

# Human Rights Approaches of Corruption Control Mechanisms—Enhancing the Hong Kong Experience of Corruption Prevention Strategies<sup>†</sup>

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## I. INTRODUCTION

Hong Kong has been one of the few societies in the world in which corruption as a law enforcement and social problem has been successfully tackled. The problem of corruption in Hong Kong<sup>1</sup> has been dealt with traditionally as a law enforcement, public order and social policy issue. The systematically developed legal and institutional mechanisms in Hong Kong over the last three decades have ensured that corruption is significantly reduced in the functioning of government. The corruption issue was basically handled as a part of law enforcement strategy along with certain social measures intended to create an attitudinal change among the people of Hong Kong that paying bribes is not only illegal, but also against social norms and practices. This transformation from a corrupt society to a society that no longer tolerates corruption is a remarkable achievement given the fact that institutionalized forms of corruption affect social, economic and political development of every society, besides threatening the rule of law.<sup>2</sup> However, the law enforcement and public policy approach of attacking corruption has potential risks if it is pursued alone. Hence, it is important that corruption be brought into the central political discourse in Hong Kong. Hong Kong's Basic Law and Bill of Rights Ordinance protect the rights and freedoms of the residents of Hong Kong and the judiciary is by and large independent. These are factors that would help the process of recognizing corruption

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1. For a comprehensive and most recent work on the law relating to corruption and bribery in Hong Kong, see Ian McWalters, *Bribery and Corruption Law in Hong Kong*, Lexis Nexis Butterworths, Hong Kong, 2003.

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

as a violation of human rights. Moreover, the general political culture in Hong Kong is dramatically transforming with people increasingly seeking greater accountability and transparency in the government of the Hong Kong Special Administrative Region (HKSAR).

Hong Kong experienced rampant corruption until the late 1970s, after which systematic policies coupled with political will, law enforcement strategies and above all an enlightened citizenry worked to improve the quality of governance<sup>3</sup> and promoted transparency resulting in greatly reduced corruption. In fact, Hong Kong's Independent Commission Against Corruption (ICAC) is perceived worldwide to be an effective model of how an institutional framework can successfully tackle corruption. This article is intended to make a case for promoting transparency in governance policies from a human rights perspective so as to argue for the development of a human right to good governance<sup>4</sup> in Hong Kong. The human right to good governance<sup>5</sup> would encompass rights relating to the promotion of transparency and accountability at all levels of decision-making in government as well as the private sector. Firstly, the article gives an overview of the issue of corruption in Hong Kong from a historical standpoint and also the efforts taken at the initial level to ensure the reduction of corruption. Secondly, it analyzes the work of the Independent Commission against Corruption (ICAC) in Hong Kong and addresses certain concerns in improving the efficiency of the ICAC. Thirdly, it argues that rights against corruption in Hong Kong should move beyond a law enforcement and public policy issue and attain the status of a human right. Hong Kong is well suited for this transformation as it has a fairly developed legal system possessing the relevant legal, constitutional, judicial and institutional mechanisms necessary to protect the rights and freedoms of its people. The fact that Hong Kong has been successful in controlling corruption through certain legal and institutional mechanisms should not discourage the development of a human right against corruption-free society in Hong Kong. Fourthly, the

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3. For an analysis of the problem of corruption from a governance standpoint, see Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 GLOBAL GOVERNANCE 25 (2001).

4. *Human Settlements: What is Good Governance?*, U.N. Economic and Social Commission for Asia and the Pacific, available at <http://unescap.org/huset/gg/governance.htm> (last visited Mar. 6, 2004).

5. For understanding the development of governance discourse, see Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21 THIRD WORLD Q. 795 (2000).

article examines the growth and development of international human rights law,<sup>6</sup> its impact on Hong Kong, and relates its relevance to the corruption issue. Fifthly, the article identifies the role of media and the civil society<sup>7</sup> in Hong Kong to play a pivotal role in developing the right to transparency in governance through the right to information. The right to information brings with it notions of accountability and responsibility of the government. These principles ensure the development of corruption-free governance from a human rights standpoint. Sixthly, the article highlights the need for ensuring that the fight against corruption does not result in human rights violations through the work of the criminal justice system. In this regard, the need for an Independent Human Rights Commission (IHRC)<sup>8</sup> in the form of a national human rights institution<sup>9</sup> is demonstrably felt in Hong Kong, which can work closely with the Independent Commission against Corruption (ICAC). This brings forward the need for greater institutional collaboration on human rights and corruption matters so that fight against corruption does not compromise the protection and promotion of human rights. Finally, the article argues that the Hong Kong experience has demonstrated that corruption can be effectively controlled by a set of measures intended to ensure a certain degree of transparency and accountability in governmental decision-making. These efforts can be significantly enhanced if the mainstreaming of human rights is undertaken with a view to developing rights relating to a corruption-free society in Hong Kong.<sup>10</sup>

## II. CORRUPTION IN HONG KONG—HISTORICAL PERSPECTIVES

Today's Hong Kong is known for its integrity in governmental

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6. For further reading, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* (2d ed. 2000).

7. See generally C. Raj Kumar, *Moving Beyond Constitutionalization and Judicial Protection of Human Rights—Building on the Hong Kong Experience of Civil Society Empowerment*, 26 *LOJ. L.A. INT'L & COMP. L. REV.* (forthcoming 2004).

8. See generally *id.*

9. See generally C. Raj Kumar, *National Human Rights Institutions—Good Governance Perspectives on Institutionalization of Human Rights*, 19 *AM. U. INT'L L. REV.* 2003, at 259–300.

10. For a similar and persuasive argument at the international level, see Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law*, 34 *INT'L LAW.* 149 (2000). For further reading, see also Balakrishnan Rajagopal, *Corruption Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 *CONN. J. INT'L L.* 495 (1999); Nihal Jayawickrama, *Corruption—A Violation of Human Rights?*, *TRANSPARENCY INT'L* (1998), available at [http://www.transparency.org/working\\_papers/jayawickrama/jayawickrama.html](http://www.transparency.org/working_papers/jayawickrama/jayawickrama.html) (last visited Mar. 6, 2004); Laurence Cockcroft, *Corruption and Human Rights: A Crucial Link*, *TRANSPARENCY INT'L* (1998), available at [http://www.transparency.org/working\\_papers/cockcroft/cockcroft.html](http://www.transparency.org/working_papers/cockcroft/cockcroft.html) (last visited Mar. 6, 2004).

functioning, where corrupt actions come to the forefront due to the work of the ICAC, a vibrant press, and an active civil society. The Global Corruption Report prepared by Transparency International has ranked Hong Kong among the least corrupt societies.<sup>11</sup> Moreover, allegations of corruption are thoroughly investigated and violators are prosecuted for their actions. Corruption in Hong Kong is no longer tolerated at any level of government, but it is important to recognize that this was not always the case. Corruption was clearly “a way of life in Hong Kong in the 1960s and 1970s.”<sup>12</sup> Corruption was perceived to be an inevitable conduct necessary to ensure that one’s work would get done. Public resources were procured through corrupt transactions and bribery was the primary mechanism used to differentiate who would retain the scarce resources and how quickly one could attain them. The form of corruption prevalent in Hong Kong during this time was “all-pervasive” and it affected every sector of the society. Another facet of corruption, which was obviously entrenched in Hong Kong was governmental inefficiency. Corruption contributed to this inefficiency as the general motivation for work was not based upon legitimate and deserving rewards, but undue and illegal enrichment through abuse of power. The basic interaction of the citizenry with the government was based upon corruption in the form of illegal transactions, speed money, and favoritism due to corruption. Alan Lai, Former Commissioner of the ICAC commenting on the extent of corruption in Hong Kong during that time has said:

The problem of corruption reached epidemic proportions by the 1960s and early 1970s, when it permeated every aspect of the community. Subtle hints turned into outright solicitation. It was no secret, for instance, that: patients would have to pay “tea money,” a euphemism for bribe money, for a blanket or a glass of drinking water in public hospitals; a person could purchase a driving license by bribing the examiner; taxi drivers could avoid prosecution for minor traffic offences by sticking a “procured” label on the windscreens of their vehicles; by paying “protection money,” street vendors could avoid having to pay penalties for not being licensed; health inspectors would turn a blind eye to unhygienic

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11. Johann Graf Lambsdorff, 2002 *Corruption Perceptions Index*, GLOBAL CORRUPTION REPORT 2003, 262, 264 TRANSPARENCY INT’L, (2003), available at <http://www.globalcorruptionreport.org/download.shtml> (last visited Mar. 6, 2004).

