

Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong

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The women's movement in Hong Kong has significantly benefited from the political and legal changes that occurred during the transition to 1997. Citizens of Hong Kong developed a greater awareness of human rights issues, and women have successfully identified equality as a "human right" deserving legal protection. The women's movement has also allied itself with the increasingly democratic and assertive Legislative Council. As a result, the legal prohibition of female inheritance of land in Hong Kong was repealed in 1994 and the first law prohibiting sex discrimination was enacted in 1995. Additionally, Hong Kong's first Equal Opportunities Commission is being established. Ironically, the very developments that strengthened the women's movement in recent years—its association with the broader human rights movement and with assertive legislators—may threaten it when China regains sovereignty.

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I. INTRODUCTION

In June 1995, Hong Kong enacted its first anti-discrimination law, the Sex Discrimination Ordinance.¹ The law has yet to come into force and has several weaknesses, particularly in the area of remedies. Nonetheless, its very enactment represented an important victory for the Hong Kong women's movement and a significant concession by the Hong Kong government (which had long opposed the enactment of any anti-discrimination legislation). Women in Hong Kong have also recently celebrated the repeal (in 1994) of the legal prohibition on female inheritance of much of the land in Hong Kong. The government has also finally softened its opposition to the United Nations Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW) and has agreed to ask the British Government to extend this convention to Hong Kong.

This article argues that the recent achievements of the Hong Kong women's movement are, to a significant extent, a direct result of the planned transition to Chinese rule in 1997. Given the long record of inaction against discrimination in Hong Kong, the women's movement expected far less progress by 1995. Women also feared that as 1997 drew closer, discrimination would attract even less attention. It seemed only reasonable that a territory about to be taken over by the People's Republic of China would be more concerned with issues directly related to freedom than issues relating to equality.

Instead, the planned transition to Chinese rule has given an enormous boost to the women's movement, and also to the broader anti-discrimination movement in Hong Kong. This article seeks to explain why that has occurred. Part II provides a summary of the history and extent of sex discrimination in Hong Kong. Part III discusses the impact of the growing awareness of human rights on the women's movement. I argue that although the recently enacted Bill of Rights Ordinance² has had little direct impact on sex discrimination, the women's movement used the Ordinance and the debate surrounding it to obtain legal recognition and moral legitimacy for the right to equality. Thus, equality was recognized as a human right, paving the way for more concrete reforms to eliminate discrimination.

Part IV discusses the impact of changes to the Hong Kong

1. Hong Kong, Ordinance 67 of 1995, HONG KONG GOVERNMENT GAZETTE, Legal Supp. no. 1, July 21, 1995, at A1628-A1783.

2. Hong Kong, Hong Kong Bill of Rights Ordinance 1991, Cap. 383, THE LAWS OF HONG KONG [hereinafter Bill of Rights].

Legislative Council in anticipation of 1997. The Council has become more democratic and more responsive to public opinion. It also has become more willing to challenge established government policies, forcing the executive branch of the government (which is still entirely unelected) to be more responsive to public opinion as well. These developments have led directly to legal reform against sex discrimination.

Part V analyzes the two bills relating to sex discrimination that were recently voted upon by the Hong Kong legislature: the government-sponsored Sex Discrimination Bill (which was enacted in June 1995 but is not yet in force), and the more comprehensive Equal Opportunities Bill, introduced by Legislative Councillor Anna Wu (which was not enacted but may be re-introduced in the 1995-96 legislative session). The Equal Opportunities Bill is a compelling example of how the greater assertiveness of Hong Kong's legislators has forced the Hong Kong government to be more responsive to the women's movement: fearing that Wu's bill would be enacted, the government abandoned its longstanding opposition to anti-discrimination legislation and agreed to introduce its own (albeit narrower and more conservative) Sex Discrimination Bill.

Finally, Part VI of the article briefly discusses the future of the women's movement and the likely impact of the actual transition to Chinese rule in 1997. The Chinese government purports to support equality for women and there is no obvious reason why the recent achievements of the Hong Kong women's movement should be threatened by 1997. Yet such a threat exists. Ironically, this threat stems in part from the very developments that have aided the women's movement during the transition period: its identification with the broader human rights movement and with the greater role of the Legislative Council. China fears and opposes these developments and may try to reverse changes associated with them.

II. EXAMPLES OF SEX DISCRIMINATION IN HONG KONG

It should first be noted that the Hong Kong government's historical reluctance to address sex discrimination in Hong Kong was not simply a result of its so-called "free market" philosophy. As demonstrated below, sex discrimination in Hong Kong has not been limited to the private sector, nor to what the government often refers to as the "traditional" practices of the local Chinese community. Indeed, many of the worst examples of sex discrimination have been caused or perpetuated by the laws of Hong Kong or by government policies—in other words, intervention in the market to the disadvan-

tage of women.

A. The Prohibition on Female Succession to New Territories Land

The prohibition on female inheritance of land in the New Territories (finally repealed in June 1994) was one of the worst examples of discrimination under the laws of Hong Kong. The original source of this prohibition was Chinese customary law, which required that land be passed down the male line. Ironically, this aspect of Chinese law and custom was reformed long ago in other Chinese societies, including the PRC, Taiwan, and Singapore. But it was preserved in Hong Kong (and indeed made harsher) by colonial legislation.³

In general, the law of Hong Kong is based on English law. But the colonial rulers made an effort to preserve local Chinese customs in certain areas of the law, such as family law. Much of Chinese customary law (including the legal recognition of concubinage) was abolished in Hong Kong in 1971.⁴ However, the laws governing inheritance of land have been complicated by the unusual legal status of the New Territories region of Hong Kong. Unlike Hong Kong Island and Kowloon Peninsula (which were purportedly ceded in "perpetuity" to Britain), the area referred to as the New Territories was only leased to Britain for 99 years. (It is this lease that will expire on July 1, 1997.) Although China has long refused to recognize these treaties (on the grounds that they were "unequal" and essentially forced upon China), Britain has always regarded them as the source of its right to rule Hong Kong. Thus, with regard to the New Territories, its right to rule was limited to 99 years and there was a compelling argument that the customs of the indigenous people living there should be largely preserved.

Britain's policy of recognizing Chinese law and custom in the New Territories was given legislative effect in the New Territories Regulation Ordinance of 1910 and later in the New Territories Ordinance. In particular, Section 13 of the New Territories Ordinance provided that "the court shall have the power to recognize and

3. See generally Carol Jones, *Prohibition of Female Inheritance of Land and 'Small Houses' in that Part of Hong Kong Known as the New Territories*, in C. JONES, ET AL., REPORT BY THE HONG KONG COUNCIL OF WOMEN ON THE THIRD PERIODIC REPORT BY HONG KONG UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 15 (1991) [hereinafter HONG KONG COUNCIL OF WOMEN REPORT]; D. M. Evans, *New Law of Succession in Hong Kong*, 3 HONG KONG L.J. No. 1, at 7-50 (1971).

4. Evans, *supra* note 3; see also, Peter Wesley-Smith, THE SOURCES OF HONG KONG LAW, ch. 12 (1994).

enforce any Chinese custom or customary right" in any proceeding in relation to land in the New Territories.⁵ This provision has been interpreted to require the application of Chinese customary law in proceedings relating to New Territories land, and therefore to prohibit female inheritance of such land, unless exempted from the Ordinance.

The rule requiring male inheritance of New Territories land has often created real hardship. For example, if a deceased land owner had no son, his daughter or wife would lose possession of their home to a distant male relative. It appears that the local officials sometimes negotiated "deals" on behalf of the female relatives. For example, the male heir might be told by a local official that in exchange for registration of title to the land in his name, he should promise to continue to let the widow or an unmarried daughter live in the house.⁶ In fact, such obligations to widows and unmarried daughters are also a part of Chinese customary law. But New Territories women have long complained that while the rule of male-only inheritance of land was strictly enforced by Hong Kong legislation and by government officials, the supposed benefits to women under customary law were treated much more loosely—more like moral obligations of the male heir than rights which women could enforce.

Women's organizations in Hong Kong have lobbied for years for the removal of the prohibition on female inheritance of land and surveys have shown that the law was generally unpopular with the Hong Kong people.⁷ Those in favor of maintaining it argued that it was necessary to preserve the integrity of clan land. Women, it was argued, move away from their village and marry men outside of the clan. If they were permitted to inherit land, the land would fall into the hands of outsiders (their husbands). Women disputed this argument, pointing out that in modern Hong Kong land owners often sell their land to "outsiders," with the proceeds of the sale divided only among the male members of the family or clan.⁸

The law has been viewed as particularly harsh in the last twenty

5. Hong Kong, New Territories Ordinance 1910, pt. II, § 13, *consolidated in* Cap. 97, LAWS OF HONG KONG.

6. See Carol Jones, *New Territories Inheritance Law: Colonization and the Elites*, in *WOMEN IN HONG KONG 172-76* (Veronica Pearson & Benjamin K.P. Leung, eds. 1995).

7. See B. Fong, *Succession Law Rejected Says Survey*, S. CHINA MORNING POST, July 7, 1990 (reporting on a survey conducted by Asian Commercial Research Ltd., commissioned by the South China Morning Post, that revealed that three quarters of all respondents and 63% of respondents living in the New Territories residents opposed the law).

8. Jones, *supra* note 3, at 13-17.

years, as the New Territories has changed dramatically. When acquired by Britain in 1898 this part of Hong Kong was entirely rural, consisting of farm land and traditional walled villages. Thus while the New Territories is larger in size than Hong Kong Island and Kowloon, its population was quite small. However, as Hong Kong's population swelled in the post-war period, a severe housing shortage developed on Hong Kong Island and in Kowloon. This led to the development of the "New Towns" (densely populated high-rise developments located in the New Territories, accompanied by stores, hospitals and other services and connected to Kowloon and Hong Kong Island by a commuter railway and subway system). Now, in addition to making up the largest land area of Hong Kong, the New Territories also houses a very significant portion of Hong Kong's people, most of whom are not indigenous residents of the New Territories.⁹

Until the early 1990's it was widely believed in Hong Kong that the prohibition on female inheritance of land did not apply to these new residents of the New Territories, but rather only to indigenous residents living on rural land. In fact this was not the case. Under the New Territories Ordinance any land covered by "Part 2" of the Ordinance that was not specifically exempted from it was subject to Section 13 of the Ordinance and therefore to Chinese customary law.¹⁰ In other words, even an apartment in a high rise development in urban Shatin was subject to the rule. And since the rule applied not to people, but to the land, it applied even if the property owner was not Chinese and even if that property owner was a woman who had purchased it with her own money.

It was also commonly believed that exemptions from Section 13 of the New Territories Ordinance were regularly applied for and granted when an urban development was built on New Territories Land.¹¹ But in fact such exemptions were not obtained (perhaps due to the mistaken view that Section 13 of the New Territories Ordinance only applied to indigenous residents).¹² And after a multi-unit building was established, an exemption could only be applied for if

9. See, e.g., *Behind the Battle of the Sexes*, S. CHINA MORNING POST, Mar. 27, 1994, at 12; *Kuk's Power on the Wane*, S. CHINA MORNING POST, Mar. 27, 1994, at 13; *Rude End to the Village Idyll*, S. CHINA MORNING POST, Nov. 19, 1995, at 3.

10. Jones, *supra* note 6, at 176.

11. *Id.*

12. HOME AFFAIRS BRANCH, LEGISLATIVE COUNCIL BRIEF: NEW TERRITORIES LAND (EXEMPTION) BILL, CNTA/L/CON/26/21, pt II, para. 3, Nov. 15, 1994. [hereinafter LEGISLATIVE COUNCIL BRIEF ON NEW TERRITORIES LAND (EXEMPTION) BILL]

all of the owners of the apartments joined together and applied for the exemption.¹³

Another common misunderstanding about the ban on female inheritance of land was that people assumed that it only applied when a landowner died without making a will, and that a will that specifically left land to a daughter could overcome Chinese customary law. Indeed, this was apparently the case prior to 1971, although New Territories women did not really benefit from it because at that time it would have been rare for a landowner in the New Territories to make a will (and if he did he would almost certainly have followed custom and left the land to his male heirs). In 1971, the Probate and Administration Ordinance exempted "Part 2 New Territories Land" (the land subject to Chinese customary law) from its provisions. Thus, after 1971, while a landowner could make a will leaving his land to a daughter, it could not be probated and enforced under the Probate and Administration Ordinance.

For years the Hong Kong government avoided disclosing to the public the full extent of the law prohibiting female inheritance of New Territories land. But a 1991 report by the Hong Kong Council of Women publicized the issue¹⁴ and in 1993 the government had to publicly concede two points: first, that the ban on female inheritance of land applied not only to indigenous residents of rural land, but also to a great many owners of apartments in modern housing developments; and second, that even if such property were willed to a woman, the will could only be legally probated if the woman took advantage of a loophole and obtained letters of administration within three months.¹⁵ The government conceded that this would be "difficult" to achieve; in reality, it was virtually impossible. Needless to say, this created quite an uproar in Hong Kong, particularly because wills leaving apartments in the New Towns to women had, in fact, been probated (in ignorance of the law), and these women now feared that their title could be challenged.¹⁶

Part IV of this article (below) describes how changes in the make-up and role of the Legislative Council finally led to the repeal of the prohibition of female inheritance of land in 1994.

13. HONG KONG GOVERNMENT, GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN, para. 101 (1993) [hereinafter GREEN PAPER]; see *infra* text accompanying notes 94-101 for developments which led to the issuance of the Green Paper.

14. See Jones, *supra* note 3, at 12-17, and addendum.

15. GREEN PAPER, *supra* note 13, paras. 101-02.

16. See LEGISLATIVE COUNCIL BRIEF ON NEW TERRITORIES LAND (EXEMPTION) BILL, *supra* note 12, para. 4.

B. The "Small House" Policy

The Small House Policy is often considered together with the prohibition of female inheritance of land because the government likes to describe it as another example of governmental deference to Chinese law and custom. But, in fact, it is entirely a government policy—an example of how the government intervenes in the market to the disadvantage of women, helping to perpetuate their second-class status.

