



DEVELOPING A HUMAN RIGHTS CULTURE IN HONG KONG: CREATING A FRAMEWORK FOR ESTABLISHING AN INDEPENDENT HUMAN RIGHTS COMMISSION

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I. INTRODUCTION

The Hong Kong Special Administrative Region (HKSAR) has a fairly developed legal system based on the principles of common law. The rule of law,¹ the independence of judiciary and a legal framework for protection and promotion of human rights² have by and large been guaranteed under the Basic Law³ and the Bill of Rights Ordinance

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1. See generally Hsin-chi Kuan, *Support for the Rule of Law in Hong Kong*, 27 HONG KONG L.J. 187 (1997).

2. See generally HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (2d ed. 2000); see also UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2002).

3. People's Republic of China: The Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China, Apr. 4, 1990, 29 I.L.M. 1511 [hereinafter Basic Law].

(BORO).⁴ However, human rights continue to remain a contentious political and social issue receiving scant official response that does not further the cause of developing a human rights culture in Hong Kong. The need for protecting and promoting human rights cannot be purely based on and dependent upon legal, constitutional,⁵ and judicial mechanisms. The fact that international human rights law is entrenched in Hong Kong's legal system helps in bringing into focus the issues relating to human rights⁶ and facilitates the promotion of constitutionalism.⁷ But the absence of an independent human rights commission (HRC) that is exclusively vested with the task of protecting and promoting human rights in the HKSAR, such as investigating alleged violations of human rights, granting compensation and other forms of reparatory measures for the victims of human rights violations, and measuring the human rights impact of legislation, etc., is a major deficiency for a society that aspires to develop a human rights culture.

First, this article provides a critical analysis of the existing framework for protecting and promoting human rights in the HKSAR. This involves examining the human rights system prevailing within the Basic Law⁸ and the Bill of Rights Ordinance.⁹ Second, it examines the need for developing a human rights culture in Hong Kong and its contemporary relevance in the context of renewed fears of

4. HONG KONG BILL OF RIGHTS ORDINANCE, No. 59 (1991).

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

6. See generally Michael C. Davis, *Adopting International Standards of Human Rights In Hong Kong*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 168 (Michael C. Davis ed., 1995) (discussing the effect of international human rights standards, practices and values on domestic human rights framework) [hereinafter HUMAN RIGHTS AND CHINESE VALUES].

7. See generally Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998) (the core argument being a human rights critique of cultural relativist theories); see also Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT'L L. 215 (1996) (discussing contemporary perspectives on constitutionalism and its impact on human rights).

8. See Yash P. Ghai, *The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region: Complementarities and Conflicts*, 1 J. CHINESE & COMP. L. 30-71 (1995) (concerning the interaction of the BL and BORO).

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

deterioration of human rights guarantees due to proposed legislation¹⁰ on national security. It also examines the relevance of principles of constitutionalism and the rule of law¹¹ in developing a vibrant human rights culture in Hong Kong. Third, it provides a framework for establishing an independent human rights commission in the HKSAR.¹² The need for such a commission in Hong Kong will be critically examined and the role, mandate, and functions of the proposed HRC in Hong Kong will be differentiated from other commissions in Hong Kong like the independent commission against corruption (ICAC) and the equal opportunity commission (EOC). Fourth, it examines the work of the proposed HRC in the HKSAR, particularly with reference to the governance discourse, both internationally and locally, and underlines the need for Hong Kong's policies to reflect good governance. In this regard, the mushrooming of human rights commissions in a few South East Asian countries like Malaysia, Indonesia and Philippines may be of relevance to Hong Kong. Fifth, it addresses the issue of political and administrative accountability in light of the impact of government policies on the people of HKSAR and how far the HRC can improve human rights accountability of the government. This requires granting powers to the HRC, besides ensuring its functional independence and autonomy. A robust HRC would help galvanize the vibrant civil society in HKSAR to work with the NHRC and develop a sustainable human rights culture in Hong Kong.

II. LEGAL AND JUDICIAL FRAMEWORK¹³ FOR PROTECTION OF HUMAN RIGHTS IN HONG KONG

The basic framework for protection of human rights in any society is generally guaranteed through the constitution, the bill of

10. See generally H.L. Fu & Richard Cullen, *National Security Law in Hong Kong: Quo Vadis A Study of Article 23 of the Basic Law of Hong Kong*, 19 UCLA PAC. BASIN L.J. 185 (2002).

11. See generally Richard H. Fallon, Jr., *The "Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

12. See Anna Wu, *Why Hong Kong Should Have Equal Opportunities Legislation and a Human Rights Commission*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 6, at 185 (a comprehensive review of past efforts in developing a human rights commission in Hong Kong).

13. See Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003) (discussing the role of courts in democracy).

rights, or certain human rights legislation.¹⁴ In the context of Hong Kong, the Basic Law remains the primary source of the rights and freedoms of its people.¹⁵ It is noteworthy that Chapter III of the Basic Law "institutes the promises and guarantees in the Joint Declaration"¹⁶ by establishing the protection of human rights.¹⁷ Various rights that are specifically provided include the right to life,¹⁸ equality before the law,¹⁹ freedom from torture,²⁰ personal liberty,²¹ liberty of movement,²² privacy of communications,²³ freedom of expression,²⁴ freedom of religion,²⁵ freedom of association,²⁶ and the right to peaceful assembly.²⁷ While these provisions provide the human rights framework, Article 39 in particular ensures that the two international human rights covenants, the International Covenant on Civil and Political Rights (ICCPR)²⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁹ shall remain in force and will be implemented through the laws of the HKSAR.³⁰ Further, Article 39 provides that "[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the

14. See Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301 (1996) (discussing the human rights framework in the governance of the HKSAR).

15. See YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER - RESUMPTION OF SOVEREIGNTY* 403 (2d ed. 1999).

16. People's Republic of China - United Kingdom: Agreement on the Future of Hong Kong, Sept. 26, 1984, U.K.-P.R.C., 23 I.L.M. 1366.

17. Daniel R. Fung, *Foundation for the Survival of the Rule of Law in Hong Kong - The Resumption of Chinese Sovereignty*, 1 UCLA J. INT'L L. & FOREIGN AFF. 283, 302 (1996-97).

18. Basic Law, *supra* note 3, art. 28.

19. *Id.* art. 25.

20. *Id.* art. 28.

21. *Id.*

22. *Id.* art. 31.

23. *Id.* art. 30.

24. Basic Law, *supra* note 3, art. 27.

25. *Id.* arts. 32 & 141.

26. *Id.* art. 27.

27. *Id.* art. 28. See Fung, *supra* note 17.

28. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360 (1967).

29. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 31st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316.

