

Righting Wrongs against Humanity: the Role of Human Rights Institution

I. Puja Kapai: Hong Kong's Human Rights Context

- Hong Kong is a party to numerous international treaties, including the Convention of the Elimination of All Forms of Discrimination against Women (“CEDAW”), the Convention on the Rights of Persons with Disabilities (“CRPD”) and the Convention on the Rights of the Child (“CRC”).
- Hong Kong’s government and its NGOs regularly report to the UN treaty body.
- Hong Kong’s Equal Opportunities Commission (“EOC”) is responsible for the implementation of Hong Kong’s four anti-discrimination ordinance, namely the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance and the Race Discrimination Ordinance,
- The Basic Law entrenches provisions in the ICCPR and the ICESCR through article 39.
- The EOC has a number of powers to investigate and to help parties reconcile by way of the individual complains mechanism. The EOC also conducts research and has a policy arm. On occasions the EOC has intervene in court on behalf of certain parties against the government on issues involving discrimination.
- The EOC however is not in compliance with the Paris Principles. Therefore it is not, in that sense, a strictly independent human rights institution that monitors the government across its human rights obligations.

II. Puja Kapai: Ethnic Minorities in Hong Kong

- Sadly the Race Discrimination Ordinance is not as comprehensive as the other three anti-discrimination ordinances in that its application is restricted by numerous exemptions.
- The situation in Hong Kong has been particularly difficult for ethnic minority children in that they need to go through Hong Kong’s “racially segregated” education system, a system that resembles the US’s education system in the fifties.
- Ethnic minority children are concentrated in about 22 schools. On an official basis, the policy for designated schooling has been disbanded. But children are still going to the same “racially segregated” schools.
- The implication is that ethnic minority children have no access to quality education, and as a result they are unable to get into higher education institution and they cannot compete on an equal footing with local Chinese.
- In terms of health care, ethnic minority are often prescribed with Panadol to fix any medical issues due to language barriers. The refugee population in Hong Kong faces the same problem. This is being branded as the “Panadol Therapy”.

- In terms of advocacy, there has been a tremendous effort in seeking to lobby for the protection of the rights of ethnic minorities. Regrettably the government has not been very responsive.
- Since the Race Discrimination Ordinance came into effect in 2009, there has only been 1 case on race discrimination brought against the police by a young man from the Indian community (judgement still pending).

Q: What approach and strategies should be adopted when we face resistance and inertia on the part of the government? More importantly, how should we tackle the problem that members of the public do not necessarily believe that certain minorities should have equal rights?

III. Marco Wan: Sexual Minorities in Hong Kong

- A lot of progress has been made over the last decade.
- In *Leung TC William Roy v Secretary for Justice* [2006] 4 HKLRD 211, criminal law provision specifically targeting same-sex sexual behaviour were held unconstitutional.
- Both direct and indirect discrimination against sexual minorities by the government would violate the equality provisions in the Basic Law and the Bill of Rights Ordinance, Cap 383.
- In *Secretary for Justice v Yau Yuk Lung Zigo* [2006] 4 HKLRD 196, at §2, the Court of Final Appeal said that dignity is the concept that underpins the equality jurisprudence in Hong Kong
- The three key challenges for sexual minorities in Hong Kong are freedom of speech, discrimination and marriage.

Freedom of speech

- The latest manifestation of the freedom of speech issue is the Raymond Chan incident. Chan is an openly gay legislator. While he was taking the subway, two women hurled homophobic abuse at him. Chan videoed them and posted the video on his social media site.
- While many condemn the women's actions, some argue that the women enjoy freedom of speech and that they should be able to say what they want. There is currently no law in Hong Kong to guard against hate speech directed toward sexual minorities.
- The interesting aspect of the incident is the compilation of the political and the sexual. These women explicitly said that because Chan is a politician and a public figure, they as taxpayers are allowed to criticise him in whatever manner they want.

Discrimination

- There is an ongoing debate as to whether Hong Kong should legislate against discrimination based on sexual orientation
- The two main counter-argument to legislating:

1. The classic liberty argument: if I am an employer and I am uncomfortable with homosexuality, I should have the freedom to choose not to employ a homosexual person.
2. Freedom of religion argument: if I am an employer and my religious faith condemns homosexuality, I should not be forced to employ a homosexual person

Marriage

- The debate on same-sex marriage takes an interesting turn recently following QT's case. In that case a lesbian couple has forged a civil partnership in the UK. One of them moved to Hong Kong for work, but the Immigration Department refused to accept her partner's application for a dependant visa. They brought proceedings to challenge the Immigration Department's decision.

