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## II. FROM PASSIVITY TO ACTIVISM: HUMAN RIGHTS NGOs AND THE LAW IN HONG KONG

### A. From 1949 to 1989

Before the mid-1970s, human rights in Hong Kong were protected primarily by the common law, and by ad hoc provisions in Hong Kong government ordinances. There was no distinct body of human rights law in Hong Kong. There were also few active NGOs to promote internationally recognized human rights in the colony. Until the 1970s, Hong Kong NGOs were mostly engaged in community service rather than advocacy, and those advocacy groups that did exist confined their efforts primarily to the domestic arena.

In 1949, the United Kingdom, through the appointed Hong Kong Legislative Council, enacted the Societies Ordinance,<sup>5</sup> which was designed to control the creation and operation of associations in Hong Kong. In introducing the ordinance, the United Kingdom sought to prevent pro-Chinese Communist and nationalist forces from operating in Hong Kong and using it as a base of subversion.

The pre-1992 legislation required any organization that wished to operate as a society to apply to the Registrar of Societies (who was the Commissioner of Police) for registration or exemption at the moment it was established or deemed to be established (Section 5(1)). Pursuant to Section 5(2), the Registrar had the discretion to register the society if he was satisfied that it was established solely for religious, charitable, social or recreational purposes, or as a rural committee or as a federation or other association of a rural committee.<sup>6</sup>

The Registrar could refuse to register or exempt from registration any society on any of the following grounds:

(i) the society was a branch of or was affiliated to or was connected with any organization or group of a political nature established outside of Hong Kong;<sup>7</sup>

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<sup>5</sup> The Societies Ordinance, which was contained in Ordinance No. 28 of 1949, is found at Chapter 151 (1950) of the Laws of Hong Kong. After 1949, the Societies Ordinance was amended numerous times, with the more significant amendments occurring in 1957, 1961 and 1992: Societies (Amendment) Ordinances No. 31 of 1957, No 28 of 1961, and No 75 of 1992. Before the Societies Ordinance was enacted, Hong Kong people were free to associate with whomever they chose, without restriction, as was the case (and still is) in the United Kingdom. This ordinance, and its multiple iterations between 1949 and 1991, are referred to hereinafter as the "pre-1992 legislation" because they represent the widening and tightening of social control imposed on Hong Kong NGOs during the period commencing in 1949, and ending in 1992 with the adoption of liberalized amendments to the Societies Ordinance. Other legislation that governs the creation and operation of different types of groups in Hong Kong includes the Companies Ordinance and the Trade Unions Ordinance.

<sup>6</sup> Introduced by Societies (Amendment) Ordinance No. 28 of 1961.

<sup>7</sup> Societies (Amendment) Ordinance No. 33 of 1952

(ii) the society was likely to be used for any purpose prejudicial to or incompatible with peace, welfare, or good order in Hong Kong;<sup>8</sup> or

(iii) the constitution or rules of the society did not contain matters as prescribed by the ordinance or required by the Registrar.<sup>9</sup>

Furthermore, the Registrar had discretion to cancel the registration or exemption of a society on specified grounds (similar to those that applied to the approval of registration or exemption) and upon failure to otherwise comply with the ordinance, but the Registrar was required to afford the society an opportunity to be heard before cancellation (Section 10). Finally, any person aggrieved by a decision of the Registrar could appeal to the Governor in Council, who had the power to revoke or confirm the decision.<sup>10</sup>

Under the pre-1992 legislation, the Registrar could:

- enter, with or without force, premises believed to be used as a meeting place for a society;
- enter any meeting of any society at any time;
- search the premises and persons present or leaving;
- demand information about the number and places of all meetings of any society in the preceding six months;
- demand that the society provide the Registrar with a membership list of the society; and demand "such other information as may be prescribed."<sup>11</sup>

There was no requirement that any action of the Registrar be reasonable.

NGOs fought for many years for the amendment or repeal of this draconian colonial legislation, which they deemed burdensome, unnecessary and contrary to domestic and international human rights law. Not until 1992, however, were its oppressive provisions superseded.<sup>12</sup>

Awareness of human rights issues grew in Hong Kong during the late 1970s, following the United Kingdom's 1976 ratification of the two principal human rights covenants—the International

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<sup>8</sup> *Id.*

<sup>9</sup> Section 5(c), Societies (Amendment) Ordinance No. 28 of 1961.

<sup>10</sup> The Governor in Council could, at his discretion, order that any exempted or registered society be dissolved where he was satisfied that such society was being used for purposes "prejudicial to or incompatible with peace, welfare or good order in the Colony." (Societies (Amendment) Ordinance No. 28 of 1949, s 16). Appeal was once allowed to the Supreme Court of Hong Kong, but such appeals were later disallowed. See, *e.g.* Societies (Amendment) Ordinance No. 28 of 1961, s 5(g)(1).

