at 7 (George Edwards & Johannes Chan eds., 1996) (discussing various aspects of the Hong Kong Bill of Rights and the Basic Law).

35. See Fu Hua Ling, *Judicial Independence and the Rule of Law in Hong Kong*, in JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN HONG KONG 149, 229 (Steve Tang ed., 2001).

36. For example, Art 11 of the Basic Law expressly provides: "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law." See Yash Ghai, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 305, 305-07 (2nd ed. 1999).

37. See *id.*

38. See Yash P. Ghai, *The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region: Complementarities and Conflicts*, 1 J. CHINESE & COMP. L. 30, 34-35 (1997); Hong Kong Bill of Rights Ordinance, Art. 5 reprinted in 30 I.L.M. 1310, 1315 (1991).

to marry, and the right to raise a family freely."³⁹ Yash P. Ghai comprehensively summarized the characteristic liberal features of the Basic Law, which is rooted in the doctrine of "one country, two systems," when he observed that:

[T]he Basic Law has separation of powers, even though the executive dominates the political system; it espouses the ultimate aim of full democracy; it provides for an independent and competent judiciary; it provides rights of a fair trial, with an independent prosecutorial authority, juries, presumption of innocence; an independent legal profession; accords generous treatment to non-nationals; and protects a wide sphere of civil society with considerable autonomy for non-governmental organizations, domestic and international.⁴⁰

The Basic Law has an exclusive chapter on Fundamental Rights and Freedoms of the Residents (Chapter III). Article 39 in Chapter III creates a framework for domestic application of international human rights in Hong Kong:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.⁴¹

Chapter III covers a wide array of the rights listed in the Joint Declaration. It is important to note that the rights and freedoms are entrenched in the Basic Law, as no law of the legislature of the HKSAR may "contravene [the Basic] Law."⁴² In addition to this chapter, other parts of the Basic Law also cover provisions relating

39. *See id.*

40. Ghai, *supra* note 38, at 35. *See also* BASIC LAW OF THE HONG KONG ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, arts. 45, 68, *reprinted in* IAN DOBINSON & DEREK ROEBUCK INTRODUCTION TO LAW IN THE HONG KONG SAR (1996) [hereinafter Basic Law]; *id.* ch. IV, § 4, at 135; *id.* arts. 86, 87, 35, at 135; *id.* ch. VI, at 143.

41. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, *supra* note 14, at 109.

42. *Id.* *See also* Basic Law, *supra* note 40, art. II, at 127.

to rights or the means to exercise them.⁴³ For example, the right of property and of the ownership of enterprises appears in Chapter V (Economy), and the presumption of innocence and the right to trial by jury is in Chapter IV (The Judiciary).⁴⁴

In June 1991 the legislature of Hong Kong enacted the Bill of Rights Ordinance (BORO),⁴⁵ which was based upon the ICCPR.⁴⁶ The ICCPR (along with the International Covenant on Economic, Social and Cultural Rights, ICESCR)⁴⁷ is an international human rights treaty, which was adopted by the UN General Assembly on December 16, 1966, and came in to force on March 23, 1976 in accordance with Article 49 after thirty-five states had ratified it.⁴⁸ The United Kingdom signed both the treaties on September 16, 1968 and ratified them on July 20, 1976 both for itself and for Hong Kong, which was its legal dependent.⁴⁹ The actual incorporation of the ICCPR into Hong Kong law took place in 1991, when the obligations of the government and the rights of the individuals under the ICCPR started to be directly enforced under the Hong Kong legal system.⁵⁰ The Joint Declaration established the contents that the ICCPR would continue to apply in Hong Kong.⁵¹

During a tense period after the 1989 crisis in China,⁵² the Chinese government was quite resistant to the BORO⁵³ as a British attempt to usurp the Basic Law guarantees of a similar nature and

43. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, *supra* note 14, at 109.

44. *See id.*

45. Hong Kong Bill of Rights Ordinance, No. 59 (1991) reprinted in 30 I.L.M. 1310 (1991).

46. *See* Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 317-22 (1996).

47. *See* ICCPR, *supra* note 7; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

48. *See* Ghai, *supra* note 40, at 1.

49. *Id.*

50. *See* HKSAR v. Ng Kung-siu and Another [1999] 3 HKLRD 907, 920 (H.K. CFA 1999) (the Hong Kong Court of Final Appeal (CFA) stated that "the ICCPR is incorporated into the Basic Law by its Article 39").

51. Joint Declaration, *supra* note 28, ann. I, § XIII, at 1377.

52. *See generally*, Jennifer Morris, *Human Rights Violations During the Tianamen Square Massacre and the Precedents Obliging United States Response*, 13 CARDOZO L. REV. 1375 (1991).

53. *See* NIHAL JAYAWICKRAMA, *Hong Kong and the International Protection of Human Rights*, in HUMAN RIGHTS IN HONG KONG 120, 134-39 (1992).

impose additional obligations on Beijing after the handover. Ultimately, it consented to the continuance of the BORO, with minor amendments, at the handover. To constitutionally entrench the BORO before the handover, the Letters Patent, the then constitution of Hong Kong, was amended to control the legislative capacity of the Legislative Council.⁵⁴ The amendment reads:

The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly on 16 December 1966, as applied in Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that covenant as applied to Hong Kong.⁵⁵

IV. INDEPENDENCE OF JUDICIARY AND ITS IMPLICATIONS FOR HUMAN RIGHTS

The courts of the HKSAR play an important role in shaping the constitutional foundations of the Basic Law. Its interpretation leads to the development of important jurisprudence relating to constitutional law.⁵⁶ The Basic Law has been perceived and interpreted as a constitutional instrument that governs the governmental structures and the relationship between public institutions and people in Hong Kong.⁵⁷ The courts have generally ensured that the rights and freedoms of the residents of Hong Kong are duly protected. Independence of judiciary has been hailed as a *sine qua non* for ensuring the protection of human rights and fundamental freedoms.⁵⁸ While there are provisions in the legal and constitutional framework in the HKSAR that would

54. Hong Kong Letters Patent, No.2 1991, reprinted in PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK 19 (Andrew Byrnes and Johannes Chan eds., 1993).

55. The amendment is now Article VII (5) of the Basic Law.

56. See Roda Mushkat, *The Future of Hong Kong's International Legal Personality: Does International Law Matter? A Post Handover Snapshot*, 22 S. ILL. U. L. J. 275, 277-79 (1998).