IV. Gillian Triggs: Australia's Human Rights Context

- Australia and Hong Kong share the same legal-jurisprudential background, but they deal with human rights issues quite differently.
- It is interesting to note how mobile phones play a part in the Raymond Chan incident. Mobile phones have allowed people to document discrimination and provide evidence to their accusations. A quality research paper is not very accessible to the public, but a video is. Recently a video on social media sites shows a young man from North Africa vilified in the train by a mentally unstable woman. The other passengers gradually moved towards him as a gesture of support and some shock hands with the man. This visual image is very powerful, as it shows that the Australian community rejects abusive behaviour.
- Most of the contemporary human rights law arose out of the peace treaties in the 19th century to protect minority groups. However minority groups have not been the focus of Australian's human rights law.
- Australia is very exceptional in its approach to human rights law. The Australian constitution is a very technical piece of document primarily concerned with the respective rights of states, territories and the commonwealth government. It is designed to protect trade and the interests of what were the colonies.
- There are very few human rights protection in the Australian. There are provision regarding the freedom of religion, but that was designed explicitly to stop any religion from being the established religion.
- There is the right to vote.
- There is the right to be compensated if the government takes your property.
- The High Court of Australia has imply a right of political communication, the rationale being that in a representative democracy, everyone has the right to communicate at the political level. The right of political communication is however not the same as the freedom of speech.
- Australia has been a major player in developing international human rights law. She has negotiated and ratified most of the international human rights treaties, but,

- curiously, has not implemented those treaties into her domestic law. In a common law system, the courts cannot enforce an international treaty if it has not been implemented into domestic law.
- There is no regional human rights commission to build Asia's human rights jurisprudence, whereas in other parts of the world such as Africa, the Arab nations, Europe, Latin America and North Africa such institutional opportunity exists.
 - Australia is unique in that it has no charter, bill of rights provision or legislative provisions to protect basic human rights except for:
 - The Race Discrimination Act 1975, which is as close to a bill of rights that Australia has. It has been generously interpreted and has been effective in being accepted by the Australian public primarily because Australia is a nation of migrants.
 - The Sex Discrimination Act 1984. An amendment has been introduced several years ago to prohibit discrimination on the grounds of sexual orientation. The Australian public rejects homophobic behaviour.
 - The Disability Discrimination Act 1992. Australia is the first country to have a domestic piece of anti-disability discrimination legislation before the international convention came into effect. Disability is again something that attracts core support within the Australian community.
 - The Age Discrimination Act 2004. There is no international convention on age discrimination. The Human Rights Commission's Age Discrimination Commissioner is attempting to establish an international convention against age discrimination. Very interestingly, the support for such a convention is coming from the Asian region, such as China, Indonesia, Malaysia and the Philippines.
 - So how does Australia support human rights when there is so little legislation? Australia protects human rights in part by the common law principle broadly described as the principle of legality: the Parliament is presumed to have legislated in accordance with international law and consistent with the common law principles of legality-fairness, judicial review, no arbitrary decision making etc.
 - The greatest difficulty in Australia is that these common law principles only apply when the relevant legislation is unclear. If the legislation is crystal clear there is nothing the court can do to override it.

V. *Gillian Triggs: Minority Groups in Australia*

- Everyone is a migrant in Australia except for the indigenous people.
- Australians are primarily interested not in minority groups but in equality of all races because Australia is a genuinely diverse and multi-cultural society.
- There is no specific provision in Australia's domestic law that seeks to protect any minority group – this has proven to be a significant problem for Australia's indigenous people. They account for 3% of the Australian population but they suffer human rights abuses at a ratio that is grossly disproportionate to the rest of the Australian population:
 - The prison population is between 20%-40% higher amongst the indigenous community than it is amongst the whole of the Australian community.

- Statistical evidence shows that indigenous Australians are, to various degree, more likely to die as children, to be imprisoned, to have poor education, to be without a job, to be homeless and to be sick.
- Although Australia has accepted the United Nations Declaration on the Rights of Indigenous Peoples, this piece of instrument is very poorly understood by the community and often ignored by the government since it is not a legally binding treaty.
- To a certain degree the indigenous community has been effectively protected through the Race Discrimination Act. However the Race Discrimination Act had been suspended for a period of time in light of the northern territory intervention. A credible report reveals that aboriginal children and girls suffer sexual abuse within aboriginal communities at a very high rate, particularly in the Northern territory. Consequently the government enacted the Northern Territory National Emergency Response Act 2007 over a weekend and without any consultation with the indigenous community. The Act enables the government to move into aboriginal communities and in some instances take the children away. The legislation is really a vehicle for going into the territory and undertaking all sorts of programmes. The Australian public supported the intervention for some time but then became deeply concerned at the suspension of the Race Discrimination Act. The Race Discrimination Act has been reinstated with some precaution.
- There are many instances where special laws are being introduced for the aboriginal community but their implementation has gone badly wrong. By way of example, if an aboriginal woman is found with a bottle of alcohol in her car, she can be prosecuted and jailed for 2 years by way of Australia's liquor laws. The issue is whether such an act can be justify by means of the special measures provisions in the Race Discrimination Act, and the court ruled that it can.