<sup>11</sup> See Societies (Amendment) Ordinance No. 28 of 1949, s 7(1)(d).

<sup>12</sup> Societies (Amendment) Ordinance No. 75 of 1992.

Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—and the concurrent extension of both covenants to Hong Kong.<sup>13</sup> Human rights in Hong Kong now became subject to scrutiny and monitoring by the international community, notably by the United Nations treaty bodies. As individuals in Hong Kong became more aware of these new international protections, human rights NGOs in Hong Kong began to blossom, particularly in the international advocacy arena.

In 1978, the United Kingdom submitted to the Human Rights Committee its First Periodic Report on implementation of the ICCPR in Hong Kong.<sup>14</sup> Though the reporting process went virtually unnoticed among NGOs, it marked the beginning of the robust, ongoing practice of Hong Kong NGO involvement in the United Nations Treaty Body reporting and monitoring process.<sup>15</sup>

By the early 1980s, the United Kingdom and the People's Republic of China had begun to negotiate the blueprint for the change of sovereignty—the Joint Declaration on the Question of Hong Kong. Hong Kong people became increasingly aware that "1997" was not just an Orwellian abstraction but something real that was rapidly approaching. Public awareness of human rights surged.

The United Kingdom's submission to the Human Rights Committee of its Second Periodic Report on Hong Kong in May 1988,<sup>16</sup> together with the November 1988 hearings on that report in Geneva,<sup>17</sup> attracted much greater attention. Several Hong Kong NGOs submitted comprehensive briefing papers and/or delivered oral briefings to the Human Rights Committee, and attended the 1988 hearings.<sup>18</sup>

However, the real upsurge in human rights activism in Hong Kong was triggered by a more tragic event: the massacre of peaceful demonstrators by the People's Liberation Army in Beijing on June 4, 1989. As a direct and immediate consequence, Hong Kong human rights NGOs exploded with unprecedented energy and vibrancy. NGOs became more deeply immersed in international advocacy, campaigning energetically before UN bodies and playing an instrumental role in lobbying

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<sup>13</sup> The United Kingdom extended both covenants to Hong Kong on May 20, 1976.

<sup>14</sup> UN Doc. CCPR/C/1/Add. 37 (1978).

<sup>15</sup> NGOs were involved with other Treaty Body reports during this period, such as the First Report on Hong Kong under the ICESCR which was submitted to the UN Economic and Social Council (the predecessor to the Economic Committee) on April 13, 1981. U.N. Doc. E/1980/6/Add.35 (1980).

<sup>16</sup> UN Doc. CCPR/C/32/Add. 14, Annex F, pp. 62-101 (1988). That report was supplemented by UN Doc. CCPR/C/32/Add.15, Annex F, pp. 6-9 (1988).

<sup>17</sup> CCPR/C/SR 855-887 (1988).

<sup>18</sup> Among those groups was the Hong Kong Journalists Association, JUSTICE, and the Professional Lobby Group. See Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, in *HUMAN RIGHTS IN HONG KONG* 120, 134 (Raymond Wacks ed, 1992, Oxford University Press).

before the Sub-Commission on Human Rights in the summer of 1989, an effort which resulted in a resolution condemning the People's Republic of China for its human rights practices.<sup>19</sup>

**B. 1989-1992: The Bill of Rights and Amendments to the Societies Ordinance**

In 1990, the UK submitted its Third Periodic Report on Hong Kong to the Human Rights Committee, followed by hearings in New York in April 1991.<sup>20</sup> By now Hong Kong human rights NGOs had become familiar with the international advocacy process, and actively prepared critiques of the government report and attended the hearings. Among the human rights NGOs that either submitted comprehensive briefing papers to the Human Rights Committee, or attended the hearings, or both, were: JUSTICE (the Hong Kong affiliate of the Geneva-based International Commission of Jurists), the United Democrats of Hong Kong, the Hong Kong Human Rights Commission, the Hong Kong Bar Association, the Hong Kong Journalists Association, the Hong Kong Council of Women, Amnesty International and the International League for Human Rights.