The Small House Policy is essentially a social welfare policy. It was created in 1972 to remedy the inadequate housing of indigenous residents of the New Territories who were generally not moving into the urban developments of the "New Towns". The government also viewed it as a way to avoid opposition by New Territories indigenous residents to the development of the New Towns.

Under the policy, an "indigenous villager" may apply for a free building license to erect a house on his own land or, more importantly, be granted a building site on government-owned land at a concessionary premium. But "indigenous villager" is defined under the policy as a male person at least 18 years old who is descended through the male line from a resident in 1898 of a recognized village.¹⁷ As the value of land in the New Territories has increased, this policy has become extremely controversial in Hong Kong, both because it excludes women and because it favors indigenous residents.¹⁸

The government has often sought to imply that the exclusion of women is somehow mandated by respect for Chinese customary law.¹⁹ But this is not the case. The law prohibiting female inheritance of land did not prohibit women from acquiring land in other ways, and many women do now own property in the New Territories. Thus, even if it seemed inappropriate to extend the Small House Policy to women when it was created in 1972, there is no excuse for not extending it equally to men and women now that New Territories women are economic actors in their own right. Yet the government continues to maintain that the exclusion of women from the Small House Policy "reflects the traditions and customs of the New Territories indigenous communities, where heads of households have traditionally been almost exclusively male and female villagers have

17. GREEN PAPER, *supra* note 13, para. 104-105.

18. *See, e.g., Rude end to the village idyll, supra* note 9.

19. *See, e.g., GREEN PAPER, supra* note 13, para. 103.

moved away from their villages upon marriage."²⁰ (The government has apparently never considered the possibility that female residents would be more likely to bring their husbands to live with them in their own villages if the government would permit women to apply for land in their villages on which to build a home.)

C. *Discrimination in Rural Elections and Consultative Bodies*

The Governor of Hong Kong has always been appointed by Britain and has always been a white British man. For many years the Legislative Council was also entirely appointed, and the first direct elections to the Council were not held until 1991. Nonetheless, the Hong Kong government has long prided itself on being "consultative" in the sense that it established several advisory bodies which are supposed to keep the government informed as to the public's views.

Unfortunately, even in the 1990's, the consultative system in the New Territories villages has systematically excluded women. As recently as 1993, a full one-third of the approximately 690 villages in the New Territories still did not permit women to stand for election as Village Representative. Many villages also excluded women from voting in these elections (either expressly or by permitting only the "head of household" to vote, almost always interpreted to be a man). As a result, in 1993, there was only one serving female Village Representative.²¹ This discrimination also affected the next level of office in the rural elections, that of Chairmen of the Rural Committees, as these Chairmen are selected from the Village Representatives.

The other important example of discrimination in local government is within the Heung Yee Kuk, a traditional male-dominated organization which has enormous power in the New Territories, in large part because the government made it its "statutory advisory body on New Territories matters." Although the Heung Yee Kuk has recently made token efforts to include a few women, it is still extremely conservative and has steadfastly opposed reforms to address sex discrimination (for example, relating to inheritance of land and the Small House Policy). As of 1993, only 4 of the 143 Heung Yee Kuk Councilors were female.²²

20. HONG KONG GOVERNMENT, THE NEW TERRITORIES SMALL HOUSE POLICY, Legco Paper No 729/93-94, app. I, para. 11 (note prepared for members of the Hong Kong Legislative Council).

21. GREEN PAPER, *supra* note 13, para. 27.

22. *Id.* para. 28.

The government has frequently blamed "traditional practices" for the discrimination in rural elections and the Heung Yee Kuk. Yet the government helped to perpetuate this discrimination, both by refusing to intervene in the elections and by recognizing as official "representatives" of the New Territories men who had been chosen in overtly discriminatory elections. Recently, under pressure from women's organizations, the government finally issued "guidelines" to the villages to try to persuade them to implement a "one person one vote" system and to permit equal participation by women in rural elections. The government claimed that these guidelines would suffice and that there was therefore no need of a law prohibiting discrimination in rural elections. However, some villages overtly refused to change.²³ Women also feared that even villages that promised to permit women to participate might intimidate women from actually doing so. Fortunately, a provision added to the Sex Discrimination Ordinance over the objection of the government (discussed in Part V below) will prohibit discrimination in such elections when the Ordinance comes into force.²⁴

D. Other Examples of Discrimination under the Law

While the examples above focus on women in the New Territories, the law discriminates against women generally in Hong Kong. For example, Section 14 of the Marriage Ordinance provides that only a father may consent to the marriage of a child between the ages of 16 and 21. The mother may consent only if the father is dead or insane.²⁵

There are also a large number of laws in Hong Kong that restrict the hours that women can work and the nature of their work. Enacted as "regulations" (subsidiary legislation), these laws are normally referred to by the Hong Kong government as the "protective laws" because they purport to protect women from long hours of work and dangerous occupations. The government has often claimed that women workers support such legislation. In fact, many women's organizations (including the Hong Kong Women's Workers Association) are on record as arguing that such legislation should either be repealed or amended so that any protection extended to women should also be extended to men (unless the risk is truly particular to

23. See, *Democrats Attack Village Elections*, E. EXPRESS, Nov. 29, 1994, at 2; *Rebel Villagers Challenge Rules of New Democracy*, E. EXPRESS, Feb. 28, 1995, at 2.

24. Sex Discrimination Ordinance, *supra* note 1, § 35.

25. Marriage Ordinance, Cap. 181 LAWS OF HONG KONG § 14.

women, such as a risk that relates to childbearing).²⁶

Many of the restrictions on women's freedom to work are quite absurd. For example, one regulation provided that a man may work in an establishment that serves liquor once he obtains the age of 16, but a woman may not do so until she was 18.²⁷ Women are also forbidden to work underground, in any tunnelling operation, or in any "dangerous trade."²⁸ The law also forbids women to "clean any dangerous parts of any machinery or plant in the construction site while the machinery or plant is in motion."²⁹ (Apparently the law presumes that men are inherently more careful than women around moving machinery.)

Most of these regulations are based upon provisions of English law that have been repealed in England, which has adopted the principle that protective legislation is only justified for risks which affect women differently than men (such as jobs which could harm women's reproductive capabilities). They are plainly patronizing of women (indeed, many of the regulations expressly categorize women with "young persons"), and may be used by employers as an excuse to pay a woman less than a man.

As discussed in Part V below, it is hoped that these "protective regulations" will soon be repealed, as a result of the Sex Discrimination Ordinance.

E. Discrimination in Employment

As a result of a campaign in the 1960's by women civil servants, the Hong Kong government now follows a policy of equal pay and benefits for male and female civil servants.³⁰ However, the government has acknowledged that not all jobs in the civil service have been

26. See, e.g., PLATFORM OF THE HONG KONG COALITION OF WOMEN'S ORGANIZATIONS: THE NEED FOR LEGISLATION PROHIBITING DISCRIMINATION ON ALL GROUNDS RELATED TO GENDER, [hereinafter PLATFORM OF THE HONG KONG COALITION OF WOMEN'S ORGANIZATIONS], submitted to Hong Kong Legislative Council Bills Committee to Study the Equal Opportunities Bill, para. 3.7 (1995) (the document was endorsed by 13 women's organizations, including the Hong Kong Women's Workers Association).

27. Dutiable Commodities Regulations (Liquor) (Cap. 59, sub. leg.), THE LAWS OF HONG KONG.

28. Women and Young Persons Regulations (Industry) (Cap. 57, sub. leg.), THE LAWS OF HONG KONG Regulations 4, 5.

29. Construction Site Regulations (Safety) (Cap. 59, sub. leg.), THE LAWS OF HONG KONG Regulation 46.

30. See Tsang Gar-yin, *Chronology of Women's Achievements, in WOMEN IN HONG KONG*, *supra* note 6, at xiv; GREEN PAPER, *supra* note 13, para. 43.

open to women and that there is a significant degree of "occupational segregation" in the civil service.³¹

It is in the private sector where sex discrimination has been the most egregious in recent years. In the absence of any law prohibiting it, sex (and age) discrimination is very blatant in the Hong Kong employment market. For example, newspapers regularly publish job advertisements for "male engineers." Many advertisements also make clear the hierarchy that exists in the company, seeking, for example, a "male accounts supervisor" and a "female clerk."³² Studies of such advertisements have confirmed that the Hong Kong employment market is both horizontally and vertically segregated. Even in industries that tend to employ more women than men, managerial positions are more likely to be reserved for men.³³ There is also clear evidence of pay discrimination in Hong Kong, even when women are employed in the same positions as men.³⁴

In opposing anti-discrimination legislation, the Hong Kong government has often pointed out that anti-discrimination legislation is difficult to enforce and that countries with such legislation continue to experience income disparities between men and women.³⁵ But from the point of view of the Hong Kong women's movement, the fact that sex discrimination has been entirely legal in Hong Kong (and therefore quite overt) has been a major sore point. As explained in Part V (below), the recently enacted Sex Discrimination Ordinance will apply to private employers, but the government intends to delay the enforcement of most of the employment provisions.

31. GREEN PAPER, *supra* note 13, para. 43-44.

32. For examples of sexist advertisements, see Carole Petersen, *Failure of the Hong Kong Government to Enact Legislation Prohibiting Discrimination in Employment*, in HONG KONG COUNCIL OF WOMEN REPORT, *supra* note 3, at 2; Carole Petersen, *Women at Work: Government Green Paper*, THE EMPLOYMENT REPORT, vol. 1, no. 6, at 2-3 (1994).

33. See, e.g., Ho Suk Ching, *The Position of Women in the Labour Market in Hong Kong: A Content Analysis of the Recruitment Advertisements*, 10 LABOUR AND SOCIETY 334 (1985). For a general discussion of gender related segregation in the Hong Kong employment market, see Thomas W.P. Wong, *Women and Work: Opportunities and Experiences*, in WOMEN IN HONG KONG, *supra* note 6, at 47-66.

34. For an analysis of government reports showing pay discrimination within very specific job categories (such as "button sewer" and "head teller"), see Petersen, *supra* note 3, at 3-4; Petersen, *supra* note 32, at 2-3. Wong has observed income disparities even when differences in education and age (as a proxy for experience) are controlled. See Wong, *supra* note 33, at 62-63.

35. GREEN PAPER, *supra* note 13, at para. 48. The government also regularly claimed that the "tight labour market" in Hong Kong made it difficult for employers to adopt discriminatory employment practices. *Id.* While women's organizations disputed this, the recent increase in the unemployment rate in Hong Kong has, in any event, made this a rather moot point.

The women's movement has raised many other examples of sex discrimination in Hong Kong that will not be discussed in detail in this article, including the requirement of a "corroboration warning" in rape trials, the failure of the law adequately to protect women from domestic violence, and discrimination against foreign domestic helpers, the vast majority of whom are women.³⁶ In addition, the women's movement has recently waged a strong campaign for legislation to prohibit age discrimination.³⁷ Women argue that this is a form of sex discrimination in that it affects women disproportionately and perpetuates the sexist view that women employees should be primarily valued for their appearance. Job advertisements for positions that are traditionally held by women (such as clerical and receptionist positions) regularly exclude women over the age of 30. Even the government has been known to post advertisements for jobs that set absurdly low age limits.³⁸ As discussed in Section V below, the campaign for age discrimination legislation has drawn significant public support, but as yet has not been successful.

The next two sections of the article demonstrate how Hong Kong's anti-discrimination movement has been strengthened by two developments that are directly related to 1997: the broader human rights movement and the increased assertiveness of the Legislative Council.

III. RECOGNITION OF EQUALITY AS A HUMAN RIGHT

The Sino-British Joint Declaration (the treaty by which Britain agreed to return Hong Kong to China in 1997) was agreed to in December 1984 and ratified in May 1985.³⁹ Not surprisingly, the decision to return Hong Kong to China created great concerns relating to the protection of human rights in the territory. The Hong Kong

36. See HONG KONG COUNCIL OF WOMEN REPORT, *supra*, note 3; Harriet Samuels, *Women and the Law in Hong Kong: A Feminist Analysis*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 61-86 (Raymond Wacks ed., 1993).

37. Legislative Councillor Anna Wu, who introduced the Equal Opportunities Bill which would have prohibited age discrimination, during a rally received over 2000 letters from women complaining of age discrimination.

38. In late 1993, an assistant from the office of Legislative Councillor Anna Wu photographed advertisements for temporary clerical positions in Government departments that specified a maximum age, such as 40, 35, 30, and even 24 years of age.

39. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, signed in Beijing on December 19, 1984 and entered into force on May 27, 1985, with the exchange of instruments of ratification [hereinafter, Joint Declaration].

people were given no opportunity to vote on whether they wanted to be returned to China,⁴⁰ although it was widely known at the time that most would have preferred to remain a British dependent territory.⁴¹

The Joint Declaration contains several promises designed to reassure Hong Kong people that their way of life will be maintained after 1997. For example, it states that the Special Administrative Region of Hong Kong will enjoy a "high degree of autonomy" from China's national government and that Hong Kong will retain (for at least 50 years) the same legal and economic systems, rights and freedoms, and basic way of life that existed in Hong Kong prior to 1997.⁴² These statements are also repeated in the Basic Law, which was promulgated by the National People's Congress (China's national legislature) and will serve as the mini-constitution of Hong Kong after 1997.⁴³

Not surprisingly, these promises did not alleviate the concerns of the Hong Kong people. Many feared that the Joint Declaration and Basic Law would not be adhered to. In addition, those familiar with Hong Kong law were concerned that even if the laws that existed in 1984 were maintained after 1997, they would not provide adequate protection from the Chinese government. Indeed, the laws of Hong Kong gave the British colonial government enormous powers, which could easily be subject to abuse after 1997.⁴⁴

Public concern reached its height in the summer of 1989, immediately after the massacre in Beijing's Tiananmen Square. In Hong Kong, more than one million people (almost 20% of the population) marched in the streets in condemnation of the massacre.

40. NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 9 (5th ed. 1991).

41. For example, a telephone survey conducted in 1982 revealed that 70% of respondents preferred to maintain the status quo and an additional 15% preferred that Hong Kong become a British "trust territory". Only 4% preferred that Hong Kong be returned to China. For a summary of this and other opinion polls conducted during the Sino-British negotiations on Hong Kong's status after 1997, see JOSEPH Y.S. CHENG, *HONG KONG IN SEARCH OF A FUTURE* ch. 3 (1984).