12. Alan Lai, *Building Public Confidence in Anti-Corruption Efforts: The Approach of the Hong Kong Special Administrative Region of China*, U.N. Centre for Int’l Crime Prevention, 2 FORUM ON CRIME AND SOCIETY 135, 136, U.N. SALES NO. E.03.IV.2 (2002), available at [http://www.unodc.org/pdf/crime/publications/building\\_confidence.pdf](http://www.unodc.org/pdf/crime/publications/building_confidence.pdf) (last visited Mar. 6, 2004).

kitchens if they are given "tea money."<sup>13</sup>

Thus, the prevailing patterns and levels of corruption could be compared to the contemporary situation that prevails in developing countries like India.<sup>14</sup>

The problem of corruption in Hong Kong at that time was further aggravated by a significant degree of police corruption. Corruption in the police force "was particularly rampant, where powerful corruption syndicates were institutionalizing bribe-taking."<sup>15</sup> The police officers who were supposed to uphold the law, and to ensure that the conduct of the citizenry conformed with the law, had themselves engaged in massive corruption. In that process, they accumulated wealth patently disproportionate to their legal sources of income. It was quite normal for police officers to take bribes or to tolerate the actions of their peers, superiors and subordinates. Those who attempted to become whistleblowers risked ruining their careers and were victimized for their integrity.<sup>16</sup> The institutionalized form of corruption that prevailed in Hong Kong reached its zenith when people lost faith in the system and became completely disillusioned and frustrated about the prevalence of corruption in every facet of the exercise of governmental power.

The issue of corruption came to the forefront of political discourse in Hong Kong when a high-ranking police officer fled to the United Kingdom in mid-1973, while under investigation for alleged corruption by the Anti-corruption Office of the Police.<sup>17</sup> This office has the mandate for investigating allegations of corruption in the civil service. The mishandling of this case resulted in wide resentment among the people of Hong Kong leading to protests about the actions of the government and its lackadaisical attitude in handling the case. The enormity of the incident triggered a series of governmental responses including the formation of a commission of inquiry headed by senior puisne judge, Alastair Blair-Kerr to investigate the matter.<sup>18</sup> Lai has observed that this development "marked the beginning of a new chapter in the history of anti-corruption efforts in Hong Kong."<sup>19</sup> While corruption was brought to the forefront of public policy and law enforcement, it took more

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13. *Id.*

14. For understanding the extent of corruption and its relationship to human rights in the context of India, see C. Raj Kumar, *Corruption and Human Rights—Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 1 COLUM. J. ASIAN L. 31 (2003).

15. See Lai, *supra* note 12.

16. *Id.* at 137.

17. *Id.*

18. *Id.*

19. *Id.*

efforts and several years to develop an institutional culture in the form of ICAC that works to ensure corruption is curbed at every level of governance.

### III. LEGAL FRAMEWORK FOR TACKLING CORRUPTION AND THE FORMATION OF THE ICAC

Laws existed in Hong Kong that did not allow solicitation or acceptance of bribes by civil servants even in 1897.<sup>20</sup> The Government passed the Prevention of Corruption Ordinance in 1948. This was followed by the government establishing the Anti-corruption Branch that was attached to the police in 1952.<sup>21</sup> While these legal and institutional efforts were aimed at curbing corruption, there was little positive impact in the form of empirical reductions in corruption or prosecution of charges of corruption against corrupt individuals. As past efforts to tackle the problem of corruption failed, in 1971 a more comprehensive and effective piece of legislation, the Prevention of Bribery Ordinance, was enacted.<sup>22</sup> Simultaneously, the Anti-Corruption Branch of the police was strengthened and remodeled to become the Anti-Corruption Office.<sup>23</sup> Unfortunately, while there were efforts taken both at the legal and institutional level to combat corruption, the general police culture, coupled with abuse of power practices in the form of corruption in the civil service, continued unabated.

Since the police officers were themselves corrupt, the institutional approach of resisting corruption was not effective. In fact, all the past efforts that focused on legal and institutional strategies to tackle corruption brought the same ineffectiveness. The people of Hong Kong were becoming increasingly frustrated at the failure of the government to create a system through which widespread corruption would be systematically curtailed. In fact, the continuous failure of the government to reduce corruption resulted in people questioning the seriousness of the government's desire to eliminate corruption. In 1973, Governor Sir Murray MacLehose appointed Sir Alastair Blair-Kerr to look into Hong Kong's corruption problem.<sup>24</sup> In his report, Blair-Kerr, summing up the case for the establishment of an

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20. *Id.* (quoting Blair-Kerr Report).

21. *Id.*

22. *Id.*

23. *Id.*

24. See Daniel Li, *The Road to Probity*, J. OF PUB. INQUIRY, 13, 13 (Fall/Winter 2001), available at <http://www.ignet.gov/randp/f01c04.pdf> (last visited Mar. 6, 2004).

independent agency to tackle corruption, said:

It is widely believed that the Police (including the Anti-Corruption Office) are corrupt, that mutual loyalty inhibits investigation of fellow-officers constitutes sufficient reason to take the Office out of Police hands . . . and that the formation of a new agency would demonstrate Government's determination to fight corruption and thereby enlist public support.<sup>25</sup>

Under these circumstances, in October 1973, the Governor of Hong Kong, Sir Murray McLhose, declared the need for an independent anti-corruption organization.<sup>26</sup> He told the legislature:

I believe that it is quite wrong, in the special circumstances of Hong Kong, that the police, as a force, should carry the whole responsibility for action in this difficult and elusive field. I think the situation calls for an organization, which can devote its whole time to the eradication of this evil; a further and conclusive argument is that public confidence is very much involved. Clearly the public would have more confidence in a unit that is entirely independent and separate from any department of the Government, including the police.<sup>27</sup>

The ICAC was established on February 15, 1974, through the enactment of the Independent Commission Against Corruption Ordinance. The ICAC was granted a great degree of functional independence, and made independent of the public service. The commissioner is answerable directly to the Chief Executive of the Hong Kong Special Administrative Region (HKSAR).<sup>28</sup> Since a great premium was attached to the effective functioning of the ICAC, the government conferred upon it a distinctive status, ordaining it with special powers. The corruption fighting commission was independent from the civil service and there were sweeping powers given to the ICAC in the form of powers of arrest, search, obtaining information, and restraint of property.<sup>29</sup> Two important aspects distinguished the formation of the ICAC from the previously unsuccessful efforts of the government. First, the ICAC was not part of the police. It was created as a separate organization and there was no functional duplicity of the work of the ICAC. This ensured that those police officers who are themselves corrupt do not engage in corruption related work. Secondly, the ICAC was independent from the rest of the civil service. This aspect demonstrated the commitment of the government to ensuring that bureaucratic interference or other hurdles do not arise in the fight against corruption.