30. Fung, *supra* note 17, at 305.

provisions of the preceding paragraph of this Article.”³¹ The effect of Article 39³² has been to ensure that international human rights law in the ICCPR³³ and the ICESCR gets domestically interpreted by the courts of Hong Kong and integrated with the provisions of the Basic Law.³⁴

While commenting on the international sources of rights³⁵ in Hong Kong,³⁶ Yash Ghai observed that,

[t]he first of the international instruments is the Joint Declaration which commits China to preserving and promoting a number of rights and freedoms, principally those which existed under the colonial regime. Secondly, in accordance with the Declaration, the Basic Law stipulates that the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and international labour conventions, all ‘as applied to Hong Kong’, ‘shall remain in force and shall be implemented through the laws of the HKSAR’ (art. 39).³⁷

The general provisions that are intended to protect rights and freedoms of the people of Hong Kong are available as general principles in the Basic Law.³⁸ The human rights framework that is guaranteed under the Basic Law provides “that the HKSAR ‘shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with the law’ (art. 4).”³⁹

31. *Id.* at 303 (quoting Article 39).

32. See *HKSAR v Ng Kung-siu and Another* [1999] 3 HKLRD 907, 920. In this case the Hong Kong Court of Final Appeal (CFA) stated that “the ICCPR is incorporated into the Basic Law by its Article 39.” *Id.*

33. See generally Johannes Chan, *State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights*, 45 INT’L & COMP. L.Q. 928 (1996).

34. See Fung, *supra* note 17.

35. See generally Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, in *HUMAN RIGHTS IN HONG KONG* 134-39 (Raymond Wacks ed., 1992).

36. See generally Yash P. Ghai, *Derogations and Limitations in the Hong Kong Bill of Rights*, in *THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH* (Johannes Chan & Yash Ghai eds., 1993) [hereinafter *HONG KONG BILL OF RIGHTS*].

37. See GHAI, *supra* note 15, at 403-04.

38. *Id.* at 423.

39. *Id.*

It may be observed that the Basic Law and the Bill of Rights Ordinance⁴⁰ demonstrate two important human rights structures for Hong Kong. However, the importance of constitutional judicial review and the development of human rights jurisprudence by domestic courts in Hong Kong ought to play a significant role in the protection and promotion of human rights. In this regard, Michael Davis has observed,

[t]here is, however, considerable cause for pessimism about human rights, evident in developments following the final handover process. The initial flurry of activity relating to interpretation and implementation of human rights under the HKSAR regime has been disheartening. The initial actions arose out of the Basic Law stipulation in Article 160 that the Standing Committee of the National People's Congress (NPC) could determine existing laws to be in contravention of the Basic Law, and therefore invalid The use of Article 160 review to take away rights, rather than protect them, became a source of Hong Kong anxiety about future rights security.⁴¹

It is true that even when rights are constitutionally entrenched and protected through the Bill of Rights or other legislation, their actual implementation and enforcement remains a struggle in which contentious politics attempts to create spaces for the government, people and the judiciary to identify and interpret these rights.

The experience of Hong Kong is not totally different from that of other countries.⁴² However, where the Hong Kong experience fundamentally differs is the interaction of two completely different legal systems and political cultures that value human rights and freedoms from different perspectives. In other words, the curiosity of "one country, two systems" makes human rights in Hong Kong unique. This is further aggravated by the fact that protection of the rule of law⁴³ remains the most important goal in Hong Kong. The

40. See generally Nihal Jayawickrama, *The Hong Kong Bill of Rights: A Critique*, in HONG KONG BILL OF RIGHTS, *supra* note 36, at 55.

41. Michael C. Davis, *Constitutionalism under Chinese Rule: Hong Kong after the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 287-88 (1999).

42. For an excellent and comprehensive article on the incorporation of international human rights in a few selected Constitutions of certain countries, see Yash P. Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000).

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

means and the methods to protect the rule of law⁴⁴ also differ from the jurisprudential perspectives that prevail in Mainland China. With these complexities of legal systems and political cultures interacting and at times engaging and integrating with each other, there will inevitably be problems of the kind that was demonstrated in the Ng Ka Ling case.⁴⁵

The Joint Declaration and the Basic Law require the exercise of constitutional judicial review under the Basic Law.⁴⁶ It is notable that the Hong Kong Court of Final Appeal (CFA) declared clearly in the Ng Ka Ling case⁴⁷ that it has the power of constitutional judicial review over local Hong Kong legislation and that it has the right to examine acts of the mainland's NPC for conformity to the Basic Law.⁴⁸ The Ng Ka Ling judgment arose on the basis of a challenge to a Hong Kong immigration statute, which restricted the Basic Law-guaranteed right to reside in Hong Kong for children born to Hong Kong resident parents. The CFA exercised its power of constitutional judicial review to overturn several provisions, which affected that right and declared that it would take a purposeful and generous approach to interpreting constitutional rights guaranteed under the Basic Law.⁴⁹

Discussing the human rights implications of the Ng Ka Ling case, Davis has correctly observed that,

[w]hen it comes to the rule of law in Hong Kong, there are several troubling aspects of the circumstances surrounding this case [Ng Ka Ling case]. The most blatant damage is reflected in the simple reality that final judgments in Hong Kong, at least where constitutional rights are concerned, are simply not final. They are subject to being overturned by a combination of local government and Mainland interference. . . .

44. See C. Raj Kumar, *To Protect the Rule of Law, People must get Involved*, S. CHINA MORNING POST (Hong Kong), Jan. 19, 2003, at 11.

45. Ng Ka Ling v. Director of Immigration [1999] 1 HKLRD 577.

46. See Davis, *supra* note 41. The Joint Declaration guarantees the maintenance of the common law system, the independence and finality of the local courts, and the right to challenge the executive in the courts in Annex 1, articles 2, 3, and 13. The Basic Law includes the same requirements in addition to various detailed requirements similar to common law systems respecting the judiciary. Basic Law, *supra* note 3, arts. 2, 8, 17, 80-96 & 158.

47. See Karmen Kam, *Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v. the Sovereignty Interests of China*, 27 BROOK. J. INT'L L. 611 (2002).

48. See Davis, *supra* note 41.

49. *Id.*

Though the Court of Final Appeals has seemingly taken a firm stand on constitutional judicial review there is plenty of room for timid judges to shirk this responsibility and for the government to continue to threaten the judicial bedrock of Hong Kong's stability. . . .⁵⁰

The legal and judicial framework of human rights protection in Hong Kong clearly demonstrates that it is insufficient to rely on the human rights structure guaranteed under the Basic Law and the Bill of Rights Ordinance, or, for that matter, the role of the courts in ensuring the protection and promotion of human rights. For true human rights culture to be promoted in Hong Kong, a number of factors including the development of independent institutions engaged in the process of promoting human rights education are imperative. Human rights ought to become the focal point of governance in the HKSAR. This approach is intended to develop a good governance framework for human rights protection by using various tools and mechanisms in the Basic Law, Bill of Rights Ordinance and international human rights commitments of the HKSAR. The human rights NGOs in the HKSAR could also supplement the role played by independent human rights institutions in ensuring that access to justice is available for the victims of human rights violations and human rights advocacy remains an important dimension in the efforts relating to 'norm-creation' and 'standard-setting' in the field of human rights.

