

The Hong Kong Human Rights Monitor
September 1999
Submissions to the Legislative Council Panel on Home Affairs
regarding the SAR Government's ICCPR Report 1999
to the UN Human Rights Committee

Introduction

The Hong Kong Human Rights Monitor appreciates that the People's Republic of China has agreed to acknowledge its obligation under the Sino-British Joint Declaration on Hong Kong and under the International Covenant on Civil and Political Rights (ICCPR) to submit on behalf of the Hong Kong Special Administrative Government (HK SAR) of the latter's Report to the United Nation Human Rights Committee in spite of the fact that China has not yet ratified the Covenant. The submission of the Report in this way was unprecedented and has helped the development of international human rights law in particular the devolution of the Covenant's protection human rights with land. In spite of the weaknesses in the report, we also appreciate the SAR Government's timely effort in preparing its relatively comprehensive Report and its liberal attitude towards NGO participation in United Nation human rights processes.

The reunification has been the most important event with wide-reaching implications for human rights in Hong Kong. It changed fundamentally the constitutional framework and the political landscape of Hong Kong. The end of colonial rule did not bring about major improvements to the rule of law and human rights protection in Hong Kong. On the contrary, the new constitutional order has posed serious threat to institutions essential to the protection of human rights in Hong Kong. The rule of law and democracy were among the most adversely affected areas. The deterioration in institutional framework and political landscape has in turn made more difficult the realization of substantive rights enshrined in the *International Covenant on Civil and Political Right*. Most of the recommendations raised in the *1995 Concluding Observations* of the United Nations Human Rights Committee have not been adopted by the new Hong Kong Special Administrative Region Government (hereafter referred to as "the SAR Government"). Hong Kong therefore has to face the old issues left behind by British rule in addition to new problems created by the re-unification.

Chapter 1

Self-determination and the Right to Participate in Public Life
(Articles 1 and 25)

Internal Aspect to Self-determination

The UN Human Rights Committee has explained that the right to self-determination has an internal aspect which is the determination of the constitution by the people themselves. The internal aspect has been substantially ignored in the drafting of the Basic Law, the mini-constitution for Hong Kong.

The drafting of the Basic Law was done by persons appointed by the Chinese authorities. The Chinese authorities had real control and final say of the content, and no referendum or other democratic means were used to test the acceptance of the drafts' acceptability to the public. Opinion polls revealed that the Basic Law did not command support from the majority of the Hong Kong people.

Among the worst Basic Law provisions are those limiting democratic development in Hong Kong: the requirement of a separate vote count by divisions¹ (a private member's bill or amendments to government bills have to be passed by majorities in the division consisting of functional constituency legislators; in the division of legislators returned by the Election Committee; and in the division of legislators elected on the basis of universal and equal suffrage) and the requirement that the SAR has to legislate to prohibit treason, sedition, session, subversion, theft of state secrets and foreign ties of political groups.² These provisions were included to restrict the democratic space of Hong Kong in response to the Hong Kong people's support of the 1989 pro-democracy movement in Mainland China.

Provisional Legislative Council and Other Provisional Bodies

Hong Kong's political system has undergone much change since 1 July 1997. The SAR Government has willfully and systemically distorted democratic features introduced by the out-going colonial administration, at the expense of civil and political rights protection. There has been regression since the handover in the already very limited democracy in Hong Kong.

All three tiers of elected councils, i.e., the Legislative Council, Municipal Councils (Urban Council & Regional Council), and the 18 District Boards (the 27 ex-officio District Board members who chaired the New Territories rural committees were not elected by universal and equal suffrage) were abolished by the SAR authorities on 1 July 1997. Provisional bodies were set up as their respective successors.

As a recognition of their popular mandate, all elected members to the old District Boards and the old Municipal Council were appointed to the provisional bodies. However, the SAR Government added 96 extra seats to the bodies and appointed other persons to fill those seats. These appointees were largely from the pro-Beijing lobby, including members of the Progressive Alliance and the Democratic Alliance for the Betterment of

¹ Annex II.

² The Basic Law, Article 23.

Hong Kong. Many of them were candidates defeated in the previous elections. There was no evidence that these appointments were justified as affirmative action, and it is doubtful in principle whether affirmative action is justified at all in democratic elections. The addition of new seats and appointees were intended to distort popular representation as expressed in the elections.

Despite the guarantee in Basic Law Article 68 that the "Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election," the Provisional Legislative Council (PLC) was set up by the Mainland Chinese authorities. The PLC was a body comprising 60 members selected by a group of 400 persons handpicked by Beijing. Its composition was incompatible to even the Basic Law's specifications for the first Legislative Council³ which requires 20 seats of the Legislative Council to be returned by universal and equal suffrage or Geographical Constituency Elections. Irrespective of the legality of the PLC, the failure of the Chinese authority to ensure the Hong Kong legislature to be a body to be returned by universal and equal suffrage in conformity to the ICCPR constituted a serious breach of Articles 1 and 25 of the Covenant.

The PLC received no mandate from the Hong Kong public, and it was far from being accountable to them except in some minor and politically non-sensitive issues in the last days of its operation. The members' terms ended on 30 June 1998, and the first post-handover Legislative Council commenced on 2 July 1998.

Post-Handover Legislative Council

The composition of the post-handover Legislative Council and the schedule for future elections are explained in paragraphs 458 to 480 of the Government's submission. What the Government's report does not mention is that the 1998 Legislative Council election, although efficiently administered, was extremely unfair. The design of the electoral system continues to ensure that popular choices will be disproportionately outnumbered by candidates representing business and professional interests. The reduction by 88% in the size of the total electorate of the functional constituencies, the re-introduction of corporate voting, and the requirement to select 10 candidates from the appointed Election Committee are means to manipulate the so-called "election" after the handover.⁴

Functional constituency elections permit corporate voting. This archaic system was continued by the SAR Government in the 1998 elections. A study by Human Rights Monitor found that some businessmen control multiple votes through subsidiary companies. For instance, a property developer owns at least 17 voting companies registered in the Real Estate functional constituency, which has only 410 registered electors. In addition, he has a personal vote in that constituency. His electoral power in

³ Annex II.

⁴ For more information please consult Human Rights Monitor's election report, published on "<http://hkhrm.org.hk>".

the Real Estate constituency is equivalent to that of 15,490 voters in the geographical constituencies. A businessman may control votes in more than one functional constituency. The property developer mentioned above controls another two votes in the Tourism functional constituency because he owns two tourism-related companies.

The majority of functional constituencies have electorates of fewer than 1500 people. The two smallest functional constituencies, the Urban Council and the Rural Council, each consists of 50 members. The next five smallest constituencies are the Heung Yee Kuk rural organization (132 voters), Agriculture and Fisheries (165 voters), Insurance (196 voters), Transport (137 voters), and Finance (207 voters). Apart from the Heung Yee Kuk these electors are all corporations. Between them these 837 electors elect the same number of Legislative Council members as one quarter of the total registered electorate of Hong Kong—698,843 people—in the geographical constituencies.

The composition of the election committee is essentially a duplication of functional constituencies. It is therefore another effort to give undue power to the business and professional sectors—an effort already condemned by the UN Human Rights Committee. The requirement that a member of the election committee must vote for exactly the specified number of people to be returned by the election committee is another design to undermine the chances of returning a pro-democracy candidate to the Legislative Council. It ensures that the few liberal members on the committee must vote for candidates they dislike if they want to support a pro-democracy candidate. As expected, none of the more liberal candidates were returned by the election committee.

In point of constitution, the promise of eventually having all legislators elected on the basis of universal and equal suffrage is largely at the mercy of the Chief Executive and members elected in functional constituency elections, because Annex II to the Basic Law requires that amendments to the composition of the Legislative Council be endorsed by two-thirds majority among all the legislators and the Chief Executive. Thus, the review in 2007 may not lead to any improvements to the electoral system, not to mention universal and equal suffrage.

We urge the Panel to recommend the abolition of this archaic electoral system and its replacement by genuine universal and equal suffrage embodied in a one-adult-one-vote system.

Post-Handover Municipal Councils and District Councils

The Government is attacking the limited democracy in Hong Kong by scrapping the elected Municipal Councils and re-introducing appointed members to the District Boards (to be renamed "District Councils" in the year 2000). Although the appointment system in the District Boards was abolished by the colonial government in 1994, the SAR Government rushed through a District Council Bill to provide a statutory basis for the reinstatement of the said appointment system in mid-March 1999.

The first post-handover elections of the District Councils will take place before the end of 1999 and the terms of these members will commence on 1 January 2000. The restoration of the appointment system was intended to prevent pro-democracy politicians from forming a majority. This will strengthen the apparent support for the Government at the District Councils level. It also makes it possible for the Executive to exercise stronger control on politically sensitive issues. Since District Board members have a role in the selection of the Chief Executive, the appointment system will also give the Chief Executive a chance to influence his own re-selection.

Distorting the representation of elected members by the appointment system is a way to defeat the will of the electorate. This is a breach of people's right to participate in public life through their elected representatives.

Political Rights of Women

Contrary to the Covenant's requirement, the Government has done little to eliminate social and political disadvantages traditionally faced by women.

As criticized in the *Concluding Observations* of the UN Committee on the Elimination of All Forms of Discrimination Against Women, the functional constituency election system discriminates against women. The government uses the system to allocate political power to those quarters in the community it considers to have function or contribution to society. Household chores are deemed to be of insufficient importance to warrant a functional constituency in the Legislative Council. People performing such chores therefore have disproportionately fewer seats. As these people are predominantly female, the current electoral system inherently works against women. On the other hand, social, cultural and other institutional restraints have limited women's access to the most senior posts in corporations, rendering them less likely to be appointed as corporate representatives. Appendix I, compiled by Human Rights Monitor, indicates that functional constituency elections are dominated by men at the expense of women.

Village Representatives Election

Although Hong Kong's Sex Discrimination Ordinance prohibits overt discrimination in certain forms, it is a sad fact that gender discrimination is part of the culture and practice in many indigenous villages in the New Territories. Subordination of women in the political life of these villages is commonplace. Many villages still refuse to allow women to vote in village elections. In other villages, women have reported that they feel intimidated by the male-dominated political establishment, which in turn prevents them from full participation.

Discrimination can also occur in the family, where a male member will usually act as the

head of the household, a status that has legal significance both in land ownership and rights to participate in village affairs. When a village representative is elected from amongst household heads, a woman can stand as the head of a household (where there are no adult males in the family) but she is at a severe disadvantage because most of her fellow electors will be men. As a result, among the 1000 or so village representatives in Hong Kong, only 17 are women. Village representatives should be elected not on a household basis but on an individual basis so that all villagers above a certain age are allowed to vote.

In a lot of villages, residents who are not indigenous people are ineligible to participate in village representative elections. In other villages, non-indigenous residents' rights to stand for and to vote in village elections are more restricted than those of indigenous residents. There is widespread discrimination in these elections on the grounds of descent, gender and ownership of property.

The Government has failed to combat discrimination in these elections except delivering halfhearted persuasion. It has even been defending the unfair system in a recent case by supporting an appeal against a court ruling which denounced the disqualification of non-indigenous residents in village representative elections.

We ask the Panel to urge the Government to take steps to establish a one-person-one-vote system in all villages.

Chapter 2

Ensuring Rights to All individuals and Effective & Enforceable Remedies without Distinction (Articles 2 and 3)

Citing the rule of law, the independent judiciary, the Bill of Rights and institutions such as the Ombudsman's Office, the Equal Opportunities Commission, the Privacy Commissioner's Office, the legislature, the press and NGOs, the Government states in its recent ICCPR and ICESCR reports that "the system has served Hong Kong well and has provided a sound framework for the protection and development of human rights in the territory", and that it "does not see any obvious advantage in introducing a new institution such as a Human Rights Commission."⁵

Several developments after the re-unification have weakened these institutions and highlighted the need for a human rights commission and the revitalization of the above-mentioned institutions.

⁵ HKSAR Government 1998 ICCPR Report, at para. 21-22 and the Government's 1998 ICESCR Report, at para. 33-34. See also the "Country Profile" in Part I in both reports.

Erosion of the Rule of Law

The Basic Law came into operation on 1 July 1999 with all the serious defects in the constitutional document including those mentioned in Chapter 1 of this report.

Mainland China has made enormous strides towards the reintroduction of a system of law since 1979, and it has also promised in the Sino-British Joint Declaration that the common law shall continue to apply in Hong Kong. Although the Basic Law provides for an independent judiciary, it is doubtful whether the central authorities fully understand what this means, namely that judges are still under a duty to decide cases according to the law, even when this entails deciding them against Beijing's stated or perceived interests. Whether China really allows a genuinely independent, impartial and effective legal system to operate in Hong Kong remains one of the problems after the transfer of sovereignty.

This doubt was highlighted by China's criticism of the Court of Final Appeal's (CFA) view that it had the power to review acts of the National People's Congress, as expressed in the right of abode cases judgment. The Central authorities' subsequent pressure on the CFA to clarify the judgment and the re-interpretation of the Basic Law by the Standing Committee at the request of the SAR Government were justified the doubt. The Government's refusal to guarantee that it will not request another interpretation from the Standing Committee and its assertion that the Standing Committee has the power to interpret the Basic Law without, before, during or after a court case continue to threaten the rule of law in Hong Kong.

In spite of the guarantees in the Basic Law that branches of the Chinese central authorities in Hong Kong should abide by the laws of Hong Kong and that all are equal before the law, the "adaptation of law" exercise has immunised Mainland subordinate state organs operating in Hong Kong from the control of some 500 statutes.

The Joint Declaration promised Hong Kong courts the power of final adjudication. This promise was broken by the Basic Law, which provides in its Article 158 that "in the case of affairs which are the responsibility of the Central People's Government or which concern the relationship between the Central authorities and Region, the courts shall, before making a non-appealable final judgment seek an interpretation from the Standing Committee of the National People's Congress in Beijing."

The Hong Kong Legislative Council in 1990 passed a resolution condemning this provision and calling for that part of the Basic Law to be amended. However, the British Government reached an agreement with China in 1995 on the arrangements for the Court of Final Appeal which included introducing an ordinance implementing the

provisions of Basic Law Article 158. Thus, in any matter which the SAR Government or the Central People's Government deems to affect the Central authorities, the final decision will be made not by Hong Kong judges but by the political leadership of Mainland China who form the membership of the Standing Committee of the National People's Congress.

The recent re-interpretation of the Basic Law in the rights of abode cases by the Standing Committee was a natural consequence of the combined effect of the defective constitutional provision in the Basic Law and the lack of respect for the rule of law by the Chinese and SAR Governments. This incident unequivocally demonstrated the SAR Government's willingness to ignore the finality of judgments made by Hong Kong's highest court and to resort to political mechanisms when displeased by that court's decisions. The re-interpretation has severely curtailed the development of a constitutional convention to limit the erosion of the court's power of final adjudication.