It needs to be noted that public expectations were very high, and it

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25. *Id.*

26. For further reading, see INDEPENDENT COMM'N AGAINST CORRUPTION, HONG KONG: THE FACTS (2003), available at <http://www.info.gov.hk/hkfacts/icac.pdf> (last visited Mar. 6, 2004).

27. See Lai, *supra* note 12, at 138.

28. See INDEPENDENT COMM'N AGAINST CORRUPTION, *supra* note 26.

29. See Li, *supra* note 24, at 14.



looked like an almost impossible task to tackle the problem of corruption in Hong Kong. As a result, the ICAC was watched with a high degree of political and public scrutiny. ICAC was provided with an "integrated, three-pronged strategy, involving investigation, prevention and community education."<sup>30</sup> Interestingly, the prevention of corruption in governing Hong Kong was not confined solely to the public sector. The Prevention of Bribery Ordinance prohibited corruption in the private sector, which sent proper signals to the community at large of the government's sincerity in its actions and dedication to pursuing a coherent strategy to tackle corruption.<sup>31</sup>

Besides the operational safeguard guaranteed in the Prevention of Bribery Ordinance determining that the head of the ICAC is answerable only to the highest authority, other powers granted under the Ordinance included powers: to examine the practices and procedures of government departments and public bodies in order to ensure the proper discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Commissioner, may be conducive to corrupt practices; to instruct, advise and assist any persons, on their request, on various ways by which corrupt practices may be eliminated by such persons; to advise heads of government departments or of public bodies of changes in practices and procedures conformity with the effective discharge of the duties of such departments or public bodies which the commissioner thinks necessary to reduce the likelihood of the occurrence of corrupt practices; to educate the public of Hong Kong against the evil of corruption; to enlist and foster public support in tackling corruption.<sup>32</sup>

#### IV. WORKING AND ACHIEVEMENTS OF THE ICAC—A CRITICAL ASSESSMENT

The ICAC was born out of certain social and political circumstances that prevailed in Hong Kong three decades ago. The ICAC has developed into one of the most successful institutional models to tackle corruption. The success of ICAC in Hong Kong has been praised worldwide and efforts are taken to imbibe the approaches of ICAC in other countries and societies so that corruption is curtailed. It is useful to

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30. See Lai, *supra* note 12, at 138.

31. *Id.*

32. *Id.* at 139.

examine the working and achievements of the ICAC with a view to understanding how ICAC managed to develop a culture of integrity in Hong Kong, particularly among the potential bribe-receivers (power-holders, typically government representatives like the politicians and the bureaucrats) and the bribe-givers (the people). To begin, it is important to recognize that the formation of the ICAC was based upon an understanding that the commission “could not win the battle against corruption only by punishing the corrupt. It must also improve the bureaucratic systems and the government machinery and bring about fundamental changes in public attitudes towards corruption.”<sup>33</sup> This realization at the nascent stage of its formation enabled it to develop a three-pronged strategy to tackle corruption based on the components of investigation, prevention and education.<sup>34</sup>

The Operations Department is the investigative machinery of the ICAC and its duties involve complying with the statutory obligation to investigate every pursuable complaint made to the ICAC.<sup>35</sup> The ICAC investigators tend to pursue the relevant information without any judgment on the severity of the case or the amount of bribes involved.<sup>36</sup> The cases relating to corruption are obtained from complaints received from numerous sources, including a 24-hour hot-line report center and cases that are referred by government departments.<sup>37</sup> The reputation of the ICAC was built on the basis of its success in crushing all corruption syndicates entrenched in government within the initial three years of operation.<sup>38</sup> Further, the ICAC earned the faith and confidence of the people of Hong Kong as it focused not only on those who received petty bribes, but also on the big fish in the higher echelons of power where corruption was institutionalized.<sup>39</sup> Investigative officers under the Operations Department of the ICAC have full powers of arrest<sup>40</sup> without warrant<sup>41</sup> for offenses under the three ordinances, the Prevention of

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33. Jean Au Yeung, *Fighting Corruption—The Hong Kong Experience*, Presentation Paper for The Seminar on International Experiences on Good Governance and Fighting Corruption (Feb. 17, 2000), available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002750.pdf> (last visited Mar. 6, 2004).

34. *Id.*

35. See Li, *supra* note 24, at 14.

36. *Id.*

37. Yeung, *supra* note 33.

38. See Li, *supra* note 24, at 14.

39. *Id.*

40. For a very interesting article on the human rights implications of the powers of the ICAC, see T. Wing Lo & Ricky C.C. Yu, *Curbing Draconian Powers: The Effects on Hong Kong's Graft-Fighter*, 4 Int'l J. of Human Rights 54 (2000).

41. Obviously such arrests for corruption related cases raise human rights concerns. Some of these concerns have been addressed by the courts in Hong Kong. However, the existence of a Independent Human Rights Commission (IHRC) will significantly help the bring in the human rights dimension of anti-corruption work. For knowing

Bribery Ordinance, the Independent Commission Against Corruption Ordinance and the Elections (Corrupt and Illegal Conduct) Ordinance.<sup>42</sup> This department is also entrusted with the powers for investigating any conduct of a public servant, which, in the opinion of the Commissioner, is conducted with or conducive to corrupt practices and to report thereon to the Chief Executive.<sup>43</sup> The Prevention Department of the ICAC's work involves identifying corruption opportunities in government systems and procedures with a view to suggest measures to plug the loopholes.<sup>44</sup>

The legal framework governing the activities of the ICAC has allowed it to access government information for the purpose of corruption prevention studies.<sup>45</sup> The ICAC, while formulating a system of regular checks, also gives consultant advice to government departments on new legislation, policies, and procedures prior to their adoption.<sup>46</sup> The range of work the prevention department of the ICAC does will vary from case to case, but it can include activities that would strengthen the internal and external control mechanism in the government as well as the private sector<sup>47</sup> so that corruption is avoided in the first place. The mandate of this department is to prevent corruption within public and private organizations by assessing their internal operations and functional systems, and then suggesting corruption-resistant measures.<sup>48</sup> This is akin the capacity-building activities which international development institutions undertake in developing countries. The capacity building work is mostly neglected albeit the fact that national institutions like the ICAC can be most effective in this regard. The focus of this department is to understand various possible loopholes in the prevention of corruption.

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more about the need for a human rights commission in Hong Kong, *see* Kumar, *supra* note 8.

42. For further reading, *see* INDEPENDENT COMM'N AGAINST CORRUPTION, *supra* note 26.

43. *Id.*

44. *See* Li, *supra* note 24, at 14.

45. *Id.*

46. *Id.*

47. As far as the private sector is concerned, corruption prevention advice is provided on their request. Since the formation of the ICAC's Advisory Services Group in 1985, advice has been given to private sector organizations on more than 3,400 occasions. In 2002 alone, private sector institutions were advised on corruption matters on over 300 occasions, with most of such requests coming from small businesses, which did not have the institutional mechanism or expertise to handle corruption control methods of their own. This service is confidential and free and can be obtained by ringing the hotline (852) 2526 6363. INDEPENDENT COMM'N AGAINST CORRUPTION, *supra* note 26.

48. *See* Yeung, *supra* note 33.