VI. *Gillian Triggs: the Australian Human Rights Commission*

- The Commission has 5 commissioners: Children, Race, Aboriginals and Torres Strait Islander, Age, Disability and Sex. Most of the work done by the commissioners receive support from major parties.
- But in areas such as asylum seeker rights, arbitrary detention of aboriginals, and arbitrary detention of individuals with cognitive disability (who may end up in criminal facilities for decades without proper treatment), the government is in profound disagreement with the commission.
- Sadly, on asylum seeker policy, both major party disagree with the commission thus it is very difficult to gather support and lobby for asylum seeker rights.
- Given that Australian has no constitution and legislative protection for human rights, the existence of independent statutory bodies like the Australian Human Rights Commission is important in that they can hold the government accountable.
- The courts are very constrained by the precise terms of a piece of legislation hence there is very little they can do.

VII. Q&A

- *“Firstly, how has Australia’s newly introduced sexual orientation discrimination law been received? Are there any complains and is it effective? What are the reaction of religious communities, given that in Hong Kong Christian religious groups strongly opposed to such a legislation? Secondly, since Hong Kong is reviewing its own anti-discrimination laws, what are you views on the Australian government’s intended amendment on Australia’s racial vilification laws?”*
- The former government introduced the sexual orientation discrimination laws. The Australian Human Rights Commission was very cautious, fearing that the legislation would not receive public endorsement. But the Australian public embrace it completely, and now many Australians are urging the government to bring in marriage equality
- The Commission do get complains but only very few. It seems that Australians have internalised the idea that one cannot discrimination against LGBTQs.
- Another aspect of it is that Australians are not religious people, thus religious groups do not have the same lobbying power as in the US or Europe. The Commission has had conversations with various religious groups and they all stated that they will not discriminate against LGBTQs on practical basis
- With regards to the second question, the Australian government decided to repeal its racial vilification laws but the public rose up and defended them, insisting that it is important to keep those laws in place. Australians see the need for laws that prevents abuse on racial grounds. It is important for the public to absorb these core human rights principles as cultural norms.
- *“You emphasise that the Australian public has been very supportive towards the anti-discrimination legislations. In Hong Kong the EOC very much wants to obtain public support before taking the lead on legislation. How important is public support? From a rights perspective surely one should take the lead even if the public have discriminatory views? Can we not legislate first then change the mindset?”*
- Education is vital, it is in fact the most important thing that the commission does
- The education curriculum includes human rights education, but teachers are not trained lawyers and human rights issues are not easy to teach. Thus the commission has created human rights modules that fit the curriculum and teaching materials are freely available on the Commission’s website. The Commission has also invested a lot of money on interactive materials and videos in hopes of engaging the general community in human rights education.
- The government definitely should take the lead. Without government leadership it is impossible to achieve cultural change. For example, a conservative politician recently approach the Commission in hopes of improving the condition of seasonal workers at plantations. The Commission is hoping that this collaboration will turn out well and

they may even be able to encourage Australia to sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

- *“You talked about your controversial work on the detention of child asylum seekers and that the issue did not obtain much support from political parties. What is the public reaction towards asylum seekers rights? Is this an instance where public opinion may influence the development on refugee laws?”*
- The thousands of child asylum seekers released in the last few months owe something to the public’s acceptance of the Commission’s report. The tide is turning and the public support is huge. Australians are migrants, and many groups come as refugees – the Vietnamese, the Jews and the Sri Lankans - they use people smugglers and came with no paper too. Australia is based on illegal immigrants.
- Communities have opened their arms and drawn asylum seekers in, making sure they receive adequate care, schooling and are properly engaged in the community. The community’s endorsement of a humane approach towards asylum seekers is wonderful.
- *“Firstly, how effective was the Commission in influencing the implementation of international treaties into domestic legislations? Secondly, do you think the EOC is as effective as the Commission as a statutory, regulatory and educational body?”*
- Australia is very poor in implementing international treaties into domestic law. Hence there is a huge gap between Australia’s international obligations and its domestic legislation. This is exceptional in common law countries.
- The Commission’s combination of roles works effectively. For instance, because the Commission is responsible for handling discrimination complaints, it can obtain accurate statistics on what the Australian public is facing and translate that into policies.
- Independence is key. The Commission is however enormously vulnerable because the government gets to determine its budget every year.
- The concept of an independent statutory body is very important because it acts as an institutional body that connects the government and civil society.