The Hong Kong courts' jurisdiction is threatened by the Basic Law and Government practices.

The wording of Basic Law Article 19 is too lax over matters other than defense and foreign affairs in the name of "acts of state," and the Article may be used to exclude the courts' jurisdiction from a lot of issues especially at a time of national emergency.

The Government has followed a "standard practice" to relinquish jurisdiction whenever a Mainland court claims jurisdiction over a case, even be it clearly within the jurisdiction of the Hong Kong courts and even when a Mainland court applies national laws to Hong Kong in breach of the Basic Law. The Cheung Chee-keung case and the Telford Garden case are obvious examples.

In three recent cases, the Government ignored pending and on-going court hearings and repatriated right of abode claimants to Mainland China from the Hong Kong jurisdiction, thereby defeating the purposes of two interim injunctions and a pending hearing to stop the Government from removing those claimants. In the court hearings of two of these cases, the Government's counsel acknowledged that the Director of Immigration knew about the hearings in progress, but asserted that it is the government policy "not to wait".

In another case the police applied for a warrant from a magistrate to search the premises of the Macau Jockey Club, and the application was refused. The police resorted to getting a police superintendent to sign a search warrant for the same purpose. Although this act was lawful, it was a clear disregard of the court's judgment.

Two years after the passage of the Interception of Communications Ordinance, the Chief Executive still has not assigned a day for the Ordinance to take effect. This Ordinance provides for a court warrant system against interception of telecommunications to replace the current warrant system which is administered exclusively by the Government on the

broad and vague ground of "public interest."

All these have reduced the effectiveness of the courts and the judiciary's role as the guardian of life, limb and liberty.

The courts' role is further diminished by improper enforcement of the law, such as the selective enforcement of the law in removing Taiwanese flags and unjust prosecution and non-prosecution decisions made by the Secretary of Justice at the expense of equality before the law. The Sally Aw, Xinhua, and water torture cases are obvious examples, as this Report will highlight.

The Bill of Rights Ordinance

In 1976 the United Kingdom government ratified the ICCPR for Hong Kong. The British and Chinese governments agreed in the 1984 Sino-British Joint Declaration that the provisions of the Covenant "shall remain in force" after sovereignty transfer.⁶ In response to public demand for the effective protection of human rights by legislation after the crack down of the 1989 pro-democracy movement in China, the Hong Kong Bill of Rights Ordinance (BORO) was enacted in spite of opposition by China. The Ordinance came into force in 1991.

The Standing Committee of the National People's Congress has power under the Basic Law to repeal Hong Kong laws which conflict with the Basic Law. It exercised this power in Spring 1997 to repeal the three operative sections of the BORO which embodied the basic canons of statute interpretation. It is unclear as to what effects this decision will have on the law, as those parts of the BORO simply gave statutory form to common-law rules which already existed and still exist now. However, it seems likely that the intention behind the Standing Committee's decision was to emasculate the Bill of Rights, to prevent Bill of Rights challenges to draconian new laws curbing civil liberties, or to embarrass the British authorities which insisted on the enactment of the Ordinance.

Human Rights Monitor is also concerned that the Standing Committee had no legal basis to repeal the operative sections of the Ordinance. The Secretary for Justice Elsie Leung expressed her personal disagreement to the repeal. We worry about the lack of respect for the law and the Standing Committee's interpretation of the Basic Law as a means to interfere with the laws of Hong Kong for political purposes. This worry was reinforced by the right of abode saga.

In Lai Hing-ye's case, the Court ruled that the wording of Section 7 of the BORO prevented the Ordinance from repealing draconian legislation governing inter-citizen

⁶ Hong Kong Government, *An Introduction to Hong Kong Bill of Rights Ordinance*, (Government Printer, Hong Kong: 1992), p.1.

relationships. This interpretation of the Section has led to the UN Human Rights Committee's emphasis in its *1995 Concluding Observations* that a State Party "does not only have an obligation to protect individuals against violations by the Government but also by private parties."

In June 1997, Legislative Councilor Lau Chin-Shek introduced a private member's bill, clarifying the interpretation of the BORO as repealing all pre-existing laws inconsistent with the BORO, including laws governing "relations between private persons." The amendment was passed by the Legislative Council under British rule. As the amendment was in line with the UN Human Rights Committee's comment, it should have been supported by the SAR authorities. But the Provisional Legislative Council put a freeze on the amending Ordinance in July 1997. This freeze lasted till January 1998. On 24 February 1998, the PLC voted in favour of a government bill that repealed Lau Chin-Shek's amendment without providing for any substitutes. In repealing the amendment, the Government reaffirmed its intention to provide protection against violations of rights by the public sector, but not by the private sector.

Article 2(3)(a)⁷ of the ICCPR requires that violations (whether by people acting in private or official capacities) of any person's rights have an effective remedy. Paragraphs 8 to 19 of the SAR Government's report provide weak explanations for the non-adoption of Lau's 1997 amendments to the BORO.

We urge the Panel to urge the SAR Government to afford protection against all human rights violations by private parties in inter-citizen relationships.

Human Rights Commission and Ombudsman's Office

The UN Committee on Economic, Social and Cultural Rights recognised in its *General Comment 10* that the establishment of a human rights commission is one of the "appropriate means" envisioned by Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.⁸ The important role that human rights commissions may play in the protection and promotion of human rights has also been affirmed by the United Nations General Assembly and the Commission on Human Rights. The UN Human Rights Committee recommended in its *1995 Concluding Observations* that the Government reconsider the establishment of a Human Rights Commission. The Government has not acted on this recommendation. The general public, non-governmental organisations (NGOs), and even the Legislative Council have never been consulted about the possible establishment of a human rights commission.

The Government has simply ignored the need for such a Commission, and it has

⁷ "Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity [.]"

⁸ See General Comment 10.

overlooked the weaknesses of the existing institutions. The independence of the Office of the Ombudsman, for instance, has been called into question. In 1998, the Chief Executive declined to renew Andrew So's tenure as Ombudsman, despite considerable public support for him and his own stated wish to remain in office. Mr. So was replaced by Alice Tai, who had been a civil servant for 24 years. It was widely reported that the Government's refusal to retain Mr. So was motivated by his vigorous investigation into government maladministration and his attempts to expand the Ombudsman office into a broad-based human rights body.⁹

The Ombudsman Ordinance (Cap. 397) contains a number of restrictions preventing the Ombudsman's office from functioning as an independent and effective human rights commission as envisioned in the "Principles relating to the status of national institutions" (also known as the "Paris Principles").¹⁰ For example, the Paris Principles provide that appointment of members to national human rights institutions shall be in accordance with a procedure that ensures a pluralistic representation of society. Section 3 of the Ombudsman Ordinance, however, merely states that the Chief Executive shall appoint the Ombudsman. Not only is there no opportunity for input into the selection process from the legislature, the judiciary, and the public, the Ordinance does not even establish any criteria for candidacy.

The jurisdiction of the Ombudsman is severely limited by broad and vague exceptions in the Ombudsman Ordinance. According to Section 7 of the Ombudsman Ordinance, the Ombudsman may only investigate actions taken by or on behalf of specified government departments.¹¹ With regard to the Hong Kong Police force, the Ombudsman may only investigate actions in the "exercise of its administrative functions in relation to the Code on Access to Information published by the Government." The Ombudsman is also barred from investigating "[a]ny action taken in matters certified by the Chief Executive as affecting security, defence or international relations (including relations with any international organization) in respect of Hong Kong." Restricting the jurisdiction of the Ombudsman in this manner is incompatible with the Paris Principles, which provide that a "national institution shall be given as broad a mandate as possible."

Finally, Section 15 of the Ombudsman Ordinance requires the Ombudsman and his staff to maintain secrecy regarding any investigation or complaint. Individuals who breach the secrecy of a complaint may be subject to a \$50,000 fine or imprisonment for two years. In practice, this has meant that when a Justice of the Peace, responsible for inspecting prisons in Hong Kong, refers a prisoner's complaint to the Ombudsman, he is unable to learn about the outcome of the complaint because of the Ombudsman's

⁹ Gren Manuel, "A new watchdog in the jungle." *South China Morning Post* (27 December 1998).

¹⁰ "National institutions for the promotion and protection of human rights," United Nations General Assembly Resolution No. 134, U.N. Doc. A/RES/48/134 (20 December 1993), Annex.

¹¹ Section 7(1) of the Ombudsman Ordinance states that "The Ombudsman may investigate any action taken by or on behalf of (a) an organization set out in Part I of Schedule 1 in the exercise of its administrative functions; or (b) an organization set out in Part II of Schedule 1 in the exercise of its administrative functions in relation to the Code on Access to Information published by the Government."

obligations to maintain secrecy.¹² While the secrecy requirement does not apply to the Ombudsman's report to the head of the affected organization, the complainant or the Chief Executive, when the Ombudsman releases a report to the general public, he may not reveal the identity of the person aggrieved, the complainant, or officers who are the subject of the investigation. These strict requirements for secrecy are contrary to the Paris Principles. While mindful of the need for maintaining the integrity of the investigation process, the Paris Principles also recognize that publicizing abuses is necessary for generating moral opprobrium for such actions (since national human rights institutions may not have independent enforcement powers) and promoting awareness about issues. Accordingly, the Paris Principles provide that a national institution shall be empowered to "address public opinion directly or through any press organ, particularly to publicize its opinions and recommendations."

Similar structural and operational defects can be found in the Equal Opportunities Commission and the Office of the Privacy Commissioner.¹³ These offices therefore fail to meet the standards set out in the Paris Principles.

As discussed above and in other parts of this report, there are serious problems with our institutions essential to the protection of human rights. The need for an independent Human Rights Commission is very obvious.

We recommend that the Panel should urge the Government to set up a Human Rights Commission in accordance with the Paris Principles.

Chapter 3

Emergency and Limitation on Derogation; Right to Life; No Torture and Slavery (Articles 4, 6, 7 and 8)

Emergency Regulations Ordinance 1922

The Emergency Regulations Ordinance (Cap. 241) grants the Chief Executive sweeping powers to "make any regulations whatsoever which he may consider desirable in the public interest" during times of emergency or public danger.¹⁴ Although in theory this Ordinance has the trappings of Article 4(1),¹⁵ such regulations may provide for, among

¹² Home Affairs Department, Justice of the Peace Consultation Paper (1999)

¹³ See Disability Discrimination Ordinance (Cap 487), Sex Discrimination Ordinance (Cap 480), Family Status Discrimination Ordinance (Cap 527) and Personal Data (Privacy) Ordinance (Cap 486).

¹⁴ Section 1 of the Hong Kong Emergency Regulations Ordinance, (Cap. 241).

¹⁵ "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their

other things, censorship and the control and suppression of publications, writings, photographs, and other means of communications. Emergency regulations may also empower the Government to require persons to do work or render services, or to appropriate or control property, which can potentially violate Articles 7 and 11, respectively, of the Covenant.

In the Government's *Third Report to the United Nations Human Rights Committee*, the Government admitted that there are no existing defined criteria for invoking the powers provided by the Emergency Regulations Ordinance. This is very unsettling as the Ordinance provides for tremendous powers, imposes heavy penalties (including mandatory life imprisonment), and allows derogatory measures restricting human rights, subject to the limit of preserving some unfringeable rights like the right to life and freedom from torture and slavery. The Emergency Regulations Ordinance therefore still has serious implications for the freedom of expression as prescribed by Article 19(2) of the Covenant.¹⁶ Pre-handover efforts to amend the Ordinance only succeeded in removing the draconian regulations made under it.

The United Nations Human Rights Committee has already expressed its concern over the scope of the Emergency Regulations Ordinance and its incompatibility with the International Covenant on Civil and Political Rights which also requires that any restrictions on rights be narrowly construed and strictly necessary. The wording of the Emergency Regulations Ordinance does not conform to the requirement in Article 4 of the Covenant that any limitation on rights must be compatible with the nature of the right and necessary to promote the "general welfare in a democratic society." Since the Emergency Regulations Ordinance contravenes the ICCPR, it violates Article 39 of the Basic Law, which requires that "restrictions [on rights and freedoms] shall not contravene the provisions" of the ICCPR. Thus, the Government has an obligation to revise the Emergency Regulations Ordinance itself and repeal all provisions that violate the ICCPR and the Basic Law. To prevent the Government from invoking the offending provisions and rushing through draconian regulations at the agony of the moment in an actual or perceived emergency, this Ordinance needs substantial revision.

Article 18 of the Basic Law provides that the Standing Committee of the National People's Congress may declare a state of emergency "by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the region." In a state of war or emergency, the Central People's Government may apply relevant national laws in the Region. Amendment of Article 18 is necessary, in the face of deficiencies and vagueness in the Article. Firstly, Article 18 lacks procedural and other safeguards

obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

¹⁶ "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form or art, or through any other media of his choice."

regarding the declaration of a state of emergency. Secondly, key words such as "turmoil" and "endangerment of national unity" are undefined, leaving the provision open to abuse. Thirdly, Article 39 of the Basic Law provides that the "rights and freedoms enjoyed by Hong Kong Residents shall not be restricted unless as prescribed by law" and that "such restrictions shall not contravene" the ICESCR, the ICCPR and the international labour conventions. However, it is unclear whether the word "law" as used in Article 39 and the requirement of the law's conformity with international human rights standards apply also to Chinese national laws when they are extended to Hong Kong by means of Article 18 of the Basic Law.¹⁷ Article 18 should be amended to clarify that the application of Chinese national laws to Hong Kong is subject to the Article 39 requirement of conformity to international human rights law. Finally, the scope of Article 18 exceeds the requirements of necessity and conformity with human rights imposed by Article 4 of the Covenant.

Human Rights Monitor asks the Panel to request that the Government amend the Emergency Regulations Ordinance and Article 18 of the Basic Law to bring them to conformity with Article 4 of the ICCPR.

Chapter 4

Liberty and Security of the Person; Detention and Rights of detainees; & Prohibition of Torture and Inhuman Treatment (Articles 7, 9 and 10)

There is a general lack of independent monitoring and investigatory mechanism to prevent and redress abuse of power by officers in the police force, the Correctional Service Department, the Immigration Department, and detention facilities for children supervised by the Social Welfare Department. There are problems of torture and other mal-practices in these law enforcement and rehabilitation authorities left unaddressed. In the rare cases where complaints against officers were substantiated, the charges against them and the punishments were disproportionately light. The Secretary of Justice has the final say on criminal charges against police officers.