III. DEVELOPMENT OF A CULTURE OF HUMAN RIGHTS IN HONG KONG

The challenges of governance posed in Hong Kong due to the unique and distinctive development of constitutionalism and political culture under "one country, two systems"⁵¹ can be confronted only through the development of a sustainable human rights culture. Any rule-of-law society ought to develop its governance apparatus on the basis of laws, rules, regulations, and institutions that ensure adherence to the principle of the rule of law. In the Hong Kong context, the colonial history and the disinterest of the colonial power in developing a deeply entrenched system of human rights have created a unique situation after the handover in 1997. The international community's apprehensions about post-handover civil

50. *Id.* at 294-95.

51. See Joseph R. Crowley Program, *Special Report: One Country, Two Legal Systems?*, 23 FORDHAM INT'L L.J. 1 (1999).

liberties and social expectations generated by the Basic Law and the Bill of Rights Ordinance have further deepened the need for developing a human rights culture in Hong Kong.

It is notable that the desires of the Hong Kong populace to pursue democratic governance⁵² have been recently manifested in the peaceful protests against the anti-subversion laws. Civil society movements need to be galvanized to drive home the fact that Hong Kong needs a culture of human rights. The development of a culture of human rights goes beyond the work and mandate of laws, rules, regulations, work of the government departments, functioning of institutions and the work of the judiciary. For human rights to become part of the civil culture in Hong Kong, it needs to be inculcated within the social and political psyche of the people. Existing institutions, in particular the judiciary, can play a vital role in developing human rights culture in Hong Kong. However, the judiciary by virtue of its status as an official body that is involved in developing jurisprudence in all aspects of law may not be the most effective institution engaged in the development of human rights culture.

Hong Kong should continue its work in creating its own brand of independent civil society that is engaged in developing a human rights culture. The fact that the people of Hong Kong are increasingly seeking accountability from the government of the HKSAR in all its actions is an important step in the right direction for promoting a human rights culture. A culture of human rights shall flourish only in a society that does not fear to dissent.⁵³ Freedom from fear is an important freedom, which people should be in a position to pursue. Recent political developments in the HKSAR demonstrate that the aspirations of people towards democratic governance and the desire for political participation⁵⁴ are not in tune with the attitudes of the government. The nature of contentious politics that is prevailing in Hong Kong has the potential to create space for civil society activism. However, recent efforts to formulate a national security law in the form of Article 23 legislation⁵⁵ have fueled a number of controversies

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

53. See C. Raj Kumar, *Why Good Governments Should Welcome Protests?*, S. CHINA MORNING POST (Hong Kong), July 15, 2003, at 13.

54. See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

55. See The Government of the Hong Kong Special Administrative Region of the People's Republic of China, *Proposals to Implement Article 23 of the BASIC LAW*:

surrounding the commitment of the government to human rights. Civil society response to the Article 23 legislation efforts and the need for promoting democracy in Hong Kong are indeed significant developments.

The need for promoting a culture of human rights is imminent in the case of Hong Kong. There are several factors favorably present in Hong Kong for the development of a culture of human rights. As we have already seen, Hong Kong has a fairly well developed common law system and a comprehensive rights regime under the Basic Law and the Bill of Rights Ordinance. Second, the Basic Law and the Bill of Rights Ordinance are interpreted by the local courts through the principles of common law, thereby having the potential for developing/creating human rights jurisprudence. Third, Hong Kong has uniquely entrenched the international bill of rights into its legal system by integrating the ICCPR and the ICESCR into the BORO. This provides for reorienting the governance policies of the HKSAR towards the rights and freedoms guaranteed under international human rights covenants. The existence of an Equal Opportunity Commission (EOC) ensures that equality and non-discrimination remain the watchwords of governance in Hong Kong. Initiatives can be taken to inculcate a sense of tolerance, respect for diversity, and non-discrimination not only at the level of government policies and decision-making processes, but also at the societal level in interaction among the people of Hong Kong. Fourth, the existence of a variety of media organizations, both in Chinese and English languages, can help promote a human rights culture by developing public opinion on these issues. Fifth, the fact that Hong Kong has a vibrant civil society aspiring to achieve its rights and freedoms can only help the promotion of human rights culture.

IV. IMPARTING HUMAN RIGHTS EDUCATION⁵⁶ AND ITS RELEVANCE FOR PROMOTING HUMAN RIGHTS CULTURE

A culture of human rights⁵⁷ ought to be promoted through human rights education. Human rights education in Hong Kong is extremely

Myths and Facts, available at http://www.basiclaw23.gov.hk/english/pamphlet/facts/leaflet1_f1.htm (last visited Mar. 24, 2004).

56. See generally Upendra Baxi, *Human Rights Education: The Promise of the Third Millennium?*, at http://www.pdhre.org/dialogue/third_millennium.html#notes (last visited Mar. 24, 2004).

57. See generally, Jose Ayala Lasso, *A Culture of Human Rights*, UN CHRONICLE, 1997, Volume 34, Issue 4, Academic Search Premier 02517329.

important, given the fact that general awareness of the Basic Law and the Bill of Rights Ordinance in the community is marginal. Awareness relating to rights is very important for empowering the people of Hong Kong to seek good governance policies from the government. The strategy for inculcating human rights culture among the people of Hong Kong needs to be based upon a number of factors: social, legal, political, judicial, and institutional. Human rights education has been a focal point of UN activities in creating the United Nations Decade for Human Rights Education (1995-2004) in December 1994. In this process, the United Nations General Assembly (UNGA) defined human rights education as "a life-long process by which people at all levels of development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies."⁵⁸ The international significance of this is demonstrated by the fact that the UNGA sought the support of the international community and the civil society during 1995-2004 in its efforts to promote a culture of human rights worldwide through human rights education and training.⁵⁹ Further, the role of human rights education was fully recognized by the World Conference on Human Rights held at Vienna in 1993. "The Conference considered human rights education, training and public information essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace."⁶⁰

Human rights education in Hong Kong needs to go beyond the frontiers of academic learning or, for that matter, professional pursuit. Human rights education should aim to forge social transformation and promote a worldview based upon respect for the rights and freedoms of humanity. Shulamith Koenig in her essay has referred to the views of Upendra Baxi,⁶¹ for whom

58. See Office of the High Commissioner for Human Rights, Human Rights Education: Lessons for Life, Nov. 1998, available at <http://www.unhchr.ch/html/50th/50kit4.htm#Human%20rights%20education> (last visited Mar. 24, 2004).

