

Civil Liberties in Hong Kong: Recent Controversies, Evolving Consciousness and Future Legal Protection

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Within the last few years, Hong Kong society has reacted with increasing sensitivity to issues of civil liberties. This heightened awareness contrasts sharply with the previous atmosphere in Hong Kong, which appeared to be relatively content with a "benign" colonial rule under the British and in which no significant movement for civil or political rights existed.¹ This rising new consciousness of civil liberties may be largely attributed to the "spectre" of 1997.² The people of Hong Kong believe that the rights and freedoms which they currently enjoy are more extensive than those of their compatriots in the People's Republic of China (PRC), and they fear that after Hong Kong's incorporation into the PRC in 1997, civil liberties will be curtailed. Thus, in the closing years of British rule, the people of Hong Kong, or at least the more vocal and politically conscious among them, have become more vigilant on matters of civil liberties.³ Perhaps it is common psychology suddenly to treasure and jealously defend that which one has possessed, when the prospect of losing it suddenly becomes very real.

This article will elaborate on the above observations by examin-

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1. For the political culture of Hong Kong, see generally LAU SIU-KAI, *SOCIETY AND POLITICS IN HONG KONG* (1982); Lau & Kuan, *The Changing Political Culture of the Hong Kong Chinese*, in *HONG KONG IN TRANSITION* 26 (J. Cheng ed. 1986). For recent developments, see Kuan & Lau, *Hong Kong's Search for a Consensus: Barriers and Prospects*, in *THE FUTURE OF HONG KONG: TOWARD 1997 AND BEYOND* 95 (Chiu, Jao & Wu eds. 1987) [hereinafter *THE FUTURE OF HONG KONG*]. For a discussion of the system of government in Hong Kong, see MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* (4th ed. 1986); Davies, *One Brand of Politics Rekindled*, 7 *HONG KONG L.J.* 44; Hook, *The Government of Hong Kong: Change Within Tradition*, 95 *CHINA Q.* 491 (1983).

2. See generally A Draft Agreement between the Government of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Sept. 26, 1984, Gr. Brit.-PRC, 23 *I.L.M.* 1366 [hereinafter *Joint Declaration*]. See also *THE FUTURE OF HONG KONG*, *supra* note 1, at 181.

3. The Joint Declaration contains specific provisions on the continued protection of rights and freedoms in Hong Kong after 1997. See *Joint Declaration*, *supra* note 2, Annex I, sec. XIII, para. 3(5).

ing several civil liberties issues which have become headline news since the September 1984 initialing of the Sino-British Joint Declaration on the Question of Hong Kong (Joint Declaration). Following this survey of recent civil liberties controversies under current British rule, the article will comment on the August 1987 working draft chapter on civil rights and obligations of the Basic Law for the Special Administrative Region of Hong Kong (Basic Law).⁴ A preliminary assessment will be made of the extent to which this draft appears to satisfy the needs and aspirations of the people of Hong Kong in the field of civil liberties.

I. RECENT CIVIL LIBERTIES CONTROVERSIES UNDER BRITISH RULE

A. *Trial of Commercial Crimes Bill*

The controversy over the Trial of Commercial Crimes Bill heralded a new era in Hong Kong's legislative history; it was the first of a series of heated debates over issues of civil liberties following the initialing of the Joint Declaration. Ironically, when proposals for this bill were published in the form of a discussion paper⁵ in July 1984, coinciding with the final stages of Sino-British negotiations on the future of Hong Kong, they did not attract much public attention. The government, therefore, was taken by surprise when fierce opposition to the bill, from the legal profession as well as from many other sectors of public opinion, developed in the weeks following the bill's March 1987 formal introduction⁶ into the Legislative Council.

The bill was designed to replace the existing system of trial by judge and jury in criminal cases involving complex commercial crimes with trial before a composite court consisting of a judge and three "commercial adjudicators." Unlike ordinary jurors, who are lay persons selected at random, the commercial adjudicators were to be drawn from a panel of businesspeople, accountants and others who

4. The draft commented on in this article is that published in *Ta Kung Pao* on August 23, 1987. This draft was presented at the Fifth Plenary session of the Basic Law Drafting Committee held in Beijing from August 22 to August 26, 1987. An English translation of the draft was subsequently prepared by the Secretariat of the Basic Law Consultative Committee in Hong Kong and circulated among members of the Consultative Committee. See generally *Zhongyang yu Xianggang Tebiexingzhengqu de Guanxi Zhuanti Xiaozu Gongzuo Baogao*, *Ta Kung Pao*, Aug. 23, 1987 [hereinafter *Gongzuo Baogao*]; Secretariat of the Drafting Committee for the Basic Law, Collection of Draft Provisions of the Various Chapters Prepared by the Subgroups of the Drafting Committee (Dec. 1987).