Police Complaints System

The absence of an independent mechanism to handle complaints against police brutality and abuses continues to be a problem. This can be highlighted by the embarrassing

¹⁷ For example, Article 8 of the Basic Law provides that "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." Article 8 does not refer to Chinese national law.

situation in which the Senior Assistant Commissioner Dick Lee headed the branch of the police force, the Complaints Against Police Office (CAPO), that was responsible for handling a complaint against himself. He needed special arrangement so that he would not oversee the investigation. He was later found to have been acting lawfully in drowning a demonstration by broadcasting music on the eve of re-unification, presumably because his subordinates were under the direction of a senior officer other than himself. The Independent Police Complaints Council (IPCC), however, concluded that the complaint against him should be substantiated. The Police Commissioner insisted that the complaint was not substantiated. The chairman of the IPCC then wrote to Chief Executive Tung Chee-hwa who told Human Rights Monitor that the incident was over. The public has questioned the credibility of the whole complaints handling system.

Complaints against police brutality, fabrication of evidence, unnecessary use of force, neglect of duty, abusive language and impolite conducts are commonplace in Hong Kong. Such complaints usually relate to interrogation practice, treatment during custody and identity check. The total number of complaints in the past five years have been around 4000 to 5000 per annum. The proportion of substantiated complaints remained, hovering around 3% in recent years. The lack of trust in the non-independent system, fear of retaliation, discouragement by police officers, the delay in investigation, time conflicts in appointments, and the time-consuming nature of various processes, disturbances during anti-social hours, and unwanted troubles directed at the complainants' employers—all of these factors have contributed to the high withdrawal rate, which stands upwards of 50%. An average of about 15 to 20% of the complaint cases are dealt with annually by way of informal resolution in which the complainants are only informed of the complaints against him or her and given informal advice. To enhance their image, the police have changed their definition of "substantiated rate" by discounting all the cases not fully investigated by themselves, i.e., by excluding all the cases withdrawn or resolved by informal resolution.

The fact is that the rate of substantiated cases remained suspiciously low. People who have witnessed open meetings of the IPCC can tell how the police representatives from CAPO and superiors of complainees have vigorously defended the complainees. Recent figures disclosed by the police show that more than 20% of the confession statements adduced by the police in the High Court in 1997 were rejected by the court for doubts about the voluntariness of the defendant in giving the statement. This year alone there were three suspicious deaths in police custody and another death in the custodial ward of a hospital in which the deceased had complained to the court that he had been beaten up by the police.

All deaths in custody are required by the Coroner Ordinance to be inquired by a coroner in the presence of a jury. The Ordinance, however specifically requires the police to investigate all deaths and provide their findings to the coroner. This restriction has made coroner inquests into deaths in police custody much less effective. To ensure the independence of coroner inquest, the Ordinance should be amended so that all investigation for the coroner on death in police custody should be entrusted to an

independent body.

The UN Human Rights Committee recommended in its *1995 Concluding Observations* that the "State party adopt the proposal of the Independent Police Complaints Council to incorporate non-police members in the investigation of all complaints against the police." The Government has refused to adopt the recommendation. In fact, the *Concluding Observations'* salutation about the provision of a statutory status to the IPCC was misdirected as the Government had withdrawn the IPCC Bill from its Third Reading after the Legislative Council successfully amended the Bill in its Second Reading to provide for power of investigation to the IPCC. It is clear that the Government has been vigorously defending the black sheep in the Police Force from independent investigation — a gross offense of ICCPR Article 2, which provides effective remedy against violations of the security of person.

We consider that at a minimum the Government should provide the IPCC with statutory status, empower the IPCC to undertake investigation of serious cases, introduce a civilian to head CAPO, and implement a lay observer scheme at police stations.

Prosecution and Disciplinary Measures for Police Officers

Human Rights Monitor very much doubts the Government's sincerity in enforcing the Crimes (Torture) Ordinance (CTO). In an obvious case of torture — the one mentioned in paragraphs 109 to 112 of the Government's submission — the officers responsible for acts of torture have not been prosecuted for torture under the CTO. The Government's submission does not adequately summarise the way in which the victim was tortured. This is a serious omission. As a result, the UN Human Rights Committee and the Legislative Council cannot judge with proper information the validity of the Government's justification for not prosecuting the concerned police officers under the CTO.

It was a crime of extreme and senseless cruelty as summarised by a court judgment. Four police officers handcuffed a victim, took him to an empty refuse room, and made him lie on his back before one officer sat on his pelvis and another on his shins while he was being punched in the chest. The officers then stuffed a shoe in the victim's mouth and inflicted a form of water torture that involved pouring water into his ears, nose, and mouth until he could hardly breathe, while two officers sat on him. The four policemen then carried him to the railings in the refuse room, which was on the 16th floor, and threatened to throw him to his death. At that point, the victim agreed to "confess" to an alleged crime. But the torture continued. The officers returned him to his former position of lying on the floor. One policeman pressed his thumbs into the victim's neck, while another poured more water into his nose and mouth, causing him to lose consciousness.

The Secretary for Justice's did not prosecute the said policemen under the CTO. She reasoned that it would have been difficult to prove the officers intended to inflict "severe"

pain on the victim "above that which is normal," as the CTO requires such proof. The acts of torture, especially those which were perpetrated after the "confession," should be clear to any reasonable third parties as intended to inflict severe pain "above that which is normal." The Secretary for Justice failed to identify the required intention patently evident in the officers' observable acts readily noticeable by all legal practitioners with required professional standards.

The Government chose to charge the officers in the Magistrate's Court with assault occasioning actual bodily harm, resulting in four months' imprisonment for two officers, and six months' sentences for the other two. Had they been tried for torture under the CTO alone, or tried for assault as an alternative to the CTO torture charge, the responsible officers would most probably have been convicted of torture and might have been liable to life imprisonments.

The Government's decision not to charge the officers under the CTO sets an alarming precedent. The Panel should urge the Government to reconsider its position, and to state publicly that the unreasonable test it applied for prosecutions under the CTO as described in paragraph 111 of its submission will not apply in the future. The prohibition of torture required by ICCPR Article 7 will not be effectively implemented otherwise.

The Police Commissioner has discretion whether to discipline officers, and whether to refer cases to the Public Service Commission for its advice on the conduct and discipline of officers under the Public Service Ordinance (PSO). Section 12 of the PSO prohibits the disclosure of any information on disciplinary processes without the written permission of the Chief Executive. Section 10 ensures that the relevant documents are privileged because their production may not be compelled in any legal proceedings unless the Chief Executive under the hand of the Chief Secretary consents to their production in such proceedings. This secretive process makes it difficult for the public to monitor the punishment of convicted officers.

Monitoring of Prisons

Although Hong Kong prisons are reasonably well-managed by international standards, the protection of inmates' civil rights needs institutional improvement.

There is a superficial profusion of prison monitoring bodies. Prisoners' grievances may in principle be aired before Correctional Services Department (CSD) internal bodies, visiting Justices of the Peace (JPs), the Ombudsman, and the courts. JPs are the primary mechanism for outside monitoring of the prisons. Appointed by the Chief Executive (previously by the Governor), JPs enjoy an array of formal powers, although their main practical function is to visit prisons and other penal and correctional institutions. The job of a JP is not a full-time occupation, but rather more of an honorary post. JPs include both government officials (known as official JPs) and members of the public (known as unofficial JPs).

According to the Prison rules, each prison is to be visited by two JPs (one official and one unofficial) every fifteen days. Training centres, detention centres, and drug addiction centres entertain JP visits once a month. Within this prescribed monthly period, JPs have considerable flexibility to choose the date and time of their visits, and they can arrive without prior notice. JPs normally receive a fifteen-minute to half-hour orientation from the facility superintendent, then tour the facility in the company of the superintendent or a high-ranking officer. Although the amount of time spent at a given facility varies according to its size and the preferences of the JPs, JPs normally spend between one and one-half to three hours per visit.

There are serious defects in the methodology of JP visits. Because JPs have no specific training or experience in prison matters, they are ill prepared to delve beneath the surface in investigating conditions. Also, their visits are largely overseen by the prison authorities. One knowledgeable observer described JPs' prison tours as "staged visits". Indeed, the Prison Rules specifically mandate that a high-ranking officer accompany the JPs around a prison and "bring before them" any prisoners wishing to speak to them. Although a few prison officials stated, when pressed on this point, that JPs might if they preferred speak with prisoners privately, it is quite clear that the normal practice is for JPs to speak with inmates in the presence of prison officials.

The JP system suffers from a serious lack of continuity. Instead of repeated visits by the same inspector over a period of time — which would permit him to evaluate whether conditions improve and whether recommended improvements are implemented — every fifteen days a different pair of JPs visit a given facility.

The Panel should urge the Government to revamp this fundamentally flawed inspection complaints system. A board of visitors system should be implemented to enable JPs to focus on one prison over an extended period to better monitor the facility. An independent inspectorate with proper training and expertise should be established to ensure proper external monitoring of the prison system.

Rights of Complaints of Persons Deprived of Liberty

The Prison Rule 68B, which is closely modeled on the UK's Prison Rule 43, authorizes segregation "for the maintenance of good order or discipline" or for prisoners' own protection. There are three types of Rule 68B segregation.

The first type covers those who require protection from other prisoners because they are ex-policemen or because they provided testimony for prosecution in a criminal proceeding. The second type is for those who ask for protection because they are in debt to other prisoners or they fear that other prisoners will hurt them. The final type, also the most problematic, is called administrative confinement. It covers prisoners deemed to be "violent and influential characters." Prisoners of this type are segregated from the

general prison population because prison officials fear that they would cause disruption, either through their own actions or through influencing other prisoners. Inmates placed in disciplinary confinement for a set period of time are often subsequently placed in Rule 68B administrative confinement for an indefinite period. Although this type of confinement is technically not punishment, it is no different from punishment when viewed from the prisoners' perspective. The fact that it is technically not punishment, however, means that the concerned inmates are deprived of the right to a disciplinary hearing and that the confinement can be extended indefinitely.

During a visit to Ma Po Ping prison by a Hong Kong Human Rights Monitor / Human Rights Watch delegation, we learned of one prisoner who had been transferred from Ma Po Ping Prison to Shek Pik Prison, probably as retaliation for complaining. The delegation found out about the case by reading the log kept at Ma Po Ping prison. The log's first relevant entry was in mid-December 1996. It stated that the inmate, a Pakistani man, was in administrative segregation and complained to a visiting JP that he was being unjustly punished. The CSD response to the entry, also included in the log, was that the inmate had been removed from association with other prisoners under Rule 68B because he had "intimidated a fellow prisoner to jointly sign a letter in order to protest against the allegedly poor quality of food provided to prisoners of non-Chinese nationalities."¹⁸

We urge the Panel to ensure that Rule 68B is not misused or abused by the authorities, and to press the Government to institute an effective prison complaints mechanism. These would enhance the implementation of ICCPR Article 10(1)¹⁹.

Monitoring of the Immigration Department

Human Rights Monitor has learned of numerous but consistent complaints against abuses by officers of the Immigration Department this year during when assisting right of abode claimants and other minorities. These complaints were mainly about the misleading and use of duress to extract compliance like "voluntary" repatriation, verbal abuses, and racial discrimination. Instances of complaints of physical abuses have also been recorded. There were also several allegations in respect of disclosure to Mainland authorities in forms of video records or written information on the campaigning activities in Hong Kong of some of organizers in local self-help groups of the right of abode claimants.

We hope this sudden increase in complaints against the Immigration Department does not represent a serious deterioration of the Immigration force in Hong Kong.

All complaints were investigated by the Immigration Department and reviewed by a Complaints Review Working Party headed by Assistant Director (Administration and Planning) internally. Such a complaints handling mechanism is entirely internal to the

¹⁸ Letter from the CSD to the Justice of the Peace concerned, 28 January 1997.

¹⁹ "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Immigration Department and are therefore institutionally less independent and unfair than that handling complaints against police officers.

Victims of immigration abuses are usually visitors, right of abode claimants and minorities, unfamiliar with the system and their rights, subject to immigration control and repatriation, vulnerable to retaliation, handicapped by language barriers and detention with little outside assistance. These victims are particularly vulnerable to abuses and helpless in knowing and in lodging complaints.

Like other disciplinary forces, the Government should introduce independent and effective mechanism to prevent and investigate abuses by immigration officers.

Death of a child in the Social Welfare Department's Custody

The Social Welfare Department is responsible for the custody and treatment of young persons detained in facilities called "homes." The reasoning behind placing juveniles into the custody of the Social Welfare Department lies in the belief that it would be more humane and caring in the treatment of young people, with an emphasis on rehabilitation, not institutionalization. However, the Human Rights Monitor questions the adequacy of the training of the staff of these homes, as well as the control of such staff, both in terms of policy, procedure, internal supervision and independent audit.

These deficiencies are clearly illustrated in the case of 14 year-old male, Tseung Siu-ming, who committed suicide on 5 April 1997 Children's Day while in custody at the Pui Yin Juvenile Home. Siu-ming had been kept in isolation for seven days before he hung himself with a rope made from a torn blanket in his room. The Superintendent of the home admitted at the Coroner's Inquest, that he might have used strong words to scold Siu-ming hours prior to the suicide. The Superintendent denied that the boy had exhibited suicidal tendencies, but witnesses testified that after the Superintendent's conversation with the boy, the Superintendent had instructed the assistant social welfare officer to keep close watch on the boy as he had a high chance of committing suicide. The jury found beyond reasonable doubt that such a warning have been made. The assistant social welfare, who was praised by the coroner as "an impressive and honest witness", further testified that the boy had been upset, cried and claimed that he had been scolded for no reason.

The Human Rights Monitor gathers from the Inquest Report²⁰ that Siu-ming's suicide might be a result of mental torture, after being scolded and led to believe that he would spend the rest of his life in solitary confinement. The Coroner at the end of the hearing voiced his concern that "[i]f this state of affairs had accumulated up to a point leading to the deceased acquiring a suicidal frame of mind, surely those genuinely mindful of social welfare and reform of delinquents should have cause for concern." The Social Welfare

²⁰ Inquest Report, INK 60/97, Re Tseung Siu-ming. Deceased aged 14.

Department initially refused to conduct its internal inquiry into the incident by saying that there has been a coroner's inquest. After its investigation, the Department has never released its report. Nor was there any report on punishments, if any, instituted against those responsible for putting Siu-ming into a "suicidal frame of mind" and for other possible faults.

The putting of Siu-ming into solitary confinement for seven days were prima facie breach of Rule 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,²¹ which provides among other things that, "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned." The breach is more apparent taking into consideration that Siu-ming has hung himself during such lengthen solitary confinement.

The Administration is in violation of the Convention Against Torture²², which not only prohibits physical, but also mental torture and all forms of other cruel, inhuman or degrading treatment or punishment.