There is no doubt that corruption was a deeply entrenched problem in Hong Kong until the late 1970s, and systematic efforts through legal and institutional approaches to tackle corruption have produced truly remarkable results since that time. Besides the fact that ICAC was a successful model of how to ensure corruption-free governance in Hong Kong, there were other factors that helped make the fight against corruption successful. Yeung has observed the following as various factors of success: government determination, strong legislation, public support, system of checks and balances and international cooperation.<sup>49</sup> The success of the ICAC model of corruption control mechanisms has resulted in attitudinal changes among the people of Hong Kong towards corruption and its impact on governance. This also has ensured the development of an efficient and “cleaner” civil service, as well as a vigilant public sector that promotes good governance policies in Hong Kong. However, the present approach of perceiving the problem of corruption as a public policy issue affecting the efficient working of the legal and economic apparatus of Hong Kong may not be sufficient to develop and sustain a culture of integrity in Hong Kong’s administration.

#### V. HUMAN RIGHTS APPROACHES OF CORRUPTION CONTROL MECHANISMS IN HONG KONG

To develop a governmental culture based upon integrity and incorruptible conduct of government affairs, the entire governance structure in a society ought to be based on non-derogable principles of transparency and accountability. Transparency in governance and accountability of its administrators are *sine qua non* of good governance. It is essential that Hong Kong moves toward developing such a system on the basis of rights-based approaches to development. The UN Office of the High Commissioner for Human Rights (UNOHCR) has observed that

a rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. Essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development. The norms and standards are those contained in the wealth of international treaties and declarations.<sup>50</sup>

From the standpoint of corruption control mechanisms, it is important to recognize that corruption impedes social and economic development,

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49. *Id.* at 4–6.

50. *Rights-Based Approaches*, U.N. Office of High Commissioner for Human Rights, available at <http://www.unhcr.ch/development/approaches-04.html> (last visited Mar. 6, 2004).

and threatens the rule of law and social fabric of any society.<sup>51</sup> The purpose of evolving a human rights-based approach to corruption control is to supplement and enhance the successful Hong Kong model of an institutional approach to tackling corruption. While the Hong Kong corruption control mechanism has been effective, the purpose and importance of bringing the corruption issue within the framework of governance will be best achieved through a human rights discourse.

Corruption does violate human rights in a profoundly significant manner. Human rights create entitlements among people, and these rights attempt to provide redress mechanisms capable of ensuring violations of rights be duly redressed. Corruption distorts government actions and leads to the misallocation of resources. It also provides avenues for gross abuses of power. The corrupt tend to wield governmental authority in an undemocratic manner and their actions tend to be based on misplaced priorities. Corruption perpetuates discrimination as the bribe-payers are given special treatment (as opposed to those who did not pay a bribe). Corruption of this kind amounts to gross dereliction of duty and the abuse of power in the form of illegal gratification. This also gradually results in government losing its basic legitimacy to govern, people losing faith in the government machinery and its capacity to make decisions based on respect for the law.

The principle of rule of law encompasses within its understanding a scrupulous adherence to law, rules and regulations of the legal system so that government remains accountable to the people. Rule of law also ensures that the legal system responds to injustices and inequalities within the system. The problem of corruption creates a government administration system that discriminates people on the basis of irrational criteria. The state's largess is distributed on the basis of inappropriate criteria, which undermines the basic principles of democratic governance. Corruption violates the foundational principles of rule of law because government decisions are no longer based on law, but rather on factors extraneous to the law. Moreover, corrupt societies lack transparency in governance and hence the working of government remains a mystery to the people. This is further corroborated by the fact that the governance system will lack the kind of accountability the rights-based approaches can provide. The purpose of the rights-based approaches is to provide for

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51. See Yash Ghai, *The Rule of Law, Legitimacy and Governance*, 14 INT'L J. OF THE SOC. OF LAW 179 (1986).

a governance system inclusive of principles like equality and equity, accountability, empowerment and participation. It is worthy to note that “a rights-based approach to development includes the following elements: express linkage to rights, accountability, empowerment, participation, non-discrimination and attention to vulnerable groups.”<sup>52</sup> Undoubtedly, some of these aspects of governance are reflected in the Basic Law and Bill of Rights Ordinance in Hong Kong. But to move beyond the legal and human right framework given in legislation and to ensure that the attributes of good governance become integrated within the government policy formulation strategies and administrative system, it is necessary for developing rights-based approaches to good governance.<sup>53</sup>

In Hong Kong, corruption prevention<sup>54</sup> and control strategies have focused on tightening the law enforcement mechanisms, developing community education methods and providing for a viable and effective legal and institutional framework. But the effectiveness of the ICAC will, to a large extent, depend upon the particular government’s focus on corruption as an issue and whom it will appoint as a commissioner. Arguably, the successful ICAC model of corruption control mechanisms in Hong Kong is dependent upon the level of importance attached by the government of the day to corruption as a social, economic and political issue.<sup>55</sup> The human rights approach to corruption control mechanisms aims to insulate the corruption discourse in Hong Kong from the governmental machinery, thus bringing it to a higher level of political discourse. The fact that corruption is already illegal, and there are effective legal, institutional and judicial apparatuses in Hong Kong, would help enhance, institutionalize and strengthen the corruption control system.

The freedom from corruption in Hong Kong would mean the existence and development of a few rights for the citizenry. For instance, it is possible that the corruption-free service can be developed into a human right, to which every Hong Kong resident is entitled. It is not argued that the mere existence of such a right will ensure that corruption will not exist in administration or, for that matter, that the people of Hong Kong

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52. U.N. Office of High Commissioner for Human Rights, *supra* note 50.

53. See generally C. Raj Kumar, *The Benefit of a Corruption-free Society*, HONG KONG LAWYER, Dec. 2002, at 39-46, available at <http://www.hk-lawyer.com/2002-12/Dec02-viewpoint.htm> (last visited Mar. 6, 2004).

54. See Daniel R. Fung, *Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience*, in 8TH INTERNATIONAL ANTI-CORRUPTION CONFERENCE, available at [http://www.transparency.org/iacc/8th\\_iacc/papers/fung.html](http://www.transparency.org/iacc/8th_iacc/papers/fung.html) (last visited Mar. 6, 2004).

55. See Thomas Chan, *Corruption Prevention—The Hong Kong Experience*, INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC), RESOURCE MATERIAL SERIES No. 56, available at <http://www.unafei.or.jp/pdf/56-26.pdf> (last visited Mar. 6, 2004).

will experience good governance policies that promote sound public administration. But the importance of such a right to corruption-free society for Hong Kong is vastly enhanced by the commitment of all institutions to ensure the protection and promotion of this right. Such a development is possible due to several factors. Firstly, the judiciary in Hong Kong like the government of the HKSAR is highly committed to ensuring that Hong Kong sustains its contemporary international reputation of a society that has successfully tackled the problem of corruption and has achieved a high degree of integrity and efficiency in public service; secondly, as a component of the right to corruption-free service, the residents of Hong Kong would also have a right to transparency in governance and the right to demand accountability.<sup>56</sup> Increasingly, the necessity of governments becoming answerable to its people has been felt all over the world, in both developing and developed societies. The accountability that good governance discourse seeks to achieve is not just electoral accountability which democracy provides in the form of regular free and fair elections.<sup>57</sup> But what is needed is a continuous system of accountability by which people are heard and involved in the decision-making processes of the government. The Human Development Report 2002 of the UNDP observes that,

Accountability is about power—about people having not just a say in official decisions but also the right to hold their rulers to account. They can demand answers to questions about decisions and actions. And they can sanction public officials or bodies that do not live up to their responsibilities.

This is the kind of accountability that the human rights approach to corruption prevention hopes to achieve. To exercise the above rights, it is important that the right to corruption-free governance in Hong Kong include within its ambit a right to information so that the affairs of the government are made available for media and public scrutiny. The right to information will become an integral part of enforcing accountability of the governments so that acts of corruption, besides being investigated by the relevant institutions, will also be censured by the media and the civil society organizations. The human rights approach of developing

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56. See Christine Loh & Richard Cullen, *Politics Without Democracy: A Study of the New Principal Officials Accountability System in Hong Kong*, 4 SAN DIEGO INT'L L. J. 127 (2003).