57. Yash P. Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 3, 41 (Johannes Chan et al. eds., 2000).

58. See Emily Johnson Barton, *Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong*, 43 HARV. INT'L L.J. 361, 362-63 (2002).

ensure independence of judiciary in Hong Kong, the *Right of Abode Cases* and the seeking of "reinterpretation" of the National People's Congress Standing Committee (NPCSC) raise serious questions as to the level of the constitutional protection that is granted to the judiciary.⁵⁹ It also brings to sharp focus whether democratic institutions in the HKSAR, like the judiciary, can be depended upon when their functions are potentially interfered with, or when the executive does not agree with the decision.⁶⁰

In its judgment on January 29, 1999, in the *Right of Abode Cases*, the Court of Final Appeal (CFA) declared unconstitutional parts of the procedure established by the Director of Immigration for application for a certificate of entitlement as a permanent resident.⁶¹ As a response to the decision of the CFA in the right of abode case, the government prepared a memorandum to the Legislative Council dated May 18, 1999, where it outlined three options: present another case to the CFA to give it an opportunity to reconsider its previous judgment, amend the Basic Law, or seek an interpretation from the NPCSC.⁶² Without giving serious consideration to the first of the three options, the HKSAR decided to seek an interpretation from the NPCSC, before which the government of the HKSAR asked the CFA to "clarify its judgment."⁶³

The NPCSC observed that the CFA did not seek an interpretation of these provisions from the NPCSC in compliance with the requirements of Article 158(3).⁶⁴ The NPCSC also decided that CFA's interpretation was not consistent with the legislative

59. See E.g., *Ng Ka Ling v. Director of Immigration*, [1998-1999] 8 HKPLR 902, 902 (CFA 1999); see also, *Tai, Benny, Ng Siu Tung and Others v. Director of Immigration*, 1 INT'L J. CONST. L. 147 (2002).

60. Karmen Kam, *Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v the Sovereignty Interests of China*, 27 BROOK. J. INT'L L. 611, 624-25 (2002). For further reading, see generally HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION (Johannes M. M. Chan et al. eds., 2000); F. S. Hong, *International Decision: Ng Ka Ling v. Director of Immigration*, 94 AM. J. INT'L L. 167 (2000); A. R. Fokstuen, *The 'Right of Abode' Cases: Hong Kong's Constitutional Crisis*, 26 HASTINGS INT'L & COMP. L. REV. 265 (2003).

61. Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, *supra* note 57, at 29.

62. *Id.*

63. See Cliff Buddle, et al., *Judges Asked to Clarify Right of Abode Decision*, 55 S. CHINA MORNING POST, Feb. 15, 1999, at 1.

64. *Id.*

intent.⁶⁵ Hence, it decided to provide an interpretation under Article 67(4) of the People's Republic of China's (PRC) constitution and Article 158(1) of the Basic Law.⁶⁶ The NPCSC did not conform to the interpretation given by the CFA. Rather it ends with instructions to the HKSAR courts to "adhere to this interpretation."⁶⁷

The NPCSC observed that the CFA was wrong not to refer to Article 22(4) and Article 22(2)(3) to it for interpretation as it did not conform to legislative intent. The NPCSC interprets Articles 22(4) and 24(2)(3); it states that the Opinions of the Preparatory Committee are reflective of the legislative intent of Article 24(2); it states that the courts of Hong Kong must apply the interpretation to these Articles as from its promulgation; and it also protects the right to abode of those persons who were successful parties in the CFA case of January 29, 1999.⁶⁸

That the NPCSC has taken steps to clarify the law, correct and direct the lower tribunals, provide instructions and guidelines, and protect past rights demonstrates a significant degree of exercise of powers wider than legislation.⁶⁹ If the HKSAR continues to seek references from the NPCSC, and this practice becomes frequent, it will have the effect of eroding the principles of common law and threatening the finality of judicial adjudication and the independence of the judiciary in Hong Kong. While it may be justified for the government to hesitate to acquiesce to limitations on its powers to seek interpretation from the NPCSC as this is expressly provided in the Basic Law, it is important to highlight the fact that the methods of interpretation by the NPCSC are significantly different from that of the courts in Hong Kong. Typically, the NPCSC interpretations are politically driven, discussions are secret, 'true intent' is invented to justify what is deemed convenient, and they open up endless opportunities of rulings which derogate from regional autonomy and the protection of rights.⁷⁰ In addition, the legal, constitutional, and judicial framework of protecting rights and freedoms in the HKSAR is

65. *Id.*

66. *Id.*

67. See Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, *supra* note 14, at 109.

68. *Id.*

69. See *id.* at 145.

70. See generally, *id.*

threatened by the fact that it is possible for the government to rely on Article 158(1), which can create a:

[S]hift in the concept and practice of legality in Hong Kong, away from its common law traditions where law is a discipline on the government and residents alike, to a more 'administrative' legality where the say so of the government carries more authority than the law, and courts are effectively subordinated to the government.⁷¹

Ghai observes that this shift has not yet occurred in Hong Kong.⁷²

V. CIVIL SOCIETY, CONSTITUTIONALISM, AND HUMAN RIGHTS— THE DIALECTIC OF THE RELATIONSHIP

Civil society discourse is about the state of citizenship and the essential character of good society.⁷³

[It is] about what shapes citizens and contributes to civil virtue and engagement, and about what role the ordinary occupations and preoccupations of citizens play in the public sphere and in building the good society, about the function and place of the associations that make up modern societies in the politics that attempt to govern them.⁷⁴

The role of civil society in various points of time in history has been to attempt to create some form of resistance to established systems, so as to engage in the process of democratic discourse.⁷⁵ In this perspective, the debate can be traced back to Plato and Aristotle, with the latter arguing against his mentor that the good society was one in which human nature reached its ultimate perfection through the practice of the arts of civil responsibility.⁷⁶

The term civil society, derived from the Latin *societatis civilis*, refers to an ordered and peaceful society—one governed by law.⁷⁷ Georg Wilhelm Friedrich Hegel, developing the framework of modern civil society described by Adam Ferguson, argued that civil society encompassed the "ethical ideal" in its preoccupation

71. See Fokstuen, *supra* note 63, at 288.

72. See Ghai, *supra* note 57, at 33-37.

73. VIRGINIA A. HODGKINSON & MICHAEL W. FOLEY, *THE CIVIL SOCIETY READER* vii (2003).

74. *Id.* at vii.