Principle 34 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²³ provides among others, "The findings of such inquiry [on the death of a detained person] or a report thereon shall be made available upon request"

The Human Rights Monitor asks the Panel to urge the SAR Government to investigate the case by an independent authority and review the training program and procedures of the Social Welfare Department to ensure that there is sufficient care for and protection of the well-being of children in custody and there are effective internal control procedures and independent external monitoring mechanisms.

Chapter 5

Liberty of Movement; Choice of Home; & Aliens' Right to Appeal against Expulsion (Articles 12 and 13)

Immigration Law

²¹ Adopted by General Assembly resolution 45/113 of 14 December 1990

²² Articles 2, 10, 11, and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

²³ Adopted by General Assembly resolution 43/173 of 9 December 1988

Immigration Ordinance 1972 Section 53 provides that all decisions made by immigration officers under the Ordinance may be reviewed by the Chief Executive in Council except for decisions mentioned in Sub-section 8, which are removal orders of one kind or another.

This means that decisions in individual cases concerning the imposition of conditions of stay can be reviewed. Thousands of such decisions are made each year. But Human Rights Monitor understands that when a decision which could be reviewed under S53 (1)²⁴ is made, the person affected is not informed of the right to review. This is not acceptable administrative practice. In this day and age, a public body having the power to make decisions affecting lives and livelihoods is normally expected to alert affected people to the existence of a right to appeal or review. Non-publication of this right probably accounts for the small number of reviews that take place each year. If all persons adversely affected by immigration decisions knew of the right to review, a good part of the weekly business of the Chief Executive in Council might be taken up with reviews. This might be one reason for the Government's rejection of our request that existence of this right be published. Human Rights Monitor urges the Panel to ensure that the Government desists from this intentional withholding of information on the right to appeal.

Quite apart from the prospect of the Chief Executive in Council being overwhelmed by review work if people were informed of their rights, Human Rights Monitor believes that there is a strong case for devolving the review function of the Chief Executive in Council to an independent review body. Human Rights Monitor notes that it was the absence of an effective appeal body that gave rise to a feeling of unfairness and lack of transparency in UK immigration law. Such feeling led to recommendations in 1969 by a special committee that the UK system, which then closely resembled Hong Kong's current system, be changed. The recommendations were adopted in the UK's Immigration Act 1971. Under that Act, immigration policy for routine cases (e.g., the conditions to be satisfied for obtaining entry as a student or fiancée/fiancé) was published in the form of rules that the Home Secretary would follow. If a person claimed that the Home Secretary misapplied or misunderstood the rules, resulting in curtailment of leave to remain or the imposition of extra conditions, he had a right of appeal. Human Rights Monitor urges the Panel to recommend the creation of a right of appeal to an independent body for the effective implementation of Article 13.²⁵ This would be a progressive step welcomed by all those people in Hong Kong who do not have the right of abode and who live here subject to conditions imposed by immigration officials.

²⁴ "Subject to subsection (8), any person aggrieved by a decision, act or omission of any public officer taken, done or made in the exercise or performance of any powers, functions or duties under this Ordinance may by notice in writing lodged with the Chief Secretary within the time prescribed in subsection (2) object to that decision, act or omission."

²⁵ "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Human Rights Monitor is also disappointed that regressive legislation was enacted to deal with the anomalous situation of resident Britons who had the protection of having deportation decisions reviewed by an independent panel. The post-handover legislature abolished this institution altogether. Given the very serious impact of a deportation order on a non-permanent resident and his family, Human Rights Monitor recommends that in common with the situation in many other countries, procedural safeguards be included in the Immigration Ordinance in all deportation cases. Where deportation is on the ground of the commission of a criminal offense, the normal time to make a deportation order should be after a court has recommended such an order. This is because judges and magistrates are usually best equipped to decide whether a particular crime warrants the heavy sanction of deportation in public interest in addition to any other punishment imposed. Where deportation is said to be justified on the ground of public interest, there should be a right of appeal to an independent body.

Chapter 6

Children and Family; Equality before Courts; Right to Fair and Public Hearings; Legal Aid; Due Process; Equality before the Law; Privacy (Articles 14, 17, 23, 24, and 26)

Since the transfer of sovereignty, there have been a number of important cases and incidents concerning family re-union and the right of abode, privacy, and prosecution decisions which called in to question the realization of equality before courts and the law, due process, and the right to fair and public hearings. These cases and incidents have highlighted not only the violations of the relevant substantive rights, but also the deterioration in the rule of law in Hong Kong and the lack of protection of Hong Kong permanent residents in the Mainland.

Right of Abode Cases

The definition of "Hong Kong permanent resident" in the Basic Law was drafted at a time of brain drain from the territory after the crackdown on the 1989 pro-democracy movement in the Mainland. It was deliberately enacted to enable a lot of people to be eligible for permanent resident status. The liberal definition took legal effect when the Basic Law came into operation on 1 July 1997. Children born to Hong Kong permanent residents who previously had no right of abode in Hong Kong became permanent residents on that day. NGOs in had warned the Government well before the re-unification to prepare for the influx of these children by making available various social facilities. They also advised the Government to absorb the children together with their Mainlander

parents on a more gradual basis. The Government, however, was not very keen to address the need for the re-union of split families except by increasing the daily quota to 150 for Mainlanders to come to Hong Kong.

Due to close interaction between Hong Kong people and Mainlanders since the inception of the Mainland's "open door policy," there were a great increase in cross-border marriages and relationships which gave rise to a large number of children born to Hong Kong parent (or parents) in the Mainland. Government figures on the number of such children for the years immediately before the handover were about 30,000.

Soon after sovereignty transfer, some Hong Kong permanent residents applied to the Immigration Department for recognition of the right of abode in Hong Kong of their Mainland-born children who had already entered Hong Kong on temporary travel permits. A dispute arose as to whether the Basic Law gave these children the right of abode, which the Immigration Department refused to accept. The dispute turned on whether or not the children of Hong Kong residents were within the categories of people given the right of abode by Article 24(2)(3) of the Basic Law, as they appeared to be on the ordinary wording of the Article.²⁶ The number of claimants for the right of abode continued to increase over time. The Government amended the Immigration Ordinance to require all right of abode claimants to apply in Mainland for a certificate of entitlement it issues and wait for a one-way permit issued by the Mainland Public Security Bureau. Only when the certificate was affixed to the one-way permit will that claimant be eligible to exercise his or her right of abode to come to Hong Kong. The system was in fact instituted to delay or deny by administrative means of the constitutional right of abode guaranteed in the Basic Law. As a result, several court cases were initiated to challenge the new system established by the Governments under the amendments to the Immigration Ordinance, and these cases found their way to the Court of Final Appeal (CFA).

The CFA gave its authoritative decision on 29 January 1999, granting the right of abode to persons who fell within the categories as specified in Article 24 of the Basic Law and declaring the linkage of the certificate of entitlement to the one-way permit as unconstitutional. The CFA's decision — based on its interpretation of the Basic Law as informed by the Joint Declaration with due regard to the obligations laid down in various international human rights treaties — should have been a final decision, which the Government was obliged to observe. But the Government used a grossly inflated estimate of the number of persons eligible for right of abode to scare the public, to fan discrimination against Mainlanders, and to create hostility against the CFA judgment in an attempt to overturn it by political means. On 20 May 99, the Government requested

²⁶ Article 24: "The permanent residents of the Hong Kong Special Administrative Region shall be:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);..."

the Standing Committee of the National People's Congress to give an "interpretation" of the Basic Law on which the CFA had based its judgment.

The Basic Law gives the power of final adjudication to the Hong Kong judiciary. The SAR Government's request for "interpretation" was illegal on four points. Firstly, the Executive has no legal power to refer any court cases to the Central Authorities. The Basic Law only provides the judiciary — not the SAR Government — with the right to seek interpretation from the Central Authorities. Secondly, the Standing Committee has no power to accept any requests for interpretation from any body — including the SAR Government — other than the CFA. Thirdly, the Standing Committee's interpretation of the right of abode as extending to fewer categories of people than recognized by the CFA's ruling is inconsistent with the Basic Law. Article 39(1) provides for the continued application of the ICCPR after sovereignty transfer.²⁷ In the case of ambiguity, issues should be resolved in the favour of individuals' rights. A generous and purposive approach to interpretation of the Basic Law should be adopted. The Standing Committee's "interpretation" method searched the memory of Basic Law drafters for their "original intent" regarding the constitutional provision; this was done without adhering to the rules of interpretation in accordance with the law as guided by production of evidence and with proper regard for due process for all parties involved. All of these are antithetical to the rule of law. Reputable Mainland scholars have called for the Standing Committee's power of legislative interpretation to be abolished as not compatible with a proper legal system. The interpretation by a non-judicial body was a breach to the guarantee in the Joint Declaration that the common law judicial system would be maintained. Finally, the Standing Committee's interpretation invokes retrospectivity, which is utterly alien to the common law tradition, to which Hong Kong is entitled under the Basic Law.

The process of re-interpretation was only available to the Central and SAR governments and those who are politically well-connected. Those seriously affected have been denied access by the Mainland and Hong Kong authorities to a fair and public hearing before the Standing Committee. This violates the basic notions of equality before the court and equality before the law.

Legal Immunity of Persons and Organizations Close to the Central Authorities

The SAR Government's submission states that everyone is equal before the law. But there seems to be immunity to Hong Kong laws of people and organizations close to the Beijing authorities. This contravenes Article 14(1) of the ICCPR.²⁸ In a controversial case the Secretary for Justice Elsie Leung decided — without valid justification — not to

²⁷ "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."

²⁸ "All persons shall be equal before the courts and tribunals..."

prosecute Sing Tao Holdings Chair Sally Aw Sian for an alleged fraud with 3 other employees in the charge sheets for these employees. All the three employees were tried and convicted. Apart from being the chair of the holding company, Aw is also a member of the Chinese People's Political Consultative Conference and a family friend of Chief Executive Tung Chee-hwa. In her statement of explanation to the Legislative Council, the Secretary for Justice cited "public policy" as a ground not to prosecute Aw in addition to the claim of lack of evidence. According to Leung, "public policy" includes consideration not to prosecute Aw since she was the employer of a large number of employees and her prosecution might lead to the collapse of her media enterprise which was experiencing financial difficulties. But Leung acknowledged that she considered whether "public policy" was a ground not to prosecute the three employees concerned and her conclusion was "no." There was public outcry as to whether there is true equality before the courts in Leung's prosecution decisions.

The Department of Justice's decision not to prosecute New China News Agency (usually called by its Mandarin name "Xinhua") for its breach of the Privacy Ordinance sparked off another controversy. Xinhua failed to respond within the 40-day statutory limit to respond to Legislative Councilor Emily Lau's request for information about whether the Agency kept a file on her. The Chief Executive said that the offence was merely "technical." The SAR Government's decision not to prosecute Xinhua breached Article 2 and Article 17 of the ICCPR.²⁹ In its report, the Government said that "public policy" was again involved in its decision not to prosecute. The Panel should clarify with the Government as to how "public policy" was involved in its decision not to prosecute.

Close examination of the legal status of Xinhua revealed that it was an unincorporated body which had no legal personality of its own. That means Xinhua was immunized from legal process and was practically above the law.

The time limit for the prosecution of a crime under the Personal Data (Privacy) Ordinance is six months. The Privacy Commissioner took about six months to complete his investigation. This did not include the case's submission to the Department of Justice. That means either the Commissioner's investigation has to speed up or the Ordinance has to be amended.

Erosion of Hong Kong's Jurisdiction and Lack of Protection for Hong Kong People in the Mainland

Article 2(1) of the ICCPR requires the SAR Government to ensure to all people subject to its jurisdiction the rights recognized in the Covenant.³⁰ Article 18(2) of the Basic Law

²⁹ Article 2(3)(a): "Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity[.]"

Article 17(1): "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

³⁰ "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within

prevents the application of Mainland criminal laws to try acts committed in Hong Kong, and Article 19(2) of the same law ensures that Hong Kong courts have jurisdiction over all Hong Kong cases. Article 22(1) of the Basic Law requires all Mainland authorities not to interfere in affairs over which the Hong Kong courts have jurisdiction.³¹

Two widely debated cases threw all these provisions into serious doubt. In the Cheung Tze-keung case, a Hong Kong permanent resident popularly known as "Big Spender" and his four accomplices, also Hong Kong permanent residents, kidnapped two local tycoons for ransoms. The crimes were mainly committed within SAR territory. The kidnappers got the ransoms, released the two victims, and then escaped to the Mainland. They were arrested by Mainland police officers and tried there under Mainland criminal law behind closed doors, without access to free media under the auspices of senior government officials. He was sentenced to death after a cursory appeal process and was immediately executed. The SAR Government did nothing to ensure a fair and public trial for him. The Secretary for Justice did not defend the jurisdiction of the Hong Kong courts and failed to apply for the extradition of the five suspects, as she should have, for the crimes were committed in Hong Kong. She even went as far as to defend the Mainland courts' reasoning that the suspects "planned the crimes in the Mainland" and, therefore, could be tried under Mainland law.

In the "Telford Garden" case, geomancy consultant Li Yok-fai, who was a People's Republic of China citizen without Hong Kong residency, apparently cheated five Hong Kong women clients into drinking poison in one of the victim's Telford Garden residence. Before they drank the poison they had withdrawn all money in their bank accounts and given it to him. He later escaped to the Mainland with the money and was arrested, tried under Mainland national criminal law under the same conditions in which Big Spender and his accomplices were tried, and executed. Since the alleged crime was committed in Hong Kong and Hong Kong courts have jurisdiction over all Hong Kong cases, the Secretary for Justice should have sought his extradition, which she failed to do. She did not protest the application of national law to try acts committed in Hong Kong by the Chinese court although it breached the Basic Law prohibition of any application of national laws to Hong Kong save under certain conditions which were not met in Li Yok-fai's case. Leung should have sought his extradition to Hong Kong for trial in an agreement with the Mainland. Worst of all, to justify the claim of jurisdiction by the Chinese court over Chinese Mainland Chinese national's acts in non-Chinese territory, the Secretary for Justice has twisted the interpretation of the national criminal law by saying that Hong Kong was not part of Chinese territory. The letters of relevant

its territory and subject to its jurisdiction the rights recognized in the present Covenant..."

³¹ Article 18(2): "National law shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to the Law [which have nothing to do with criminal codes]..."

Article 19(2): "The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained."

Article 22(1): "No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law."

provision in the Chinese national criminal law claim jurisdiction over acts of Chinese nationals on soil outside Chinese territory. Hong Kong is definitely within Chinese territory but it is governed by Hong Kong criminal laws, not the Mainland national criminal ones, in accordance with the Basic Law.

