

*Recommendations by the Chairman of the Executive Committee of the
International Commission of Jurists.*

Hong Kong,

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HONG KONG

RECOMMENDATIONS BY THE CHAIRMAN OF THE EXECUTIVE COMMITTEE OF THE INTERNATIONAL COMMISSION OF JURISTS

The Hon Justice M D Kirby AC CMG
Australia

Sedition and international NGOs

1. Article 23 of the *Basic Law* contains a troubling provision committing the Hong Kong SAR to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central Peoples' Government ... to prohibit foreign political organisations or bodies from conducting political activities in the Region and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies". Serious concern has been expressed in Hong Kong that this provision will, after 1997, lead to:

- (a) the enactment of a law of treason and sedition which is much broader than that presently operating and much more likely to be enforced; and
- (b) the prohibition of the operations of non-governmental organisations (NGOs), having links with international human rights and other like organisations. Examples of these bodies presently in existence are the Hong Kong branch of Amnesty International and the Hong Kong Branch of the International Commission of Jurists itself (Justice, Hong Kong). Ms Gladys Li QC, a distinguished member of the Bar of Hong Kong, is the Hong Kong Commissioner of the International Commission of Jurists.

2. An important monitor of human rights in Hong Kong after 1997 will be provided by bodies operating in Hong Kong which have links with international human rights agencies that will not hesitate to expose abuses of human rights. See ICJ *Report*, 105. It is therefore essential that laws should be put in place before 1997 which protect the existence and legitimate operations of local NGOs. Although these will not hold against the determined application of Article 23 of the *Basic Law*, such provisions might cause the Government of China to hesitate before interfering in the existence and reasonable operations of those NGOs which currently pursue lawful activities in Hong Kong.

3. It is recommended that:

- (i) The Government of Hong Kong initiate a revision of the current law of treason and subversion so that, before transition, a reformed law accords with the most liberal and rights-respecting provisions now operating in the democratic countries. Often in former British colonies, it has been thought sufficient to leave the law unreformed, in the expectation that it will wither on the vine. But when examined, the common law of sedition is itself quite oppressive; reliance being had upon its normal non-enforcement. That reliance may be misplaced as contemporary events in Nigeria show. The passage of an updated law with procedural safeguards and substantive checks could provide some protection against the excessive application of Article 23; and
- (ii) The Government should propose laws on NGOs to protect them in carrying out their reasonable human rights activities, particularly in promoting the objects of the *International Covenant on Civil and Political Rights*. Specifically, it should be rendered lawful for such bodies to have links with other recognised international human rights NGOs, so long as the ultimate decisions upon local action are taken democratically by the members of the local branch or section.

4. Initiatives by the Government of Hong Kong upon these matters would allay some of the concerns which exist about the possible implications of Article 23 for the future watchdogs for human rights in Hong Kong.

Human Rights Commission

5. I understand that the Government of Hong Kong has reservations about the establishment of a Human Rights Commission. However, such bodies (together with Ombudsmen and specialised Commissioners) have an established track record in many Commonwealth countries. Their great advantage over the more formal procedures of the courts is that they are more accessible, less expensive, involve less unwanted publicity and often have an educative impact within the bureaucracy. I have no doubt that, after 1997, there will be many Hong Kong residents who would not be willing to pursue remedies in the courts - with the public confrontation that this involves with the government. However, they might, in a case of perceived injustice, be prepared to take complaints to a Human Rights Commission comprising distinguished and trusted citizens. See *ICJ Report* p 108.

6. In Australia there are both Federal and State Human Rights Commissions or equivalent bodies. The Federal body is the Human Rights and Equal Opportunity Commission. This comprises a number of Commissioners. It is headed by Sir Ronald Wilson, a past Justice of the High Court of Australia. Specialised Commissioners (such as the Race Discrimination Commissioner and the Privacy Commissioner) are *ex officio* members of the Commission. The Commission has lately, by contract, given advice to the Russian Republic and other countries on the establishment of its Human Rights Commission. I would urge consideration of inviting the Australian Commission to provide information on the establishment of a like body in Hong Kong. In the longer term it might have a greater impact for the practical protection of human rights than court cases. The confrontational court challenge to government in public law matters, although a feature of English culture and history over the past three centuries at least, may not always be a feature of a Confucian society.