59. *Id.*

60. *Id.*

61. See Upendra Baxi, *Random Reflections on the [Im]possibility of Human Rights*, at <http://www.pdhre.org/dialogue/reflections.html> (last visited Feb. 15, 2004). See also Upendra Baxi, *Acquisitive Mimesis in the Theories of Reflexive Globalization and the Politics of Human Rights*, at <http://www.pdhre.org/dialogue/mimesis.html> (last visited Mar. 24, 2004) (paper presented at Chicago Humanities Institute, May 9-10, 1996).

no single phrase in recent human history has been more privileged to bear the mission and burden of human destiny than [the phrase] "human rights."⁶¹ In his view, the greatest gift of classical and contemporary human thought is the notion of human rights. Indeed, more than any other moral language available to us at this time in history, the language of human rights is able to expose 'the immorality and . . . barbarism of the modern face of power'.⁶²

Thus, the need for empowering the people of Hong Kong cannot be better achieved than by developing varied components of human rights education. A sustained development of human rights education in Hong Kong can result in the promotion of a culture of human rights.

In the case of Hong Kong, it needs to be examined how human rights education can be promoted and to what extent the promotion of human rights education can actually facilitate the development of a human rights culture. Interestingly, the International Consultation on the Pedagogical Foundations of Human Rights Education (IC) has formulated pedagogy of human rights education at a meeting held at the Center for Democratic Studies in La Catalina, (CEDAL), Costa Rica in 1996. In this meeting, it was observed that

[f]ormal education (schools, universities, vocational and technical schools, professional schools, etc.) and other learning environments can be and sometimes are places where faculty, students and staff have the opportunity to search for meaning, to pursue the search for justice and to develop their unique beings in an atmosphere of safety, caring, and compassion. We strongly believe that students who are fully engaged in such an educational process are much more likely to challenge social and cultural domination. Vested interests, persistent habits, and bureaucratic [attitudes] can be obstacles to the incorporation of a human rights pedagogy into formal education.⁶³

62. Shulamith Koenig, *Human Rights Education, Human Rights Culture and the Community of Non-Governmental Organizations: The Birth of a Political Ideology for the Twenty-First Century*, The People's Movement for Human Rights Education (PDHRE), at <http://www.pdhre.org/dialogue/ideology.html#political> (last visited Mar. 24, 2004).

63. *Towards a Pedagogy of Human Rights Education*, International Consultation on the Pedagogical Foundations of Human Rights Education, Center for Democratic Studies in La Catalina, (CEDAL), July 22-26, 1996, The People's Movement for Human Rights Education (PDHRE), at <http://www.pdhre.org/dialogue/costarica.html> (last visited Mar. 24, 2004).

Hong Kong needs to overcome such hurdles in its efforts to develop a system of human rights education that ensures the development of a human rights culture in all its forms and manifestations. The starting point can be to develop knowledge and capacity-building in imparting greater awareness of the Basic Law, the Bill of Rights Ordinance, the UDHR, ICCPR, and the ICESCR. These efforts can be further developed to identify particular groups from different strata of the society to develop skills and expertise in pursuing training programs in human rights education ("training of trainers" is an activity that several local and international NGOs perform). The IC has further observed that

[t]he pedagogy required for such a process will undoubtedly involve a wide variety of methods and approaches that should reflect and be guided by the principles that are basic to in [sic] the human rights movement. These principles include:

- Full respect for all people regardless of class, caste, sexual preference, race, gender, religion, income, ability, age, or other condition;
- Participation of students in their own education and sharing in the decision-making process;
- The celebration of human experience as an expression of diversity and uniqueness as well as an important source of knowledge and wisdom;
- The vital importance of social responsibility.⁶⁴

In the process of promoting a culture of human rights,⁶⁵ human rights education can also ignite human rights activism. Hong Kong has witnessed a unique type of civil society activism that hopes to seek transparency and accountability of the government. Human rights activism is thus another facet of accountability-seeking endeavors. Commenting on the interaction of human rights and politics, Michael Ignatieff has observed that

[h]uman rights activism means taking sides, mobilizing constituencies powerful enough to force abusers to stop. As a consequence, effective human rights activism is bound to be partial and political. Yet at the same time, human rights politics is

64. *Id.*

65. See generally Tom Campbell, *Human Rights: A Culture of Controversy*, 26 J.L. & Soc'y 6 (1989).

disciplined or constrained by moral universals. The role of moral universalism is not to take activists out of politics but to get activists to discipline their partiality—their conviction that one side is right—with an equal commitment to the rights of the other side.⁶⁶

This is the kind of tolerant conviction that human rights education hopes to promote in Hong Kong. It is consciously different from dogmatic and fundamentalist viewpoints of values which are intolerant of other variants and understandings of human rights and human values. The culture of human rights that we are seeking to achieve in Hong Kong also necessitates rights education that informs the way by which governance policies affect human rights and the responses required by the civil society to participate in the decision-making process.

V. ROLE OF THE MEDIA,⁶⁷ NGOS AND CIVIL SOCIETY⁶⁸ IN PROMOTING A HUMAN RIGHTS CULTURE

While Hong Kong's legal and human rights frameworks are created by the rights guaranteed under the Basic Law and the Bill of Rights Ordinance, it is important for other social control mechanisms to play their role in promoting human rights culture.⁶⁹ Media organizations should conduct activities in a free and fair manner. While Hong Kong media is by and large fair in its reporting, there are legitimate concerns about its freedom. It is difficult to understand as to what extent self-censorship prevails in its reporting.⁷⁰ Self-censorship is as much a problem as executive interference in the work of the media. It is a reflection of a lack of courage or knowledge of rights for an editorial board to always conform to the "politically correct" viewpoints that may be detrimental to social good. A society

66. Michael Ignatieff, *Human Rights as Politics*, in *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 9-10 (Amy Gutmann ed., 2003).

67. See generally Richard Cullen, *Media Freedom in Chinese Hong Kong*, 11 *TRANSNAT'L LAW* 383 (1998) (providing a critical perspective on media freedom in the HKSAR).

68. See generally Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 *AM. U. INT'L L. REV.* 1335 (1999).

69. See Davis, *supra* note 41 (discussing the principles of constitutionalism in and its implications).

70. See Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 *IND. L.J.* 765 (1998) (for a critical perspective on press freedom).

that hopes to promote human rights culture should ensure that its media is given due protection under the law for exercising its freedom of speech and expression.

The notion of dissent and tolerance to dissent is a very important aspect that ought to be highlighted in a human rights culture. This was demonstrated during government's reluctance to appreciate dissenting views while conducting various consultation exercises in the HKSAR – for example, in 1988 in a consultation on political reform for elections in 1990, the government badly distorted their findings of popular opinion; they did that again in the consultation on Article 23 legislation. This was further accentuated by the fact that there are growing instances of political intolerance. This is demonstrated in Hong Kong by the fact that there is current row over patriotism where they condemn dissenters as unpatriotic and unsuitable for political participation.