5. HONG KONG ATTORNEY GENERAL'S CHAMBERS, THE PROBLEM OF THE TRIAL OF COMPLEX COMMERCIAL CRIMES: A PROPOSAL FOR REFORM (1984).

6. Trial of Commercial Crimes Bill, HONG KONG GOV'T GAZETTE, LEGAL SUPP. NO. 3, at C19 (1985).

were considered to possess sufficient expertise in commercial matters such as securities, banking and insurance. The rationale behind the proposed new mode of trial was the assumption that the nature and quantity of evidence required for the prosecution of complex commercial crimes are such that it is often difficult, if not almost impossible, for ordinary jurors to comprehend them. Proponents, therefore, believed that the proposed mode of trial would reduce the time and expense involved in such trials, while achieving a higher degree of efficiency and justice.⁷

The bill was criticized on both technical and ideological grounds. One of the strongest pragmatic arguments against the bill was that the business circle in Hong Kong is small, thus making it difficult to find fair and impartial commercial adjudicators who would not have had past dealings or future business relationships, direct or indirect, with the accused. The most powerful weapon used by the bill's critics, however, was, in the words of Lord Devlin, the banner of the jury as "the lamp which shows that freedom lives."⁸ The right to trial by jury⁹ is a fundamental and sacred element of the common law system, and any tempering of it, even if limited initially to "complex commercial crimes," was perceived to be as dangerous as "the thin end of the wedge."

In his speech at the Legislative Council meeting at which the government agreed to yield to public opposition and to shelve the bill,¹⁰ Mr. Michael Thomas, Attorney General of Hong Kong, captured Hong Kong's changing mood in the aftermath of the Joint Declaration.

[W]hat will the historian make of this episode? A proposal to alter the mode of trial in a handful of cases appeared to be

7. For a discussion of the merits and demerits of the bill, see A. CHEN, XIANGGANG FAZHI YU JIBENFA (Hong Kong's Legal System and the Basic Law) 52 (1986). See also Editorial, *Trial of Commercial Crimes Bill*, 16 HONG KONG L.J. 189 (1986).

8. In addition, Lord Denning described the jury as "the bulwark of our liberties." See K. EDDEY, *THE ENGLISH LEGAL SYSTEM* 33 (4th ed. 1987).

9. It has been pointed out, however, that it is doubtful whether there is a general "right to trial by jury" in Hong Kong, because the prosecution is entitled to bring a case involving a commercial fraud in the District Court (whose sentencing powers are more limited than those of the High Court), where, unlike the High Court, criminal cases are tried by a judge sitting alone. In other words, the defendant has no right to insist that the case be tried in the High Court, where there are jury trials in all criminal cases. See Editorial, *supra* note 7, at 191.

10. The Legislative Council resolved on April 24, 1985 to establish a select committee of the Council to consider the bill. The committee submitted its final report in July 1986, rejecting the proposal regarding trial of complex commercial crimes by a tribunal consisting of a judge and commercial adjudicators. See *Report of the Select Committee on the Problems Involved in the Prosecution and Trial of Complex Commercial Crimes, 1985-86 HONG KONG HANSARD* 1708.

broadly if thinly supported as a sensible measure. Within six months, it became the focus of outraged indignation and strident criticism of its promoters . . . it is also possible to suggest that there has in fact been a change of public mood since those momentous times [of the conclusion of the negotiations on the future of Hong Kong and the publication of the Joint Declaration]. The Joint Declaration brought relief to the people of Hong Kong. It also focused their attention upon the essential systems underpinning Hong Kong's way of life And in consequence I detect a new mood of wariness to change: particularly changes to the legal system, on which the rule of law and the preservation of individual rights and freedoms so much depend. Because it came so soon after the Joint Declaration, the bill was the first proposal to touch the raw nerve of anxiety about future political arrangements. And the community recoiled instinctively from changes to traditional procedures that have served Hong Kong well in the past.¹¹

B. Legislative Council (Powers and Privileges) Bill

Two months after the episode over the Trial of Commercial Crimes Bill, another major legislative proposal by the Hong Kong government was met with public outcry. In the opinion of this writer, this second episode was more a result of negligent draftsmanship than a direct conflict between a definite policy proposal and public sentiment. In preparation for constitutional development leading up to 1997, the Legislative Council (Powers and Privileges) Bill¹² was introduced for the purpose of codifying certain existing rules of usage or common law which the government argued were already previously applicable to the Hong Kong legislature.¹³ The bill provided for certain powers, privileges and immunities of the Legislative Council and its members, and for various offenses in order to "enable Members to discharge their functions properly, without fear or favor, and to

11. Speech of the Attorney General, (May 1, 1985), *reprinted in* 1984-85 HONG KONG HANSARD 1083.

12. The bill was first published in HONG KONG GOV'T GAZETTE, LEGAL SUPP. NO. 3, at C127 (1985). A revised version was published for further consultation before enactment in HONG KONG GOV'T GAZETTE, SPECIAL SUPP. NO. 5, at E61 (1985).