42. Joint Declaration, *supra* note 39, art. 3.

43. BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, adopted on April 4, 1990 by the Seventh National People's Republic of China at its Third Session, arts. 2, 5, 8 [hereinafter, BASIC LAW].

44. For a discussion of controls on freedom of expression and assembly under Hong Kong colonial law, see Yash Ghai, *Freedom of Expression*, in *HUMAN RIGHTS IN HONG KONG* ch. 11 (Raymond Wacks ed., 1992); Roda Mushkat, *Peaceful Assembly*, in *HUMAN RIGHTS IN HONG KONG* ch. 12 (Raymond Wacks ed., 1992).

The Chinese government reacted to these protests by accusing Hong Kong of having instigated the pro-democracy movement in China and acting as a "base for subversion" (a cruel irony in view of the political passivism of most Hong Kong people up to that time). Not surprisingly, public confidence in the future of Hong Kong after 1997 "sank to an all-time low."⁴⁵

Caught in the middle of this panic were the Hong Kong and British Governments. They were limited in what they could do to restore public confidence. There was no changing the Joint Declaration, which had been ratified by both governments in 1985. The Basic Law was still in the drafting process, but was under tight control of the Chinese central government.⁴⁶

One thing that the Hong Kong government could do was to introduce domestic human rights legislation. Demands for a Hong Kong Bill of Rights had been made prior to 1989.⁴⁷ But it was not until after the Tiananmen massacre that the proposal was endorsed by the government. The Governor announced in October 1989 that the administration would move quickly to draft a bill for public consultation. The first draft of the bill was publicly released in March 1990 and the Bill was introduced into the Legislative Council in July 1990. After further consultation and debate in the Legislative Council, the Bill of Rights Ordinance was enacted, in July 1991.

In drafting the proposed Bill of Rights, the Hong Kong government used the International Covenant on Civil and Political Rights (ICCPR) as its model. The ICCPR had applied to Hong Kong by virtue of the United Kingdom's ratification since 1976 and the enactment of domestic legislation could be viewed as a fulfillment of the obligation of the British and Hong Kong governments to enforce the Covenant in the territory. But the main reason for choosing the ICCPR as the model was the fact that the Chinese government had already agreed in the Joint Declaration that the provisions of the ICCPR "as applied to Hong Kong shall remain in force."⁴⁸ The two drafts of the Basic Law that had been published at that time (as well as the final version) further stated that the provisions of the ICCPR

45. MINERS, *supra* note 40, at 27.

46. See Ming K. Chan, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90*, in *THE HONG KONG BASIC LAW: BLUEPRINT FOR STABILITY AND PROSPERITY UNDER CHINESE SOVEREIGNTY?* 7-9 (Ming Chan & David J. Clark eds., 1991).

47. For a history of the campaign for a Hong Kong Bill of Rights, see Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, in *HUMAN RIGHTS IN HONG KONG* 63-76 (Raymond Wacks ed., 1992).

48. Joint Declaration, *supra* note 39, annex I, § XIII.

“as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.”⁴⁹ Thus, the Hong Kong government hoped that China would find it more difficult to repeal a bill that essentially repeated the rights already guaranteed in the Basic Law by its reference to the ICCPR.⁵⁰

Most of the “rights” articulated in the ICCPR address issues directly related to freedom—freedom of speech, of association, of movement, etc. But the ICCPR also contains three articles prohibiting discrimination. Article 2, Paragraph 1 requires state parties to ensure equal enjoyment of the rights recognized in the Covenant itself. Article 3 specifically prohibits any discrimination on the ground of sex in the enjoyment of the rights provided in the Covenant. These two provisions were replicated in both the draft and the final version of the Hong Kong Bill of Rights Ordinance, which prohibits (at Part II, Article 1) discrimination in the enjoyment of the rights recognized by the Bill of Rights.

More importantly, however, the ICCPR also provides protection against discrimination in areas other than the specific rights recognized elsewhere in the Covenant. Article 26 states:

- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This language was copied (without amendment) in both the draft and the final version of the Hong Kong Bill of Rights Ordinance (at Part II, Article 22). Thus, the Hong Kong women’s movement viewed the Bill of Rights Ordinance, throughout the consultation process, as a potentially powerful weapon against discrimination. For example, women hoped to use the proposed bill to challenge the laws that discriminated against women, such as the law (discussed in Part II

49. BASIC LAW, *supra* note 43, art. 39. This language appeared at Article 39 of the February 1989 draft and at Article 38 of the April 1988 draft. See THE HONG KONG BASIC LAW: BLUEPRINT FOR ‘STABILITY AND PROSPERITY’ UNDER CHINESE SOVEREIGNTY?, *supra* note 46, at 73, 150, 176.

50. China’s opposition to the Bill of Rights and its present threat to amend it after 1997 is discussed below in part VI.

above) that prohibited women from inheriting most of the land in the New Territories. Women were encouraged in this expectation by the fact that the proposed Bill of Rights clearly applied to the laws of Hong Kong. With regard to pre-existing legislation, Section 3 provided:

- (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
- (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.⁵¹

Thus, courts would have the obligation to interpret pre-existing legislation in a manner that is consistent with the Bill of Rights, and should this prove impossible, to declare the offending provision invalid.

With respect to legislation enacted after the Bill of Rights Ordinance, the drafters were required to adopt a different approach. Under the Colonial Laws Validity Act 1865 (an Act of British Parliament that applies to Hong Kong), only a representative colonial legislature has the power to enact a law that affects its own constitution.⁵² At the time the Bill of Rights was enacted, in June 1991, the Hong Kong legislature clearly was not representative.⁵³ Thus, a Bill of Rights Ordinance that purported to be superior to future legislation, would have likely violated the Colonial Laws Validity Act, as it would have been an attempt to restrict the powers of the legislature.

It was ultimately decided that the Letters Patent (the colonial Constitution of Hong Kong, which presently empowers the Hong Kong legislature, but will be of no effect after July 1, 1997) would be amended by the British government so as to provide that "No law

51. Hong Kong Bill of Rights Bill 1990, HONG KONG GOVERNMENT GAZETTE, vol. CXXXII, no. 29, Legal Supp. no. 3, C776-C811, at C784 (July 20, 1990).

52. Colonial Laws Validity Act, 1865, 28 & 29 Vict. c. 63, §§ 1, 5.

53. Under the Letters Patent, the colonial Constitution of Hong Kong, the legislature is the "Governor, by and with the advice and consent of the Legislative Council". HONG KONG LETTERS PATENT 1917-1993, art. VII(1) [hereinafter LETTERS PATENT]. The Governor is appointed by the British Government and in July 1991 the Legislative Council was constituted as follows: 11 appointed "officials" (officers in the government); 20 appointed non-governmental members; 14 members elected by "functional constituencies" (elitist business and professional groups) and 12 indirectly elected members. The first directly elected seats were introduced in the September 1991 elections. The appointed seats were abolished in September 1995, and now all of the seats are "elected", although the majority of seats still are not directly elected from geographic constituencies. However, the functional constituencies have been broadened so as to include all working people in Hong Kong.

of Hong Kong shall be made . . . that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with [the ICCPR]."⁵⁴ For continuity, Section 4 of the Bill of Rights Ordinance, which refers to the interpretation of legislation enacted after the Ordinance, provides that such legislation will be construed, to the extent possible, so as to be consistent with the ICCPR. By referring to the ICCPR, rather than the Bill of Rights itself, the British and Hong Kong governments hoped to provide continuity through 1997. For (as noted above) both the Joint Declaration and the Basic Law provide for the continued application of the ICCPR to Hong Kong after 1997.

Women's organizations in Hong Kong recognized that the proposed Bill of Rights could be used as a weapon against discrimination. Women thus actively participated in the Bill of Rights consultation process and several organizations made written or oral submissions on the content of the proposed bill.⁵⁵ Not surprisingly, women found themselves at odds with the Heung Yee Kuk (the male-dominated group that advises the government on the New Territories) and also with the local business community.

Almost as soon as the draft Bill of Rights was released for public consultation, the Heung Yee Kuk began lobbying for an exemption for the "traditional rights" of males in the New Territories, including male-only inheritance of land and the government's Small House Policy.⁵⁶ The Heung Yee Kuk made the usual arguments (e.g., that any reform of the male-dominated system in the New Territories would destroy the fabric of society in the New Territories villages). It also argued that an exemption was necessary to comply with the Joint Declaration and Basic Law (which contain general promises to preserve the "lawful traditional rights" of New Territories indigenous residents, but do not specifically preserve the exclusion of

54.*Id.* art. VII(3). This amendment came into force on June 8, 1991, the same day that the Bill of Rights Ordinance came into force.

55. For example, during consultation on the proposed Bill of Rights, the Hong Kong Council of Women made written and oral submissions to the Hong Kong Government and the Legislative Council. See *Submission on the Bill of Rights*, HONG KONG COUNCIL OF WOMEN NEWSLETTER (Hong Kong Council of Women, Hong Kong), April-June 1990, at app. A. During this period the Council also appeared (together with other women's organizations) before the Legislative Council's Ad Hoc Group on the Draft Hong Kong Bill of Rights and distributed a report criticizing the Hong Kong government for its failure to comply with the anti-discrimination provisions of the ICCPR. See HONG KONG COUNCIL OF WOMEN REPORT, *supra* note 3, at 4.

56. See *Overhauled Bill of Rights Stumbles Across Tradition*, HONG KONG STANDARD, June 20, 1990; *Fight to Save Inheritance for Villagers*, S. CHINA MORNING POST, June 28, 1990, at 6.

women from these rights).⁵⁷

To counter the Heung Yee Kuk, women activists argued that an exemption for laws and policies that discriminated against women would mean that women were effectively being left out of the Bill of Rights. Women also took the debate further, arguing that even without the exemption, the draft Bill of Rights was inadequate. They lobbied for the enactment of detailed anti-discrimination legislation, for the creation of a women's commission, and for the ratification of CEDAW.⁵⁸ Thus the women's movement used the debate over the exemption requested by the Heung Yee Kuk to publicize sex discrimination in general and to criticize the government's failure to address it.⁵⁹

In the end, the Heung Yee Kuk failed to convince the Hong Kong government and Legislative Council that an exemption should be inserted into the Bill of Rights. The government tried to avoid a direct confrontation with the Heung Yee Kuk by stating that different treatment did not necessarily constitute discrimination and that it was therefore unclear that there was any "inconsistency between male line inheritance and the provisions for sexual equality in the bill."⁶⁰ However, the government also stated that the issue would ultimately be left to the courts and that the law requiring male-only inheritance would be reformed if a court determined that it violated the Bill of Rights.⁶¹

Women had to lobby for an additional four years for the repeal of the law prohibiting female inheritance of land. And (as discussed below) the Bill of Rights itself ultimately had no direct impact upon that reform. Nonetheless, the Heung Yee Kuk's failure to obtain an exemption represented an important victory for women. It was the first sign that the laws prohibiting female inheritance were vulnerable to reform. It also gave recognition and legitimacy to women's claim that the right to equality was an important human right, one that

57. See BASIC LAW, *supra* note 43, art. 40. It is sometimes argued that Annex III to the Joint Declaration specifically protects male-only inheritance of land. But a close reading of this Annex reveals that it simply refers to the rent on leases to land which were granted by the Hong Kong government.

58. See *Women Petition for Equal Rights in the New Territories*, S. CHINA MORNING POST, July 11, 1990, at 2. See also *supra* note 55, at 23.

59. See Debate on the Bill of Rights in the Legislative Council, OFFICIAL REPORTS OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL, June 27, 1990; Andrew Byrnes, *Women's Equality Low Priority in Promised New Bill for HK*, S. CHINA MORNING POST, Dec. 3, 1989, at 17.

60. *Decision on Rights Bill Up to Courts*, HONG KONG STANDARD, July 18, 1990.

61. *Id.*

deserved its place in the Hong Kong Bill of Rights and the human rights movement.

Women were less successful with respect to their second major demand relating to the Bill of Rights: that it should bind private persons and thereby prohibit discrimination in the private sector. The initial draft of the Bill of Rights that was published, in March 1990, for consultation did, in fact, apply to private persons. Section 7 of the proposed Bill stated in relevant part:

- (1) This Ordinance binds the Government and all authorities and persons, whether acting in a private or public capacity.
- (2) In subsection (1) "person" includes any body of persons, corporate or unincorporated.⁶²

The decision to make the draft Bill of Rights apply to private parties was not inadvertent. As one of the drafters stated during the consultation period: "We have created [in Section 7] new rights and obligations which affect personal relationships between private citizens. We felt here that by binding everyone in Hong Kong we would help to secure the health and vigour of the Bill of Rights."⁶³

It is unlikely that the drafters were actually hoping to make the Bill of Rights a weapon against discrimination in the private sector (as that would have directly contradicted the government's established policies at that time). Rather, the motivation behind this proposed "universal application" of the Bill of Rights was probably the drafters' desire to apply the law to agents of the Chinese government who might be present in Hong Kong after 1997, but not considered a part of the local Hong Kong government (such as members of the People's Liberation Army stationed in Hong Kong by the central authorities).