57. See generally C. Raj Kumar, *Election and Voting Systems: Perspectives on Democratic Governance*, in BUILDING DEMOCRACY—CREATING GOOD GOVERNMENT FOR HONG KONG, 44-60 (Christine Loh & Civil Exchange eds., 2003).

corruption prevention strategies ensures that the anti-corruption efforts move beyond legal and institutional responses. It provides a broader platform of governance discourse that is essential for the protection of human rights and preservation of the rule of law in Hong Kong.

#### VI. ROLE OF MEDIA AND CIVIL SOCIETY IN ENSURING CORRUPTION-FREE GOVERNANCE—INSTITUTIONALIZING THE RIGHT TO INFORMATION

Enforcing transparency and accountability of the government will not be possible only through legislation and institutionalization. It is important that the media organizations in Hong Kong exercise their freedom to promote public interest through objective reporting on corruption. The secrecy that essentially surrounds government matters and the resultant consequence of corruption and bribery can be tackled effectively through a pro-active and vigilant media.<sup>58</sup> The right to information in Hong Kong needs to be promoted by the media to ensure that the people of Hong Kong are aware of the activities of the government.<sup>59</sup> While the ICAC is a truly independent and effective anti-corruption agency in Hong Kong, it is important to insulate the anti-corruption efforts from purely official response. The corruption-free governance is a wider discourse, which needs to involve all actors in Hong Kong. It is in this context that the role played by the media in Hong Kong assumes significance as it can influence public policy and the decision-making process and inculcate a culture of integrity. The fact that the activities of the government are constantly under check by the media ensures greater scrutiny of the exercise of government powers.

Traditionally, media has played an important role in bringing to the limelight numerous injustices that take place in every society. The role played by the media will obviously depend upon the extent of the developed freedoms in any particular society and also the nature of political culture that prevails. Hong Kong is presently undergoing a dynamic phase since the hand-over in 1997, where the government of the HKSAR is constantly under scrutiny by, and accountable to the people of Hong Kong. The criticism of the government of the HKSAR by the media and civil society and the exuberance of the people of Hong Kong was vastly demonstrated in at least three instances from recent past: the handling of the article 23<sup>60</sup> imbroglio and the resistance of the

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58. For a critical perspective on media freedom in the HKSAR, see Richard Cullen, *Media Freedom In Chinese Hong Kong*, 11 *TRANSNAT'L LAW* 383 (1998).

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

60. See generally H. L. Fu, Richard Cullen, & Pinky Choy, *Curbing the Enemies*



people of Hong Kong; the initial responses to the SARS crisis;<sup>61</sup> and the current approach relating to debates relating to democratization<sup>62</sup> in Hong Kong.<sup>63</sup> In all three of these instances, the media of Hong Kong has played a very important role in ensuring public debate and civil discourse. It is obviously very difficult to strike a fine balance in order to determine the role of media and the civil society.

In order to ensure the sustenance of corruption-free governance, the media ought to develop its own approaches to expand the right to information. While the Basic Law and the Bill of Rights Ordinance (BORO) provide the general framework for rights and freedoms, it is important that the government of the HKSAR develops policies and pursues actions that are transparent and for which it is accountable. Corruption at any level of the government should not be tolerated. Additionally, corruption in the media should be pursued with all sincerity. Investigation, prosecution and punishment of corruption cases should stand independent and distinct from social ostracism and other forms of social control mechanisms that are needed for active pursuit of anti-corruption policies. Media has a social responsibility to expose acts of corruption and nepotism as the effective functioning of the press is dependent upon the public legitimacy of its existence. Media is a public trust and hence, its actions in the form of reporting and influencing public opinion ought to reflect public interest, societal sensitivity and democratic governance.

Civil society<sup>64</sup> has an important role in ensuring corruption-free governance in Hong Kong. As discussed earlier, the people who govern Hong Kong ought to understand and appreciate the hopes and aspirations of the people of Hong Kong. The "discourse of dissent"<sup>65</sup> generated by

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of the State in Hong Kong—What does Article 23 Require?, 5 J. CHINESE COMP. L. 45 (2001-02).

61. See generally Michael C. Davis & C. Raj Kumar, *The Scars of the SARS—Balancing Human Rights and Public Health Concerns*, HONG KONG LAWYER, May 2003, available at <http://www.hk-lawyer.com/2003-5/May03-phprac.htm> (last visited Mar. 6, 2004).

62. See C. Raj Kumar & Richard Cullen, *Drawing Lessons from SARS — We are ready for Democracy*, S. CHINA MORNING POST (HONG KONG), May 20, 2003.

63. See generally Michael Davis & C. Raj Kumar, *Accepted Principles can Guide our Response to the Outbreak*, S. CHINA MORNING POST (HONG KONG), Apr. 4, 2003, at 13.

64. See generally Christine Loh, *Civil Society and Democratic Development in Hong Kong*, in BUILDING DEMOCRACY—CREATING GOOD GOVERNMENT FOR HONG KONG, 127-35 (Christine Loh & Civil Exchange eds., 2003).

65. See Raj Kumar, *Why Good Governments should Welcome Protests*, S. CHINA

article 23<sup>66</sup> has widened the constituency of civil society in Hong Kong. This space that has been created in Hong Kong even without democracy, can be usefully channeled to ensure that people are constantly vigilant against corruption.<sup>67</sup> Given the growing exchange and interaction of ideas, businesses, institutions, and people between the HKSAR and Mainland China, it is important that civil society in Hong Kong guard against corruption creeping in any form into Hong Kong. In this context, it is useful to note that Mainland China, like other developing countries, has a high degree of corruption and is ranked low in Transparency International's Corruption Perception Index (CPI).<sup>68</sup> Due to this, the media and civil society in Hong Kong have to assure anti-corruption discourse as an inherent component of other efforts to ensure transparency and accountability.

Further, the development of Hong Kong is significantly dependant upon its economic competitiveness in the region as well as the world. Corruption can threaten this economic competitiveness and in due course affect the efficiency and productivity of the people of Hong Kong. The media and civil society have to determine their respective roles in order to ensure the social, economic, and political development of Hong Kong. In this context, the need for greater participatory governance and e-governance needs to be emphasized.<sup>69</sup> The media can pursue important capacity-building activities by bringing into focus the successful experiences of participatory governance<sup>70</sup> and its positive impact promoting greater transparency and accountability in administration.

The other aspect of promoting transparency through an active and vibrant civil society and the existence of independent and objective press is the need for expanding and developing the right to information.<sup>71</sup> The right to information<sup>72</sup> is such a comprehensive right, including within its

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MORNING POST, July 15, 2003 at 13.

66. See generally Carole J. Petersen, *National Security Offences and Civil Liberties in Hong Kong: A Critique of the Government's "Consultation" on Article 23 of the Basic Law*, 32 HONG KONG L.J. 457 (2002).

67. See generally H.L. Fu & Richard Cullen, *Political Policing in Hong Kong*, 33 HONG KONG L.J. 199 (2003).

68. See Lambsdorff, *supra* note 11.

69. See generally C. Raj Kumar, *To Protect the Rule of Law, People must get Involved*, S. CHINA MORNING POST (HONG KONG), Jan. 19, 2003.