13. *Speech of the Chief Secretary*, 1984-85 HONG KONG HANSARD 1111 (May 15, 1985). The bill was drafted on the basis of relevant legislation in other Commonwealth jurisdictions, particularly Kenya, Northern Rhodesia, the Seychelles, Gibraltar and Jamaica. *See Bill is Better Dead than Read*, South China Morning Post, June 10, 1985, at 2.

uphold the dignity of the Legislature.”¹⁴ Some of the offenses for which the bill provided were heavily attacked as constituting serious threats to freedom of speech generally and to freedom of the press in particular.¹⁵ Clause 17(d) of the bill, for example, would have made it an offense punishable by a fine of HK\$10,000 and imprisonment for twelve months for any person to “commit any act of intentional disrespect to or with reference to the proceedings of the Council.” Clause 20 provided, *inter alia*, that any person who “publishes any false or scandalous libel on the Council” or “any libel on any member concerning his character or conduct as a member and with regard to actions performed or words uttered by him in the course of the transaction of the business of the Council” commits an offense and is liable for a fine of HK\$50,000 and imprisonment for three years. As a result of the strong public reaction against the bill, it was enacted only after substantial amendment, including the deletion of the two provisions discussed above.¹⁶

C. Report on Confession Statements

The Hong Kong Law Reform Commission’s Report on Confession Statements and Their Admissibility in Criminal Proceedings¹⁷ was another set of legislative proposals which was defeated by civil liberties-based opposition. The report recommended a comprehensive reform of the existing law and procedure on the questioning of suspects and the admissibility as evidence of statements made by them and of relevant behavioral responses to questioning. The most controversial recommendation concerned a citizen’s right to remain silent in the face of police interrogation.

Under the existing law, the court (or the jury) was not permitted to draw any adverse inference against the accused from the latter’s silence in the face of police questioning in the course of investigation, and neither the prosecution nor the judge, in the case of a jury trial, could invite the jury to draw such an inference. The report recommended, *inter alia*, that a jury should, in the future, be entitled to draw an adverse inference in such circumstances and that such silence

14. *Speech of the Chief Secretary*, *supra* note 13.

15. For further details, see, e.g., CHEN, *supra* note 7, at 63; *Accountability Must Be Put Into Practice*, South China Morning Post, Aug. 5, 1985, at 2.

16. For the heated Legislative Council debate on the bill, see 1984-85 HONG KONG HANSARD 1215-35, 1262-87 (second reading debate on June 12, 1985; committee stage and third reading on June 26, 1985). For the enacted version of the ordinance, see Legislative Council (Powers and Privileges), LAWS OF HONG KONG ch. 382 (1985).

17. THE LAW REFORM COMMISSION OF HONG KONG, REPORT OF CONFESSION STATEMENTS AND THEIR ADMISSIBILITY IN CRIMINAL PROCEEDINGS (TOPIC 8) (1985) [hereinafter REPORT].

on the part of the defendant may be the subject of comment by the trial judge, defense counsel and the prosecution during the trial.¹⁸ A minority of the members of the Law Reform Commission dissented from this proposed "abolition of the right to silence," arguing that it "would lead to unacceptable pressure on persons being interviewed by the police, which might sour police-community relations or cause innocent people to incriminate themselves," and lead to "abuse by the police and interference with the civil liberties of members of the community."¹⁹ After the publication of the report, the preponderance of public opinion, led by leading members of the legal profession, sided with this minority view. As a result, the government refrained from taking action to implement any of the recommendations of the report.²⁰

D. Public Order (Amendment) Ordinance

The most controversial legislative episode in Hong Kong in 1987 concerned the Public Order (Amendment) Ordinance.²¹ The outcome of this incident differed from those of the three legislative proposals discussed above. This time, the government did not make any concessions by shelving or significantly amending the proposal; instead it forced the bill through a sharply divided Legislative Council, despite almost unanimous opposition from the mass media in Hong Kong.²² The subject of the legislation affected the media themselves, and ironically was part of a package of laws designed to relax the existing controls on press freedom in Hong Kong.