In a governance system based upon human rights, it is important that the right to information is protected and promoted. The right to information includes citizens' right to access information held by public authorities. It imposes an obligation on the part of the public authorities to publish key categories of information.⁷¹ Promotion of human rights culture includes within its ambit efforts by the government of the HKSAR to promote transparency in administration and accountability in governance. It is notable that the government of the HKSAR, owing to various efforts over several years, has acquired an international reputation for corruption-free governance. This is particularly due to the excellent work of the Independent Commission against Corruption (ICAC). However, it should not be presumed that transparency relating to financial matters and corruption-free governance means concomitantly that transparency and accountability has been achieved on other matters. In Singapore too, affairs of governance were conducted behind closed doors under President Lee Kuan Yew, though the country became a role model in corruption-free governance.⁷²

71. See Toby Mendel, *Freedom of Information Legislation: Progress, Concerns and Standards*, in GLOBAL CORRUPTION REPORT 2003, at 57.

72. See generally Muhammed Ali, *Eradicating Corruption-The Singapore Experience*, Feb. 17, 2000, at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002749.pdf> (last visited Mar. 24, 2004).

The Article 23⁷³ saga in the Legislative Council and the manner in which the government of the HKSAR handled the need for public consultation⁷⁴ before and during the attempts to pass the law, clearly demonstrated that there is a long way to go in promoting transparency, which is vital for creating a human rights culture. Media organizations need to be bold and courageous in bringing the issue to the public domain in an unbiased and objective manner. This role of the media to facilitate the development of human rights culture should not be under-estimated. Governmental accountability is significantly ensured through the independent functioning of media that creates awareness about the impact of government actions and develops public opinion on matters that affect society at large. This is particularly significant in the case of Hong Kong as, at present, the people of Hong Kong do not directly elect the Chief Executive of the HKSAR and the only effective channel through which they can express their dissent is through media and civil society activism.⁷⁵

Human rights culture means a number of things to different people. There is no need for essentializing what constitutes human rights culture. However, it is important that the culture of human rights that the HKSAR intends to protect does not contravene the existing human rights framework as pronounced in the Basic Law (BL), Bill of Rights Ordinance (BORO), ICCPR and ICESCR. The dynamic role that the media has played in other democracies and societies to develop a human rights culture needs to be borne in mind while determining and assessing the potential of the media in Hong Kong.⁷⁶ It is the social responsibility mandate of the media to promote human rights culture. In this regard, it is also useful to refer to the impact of international human rights NGOs⁷⁷ and transnational civil

73. See H. L. Fu, Richard Cullen & Pinky Choi, *Curbing the Enemies of the State in Hong Kong - What Does Article 23 Require?*, 5 J. CHINESE & COMP. L. 45 (2001-2002) (discussing the implications of the proposed Article 23 legislation).

74. See Carole J. Petersen, *National Security Offences and Civil Liberties in Hong Kong: A Critique of the Government's "Consultation" on Article 23 of the Basic Law*, 32 HONG KONG L.J. 457 (2002). See also Albert Chen, *Will Our Civil Liberties Survive the Implementation of Article 23?*, HONG KONG LAW., Nov. 2002, at 80.

75. See Kumar, *supra* note 44.

76. See Foster, *supra* note 70. See also Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U. L.Q. 113 (1998).

77. See generally Peter Van Tuijl, *Entering the Global Dealing Room: Reflections on a Rights-Based Framework for NGOs in International Development*, 21 THIRD WORLD QUARTERLY 617 (2000).

society in ensuring the protection and promotion of human rights in other countries.⁷⁸

While the media is also part of civil society, there is a wider need for developing an independent civil society in Hong Kong,⁷⁹ given the numerous human rights challenges posed by Article 23 legislation⁸⁰ and other contentious issues. Hong Kong does have a vibrant civil society, which has profound social expectations of ensuring transparency and accountability in administration and moving toward democratic governance in the HKSAR. While the move toward democracy in the HKSAR is pronounced in the Basic Law, there have been divergent viewpoints on the timeframe by which democracy ought to be achieved for Hong Kong. From a human rights standpoint, there is no confusion or second opinion. Hong Kong ought to move toward democracy as quickly as possible and definitely not later than the time prescribed by the Basic Law to ensure that government representatives and the Chief Executive are directly accountable to the people. In the present scheme of things, it seems that the government of the HKSAR is overtly concerned about political sensitivities and governance directions from Mainland China, which inevitably affects local interests. If this has to change, there is a need for speeding up the process of achieving democracy within the "one country, two systems"⁸¹ formulation.

It is in the best interests of the HKSAR and Mainland China to develop a transparent and sensible approach for promoting democracy in the HKSAR so that the concerns and frustrations of the people of Hong Kong are channeled and indeed regulated through a democratic framework. This is extremely important in order to protect the rule of law⁸² and social stability in Hong Kong. Promoting a human rights culture is directly related to development of democracy. Human rights and democracy have a profound relationship. They mutually

78. See generally Gordon A. Christenson, *World Civil Society and the International Rule of Law*, 19 HUM. RTS. Q. 724 (1997).

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

80. See generally Albert H. Y. Chen, *How Hong Kong Law will Change when Article 23 of the Basic Law is Implemented*, 33 HONG KONG L.J. 1 (2003).

81. See generally Guiguo Wang & Priscilla MF Leung, *One Country, Two Systems: Theory Into Practice*, 7 PAC. RIM L. & POL'Y J. 279 (1998).

82. See generally Fu Hua Ling, *Judicial Independence and the Rule of Law in Hong Kong*, in JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN HONG KONG 73 (Steve Tsang ed., 2001).

complement each other and support the development of good governance. In the Hong Kong context, it is important to underline that we cannot wait for one to achieve the other. Hence, efforts ought to be taken, in particular by the media and wider civil society to ensure that human rights culture is promoted and sustained. The sustainability of such a human rights culture is possible only in a democratic framework.

VI. SECURING HUMAN RIGHTS ACCOUNTABILITY THROUGH HUMAN RIGHTS COMMISSIONS

Human rights commissions (HRC)⁸³ are new and innovative institutions born out of initiatives by the United Nations⁸⁴ to ensure domestic protection of human rights. The fact that international human rights law has moved toward national constitutionalization of human rights has strongly shaped the development of human rights commissions in numerous jurisdictions. It is also notable that there was much earlier development of human rights in domestic constitutionalism, e.g. the U.S., which was followed by the development of international human rights law after the Second World War. Human rights commissions

perform a variety of functions, including investigating alleged human rights violations, conducting public inquiries, exercising advisory jurisdiction, enforcement of human rights in prisons and other custodial institutions, providing advice and assistance to governments, promoting human rights education and awareness, promoting interaction, exchange, and better coordination among other NHRIs [National Human Rights Institutions]⁸⁵ in the region

83. See Office of the High Commissioner for Human Rights, *Fact Sheet No.19, National Institution for the Protection and Promotion of Human Rights*, available at <http://www.unhchr.ch/html/menu6/2/fs19.htm> (last visited Mar. 24 2004) (indicating the need to create national institutions for promoting human rights to assist the United Nations in effectively implementing its goals in this area).