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

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

72. See generally Toby Mendel, *Freedom of Information Legislation: Progress, Concerns and Standards*, GLOBAL CORRUPTION REPORT 2003, 57, TRANSPARENCY INT'L (2003), available at <http://www.globalcorruptionreport.org/download.shtml>. (last visited Mar. 6, 2004).

ambit all rights necessary to obtain and disseminate information. In this context, Hong Kong ought to have an Independent Press Council<sup>73</sup> to regulate the functioning of various media organizations and also subject the media to an institutional framework. This institutional basis for promoting the right to information is necessary as there is every likelihood that the press in Hong Kong will face challenges relating to its freedom and autonomy and in order to effectively confront such challenges, coordinated efforts are needed. The Independent Press Council may compose of people acting in their individual capacities to ensure that the freedom of media is duly protected.<sup>74</sup> They will also investigate various complaints against the media organizations and necessary actions can be taken. The reason for institutionalizing the right to information is based upon an understanding that corruption-free governance cannot be sustained without several checks and balances within the social, legal, and institutional domain of governance in Hong Kong. This will provide the true empowerment for the victims of corruption to resisting return of corruption in administration in Hong Kong.<sup>75</sup>

## VII. GUARDING AGAINST HUMAN RIGHTS VIOLATIONS IN THE FIGHT AGAINST CORRUPTION

The fight against corruption should zealously guard against violations of human rights. The laws that are intended to protect a society from corruption should not violate human rights or infringe upon the

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73. While Hong Kong does have a Press Council, this organization, which was founded in July 2000 is funded by the newspapers and public donations and does not have any statutory protection. For further information, see <http://www.presscouncil.org.hk/e/defaultc.htm> (last visited Mar. 6, 2004). I thank Prof. Richard Cullen for directing my attention to this issue.

74. The formation of an Independent Press Council in Hong Kong with sufficient statutory protection of the freedom of speech and expression of the media needs to be carefully examined with due consultations among the community in Hong Kong and the media fraternity as issues relating to governmental intrusion will be of serious concern in the formation of a Independent Press Council. For example, the Indian experience of having an effective and independent press council since 1966 can be instructive in guaranteeing the functional autonomy in any legislation that is proposed for establishing the Independent Press Council in Hong Kong. For more on the Press Council of India, see <http://presscouncil.nic.in/home.htm> (last visited Mar. 6, 2004).

75. For a very interesting argument on empowering the victim of corruption, see Pether Langseth, *Empowering the Victims of Corruption through Social Control Mechanisms*, U.N. OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, GLOBAL PROGRAMME AGAINST CORRUPTION, RESEARCH AND SCIENTIFIC SERIES (Oct. 9, 2001), available at <http://www.unodc.org/pdf/crime/gpacpublications/cicp17.pdf> (last visited Mar. 6, 2004).

freedoms of people. In the context of Hong Kong, there has been a lingering issue with regard to the powers of the ICAC and its potential impact on human rights.<sup>76</sup> The powers of the ICAC were duly trimmed before the passing of the Bill of Rights Ordinance (BORO). Commenting on the consequence of reducing the powers of the ICAC in accordance with the provision of the BORO, Lo and Yu have observed that,

The ICAC has suffered a major power cut with the introduction of the Bill of Rights Ordinance in 1991 and a further trim down of powers as a result of the ICAC Review in 1994. The main characteristic of the change is to transfer power from the hands of the Commissioner to the Court. Under such an arrangement, the powers originally enjoyed by the ICAC have become more judicially confined and the likelihood of them being abused has been drastically minimized.<sup>77</sup>

The fact that powers of the ICAC have been kept under judicial check is an important method by which human rights are protected.

The provisions of the International Covenant on Civil and Political Rights (ICCPR) are entrenched throughout the BORO and hence, there are international legal commitments requiring Hong Kong's adherence to established human rights principles.

The fact that the activities of the ICAC can potentially infringe upon human rights demonstrates the need for a human rights commission in Hong Kong. The establishment of an Independent Human Rights Commission (IHRC) is called for so that all potential human rights concerns of anti-corruption efforts and other similar issues can be scrutinized.<sup>78</sup> This would also help foster greater sharing of information and mutual understanding of concerns by the ICAC and the IHRC.

If the anti-corruption efforts are not adequately provided with the much needed democratic checks and balances, it is possible that the institutional approach of anti-corruption will be politicized. Politicization of the corruption issue is not good for law enforcement work in Hong Kong and would threaten the very foundations of the rule of law and good governance. Interestingly, given the fact that the ICAC has enormous powers under the law to investigate and prosecute acts of corruption in Hong Kong, the human rights implications of its power came in to question in the landmark case of *Attorney General v. Hui Kin-hong*

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76. For a comprehensive understanding of human rights implication of the anti-corruption efforts in Hong Kong, see T. Wing Lo & Ricky C.C. Yu, *Curbing Draconian Powers: The Effects on Hong Kong's Graft-Fighter*, 4 INT'L J. HUM. RTS. 54 (2000) at 54-73.

77. *Id.* at 68.

78. For understanding the need for establishing a human rights commission in Hong Kong, see C. Raj Kumar, *Developing a Human Rights Culture in Hong Kong — Creating a Framework for Establishing the Independent Human Rights Commission*, 11 TULSA J. COMP. & INT'L L. (forthcoming 2004).

[1995] 1 HKCLR 227 (“*Harry Hui’s Case*”).<sup>79</sup> The facts of the case are that Mr. Hui a former civil servant being a senior estate surveyor with the Buildings and Lands Department was charged with an offense under section 10(1)(a) of the Prevention of Bribery Ordinance (Cap. 201) (hereinafter POBO).<sup>80</sup> The basic argument of his counsel was that section 10(1)(a)<sup>81</sup> was inconsistent with BOR Art 11(1)<sup>82</sup> and was thereby repealed.<sup>83</sup> According to section 10(1)(a) of the POBO,

any person who, being or having been a Government servant maintains a standard of living above that which is commensurate with his present or past official emoluments shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living, be guilty of an offence.

Commenting on the decision of the Court of Appeal in this case, Fung has observed that the,

Court of Appeal emphasised the importance of striking a right balance between the presumption of innocence and the need of society to combat corruption, the latter characterised as a cancerous activity and an evil practice. Before the Court of Appeal came to its conclusion, it noted that the prosecution was not simply required by the provision to prove that expenditure was greater than income. The Government is under an obligation to establish the following: a. the amount of pecuniary resources and other assets in the accused’s control at the charge date; b. the accused’s total official emoluments up to the same date; and c. disproportion between (a) and (b) *i.e.* the acquisition of the total assets under the accused’s control could not reasonably, in all the circumstances, have been

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79. See Daniel R. Fung, *Anti-Corruption and Human Rights Protection: Hong Kong’s Jurisprudential Experience*, in 8TH INTERNATIONAL ANTI-CORRUPTION CONFERENCE, available at [http://www.transparency.org/iacc/8th\\_iacc/papers/fung.html](http://www.transparency.org/iacc/8th_iacc/papers/fung.html) (last visited Mar. 6, 2004).

80. *Id.*

81. Section 10: Possession of Unexplained Property: (1) Any person who, being or having been a prescribed officer- (Amended 14 of 2003 s. 17) (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence. This is available at <http://www.icac.org.hk/eng/main/index.html> (last visited Mar. 6, 2004).

82. Article 11: Rights of persons charged with or convicted of criminal offence: (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. This is available at <http://www.justice.gov.hk/blis.nsf/0/45005C093DC38DA1C825648300293CC4?OpenDocument> (last visited Mar. 6, 2004).