The package consisted of two bills introduced simultaneously: the Control of Publications Consolidation (Amendment) Bill (CPCAB)²³ and the Public Order (Amendment) Bill (POAB).²⁴ The

18. A related recommendation was that the accused should be given an opportunity, during an interview with a justice of the peace before the trial, to give an explanation for such silence. Such explanation may of course also be given to the court during the trial. See REPORT, *supra* note 17, at 61.

19. See *id.*, at 104. Cf., *id.*, ch. 9 (views of the dissenting minority.)

20. Any partial implementation of the Report would probably be inconsistent with the view of the majority of the members of the Commission, who stressed that their proposals "are to be read as a whole. The system we have devised is a composite one and the proposals are designed to dovetail one into another." See REPORT, *supra* note 17, at 37.

21. Public Order (Amendment) Ordinance, HONG KONG GOV'T GAZETTE, LEGAL SUPP. NO. 1, at A83 (1987).

22. For a record of the marathon debate in the Legislative Council on the bill, see 1986-87 HONG KONG HANSARD 1016, 1086 (March 11, 1987).

23. Control of Publications Consolidation (Amendment) Bill, HONG KONG GOV'T GAZETTE, LEGAL SUPP. NO. 3, at C527 (1986).

24. Public Order Amendment Bill, HONG KONG GOV'T GAZETTE, LEGAL SUPP. NO. 3, at C535 (1986).

former bill was designed to abolish various repressive features of the existing Control of Publications Consolidation Ordinance (CPCO).²⁵ The latter bill, however, sought *inter alia*, to perpetuate the restrictions of section 6 of the CPCO, which made it a criminal offense, punishable by a fine of HK\$10,000 and three years' imprisonment, to "maliciously publish in any local newspaper false news which is likely to alarm public opinion or disturb public order." Section 6 of the CPCO also provided that "malice" for the purpose of the provision "shall be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news." The government thus sought to retain, in effect, the offense of "publishing false news" by transferring section 6 of the CPCO to the Public Order Ordinance,²⁶ by re-enacting it as the new section 27 of the latter ordinance.²⁷

The repeal of provisions on the suppression of newspapers by the CPCAB was welcomed by all parties concerned, but opposition to section 27 of the POAB, re-enacting the offense of publishing false news, gradually built up as the date for the Legislative Council debate on the bills drew closer. Ironically, this series of measures, primarily intended for the extension of the freedom of the press, led to widespread accusations that the government was seeking to limit press freedom unreasonably as critics of the POAB focused their attention on the unsatisfactory features and possible abuses of the "false news" provision.²⁸ The government refused to amend the POAB substantially and pushed the bill through the Legislative Council²⁹ by using the support of official members (i.e., government officials appointed as

25. Control of Publications Consolidation Ordinance, LAWS OF HONG KONG ch. 268 (1979). The ordinance as now amended has been retitled the Registration of Local Newspapers Ordinance.

26. Public Order Ordinance, LAWS OF HONG KONG ch. 245 (1981).

27. The proposed provision regarding "publication of false news" in the POAB was almost identical to the original section 6 of the CPCO, except that the maximum fine to which a defendant was liable on conviction was raised from \$10,000 to \$100,000.

28. It was pointed out that under the provision, publication of news which was honestly believed to be true but which turned out to be false might be punished. This would have the effect of discouraging immediate reporting of sensitive matters. Furthermore, reporters would have to disclose the source of their information in order to prove that they reasonably believed the news to be true in order to escape conviction for the offense. This disclosure would be contrary to journalists' ethics. For a more detailed analysis, see A. CHEN & J. CHAN, RENQUAN YU FAZHI — XIANGGANG GUODUQI DE TIAOZHAN (Human Rights and the Rule of Law — The Challenges of Hong Kong's Transition) 196 (1987).

29. The final version of the "false news" provision that was enacted subjects to criminal liability (up to a fine of HK\$100,000 and two years imprisonment) "any person who publishes false news which is likely to cause alarm to the public or a section thereof or disturb public order," but it shall be a defense "to prove that [the person charged] had reasonable grounds for believing that the news to which the charge relates was true." See Public Order (Amendment) Ordinance, *supra* note 21.

members of the council, who are as a general rule required to vote in support of government bills) in addition to that of some non-official members.³⁰ This action was widely condemned as undemocratic, repressive and one made in complete disregard of public opinion. The government's determination to pass the bill despite the strong opposition possibly reflected a concern on its part that its authority and prestige would further weaken, and that it would be reduced to a "lame duck" administration in the pre-1997 transition if pressure from interest groups were always to prevail over the government.³¹ After the bill was passed, the government attempted to assure the public that it would not abuse its prosecuting powers under the "false news" provision; it issued detailed guidelines defining and limiting the circumstances under which the Attorney General would prosecute under the provision.³²