However, the Hong Kong women's movement and the local business community quickly recognized the potential for the draft Bill of Rights to affect private discrimination and a vigorous debate

62. Hong Kong Bill of Rights Bill 1990, *supra* note 51, C776, C786. The one exception to this general rule appeared in subsection (3) of Section 7, which stated that Article 14 of the Bill of Rights, relating to privacy, would only bind the government and public authorities. Subsection (4) provided that subsection (3) could be repealed by the Governor in Council. *Id.*

63. Phyllip J. Dykes, *The Bill of Rights: Some Basic Constitutional Considerations*, in HONG KONG BILL OF RIGHTS: PROBLEMS AND PROSPECTS 22-23 (paper delivered at a seminar on March 31, 1990) (Raymond Wacks ed., 1990). Mr. Dykes was Assistant Solicitor General of Hong Kong at the time.

ensued. Women's organizations were encouraged by the fact that the version of the Bill of Rights introduced into the Legislative Council (in July 1990) still contained the language applying to private persons. But from July 1990 to July 1991 (when the Bill was finally enacted), the business community lobbied hard against this provision. The debate on this issue was, however, far more subtle than the debate concerning the Heung Yee Kuk's request for an exemption. In general, those who opposed private application of the Bill of Rights were careful not to oppose the entire concept of anti-discrimination laws. Rather, they argued that Article 2 of the Bill of Rights (the broadest provision relating to discrimination in the Bill) was too vague to be fairly enforced against private persons. They suggested that if Hong Kong wished to enact anti-discrimination legislation that applied to the private sector, it should do so not through the Bill of Rights, but rather with detailed legislation.⁶⁴

Of course there was merit to this argument. Article 26 of the ICCPR (on which Article 22 of the Bill of Rights was based) was not designed to be an anti-discrimination law. Rather it was intended to obligate state parties to the ICCPR to enact domestic laws protecting citizens from discrimination. Indeed, since Article 22 of the Bill of Rights does not state "discrimination is prohibited," but rather that "the law shall prohibit discrimination," it was argued by some local experts that even if the Bill of Rights did apply to everyone, Article 22 would not state an obligation that could be enforced against private persons, because such persons do not enact laws.⁶⁵ But from the point of view of the women's movement, it was still important to try to maintain the universal application of the Bill of Rights, if only to use it later as an argument in favor of the enactment of detailed anti-discrimination legislation.

Ultimately, however, the conservative viewpoint prevailed. When the Bill of Rights was enacted in July 1991, Section 7 was amended so as to state in relevant part:

- (1) This Ordinance binds only—
 - (a) the Government and all public authorities; and

64. See Legislative Council's debate on the Bill of Rights Bill, OFFICIAL REPORT OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL, June 5, 1991, at 2307-39; see also Andrew Byrnes, *The Hong Kong Bill of Rights and Relations Between Private Individuals*, in THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 71, 83-88 (Johannes Chan & Yashi Ghai eds., 1993).

65. See, e.g., Nihal Jayawickrama, *The Content of the Bill of Rights*, in HONG KONG BILL OF RIGHTS: PROBLEMS AND PROSPECTS 43 (paper delivered at a seminar on March 31, 1990) (Raymond Wacks ed., 1990).

- (b) any person acting on behalf of the Government or a public authority.

While women's organizations were clearly disappointed by this amendment, they were consoled somewhat by two facts. First, when the language providing for application to private persons was removed, it was strongly implied (in the Legislative Council debate) that the Hong Kong government would commence a study of discrimination and propose detailed anti-discrimination legislation.⁶⁶ Second, women were encouraged by the fact that Section 3 of the Bill of Rights was not amended, and thus still provided that "[a]ll pre-existing legislation that does not admit of a construction consistent with [the Bill of Rights] Ordinance is, to the extent of the inconsistency, repealed." Thus, women hoped to use the Bill of Rights to challenge discriminatory laws, (such as the law prohibiting female inheritance of much of the land in the New Territories) as well as discriminatory acts by the government.

Unfortunately, the Bill of Rights Ordinance proved far less effective against discrimination than women had hoped. Three factors limited the impact of the Bill of Rights. First, in November 1991 (less than five months after enactment of the Bill of Rights), in the case of *Tam Hing-yeo v. Wu Tai-wai*, the Hong Kong Court of Appeal overruled a decision of the High Court and held that Section 3 of the Bill of Rights Ordinance (which repeals inconsistent pre-existing legislation) is limited by Section 7 (which, as a result of the last-minute amendment, provides that the Bill of Rights Ordinance binds only the government and public authorities). The Court of Appeal thus held that the Bill of Rights cannot be applied to a dispute between private parties even where one party alleges that legislation that affects their dispute violates the Bill of Rights.⁶⁷

The Court of Appeal stated that it found no "conceptual difficulty" with the fact that its judgment would mean that pre-existing legislation could be held to have been repealed by Section 3 of the Bill of Rights if the Government sought to rely upon it, but not with respect to private citizens who may wish to rely upon it.⁶⁸ The Court of Appeal acknowledged, however, that the inevitable result of

66. See, e.g., the Chief Secretary's speech to the Legislative Council on the second reading of the Bill of Rights Bill, OFFICIAL REPORT OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL, June 5, 1991, at 2337.

67. *Tam Hing-yeo v. Wu Tai-wai*, 1 H.K.L.R. 185 (Cons V.P., Clough and MacDougall J.J.A. 1992). The Court of Appeal reversed the judgment of Judge Downey below that the Bill of Rights applied to all legislation.

68. *Id.* at 189.

its interpretation was that the Bill of Rights would fail to comply with the intention expressed in its preamble: "to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights."⁶⁹

There is nothing in the legislative history to indicate that the amendment to Section 7 was intended to restrict the operation of Section 3 of the Ordinance. Thus, the Court of Appeal's decision came as a surprise to the women's movement and to others who had assumed that the Bill of Rights could be used to challenge legislation generally. The decision has been criticized in Hong Kong,⁷⁰ but will continue to bind Hong Kong courts unless overruled by the Privy Council or the legislature.⁷¹ This decision has certainly discouraged women from challenging discriminatory laws that affect private relations. For example, the legislation that applied Chinese customary law to New Territories land would very likely have been held to be beyond the scope of the Bill of Rights, as any challenge would have been brought in the context of a civil dispute between a woman and the nearest male heir.

The second reason that the Bill of Rights had less impact on sex discrimination than women had hoped is a very pragmatic one: money. Legal fees in Hong Kong are among the highest in the world. Ethical rules prohibit lawyers from operating on a contingency fee basis and legal aid is extremely difficult to obtain in non-criminal matters. Moreover, the costs rules are the opposite of those in the United States, so that if a plaintiff brings a legal action and loses, she is likely to be held liable for the defendant's legal fees as well as her own. These considerations, combined with the limitations placed on the Bill of Rights by the decision in *Tam Hing-ye*, have greatly restricted the impact of the Hong Kong Bill of Rights Ordinance in civil law.⁷²

The third reason that the Bill of Rights did little to alleviate

69. *Id.*

70. See, e.g., Andrew Byrnes & Johannes Chan, BILL OF RIGHTS BULLETIN, vol. 1, no. 2, 1-4 (1991).

71. Had it been enacted, Section 242 of the Equal Opportunities Bill 1994, HONG KONG GOVERNMENT GAZETTE, Legal Supp. no. 3, July 1, 1994 [hereinafter Equal Opportunities Bill], introduced by Anna Wu (discussed in part V below) would have overruled the decision in *Tam Hing-ye*. Thus far, the Hong Kong government has declined to introduce a bill to make the Bill of Rights apply to all legislation.

72. See Gladys Li, *The Non-impact of the Bill of Rights in the Civil Area*, in HONG KONG BILL OF RIGHTS: 1991-1994 AND BEYOND 45, 45-46 (George Edwards & Andrew Byrnes eds., 1995).

discrimination is that the Hong Kong government itself refused to take the initiative to comply with Article 22. The government apparently realized that victims of discrimination were unlikely to have the resources to mount a legal challenge and so felt no need to amend discriminatory legislation or change discriminatory policies. Thus, the law prohibiting female inheritance of New Territories land, the "protective" regulations, the Small House Policy and other examples of discrimination by the law and the Hong Kong government were largely unaffected by the Bill of Rights Ordinance.⁷³ Even relatively non-controversial reforms were not made. For example, the government failed even to propose an amendment to the Marriage Ordinance (which, as noted in Part II, recognizes only the father's consent for a child to marry between the ages of 16 and 21).⁷⁴

The women's movement criticized the government's continuing inaction, accusing it of renegeing on the implied promise to take action against discrimination that was made when the Bill of Rights was limited to government and public authorities. The government's only response was a cosmetic one. In the spring of 1992, the government announced that it was creating an "Inter-departmental Working Group on Sex Discrimination."⁷⁵ The announced terms of reference of the group were to ascertain the extent to which discrimination against women is a problem in Hong Kong, and to consider what government measures, if any, should be adopted to address sex discrimination.⁷⁶

73. For further discussion of the government's failure to comply with Article 22 of the Bill of Rights, see Carole Petersen, *The Hong Kong Bill of Rights and Women: A Bait and Switch?*, in HONG KONG BILL OF RIGHTS: TWO YEARS ON 95, 95-113 (Fong, Byrnes, & Edwards eds., 1993).

74. In 1993 the Government stated that it was preparing to introduce an amendment to this Ordinance to permit consent for marriage of a child between 16 and 21 to be given by either parent. GREEN PAPER, *supra* note 13, at 33, para. 95. But no amendment was introduced in the 1991-95 legislative term and in the summer of 1995 the government stated only that "consideration is being given to requiring the consent of both parents." FOURTH PERIODIC REPORT BY HONG KONG UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1995), at 146, para. 279.

75. The group was chaired by the Secretary for Education and Manpower and included representatives from seven other policy branches and departments: the Constitutional Affairs Branch, the Health and Welfare Branch, the Economic Services Branch, the Civil Service Branch, the City and New Territories Administration, the Labour Department and the Legal Department. WORKING GROUP ON THE DISCRIMINATION PROBLEM IN EMPLOYMENT TERMS OF REFERENCE (Dec. 1992) (on file with author).

76. *Id.* The Terms of Reference also state that the Working Group would advise on whether CEDAW should be extended to Hong Kong. However, it is clear from the findings of the Working Group (discussed below) that it did not conduct any actual study of CEDAW or its implications for Hong Kong. HONG KONG GOVERNMENT SECRETARIAT, CONSTITUTIONAL AFFAIRS, FINDINGS OF WORKING GROUP ON SEX DISCRIMINATION IN EMPLOYMENT (Dec.

Women's organizations that met with representatives of this Working Group were convinced that the results of its "study" were pre-ordained and would basically repeat the government's longstanding position that discrimination was not a significant problem in Hong Kong and required no real attention.⁷⁷ The written Findings of the Working Group confirmed that this was true. The Findings consisted of six double-spaced pages, with no footnotes or specific sources cited other than the 1981 and 1991 Population Censuses. The Working Group referred only to unnamed "surveys," which it claimed showed that only a small proportion of Hong Kong women perceive themselves to be victims of discrimination. It also noted that the government had not received many individual complaints of employment discrimination (which was not surprising given that such discrimination was a perfectly legal employment practice and there was therefore no government department to receive such complaints). Although the Working Group acknowledged the existence of sex-specific job advertisements and a high concentration of women in low-paying jobs, it apparently viewed these facts as insignificant. Perhaps most disappointing to the women's movement was the Working Group's refusal to study the issue any further, concluding that the extent of employment discrimination would be "very difficult to ascertain since many factors including judgmental ones" (it mentions differences in education, experience and productivity as such factors) could give rise to different treatment of male and female workers.⁷⁸ Thus, the Working Group essentially repeated the government's longstanding view that gender-specific job advertisements and differential pay are not necessarily evidence of discrimination as they can likely be explained by women's inferior qualifications.

In all, the Working Group used three paragraphs to justify its conclusion that "the problem [of sex discrimination] is not serious in Hong Kong."⁷⁹ The Working Group then proceeded to recommend that anti-discrimination legislation should not be introduced. It

1992) [hereinafter FINDINGS OF WORKING GROUP].

77. The author met with representatives of the Working Group in the early stages of its "deliberations." The two comments that were repeatedly made by the governmental representatives in that meeting were "so hard to measure" (regarding the extent of discrimination) and "so hard to enforce" (regarding legislation prohibiting it). Of course it is also difficult to measure the extent of pollution, illegal drug smuggling, child abuse and a host of other evils, and it is difficult to enforce the laws against such acts. But this has not stopped society from legislating against them.

78. FINDINGS OF WORKING GROUP, *supra* note 76, para. 7.

79. *Id.* para. 8.

justified this recommendation with a two-page discussion in which it alleged, without citing any evidence or sources, that such legislation would likely have an "adverse impact" on the Hong Kong economy. Discrimination outside the area of employment (such as the prohibition of female inheritance of land and the Small House Policy) was not considered at all.

Given that this was the extent of the government's response to Article 22 of the Bill of Rights Ordinance, it is fair to conclude that the Ordinance was largely a symbolic achievement for the women's movement. Nonetheless, the debate surrounding the Bill of Rights had helped the anti-discrimination movement to raise awareness of discrimination, and to become better organized and more prominent within the Hong Kong community.⁸⁰ It also recognized equality as a human right and gave the anti-discrimination movement legal and moral legitimacy, something that previously had been sadly lacking. Finally, the Bill of Rights Ordinance greatly raised expectations among women, encouraging them to take full advantage of the other important development in Hong Kong during this period: the increasingly democratic Legislative Council.

IV. SUPPORT FOR EQUALITY IN THE LEGISLATIVE COUNCIL

Prior to the signing of the Joint Declaration, the Legislative Council was entirely appointed by the Governor. However, during the negotiation of the Joint Declaration, the British government made a commitment to introduce a more democratic government in Hong Kong,⁸¹ and the Joint Declaration itself promised that the legislature would be constituted by elections and that the executive branch would be accountable to the legislature.⁸² As a result, in 1985 the first elections were held for 24 of the 56 seats in the Legislative Council (the remainder continued to be appointed). Even these seats were not chosen by direct elections, but rather by a combination of indirect elections (in which members of District Boards and the Urban and Regional Councils voted) and "functional constituencies" (in which

80. During the debate on the Bill of Rights a number of local and expatriate women's groups began working together, submitting joint statements to government and the public. See, e.g., *WOMEN IN HONG KONG: A BROADSHEET* (1991) (published in Chinese and English by twelve women's organizations). This cooperation later developed into a formal Coalition of Women's Organizations which lobbied for a women's commission, anti-discrimination legislation, and the ratification of CEDAW.

81. See *MINERS*, *supra* note 40.

82. Joint Declaration, *supra* note 39, annex I.

members of elitist business and professional groups voted).

In 1991, the first direct elections were held for 18 of the 60 seats in the Legislative Council. The remaining seats were constituted as follows: 3 ex-officio seats (held by members of the Hong Kong government and therefore guaranteed government votes); 18 appointed members;⁸³ and 21 members elected by functional constituencies.