In the period between June 1989 and June 1991, Hong Kong NGOs also played a leading role in public debate about a British-backed bill to introduce a Bill of Rights that, as a direct result of the Beijing massacre, had been tabled in the Hong Kong Legislative Council.<sup>21</sup> The Bill of Rights Ordinance, with enthusiastic NGO backing, was enacted on June 6, 1991 and came into effect two days later, to "provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong."<sup>22</sup>

In 1992, the draconian colonial provisions of the pre-1992 Societies Ordinance were superseded, in an attempt to bring the law in line with the Hong Kong Bill of Rights Ordinance, and with the ICCPR. The 1992 Amendments will not survive the July 1, 1997 handover because the Standing Committee of China's National People's Congress (NPC) voted to not adopt them as part of the law of the Hong Kong Special Administrative Region (HKSAR).

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<sup>19</sup> The Sub-Commission on Human Rights is the Charter-based body of the United Nations that meets each August in Geneva, and in which many human rights abuse complaints against nations are first officially lodged within the UN system. Although the resolution was not directly related to Hong Kong, Hong Kong people participated instrumentally in the NGO team that lobbied for its passage. The international community has attempted to have a resolution passed each of the past seven years in the UN Commission on Human Rights, but China has managed to muster sufficient political support to defeat these efforts.

<sup>20</sup> UN Doc CCPR/C/58/Add. 6 (March 6, 1990); UN Doc CCPR/C/58/Add.11 (March 18, 1991) (supplemental report). Other reports that were submitted to UN Treaty Bodies, and for which hearing were held in the early 1990s, included the United Kingdom's Tenth Periodic Report to the Race Committee, which was heard at the Race Committee's March 1991 Session. See UN Doc. CERD/C/SR.907 (1991); UN Doc CERD/C/SR.908 (1991); UN Doc CERD/C/172/Add. 16 (1991).

<sup>21</sup> Nihal Jayawickrama, *The Bill of Rights*, in *HUMAN RIGHTS IN HONG KONG* 37, 67 (Raymond Wacks, ed., Oxford University Press 1992). Among the NGOs involved in Bill of Rights discussions and debates were the Bar Association of Hong Kong, JUSTICE, the Law Society of Hong Kong, the Civic Association of Hong Kong, and the Human Rights Commission. See *id.* at 67, 71.

<sup>22</sup> Hong Kong Bill of Rights Ordinance (Chap 383 of the Laws of Hong Kong) (Preamble), reprinted in *Public Law and Human Rights: A Hong Kong Sourcebook* 218 (Andrew Byrnes & Johannes Chan eds., Butterworths Asia 1993)

Under the 1992 amendments, the NGO registration requirement was abandoned and replaced by a requirement of notification. Organizations were required to inform the Societies Officer<sup>23</sup> in writing of specified particulars within one month of the date of establishment of an organization, or the date that the organization was deemed to be established (Section 5). The notification called for the name of the organization, its objects, the names of its office bearers and the address of its principal place of business and every place or premises that it owns. After notification, the organization was listed on a "list of all societies." Only two restrictions were attached to the notification process: an organization could not be listed under a particular name if another was already listed under that or a similar, confusing or misleading name (Section 9); and notification was required within one month of any change in a society's name, objects, office-bearers or principal place of business (Section 10(1)). Societies were not required to spell out a detailed set of objectives.

Under the 1992 amendments, the Societies Officer was granted only limited powers to make inquiries of a society, or to take action against an organization. For example, the Societies Officer could ask a society for information about itself or its operations only if the request was reasonably related to discharging the functions of the Societies Officer (Section 15(1)). Although the Societies Officer was still empowered to enter a meeting, he could do so only if his entry was reasonably necessary (Sections 31 & 33). If the Societies Officer reasonably believed that the operation or continued operation of a society would be prejudicial to the security of Hong Kong or to public safety or public order, he was obliged to notify the Secretary for Security, and could recommend the publication of a prohibition order in the Gazette (Section 8). After gazetting of the prohibition order, the society was given the opportunity to be heard before any action was taken against it. Only after these procedural safeguards had been effected could a society be de-listed. Any person aggrieved by a decision of the Secretary for Security was able to appeal to the Governor in Council, who could revoke, vary or confirm the decision (Section 8(7)). Under the 1992 amendments, the Governor no longer had the power to dissolve societies.

NGO activity grew in depth and breadth after passage of the 1992 amendments. At the same time, international scrutiny of Hong Kong heightened, with the UN treaty bodies calling for extraordinary hearings on Hong Kong in the light of new human rights concerns generated by the impending transfer of sovereignty. For instance, at the conclusion of the October 1995 hearing on the Fourth Periodic Report under the ICCPR, the Human Rights Committee expressed serious concern about China's willingness to continue submitting periodic reports on Hong Kong and called for a Supplemental Report by the United Kingdom. The Committee held an extraordinary hearing to consider that report in Geneva in October 1996, and concluded by requesting another report to examine human rights in Hong Kong until June 30, 1997, the final day of British sovereignty. That

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<sup>23</sup> The "Registrar", under the pre-1992 legislation, was replaced by a "Societies Officer". However, in both cases, that individual is the Commissioner of Police.

report will necessarily fall due after the reversion, and it is far from certain that there will be a hearing of the Human Rights Committee to consider the report—let alone that China would attend.