E. The "Film Censorship Affair"

Another civil liberties issue that attracted much attention in 1987 was that of the censorship of cinematographic films. The episode started with leakage to the press of information contained in highly confidential Executive Council³³ papers. It was disclosed that the government had been advised by its counsel as early as 1972 that the Film Censorship Regulations of 1953, a piece of subordinate legislation made under the Places of Public Entertainment Ordinance (PPEO),³⁴ were *ultra vires*.³⁵ The proposition, if true, would mean that the government had been censoring films without legal authority since 1953. The matter was immediately regarded as a scandal, particularly in view of the revelation that top government officials had deliberately chosen to rely on the dubious regulations even after becoming aware of the defect, instead of remedying the situation by introducing amending legislation.

30. See *id.*

31. For the position of the Hong Kong Government during the pre-1997 transition, see LAU SIU-KAI, *DECOLONIZATION WITHOUT INDEPENDENCE: THE UNFINISHED POLITICAL REFORMS OF THE HONG KONG GOVERNMENT* (1987); Louie Kin Sheun, *Cong Gongan Tiaoli Zhenglun Kan Xianggang Yihui Zhengzhi de Tezheng*, 4 MINGBAO YUEKAN 3 (1987); Kuan & Lau, *supra* note 1, at 101.

32. Spackman, *Thomas Bows to Pressure on News Law*, South China Morning Post, May 3, 1987, at 1; *The Public Order Guidelines*, South China Morning Post, May 3, 1987, at 2; Chen and Chan, *supra* note 28, at 202.

33. The Executive Council is the highest policy-making organ in Hong Kong and is the functional equivalent of the cabinet in other political systems. For the government system of Hong Kong, see generally MINERS, *supra* note 1.

34. Places of Public Entertainment Ordinance, LAWS OF HONG KONG ch. 172 (1982).

35. For details and comments on this "film censorship affair," see Chen, *Some Reflections on the "Film Censorship Affair"*, 17 HONG KONG L.J. 352 (1987).

Given the publicity of the incident, the government had no alternative but to introduce a new Film Censorship Bill.³⁶ The bill had two objectives: first, to provide a sound legal basis for the operation of the film censorship authority in the future, and second, to improve (and to some extent liberalize) the existing system by introducing a three-tier classification scheme.³⁷ Because of the sensitive nature of the issue, the government decided to publish the bill in draft form for community wide consultation before introducing it into the Legislative Council. In the course of public discussion over the bill, the question of censorship of films for political reasons soon became the center of attention. Under the first published draft of the bill, one of the factors which censors were to consider in determining whether a film should be censored was "whether and the extent to which the film is seriously prejudicial to good relations with territories outside Hong Kong."³⁸ This provision was understood to refer mainly to films which might offend the PRC government. Critics of the bill argued that the provision was contrary to article 19 of the International Covenant on Civil and Political Rights (ICCPR), which provides for freedom of expression and of information and for restrictions thereto only insofar as the restrictions are necessary "for respect of the rights or reputations of others," or "for the protection of national security or of public order, or of public health or morals."³⁹

36. Film Censorship Bill, HONG KONG GOV'T GAZETTE, SPECIAL SUPP. NO. 5, at E71 (First Draft), E303 (Second Draft) (1987). Note that whereas Legal Supplement No. 3 is used to publish every bill received by the Clerk of the Legislative Council, Special Supplement No. 5 is published only on special occasions when it is considered necessary to publicize the text of draft bills for public discussion before the bills are formally introduced into the Legislative Council. See Chen, *The Legal System*, in HONG KONG IN TRANSITION 88, 98 (J. Cheng ed. 1986).

37. Films approved for exhibition would be classified into three types: (a) those approved for general exhibition to persons of any age; (b) those approved for exhibition only to persons above the age of eighteen; (c) those approved for general exhibition subject to the condition that advertising materials shall contain the notice that the film is "not suitable for children." Film Censorship Bill (Second Draft), *supra* note 36, cl. 12, at E312.

38. Film Censorship Bill (First Draft), *supra* note 36, cl. 9(2)(c), at E76. It should be noted that this provision was not an innovation of the bill because a similar criterion had previously existed as part of the Film Censorship Standards, a set of administrative guidelines relating to the enforcement of the former Film Censorship Regulations. See Chen, *supra* note 35, at 353 n.8. In the second published draft of the bill, the provision was slightly amended to refer to "whether there is a likelihood that the exhibition of the film would seriously damage good relations with other territories." Film Censorship Bill (Second Draft), *supra* note 36, cl. 10(2)(c), at E310.