75. Lindsay Paterson, *Civil Society: Enlightenment Ideal and Demotic Nationalism*, *SOCIAL TEXT*, 18.4, 109-16 (2000).

76. *Id.*

77. *Id.*

with everyday relationships.⁷⁸ Alexis de Tocqueville developed a civil society tradition arguing that America's diverse associations produced what he called "habits of the heart" and civil skills necessary for political life in a democratic republic.⁷⁹ De Tocqueville's cautiously optimistic approach is restrictive when it comes to developing political associations however, which he warned may threaten to tear apart the polity in pursuit of a particular passionate interest.⁸⁰

Ernest Gellner has maintained a fairly uncontroversial definition of civil society stating: "[T]hat set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society."⁸¹

This definition may be acceptable as long as it is inclusive and illustrative. It is possible that different societies may have different actors who can play the role of a civil society⁸² and it would depend upon particular social, political, and economic circumstances.

Constitutionalism is a principle that encompasses a variety of political theory ideals, demonstrating a framework of governance that is based upon human rights, fundamental freedoms, and human dignity. Davis argues that constitutionalization is an empowering aspect in engaging civil society.⁸³ Stephan Holmes argues that the measure of constitutional success is its capacity to create public empowerment.⁸⁴

Constitutional scholars often see constitutionalism in more limited constraining terms. Walter F. Murphy argues that constitutionalism, "enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a

78. John Morison, *The Government-Voluntary Sector Compacts: Governance, Governability, and Civil Society*, 27 J. LAW & SOC. 98 (2000).

79. See generally, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Doubleday 1969) (1835).

80. *Id.*

81. ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 5 (1994).

82. David Reiff, *Civil Society and the Future of the Nation-State*, 268 NATION 7, 7 (1999).

83. See Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, *supra* note 14, at 109.

84. See *id.*

right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the political will."⁸⁵ Emphasizing this constraining feature of constitutionalism may undermine its empowering role. It is possible to conceive that even with a right to political participation and substantive limitations on the powers of the government, the citizenry may not be able to actively engage in political discourse. In such a case, constitutionalism will have failed. The active engagement of civil society with constitutional political institutions can actually shape and develop good governance policies within a country or a society. If we fail to appreciate and develop this empowering role, constitutionalism may fail to effectively work in dormant civil society situations.

The relationship between constitutionalism and civil society⁸⁶ is profoundly significant for the preservation of the rule of law and to understand the roles they play in ensuring the protection and promotion of human rights. To develop a viable relationship between civil society⁸⁷ and constitutionalism, it is necessary to recognize that "constitutionalism is a dynamic, political process, rather than a fixed mode of distributing power, rights and duties."⁸⁸ It is not merely about constraint but about empowerment. Constitutional "legitimacy thus is more often validated by political and social realities than by formal legal criteria."⁸⁹ It is persuasively argued that:

[B]road-based political socialization, generally expressed as the creation of civil society, is a prerequisite to stable constitutionalism. A theory of constitutional literacy has emerged that contends that the polity must be educated about the idea of limited government before such a government can succeed. This view is based, in part, on the principle that constitutionalism imposed from above, rather than being allowed to develop from below, is actually authoritarianism,

85. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Douglas Greenberg et al. eds., 1993).

86. Gordon A. Christenson, *World Civil Society and the International Rule of Law*, 19 HUM. RTS. Q. 724, 724-37 (1997).

87. Michael Clough, *Reflections on Civil Society*, 268 NATION 17 (1999).

88. Stanley N. Katz, *Constitutionalism, Contestation, and Civil Society*, 8 COMMON KNOWLEDGE 287, 287-303 (2002).

89. See *id.*

and has insufficient basis in civil society to be considered "genuine" constitutionalism.⁹⁰

This framework needs to be further developed to include civil society⁹¹ and democratic governance perspectives within the constitutional and human rights framework of public administration.

VI. CIVIL SOCIETY IN HONG KONG AND ITS RELEVANCE FOR HUMAN RIGHTS ACTIVISM

In a policy address delivered in 2000, the Chief Executive of the HKSAR said: "In Hong Kong, voluntary organizations already provide a vast array of services, but still have great potential to improve in terms of both quality and quantity.... We will continue to enhance our working partnership with these organizations. Together we will build a better future of Hong Kong."⁹² There is no indication, however, that the remarks demonstrate any specific engagement with human rights NGOs or democratic development organizations.

The role of civil society in Hong Kong needs to be examined in light of the Article 23 debates and the recent debates relating to democratic development in Hong Kong.⁹³ Both highlighted the need for Hong Kong to develop its own brand of civil society, one that brings together NGOs, social welfare groups, and others interested in preserving Hong Kong's status as an international society with a certain degree of autonomy, albeit still as a part of the Peoples' Republic of China.

The most serious issue with the proposed national security legislation is that it underwent little democratic scrutiny.⁹⁴ The refusal of the Government of HKSAR to accept a higher degree of

90. Greenberg, *supra* note 85, at xix-xx.

91. Larry Diamond, *Rethinking Civil Society: Toward Democratic Consolidation*, 5 J. DEMOCRACY 4, 8 (1994).

92. See Patrick Ho, *Contested Space: The Role of Civil Society Organizations in Hong Kong*, Presentation by the Secretary for Home Affairs, Government of the HKSAR in the Conference on Governance, Organizational Effectiveness, and the Nonprofit Sector (September 5-7, 2003), available at www.asianphilanthropy.org/staging/about/RoleCSOsInHongKong.pdf.

93. See generally, Tom Kellogg, *Legislating Rights: Basic Law Article 23, National Security and Human Rights in Hong Kong*, 17 COLUM. J. ASIAN L. 307 (2004).

94. Benny Y. T. Tai, *The Principle of Minimum Legislation for Implementing Article 23 of the Basic Law*, HONG KONG L. J. 579, 579 (2002).

democratic discourse on all aspects of the bill, refusal to accept critical engagement, and the absence of meaningful consultation⁹⁵ has sent dangerous signals to Hong Kong residents and the international community. The fundamental nature of freedom of speech and expression is such that it has a direct and tangible relationship with the exercise of other freedoms and rights.

While national security should be protected in Hong Kong, during the course of formulating such laws, no government that relies on the rule of law, including that of the HKSAR, can compromise on the protection of human rights, fundamental freedoms, and civil liberties. Verbal assurances by senior government officials that the proposed national security legislation will conform to the human rights guarantees of the Basic Law and the ICCPR were insufficient and publicly perceived as highly suspect in the face of opposition from the Hong Kong Bar and lawyers groups.⁹⁶ It is important that international standards relating to human rights are steadfastly adopted by the HKSAR while formulating legislation relating to national security.