83. See Fung, *supra* note 79.

84. *Id.*

afforded out of the total official emoluments up to that date. In other words, the disproportionality must be sufficiently significant as to call out for an explanation.<sup>85</sup>

In this case, the Court of Appeal found section 10(1)(a) of the POBO to be consistent with the presumption of innocence guaranteed under the BORO. It is possible that similar cases relating to the impact of anti-corruption legislation and enforcement mechanisms may come before the courts in the HKSAR and it is important that human rights and civil liberties are not compromised in the efforts to develop corruption-free governance.

#### VIII. RELATIONSHIP OF CORRUPTION AND INTERNATIONAL HUMAN RIGHTS LAW<sup>86</sup>—RELEVANCE AND IMPLICATIONS FOR HONG KONG<sup>87</sup>

The issue of corruption has recently become a matter of global concern and the UN General Assembly has approved the first internationally negotiated treaty against corruption. The anti-corruption treaty was opened for signature at a High-Level Political Signing Conference beginning December 9, 2003, in Merida, Mexico, and will enter into force 90 days after the 30th country deposits its instrument of ratification. It was adopted without a vote.<sup>88</sup> The UN Secretary-General, Mr. Kofi Annan, made a statement on the adoption of the Convention against Corruption that clearly demonstrates the important linkages between corruption, human rights and the rule of law. His speech underlined the need to understand the implications of corruption on governance in both developed and developing countries. Mr. Annan observed that, "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish."<sup>89</sup> The

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85. *See id.*

86. I have examined the relationship of corruption and human rights with reference to India in another article *see* Kumar, *supra* note 14. While the concept of linking corruption and human rights is similar, the examination of the type of linkage and the issues arising out of the linkage are different due to the nature of the differences in legal systems and political cultures of Hong Kong and India.

87. *See* C. Raj Kumar, *The Benefit of a Corruption-Free Society*, HONG KONG LAWYER, 39, (2002), available at <http://www.hk-lawyer.com/2002-12/Dec02-viewpoint.htm> (last visited Mar. 6, 2004).

88. UN OKs 1<sup>st</sup> International Anti-Corruption Treaty, WASHINGTON TIMES, available at <http://washingtontimes.com/upi-breaking/20031031-071502-6571r.htm> (last visited Mar. 6, 2004).

89. U.N. SECRETARY-GENERAL OFFICE OF THE SPOKESMAN, SECRETARY-GENERAL'S STATEMENT ON THE ADOPTION BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, at <http://www.un.org/apps/sg/sgstats.asp?nid=602> (last visited Mar. 6, 2004).

fact that the U.N. Secretary-General chose to draw these linkages at this point in time, while the international anti-corruption treaty is about to come into force, demonstrates the need for countries currently battling corruption to take the initiative in their approaches formulating human rights based approaches to tackle corruption.

As a part of the concept of mainstreaming human rights, in 1997 the U.N. Secretary-General designated human rights as a broad and cross-cutting issue in his U.N. reform program. According to this new paradigm of development, "mainstreaming human rights refers to the concept of enhancing the human rights program and integrating it into the broad range of United Nations activities, also in the areas of development and humanitarian action."<sup>90</sup>

Generally, international human rights law has evolved gradually to become enforceable treaty obligations when countries become parties to the treaties such as the ICCPR or the International Covenant in Economic, Social and Cultural Rights (ICESCR). In the context of Hong Kong, human rights in the form of rights that are guaranteed under the Basic Law and the BORO have evolved in different stages. Hong Kong has embraced international human rights law in a significant manner.<sup>91</sup> The Basic Law has an exclusive chapter on Fundamental Rights and Freedoms of the Residents (Chapter III). Article 39 in Chapter III creates a framework for domestic application of international human rights in Hong Kong:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this article.<sup>92</sup>

Chapter III of the Basic Law incorporates a comprehensive set of

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90. *Mainstreaming Human Rights*, U.N. Office of High Commissioner for Human Rights, available at <http://www.unhchr.ch/development/mainstreaming-01.html> (last visited Mar. 6, 2004).

91. For an excellent article in this perspective, see Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

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

rights listed in the Joint Declaration. The rights and freedoms are entrenched in the Basic Law, as no law of the legislature of the HKSAR may “contravene this Law” (art II).<sup>93</sup> Besides this chapter, there are other parts of the Basic Law, which include provisions relating to rights or the means to exercise them.<sup>94</sup> In June 1991, the legislature of Hong Kong enacted the Bill of Rights Ordinance.<sup>95</sup> This was based upon the ICCPR.<sup>96</sup> The ICCPR<sup>97</sup> (along with the ICESCR<sup>98</sup>) is an international human rights treaty, adopted by the UN General Assembly on December 16, 1966, that came into force on March 23, 1976.<sup>99</sup> The United Kingdom signed both the treaties on September 16, 1968, and ratified them on July 20, 1976, both for itself and Hong Kong, its legal dependency.<sup>100</sup> The incorporation of the ICCPR into Hong Kong law happened in 1991, when the obligations of the government and the rights of the individuals under the ICCPR<sup>101</sup> started to be directly enforced by the Hong Kong legal system.<sup>102</sup> The Joint Declaration ensured that the ICCPR would continue to apply in Hong Kong, though China was quite resistant to the enactment of the BORO based on this covenant.<sup>103</sup> To constitutionally entrench the BORO<sup>104</sup> before the hand over, the constitution at the time, the Letters Patent,<sup>105</sup> was amended to control the law-making capacity of the Legislative Council.<sup>106</sup> The amendment

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93. *Id.*

94. *Id.*

95. Hong Kong Bill of Rights Ordinance, Sept. 1991, 30 I.L.M. 1330 (effective June 8, 1991).

96. See Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis*, 34 COLUM. J. TRANSNAT'L L. 301 (1996).

97. International Covenant on Economic, Social, and Cultural Rights & International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

98. *Id.* at 49.

99. See Yash Ghai, *The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region: Complementarities and Conflicts*, 1 J. OF CHINESE AND COMP. L. 30, 31 (1997).

100. *Id.* at 31. For further reading, see Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 32, 51-52 (Louis Henkin ed., 1981). See also Li, *supra* note 24.

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

102. See Ghai, *supra* note 99, at 31.

103. *Id.* at 36-37. Section XIII of Annex I of the Joint Declaration

104. See Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, in *HUMAN RIGHTS IN HONG KONG* 120, 134-39 (Raymond Wacks ed., 1992).

105. Hong Kong Letters Patent, No.2 1991, reprinted in *PUBLIC LAW AND HUMAN RIGHTS: A HONG KONG SOURCEBOOK* 19 (Andrew Byrnes & Johannes Chan eds., 1993).

106. See Ghai, *supra* note 99, at 38.



reads:

The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly on 16 December 1966, as applied in Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that covenant as applied to Hong Kong.<sup>107</sup>

Ghai has observed correctly that this amendment does not entrench the BORO<sup>108</sup> as such, but only the ICCPR as applied to Hong Kong.<sup>109</sup>

In any event, there is no controversy as to the application of international human rights law in Hong Kong, given the fact that the human rights framework in the HKSAR has included it within the enforceable rights of Hong Kong. The rights relating to corruption-free governance and its component rights relating to transparency in governance, accountability of administrators, and the right to information can be included with a view to enforce international human rights law. There are a number of ways to ensure that these rights become translated into enforceable mechanisms. The typical approaches that have been adopted by a few constitutional jurisdictions is by way of courts recognizing these human rights as a part of the Constitution of a particular society and, in the process, interpreting the law in accordance with international human rights. This approach has been effective in some jurisdictions, and has resulted in the promotion of constitutional reform in the form of amendments to the Constitution, legal reform, institutional development, and other measures intended to reflect the constitutional interpretation adopted by the courts.