84. See generally *Report of the Secretary-General on National Institutions for the Promotion and Protection of Human Rights*, U.N. Commission on H.R., 53d Sess., Agenda Item 9, at 2, U.N. Doc. E/CN.4/1197/41 (noting the importance of national institutions in the promotion and protection of human rights).

85. See Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 2 (2000).

and worldwide, promoting interaction and exchange with NGOs, and publication of annual reports.⁸⁶

While there is a high degree of consensus on what ought to be the functions of HRCs, the actual performance of the commissions and indeed their institutional effectiveness significantly vary from country to country.⁸⁷

Some HRCs have acquired national legitimacy and international reputation for having worked towards protection and promotion of human rights in an impartial and independent manner, while some others, in the method of their creation and the exercise of regular functions, demonstrate the state apparatus' arm to legitimize numerous actions that are not in harmony with human rights.⁸⁸ In this regard, the subject of human rights commissions has also invited much academic attention⁸⁹ in recent years, besides assessment by UN

86. See C. Raj Kumar, *National Human Rights Institutions – Good Governance Perspectives on Institutionalization of Human Rights*, 19 AM. U. INT'L L. REV. 259, 283-84 (2004) (for a critical perspective on human rights commissions); see also C. Raj Kumar, *Role and Contribution of National Human Rights Commissions in Protecting National and International Human Rights Norms in the National Context*, 47 INDIAN J. PUB. ADMIN. 222, 225 (2001) (outlining the functions and role of NHRIs).

87. See generally Brian Burdekin, *Human Rights Commissions*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD 801, 807-08 (Kamal Hossain et al. eds., 2000) (mentioning the advantages of developing national institutions based on human rights instruments).

88. See HUMAN RIGHTS WATCH, *GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA: PROTECTORS OR PRETENDERS?* (2001).

89. See generally Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission*, 39 STAN. J. INT'L L. 59, 72-74 (2003) (examining the U.N. initiatives and Paris Principles as a basis for discussing human rights in Malaysia); see also Sonia Cardenas, *National Human Rights Commissions in Asia*, 4 HUM. RTS. REV. 30, 31-32 (2002) (evaluating international human rights against state sovereignty); see also Mario Gomez, *Sri Lanka's New Human Rights Commission*, 20 HUM. RTS. Q. 281, 282-83 (1998) (assessing the value of the U.N. proposals and the Paris Principles); see also Sidney Jones, *Regional Institutions for Protecting Human Rights in Asia*, 50 AUSTL. J. INT'L AFF. 269, 269-70 (1996) (examining the effectiveness of international commissions on the regional level); see also Stephen Livingstone, *The Northern Ireland Human Rights Commission*, 22 FORDHAM INT'L L.J. 1465, 1468-69 (1999) (discussing the Paris Principles and the U.N. guidelines as the basis for creating NHRIs in Northern Ireland); see also Vijayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?*, 18 B.U. INT'L L.J. 1, 4-6 (2000) (assessing the success of the U.N. ideals and Paris Principles in India); see also JAPANESE CIVIL LIBERTIES UNION, NATIONAL HUMAN RIGHTS COMMISSION FOR JAPAN, UNIVERSAL PRINCIPLE: HUM. RTS. NEWSL. FROM JAPANESE CIV. LIBERTIES UNION 3-10 (2002), available at http://www.jclu.org/katsudou/universal_principle/up10.pdf (last visited Mar. 24,

bodies,⁹⁰ and civil society scrutiny by virtue of numerous international NGOs⁹¹ conducting independent assessments of the work of the HRCs.

A few important aspects to be noted in connection with HRCs and their attempts to secure human rights accountability is that they are not the panacea for all human rights problems that affect a society. HRCs tend to be effective only under a given set of circumstances, but most importantly, much will depend upon the level of funding, functional independence and institutional autonomy that is guaranteed to the HRC. Also, the composition of the HRC will matter to a large extent in determining the kind of focus and human rights activism that it will promote. However, human rights commissions are important institutional approaches that can ensure the protection and promotion of human rights. The effectiveness or otherwise of a HRC does not directly depend upon the preexisting human rights structure in any society. What is important is how the particular HRC situates itself in a society and is able to confront the human rights issues that come before it.

There are various ways by which states ensure human rights accountability. Traditional approaches to human rights protection and promotion have tended to focus on constitutional judicial review, human rights provisions in the constitution or other legislation in a society, and the interpretation of these laws by the courts of the particular jurisdiction. Such mechanisms directly ensure the enforceability of human rights⁹² through the directions of courts. However, this method of ensuring human rights accountability is not without weaknesses. Since the courts in most jurisdictions are inundated with civil, criminal, constitutional, commercial, corporate and other types of cases that come before them, direct focus on human rights issues and cases tends to be weak. This creates a situation wherein human rights cases have to be themselves couched under administrative law or some other public law issue for them to receive

2004) (proposing the creation of a National Human Rights Commission for Japan and evaluating its role and purpose in the country).

90. See generally Sonia Cardenas, *Emerging Global Actors: The United Nations and National Human Rights Institutions*, 9 GLOBAL GOVERNANCE 23, 28 (2003) (arguing that NHRIs serve as local counterparts to international human rights commissions).

91. See generally Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 320 (1997).

92. See Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1408-16 (1999) (discussing how states, non-governmental organizations, and individuals all play a role in enforcing international human rights).

the right kind of attention from the courts. Moreover, the elaborate legal processes and the procedures involved in court cases tend to complicate human rights issues in a court environment. Human rights issues need to be directly and seriously confronted by a body that is exclusively mandated to perform such a task. It was this realization that resulted in international opinion moving towards the formation of HRCs. It must however be clarified that human rights commissions are most effective when their tasks are adequately supported and supplemented by other legal, judicial and institutional mechanisms that ensure the accountability of the government. They cannot work in isolation from courts due to their quasi-judicial nature and soft power.

VII. CREATING AN INDEPENDENT HUMAN RIGHTS COMMISSION (IHRC) IN HONG KONG

The earlier part of this article focused on the human rights framework prevailing in Hong Kong and the need for developing a sustainable human rights culture through human rights education. The institutional approach to handling human rights issues has proven to be one of most commonly developed strategies to facilitate domestic protection and promotion of human rights. Hong Kong needs an independent human rights commission (IHRC) that should specifically be mandated to investigate allegations of human rights violations that come before it or those cases in which it decides to take *suo motu* jurisdiction. The need for creating an IHRC is demonstrated by the fact that human rights issues have once again come to the forefront of political discourse in Hong Kong in view of controversies surrounding the Article 23 legislation.⁹³ Various interest groups had to engage with the government of the HKSAR for several months in vain to convince it of the need for examining the Article 23 legislation due to its negative impact on human rights and civil liberties.