Legal Aid Commission

7. Some concern has been expressed about the need for strong independence of the Legal Aid Commission. Self-evidently, it is vital that the Commission should be willing and able to support proceedings against the Government even in sensitive matters of public law where this is justified. The removal of the Vietnamese refugees from Hong Kong was such a case. In that instance, the courts were tested and their independence was widely appreciated. I would recommend that the Government of Hong Kong give thought to the ways in which, by appropriate appointments and by the provision of adequate statutory powers, the Legal Aid Commission can be assured of full independence from government in the provision of funds, particularly for public interest litigation. See *ICJ Report*, p 105.

Court of Final Appeal

8. By Article 82 of the *Basic Law*, the power of final adjudication of the Hong Kong SAR is to be vested in a Court of Final Appeal "which may, as required, invite judges from other common law jurisdictions to sit in the Court of Final Appeal".

9. Concern has been expressed about the serious delay in the establishment of the Final Court and in the reduction of the number of proposed judges from other common law countries who will participate. This concern has been expressed to me by many Hong Kong citizens.

10. The concern will not have been alleviated by the report in the *South China Morning Post* that Duanmu Zeng, Vice-President of the Supreme Peoples' Court of China, has declared that the existing legal system in Hong Kong "would gradually be absorbed by the mainland continental system, following the return of the Territory to Chinese rule". According to the report, Mr Duanmu described the common law system as a relic of "the shadows of colonial rule". He described the "continental system" as "a simpler approach" which did not rely too much on the "British legal system" or on "precedents".

11. Whilst coalescence of the Hong Kong and Chinese legal systems is inevitable over time, the fundamental premise of the arrangement between the United Kingdom and China is the preservation of, amongst other things, the Hong Kong legal system, which has made such a notable contribution both to the business success of the colony and a high level of individual freedom and respect for fundamental human rights.

12. The greatest priority should be placed upon the establishment of the machinery for the final Court of Appeal and the recruitment of judges of the highest calibre from common law countries whose presence will be an assurance of the integrity of the system and a guarantee of human rights. Attention is drawn to the *ICJ Report* p 91.

13. One source of special concern, in the wording of Article 82, is the phrase "as required". It would be imperative that the statute establishing the Hong Kong Court of Final Appeal should assure against the prospect that foreign judges are assigned to purely commercial cases whilst public law matters are reserved to local judges, possibly more vulnerable or amenable to pressure from government. Whilst the assignment of cases should, in accordance with international principle, be a matter for the judicial branch of government, and whilst much will depend upon the Chief Justice of the Court of Final Appeal and his/her integrity, it should not be difficult to establish panels - comprising local and overseas judges - who would be available for all cases in the Court. It is recommended that the Government of Hong Kong give priority of attention to the constitution and statute of the Court of Final Appeal. Whilst it will most likely deal with only a tiny fraction of cases, the standard which it sets will influence the judiciary at every level below it.

Discrimination laws

14. It is understood that the Government of Hong Kong is not sympathetic to the enactment of substantive laws for the redress of discrimination on the grounds of race, religion, political opinion, sex, sexual orientation, age, handicap, etc. I would respectfully urge that the Government reconsider this matter. Experience in Australia and other common law countries has taught the highly valuable, educative role which

anti-discrimination and equal opportunity law can play. In Australia, such laws are now reinforced with criminal sanctions in the case of vilification on the grounds of race (Federal) and sexual orientation (NSW). Whilst it is impossible to change people's established private opinions by the mere enactment of law, experience in the United Kingdom, Australia and elsewhere has taught that such legislation can, over time, influence community and individual opinions and break down stereotypes and irrational prejudice.