The limited increase in democracy in 1991 dramatically changed the role of the Legislative Council and its relationship to both the people and the executive branch. Under the colonial Constitution of Hong Kong, the legislature is actually not the Legislative Council, but rather the "Governor acting with the advice and consent of the Legislative Council."⁸⁴ Prior to the introduction of the elected seats, virtually all new bills were proposed by government policy branches and submitted to the Legislative Council only for debate, amendments, and approval. This was in part due to constitutional limitations on the law-making power of members of the Legislative Council,⁸⁵ but also reflected the fact that the members were accountable only to the colonial government and therefore were unlikely to propose any new legislation that would conflict with the government's agenda. With the introduction of the elected seats, the Legislative Council gained legitimacy in the eyes of the Hong Kong people and became more accountable to them. In turn, the entirely unelected executive branch of the Hong Kong government experienced a decrease in legitimacy. As a result, members of the Legislative Council became much more willing to question and challenge government policies.⁸⁶

The women's movement has taken full advantage of the increased responsiveness and assertiveness of the Legislative Council.

83. Traditionally, appointed members could be counted upon to vote with the government if urged to do so. But some appointed members have shown greater independence. For example, Anna Wu and Christine Loh, both Patten appointees during the 1991-95 term, introduced private members bills that directly challenged government's established policies. Loh was elected to one of the directly elected seats in the 1995 elections. Wu, a solicitor, chose not to stand for election in 1995.

84. LETTERS PATENT, *supra* note 53, art. VII.

85. HONG KONG ROYAL INSTRUCTIONS 1917-1993, cl. XXIV(2) [hereinafter ROYAL INSTRUCTIONS] provides that a non-governmental member of the Legislative Council may not introduce a bill that will place a charge upon the public revenue without the express permission of the Governor. As discussed below, the Hong Kong government used this provision to prevent Anna Wu from introducing her Human Rights and Equal Opportunities Commission Bill and from moving certain amendments to the Sex Discrimination Bill.

86. See generally KATHLEEN CHEEK-MILBY, A LEGISLATURE COMES OF AGE: HONG KONG'S SEARCH FOR INFLUENCE AND IDENTITY ch. 7 (1995).

When the first direct elections to the Council were being held, women's organizations targeted candidates and asked them to state their views on sex discrimination.⁸⁷ Although many initially had no position, the elected members quickly recognized the importance of courting the women's vote and many became strong advocates of women's rights, regularly clashing with the government's refusal to acknowledge or address discrimination. This led to three important achievements (discussed below): a Legislative Council motion calling for the ratification of CEDAW; the issuance of the "Green Paper" (the first formal consultative document on sex discrimination); and the repeal of the prohibition of female inheritance of land.

A. The Legislative Council's Endorsement of CEDAW

The Legislative Council's debate on CEDAW originated with Emily Lau, one of several legislators who became advocates for women's rights. When Lau was elected to one of the directly elected seats in September 1991, she was well-known as a proponent of civil liberties, but not as an advocate for equality rights. In October 1991, Lau spoke at a seminar organized by the Hong Kong Association of Business and Professional Women on the potential impact of the Bill of Rights on women. Her presentation was not specific to women and she conceded that she was not as well-informed about women's issues as she could be. But after listening to the other speakers and to the comments from the audience, Emily Lau volunteered to become a spokesperson for women's rights in the Legislative Council.

Lau kept her promise, with significant results. In November 1991, she helped to form an Ad Hoc Group in the Legislative Council to study women's issues, and in December 1992, she introduced the following motion for debate in the Legislative Council:

That this Council calls upon the Administration to support the extension to Hong Kong of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women and to request the British Government to take the necessary action to so extend the Convention forthwith.⁸⁸

Motion debates are one of the ways that the Legislative Council

87. See Tsang Gar-yin, *Chronology of Women's Achievements, in WOMEN IN HONG KONG* xvii (Veronica Pearson & Benjamin K.P. Leung, eds., 1995).

88. HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, Dec. 16, 1992, at 1451.

can try to influence government policies. In this case, Lau's motion directly challenged the government's long record of opposing the extension of CEDAW to Hong Kong. CEDAW was ratified by the United Kingdom in 1986, and it had extended it to a number of its dependent territories. But, at the request of the Hong Kong government, the Convention was not extended to Hong Kong. At the time, the Hong Kong government stated that it needed to study the implications of CEDAW before deciding whether, and on what terms, CEDAW should be extended to Hong Kong. In the late 1980's, women's organizations pressed the government to make a decision on CEDAW, but the government staunchly refused to do so. For example, in 1989, the Hong Kong government claimed that it had been "actively considering the application to Hong Kong" of CEDAW and that all "existing policies and legislation relevant to the question of equality between the sexes [were] being reviewed."⁸⁹ But two years later, it still had made no move to consult the public on the issue or to report on the progress of its "active review." In March 1991, five years after the United Kingdom's ratification of CEDAW, the Hong Kong government would only state that the "application of [CEDAW] to Hong Kong is still under consideration."⁹⁰

In fact it is likely that no real government study of CEDAW or its potential implications for Hong Kong was ongoing at this time. The Hong Kong government did not have to conduct a study to know that if CEDAW were extended to Hong Kong, it would have required major changes in Hong Kong's discriminatory laws and policies, as well as the enactment of domestic anti-discrimination legislation, something that the Hong Kong government staunchly opposed. The purported "active consideration" was thus simply a way of delaying (indefinitely if possible) the day when the government would have to admit that it opposed CEDAW and had no intention of taking action against sex discrimination in Hong Kong. This can be seen from the fact that the only document released by the government indicating any consideration of CEDAW is the Written Findings of the Inter-departmental Working Group (discussed above), which recommended (in two brief paragraphs) that CEDAW should not be extended to Hong Kong (because CEDAW would require anti-discrimination legislation, which the Working Group had already rejected).

The Legislative Council's motion debate on CEDAW proved to

89. THIRD PERIODIC REPORT BY HONG KONG UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, at para 26 (1989).

90. THIRD PERIODIC REPORT BY HONG KONG UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: AN UPDATE, at para. 89 (Mar. 1991).

be a major embarrassment to the government. Two ex-officio members (the Secretary for Education and Manpower and the Secretary for Constitutional Affairs) spoke in opposition to the motion. They cautioned that Hong Kong should not make a hasty decision on CEDAW and that "the administration doubts the wisdom of extending CEDAW to Hong Kong forthwith."⁹¹ The administration did not refer once to its "active review" of CEDAW, which it had claimed for the past six years to have been conducting. Instead it relied only upon the meager Findings of the Interdepartmental Working Group on Sex Discrimination, which the Hong Kong government had released just before the motion debate, apparently in the hope that it would justify the government's opposition to CEDAW.⁹²

The administration failed to persuade even one member. Every legislator present voted in favor of the motion except for the three ex-officio members (who, faced with certain defeat, chose to abstain). Many legislators made speeches in favor of the motion, citing detailed information on the extent of discrimination in Hong Kong and submissions that they had received from constituents and women's organizations. The speeches made clear that the legislators did not view CEDAW as merely a symbolic gesture. Rather, they called for the actual implementation of CEDAW through substantive reforms, including anti-discrimination legislation, a women's commission, and reform of discriminatory laws. Several of the speeches openly criticized the government's history of failing to acknowledge or address discrimination.⁹³

In the face of the unanimous vote of the Legislative Council (the only arguably representative body at that level of the Hong Kong legal system), the administration could not continue to do nothing about CEDAW. Yet it was not prepared to act upon the motion and request the British government to extend CEDAW to Hong Kong. And so the Hong Kong government chose to buy itself some additional time, by conducting public consultation on sex discrimination in Hong Kong. Thus, at the conclusion of the debate on Emily Lau's motion, the Government announced that it would issue, in

91. Speech by Secretary for Constitutional Affairs, HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, Dec. 16, 1992, at 1488.

92. Speech by Secretary for Education and Manpower, HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, Dec. 16, 1992, at 1456.

93. *See, e.g.*, the speeches of Emily Lau, Lee Wing-tat, and Martin Lee. HONG KONG LEGISLATIVE COUNCIL OFFICIAL RECORD OF PROCEEDINGS, Dec. 16, 1992, 1456-89.

1993, the Green Paper on Equal Opportunities for Women and Men.⁹⁴

B. *The Green Paper*

In the Hong Kong and English legal systems, a "Green Paper" is a formal consultative document used to consult the public on areas of social concern or proposed legislation. When the government announced that it would issue a Green Paper on sex discrimination, women's organizations were encouraged but also suspicious. Given the government's long opposition to CEDAW (and the fact that it had not thought it necessary to conduct a formal consultation when other international human rights conventions were extended to Hong Kong), women naturally feared that the government intended to use the Green Paper merely to delay CEDAW. They also feared that the government would write a misleading Green Paper, in order to persuade the public of the government's own views.

The Department of Home Affairs took close to nine months to prepare the Green Paper. It was issued (in Chinese and English) in August 1993, with December 1993 as the deadline for members of the public to respond. Women's concerns were borne out, in that the government did its best to downplay the extent of discrimination in the Green Paper. For example, the issue of discrimination in the New Territories received almost no coverage, despite the fact that some of the most blatant and severe examples of discrimination could be found there. Although the Green Paper was 56 pages long (and contained nine chapters) no one chapter was devoted to the New Territories. Instead, the government buried New Territories issues in a variety of different chapters. For example, the legal prohibition on female inheritance of land and the Small House Policy were buried in the chapter entitled "Private, Family, and Financial Matters." This was a rather obvious attempt to characterize these examples of discrimination as "private" practices, although the prohibition on female inheritance was contained in an ordinance enforced in the courts of Hong Kong and the Small House Policy is a government welfare policy that benefits only men.

Readers who managed to locate the reference to male-only inheritance of land found a cursory description of the issue, with no reference to the fact that this aspect of Chinese customary law had been reformed in every other Chinese society or to the hardships that

94. GREEN PAPER, *supra*, note 13.

it caused. Indeed, the combined discussion of land inheritance and the Small House Policy consisted of less than two pages. Even more shocking, the government did not disclose the options for reform that were being considered by the government (although it was later revealed that at the time the Green Paper was issued, the government was already working on a bill that would restrict the ban on female inheritance of land to rural land).⁹⁵

The Green Paper also made a number of obviously biased statements regarding employment discrimination in Hong Kong.⁹⁶ For example, the government asserted that the persistent differential between male and female earnings in Hong Kong could be explained by the following "variables . . . (a) differences in specific job requirements; (b) differences in physical or other capabilities; (c) differences in education attainment; and (d) differences in length of service and experience."⁹⁷ Thus, the government refused to acknowledge the possibility that sex discrimination could be even partly to blame for the fact that women earn less than men. No evidence was cited for this list of "variables," and the government was later forced to admit that it had no evidence supporting the claim that these factors could explain any (let alone all) of the male/female wage differentials in Hong Kong.⁹⁸

The Green Paper also seriously misrepresented the effect of the Bill of Rights Ordinance, stating that the effect of the Ordinance and Article VII(3) of the Letters Patent was "to ensure that Hong Kong laws are not . . . discriminatory against women."⁹⁹ This was simply wrong. The Court of Appeal had already held, in *Tam Hing-ye v. Wu Tai-wai*, that the Bill of Rights Ordinance could not be used to challenge pre-existing legislation in a dispute between private parties.¹⁰⁰ Moreover, it was obvious in 1993 that many Hong Kong laws continued to discriminate against women, the most blatant example being the legal prohibition on female inheritance of most of

95. See discussion *infra* part IV.C.

96. For examples of these biased statements and the government's inability to substantiate them, see Carole J. Petersen, *The Green Paper on Equal Opportunities for Women and Men: An Exercise in Consultation or Evasion?*, 24 HONG KONG L.J. 8, 11-13 (1994).

97. GREEN PAPER, *supra* note 13, at 17.

98. This was admitted by the Secretary for Home Affairs in response to a question by the Hong Kong Association of Business and Professional Women at a meeting held on September 29, 1993. A follow-up letter to government repeating the question also generated no supporting evidence.

99. GREEN PAPER, *supra* note 13, at 51.

100. See *supra* text accompanying notes 67-71.

the land in the New Territories.

Fortunately, the public read the Green Paper with a skeptical eye. Despite the government's effort to understate the extent of discrimination, the submissions made in response to the Green Paper indicated significant public support for action against sex discrimination, including the extension of CEDAW to Hong Kong.¹⁰¹ The government conceded this at the end of the consultation period, admitting that in light of the public's response "[it] would be difficult for [the government] to come up with credible arguments not to extend CEDAW."¹⁰² Despite this admission (in December 1993), as of November 1995 CEDAW still had not been extended to Hong Kong (and women's organizations are now concerned that it might not be extended prior to 1997).¹⁰³ Nonetheless, the Green Paper consultation exercise was an important step. As demonstrated below, it gave the women's movement and legislators working on its behalf significant support for law reform to eliminate discrimination.

C. *The New Territories Land (Exemption) Bill*

The repeal of the legal prohibition on female inheritance of land, achieved in 1994, clearly demonstrates the impact of the more assertive and responsive Legislative Council. The Council refused to approve a government proposal that would have merely narrowed the scope of the law, choosing instead to amend the government's bill so as to repeal the law entirely.

Although the government's Green Paper was entirely silent on any specific proposals to reform male-only inheritance, less than three

101. See HONG KONG GOVERNMENT, GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN: COMPENDIUM OF SUBMISSIONS [hereinafter COMPENDIUM] (1994). Although the Government received 1,161 submissions and 52,610 signatures, not all were published. *Id.* at 1.

102. S.Y. Yue, *UN Convention to Be Adopted*, S. CHINA MORNING POST, Dec. 31, 1993, at 2 (quoting Secretary for Home Affairs Michael Suen Ming-yeung).

103. The Hong Kong government has stated (and representatives of the British government have confirmed) that the reason that CEDAW still has not been extended to Hong Kong is that the British government wanted to complete a review of its own reservations to CEDAW before considering the reservations that should be entered for Hong Kong. (For example, the Hong Kong government has indicated that it will insist upon a reservation for the Small House Policy.) Once this is complete, CEDAW will also have to be considered by the Joint Liaison Group, which could delay ratification beyond July 1997. (Meeting with Erica Hui, Principal Secretary for Home Affairs, Hong Kong Government and with members of the British delegation to the United Nations Fourth World Conference on Women, Beijing, September 1995.)

months after the Green Paper was issued (and indeed *during* the consultation period on the Green Paper), the government introduced the New Territories Land (Exemption) Bill. This bill did not propose anything approaching a comprehensive reform of sex discrimination in the New Territories. Rather, it was designed to provide the government with a "quick fix" for some of the more embarrassing results of the New Territories Ordinance (discussed in Part II above).