39. See generally Chen, *supra* note 35, at 356 n.12. The amended version in the second draft of the bill did not satisfy critics and was still criticized as a violation of the ICCPR. See Wong, *Censorship Bill Still Infringes Rights*, South China Morning Post, Nov. 8, 1987, at 5; Editorial, *Film Law Amendment Does Not Go Far Enough*, South China Morning Post, Nov. 7, 1987, at 10.

The invocation of the ICCPR as a yardstick against which legislative proposals should be measured was a significant development in the evolving public debate over issues of civil liberties in Hong Kong. It was a major step forward because throughout the other civil liberties related controversies discussed above, international human rights standards had never been directly relied upon by commentators and politicians. In retrospect, however, the reference to the ICCPR in the film censorship debate is not surprising and may even be considered to be a logical development stemming from the Joint Declaration itself, which provides, *inter alia*, that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force."⁴⁰ Although the two covenants are not enforceable in Hong Kong courts as part of domestic law,⁴¹ as a matter of international law, the United Kingdom, as a party to the covenants, is obligated, at least in theory, to comply with their standards.

F. Control of Obscene and Indecent Articles Ordinance

The enactment in 1987 of the Control of Obscene and Indecent Articles Ordinance (COIAO)⁴² affords interesting comparisons with the "film censorship affair" as well as with the other controversies outlined above. Despite the vague concepts of obscenity and indecency employed by the ordinance and the severe punishment⁴³ that it imposes upon publishers of obscene materials, no vocal opposition to its enactment developed. The pre-existing law, which was part of the Objectionable Publications Ordinance,⁴⁴ also aimed at prohibiting "publications of an indecent, obscene or revolting nature or which are harmful to juveniles." One main difference between the old ordinance and the new scheme,⁴⁵ however, was that under the old ordinance, the determination of whether an article was obscene or indecent was to be made by the magistrate at the trial of a person accused of publishing an "objectionable article." The center of the new system, however, is an Obscene Articles Tribunal, consisting of a magistrate and two lay adjudicators drawn from a panel of appointed citizens. Prospective

40. Joint Declaration, *supra* note 2, Annex I, sec. XIII.

41. Chen, *supra* note 35, at 358 n.23; Editorial, *A Disappointing Draft of Hong Kong's Bill of Rights*, 17 HONG KONG L.J. 133 n.6 (1987).

42. Control of Obscene and Indecent Articles Ordinance, HONG KONG GOV'T GAZETTE, LEGAL SUPP. NO. 1, at A33 (1987).

43. The maximum punishment is a fine of \$1,000,000 and imprisonment for 3 years. See *id.* pt. IV.

44. Objectionable Publications Ordinance, LAWS OF HONG KONG ch. 150 (1975).

45. See generally Chan, *The Control of Obscene and Indecent Articles Ordinance 1987*, 17 HONG KONG L.J. 288 (1987).

publishers may submit proposed publications to this panel for classification.⁴⁶ In addition, courts trying defendants charged with publishing obscene or indecent articles must refer to this panel the question of whether the article concerned is obscene or indecent.

The defects of the new system began to draw attention only after it became operative in September 1987.⁴⁷ A main problem is that the standards used by the tribunal are not consistent with, and are in many cases stricter than, the norms that were applied by prosecuting authorities and magistrates before the establishment of the tribunal. Furthermore, the tribunal's criteria of classification seems to fluctuate from case to case, depending upon which two adjudicators from the eighty-member panel are chosen to sit with the magistrate. That the tribunal is not required to give any reason for classifying an article under a particular category has raised further grievances. Although the ordinance allows appeals from tribunal decisions to the High Court on points of law,⁴⁸ appeals against classification decisions are in practice difficult because whether an article is obscene or indecent is not a pure question of law. It remains to be seen whether the growing dissatisfaction with the operation of the COIAO will lead to its amendment and reform.

G. *The Offence of Loitering*

Another area of law of which has been increasingly criticized recently concerns the criminal offence of "loitering." Section 160 of the Crimes Ordinance⁴⁹ provides, *inter alia*, that:

Any person who loiters in a public place or in the common parts of any building shall, unless he gives a satisfactory account of himself and a satisfactory explanation for his

46. Submission for classification before publication is voluntary and not compulsory. However, a person who publishes materials not submitted for classification before publication but determined by the tribunal to be obscene or indecent after publication may be prosecuted under the ordinance. See Control of Obscene and Indecent Articles Ordinance, *supra* note 42, pt. IV.