Between 1992 and March 1997, nearly a dozen reports have been submitted on behalf of Hong Kong to five UN treaty bodies, each with a corresponding hearing.<sup>24</sup> Hong Kong human rights NGOs have been an indispensable part of the monitoring process,<sup>25</sup> attending hearings and briefing members of the various committees.<sup>26</sup>

The NGO community expanded rapidly during this period, as did receipts of contributions from overseas sources. NGOs stepped up their lobbying and briefing of foreign governments and inter-governmental organizations. Domestic advocacy was also an important part of their work, and many NGOs became more heavily involved in lobbying the executive and legislative branches of the Hong Kong government. Some NGOs worked on judicial proceedings involving human rights issues, such as immigration claims.

The period after Tiananmen brought a huge shift in Hong Kong's political culture. Historic quiescence gave way to an explosion of activism. The heightened political awareness among NGOs

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<sup>24</sup> Among the respective Committees, reports and corresponding hearings are: the Economic, Social and Cultural Committee (two periodic reports; hearing November 1994 and 1996); the Human Rights Committee (one periodic report and one supplementary report; hearings October 1995 and 1996); the Committee Against Torture (one report; hearing November 1995); the Race Committee (one report; hearing March 1996); and the Committee on the Rights of the Child (one report; hearing September 1996).

<sup>25</sup> See, e.g., Peter Burns, *The Convention Against Torture and the Work of the Torture Committee* (in *TORTURE IN HONG KONG: IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE & OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*) (Eds. A Byrnes, G Edwards, & S Wilkens, Center for Comparative and Public Law, University of Hong Kong: 1995) (The Torture Committee "finds the materials supplied to it by NGOs to be of the most vital significance. ... [S]pecifically directed NGO material related to the particular country that we are dealing with has provided us with the most useful check against the information contained in the government report. Without that, I suspect we just could not function effectively at all.")

<sup>26</sup> The Center for Comparative and Public Law of the Faculty of Law, University of Hong Kong, has traditionally invited members of the various treaty bodies to Hong Kong, following the publication of particular Hong Kong periodic reports, and before hearings on them. Hong Kong NGOs have also accompanied Committee members to prisons, refugee detention centers, "cage homes," the courts, etc., to talk to victims of human rights abuses, to listen to concerned members of the public and to meet with government officials.

In October 1995, the Human Rights Committee held hearings on the United Kingdom's Fourth Periodic Report on Hong Kong. (UN Doc. CCPR/C/95/Add. 5 (1995).) NGOs attending the hearings included the United Ants, the Hong Kong Human Rights Commission, the Hong Kong Human Rights Monitor, the Hong Kong Bar Association, the Hong Kong Journalists Association and JUSTICE. Representatives of the Center for Comparative and Public Law also attended the hearings and presented submissions by several Hong Kong NGOs who were unable to travel to Geneva.

In October 1996, the Human Rights Committee held hearings on a United Kingdom Supplemental (Extraordinary) Report to the Fourth Periodic Report on Hong Kong. The hearings, also held in Geneva, were attended by the Hong Kong Human Rights Monitor, the United Ants, the Hong Kong Bar Association, the Hong Kong Human Rights Commission, JUSTICE, the Hong Kong Journalists Association and the Society for Community Organisation. The Center for Comparative and Public Law was also present.

coincided with electoral reform and increased enfranchisement.<sup>27</sup> Through organized training, the NGO community grew more familiar with international human rights law. This training in turn helped inform Hong Kong people of their rights, and of the role they could play in ensuring their continued protection. NGOs learned that they could be effective in the international arena. In the final analysis, public concern for human rights was spurred by a lack of trust in China as reversion drew closer. Many people began to pose the unthinkable question: could what happened in Tiananmen Square be re-enacted at Statue Square in downtown Hong Kong after July 1, 1997?

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<sup>27</sup> Enfranchisement has been slow in coming to Hong Kong. Until recently, all Hong Kong Legislative Council members were appointed by the Governor of Hong Kong, who in turn was appointed by the Queen. Democratic elections for Hong Kong Legislative Council members began in 1991, with a small portion of members being elected by universal and equal suffrage. By 1995, all 60 members of the Council were "elected," although the electoral system remained defective in many ways.