Power-holders need to be accountable to the people who are governed and such accountability can be assessed only on the basis of the level of transparency and information that is available on the nature and scope of the laws that are to be passed under Article 23. It is pertinent for all people in Hong Kong to understand and fully appreciate the implications of the proposed legislation. Previously, civil society initiatives were galvanized to bring such an understanding to all social strata. There was a development of vibrant, broad-based, and institutionalized initiatives, in the form of NGOs taking keen interest in mobilizing people about the implications of such legislation. The government failed to ultimately get its way on this legislation because of a substantial civil society response.

It is important to recognize that civil society movements should function in an autonomous manner and should be in a position to take independent opinions on issues that affect Hong

95. See Michael C. Davis, *Who defines national security?*, Submission to the Hong Kong Legislative Council, LC Paper No CB(2)201/02-03(11), available at <http://www.legco.gov.hk/yr12-03/english/panels/ajls/papers/ajlsse1107cb2-201-11e.pdf> (last visited Oct. 23, 2004).

96. See generally Michael C. Davis, *Adopting International Standards of Human Rights in Hong Kong*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 168 (Michael C. Davis ed., 1995).

Kong. Moreover, it may be noted that any law passed pursuant to Article 23 will suffer serious legitimacy issues if it is passed without the informed consent of the people of Hong Kong, because it would therefore not reflect the public and social consciousness. Such a law would face legal challenges under the Basic Law and international human rights standards. Resistance and informed criticism of the proposed legislation under Article 23 should not only come from the Bar Associations, but also from members of other disciplines and professional associations. For this to happen, efforts need to be taken from all professions to create a greater awareness about the proposed legislation and its true implications for Hong Kong.

Adherence to the rule of law by the power-holders and preservation of the rule of law by the people who are ruled is a *sine qua non* of any society that hopes to maintain peace and social harmony. It is only through these initiatives that Hong Kong can hope to achieve further social and economic development. The government of Hong Kong has a unique opportunity to rise to the occasion and seek a genuine consultative process before passing any legislation under Article 23. This will send the right signals and help to give greater assurances to all the concerned people in Hong Kong and the international community that the rule of law is entrenched in Hong Kong and has its own corrective mechanisms for regulating government actions. The civil society movement that has emerged in Hong Kong could actually serve as a watchdog, along with the media and other organizations, to monitor the judicial exercise of governmental power.⁹⁷ This movement could also play a key role in bringing greater accountability and transparency to Hong Kong's government. While Hong Kong has an international reputation for successfully achieving positive results in tackling the problem of corruption,⁹⁸ and transparency⁹⁹

97. Telephone Interview by Open Democracy with Christine Loh, CEO, Civic Exchange (Sept. 16, 2004), at <http://www.opendemocracy.net/debates/article-10-83-2093.jsp> (last visited Oct. 23, 2004) [hereinafter Christine Loh Interview].

98. See generally, C. Raj Kumar, *Human Rights Approaches of Corruption Control Mechanisms: Enhancing the Hong Kong Experience of Corruption Prevention Strategies*, 5 SAN DIEGO INT'L L.J. 323 (2004).

THOMAS CHAN, CORRUPTION PREVENTION – THE HONG KONG EXPERIENCE 365 (UNAFEI Resource Material Series No. 56, 2002).

99. Daniel R. Fung, *Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience*, 8th International Anti-Corruption Conference (IACC),

in governance from the standpoint of a corruption-free society, it needs to take more efforts to ensure that all decisions of the government are made in a transparent and socially accountable manner.¹⁰⁰ However, it is important that anti-corruption measures adopted by the Independent Commission Against Corruption (ICAC) in Hong Kong do not violate human rights.¹⁰¹

VII. STRENGTHENING CIVIL SOCIETY AND SOCIAL EMPOWERMENT: THE NEED FOR A HUMAN RIGHTS COMMISSION

The absence of a human rights commission is deeply felt by civil society in Hong Kong.¹⁰² A human rights commission would serve as a front line response mechanism to ensure that there is an institutional structure that works specifically for the protection and promotion of human rights in Hong Kong.¹⁰³ While debates about the appropriateness and necessity of the enactment of laws against subversion, sedition, secession, and theft of state secrets in Hong Kong is actively in progress at all levels, it is useful to encourage the government of the HKSAR to consider establishing the statutory and independent Hong Kong Human Rights Commission (HKHRC).¹⁰⁴

available at http://www.transparency.org/iacc/8th_iacc/papers/fung.html (last visited Oct. 23, 2004).

100. See Christine Loh & Richard Cullen, *Politics Without Democracy: A Study of the New Principal Officials Accountability System in Hong Kong*, 4 SAN DIEGO INT'L L.J. 127, 135 (2003).

101. For further reading on recent issues relating to balancing of human rights and protection of corruption-free governance in Hong Kong, see C. Raj Kumar, *Protecting Human Rights while Ensuring Corruption-Free Governance: The Need for Establishing Hong Kong's Independent Human Rights Commission (Part 1)*, HONG KONG LAWYER, Sept. 2004, at 99, available at <http://www.hk-lawyer.com/2004-9/Default.htm> (last visited Oct. 23, 2004); and C. Raj Kumar, *Protecting Human Rights while Ensuring Corruption-Free Governance: The Need for Establishing Hong Kong's Independent Human Rights Commission (Part 2)*, HONG KONG LAWYER, Oct. 2004, available at <http://www.hk-lawyer.com/2004-10/default.htm>.

102. See Anna Wu, *Why Hong Kong Should Have Equal Opportunities Legislation and a Human Rights Commission*, in HUMAN RIGHTS AND CHINESE VALUES 185, 185-202.

103. For further elaboration see C. Raj Kumar, *Developing a Human Rights Culture in Hong Kong: Creating a Framework for Establishing the Independent Human Rights Commission*, 11 TULSA J. COMP. & INT'L L. 101, 101-130 (2004).