In these two cases, instead of defending Hong Kong's own legal framework for the protection of civil rights, the Government was overzealous in justifying the Mainland's encroachment of Hong Kong's jurisdiction even by twisting the proper interpretation of the law. The SAR Government thus breached Article 6 of the ICCPR (regarding the right to life) and Article 14 (regarding fair and open trial).³²

The SAR Government's crooked interpretation that Mainland courts may apply Mainland criminal laws to try acts committed in Hong Kong by Chinese citizens effectively opened a way for the Mainland authorities to penalize most Hong Kong permanent residents (since they are also Chinese citizens) for acts done in Hong Kong, including acts which are lawful under Hong Kong laws. The Government's view obviously contravenes Article 22(1) of the Basic Law.

Legal Aid and the Duty Lawyer Scheme

Article 14 of the ICCPR requires equality of all persons before the courts,³³ which means that poor people must be provided with legal representation in order to assert their legal rights. There are two main Government bodies, Legal Aid (LAD) and Duty Lawyer Scheme (DLS), offering legal aid services. Both of them lack independence from the Executive.

The Government's tight funding control over DLS necessitates DLS lawyers' being assigned large caseloads, resulting in their having little time to prepare for each case. The Government generally only funds DLS representation of defendants accused of crimes on a schedule of offences approved by the Executive's office. This schedule excludes many immigration offences.

The LAD is subject to an array of institutional controls by the Government over its policies and decisions, particularly in cases where Government decisions or actions are

³² Article 6(4): "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence..."

Article 14(3): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality..."

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;..."

³³ "All persons shall be equal before the courts and tribunals..."

challenged. Thus, the Government effectively decides which cases come before the court and which cases do not. This is against Article 14 and requires institutional remedy. Human Rights Monitor expresses its deep concern over the lack of independence from the Government of both the DLS and the LAD.

We ask the Panel to urge the Government to establish an independent LAD and give DLS more resources and greater autonomy.

Invasion of Telecommunications Privacy

The Government's active invasion of private persons' privacy remains unsettling. As paragraph 315 of the Government's submission describes, Telecommunication Ordinance 1963 section 33 ("Power of Governor to prohibit transmission of messages, etc.")³⁴ enables the Government to block, monitor, and even disclose telecommunication messages without the consent of the sender or the receiver. The Government's monitoring power covers telephone conversations, fax messages, e-mails, data sent through wire or wireless means, and pager messages. In other words, it practically covers all means of telecommunications. This power can be invoked on the broad and vague ground of "public interest" and is not subject to scrutiny by an independent supervisory body, not even the Privacy Commissioner. The Government is not required by the law to disclose monitoring to the sender or receiver, as required in some other jurisdictions. Organizations and individuals will not usually be able to detect that their communications are being monitored unless in rare and exceptional circumstances. Legal action to challenge wrongful interception and the Telecommunication Ordinance in the court is therefore virtually impossible to substantiate. So far, Human Rights Monitor has not learned of any such legal action. This situation cannot be redressed unless the law is amended or there is a court judgment striking down the Telecommunications Ordinance as unconstitutional for violation of the right to privacy enshrined in the ICCPR.

The Government even refuses to disclose statistics on the number of telephones it monitors when requested by Legislative Councillors and Human Rights Monitor. The excuse provided by the Government was that disclosure of such statistics would jeopardize detection and prevention of serious crimes. Such a reason is totally groundless as the Government need not disclose individual cases to the public.

The Interception of Communications Ordinance was enacted before the re-unification and assented by the then Governor under British rule. The Ordinance will not take effect until a date to be determined by the Chief Executive. This Ordinance replaces the current warrant

³⁴ "Whenever he considers that the public interest so requires, the Governor [now the Chief Executive], or any public officer authorized in that behalf by the Governor either generally or for any particular occasion, may order that any message or any class of messages brought for transmission by telecommunication shall not be transmitted or that any message or any class of messages brought for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained or disclosed to the Government or to the public officer specified in the order."

system — which is administered exclusively by the Government on the broad and vague ground of "public interest"—by an impartial court warrant system against interception of telecommunications.

Similarly, the Post Office Ordinance provides for interception of postal communication on a similarly vague basis, rendering the SAR Government effectively unchecked and the right to privacy in postal communication entirely at the mercy of the Government. No legislation has been enacted to redress the existing interception regime.

Before a court challenge is mounted, the Government should appoint a date for the Interception of Communications Ordinance to take effect and amend the Post Office Ordinance as soon as possible.

Chapter 7

Freedoms of Expression, Opinion, Thought, Conscience, and Religion (Articles 18, 19, 20, 21 and 22)

A vulnerable right after the re-unification is freedom of expression, especially of expression with strong political content. Display of Taiwanese flags, **lotion** of national and regional flags, posters of controversial political leaders — all have been subjected to unnecessary censorship, restriction and even prohibition.

The "one country principle" has been used in a politically sensitive environment to harass expressions of political dissent or opposition. Existing laws have been inconsistently cited to justify selective removal of Taiwanese flags on display. Legislation has been enacted since the re-unification to prohibit expression of political dissent by peaceful desecration of national or SAR flags or emblems.

All the cases and incidents documented below are examples of attacks on the freedoms of expression, opinion, or conscience. These cases and incidents indicate the intolerance towards political dissent and its will for political domination, both of which are incompatible with a free and pluralistic society. Inherent in a democracy is the free and peaceful competition for support by different ideologies. Social stability is established on the free articulation of views, not their suppression. The following cases reflect the style of governance of the SAR Government: that it practices rule by law — not rule of law — and it uses laws to achieve explicit or implicit political ends at the expense of promotion and the protection of human rights.

The reason behind these violations of freedoms, coached in the language of upholding the "one country principle," was the SAR Government's misguided equation of China's

sovereignty over Hong Kong with the need to eradicate any symbols which the Mainland might see as politically objectionable, to restrict certain forms of expression of political dissent associated with the concept of sovereignty, and to exclude "unwelcome visitors."

Display of Taiwanese Flags Prohibited

"Sensitive" Taiwanese flags have been systematically removed from public places since the handover without lawful authority. On 10 October 1997, Taiwanese flags were displayed at several spots on Hong Kong Island. Upon the order of the Chief Executive Tung, plainclothes policemen removed them within hours. The "One Country Principle" cited by Tung was very alarming, as if it was a law providing for the removal of those flags. Other government officials either failed to provide a legal basis, or cited inconsistent legal provisions to justify the act after its commission. In 1998 nothing changed. Taiwanese flags were displayed on footbridges and at roadsides to commemorate the Double Tenth, anniversary of the 1911 revolution which overthrew China's last imperial dynasty and the National Day recognized by the Nationalist Government in Taiwan. Other banners and sign boards on display on government land and property or in public places nearby, which according to these officials' justification were also unlawful, were left untouched. Even though they could cite statutory provisions to justify their acts, the government officials' selective enforcement of the law remained unlawful in our common law system.

The Government should respect people's right to freedom of expression, which includes the flying of flags, even though it might not share the same political opinions of those who flew the flags. A poll conducted by the University of Hong Kong Social Sciences Research Centre showed that 65.5% of respondents opposed the Government's ban on flying the Taiwan national flag or Kuomintang flag.

The Government could use the Government Land Ordinance to remove objects displayed on Government land without prior approval. If this power were exercised, then all banners and boards on display without permission (and there are very many of them in Hong Kong) would have to be removed at the same time to avoid selective enforcement of the law. Government departments have no more power than granted by the law and there is no discrete legal power providing for the removal of flags on public display. An order by the Chief Executive to the police does not make flag removal lawful. The flag removal orders indicate that Tung considers it acceptable to use the police for political ends.

In general, the police seem hostile to the expression of political messages. Government authorities appear to consider the public display of flags, banners and posters as potentially leading to a breach of peace. According to the Police General Orders, sensitive posters and flags that may lead to serious breaches of peace should be removed in the hours of darkness if possible. The Orders provide no safeguard against indiscriminate removal in the case of a remote chance that the expression concerned would lead to a

breach of peace. The internal rules in the Police General Orders and Procedure Manual only outline ways and means to restrict and discourage the display of political posters and banners. The rules do not indicate the police as responsible for protecting the freedom of expression, and do not set out guidelines by which the police should protect people's expression of opinions in a medium of their choice, whether such opinions are welcome by or repugnant to the majority of the population or the Government authorities. We urge the Panel to persuade the Government to stop using the police force as a political tool, and to advise the police to be more tolerant of the expression of views, for the effective implementation of Article 19(2).³⁵

Unnecessary and Restrictive Flags Ordinances

Article 18 of the Basic Law prevents the application of national laws to Hong Kong except those relating to defence, foreign affairs or other matters outside the limits of the autonomy of the Region as listed in Annex III to the Basic Law and applied to Hong Kong in accordance with certain procedures. The designation of National Flag and Emblem is not within the limits of Hong Kong's autonomy, and their designation is therefore could lawfully done in accordance with the Basic Law by adding the relevant provisions of the national laws to Annex III. The Law of the People's Republic of China on the National Flag and the Law of the People's Republic of China on the National Emblem were added to the Annex on 1 July 1999. Its provisions, and only those provisions, in respect of the designation of National Flags and Emblem became law in Hong Kong. The Hong Kong Government enacted the National Flag and National Emblem Ordinance (Cap. 2401) and the Regional Flag and Regional Emblem Ordinance on 1 July 1997. Section 7 of each of these Ordinances prohibits intentional desecration of the Flags and Emblems in public. Their violations are offences punishable by fines or imprisonment.

As described in paragraphs 364 to 370 of the Government's report, two young civil rights activists were convicted of defacing the SAR and Chinese national flags and fined HK\$4000 each in May 1998. Magistrate Tong Man in a verdict full of patriotic catchwords said that the flags were "sacred" and the act of desecration was itself likely to cause a breach of peace. The Court of Appeal quashed the convictions in March 1999 and declared the provisions outlawing such flag desecration unconstitutional as they were unnecessary restrictions of freedom of expression. But the Government is currently appealing to the Court of Final Appeal to have the Court of Appeal's judgment reversed.

Article 19 of the ICCPR provides that "Everyone shall have the right to freedom of expression ... through any media of his choice." It is wrong to follow the Mainland's policy of criminalising expression through flag or emblem desecration. The Ordinances are legislative encroachments on the freedom of expression. Flag desecration had been

³⁵ "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

performed in Hong Kong in demonstrations and performances for over two decades without problem. All breaches of peace have been successfully dealt with by common law and statutory offences. Thus, these Ordinances are absolutely unnecessary.

No European Union member state has similar flag legislation. In the US, flag burning is seen as a form of lawful expression, and judicial scrutiny has resulted in regulatory statutes being declared unconstitutional without exception, for breaching the freedom of expression. (Yet Magistrate Tong relied on dissenting judgments in American flag burning cases.) Human Rights Monitor submits that the magistrate's court erred in its assessment of the necessity of this legal prohibition. We urge the Panel to recommend the repealing of these oppressive laws for the effective implementation of Article 19(2).

Politically Motivated Censorship

The director of the Hong Kong and Macau Office Mr. Lu Ping warned Hong Kong journalists in August 1996: "After 1997, it will not be possible for you to advocate two Chinas, or one China and one Taiwan, or Hong Kong independence, or Taiwan independence, or Tibet independence. The press will not be allowed to do so. It is a different issue from press freedom."

One of the first legislative encroachments on human rights by the then incoming administration under Tung Chee-hwa was the toughening up of the Society Ordinance and Public Order Ordinance by adding "national security" as a ground to prohibit public gatherings and ban societies' legal registration. Tung's guidelines to the police on the application of the Public Order Ordinance states that the Commissioner would take into consideration, among other things, whether or not the declared purpose of the notified public meeting or procession was to advocate separation from the People's Republic of China including "advocacy of the independence of Taiwan or Tibet."

The regression in these Ordinances and the propaganda before, during, and after the enactment of such regression have apparently terrified many sectors in the community, and turned political discussions related to the independence of Tibet and Taiwan into taboos.

The film distribution industry has been criticized for distributing three films on Tibet and a movie which was critical of the Chinese legal system. The industry denied the charge. A distributor contracted to distribute "The Red Corner" but only after consulting the Chinese Cultural Ministry.

There have been reports that documentaries on the possible independence of Xinjiang and Tibet were either been banned or abridged by different television stations.³⁶ Scenes and

³⁶ The Hong Kong Journalist Association has also documented reports of television station cutting back "to just one episode its original plan to broadcast a six-part series on Tibet." It was reported in the same report that some observers saw "the broadcasting of even a single episode, which included excerpts from an

sound tracks of demonstrations in support of Tibet's independence have not been broadcast in television news.

The Radio Television Hong Kong (RTHK) was a government agency. Under an agreement between RTHK and the colonial government, this independence was guaranteed to RTHK despite its status as a government body. Originally there was a plan to let RTHK become an independent corporation like the BBC. But in 1994 the Government reversed its position after China strongly opposed the plan in the Sino-British Joint Liaison Group (JLG).

The RTHK has been under severe repeated attacks by pro-Beijing politicians. In March 1998, a member of the provisional legislature, Mr. Wong Siu-ye, attacked RTHK's independence. He criticised RTHK for not toeing the government line and for allowing its journalists to criticise China and Chief Executive Tung Chee-hwa "from dawn to dusk." This was followed by another attack by Mr Xu Simin, a Hong Kong delegate to the Chinese People's Political Consultative Congress who criticised the HKSAR government for spending public money to enable RTHK to attack China and Tung. The reply of Chief Executive to these accusations was "slowly, slowly", apparently intimating that RTHK was and should be treated like a government department. Local outcry to this answer subsequently prompted the then (on the very day of her statement) Acting Chief Executive, Ms Anson Chan, to state publicly that criticism of the Hong Kong Government should take place in Hong Kong, and not in Beijing, in order to avoid the impression of inviting intervention from Beijing on domestic affairs.

Mr. Tung's reaction and his subsequent silence contradicted reassurances by the Secretary for Broadcasting, Culture and Sport on 27 November 1997 that RTHK's editorial independence would not be reviewed. The local press has since reported that in a meeting between Mr. Tung and the Information Secretary for Technology and Broadcasting (a newly created post to handle broadcasting matters) designate, there were discussions on how to "cure" RTHK. These reports have not been responded to by either Mr. Tung or his Policy Secretary.