As drafted by the government, the bill would have continued the legal prohibition on female succession to rural land (although it would have made it easier for land owners to obtain an exemption from the law). But the bill would have declared, with retrospective application, that the prohibition on female inheritance of New Territories land did not apply to urban land. The purpose of this proposal was to alleviate the uncertainties in title that had been created when it was revealed that exemptions from the New Territories Ordinance had not been obtained for modern developments in the New Towns. Many women had inherited apartments in these developments (under the assumption that an exemption had been obtained) and now feared that their title could be challenged by the nearest male heir. The bill sought to remove these uncertainties by retrospectively exempting all urban land from the ban on female inheritance.

The government's timing of this bill was probably carefully planned. It introduced the bill after the Green Paper was published, but before the Green Paper consultation period was complete. It thus avoided disclosing its specific proposal in the Green Paper (although it must have had it in mind when the Green Paper was published)¹⁰⁴ and managed to introduce the bill into the Legislative Council before having to acknowledge the views expressed in response to the Green Paper (which the government knew would almost certainly call for more comprehensive reform). Thus, the government hoped to modify the law quickly, in a way that would calm a large percentage of the public (those living on "urban land" in the New Territories) and yet not outrage the Heung Yee Kuk. Indeed, the Heung Yee Kuk actually supported the government's proposal, no doubt because it realized that in the new political climate, this represented its only

104. Prior to introducing this bill, the government would have been required to brief the Executive Council on the proposal, as well as on any alternative proposals, then draft the bill and circulate it to the relevant policy departments for comments. Given the time constraints, it is clear that the government was at least considering this bill when the Green Paper was published. Indeed, it is likely that the government had already decided upon it, but deliberately left it out of the Green Paper, so as to avoid receiving negative comments on it.

chance of avoiding a complete repeal of the ban on female inheritance.¹⁰⁵

The government's strategy backfired. Women's organizations condemned the proposal as a deliberate effort to isolate rural women and fossilize forever the discrimination against them.¹⁰⁶ Christine Loh, an appointed member of the Legislative Council,¹⁰⁷ announced that she would propose an amendment to the Bill, so as to exempt rural as well as urban land from the ban on female inheritance. Interestingly, the government decided not to oppose Ms. Loh's amendment, although it warned that opposition from conservatives in the New Territories would be strong. Thus, the government essentially bowed out of the debate, perhaps relieved that a member of the Legislative Council had taken on the responsibility of challenging the Heung Yee Kuk.

The amendment proposed by Loh did not require land-owners to leave their land to their female heirs, and any land-owner who wished to leave his or her land only to male heirs would still be able to do so by simply making a will. Thus, the only effect of Loh's amendment was to give landowners the right to leave land to their female heirs. Nonetheless, the Heung Yee Kuk and conservatives in the New Territories strongly opposed the amendment and organized very emotional (and at times violent) protests against it, frequently making front-page news.¹⁰⁸ The United Democrats (which held the largest number of elected seats in the Legislative Council) pledged to endorse Loh's amendment and one member of the party was assaulted by protesters on his way to a Legislative Council session.¹⁰⁹ Women who demonstrated in favor of the amendment also claimed that

105. When the government introduced the bill it informed the Legislative Council that "[w]e have sounded out the Heung Yee Kuk on our proposal . . . [and it] has indicated that it is prepared to give support to the Bill." LEGISLATIVE COUNCIL BRIEF ON NEW TERRITORIES LAND (EXEMPTION) BILL, *supra* note 12, at para. 18. The Heung Yee Kuk was the *only* organization that the government claimed to have consulted regarding the proposal (other than the Housing Authority, which is hardly a member of the public). *Id.*

106. See, e.g., *Submission of the Hong Kong Council of Women on the Green Paper* (Dec. 17, 1993), in COMPENDIUM, *supra* note 101.

107. At the time, Ms. Loh was an appointed member, having been appointed to the Legislative Council by Governor Patten. However, in September 1995, she ran for one of the directly elected seats and easily won.

108. See, e.g., *An Ugly Blow of Dissent Fells Legislator: Inheritance Protest Ends in Violence*, S. CHINA MORNING POST, Mar. 23, 1994, at 1; *Police Beef Up Security Ahead of NT Protests*, S. CHINA MORNING POST, Apr. 11, 1994, at 2; *Villagers Pledge to Fight for Traditions*, E. EXPRESS, Apr. 18, 1994, at 2.

109. *Ugly Scenes as New Territories Land Rights Protest Turns to Violence—Mob Kicks Legislator*, HONG KONG STANDARD, Mar. 23, 1994, at 1.

they were assaulted,¹¹⁰ and some women demonstrators reported that they were afraid to return to their villages in the New Territories.¹¹¹

However, public opinion polls showed that the majority of the Hong Kong people supported Ms. Loh's amendment and that her chances of winning a directly elected seat in the Legislative Council (she had already announced that she would stand in the 1995 elections) had increased significantly as a result of the issue.¹¹² Even the government ultimately offered some support, in that it assisted in the drafting of Ms. Loh's amendment, so as to ensure that the appropriate consequential amendments were made and that the bill would only repeal the ban on female inheritance and not affect any other customary rights related to land (such as the traditional right to be buried in the village).¹¹³

The protests by the Heung Yee Kuk and its supporters managed to delay the vote on the bill for several weeks, while government officials and legislators tried to persuade the Kuk to suggest a compromise proposal.¹¹⁴ Some legislators suggested possible compromises, but the Kuk refused to endorse them, stating that its "bottom line" was that only men should be permitted to inherit land.¹¹⁵ Ultimately, the Legislative Council also stood by its "bottom line" and in June 1994 the New Territories Land (Exemption) Ordinance (with Ms. Loh's amendment) was easily enacted.

The repeal of this law represented a major victory for the women's movement (as the Heung Yee Kuk previously had held such influence in the government that reform was almost unthinkable). It should be noted, however, that the battle over the issue is far from

110. *Id.*

111. The author heard this complaint (at the time of the demonstrations) directly from some New Territories women and indirectly from representative of various women's organizations.

112. A poll taken in April 1994 by Hong Kong Polling and Business Research showed that 64% of respondents supported the amendment; 24% were unsure and only 12% opposed it. *Loh's Popularity Soars Over Stance on Inheritance Laws*, S. CHINA MORNING POST (H.K.), Apr. 2, 1994.

113. See HOME AFFAIRS BRANCH, LEGISLATIVE COUNCIL, PAPER FOR THE BILLS COMMITTEE ON THE NEW TERRITORIES LAND (EXEMPTION) BILL, May 21, 1994. A special clause was also inserted to ensure that the bill would not affect customary land trusts. See, New Territories Land (Exemption) Ordinance, § 5.

114. *NT Inheritance Bill Held Up to Avoid Confrontation*, S. CHINA MORNING POST, Apr. 12, 1994.

115. *Kuk Rejects New Moves in Row Over Land Rights*, S. CHINA MORNING POST, Apr. 10, 1994, at 2.

over. As discussed in Section VI (below), the Heung Yee Kuk has pledged that it will try to have the ban on female inheritance reinstated after 1997, and China has indicated that it will support it.

Moreover, the New Territories Land (Exemption) Bill did not address other examples of discrimination in the New Territories, such as the Small House Policy and restrictions on women's rights to vote and stand for office in village elections. These issues, as well as discrimination in employment, required a more comprehensive legislative effort, which is described in the next section.

V. ANTI-DISCRIMINATION LEGISLATION FOR HONG KONG

In September 1993, shortly after the Green Paper was released for public consultation, Anna Wu, an appointed member of the Legislative Council, began drafting two bills, the "Equal Opportunities Bill"¹¹⁶ and the "Human Rights and Equal Opportunities Commission Bill."¹¹⁷ The Equal Opportunities Bill was intended to prohibit discrimination on a wide range of grounds (including sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, political and religious conviction, and "spent conviction"), in a range of activities, including employment, education, housing, and the administration of laws and government programs. The Commission Bill would have created an independent public body charged with the promotion and enforcement of the rights created by the Equal Opportunities Bill, as well as other internationally recognized human rights. The Commission would have provided conciliation services where a complaint arose under the Equal Opportunities Bill. The Commission Bill also would have created a specialist tribunal, the Equal Opportunities Tribunal, to provide effective adjudication of claims under the Equal Opportunities Bill where

116. Equal Opportunities Bill 1994, *supra* note 71, at 991-1275. (A person has a "spent conviction" if he was convicted of at most one offence, was not sentenced to death, imprisonment or a fine exceeding HK \$5,000, and has had a "clean" record for at least three years. *Id.* cl. 188.)

117. Human Rights and Equal Opportunities Commission Bill 1994, draft distributed for public consultation, March 1994 [hereinafter, the "Commission Bill"]. Unlike the Equal Opportunities Bill, the Commission Bill was not published in the Government Gazette because Governor Patten refused permission for it to be introduced into the Legislative Council. *See infra* texts accompanying notes 122-23. However, the Bill was published as an appendix to an article by Anna Wu, HONG KONG'S BILL OF RIGHTS: 1991-1994 AND BEYOND, *supra* note 72.

conciliation failed.¹¹⁸

By deciding to draft these two bills on her own, Ms. Wu violated an old and established tradition. In the Hong Kong legal system, the government had always proposed and drafted new laws. The Legislative Council merely studied the legislation, proposed amendments, debated, and voted upon it. The Legislative Council's Standing Orders permitted the introduction of "private members bills," but until 1991 this was only used for bills to regulate the affairs of a charity or other private institution.¹¹⁹ In 1991, Martin Lee became the first non-governmental member of the Council to introduce a public law (introducing a short bill to amend the Electoral Provisions Ordinance so as to make all geographic constituencies for the newly created, directly elected seats approximately equal in population).¹²⁰ But Wu's Equal Opportunities Bill is the most significant legislative initiative to come from a non-governmental member, as it was the "first private member's bill covering an entire area of law."¹²¹

In addition to tradition, Wu had to confront some very practical constraints. Like most members of the Legislative Council, she was not a full-time legislator. She is a practicing solicitor who was expected to fulfil her obligations as a legislator on a part-time basis. She also had limited legislative resources. When the government decides to draft new legislation, it has access to a team of specially trained law draftsmen in the Legal Department. In contrast, Wu drafted her bills primarily with the assistance of her two legislative aids (who assisted her with general legislative duties as well), and two law lecturers from the University of Hong Kong, who served as part-time consultants on the project.¹²²

Wu also faced an important legal constraint. Under Hong Kong's colonial constitution, a member of the Legislative Council must obtain express permission from the Governor before she may propose any bill "the object or effect of which may be to dispose of

118. Commission Bill, cl. 62-101. Appeals from the Equal Opportunities Tribunal would have been heard by the Court of Appeal. *Id.* cl. 100.

119. MINERS, *supra*, note 40, at 121.

120. *Id.* at 121.

121. Cheek-Milby, *supra* note 86, at 243.

122. These four (Andrew Byrnes, Eric Chow, Adam Mayes, and the author) assisted Ms. Wu for the entire period of the project (from the fall of 1993 through the summer of 1995). There were others who worked on special parts of the project, such as translation and public consultation, for shorter periods of time.

or charge any part of Our revenue arising within the colony."¹²³ This means that a member of the Legislative Council may not propose any bill that would require the expenditure of revenue unless she first obtains the express approval of the Governor. Thus, in addition to the Governor's power to refuse assent to any bill passed by the Legislative Council (which applies to all bills),¹²⁴ the Governor also has the power to prevent the Legislative Council from even considering bills that require the expenditure of public funds.

From the start, Wu recognized that the Governor might well refuse permission, as the government itself had never shown support for anti-discrimination legislation. It was for this reason that Wu elected to split her proposal into two separate bills, one bill creating the substantive law (the Equal Opportunities Bill) and the other creating what Wu considered the optimal enforcement mechanisms: the Human Rights and Equal Opportunities Commission and the Equal Opportunities Tribunal. There was obviously no way to draft the Commission Bill so as not to require the expenditure of funds, as it would create a new public body. But it was possible to create the substantive legal rights, in the Equal Opportunities Bill, in a manner that would not require funding. Thus, Wu drafted the Equal Opportunities Bill separately and provided for its enforcement through the existing court system.¹²⁵

In drafting the two bills, Wu used Australian legislation as her model. She chose Australian law in preference to English law (which is often followed in Hong Kong) because it is more comprehensive (in terms of the grounds of discrimination prohibited), more recent, and provides for enforcement through a commission with broad equality and human rights functions. However, Wu and her team endeavored to make the proposed legislation suitable for Hong Kong and its special circumstances. For example, special provisions were drafted to address sex discrimination in New Territories elections¹²⁶ and in the inheritance of New Territories land.¹²⁷

From the very beginning of the drafting project, Wu consulted

123. ROYAL INSTRUCTIONS, *supra* note 85, cl. XXIV(2)(c).

124. LETTERS PATENT, *supra* note 53, art. X.

125. In the event that both bills were introduced and enacted, the Commission Bill would have amended the Equal Opportunities Bill so as to provide for enforcement through the Commission and the Tribunal. Commission Bill, *supra* note 117, cl. 103.

126. Equal Opportunities Bill, *supra* note 71, cl. 28.

127. These provisions were deleted when it became apparent that the New Territories Land (Exemption) Bill, including the amendment proposed by Christine Loh (discussed above) would be enacted before the Equal Opportunities Bill was introduced.

with the Hong Kong government, particularly with the Secretary for Home Affairs, Michael Suen (who had responsibility for human rights issues, including women's rights). She provided Suen and his staff with drafts of her bills before releasing them to the public for consultation. Wu hoped that the government might agree to work with her, at least on some of the grounds of discrimination covered in her proposal. But the government declined to do so.