104. For additional information, see *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission, National Institutions for the Promotion and Protection of Human Rights*, Report of the Secretary-General, U.N. ESCOR, Hum. Rts. Comm., 53rd Sess., Agenda Item 9, U.N. Doc. E/CN.4/1997/41 (1997), available at <http://www.unhchr.ch> [hereinafter Proposed UN HRC Standards]. See also, AMNESTY INTERNATIONAL,

There is no doubt that Hong Kong lacks a fully accessible, affordable, expeditious, and an effective mechanism under which individuals could seek redress and reparations for alleged violations of human rights.¹⁰⁵ Since 1976 the governments of the UK and Hong Kong have been bound by the ICCPR to formulate legal remedies that are effective in practice for all victims of human rights violations in Hong Kong. This is an international treaty obligation and hence results in a legal obligation and not an aspiration or evolutionary goal for the future. The Hong Kong government has a duty to set up adequate human rights awareness, education, and training programs, which would be possible by establishing such a statutory Hong Kong Human Rights Commission.¹⁰⁶ Moreover, establishing the HKHRC now would demonstrate a greater degree of sincerity and genuineness to the Hong Kong government's claims that laws under Article 23 of the Basic Law will be clearly and narrowly defined so that fundamental rights, civil liberties, and freedoms of the people of Hong Kong are protected.¹⁰⁷ It is important to recognize that some of the countries in Southeast Asia have established human rights commissions¹⁰⁸ and hence, there is no need for Hong Kong to lag behind such initiatives, particularly when the HKSAR has a fairly impressive legal and constitutional framework for the protection of rights.¹⁰⁹

PROPOSED STANDARDS FOR NATIONAL HUMAN RIGHTS COMMISSIONS, AI Index: IOR 40/01.93, (Jan. 1993) [hereinafter Amnesty International Standards for HRCs].

105. See C. Raj Kumar, *Hong Kong Needs Human Rights Commission to Build Credibility*, S. CHINA MORNING POST, Oct. 18, 2002, at 18.

106. There have been proposals for such a human rights commission in Hong Kong, largely based on Australian model. See Anna Wu, *Human Rights - Rumour Campaigns, Surveillance and Dirty Tricks and the Need for a Human Rights Commission*, in HONG KONG'S BILL OF RIGHTS: 1991-1994 AND BEYOND 73 (George Edwards & Andrew Byrnes eds., 1995).

107. For a general overview of NHRIs, see UNITED NATIONS, NATIONAL INSTITUTIONS: A HANDBOOK ON THE ESTABLISHMENT AND STRENGTHENING OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (1995).

108. For an analysis of the working of NHRIs in Indonesia, Philippines, Thailand and Malaysia, see Philip Eldridge, *Emerging Roles of National Human Rights Institutions in Southeast Asia*, 14 PACIFICA REVIEW 209, 209-36 (2002). See also Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commission in Africa*, 2001, available at <http://www.hrw.org/reports/2001/africa/overview/summary/html> (last visited Oct. 19, 2003).

109. BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, Apr. 4, 1990, translated in 29 I.L.M. 1511 (1990); HONG

Human rights commissions are a relatively recent development among the various mechanisms designed for the protection and promotion of human rights.¹¹⁰ The development of these institutions has resulted in the states that have adopted them now being better positioned to work effectively towards guaranteeing human rights within their own jurisdictions. They do not replace the role of the already existing legal and administrative framework in the form of courts, legislative and executive bodies, and many other institutions that are engaged in governance. Rather, they are unique and independent institutions that play an ideal supportive and supplementary role to the other institutions that are engaged in upholding the rule of law in a democratic society.¹¹¹ But the distinctive role of the human rights commission in exclusively and specifically working for the enforcement of human rights within a country raises issues of mandate determination, functions, legitimacy, independence, institutional autonomy, accountability, and performance appraisal in a direct manner that are fundamental for the very sustenance of these institutions.

The proposed HKHRC may be vested with the following tasks: issuing annual reports of human rights in Hong Kong, holding public sittings regarding systematic violations of human rights, and advising governmental agencies on questions of human rights, particularly when evaluating proposed legislations from the standpoint of national and international human rights norms.¹¹²

KONG BILL OF RIGHTS. Ordinance 59 of 1991, *translated, with Chinese text, in CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES*. This law is in part declared to be in contravention of the Basic Law by the National People's Congress Standing Committee decision of Feb. 23, 1997; Family Status Discrimination Ordinance of Nov. 21, 1997. Legal notice 92 of 1997. Chapter 527. Current text in 1990 AUTHORIZED LOOSE-LEAF EDITION. Full text, as of 2000, found at <http://www.justice.gov.hk>; Disability Discrimination Ordinance of Sept. 30, 1996. Legal notice 395 of 1996. Chapter 487. Current text in 1990 AUTHORIZED LOOSE-LEAF EDITION. Full text, as of 1998, available at <http://www.justice.gov.hk>; Sex Discrimination Ordinance of Sept. 20, 1996. Legal notice 394 of 1996. Chapter 480. Current text in 1990 AUTHORIZED LOOSE-LEAF EDITION. Full text, as of 1997, available at <http://www.justice.gov.hk>; see Michael C. Davis, *HONG KONG AND CHINA: THE 1997 TRANSITION: ARTICLE: Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301, 303 (1996).

110. See Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 3 (2000).

111. *Id.* at 5-7.

112. See UN HRC Standards, *supra* note 103.

The commission may also engage in the task of submitting recommendations, proposals, and reports on any matter relating to the government or any other competent body; promote conformity of national laws with international standards; receive and act upon individual complaints of human rights violations; encourage ratification and implementation of international human rights standards and contribute to the reporting procedure under international instruments; promote awareness of human rights through information and education and to carry out research; and cooperate with the United Nations, regional and national institutions of other countries, and NGOs.¹¹³

Human rights commissions are generally concerned with a wide range of issues that affect the rights of individuals and groups within a particular society, ranging from violations of civil and political rights to discrimination.¹¹⁴ The precise authority and function of each commission is defined by the constitutional provisions, legislative acts or decrees under which it is established.¹¹⁵ Some commissions are limited to protecting rights prescribed in the national constitutions, while most are empowered to promote those rights found in the various international human rights treaties and other instruments.¹¹⁶ These commissions face the inherent danger of becoming tools in the hands of the state, and becoming quasi-governmental eyewashes to hide autocratic practices. The standards are relevant at every stage of the commission's development, from the origin, determination of functions and powers, composition of the commission, including the appointment of members, complaints acceptance mechanisms, investigation of those complaints and also the recommendations, which may include punishment for the violator of the human rights or compensation to the victim, or both as the case may be.

113. *Id.*

114. For a critical perspective on human rights commission, see C. Raj Kumar, *Role and Contribution of National Human Rights Commissions in Protecting National and International Human Rights Norms in the National Context*, INDIAN JOURNAL OF PUBLIC ADMINISTRATION, Vol. XLVII, No.2, April-June 2001, at 222, 222-36.

115. Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000); C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 AM. U. INT'L L. REV. 259, 265 (2003).

116. See generally *id.*

The proposed HKHRC needs to function in a manner that creates extraordinary credibility from other government institutions, NGOs, people of Hong Kong, and other members of the civil society. Its legitimacy can only be acquired through the actions and the functions performed by its members. This moral legitimacy needs to be built upon the institutional framework on which the commission rests and would eventually help in promoting an effective human rights community involving partners from all the sectors within a society. It is indeed a very difficult role and a lot will depend upon the members and staff of the commission in inculcating a sense of purpose and belonging to the human rights fraternity. The legitimacy of the HRC does not necessarily depend exclusively upon the enforcement powers that are guaranteed by the act, though they play an important role; rather, the institutional integrity and professional competence of its members and staff will play a dynamic role. The HKHRC must create democratic space for their functions and be able to command respect from the government, even when it engages in vociferous criticism of some government activities. While the HRC can serve to enhance the promotion and protection of human rights, it should never replace nor in any way diminish the safeguards inherent in comprehensive and effective legal structures enforced by an independent, impartial, easily accessible, adequately resourced, and effective judiciary in the HKSAR.

The interrelation of the work of civil society and human rights commissions is significant for Hong Kong. Civil society can assess the work of a human rights commission in fulfilling its mandate. Furthermore, a human rights commission may not have the resources to obtain all the necessary information relating to human rights violations, and hence could draw from the experience of a vibrant civil society in Hong Kong. The proposed human rights commission in Hong Kong should develop internal mechanisms that involve civil society so that human rights do not remain an official or quasi-official discourse, but rather, that the human rights discourse gets democratized. This democratization of the human rights discourse can help immensely in the process of human rights becoming an empowering language within Hong Kong and possibly influence the policies of Mainland China as well.¹¹⁷

117. See Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 370-71 (1997).

Civil society organizations and human rights commissions need to understand that these institutions are performing different functions and legitimate disagreements on issues relating to human rights may occur in democratic societies and those ought to be solved within the framework of the democratic discourse. Civil society in Hong Kong can actually empower the HKHRC by bringing into focus the human rights issues that affect governance in a particular society.¹¹⁸ The critical engagement of civil society with the human rights commission ought to be legislatively guaranteed in the HKSAR so that participation of civil society does not depend upon the decision of the particular members of the HKHRC. This would pave the way for a healthy development of institutional cultures that respect human rights.

There is a lot to learn from the experience of Hong Kong civil society actors for the proposed HKHRC due to the different yet complementary approaches to the protection and promotion of human rights. The three key functions of an independent human rights commission have also been identified by the Office of the UN High Commissioner for Human Rights as an advisory function, an educative function, and an impartial investigative function.¹¹⁹ It is with these standards in mind that the HKHRC should be established. The independence, impartiality, and effectiveness of the proposed HKHRC and its members are factors that would give true legitimacy to its functions and help in performing its tasks in a socially fulfilling manner.

VIII. DEMOCRATIC DISSENT AND THE RIGHT TO PROTEST – IMPLICATIONS FOR HUMAN RIGHTS

Silence amounts to guilt when there is a duty to speak. In commemoration of the sixth anniversary of reunification with Mainland China, Hong Kong witnessed its largest ever peaceful protest since 1989.¹²⁰ It was, in effect, the largest demonstration ever relating directly to Hong Kong itself. Even though the protest was made with the core objective of resisting the government's

118. See Julie Mertus, *From Legal Transplants To Transformative Justice: Human Rights And The Promise Of Transnational Civil Society*, 15 AM. U. INT'L. L. REV. 1335, 1337-40 (1999).

119. *Proposed UN HRC Standards*, *supra* note 103 (explaining the importance of national institutions in the promotion and protection of human rights).

120. Philip P. Pan, *Hong Kong's Summer of Discontent: Spread of Unrest Feared by Beijing*, THE WASH. POST, at A01, July 15, 2003.

proposals to pass legislation on Article 23, the protest and the expression of the right to dissent are reflections of the state of governance in Hong Kong.¹²¹ The government of HKSAR has obviously not sufficiently and genuinely engaged the residents of the region on the need for national security legislation. The SARS crisis and the government's handling of it only aggravated the concerns of the people, and July 1st witnessed the deep and pervasive resentment of the residents of Hong Kong on the policies and approaches of the government of the HKSAR.¹²²

The protest brought to the forefront numerous issues relating to good governance, democratic dissent,¹²³ and the human right to protest and dissent. The residents of HKSAR have demonstrated a unique sense of civic leadership by coming to the streets and expressing their concerns in a truly democratic way. The right to protest and the freedom to dissent is an inextricable part of democratic governance, as it is also about enjoying political freedoms and meaningfully participating in the decisions that shape a society. It would be a mistake if the HKSAR government does not take complete and sincere cognizance of the fact that half a million people were on the streets of Hong Kong. This is indeed significant and government functionaries must recognize that at some point, the distance between the rulers and ruled in the HKSAR has widened.

Hong Kong is indeed maturing and is getting ready to embrace democracy. But democracy is not just about elections. It is also about accountability and responsibility, and in this context the Hong Kong experience of people protesting in the streets can have profound implications for the government developing policies relating to good governance. The United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) has put forth the characteristics of good governance to be participation, rule of law, transparency, responsiveness, consensus-oriented, equity and inclusiveness, effectiveness,

121. For some useful insights on the development of governance discourse, see Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21 *THIRD WORLD Q.*, 795, 795-814 (2000).