In Hong Kong, it is possible that the judiciary can play an important role in achieving the linkages between corruption and human rights, particularly if it can relate the activities of the government by way of corruption to abuse of power, acknowledged to be an example of human rights violations. The implications of developing a human rights based approach to corruption control mechanisms<sup>110</sup> in Hong Kong has

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107. Now article VII (5).

108. See Nihal Jayawickrama, *The Hong Kong Bill of Rights: A Critique*, in *THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH* (Johannes Chan & Yash Ghai eds., 1993).

109. See Ghai, *supra* note 99, at 38.

110. For a general paper on the linkages between corruption and human rights, see Zoe Pearson, *Human Rights and Corruption*, Research Paper produced by the Centre for

profound implications for shaping future governance policies in Hong Kong. Following, are some of the specific advantages of this approach.

*A. Judicial Enforcement of Corruption—Free Governance  
as a Human Right*

If corruption is recognized as a violation of human rights, it is possible that the judiciary in Hong Kong may be empowered to intervene on matters when the abuse of power has occurred as a result of corruption. What is perceived as an illegal act when understood to be a human rights violation provides for valuable judicial space ensuring mandatory enforcement of its directions providing for transparency in governance and freedom from corruption. Judicial empowerment,<sup>111</sup> through an expanded interpretation of rights,<sup>112</sup> would necessitate an attitudinal change in government to facilitate the development of corruption prevention systems while recognizing that corruption is no longer merely a public policy goal, but a constitutional imperative. It is useful to refer to the decision of the Court of Appeal in Hong Kong that underlines the importance of corruption-free governance and also the role of judiciary in anti-corruption efforts. The Court of Appeal in the landmark case of *Attorney General v. Hui Kin-hong*<sup>113</sup> (per Bokhary JA, as he then was) observed:

Nobody in Hong Kong should be in any doubt as to the deadly and insidious nature of corruption. Still fresh is the memory of the days of rampant corruption before the advent of the Independent Commission Against Corruption in early 1974. And there have been recent reminders. "Bribery is an evil practice which threatens the foundations of any civilised society." That IS how the Privy Council put it in the recent case of *Attorney General v. Reid* [1994] 1 AC 324. "And even more recently ... this Court, speaking, of corruption in the same breath as drug trafficking, characterised both as cancerous activities."<sup>114</sup>

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Democratic Institutions, available at [http://www.cdi.anu.edu.au/research\\_publications/research\\_downloads/hrc.pdf](http://www.cdi.anu.edu.au/research_publications/research_downloads/hrc.pdf) (last visited Mar. 6, 2004).

111. For a very interesting article on the nature of interaction between the judiciaries in the field of human rights, see Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. OF LEGAL STUDIES 499 (2000).

112. See generally Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HONG KONG L.J. 200 (2001).

113. [1995] 1 HKCLR 227 (CA) at 229.

114. See Fung, *supra* note 79.

*B. Civil Society Empowerment to Combat Corruption as it Violates Human Rights*

The active and sustained involvement of civil society is necessary for tackling any social problem, including corruption. If corruption is recognized as a human rights issue, it will ensure that the civil society actors in Hong Kong take an active part in protecting and promoting this right. Hong Kong's vibrant civil society will have an important tool to resist any political pressure that may lose sight of the need for constantly keeping a check on corruption.<sup>115</sup> Also, the civil society would be socially empowered to tackle the problem of corruption by playing the role of the guardian of human rights and any infringement of the rights of the residents of Hong Kong would invite swift response from the civil society.<sup>116</sup> The human rights activism that is typically generated through the work of the civil society in Hong Kong can be useful for various institutions, including the ICAC to fight corruption in Hong Kong. Human rights approach creates an empowering dimension to the work of the civil society in ensuring transparency of the government. Corruption being a law enforcement and public policy issue, and which only invites official response will start to receive a wider community and civil society response due to its human rights consequences. The empowering dimension of human rights discourse is useful in sustaining corruption-free governance as a basic principle of administration in the HKSAR.

The right to information<sup>117</sup> can be effectively used by the civil society in Hong Kong ensuring transparency in governance and preventing the possibility of corruption through mechanisms that monitor actions of the government. Obviously, the media, non-governmental organizations, voluntary organizations, public spirited individuals, academic and other independent institutions, have to play an important role in developing a broad and dynamic civil society base to underline the human rights

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115. See C. Raj Kumar, *To Protect the Rule of Law, People must get Involved*, S. CHINA MORNING POST, Jan. 19, 2003.

116. See Dr. Patrick Ho, *Contested Space: The Role of Civil Society Organizations in Hong Kong*, Presentation by the Sec. for Home Affairs, Govt. of the HKSAR in the Conference on Governance, Organizational Effectiveness, and the Nonprofit Sector (Sept. 5-7, 2003), available at <http://www.asianphilanthropy.org/staging/about/RoleCSOs.htm> (last visited Mar. 6, 2004).

117. Lotte E. Feinberg, *Open Government and Freedom of Information: Fishbowl Accountability?*, in HANDBOOK OF PUBLIC LAW AND ADMINISTRATION (Philip J. Cooper & Chester A. Newland, eds., 1997).

implications of corruption.<sup>118</sup>

*C. Human Rights Approach to Corruption Control  
Maintains Political Consensus*

When corruption is recognized as a human rights issue, it is possible to achieve political consensus on corruption. Further, it can ensure that neutrality is maintained in the enforcement of laws relating to corruption so there is no biased and/or selective enforcement. This is important as it is possible that laws relating to corruption prevention and the institutions that are designed to tackle corruption can be potentially misused by the government to settle political scores against opposition party members. This practice may seem to demonstrate that corrupt acts are coming to light and corruption is unraveled, but a deeper examination would reveal the discriminatory nature of the target enforcement mechanism. To avoid this problem, the recognition of corruption as a human rights issue broadens the scope for engagement and political consensus can be developed to ensure that such a violation of human rights is uniformly recognized without any form of discrimination. This has the potential to achieve greater coherence in political debates as the issue of corruption affects all aspects of administration. It is in the best interests of government of the HKSAR and the political opposition to confront corruption and maintain the independence and integrity of the ICAC in its efforts to fight corruption. Maintaining political consensus on issues relating to corruption underlines the need for integrating the rule of law framework that is prevailing in Hong Kong to good governance principles that are internationally developed.

IX. CONCLUSION

The problem of corruption when examined as a human rights issue produces an entirely new and important approach to ensure that good governance remains the goal of public administration. In the context of Hong Kong, the successes achieved in combating corruption may not be sustained if it remains purely within the domain of law enforcement and public policy discourse. The fact that community education and participation of the people in generating an attitudinal change was deemed one of the initial goals of the ICAC's approach, there is a need for the empowerment of the people of Hong Kong to fight against corruption on the basis of developing certain rights against corruption. The human rights approach to corruption control mechanism makes the people of

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118. Loh, *supra* note 64.

Hong Kong central players in the corruption resistance movement. The law enforcement work of the government to ensure corruption-free governance is perceived as a part of the rights of the people of Hong Kong to seek a corruption-free government. Concomitantly, it then becomes the duty of the government to ensure that all of its affairs are conducted in a manner that promotes transparency, accountability, and integrity in public administration. This would truly institutionalize a culture of integrity in Hong Kong. The human rights approaches of corruption control mechanisms are expected to enhance the successful model of corruption prevention strategies that have already been institutionalized in Hong Kong. Corruption-free governance is an important dimension to the rule of law framework that is firmly established in Hong Kong. If this framework needs to be sustained in the context of various social, economic and political transitions that are occurring in Hong Kong, the anti-corruption initiatives should be integrated with the human rights discourse to ensure good governance in Hong Kong.