In August 1999, RTHK was criticised for allowing Cheng An-kuo, Taiwan's de facto envoy in Hong Kong, to suggest on a radio talk show that the People's Republic of China and the Republic of China on Taiwan are two separate states. Tsang Hin-chin, a member of the National People's Congress Standing Committee, said that as a government-funded broadcaster, RTHK should consider "basic principles." He threatened to "express his views to the Standing Committee meeting in August 1999." This was despite RTHK's clear statement that discussing and debating an issue in the media does not constitute an act of advocacy. Tsang further threatened that if the public media did not practice self-censorship, laws enforcing Article 23³⁷ of the Basic Law would soon have to be drafted.

interview with the Dalai Lama, as positive." See Hong Kong Journalist Association and Article XIX, Freedom of Expression Report 1999.

³⁷ "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to

Such a menace, standing on its own, was a strong challenge to the editorial autonomy and freedom of the press. There is serious worry among rights conscious people in the community that the Government might introduce oppressive laws to enforce Article 23 of the Basic Law.

In response to a question by Hong Kong journalists, Vice Premier Qian Qichen said that officials of the Taiwanese authorities in Hong Kong should not promote the "two states theory." In Hong Kong's sensitive environment, his comment has resulted in pressure on the Hong Kong media. His comment has become a threat to the freedom of expression and the freedom of the press. Similar threats were delivered by the Information Coordinator and then the Chief Executive of the SAR Government. They have severely offset the assurances issued by the SAR Government.

Taiwanese President Lee Teng-Hui's new book *Voice of Taiwan* proposed splitting China into several autonomous regions including Taiwan, Tibet, Xinjiang and Inner Mongolia. This proposal was unacceptable to the Beijing government. In July 1999, the Mass Transit Railway (MTR) removed an advertisement for Lee's book from a train station before the relevant contract expired. When questioned, MTR's spokeswoman said that the advertisement was removed by mistake. But MTR did not put up the poster again, claiming that advertising space was over-booked. The MTR only arranged to compensate the publisher for breaking the advertisement contract. It refused to acknowledge that the incident was politically motivated.

Given Hong Kong's political atmosphere, perhaps it was not surprising that MTR exercised self-censorship in order not to offend Beijing and thereby debilitating its own commercial interest. Unchecked, such a social environment would be detrimental to the proper implementation of Article 19(2). MTR controls a lot of public land important to publicity efforts, such as signature campaigns and fund raising activities. Its privatization might render it practically immune from scrutiny against censorship and discrimination on the ground of political opinion, thereby undermining the freedom of expression in public places.

We urge the Panel to make its view on this issue clear to the Government for the effective implementation of Article 19(2), and to prevent the privatisation of the MTR until there are statutory provisions to prohibit the MTR from restricting the freedom of expression in a way inconsistent to the ICCPR.

Immigration Barrier to Political and Academic Discussions

Hong Kong Human Rights Monitor is concerned about the Director of Immigration's refusal in April 1999 to permit Wang Dan and other overseas Chinese dissidents to enter

prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

Hong Kong for "operational reasons" according to "existing policies". As a result, these dissidents could not attend a seminar organized by the group Hong Kong Alliance in Support of the Patriotic Pro-Democracy Movement in China to commemorate the 10th Anniversary of the June 4th Massacre.

The Government denied that the refusal was based on political reasons. Yet the public has absolutely no idea what these "operational reasons" and "existing policies" are. Some of the dissidents had been allowed to visit Hong Kong before the re-unification. Information Co-ordinator Stephen Lam Sui-lung even said that all "government decisions are being taken in the long-term interest of Hong Kong and for ensuring success of the 'one country two systems policy'." This further fueled speculation that political considerations were taken into account.

The explanation advanced by the HKSAR Government only strengthened the popular belief that the Government acquiesces the Mainland's well-known policy of excluding Mainland dissidents from all parts of the People's Republic of China. This is achieved by a policy of discrimination as to who can come to Hong Kong on the ground of political opinion. This restricts the freedom of speech in Hong Kong in respect of the development of democracy in China.

The Hong Kong Government said that it was not under any pressure from the Mainland Government. If true, then in the absence of any explanation, this appears to be a case of self-censorship. This will destroy confidence in the "one country two systems, and no change for fifty years" as promised by the Basic Law.

Up until now, the Government has refused to explain the "existing policies" and "operational reasons" concerning these cases. Human Rights Monitor believes this to be a sign of irresponsibility on the Government's part, contrary to the concept of basic fairness as required in administrative law. Had this been an individual case, the decision to exclude would have been more easily explained away. However, this case involved 11 applicants with the common background of being Mainland dissidents in de facto exile. There is reasonable ground to believe that this was done as a result of political censorship by the Hong Kong Government. The ICCPR requires the freedom of speech to be maintained in Hong Kong, and the Government should refrain from placing obstacles in the way of peaceful academic or political discussions. The Government's self-censorship in this incident compromised the freedom of expression and the freedom of assembly, and consequently aroused doubts about the credibility of the administration.

Human Rights Monitor has repeatedly urged the Hong Kong Government to publish its immigration policies and to enact such policies into rules and thereby giving the public and the Legislative Council the chance to know, discuss and amend these policies. The publication and enactment of such policies with proper amendment into immigration rules are essential to protect the rights of Hong Kong people, their families and other visitors. Otherwise, not only will the people and visitors not know how to defend their interests, even lawyers and human rights workers will not be able to advise their clients as

to their rights. The Government will be left to exercise its unlimited "discretion" arbitrarily, which is incompatible with the concept of limited government. Human Rights Monitor calls on the Secretary for Security and the Immigration Department to explain what exactly the "existing policies" and "operational reasons" are.

In accordance with section 53 of the Immigration Ordinance, any person aggrieved by a decision, act or omission of any public officer taken, done or made in the exercise or performance of any powers, functions or duties under the Ordinance may by notice in writing lodged with the Chief Secretary within the time prescribed in subsection (2) object to that decision, act or omission. But visa applicants cannot apply for a review of their applications if they do not even know the "operational considerations" and "existing policies." The Government has regrettably also failed to inform the applicants of the channel for appeal, and has intentionally refused to redress the situation.

Human Rights Monitor calls on the Panel to urge the Government not to conduct self-censorship in immigration decisions and not to place obstacles to academic or political discussion in Hong Kong, but to enact its immigration policies into immigration rules with proper amendments.

Immigration Barrier to Religious Freedom

The Pope gave up his intention to visit Hong Kong as a result of the Chinese Government and the Hong Kong Government's refusal to admit him. The refusal was a strong blow to religious freedom in Hong Kong as guaranteed in the ICCPR and the "established basic policies of the People's Republic of China" as set out in the Sino-British Joint Declaration.

The Established Basic Policies provide that "religious organisations and believers may maintain their relations with religious organisations elsewhere".

Permission to enter Hong Kong is within the jurisdiction of the Director of Immigration. Policies respecting entry are determined by the Hong Kong Government.

In 1970 the previous Pope visited Hong Kong. It was reasonable for Hong Kong's large Catholic community to assume, in light of that visit and the above-cited statement in the Established Basic Policies, that papal visits would still be permitted after the transfer of sovereignty.

The Pope is the leader of one of the world's largest religious denominations, which has hundreds of thousands of adherents in Hong Kong. The local Catholic community's wish for the Pope to visit the territory is entirely legitimate.

The obvious reason for banning the proposed Papal visit is the Vatican's continuing recognition of Taiwan. It seems very doubtful whether in the Central People's Government's own terms this can be described as a foreign affairs matter in which the

Central People's Government is entitled to intervene.

Article 22(1) of the Basic Law provides: "No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law." Even if the Pope's visit is an issue of foreign affairs over which the Central Authorities have jurisdiction, it is also an issue of religious freedom and independence of immigration decisions of Hong Kong. The Central Authorities should refrain from taking any decisions in such areas.

Were it lawful for the Central Authorities to make a decision on the Pope's visit to Hong Kong, they were obliged to make a decision for the full realization of religious freedom in Hong Kong as guaranteed in Article 33 of the Basic Law. This should have been done without intervening in immigration decisions of Hong Kong to the detriment of its autonomy. Unfortunately, China has not acted in accordance to the Basic Law and the ICCPR.

We call on the Panel to urge the Central and Hong Kong Governments to reconsider their respective roles and positions on the thwarted Papal visit.

Pillar of Shame

As the major providers of cultural facilities, the Provisional Urban Council and Provisional Regional Council have the responsibility to respect the freedom of expression and to ensure pluralism and diversity in artistic expression, without regard for the political content of the art. Unfortunately, the Councils' treatment of the Pillar of Shame, a sculpture commemorating the Tiananmen Square massacre of 1989, reveals that decisions regarding the public display of art have been motivated by political considerations.

The Government claims in its report that the decision of the Provisional Urban Council to deny an application for the display of the Pillar of Shame for three months in Kowloon or Chater Garden during 1997 was purely benign. "The Provisional Urban Council reached its decisions having considered all relevant factors including the fact that the dates applied for clashed with events sponsored by other applicants that the Council had already approved. The Council was also concerned that the presence of the sculpture and related display boards would inconvenience park users and would be inconsistent with the primary use of the parks."³⁸ The Government fails to report, however, the relevant discussion in the Provisional Urban Council.

When the Provisional Urban Council voted again in 1998 to reject an application to the

³⁸ HKSAR Government Report, at para. 604.

put the Pillar of Shame on permanent display, the councillors were more explicit about the political factors behind their decision-making. Ip Kwok-chung of the pro-Beijing Democratic Alliance for the Betterment of Hong Kong stated that "the council should not agree to display objects which were controversial." Another councilor said Hong Kong should not get involved with the Tiananmen Square massacre since "[t]his incident happened in Beijing and we don't need to focus so much on events happening in Beijing as we are under 'one country, two systems.'"³⁹

In 1998, the Government announced that it would be abolishing the urban and municipal councils. The cultural promotion functions exercised by these elected bodies would be assumed by a newly-created Culture and Heritage Commission to be appointed by the Chief Executive. Apart from the erosion of democratic institutions in Hong Kong, Human Rights Monitor is also concerned that given the appointment of the Commission by the Chief Executive, and the lack of public input in selection of the Commission members, the body would simply be an organ for "cultural indoctrination."⁴⁰ Moreover, since the Commission may be merely an advisory body, it appears that the un-elected Government would retain the power to make decisions relating to art and cultural, a power that had been previously delegated to a popularly-elected body.⁴¹

Human Rights Monitor requests the Panel to call upon the Government to respect the freedom of expression and to ensure that all relevant government bodies authorized to make decisions about the public's access to art remain free of political biases and refrain from exercising political censorship.

Chapter 8

Right of Peaceful Assembly; Freedoms of Association & Trade Union (Articles 21 and 22)

Both the 1992 amendment to the Societies Ordinance and the 1995 amendment to the Public Order Ordinance—which liberalized laws for the enhancement of civil rights—were partially repealed in 1997 by the Standing Committee of the Chinese National People's Congress (hereafter referred to as the "Standing Committee") to the detriment of basic rights. The requirement of registration for societies—which had been discarded by the colonial government in 1992—was re-introduced on the day of re-unification by the SAR Government in the new Societies Ordinance. An application for registration of a

³⁹ Genevieve Ku, "Urbco votes down Pillar of Shame park home," *South China Morning Post* (3 June 1998).

⁴⁰ Jimmy Cheung, "Fear of cultural indoctrination in new policy," *South China Morning Post* (27 March 1999).

⁴¹ Tung Chee-hwa was selected by a group of 400 people hand-picked by the Chinese authorities. The Hong Kong people had practically no say in his selection.

society may now be refused by the police on the new ground of "national security."

Similarly, the Public Order Ordinance was rolled back on 1 July 1997 to require police approval for public gatherings, and "national security" was been introduced as a ground to prohibit public gatherings.

Draconian powers left over from the colonial days lying idle in the Ordinances have found the new political landscape conducive to their revival. These Ordinances, compounded with some wrongful police measures, threaten the freedoms of assembly and association.

Labour legislation on the right to free trade unions were rolled back by the SAR Government shortly after the re-unification. Such regresses in union laws have been declared inconsistent with Hong Kong's obligations under various international labour conventions.

Rolling back of Societies Ordinance

The Societies Ordinance is probably the single most important statute in Hong Kong laws governing the formation, operation, and dissolution of NGOs. It is therefore central to the freedom of association in Hong Kong. It governs, among other things, how societies may get lawful status in Hong Kong.

The Societies Ordinance was first enacted in 1949. Before then, societies in the colony had not been required to register. The Ordinance's aim was to control both triad societies and, perhaps more importantly, political groups at the time of the Communist takeover in China. Since its inception the Ordinance has attempted to regulate political and other ordinary societies together with triad ones, subjecting them to similar if not exactly the same control regime. Although gradually some differentiation, mostly on penalties, between triad and ordinary groups was made in the Ordinance after many amendments, the common treatment of such fundamentally different groups in one law is still a real threat to the freedom of lawful association. We fundamentally oppose this approach. Societies operate freely without any need to register or notify any authorities in the United Kingdom and the United States.

The Societies Ordinance in its earliest version provided for a registration system. In 1992, a notification system was introduced to bring the Societies Ordinance in line with the Bill of Rights Ordinance. The power to prohibit any society from having connection with any political group outside Hong Kong was abolished, which caused criticism by Mainland China.

Article 23 of the Basic Law requires the enactment of laws in Hong Kong "to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with

foreign political organizations or bodies." It is unfortunate that re-unification and the taking effect of the Basic Law have led to the rolling back of the Societies Ordinance.

In Spring 1997 the Standing Committee of the National People's Congress resolved to repeal the 1992 "major amendments" to the Ordinance, and on the day of re-unification the Hong Kong SAR Government rolled back the Ordinance by re-installing the registration system. The 1997 amendments provide that if the Societies Officer (who is the Police Commissioner) "reasonably believes" that the prohibition of a society "is necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others," he may make a recommendation to the Secretary for Security, who may ban the society concerned.

Article 22(2) of the ICCPR provides: "No restrictions may be placed on the exercise of [the right of free association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." The purpose of this article was not to provide convenient excuses for governmental authorities to restrict the freedoms and rights of their people, but to prevent every government derogatory measure for restricting the rights of the people from going beyond the minimum standards defined by the ICCPR and its related international jurisprudence. The grounds in Article 22(2) of the ICCPR were intended to guide all governments to ensure that their measures for restricting rights should not be outside those acceptable categories. It was not meant to allow for everything which fall within those categories should all be restricted. The grounds should only be used with a view to minimize the possible restrictions by the governments on the people's rights. The grounds were not intended to be copied by any government directly into domestic legislation to provide for the broadest restriction of rights in the name of the ICCPR.