47. See, e.g., Wong, *Porn Censorship Guidelines Urged*, South China Morning Post, Oct. 11, 1987, at 2. Editorial, *Strict Censorship Rules Need to be Reviewed*, South China Morning Post, Nov. 16, 1987, at 24; Course, *Obscenity Tribunal Too Puritanical*, South China Morning Post, Dec. 3, 1987, at 1.

48. Control of Obscene and Indecent Articles Ordinance, *supra* note 42, § 30.

49. Crimes Ordinance, LAWS OF HONG KONG ch. 200 (1984). This section was first enacted in 1979 in order to "help in crime prevention and generally help the police force to minimize the public manifestations of the association of thugs and bullies," who had been "skulking around in the street or public parts of buildings, behaving in an offensive or menacing way without actual aggression." Speech by the Attorney General during the Legislative Council debate on the bill on April 25, 1979, quoted in Wong & Shum, *Time to Review Loitering Law*, 1987 LAW SOCIETY OF HONG KONG GAZETTE 22, 28 (Oct. 1987).

presence there, be guilty of an offence and shall be liable on conviction to a fine of \$2,000 and to imprisonment for six months.

The interpretation of this provision was the subject of a recent decision⁵⁰ by the final appellate court in the Hong Kong legal system — the Judicial Committee of the Privy Council in London. It was held that when a person lingering in suspicious circumstances is questioned by a police officer and asked to explain his actions, the above provision takes away the common law "right to silence" insofar as the person's failure to provide a satisfactory answer can lead to a conviction for the offence of loitering. The Privy Council's decision, however, did not completely abolish the right against self-incrimination in this context. It suggested that any admission to an offence other than loitering would be inadmissible if given under a direct threat of arrest for the charge of loitering.

The offence of loitering has been criticized as one highly vulnerable to abuse by the police, who already possess extensive powers to stop persons in the street for questioning, search, arrest and detention.⁵¹ This broad police power is contrary to common law notions of liberty of the person and the right to silence.⁵² Most recently, the Government has requested the Law Reform Commission to conduct a review of the law concerning loitering.⁵³

II. DEVELOPMENTS IN THE DRAFTING OF HONG KONG'S FUTURE BASIC LAW

While the debate over civil liberties under British rule shifted from one issue to another as discussed above, the Basic Law Drafting Committee (Drafting Committee) was developing the future constitutional and legal framework for the protection and limitation of civil liberties under PRC rule in post-1997 Hong Kong. The draft structural outline⁵⁴ of the Basic Law published after the second meeting of the Drafting Committee in April 1986, revealed that chapter 3 of the Basic Law would provide for the fundamental rights and duties of Hong Kong residents. A working draft of chapter 3 was released to the press after the third Drafting Committee meeting in November

50. Attorney General of Hong Kong v. Sham Chuen, 1 AC 887 (1986).

51. See, e.g., Police Force Ordinance §§ 50 & 54, LAWS OF HONG KONG ch. 232 (1984).

52. See generally Wong & Shum, *supra* note 49; Morrow, *Loitering in Hong Kong*, 17 HONG KONG L.J. 329 (1987); Wong, *Lawyers Urge Scrapping of Loitering Laws*, South China Morning Post, Nov. 29, 1987, at 2.

53. *Loitering Law Review Under Way*, South China Morning Post, Nov. 26, 1987, at 7.

54. Reprinted in THE FUTURE OF HONG KONG, *supra* note 1, at 237.

1986.⁵⁵ Amended versions of the draft were presented to the fourth and fifth Drafting Committee meetings in April and August 1987 respectively. However, these drafts of chapter 3 of the Basic Law have not attracted significant public attention thus far.⁵⁶ Without engaging in a clause-by-clause analysis, the following general comments may be made on the working draft presented at the Drafting Committee meeting in August 1987.

(1) Most of the rights listed in the working draft directly follow the relevant provisions of the Joint Declaration. There is also some similarity between the working draft and chapter 2 of the 1982 Constitution of the PRC, which is entitled "The Fundamental Rights and Duties of Citizens."⁵⁷

(2) The language in which rights and freedoms are stated is brief and simple, thus stylistically closer to chapter 2 of the PRC Constitution than to bills of rights in constitutions of Commonwealth countries⁵⁸ or to the ICCPR or the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁹

(3) It is not clear whether the courts of the Hong Kong Special Administrative Region (SAR) will be able to review, and if necessary declare as invalid, laws enacted by the SAR legislature or other laws otherwise in force in the SAR which are alleged to be inconsistent with guarantees of civil liberties in the Basic Law. In this regard, however, the August 1987 working draft is already much improved compared to the previous drafts, which clearly ruled out the possibility of such constitutional judicial review.⁶⁰ Article 15 of the August 1987 working draft provides, *inter alia*, that

[t]he rights and freedoms of Hong Kong inhabitants shall not be restricted save as prescribed by law. Such restrictions shall only be introduced if they are necessary for the maintenance of national security, public order, public safety, public

55. *Zhongyang yu Xianggang Tebiexingzhengqu de Guanxi Zhuanti Xiaozu Gongzuo Baogao*, Ta Kung Pao, Nov. 30, 1986, at 5.