Moreover, Hong Kong courts, by their nature, cannot pass any opinion on the legality or otherwise of a future legislation. Hence, the

93. See Hong Kong Bar Association, *Hong Kong Bar Association's View on Legislation under Article 23 of the Basic Law*, at <http://www.hkba.org/whatsnew/press-release/20020722.doc> (last visited Mar. 24, 2004) (the Hong Kong Human Rights Monitor has a similar view). See Hong Kong Human Rights Monitor, *Ticking Time Bomb? Article 23, Security Law, and Human Rights in Hong Kong*, at <http://www.hkhrm.org.hk/english/reports/docs/art23.rtf> (last visited Mar. 3, 2004).

much needed human rights scrutiny of the Article 23 legislation was not available. However, the human rights consequences of this legislation were publicized through academic writings, independent opinions, consultations, media opinions, NGOs and professional organizations like bar associations.⁹⁴ But these opinions would tend to fundamentally differ from the kind of opinion that would typically come from an IHRC, if there were such an institution in Hong Kong. Commenting on the need for establishing an independent human rights commission in Hong Kong, Anna Wu has observed that,

[g]iven the track record of the Hong Kong Government in the area of human rights development, it should not be at all difficult to conclude that what Hong Kong needs is an authoritative and independent human rights commission that will develop human rights awareness and protection in an objective fashion.⁹⁵

Even though these comments were made before the establishment of the present Equal Opportunities Commission (EOC), Anna Wu's arguments about the need for this commission to be independent are true even now. She further observed that the IHRC be granted authority to do the following:⁹⁶

- monitor government policies and programmes,
- provide advice on legislation and other human rights matters,
- promote awareness of human rights and educate the public,
- provide reports on human rights development in Hong Kong to international supervisory bodies,
- investigate complaints,
- provide dispute settlement on matters relating to human rights,

94. In an interview with the author, the noted Barrister, Mr. Philip Dykes, who is also the Chairman of the Human Rights Committee of the Hong Kong Bar Association, opined that many of the tasks which the Bar Association is presently engaged with in the form of providing legislative comment consultations to the government from human rights standpoint can be suitably and much more effectively performed by an independent human rights commission. Moreover, he was of the opinion that this would ensure that the Bar does not get entangled in issues that are better suited for a human rights commission.

95. Wu, *supra* note 12, at 199.

96. See Anna Wu, *supra* note 12 (discussing a comprehensive understanding of the past efforts in developing a human rights commission in Hong Kong).

- provide legal expertise and financial assistance to complainants initiating proceedings relating to human rights violations,
- help develop jurisprudence and standards of interpretation relating to human rights in Hong Kong in a manner consistent with international norms, and
- initiate proceedings to clarify the status of laws which may be inconsistent with Hong Kong's international obligations and domestic laws relating to human rights such as the Hong Kong Bill of Rights.⁹⁷

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

In this regard, the IHRC can usefully refer to the work of the Independent Commission against Corruption (ICAC) in Hong Kong and how it was successful in developing a culture of integrity and corruption-free governance in Hong Kong. Hong Kong has successfully developed a system of corruption-free governance and a governmental administrative system that is largely based upon integrity and efficiency. Hong Kong's ICAC is known to be one of the most successful institutional approaches to tackle corruption. The Global Corruption Report of 2003, prepared by Transparency International, ranks Hong Kong to be one of the least corrupt cities in the world.⁹⁸ However, efforts to tackle corruption through the ICAC and endeavors to protect and promote human rights through the proposed IHRC are quite different processes. Much will depend on political consensus and the commitment of the government of the HKSAR to provide the institutional autonomy and functional independence for an IHRC. Undoubtedly, it would also involve

97. *Id.* at 199.

98. GLOBAL CORRUPTION REPORT 2003 (Transparency International 2003), at 135.

political bargaining with the Mainland that brings into question the autonomy that HKSAR is supposed to enjoy while being a part of the PRC. The autonomy of an IHRC will in a way mirror the larger question of how politically autonomous Hong Kong itself can be.

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

While drafting a suitable legislation for establishing the IHRC in Hong Kong, it is possible to borrow the practice of the Court of Final Appeal (CFA) in Hong Kong, to have some members of the IHRC come from outside Hong Kong and in particular, from other common law jurisdictions and other HRCs to sit on the IHRC in Hong Kong and thus contribute to the development of best practices for the protection and promotion of human rights. There are other countries in which HRCs are functioning effectively and they have started to take capacity-building initiative and training programs to promote the establishment of HRCs worldwide. The proposed IHRC of Hong Kong could very well use these experiences and indeed engage and interact with other countries where HRCs have been successfully protecting and promoting human rights.⁹⁹

99. See Sonia Cardenas, *Transgovernmental Activism: Canada's Role in Promoting National Human Rights Commissions*, 25 HUM. RTS. Q. 775 (2003) (discussing the role played by the Canada in promoting human rights commissions in other parts of the world, including Asia).

The proposed IHRC should also be empowered to handle violations of economic, social and cultural rights,¹⁰⁰ besides civil and political rights. The experience of HRCs that have been established in other parts of the world also demonstrate that even the successful HRCs have not been effective in the area of economic and social rights and have been subject to criticism on this account. In this context, it is important to recognize that the mandate of the IHRC in Hong Kong should specifically include powers to investigate allegations of violations of ESC rights and provide remedies for the victims.¹⁰¹ Since the ICCPR and ICESCR are both entrenched in the HKSAR, the proposed IHRC will have a legal and constitutional framework to ensure the proper protection and promotion of all human rights.

VIII. MANDATE OF THE PROPOSED IHRC – ROLE DIFFERENTIATION AND FUNCTIONAL DISTINCTION WITH EOC & ICAC

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

100. See generally Cecile Fabre, *Constitutionalising Social Rights*, 6 J. POL. PHIL. 263 (1998).

101. See UNIVERSITY OF MINNESOTA HUMAN RIGHTS RESOURCE CENTRE, MODULE 23: NATIONAL HUMAN RIGHTS COMMISSIONS AND ESC RIGHTS, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module23.htm> (last visited Mar. 24, 2004) (explaining the characteristics of human rights commissions and the activities they could perform that would further ESC rights).

also translates into demands that the government allow genuine public consultation and receive feedback, in addition to being ready and willing to listen to the views of the people of Hong Kong and if necessary, make amendments to the legislation. The government of the HKSAR has demonstrated little sincerity in its handling of the Article 23 episode and if at all, it has only widened the distance between the government and the people of Hong Kong.

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

It is important to note that that the formation of EOC in Hong Kong was preceded by initial efforts to create a human rights commission.¹⁰² These efforts did not come to fruition and what ultimately came about was not an IHRC but an EOC. Equality and non-discrimination, albeit a very important human rights issue, is only one of the various human rights issues that need an institutional response. EOC has jurisdictional limitations to pursue matters that are violations of the anti-discrimination law. This means that many of the other human rights violations that take place in Hong Kong will have to be dealt with by the courts of the HKSAR or some other administrative tribunal with little relief to the survivors. A recent controversy over the appointment of a new Director of the EOC and his comments on his predecessor, Anna Wu, has damaged the reputation of the institution, and there is now an investigation in this respect in the Legislative Council. There was some public speculation that the earlier Director was let go because she was fiercely independent and forceful in her mandate. This only underscores the

102. See Wu, *supra* note 12.

argument that was earlier made about the need for the proposed IHRC to have its autonomy and independence and should not have any governmental interference in its functioning.