Legitimate restrictions of rights are not simply required to be within the scope of the grounds of restrictions set out in the ICCPR; these restrictions must also be limited to those necessary to meet sufficiently important social exigencies to justify their imposition. It is the authorities' duty to prove that there are grave social needs and legitimate aims. Restrictions must have rational connections to those needs and aims, be commensurate to them, and cause minimal impairment to the rights. Such restrictions can only be prescribed or imposed by law, which must be clear and unambiguous enough that people know how they are affected and are able to predict the consequences of their own decisions and acts. Falling short of any of such requirements, a restriction is unlawful. Simple incorporation of the ICCPR grounds into domestic laws will exaggerate the permissible scope of restriction and is a misuse of the Covenant.

Article 5 of the ICCPR states clearly that "nothing in this Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant," and that "there

shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing ... on the pretext that the present Covenant recognizes them to a lesser extent." Unfortunately, SAR administration is doing exactly this—by misusing the ICCPR.

The 1997 amendments purport to incorporate the requirement of necessity; but what is required is the "reasonable belief" by the security authorities, not any other people, of its necessity. So, the very purpose of having common objective standards in the ICCPR was defeated by incorporating this subjective requirement. The United Nations Human Rights Committee has stressed the need for objective universal standards of implementation of the ICCPR (to the extent that it even rejects the doctrine of margin of appreciation forwarded by the European Court of Human Rights) to ensure that the meaning of "necessity" in the ICCPR is not left open entirely to a national or municipal court, not to mention the subjective judgment of the state or municipal security authorities. The subjective concept of "necessity" in the 1997 amendments makes it too ambiguous a law to satisfy the ICCPR requirement of clear prescription in legislation.

Another important aspect of the ICCPR's requirement of necessity is that there must be cogent evidence to prove that there is a problem serious enough to justify a restriction of rights. The necessity for expansion of the grounds of prohibition to "national security" and "the protection of the rights and freedoms of others" in the 1997 amendments has not been demonstrated. From the enactment of the 1992 amendments up to the last day of British rule, the NGO community did not pose any problems to Hong Kong which justified the tightening of the leash on societies. Even the then existing grounds did not need to be invoked. No NGO has ever been prohibited or refused notification by the colonial authorities in the last decade of British rule. Had there been any problem, the grounds of public order and public safety would have been enough to handle it. These evidence suggest that the Societies Ordinance could, in respect of groups other than triad societies, be liberalized without negative consequences. The problem is excessive power of control rather than inadequate regulatory provisions.

The use of the term "national security" is particularly objectionable because this concept has frequently been used in China to delegitimize the right of expression and to persecute those with legitimate demands like democracy and human rights. Its inclusion raises fears of extension of such Mainland Chinese practices to Hong Kong, especially in the light of Article 23 of the Basic Law.

The consensus of international jurists as enumerated in the Siracusa Principles is that national security "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order." It may only be invoked "to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force." Its inclusion in the Societies Ordinance and the Public Order Ordinance is therefore unwarranted, as it is difficult to suggest that a society or a demonstration in Hong Kong will threaten the existence of China. If there is any local and isolated threat to

law and order, it can be dealt with under the heads of public order and public safety.

The Johannesburg Principles, which are concerned more with the freedom of expression, also stress the importance of the requirement of force in imposing restrictions on the ground of national security. The Principles state that the freedom of expression may be restricted as a threat to national security only if a government can demonstrate that the expression is intended to incite violence, that such violence is likely to be incited, and that there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

However, the ground of "national security" was introduced without any qualification with regard to the requirement of violence or force, despite local and international criticisms. A concession was made by the Chief Executive in respect of the definition of "national security" in that it was defined as "safeguarding of the territorial integrity and the independence of the People's Republic of China" while linking its meaning to that in the ICCPR. It is difficult to understand how the HKSAR's intention to exclude the requirement of force could be reconciled with the ICCPR's meaning of "national security" as outlined in the definition. It is to be hoped that the court would be prepared to impute the requirement of force in light of the wording of the definition in the 1997 amendments, equating the concept of "national security" in the Ordinance to that found in the ICCPR. The Government's refusal to include the requirement of force in the ground of national security has already set a bad precedent for other legislation under Article 23 of the Basic Law.

Another serious consequence of including the "national security" ground is that it fundamentally alters the role of the police force. The police are now required to judge whether a society is a threat to the territorial integrity and the independence of the People's Republic of China rather than to regulate on the grounds of public order and public safety, with which they are familiar and which involve no political role. As far as Human Rights Monitor knows, the "security of Hong Kong" ground in the 1992 legislation was ignored in practice. The recent withholding of the registration of the group Forget Not June 4th and the police inquiry into the group's operation indicate that such non-action is no longer the case after sovereignty transfer.

The police are empowered by the 1997 amendments to conduct political censorship of societies when they apply for registration or exemption. They are also empowered to monitor the activities of societies at all times, prohibiting them if required. It should be noted that except for these changes, the provisions in the last pre-handover Ordinance remain unchanged and the authorities inherit all the powers in the last pre-handover Ordinance, including, among others, the power to inquire, enter, search, and seize. The Societies Officer has the power to require information reasonably required for the performance of his functions under the Societies Ordinance. Once his functions include such political monitoring, it may be "reasonable" for the police to require extensive information of societies critical of Mainland China or groups having "politically controversial" members. Societies, especially opposition political parties, will be under

serious threat if the authorities decide to be "proactive". The current police inquiry into Forget Not June 4th's operations highlights that things are different under Chinese rule — the power is a very real one and the police are now ready to use it to enforce political censorship.

Not only do the vulnerable groups oppose this new ground, apparently many police officers find it difficult to be entrusted with associated duties. According to a news report, a spokesman of an association of police officers voiced his reluctance to take up the responsibility to decide whether to prohibit a public gatherings on the ground of national security as a front line officer, reasoning that such issues should only be decided by senior management.

Political Societies

One of the new grounds of prohibition introduced by the 1997 amendments is: being "a political body" having "connection with a foreign political organization or a political organization of Taiwan." "Political body" means a political party or an organization purporting to be one, or an organization whose principal function is to promote or prepare a candidate for an election. "Foreign political organization" includes foreign political party or government and its political subdivision or agent. "Connections" refer to all direct or indirect financial support or sponsorship from, affiliation to, participation in, decision making by, or having policy determined by, foreign political groups.

As the restriction covers not just election contributions, it has serious effect on political parties, especially in a place without full democracy. A political party may be deterred from many legitimate activities, including, say, endorsing a declaration drafted by foreign parties sharing similar platforms, or engaging in joint projects funded by a better off foreign partner for comparative studies to improve social services. Moreover, as the police are empowered to monitor the activities and finances of political parties, an authoritarian government could starve an opposition party by contacting donors to "verify" donation information. All societies should have the right to achieve its object by political as well as non-political means free from unnecessary restrictions.

Societies which do not directly take part in elections are not directly caught by these changes. However, this broadly couched restriction may still have a chilling effect on civil society in Hong Kong. Societies with foreign connection may be discouraged from fielding candidates in elections and trying to have elected representatives of their own to promote their causes neglected by main-stream political parties. This restriction also gives the police excuses to inquire into the expenditures, incomes, and sources of incomes, not only of political parties, but also all societies. The previous offence, introduced by the colonial government, of failure in providing information which the Societies Officer "may reasonably require for the performance of his functions under [the] Ordinance" was expressly extended to cover such financial and related information. It may well be that the police are limited by the fact that it is unreasonable to request

information on finance from a group which is not involved in elections. That still leaves societies unfamiliar with the law and without legal assistance with much difficulty to resist a request for such information.

This new restriction finds no basis in the ICCPR. It cannot be argued that it is based on "national security" or "public order". Unless substantially narrowed and qualified, foreign connections alone cannot be said to endanger "national security" or "public order".

Policing of Societies

Control of societies has been tightened up after re-unification.

Societies lawfully established with notification to the Police were required to provide the police with a proper office address and proof that the landlords agreed to the societies' use of the premises. Human Rights Monitor learned of no such request for proof by the police under the notification system. Those societies which have refused to, or are unable to, provide a proper office address will not be listed as societies, or have their registration effectively struck down. Human Rights Monitor has documented at least one unlisted society. That society used its post box address as its office address before the re-unification for notification purpose, and this practice was never challenged by the police until the transfer of sovereignty.

Within a month of the establishment of a local society, its founders were required to inform (by the Ordinance immediately before the 1997 amendments) or to register with (by the Ordinance as amended by the 1997 amendments) the Societies Officer in writing of its name, objects, addresses of its principal place of business and premises it occupied, and names of office-bearers of the society. Forget Not June 4, a pro-democracy association with a stated goal, among others, of "ending one-party dictatorship of the Communist Party in China," submitted in January 1999 papers for registration purposes to the Police Licensing Office. However, the police continue, as of mid-September 1999, to withhold the registration of Forget Not June 4. Organizers of the group have been approached by the police informally to see if they could change the group's name and drop the goal of "ending one-party dictatorship of the Communist Party in China." They refused to do so, but instead submitted papers for the registration of another group, the June 4 Committee, with the same goals and office-bearers, etc., except with a different name and without the goal of "ending one-party dictatorship of the Communist Party in China". The June 4 Committee's application was readily approved in March 1999, despite its similar nature to that of Forget Not June 4.

Relying on an old power in the Societies Ordinance to inquire, which survived the re-unification, the police demanded Forget Not June 4th to disclose its constitution, organizational structure, whether membership fees are charged, a list of all members and office-bearers, sources of income, whether it is connected to any other Hong Kong or foreign organizations, and the means by which it achieves its goals. In the letter of

inquiry, the police reminded its founders that non-disclosure of the solicited information within the time limit specified in the letter would constitute an offense punishable by a maximum penalty of HK\$20,000.

By the 16 August 1999 deadline, Forget Not June 4th had submitted all solicited data except its membership list and information as to whether or not it was connected to any Hong Kong or foreign organizations. The organization's spokesman explained that surrendering a full membership list to the police would betray the privacy of individual members, and that the questions about connection to other organizations are too vague and therefore unanswerable. So far, founders and officer bearers of Forget Not June 4 have not been prosecuted for their failure to supply the requested information.

Human Rights Monitor believes that the delay of the registration and the police's inquiry into Forget Not June 4th have violated the founders' freedom of association and constitute discrimination on the ground of political opinion. Forget Not June 4th has been singled out and targeted at for its objective to end one-party rule in China and perhaps also for its potentially provocative name. Most if not all other groups, including the June 4th Committee, have been able to register without being asked to supply a slew of data. The police have voluntarily allowed itself to degenerate into a means of political control. The goal of Forget Not June 4th to end one-party rule in China is perfectly legal and legitimate and conforms to Articles 25 of the ICCPR on people's right to participate in public affairs.

Human Rights Monitor urges the Panel to express its concern about the politicization of the police, to stop police interference with the freedom of association, and to work for the repeal of all legal provisions which threaten the freedom of association.

Right to form trade unions

Article 22 of the ICCPR and Article 22 of the ICESCR address rights relating to the formation of and participation in trade unions. The Hong Kong Government's obligation to respect the right to organize trade unions also arises from the PRC's recognition of the applicability to Hong Kong of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87) (hereinafter "Convention No.87") and the Right to Organise and Collective Bargaining Convention, 1949 (No.98) (hereinafter "Convention No. 98"). Article 39 of the Basic Law provides for the continued application of the ILO Conventions to Hong Kong.

Prior to the handover, a number of laws had been enacted to implement the rights guaranteed in the ILO Conventions to which Hong Kong is bound. After 1 July 1997, however, the Provisional Legislative Council quickly annulled these laws, resulting in a dramatic roll-back of labour rights. In November 1998, the Committee on Freedom of Association of the International Labour Organisation (hereinafter "ILO Committee") issued its report on allegations by the Hong Kong Confederation of Trade Unions

(HKCTU) that the Hong Kong Government had violated Conventions NO. 87 and 98.⁴² The ILO Committee held that the Government had breached these conventions by repealing or amending legislation that had provided for the rights guaranteed therein.⁴³ The ILO Committee therefore recommended repeals of offending provisions in the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (hereinafter "ELRO"), which amended the Trade Union (Amendment) (No. 2) Ordinance, 1997 (hereinafter "Trade Unions Ordinance").

Article 22 of the ICCPR provides for the right of everyone "to form and join the trade unions for the protection of his interests." Article 3 of Convention No. 87 further elaborates the right of trade unions to include "elect their representatives in full freedom" without any interference or restrictions from public authorities.

As amended by ELRO, Section 17(2) of the Trade Unions Ordinance (Cap. 332) requires that unless approved by the Government an officer of a trade union "is or has been engaged or employed in a trade, industry or occupation with which the trade union is directly concerned."⁴⁴ Section 17(6) further provides that "Any person who is an officer of a registered trade union in contravention of this section shall be guilty of an offence and shall be liable on summary conviction to a fine of \$1000 and to imprisonment for 6 months." The ILO Committee found that such restrictions were contrary to Convention No. 87 and stated

"The determination of conditions of eligibility of union office is a matter that should be left to the discretion of union by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right by trade union organizations."⁴⁵

Accordingly, it requested the government to repeal the occupational requirement for trade union offices. To date, the Government has not taken any measures to implement the

⁴² International Labour Organisation, Committee on Freedom of Association, "Case No. 1942: Complaint against the Government of China/Hong Kong Special Administrative Region presented by the Hong Kong Confederation of Trade Unions (HKCTU)" (November 1998) (hereinafter "ILO Committee Report") [http://www.ilo.org/public/english/20gb/docs/gb273/gb-6-1.htm#Case No. 1942](http://www.ilo.org/public/english/20gb/docs/gb273/gb-6-1.htm#Case%20No.%201942). Although the ILO Committee Report addressed at length the government's violations of Convention No. 98, the right to collective bargaining is not explicitly within the ICESCR and will not be discussed here.

⁴³ On 26 June 1997 the Hong Kong Legislative Council passed three Ordinances: 1) Employees' Right to Representation, Consultation and Collective Bargaining Ordinance, 1997; 2) Employment (Amendment) (No. 4) Ordinance, 1997; and 3) Trade Union (Amendment) (No. 2) Ordinance, 1997. In September 1997, the HKSAR Executive Council resolved to repeal the first two Ordinances and to amend the third. On 29 October 1997, the Provisional Legislative Council approved the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (hereinafter "ELRO").

⁴⁴ The full text of Section 17(2) of the Trade Unions Ordinance reads as follows: "No person shall, without the consent in writing of the Registrar, be an officer of a registered trade union unless he is ordinarily resident in Hong Kong and is or has been engaged or employed in a trade, industry or occupation with which the trade union is directly concerned." The occupational requirement for trade union officers had been removed by the Trade Union (Amendment) (No. 2) Ordinance, 1997 but was re-introduced by ELRO.

⁴⁵ ILO Judgment at para. 63.

recommendations of the ILO.