122. Pan, *supra* note 119, at A01.

123. For a discussion of developing methods of rights activism in states lacking strong democratic traditions, see Obiora Chinedu Okafor, *Re-Conceiving "Third World" Legitimate Governance Struggles in our Time: Emergent Imperatives for Rights Activism*, 6 *BUFF. HUM. RTS. L. REV.* 1 (2000).

efficiency, and accountability.¹²⁴ The United Nations Development Programme (UNDP) has observed that governance is the exercise of economic, political and administrative authority to manage a country's affairs at all levels.¹²⁵ It comprises mechanisms, processes, and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations, and mediate their differences. Dissenting and protesting does not automatically result in lack of good governance, but if protests or dissents are not heard by the government and people are not allowed to exercise their right to be heard, then arguably there is a situation that will culminate in a crisis in governance.¹²⁶

The government of HKSAR should play a far greater role in ensuring that it acquires and sustains the trust and confidence of the residents of HKSAR, even though at present, the representatives are not popularly elected by the people of Hong Kong. The conduct of the protesters in airing their views and opinions in the form of a democratic protest against the policies of the government of HKSAR, including their concerns on the national security legislation was truly remarkable. They are even more remarkable if we take into account the fact that no one was arrested. It is important that the residents of Hong Kong understand that these protests have profound implications, and the fact that the protest did not result in any violence or culminate in a law and order situation only reinforces the matured, self-regulative, and disciplined approach of the residents of Hong Kong.¹²⁷ Also, the seriousness of the issue is reinforced by the fact that if half a million people were actually in the streets of Hong Kong to protest, then, by any conservative estimate, at least two or three times more than that number share similar views and concerns of the protesters, but were not in a position to join the protest.

Expression of dissent and protesting against the policies of the government is fulfillment of civic responsibilities. The rule of law that prevails in Hong Kong is not just because of the

124. *What is Good Governance*, available at <http://unesap.org/huset/gg/governance.htm> (last visited Oct. 23, 2004).

125. *Id.*

126. *Id.*

127. See Jimmy Cheung and Klaudia Lee, *Turnout piles the pressure on Tung administration; Protest organisers threaten to besiege Legco when the national security legislation is put to a vote next week*, S. CHINA MORNING POST, July 2, 2003, at 3.

government ensuring its preservation through legal, judicial, and institutional mechanisms, but due significantly to the residents of Hong Kong who have preferred to adhere to the rule of law in pursuing their actions.¹²⁸ The rule of law in HKSAR is not necessarily eternally preserved and even assured, however, if the actions of the government in response to the dissent are not sufficiently forthcoming, civil society leadership in the form of activism, by demonstrating in the streets, has the potential to engage the government so that it may be forced to rethink various issues that remain a bone of contention between the protesters and the policy formulators.

In the short run, these protests may result in the government of the HKSAR being forced to alter its position on Article 23. In the long run the protest and demonstration by the residents of Hong Kong can provide the impetus for the movement to deepen democracy.¹²⁹ The people of Hong Kong may become more aware of their rights and obligations and be in a better position to realize the responsibilities that come along with a democratic form of government. It is conceivable that civil society activism, participation of various social pressure groups, work of the NGOs, and the sustained activism of a free and vibrant media in the HKSAR can result in the development of a larger political consensus on issues relating to how Hong Kong ought to be governed. Echoing Edmund Burke's words: "The only thing necessary for the triumph of evil is for good men [and women] to do nothing."¹³⁰ It is truly remarkable that the people of Hong Kong actually did something; they rose up to the occasion and indeed protested and recorded their dissent. The protest and the dissent in itself have intrinsic worth, regardless of whether they are being heard.

IX. CIVIL SOCIETY EMPOWERMENT AND ITS IMPACT ON THE DEMOCRATISATION

The recent withdrawal of the controversial national security bill by the government of HKSAR had brought to the forefront

128. Lilly W.Y. Heong, *One Country, Two Ideologies: The Rule of Law in the Hong Kong Special Administrative Region*, 16 TEMP. INT'L & COMP. L.J., 447, 467-70 (2002).

129. See Fu Hualing & Richard Cullen, *Political Policing in Hong Kong*, 33 HONG KONG L.J. 199, 230 (2003).

130. College Republican National Committee Poster, <http://www.crnc.org/do%20nothing%20poster.pdf> (last visited Oct. 23, 2004).

issues relating to enforcing governmental accountability, empowerment of people, and above all, the effectiveness of participative democracy.¹³¹ The government enthusiastically promoted the bill so much so that it was ready to allow its passage without any further discussion or including a few actively sought, specific exceptions. But the fact that half a million people were in the streets of Hong Kong to protest on July 1, 2003 forced the government to stop and reconsider. Even after the protest march, it was not conceivable that the government would actually withdraw the bill and give room for greater public consultation, democratic discourse, and indeed international human rights scrutiny. But the constant pressure of civil society in the HKSAR has proven to be successful in convincing the government to withdraw the bill.

Civil society activism has demonstrated a great degree of political maturity in Hong Kong. The empowerment of people to question their governments is one of the true hallmarks of a democracy.¹³² Participative democracy means that the people are constantly engaged, involved, and heard in the making of decisions that affect them.¹³³ Interestingly, people's empowerment and the development of participative democracy in Hong Kong have not arisen due to legal, judicial, or institutional efforts, but rather, it has been community-developed. Credit belongs to the local NGOs and interest groups who slowly but steadily engaged with the residents of Hong Kong and convinced them that the decisions that the government makes do matter to their freedoms.¹³⁴ This is not an easy task considering the fact that the people of Hong Kong do not directly elect the Chief Executive.

Hong Kong has become a laboratory for testing various theories of democratic governance and civil society empowerment. While stability and social order are important considerations in democratic governance, the Hong Kong experience has demonstrated that people's resistance to policies of the

131. For a discussion of the emerging right of the people to take part in the political process, see Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

132. *Implementing Democratization: What Role for International Organizations?*, 91 AM. SOC'Y INT'L L. PROC. 356, 372 (1997) (panel discussion remarks of Susan Marks).

133. See Fox, *supra* note 130, at 539.

134. Chris Yeung, *Way forward Seems Obvious in HK, but is it in Beijing?*, S. CHINA MORNING POST, July 5, 2003, at 1.

government can use legitimate resistance methods and indeed can prove successful if there is wider social consciousness. The social and political consciousness in Hong Kong was developed by a variety of actors, including certain political groups, NGOs, public interest groups, and the media.

The role of the media in shaping public opinion has been profound in Hong Kong.¹³⁵ Unbiased reporting and objective analysis of issues are important for sustained public trust and confidence in the media.¹³⁶ The fact that the government of HKSAR did not address numerous issues raised by the Article 23 Concern Group and other local and international human rights groups in the initial phase of the Article 23 bill-shaping process affected government credibility.¹³⁷ The legitimacy of any government rests upon some form of public trust; however, public trust cannot be depended upon forever, even in societies that are not fully democratic. The people of Hong Kong have developed a certain degree of vibrancy when it comes to handling public policy issues. Unfortunately, the government has yet to learn from this experience.