The proposed IHRC will not supplant the EOC. The EOC will function on the same lines in which it is presently functioning. However, there are arguments for its reform, and the need for guarantees of its greater transparency and independence is significant. The IHRC will be an independent stand-alone institution that will be broadly mandated and will have jurisdiction to investigate allegations of human rights violations. The functions of the IHRC will be determined based upon numerous factors, including the needs and human rights aspirations of the people of Hong Kong, the structure of human rights law in the BL and the BORO, the Paris Principles and other international human rights principles that are relevant for the establishment of human rights commissions. The IHRC will also draw upon comparative experiences in terms of the functions of the HRCs that have been established and functioning in other countries in the South East Asian¹⁰³ region and other parts of the world.

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

The role of the ICAC in Hong Kong is also very important to understand institutionalization of transparency in governance. Corruption is a violation of human rights.¹⁰⁴ While in the case of

103. See Philip Eldridge, *Emerging Roles of National Human Rights Institutions in Southeast Asia*, 14 PACIFICA REV. 209, 215-21 (2002) (analyzing the workings of NHRIs in the Philippines, Indonesia, Thailand, and Malaysia); see also ASIA PACIFIC HUMAN RIGHTS NETWORK, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA PACIFIC REGION, REPORT OF THE ALTERNATE NGO CONSULTATION ON THE SEVENTH ASIA PACIFIC REGIONAL WORKSHOP ON NATIONAL HUMAN RIGHTS INSTITUTIONS (2002) (examining critically the status of institutionalization of human rights in Bangladesh, India, Indonesia, Korea, Malaysia, Nepal, New Zealand, Philippines, and Sri Lanka).

104. For the relationship of corruption and human rights at the international level, see Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Rights: Elevating Official Corruption to a Crime under International Law*, 34 INT'L LAW. 19 (2000).

developing countries, there is a stronger case of corruption to be a violation of human rights,¹⁰⁵ in developed countries¹⁰⁶ and advanced economies¹⁰⁷ also there are enough instances to demonstrate that corruption violates human rights and rights-based approaches to corruption can more effectively handle the problem.¹⁰⁸ In this regard, the IHRC will benefit significantly from the work of the ICAC as corruption in administration clearly leads to abuse of power and potential human rights violations. The IHRC can be the sheet anchor institution on the basis of which other human rights work can be conducted.

The governance discourse¹⁰⁹ in Hong Kong can be significantly transformed if the IHRC remains the focal point for good governance. Close interaction and engagement of the IHRC with the EOC and the ICAC would benefit these institutions in evolving suitable policies and practices that, in totality, ensure good governance. Human rights support good governance, and any system of administration that does not respect human rights cannot promote good governance.¹¹⁰ Hong Kong has the potential to take the lead in this area, as there are numerous possible linkages between the human rights discourse of the IHRC, which could be supported by the good governance discourse

105. See C. Raj Kumar, *Corruption and Human Rights – Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31 (2003) (discussing the relationship between corruption and human rights in the context of India).

106. See C. Raj Kumar, *Corruption in Japan – Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance*, 10 NEW ENG. J. INT'L & COMP. L. (forthcoming June 2004) (discussing the importance of the right to information in anti-corruption efforts in Japan).

107. See C. Raj Kumar, *Human Rights Approaches of Corruption Control Mechanisms – Enhancing the Hong Kong Experience of Corruption Prevention Strategies*, 5 SAN DIEGO INT'L L.J. 323 (April 2004) (discussing a perspective on human rights approaches to develop corruption prevention strategies in Hong Kong).

108. See generally, Balakrishnan Rajagopal, *Corruption Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495 (1999).

109. See Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21 THIRD WORLD Q. 795 (2000) (discussing useful insights on the development of governance discourse). See generally Philip Alston, *Governance, Human Rights, and the Normative Areas*, in HUMAN DEVELOPMENT REPORT 1999, at <http://unescap.org/huset/gg/governance.htm> (last visited Feb. 15, 2004).

110. See generally Saladin Al-Jurf, *Good Governance and Transparency: Their Impact on Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 193 (1999).

of the ICAC¹¹¹ and the anti-discrimination discourse of the EOC. All these aspects are indeed human rights issues and it is in the best interests of the HKSAR's growth and development that the IHRC is established so that rule of law,¹¹² protection of rights and freedoms, and promotion of good governance and achievement of sustainable social and economic development becomes a true reality.

IX. CONCLUSION

A survey of Hong Kong's legal institutions and laws has revealed the presence of a theoretical foundation upon which a culture of human rights can be nurtured. We have seen how the conceptual basis for deepening rule of law, good governance and tolerant society already exists in Hong Kong. Nevertheless, the latent potential for a comprehensive human rights culture can only be realized through human rights education that galvanizes and enters the political and social psyche of Hong Kong residents. The incapacity of the Hong Kong courts to deal with all human rights problems and the unwillingness of the HKSAR government to allow participatory democracy means that the community's demand for preservation of liberties has no proper recourse at the moment. This was demonstrated in the weak and non-transparent response of HKSAR administration to the Article 23 agitation.

For meeting the gap in human rights protection that Hong Kong is facing, establishment of an Independent Human Rights Commission (IHRC) is essential. The word "independent" is so important in the political context of Hong Kong that it was considered appropriate to add it to the acronym "IHRC." An autonomous human rights institution in the form of an IHRC will be capable of meeting the expectations of Hong Kong society and promoting a culture of human rights. We have established in the course of this article that there will be no duplication or clash of jurisdiction of the IHRC with other entities that deal with particular human rights issues, which are covered by the EOC and the ICAC. The arguments for an IHRC outweigh those against it. However, the current political climate in

111. See Daniel R. Fung, *Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience*, 8th International Anti-Corruption Conference (IACC), at http://www.transparency.org/iacc/8th_iacc/papers/fung.html (last visited Mar. 24, 2004) (discussing an interesting perspective on the human rights implication of anti-corruption initiative).

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

Hong Kong after the impasse over passing of the Article 23 legislation will make the establishment of an IHRC more difficult. But such a move could also repair some of the damage to the government's credibility spawned by this debate. An elaborate process of internal political bargaining between the Hong Kong government and its own residents and external bargaining between the Hong Kong and Mainland China's government will decide the fate and contours of the IHRC. A model IHRC that can accommodate various concerns and still be effective has been proposed for consideration of the legal community and political authorities. This framework can go a long way in bringing Hong Kong closer to the liberal rights-respecting paradise that it has always aspired to be.