Human Rights Monitor requests the Panel to urge the Government to respect the right to form unions as provided for in Article 22 of the ICCPR, Article 8 of the ICESCR and Article 3 of Convention No. 87 and to repeal Sections 2 and 6 of the Trade Union (Amendment) (No. 2) Ordinance, 1997.

Right to protection from anti-union discrimination

Inherent in the right to join trade unions, as provided for in Article 22 of the ICCPR and Article 22 of the ICESCR, is the right to protection from dismissals or other retaliatory measures motivated by anti-union discrimination. Article 1 of Convention No. 98 explicitly states that "[w]orkers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment [including protections against] acts calculated to... cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities."

The Government claims that the Employment Ordinance protects employees from anti-union discrimination in two ways. First, employers who engage in anti-union discrimination may be subject to a criminal prosecution and a fine of up to HK\$ 100,000. Second, employees who are subject to dismissal due to their union activities may seek remedies such as reinstatement, re-engagement, terminal payments or compensation.⁴⁶

While prosecution for anti-union discrimination by employers is theoretically possible under Section 21B of the Employment Ordinance, in practice, no prosecution has ever been successful. The reason for this has been explained by the Government itself. In its Review of Industrial Relations System in Hong Kong, 1993, the Education and Manpower Branch conceded that "although the Government has from time to time received complaints from employees against their employers for anti-union discrimination, there has yet to be a successful prosecution case. Past experience has shown that it is difficult to prove such violations, as often other reasons are used as cover-up for the hidden discriminatory motive."⁴⁷ According to the Hong Kong Confederation of Trade Unions ("HKCTU"), there have only been two attempted prosecutions to date, one involving the dismissals by the New Bright Plastics Factory in 1988, and another involving a dismissed unionist at Wellcome Co. Ltd in 1994.⁴⁸ Moreover, HKCTU asserts that given the difficulties of establishing the employer's intent to discriminate against union participants, the Government is frequently reluctant to initiate prosecutions.⁴⁹

⁴⁶ HKSAR Government ICCPR Report 1999, at para. 391 - 392. HKSAR Government ICESCR Report 1999, at para. 128 - 129.

⁴⁷ ILO Committee Report, at para. 243.

⁴⁸ ILO Committee Report, at para. 243.

⁴⁹ Interview with Lee Cheuk Yan, Chair, Hong Kong Confederation of Trade Unions, on 12 July 1999.

The Government fails to provide effective remedies for individuals who are subject to anti-union discrimination. According to Sections 32M and 32N of the Employment Ordinance, if a court or a Labour Tribunal determines that an employer has not shown a valid reason for a dismissal, it may issue an order for reinstatement or re-engagement. However, Section 32N(3) requires that the employer and employee must first express their mutual consent to such an order. As noted by the ILO Committee, "it is difficult to envisage that the requirement of prior mutual consent contained therein will be easily forthcoming if the true reason for dismissal is based on anti-union motives."⁵⁰

Notably, in countries such as the United Kingdom where an order for reinstatement or re-engagement is available as a remedy, the court issuing such an order may consider such factors as the complainant's wish to be reinstated or the feasibility of the employer's compliance with the order.⁵¹ However, these countries do not permit the employer to block the award of appropriate remedies such as reinstatement or re-engagement by simply withhold consent. Accordingly, the ILO Committee also urged the Hong Kong Government to amend the Employment Ordinance so as to provide for the "the possibility of the right to reinstatement which would not be conditional upon the prior mutual consent of both the employer and the employee concerned."⁵²

Even in cases where the Labour Tribunal has not issued an order for reinstatement or re-engagement, the Government states the employee may at least be able to claim compensation of up to HK\$ 150,000. However, the ILO Committee has noted that compensation alone is an inadequate remedy. "In the Committee's view, it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities."⁵³

Finally, the Employment Ordinance does not offer any remedies for individuals who have subject to other forms of anti-union discrimination, aside from dismissal. The ILO Committee "remind[ed] the Government that protection against acts of anti-union discrimination should cover not only dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker." The ILO Committee urged the Government to amend the Employment Ordinance so as to provide for protection against all acts of anti-union discrimination.⁵⁴

The paucity of effective legal protections against anti-union discrimination has resulted in the increasing boldness of employers to take actions against individuals who engage in

⁵⁰ ILO Committee Report, at para. 266.

⁵¹ See Sections 113 - 115 of the Employment Rights Act of 1996.

⁵² ILO Committee Report, at para. 267.

⁵³ ILO Committee Report, at para. 266.

⁵⁴ ILO Committee Report, at para. 267.

union activities.

Human Rights Monitor requests the Panel to urge the Government to respect the right to join unions, as provided for in Article 22 of the ICCPR, Article 8 of the ICESCR and the right to protection against anti-union discrimination as set forth in Article 1 of Convention No. 98. Specifically, the Government should provide effective protections against and remedies for anti-union discrimination, including 1) undertaking vigorous prosecutions of employers who take retaliatory measures against their employees, motivated by anti-union discrimination; 2) amending Section 32N of the Employment Ordinance to include the possibility of the right to reinstatement without the prior mutual consent of both the employer and the employee; and 3) amending the Employment Ordinance to provide remedies for a full range of anti-union discriminatory measures.

Right of trade unions to function freely

Integral to the right to form unions is the autonomy of its decision-making on the use of union funds.

As amended by ELRO, Section 33(1)(j) of the Trade Unions Ordinance requires that any contribution or donation to foreign trade unions and organizations must be subject to the prior approval of the Chief Executive. Section 34 of the Trade Unions Ordinance further prohibits the use of union funds for any political purpose, aside from the elections for the functional constituencies.⁵⁵

The ILO Committee found that these restrictions violated the freedom of association. It reiterated that "provisions which give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes are incompatible with the principles of freedom of association."⁵⁶ With regard to the blanket prohibition on spending for political purposes, the ILO Committee noted that "provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association provided that trade unions do not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests. The [ILO] Committee considers that it would be difficult, if not impossible, for unions to engage in political activities in practice in the face of a legislatively imposed ban on the use of union funds for any political purpose."⁵⁷

Human Rights Monitor requests the Panel to urge the Government to respect the right of unions to function freely as provided for in Article 8 of the Covenant and to repeal Sections 33(1)(j) and 34 of the Trade Unions Ordinance.

⁵⁵ Restrictions on the use of union funds had been removed by the Trade Union (Amendment) (No.2) Ordinance, 1997 but were re-introduced by ELRO.

⁵⁶ ILO Committee Report, at para. 264.

⁵⁷ ILO Committee Report, at para. 264.

Chapter 9

Rights of minorities and Equal Opportunities

(Articles 2, 3 and 27)

Two-week rule for foreign domestic workers

In its review of the third periodic report in 1996, the UN Economic Social and Cultural Rights Committee expressed disappointment over the Government's failure to rescind "two-week rule" imposed upon foreign domestic workers. The rule requires foreign domestic workers to find employment or to leave Hong Kong within two weeks of the termination of their employment contract.

This rule clearly places foreign domestic workers in an extremely vulnerable position vis-à-vis their employers. The possibility of deportation would effectively prevent workers from reporting regarding violations of the minimum wage laws, sexual harassment, the denial of statutory rest days and holidays, or the infringement of other rights in the Covenant.

Furthermore, the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO Convention No. 143) provides in Article 8(1) that "[o]n condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit. China has not yet ratified ILO Convention No. 143.

Human Rights Monitor requests the Panel to urge the Government to rescind the two-week rule for foreign domestic workers. The Panel should also call upon the Chinese Government to ratify ILO Convention No. 143 and to extend its application to Hong Kong immediately.

Denial of Maternity Protection to Foreign Domestic Workers.

In June 1999, the Labour Department introduced a proposal that would "allow some flexible arrangements in the maternity provisions in respect of live-in [domestic workers] to the effect that a pregnant live-in [domestic worker] and her employer may mutually agree to terminate their employment contract whereby the employer will have to pay the

[domestic worker] a specified amount"⁵⁸ as detailed in an Annex to the proposal. The amount of severance pay would depend on the length of time that the domestic worker had been employed. Once the employer paid the severance pay, he would no longer be liable for a claim of compensation for unlawful dismissal or for criminal penalties under the Employment Ordinance. Our Common Law system cares more about the substance not the form of a legal arrangement - the "flexible arrangements" proposed is in fact an exemption from or a denial of the protection of pregnant employees.

As numerous migrants rights groups have pointed out, it is unlikely that a termination of an employment contract would be "mutually agreed upon" given the unequal power relationship between the employer and the domestic worker. The proposal also does not specify the format of such agreement, whether it needs to be in writing or simply oral. If approved, the Labour Department's proposal would be easily subject to abuse by employers, who will be permitted under the Employment Ordinance to arbitrarily terminate pregnant domestic workers. Furthermore, since live-in domestic workers are disproportionately foreign workers, the denial of maternity protections would violate the Government's obligations under Article 2(3) to "guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, [or] national or social origin."

The Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO Convention No. 143) provides in Article 10 that Government should "declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory." China has not yet ratified ILO Convention No. 143.

The proposal also violates the relevant provisions in the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Elimination of all Forms of Racial Discrimination.

Human Rights Monitor requests the Panel to urge the Government to ensure the full and equal application of maternity protections in the Employment Ordinance to live-in domestic workers. The Panel should also call upon the Chinese Government to ratify ILO Convention No. 143 and to extend its application to Hong Kong immediately.

No Legislation to Prohibit Racial and other Discriminations

The UN Human Rights Committee in its 1995 *Concluding Observations* recommended

⁵⁸ Labour Department, Report of the Applicability of the Employment Ordinance to Live-in Domestic Helpers (June 1999).

that "comprehensive anti-discrimination legislation aiming at eliminating all remaining discrimination prohibited under the Covenant be adopted." But the Government continues to resist the call.

In Hong Kong's common law system, the basic principles of the rule of law dictate that a person, a group, or an organization has the right to do anything which is not prohibited by the law, while the law enforcement agencies can only prohibit an act if there is a law against it. It is therefore impossible to prohibit any act of racial discrimination by private parties until there is a law forbidding it. The Bill of Rights Ordinance in its present form fails to prohibit violations other than by the Government (and public authorities) and is unable to provide necessary remedies to victims of violations, for example, of racial discrimination by private persons and organizations.

The failure to legislate to prohibit all remaining discrimination prohibited under the Covenant can be demonstrated in the Government's effort to oppose legislation to outlaw racial discrimination.

Thirty years after the International Convention on the Elimination of All Forms of Discrimination came into force in Hong Kong, there is still no law protecting people against racial discrimination. There have been various effort to lobby for the prohibition of racial and other discrimination.

The Government has consistently failed to do anything to legislate against acts of racial discrimination. It often uses the excuse that it will be promoting public education on racial discrimination. The Government sees such legislation incompatible with education. Education has therefore been used to exclude legislation.

In a meeting with the then Deputy Secretary for Home Affairs Peter Lo in late Oct 1998, Human Rights Monitor proposed to the Government to require government funded schools, social services and other agencies to adopt and to adhere to the Code of Practice Against Discrimination in Employment on the Ground of Racial Discrimination, a non-legally binding document drafted and published by the Home Affairs Bureau. Human Rights Monitor also proposed that the Government require all government contractors to adopt the Code.

Human Rights Monitor has also proposed Mr. Lo to urge the Government owned railway companies to demonstrate their commitment to non-discrimination policy by adopting those rules and promote themselves as equal opportunity organizations. The Government should take advantage of its position as the sole owner of the railway companies, etc. and holders of quite a substantial portion of shares in companies like the Hong Kong Bank, to persuade these corporations to become equal opportunity employers and adopt the Code.

However, he has refused to adopt all the proposals.

Human Rights Monitor question what was the point of the Home Affairs Bureau issuing

the Code of Practice to the private sector when its Deputy Secretary does not see it fit to require schools funded by public monies to adhere to the Code of Practice. This refusal is particularly objectionable in that the Government has for many years confidently held schools as an integral part of human rights education in Hong Kong in its reports to UN treaty bodies but now finds it difficult to require educational institutions not to discriminate on the ground of race. This demonstrates the lack of commitment by the Government to combat racial discrimination whether by legislation or by education.

Another justification for not legislating as reiterated time and again by the Government, was that the Home Affairs Bureau has for the past twelve months embarked on a series of district consultations, and that the overall message was that the human rights situation in Hong Kong was not serious and basically there was no need for legislation. One of the staff members of Human Rights Monitor has attended one of these district consultations, along with a social worker from the Yang Memorial Methodist Social Service who has also wanted to attend the district consultation in her district but had repeatedly been put off by the Home Affairs Bureau until it was too late. The district consultation was held on 10 November 1998 in the Wan Chai District. One of the first things that was noticeable was that most people there knew each other, and as it later turned out, they were part of the Wan Chai District Committee with only one Korean businessman who seemed impartial. Vocal members in Wan Chai who formed the Movement Against Discrimination were deliberately not invited.

The comments made at the meeting were certainly disgraceful. Two members said that they belonged to an Incorporated Owner's Committee in a building and said that most of the time complaints did not constitute discrimination. It was just that sometimes the Filipinos were too noisy, so it was more a case of dislike of their attitude. The only foreigner on the panel, the Korean man, said he felt that there was no discrimination since he employed Nepalese as well as Filipinos in his company at the same rate as the local Chinese, so there was no problem at all. When the Chairperson of the consultation was asked where the representation of this meeting was, she replied that there was the staff member from Human Rights Monitor as well as the social worker from the Yang Memorial Methodist Social Service. This was indeed laughable, since these exact two people repeatedly insisted on attending one of these district consultations, and it was not until the then Deputy Secretary for Home Affairs was confronted that they were allowed to join in.

Besides, Human Rights Monitor learns that in at least one of the districts apart from Wan Chai, a government official was told to invite individuals who were likely to be favourable to the government stance to attend the consultation.

Human Rights Monitor considers it wrong in principle for the Government to rest its decision whether or not to legislate against racial discrimination on consultation results, especially those from a far from genuine consultation. Anyway, a pilot survey in 1998 by Human Rights Monitor found that 68% of 123 respondents who were minorities personally experienced or witnessed racial discrimination in Hong Kong; 80% believed

that legislation prohibiting racial discrimination would be helpful to Hong Kong; and 76% supported legislation prohibiting racial discrimination in Hong Kong.

Human Rights Monitor found in the Government's unfounded argument that such equal opportunity legislation would lead to racial disharmony particularly objectionable. No existing equal opportunity legislation has ever led to disruption in social harmony. Similar predictions by the Government made in opposing the equal opportunity legislation in respect of sex, disability and family status have been defeated by actual experience.

Human Rights Monitor urges the Panel to support legislation outlawing racial and other discrimination and to urge the immediate adoption of the Code by government contractors, government owned business and government funded bodies.