56. See generally Editorial, *A Disappointing Draft of Hong Kong's Bill of Rights*, 17 HONG KONG L.J. 133 (1987). Note, however, that the comments therein are based on the original draft of November 1986. At the time of the writing of the editorial, the amended draft of August 1987 had not yet been published.

57. THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA ch. 2 (1982).

58. See, e.g., W. DALE, *THE MODERN COMMONWEALTH*, ch. 12 (1983); L. BARNETT, *THE CONSTITUTIONAL LAW OF JAMAICA*, chs. 13-14 (1977).

59. See *supra* text accompanying note 40. For the two international covenants and the international law of human rights, see generally, P. SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* (1983); *BASIC DOCUMENTS ON HUMAN RIGHTS*, (I. Brownlie ed. 2d ed. 1981).

60. Editorial, *supra* note 56, at 135.

health, public morals or the protection of the rights and freedoms of others.⁶¹

However, there are no express⁶² provisions empowering persons whose fundamental rights under chapter 3 have been violated to apply to a court for redress or empowering the court to provide remedies. Nevertheless, it is conceivable that an activist court could hold that article 15 suffices to enable it to strike down laws contrary to standards of basic human rights.

(4) Even if the power of constitutional judicial review by the Hong Kong SAR courts is established for laws allegedly inconsistent with rights and freedoms guaranteed by chapter 3 of the Basic Law, it should be noted that the power of the Hong Kong SAR courts to interpret authoritatively the provisions of chapter 3 is limited. Although chapter 9, article 1 of the August 1987 working draft⁶³ empowers the SAR courts to interpret, when adjudicating cases, articles and clauses of the Basic Law which fall within the scope of Hong Kong's autonomy, as defined by the Basic Law, the same article vests the final power of interpretation of the whole of the Basic Law in the Standing Committee of the National People's Congress of the PRC,⁶⁴ whose interpretations, when given, are binding on the SAR courts.

(5) By providing in article 16 that "[t]he provisions of the ICCPR and the ICESCR as applied to Hong Kong shall be enforced in accordance with the laws of the Hong Kong SAR," the Drafting Committee has rejected the suggestion put forward by some Hong Kong academics — including this writer — that the covenants should be incorporated by reference as part of the Basic Law itself and that the ICCPR should be made directly enforceable in the SAR courts.⁶⁵

61. *Gongzuo Baogao*, *supra* note 4, art. 15 (author's own translation).

62. Arguably, article 12 of draft chapter 3 might be relied upon. That article is stated in general terms and provides, *inter alia*, that Hong Kong inhabitants shall have the right to bring proceedings before the courts and to obtain judicial remedies, and that they have the right to challenge the actions of the executive in the courts. No mention was made, however, of any right to challenge legislative measures.

63. *Gongzuo Baogao*, *supra* note 4, ch. 9, art. 1.

64. The power of the National People's Congress Standing Committee to interpret all PRC laws (of which the Basic Law of the Hong Kong SAR will be one) is expressly provided for in article 67(4) of the 1982 PRC Constitution. For a general discussion, see Chen, *supra* note 7, at 196.

65. See Editorial, *supra* note 56 n.6. More recently, another suggestion has been put forward to the effect that a bill of rights should be drafted and enacted in Hong Kong before 1997 and confirmed by the Basic Law, so as to give it constitutional status after 1997. Jayawickrama, *The Basic Law and Human Rights*, Speech to the Hong Kong Branch of Justice (Dec. 7, 1987).

III. CONCLUSION

As recent controversies indicate, the legal protection of civil liberties in Hong Kong has been less than perfect under British rule. Thus, rising consciousness, at least among the more articulate and politically active members of the community, of the need to improve existing safeguards, is certainly welcomed. Drafts of chapter 3 of the Basic Law, however, which have great bearing on future civil liberties in Hong Kong under PRC rule, have not yet received the public attention which they deserve. One can only hope that the recent "civil rights movement" in Hong Kong — if it is at all proper to speak of such a movement — will gradually mature from concern over *ad hoc* issues arising from time to time, to a more systematic, comprehensive and theoretically coherent system of thought and action that will more effectively promote a truly meaningful bill of rights for the people of Hong Kong.