During the drafting process, Wu met with a number of organizations representing victims of discrimination, including women's organizations, gay rights groups, and groups representing the disabled. When the drafting was completed, in March 1994, she conducted a formal consultation on the draft bills. Wu held a press conference to announce the bills and distributed information folders to the public. These folders contained Wu's position paper on discrimination, a draft of each bill, a summary of the effect of each bill, and information sheets on the individual grounds of discrimination (which attempted to explain in layperson's language the effect of the bills). These folders were produced in Chinese and English.

During the public consultation on Wu's draft bills, the most controversial issue raised was the question of whether the Governor would give Ms. Wu permission to introduce her Commission Bill. Wu mounted a campaign to try to persuade the Governor to at least permit the Legislative Council to consider the bill. She reminded him that the Legislative Council had already expressed its support for the concept of an independent human rights commission.¹²⁸ The Foreign Affairs Committee of the British House of Commons had also expressed its support.¹²⁹ Nonetheless, in June 1994, the Hong Kong Executive Council rejected the proposal, and the Governor thus denied Wu permission to introduce her Commission Bill.¹³⁰

The Executive Council's decision probably had very little to do with the role that the proposed commission would have played in enforcing the equality rights proposed by Wu. What concerned the government was the broader role the commission would have played in promoting and protecting human rights generally. It was well

128. See, e.g., Debates of the Legislative Council on the Bill of Rights, OFFICIAL PROCEEDINGS OF THE LEGISLATIVE COUNCIL, June 27, 1990, at 1767; *Id.* June 5, 1991, at 2307.

129. *Relations Between the United Kingdom and China in the Period Leading Up to and Beyond 1997*, in FOREIGN AFFAIRS COMMITTEE, FIRST REPORT 1994, vol. I, pp. viii-ix, paras. 205-08.

130. See Sally Blyth, *Exco rejects Wu's rights commission*, EASTERN EXPRESS, June 22, 1994, at 1.

known that the creation of an independent human rights commission would anger China (which was already unhappy about the enactment of the Hong Kong Bill of Rights Ordinance). But Wu believed that the Hong Kong government was equally concerned with the ability of such a commission to critique its own human rights record, even before 1997.¹³¹

Thus, only Anna Wu's Equal Opportunities Bill was introduced into the legislature in July 1994.¹³² A Bills Committee was formed in August, meeting regularly for most of the 1994-95 legislative session, both to study the bill itself and also to listen to public submissions on it. Studying the Equal Opportunities Bill was a major task, as it was the first anti-discrimination bill proposed in Hong Kong and covered several areas of discrimination. Thus a great many organizations and individuals had an interest in the bill and made written or oral submissions on it. The Bills Committee held a total of 34 meetings, met with 34 delegations, and received numerous written submissions.¹³³

The Bills Committee's task became even more complicated in October 1994, when the government introduced its own competing bill, the Sex Discrimination Bill.¹³⁴ The government also announced that it would soon commence drafting a bill to prohibit discrimination on the ground of mental and physical disabilities.

The government's action represented an enormous shift in its approach to discrimination: in December 1992 the government's Interdepartmental Working Group had concluded that its "study" showed that discrimination was not a significant problem in Hong Kong and that anti-discrimination legislation would hurt the economy.¹³⁵ Less than two years later, the government was offering to draft its own anti-discrimination bills.

The reason for this shift was obvious. The government feared that Anna Wu's comprehensive Equal Opportunities Bill would be enacted. Given the political climate, the government could not

131. Anna Wu, *Human Rights—Rumour Campaigns, Surveillance and Dirty Tricks, and the Need for a Human Rights Commission*, in *HONG KONG'S BILL OF RIGHTS: 1991-1994 AND BEYOND* 73-80 (George Edwards & Andrew Byrnes, eds., 1995).

132. Equal Opportunities Bill 1994, *supra* note 116, at C991-C1275.

133. Speech by Dr. Leong Che-hung, Chairman of Bills Committee to Study the Equal Opportunities Bill, *DRAFT PROCEEDINGS OF HONG KONG LEGISLATIVE COUNCIL*, July 28, 1995, at 317.

134. Sex Discrimination Bill 1994, *HONG KONG GOVERNMENT GAZETTE*, Legal Supp. no. 3, Oct. 14, 1994, at C1382-C1535.

135. *See supra* text accompanying notes 76-78.

credibly argue against her bill unless it offered a reasonable alternative. Government thus decided to propose two narrower (and more conservative) bills. The government chose sex and disability discrimination because these areas had generated the most public concern. Support for sex discrimination legislation was clear from the Green Paper consultation. Disabled groups had gained a great deal of sympathy after several well-publicized incidents of severe, and at times violent, discrimination against the mentally disabled. The government hoped that by demonstrating its willingness to act against these two areas of discrimination, it could persuade the public and the legislature that Hong Kong should gain experience with these two laws before adopting a broader anti-discrimination law.

In order for the government's proposal to be viewed as a credible alternative to the Equal Opportunities Bill, the government was obliged to abandon its usual "go slow" approach and get at least one of its proposed bills to the Bills Committee quickly. Therefore it elected to copy, almost verbatim, the provisions of the British Sex Discrimination Act, simply adding exemptions for areas of government discrimination that it was determined to leave untouched (such as the Small House Policy). Thus the Sex Discrimination Bill was introduced in October 1994. (The government's Disability Discrimination Bill took longer to prepare and was not introduced until April 1995.)

From the perspective of the Bills Committee, which had already commenced its study of Anna Wu's Equal Opportunities Bill, it would have been easier had the government simply announced that it would support the sections of the Equal Opportunities Bill addressing sex and disability discrimination. Although, undoubtedly, the government would have made its support contingent on certain amendments and exemptions, at least such an approach would have permitted the Bills Committee to study one basic structure. Instead, the Bills Committee was forced to study bills employing different structures and language, making comparison more difficult and time-consuming.

The government's insistence on drafting its own sex and disability bills appears to have been part of a conscious strategy to regain control over the legislative process. The government wanted to reinstate itself as the institution that proposed bills, and thus reinstate the presumption that the Legislative Council would not normally legislate beyond the scope of the government's policy agenda. This strategy was apparent in the government's refusal to send representatives to the Bills Committee meetings except when the Committee was actually discussing the areas of discrimination

covered by the government bills. As the Chairman of the Bills Committee later complained, "in spite of repeated invitations, the Administration was conspicuous by their singular absence."¹³⁶

When the Bills Committee began working its way through the government's Sex Discrimination Bill and comparing it to relevant provisions of the Equal Opportunities Bill, it became apparent that the government had taken a much more conservative approach. For example, while both the Equal Opportunities Bill and the Sex Discrimination bill prohibited discrimination on the grounds of pregnancy and marital status (as these are clearly related to sex discrimination), the government's proposed bill addressed these forms of discrimination only in the area of employment, ignoring many other important areas, such as discrimination in education and discrimination against single mothers seeking housing. The government's bill also did not contain any specific provision prohibiting discrimination in the enforcement of laws and the administration of government programs, leaving doubt as to whether the bill would cover all government actions. Women's organizations made written and oral submissions to the Bills Committee complaining of these omissions.¹³⁷ Women's organizations also argued that age discrimination (covered by Anna Wu's bill, but not by the government's bill) should be addressed as a form of gender discrimination, both because it affects women disproportionately in Hong Kong and because "it arises from the sexist notion that women employees should be evaluated on the basis of their appearance, rather than their qualifications."¹³⁸

Perhaps most shocking was the fact that the government chose not to include any equivalent to Clause 28 of the Equal Opportunities Bill, which prohibited discrimination in any election or appointment to any public office or body. Given the long history of discrimination against women in village elections and also the fundamental nature of the right to vote and to stand for election, women found it difficult to accept that Hong Kong's first sex discrimination law might not address this issue. At first women's organizations hoped that the government had simply overlooked the issue when it drafted the Sex Discrimination Bill (as the bill was copied from the British Sex Discrimination Act, which obviously would not have a provision

136. Speech by Dr. Leong Che-hung, *supra* note 133, at 317.

137. See, e.g., PLATFORM OF THE HONG KONG COALITION OF WOMEN'S ORGANIZATIONS, *supra* note 26, paras. 3.1, 3.2.

138. *Id.* para. 1.

designed to address discrimination in New Territories village elections). But when women criticized this omission, it became clear that it was intentional. The government responded that it preferred to try to "persuade" the villages to comply with "voluntary guidelines" drafted by the government to implement a one-person, one-vote system in village elections. Women's organizations rejected this suggestion, arguing that the right to participate in elections was too fundamental to leave to voluntary guidelines.¹³⁹

The government was also determined not to make any changes to the Small House Policy and thus inserted a special exemption for it in the Sex Discrimination Bill.¹⁴⁰ The government claimed that it needed "time" to study the Small House Policy and to consider what reforms should be made. Of course, the government had been under an obligation to do this ever since the Bill of Rights Ordinance was enacted, since the Small House Policy is clearly government action. But when asked by the Bills Committee whether the government would agree to any time limit to the exemption (such as one or two years), the Secretary for Home Affairs refused.¹⁴¹

The Sex Discrimination Bill as drafted by the government also exempted the discriminatory application of the so-called "protective" regulations, which restrict women's right to work.¹⁴² The Bill also exempted discrimination as to height, weight, uniforms and equipment in a number of government departments (the Police Force, Immigration Services, Fire Services Department, Correctional Services Department, and the Customs and Excise Department).¹⁴³ The government refused to agree to amend this provision so as to exempt only discrimination that is reasonably necessary under the circumstances of employment.

The government also inserted a number of provisions into the Sex Discrimination Bill designed to delay its implementation. For example, whereas Clause 1 of the bill stated that the bill would come into force on a date to be set by the Secretary for Home Affairs, the government objected to suggestions that a date (such as January 1, 1996) be inserted. This Clause also permitted the Secretary for Home

139. *Id.* para. 3.3.

140. Sex Discrimination Bill, *supra* note 134, sched. 4, pt II, item 2.

141. Speech of Dr Leong Che-hung, Chairman of the Bills Committee to Study the Equal Opportunities and Sex Discrimination Bills, DRAFT PROCEEDINGS OF HONG KONG LEGISLATIVE COUNCIL, June 28, 1995, at 75.

142. Sex Discrimination Bill, *supra* note 134, cl. 11(2)(g) and sched. 2; *see also* discussion *supra*, p. 345.

143. *Id.* sched. 4, pt 4, para. 1.

Affairs to bring different provisions of the law into force at different times, and the government admitted when it introduced the bill that it would use this provision to delay enforcing most provisions relating to employment until detailed "codes of practice" could be drafted to explain to employers their precise duties under the new law. Moreover, the bill proposed a five-year exemption from the law for all small businesses.¹⁴⁴ Women's organizations viewed these provisions as a deliberate effort by the government to enact a law that would postpone for as long as possible any real change.¹⁴⁵

Despite these weaknesses, the government's Sex Discrimination Bill had one thing that the women's movement wanted, and that Anna Wu's bill could not give them: an Equal Opportunities Commission. Although the Governor had refused to let Wu introduce her own Commission Bill, it wisely provided for a commission in the Sex Discrimination Bill. Of course, the ambit of the government's proposed commission was much narrower than the one suggested by Wu. The government's commission would not address general human rights concerns, but rather would primarily assist in conciliating complaints brought under the Sex Discrimination Bill,¹⁴⁶ an approach that appealed both to the business community which hoped to avoid costly litigation, as well as to women. Moreover, unlike Wu's Commission Bill, the government's proposal did not provide for a specialist equal opportunities tribunal. Thus, if conciliation failed, the complainant would be obliged to commence an action in court. The government's proposed commission would, however, have the functions of researching sex discrimination, educating the public, and promoting equality for women, thus partially fulfilling the women's movement's longstanding request for a women's commission.¹⁴⁷

Recognizing the strong appeal of an Equal Opportunities Commission and also the fact that the government bill would have a strong block of votes from the appointed members, Anna Wu decided to allow the government's Sex Discrimination Bill to be voted on first in the Legislative Council and then to concentrate on trying to amend it to remove many of the exemptions and expand the functions of the Equal Opportunities Commission.

Anna Wu and her team thus drew up a list of suggested

144. *Id.* cls. 10(3), 10(6).

145. PLATFORM OF THE HONG KONG COALITION OF WOMEN'S ORGANIZATIONS, *supra*, note 26, at para. 3.5.

146. Sex Discriminationa Bill, *supra* note 134, cls. 56, 62-65, 76.

147. *Id.* cls. 56-57.

amendments to the Sex Discrimination Bill. The initial list was very long. However, it was shortened somewhat through negotiations with the government, which agreed to adopt a number of Wu's suggested amendments as its own (increasing the likelihood of passage in the Legislative Council). This phase of the legislative project was the time of the greatest cooperation between the two teams, and a number of issues were resolved.

Some of the agreed amendments were largely technical, but others were substantive. For example, the government agreed to expand the provisions relating to marital status and pregnancy discrimination to cover areas other than just employment. The government also agreed to amend the provisions relating to sexual harassment so as to expressly prohibit "hostile environment" harassment in employment¹⁴⁸ and to prohibit "student to student" harassment in education.¹⁴⁹ It also agreed to insert an exemption for voluntary affirmative action (an important issue for women's organizations since the Sex Discrimination Bill as originally drafted would likely have been interpreted as prohibiting it).¹⁵⁰ The government also agreed to shorten the exemption for small businesses to three years (Wu had asked that it be removed or shortened to one year).¹⁵¹

Of course there were many important differences that could not be resolved. Anna Wu thus proposed that the Bills Committee that had studied the Sex Discrimination Bill move a number of amendments to the Bill when it came up for vote in the Legislative Council, on June 28, 1995. Once again, the government used its constitutional muscle to restrict Wu's legislative initiative. The government objected to the introduction of a number of amendments that would have broadened the permitted functions of the Equal Opportunities Commission (to include, for example, research and education on the implementation of international conventions relating to discrimination). The government argued that such amendments would give the Commission additional responsibilities and therefore have the effect of putting a "charge upon the revenue." Wu protested, arguing, *inter alia*, that expanding the *permitted* functions of the Commission would not require any additional funding, but simply would give it greater flexibility in deciding how to spend its budget (which would not be

148. See, Sex Discrimination Ordinance, *supra* note 1, §§ 2(5)-(6).

149. *Id.* § 39(3).

150. *Id.* § 48.