15. As in the case of the Human Rights Commission (which is usually involved in the enforcement of such laws) the provision of equal opportunity rights facilitates their enforcement. Ordinary people will not pursue common law remedies in the courts because these are problematical. On the other hand, they will invoke a procedure involving informal complaint and investigation, conciliation and tribunal arbitration within limited powers. Unless substantive anti-discrimination and equal opportunity laws are put in place before the transition in 1997, it is unlikely that they will be enacted in Hong Kong in the foreseeable future thereafter. I would commend the experience in Australia and New Zealand for study by the officers of the Hong Kong Government if it is decided to proceed along this course, as I would urge.

Freedom of information

16. It is absolutely certain that no FOI law would be enacted by China after 1997; so that it must come now or be delayed indefinitely.

17. In the Asia Lecture of the Governor of Hong Kong, he rightly drew a parallel between the advance of the successful economies of Asia with the need for more open, democratic societies. In his address at the opening of the Vienna Conference on Human Rights in June 1993, the Secretary-General of the United Nations likewise emphasised the inter-relationship of human rights, democracy and development.

18. It is true that FOI legislation has not been enacted at a national level in the United Kingdom and is still apparently opposed by the British government in the United Kingdom. In a similar way the *International Covenant on Civil and Political*

Rights is not enacted as part of United Kingdom domestic law (as it is, substantiantially in Hong Kong). It is often said, not entirely in jest, that FOI is promised by Oppositions and enacted by them before they have too many skeletons in the cupboard. That was certainly the history of the enactment of much FOI legislation at the Federal and State level in Australia.

19 But whereas in the United Kingdom there are other avenues for redress (in Parliament, in the independent courts, through the free media, etc) in China such avenues will be extremely limited. In this sense, there is urgency in the passage of Christine Loh's legislation. It follows wholly orthodox lines. Its substantive and procedural provisions run parallel to those enacted in Canada, Australia, New Zealand and elsewhere. I recommend that the Government of Hong Kong gives support to this legislation. It would reinforce the activities of a courageous legislature and the free elements in the media, as well as private citizens defending human rights of their own and of others.

Imperial Acts application

20 It will be important that the laws and treaties applicable to Hong Kong should be continued, where appropriate, and not be subject to any wholesale repeal. In all jurisdictions of Australia *Imperial Acts Application Acts* have been enacted. These select *Imperial Acts* for preservation (such as *Magna Carta*, *Bill of Rights* 1688) and make express provision for other statutes of the Imperial Parliament. If not already done, it will be important that this be pursued in Hong Kong and doubts removed.

Democracy

21 Reinforcing all the above legal developments are the initiatives which the Government of Hong Kong pursued to enhance the democratic elements in Hong Kong. Those moves are entirely in accord with the provisions of the *Joint Declaration*. Moreover, the Government of Hong Kong is, for the time being, an undoubted British responsibility, both in law and in fact. Just as China has its

traditions, so the United Kingdom has its own. It also has responsibilities in international law which cannot be bargained away or forfeited. The moves of the Government of Hong Kong must be seen as part of the fulfilment of those responsibilities. Hong Kong is the last major colony of the United Kingdom. It would be shameful if there were any retreat from the rather modest steps which have been initiated and already taken. The emphasis placed at the Vienna World Conference on Human Rights upon the essential pre-condition of democracy for the long-term assurance of human rights should not be overlooked. The Government of Hong Kong can be sure that, in the steps that have been taken to enhance the democratic elements in the Government of Hong Kong, it has the wholehearted support of the international human rights community, including the International Commission of Jurists. That community will be watching vigilantly any retreat from the steps which have been taken. See *ICJ Report* pp 68ff.

References

See generally:

- International Commission of Jurists *Countdown to 1997 - Report of a Mission to Hong Kong*, 1992, Geneva.
- United Nations, World Conference on Human Rights. *The Vienna Declaration and Programme of Action*, June 1993, New York.