While SARS was by and large successfully handled,¹³⁸ the fact that there was hesitation to provide greater transparency and accountability in governance¹³⁹ was an issue that affected the people of Hong Kong.¹⁴⁰ The SARS crisis, the general downturn in the economy and the improper handling of Article 23 discussions shook the foundational faith of the people of Hong Kong in their government. This led to the nonviolent and most orderly protest of the people of the HKSAR.¹⁴¹ The civil society organizations in Hong Kong had assumed the role of watchdogs in monitoring the work of the government officials and departments, besides shaping

135. See Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT'L L.J. 371, 383 (1992).

136. For a critical perspective on media freedom in the HKSAR, see Richard Cullen, *Media Freedom In Chinese Hong Kong*, 11 TRANSN'L LAWYER 383 (1998).

137. Michael C. Davis & C. Raj Kumar, *The Scars of the SARS – Balancing Human Rights and Public Health Concerns*, HONG KONG LAW., May 2003, at 58-67, available at <http://www.hk-lawyer.com/2003-5/Default.htm>.

138. *Id.*

139. Michael C. Davis & C. Raj Kumar, *Accepted principles can guide our response to the outbreak*, S. CHINA MORNING POST, April 4, 2003, at 1.

140. See C. Raj Kumar & Richard Cullen, *Drawing Lessons from SARS – We are ready for Democracy*, S. CHINA MORNING POST, May 20, 2003, at 11.

141. See Janice Brabyn, *The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance*, 32 HONG KONG L. J. 271, 280 (2002).

the democratic discourse on policies that affect the social, economic, and political development of Hong Kong.¹⁴²

In their resistance to the passing of the Article 23 bill without proper consultation, the people of Hong Kong have sought accountability of the HKSAR government. The government must understand that it is the people's right to seek this information and is the government's duty to provide it. United Nations Development Programme's Human Development Report 2002 correctly observed that:

[A]ccountability is about power – about people having not just a say in official decisions but also the right to hold their rulers to account. They can demand answers to questions about decisions and actions. And they can sanction public officials or bodies that do not live up to their responsibilities.¹⁴³

This precious space that democracy can provide to people for their participation in crucial public policy discussions is helpful to sustain the public trust in government. The Hong Kong experience has demonstrated that trust is essential for governance and it has to be developed over a period of time. It is heartening to note that the government of Hong Kong has withdrawn the bill.¹⁴⁴ The government must take all efforts to reach out to the people in seeking their views on the national security legislation; however, it must also provide full and complete information not just about the content and character of the law, but also the potential consequences, and the comprehensive set of safeguards, including the freedom of the press provided for in any future legislation.¹⁴⁵ The government of HKSAR should deepen its discussions with the Article 23 Concern Group and other human rights and civil liberties groups in seeking their views and should make sincere efforts to allay their fears and concerns with reference to the legislation. It ought to be a genuine and transparent process so that the government is able to get the message across to the people

142. Garry Rodan, *The Prospects for Civil Society and Political Space*, in *DEMOCRACY, HUMAN RIGHTS, AND CIVIL SOCIETY IN SOUTH EAST ASIA* 55, 57 (Amitav Acharya et al. eds., 2001).

143. UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), *HUMAN DEVELOPMENT REPORT* 65 (2000).

144. See Frank Ching, *Starting Over*, *S. CHINA MORNING POST*, Sept. 11, 2003, at 12.

145. See Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong*, *China*, 73 *IND. L.J.* 765, 767 (1998); Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 *WASH. U.L.Q.* 113, 119 (1998).

of the HKSAR that "public consultation" means serious and informed consultation. In a recent interview after the Legislative Council elections in Hong Kong, Christine Loh, the head of a highly respected think-tank, Civic Exchange, and a former legislator, observed that there is great scope for fuller democracy in Hong Kong, but still work needs to be done.¹⁴⁶ She said:

Hong Kong is on the path of incremental democracy. The people have become used to voting. It's become a social norm. And people want their vote to matter more because right now the vote essentially elects a group of legislators who are seen to be in opposition to the government – but we're not electing the government.¹⁴⁷

X. CONCLUSION

In our concept of constitutionalism, moving beyond a narrow conception of judicial protection of human rights does not underestimate the importance of formal mechanisms of protection and promotion of human rights in Hong Kong.¹⁴⁸ Neither does it in any way devalue the importance of developing democratic and independent institutions in Hong Kong, which work to uphold the rule of law by ensuring that the rights and freedoms of the residents of Hong Kong that are guaranteed under the Basic Law and the BORO are steadfastly protected. The fundamental argument of including civil society in the efforts to protect human rights in Hong Kong is to ensure that human rights discourse in Hong Kong is democratised and results in social empowerment.

The handling of numerous issues by the government of the HKSAR, particularly matters relating to the right to abide, Article 23 issues, issues relating to the development of democracy in Hong Kong, and lately, the SARS crisis, have significantly demonstrated that even democratic and independent institutions may not be in a position to intervene when the government is affirmatively deciding to take a particular course of action. However, civil society in Hong Kong can play a very useful and dynamic role in constantly keeping vigil over human rights and democratic freedoms so that the government does not intrude into the rights

146. Christine Loh Interview, *supra* note 97.

147. *Id.*

148. See Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HONG KONG L.J. 200, 223 (2001).

of the people of Hong Kong. This civil society empowerment rests on the moral legitimacy of people's participation in the affairs of the government. Furthermore, the recent temporary success of the mass mobilization of people in Hong Kong to resist the government's move to quickly pass national security legislation without any meaningful and informed consultation manifests in the inherent legitimacy of such actions, as long as they are within the confines of democratic dissent, and do not affect social order and the rule of law.

The empowerment of civil society in Hong Kong would inevitably result in the empowerment of the democratic institutions of Hong Kong. As the judiciary in the HKSAR would engage in interpreting the Basic Law and the BORO, it needs to be supported by an active civil society that is engaged in human rights activism in Hong Kong. Resistance to the Article 23 bill in Hong Kong has remarkably taken the shape of actions to seek people's empowerment and development of participative democracy. This means that Hong Kong has inevitably embarked upon its journey to embrace democracy. The government of HKSAR needs to seriously think as to what it intends to do in response to the demands for democracy. This, of course, has long-term implications for the nature of polity in Mainland China itself. These are serious questions that the HKSAR must consider to prepare for the future governance of Hong Kong. Hong Kong's image as an international city would be significantly enhanced when proper steps are taken to ensure democratic governance. Since the people have been empowered to seek participative democracy through civil society activism, Hong Kong appears ready to start the next struggle.