151. *Id.* §§ 11(3), 11(7).

expanded by her amendments). Nonetheless, the President of the Legislative Council, John Swaine, determined that some of Ms. Wu's suggested amendments would have a "charging effect" and therefore could not be moved without the Governor's permission (which, of course, was not forthcoming).

The remaining amendments suggested by Anna Wu were supported by the Bills Committee and moved by the Chairman of the Committee, Dr. Leong. Speaking in support of the proposed amendments, Leong made it clear that the majority of members of the Bills Committee preferred the "wider scope" of the sex discrimination provisions of Anna Wu's Equal Opportunities Bill, and on that basis, was proposing to amend the government's bill. However, the government had lobbied hard against the Bills Committee's amendments, circulating a secret "must defend" letter among those members who could normally be counted on to vote on the side of the government.¹⁵² The impact of the lobbying could be seen from the public gallery—at 1:30 am, when the last amendment was voted upon, all but one member of the Legislative Council were still in their seats.

Ultimately, Anna Wu and her supporters persuaded the Legislative Council to make only a few additional amendments to the government's Sex Discrimination Bill. The most significant of these amendments added a provision prohibiting discrimination in all elections and appointments to public office. This provision, taken from Clause 28 of Wu's Equal Opportunities Bill, will prohibit discrimination in village elections and requires that the Hong Kong government refuse to certify a village representative elected in a discriminatory election.¹⁵³ The Legislative Council also approved an amendment limiting the exemption for "protective regulations" to one year.¹⁵⁴ This will force the government to study the regulations and to decide whether it wishes to propose amendments to them so as to make them apply equally to men and women, except where differential treatment is necessary. If the government does not propose such amendments, the Legislative Council is unlikely to agree to any extension of the exemption.

The other amendments proposed by the Bills Committee had

152. Ms. Wu learned about the letter from fellow legislators but was not provided with a copy of this "must defend" memorandum, thus making it difficult to respond to the administration's arguments. See Letter from Anna Wu to the Secretary for Home Affairs requesting a copy of the memorandum (June 26, 1995) (on file with author).

153. Sex Discrimination Ordinance, *supra* note 1, § 35.

154. *Id.* §§ 12(2)(g), 57(3) and sched. 3.

firm backing from the Democratic Party (which held the majority of the directly elected seats) and from several independents. But their votes were not enough to outnumber the combined strength of the votes from the ex-officio members, appointed members loyal to the government, and the many pro-business members (often elected from the functional constituencies which at that time were very narrowly defined and generally favored conservative pro-business views). Women were particularly disappointed that the Legislative Council voted down an amendment to compel the government to bring the Sex Discrimination Ordinance into force no later than January 1, 1996 and to limit the exemption for the Small House Policy to one year. The Council also voted down an amendment to add the remedy of reinstatement (which would have permitted the court to order that a person who lost her job due to discrimination be rehired). To add insult to injury, the legislature approved a last-minute amendment from a conservative legislator (supported by the government) limiting damages for sex discrimination to a maximum of \$150,000 Hong Kong (approximately \$20,000 US), regardless of the amount of actual damages she has suffered.¹⁵⁵ This artificial and unrealistic restriction on damages is particularly unfair given that the legal costs of an action under the Ordinance will normally not be recovered by the winner of the lawsuit (the opposite of the standard procedure in Hong Kong).¹⁵⁶ Thus, a woman who successfully sues under the Ordinance may not recover her actual damages and may not even recover enough to pay for her legal expenses. Given the high cost of litigation in Hong Kong, this will prevent many victims from even commencing a lawsuit, thus permitting the employers and others to violate the law with impunity.

The fact that the majority of the contentious amendments proposed by Anna Wu and the Bills Committee were defeated did not, of course, bode well for the remaining provisions of Wu's Equal Opportunities Bill. It indicated that if the government lobbied hard enough it could marshal enough votes to endorse its conservative approach to anti-discrimination legislation. The government did lobby very hard against the Equal Opportunities Bill. Once again it sent out a confidential memorandum to friendly legislators. The memorandum raised a number of "questions" concerning the potential impact of Anna Wu's bill (several of which focused on the provisions that would prohibit discrimination on the grounds of sexuality

155. *Id.* § 76(7).

156. *Id.* sched. 8, para. 15; Consequential Amendments to the District Court Ordinance, § 73B(3).

and made a clear appeal to homophobic concerns). Many of the issues raised by the government in its confidential memorandum might have been easily dealt with in the Bills Committee, either with an explanation by Anna Wu or by an amendment. But, of course, the government had deliberately not attended the Bills Committee meetings except when its own bills were being discussed.

In an effort to reassure legislators, Anna Wu offered to make a number of amendments to the Equal Opportunities Bill. For example, she volunteered to insert an amendment exempting mandatory retirement ages from the age discrimination provisions.¹⁵⁷ She also divided her bill into three separate bills. The first bill covered discrimination on the grounds of age, family status, and sexuality.¹⁵⁸ She felt that this bill had the best chance of passing because there had been a great many public submissions in support of legislation against these grounds. Women's organizations had been particularly outspoken on the issue of age discrimination and had lobbied hard to get the government to add it to its Sex Discrimination Bill. The second bill covered race discrimination,¹⁵⁹ and the third bill covered religious and political conviction, trade union membership, and spent conviction.¹⁶⁰

Although Wu's bills did not have a high chance of being enacted at this point, the government was nervous enough to make one further concession. The Secretary for Home Affairs publicly stated that if the Equal Opportunities Bills were defeated, the government would commence public consultation on three additional areas of discrimination: age, family responsibility, and sexuality (not surprisingly, the grounds covered by the first of Wu's restructured bills).

Ultimately, all three of the Equal Opportunities Bills were defeated by the Legislative Council. Once again, Wu's proposals were supported by the Democratic Party and by the majority of the members of the Bills Committee that had studied them. The pro-business Liberal Party voted against all three bills. Legislators who voted against the bills stressed in their speeches that they endorsed the value of equality, but were not prepared to vote for such a

157. Speech of Dr. Leong, July 28, 1995, *supra* note 133, at 320.

158. Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, HONG KONG GOVERNMENT GAZETTE, Legal Supp. no. 3, at C1660-C1767 (June 30, 1995).

159. Equal Opportunities (Race) Bill, HONG KONG GOVERNMENT GAZETTE, Legal Supp. no. 3, at C1770-C1831 (June 30, 1995).

160. Equal Opportunities (Religious or Political Conviction, Trade Union Activities and Spent Conviction) Bill, HONG KONG GOVERNMENT GAZETTE, at C1834-C1971 (June 30, 1995).

comprehensive bill until the community had gained experience with anti-discrimination legislation. Members also cited the government's pledge to consult the public on age, sexuality, and family status discrimination.

One further anti-discrimination bill was enacted in the legislative term, the Government's Disability Discrimination Ordinance.¹⁶¹ As she had done with the Sex Discrimination Bill, Anna Wu endorsed this bill, but proposed amendments designed to make it stronger. Interestingly, this time she persuaded the legislature to add the remedy of reinstatement (which had been voted down with respect to the Sex Discrimination Ordinance).¹⁶² The Disability Discrimination Ordinance is also superior in that it contains no limitation on damages. Apparently there was more sympathy for victims of disability discrimination than for victims of sex discrimination. However, women's organizations hope to persuade the legislature to amend the Sex Discrimination Ordinance so as to give women equivalent remedies.¹⁶³

However, the main concern of the women's movement now (in late 1995) is to persuade the government to implement the Sex Discrimination Ordinance. As Anna Wu and the Bills Committee feared, the government still has not stated when the two anti-discrimination Ordinances will come into force. Thus far, the government has managed to avoid too much criticism by claiming that it must first establish the Equal Opportunities Commission, which it has pledged to do within the first quarter of 1996. If the government does not bring the legislation into force soon after that, it will almost certainly face strong criticism from the Legislative Council.

There is also a possibility that broader anti-discrimination legislation may be enacted during the 1995-96 legislative session. Although Anna Wu chose not to stand in the elections, certain members of the Legislative Council have indicated that they will likely re-introduce some or all of her bills. If they do, the govern-

161. Disability Discrimination Ordinance, Ord. no. 86 of 1995, HONG KONG GOVERNMENT GAZETTE, Legal Supp. no. 1, at A2413-A2549 (Aug. 4, 1995).

162. *Id.* § 72(4)(c).

163. At a recent meeting with women's organizations, the Secretary for Home Affairs indicated that the government will not introduce an amendment to the Sex Discrimination Ordinance so as to provide women with remedies equivalent to those available under the Disability Discrimination Ordinance. Meeting with Secretary for Home Affairs (September 21, 1995). However, Christine Loh is expected to introduce a private members bill during the 1995-6 session that will seek to do so, as well as to strengthen the Equal Opportunities Commission's enforcement powers.

ment may have greater difficulty defeating them this time, as the Legislative Council no longer contains any ex-officio or appointed members.

VI. THE ANTI-DISCRIMINATION MOVEMENT AFTER 1997

There is no obvious reason why the transition to Chinese rule in 1997 should stop the progress of the women's movement or the broader anti-discrimination movement. The Joint Declaration and the Basic Law provide that Hong Kong's legal system shall remain basically unchanged after 1997 and that the laws of Hong Kong (including legislation, the common law, and the rules of equity) should remain in force so long as they do not contradict the Basic Law. Clearly laws prohibiting discrimination should not violate the Basic Law, as the Basic Law states that the ICCPR shall continue to apply to Hong Kong and shall be implemented by the laws of Hong Kong. A law that prohibits discrimination enforces Article 26 of the ICCPR, and therefore complies with Article 39 of the Basic Law.

Of course, the same argument applies to the Bill of Rights Ordinance.¹⁶⁴ Yet China has already taken the position that the Bill of Rights Ordinance violates the Basic Law and has threatened to amend it so as to remove the provisions repealing prior inconsistent laws, as well as the provisions requiring that laws be construed to the extent possible with the Bill of Rights Ordinance (or the ICCPR in the case of subsequent legislation).

China has also threatened to reinstate the previous versions of a number of colonial ordinances that have been amended during the transition period. These threats have been condemned by the Hong Kong government and the Legislative Council, but China has refused to back down from its position.¹⁶⁵

Clearly China's main concern will be with ordinances that have

164. See Yash Ghai, *The Bill of Rights and the Basic Law—Complimentary or Inconsistent?*, in HONG KONG BILL OF RIGHTS: 1991-1994 AND BEYOND, *supra* note 72, at 53-67.

165. On November 15, 1995, the Legislative Council voted (40 to 15) in favor of a motion condemning the recommendation of the China appointed Preliminary Working Committee to amend the Bill of Rights after 1997 and restore the original versions of a number of laws that have been amended during the transition period to better protect human rights in Hong Kong. See Chris Yeung & No Kwai-Yan, *Legco No to Assault on Rights*, S. CHINA MORNING POST, November 16, 1995, at 1, 6. The Hong Kong government expressed similar views. See Speech of Michael Suen, DRAFT PROCEEDINGS OF HONG KONG LEGISLATIVE COUNCIL, Nov. 15, 1995, 179-85.

been amended to provide more freedom in Hong Kong, as China views these amendments as a deliberate effort to undermine its authority and to make it harder to govern the Special Administrative Region. But women's right to inherit land in the New Territories is also under threat, as the Preliminary Working Committee has specifically named the New Territories Land (Exemption) Ordinance as one of the Ordinances that it recommends should be repealed after 1997. This threat does not reflect sexism on the part of the Chinese government, so much as a pay-back to the Heung Yee Kuk for its past support. And it does not come as a complete surprise, as China made statements in support of the Kuk when the New Territories Land (Exemption) Bill was being debated in Hong Kong. But the threat places the Chinese government in the absurd position of defending a law that was rejected long ago in China itself and was only preserved in Hong Kong because colonial ordinances fossilized Chinese customary law and, indeed, made it harsher and more rigid than originally intended.¹⁶⁶

On November 15, 1995, the Hong Kong Legislative Council passed a motion objecting to the Preliminary Working Committee's proposal that the Bill of Rights be amended after 1997. Christine Loh successfully amended the motion so as to specifically condemn the threat to repeal the New Territories Land (Exemption) Ordinance. As Loh stated in the debate: "A more retrogressive move than . . . the proposed restoration of Ching Dynasty inheritance law in the New Territories is scarcely imaginable."¹⁶⁷ The motion, as amended by Ms. Loh, easily passed.¹⁶⁸ Clearly the cause of women's rights still enjoys the support of the Legislative Council (which for the first time is entirely elected), and women can count on it to resist any efforts to take away hard fought rights. But the Chinese government refuses to recognize the legitimacy of this Legislative Council (in large part because it has become more democratic and assertive) and will almost certainly disband it on July 1 1997, replacing it with an entirely appointed "provisional legislature." Thus, women's right to inherit land in the New Territories, like other rights in Hong Kong, may be short-lived indeed.

166. Not surprisingly, China has attempted to separate its support for the Kuk from the issue of equality, characterizing it as "an historical [issue that] should not be mixed up with sexual equality." Irene So, S. CHINA MORNING POST, Apr. 2, 1994, at 3.

167. Speech of Christine Loh, *supra* note 165.

168. There were 40 votes in favor and 15 votes against the amended motion. *Id.* at 119, 123, 188-89.

Many women's organizations also fear that they will not be allowed to operate freely in Hong Kong after 1997. A number of Hong Kong's feminist organizations have been associated with the broader human rights and democracy movements in Hong Kong. They fear that China will make it difficult for them to operate (or at the very least, that China will only recognize the concerns of women's groups that are expressly "pro-China"). A number of Hong Kong women attended the United Nations Fourth World Conference on Women in Beijing, and many more attended the NGO Forum on Women (which was moved by China to Huairou in an effort to isolate and contain it). Hong Kong women thus witnessed first-hand the restrictions that China tried to place on the NGO Forum. Some have told me, privately, that they believe that they were followed at Huairou by plainclothes policemen and were given special attention because they were Chinese and from Hong Kong.

Thus, the very developments that have aided the Hong Kong women's movement during the transition period may work to its disadvantage after the actual transfer to Chinese rule. But one hopes that reason will prevail and that the women's movement, together with the broader human rights movement and the Hong Kong community, will continue to thrive—long after 1997.