

Reflections, Questions & Answers

1. Answer Styannes, AHRC: I was involved in a Non-Government Organisation(NGO) coalition in Jakarta which proposed to the government a draft Amendment to the Criminal Procedure Code. I assume the situation [of human rights] in HongKong is better than in Indonesia. But I wonder, because of anti-torture laws in HongKong, what would happen if an accused counters a charge with claims of torture? Would a parallel proceeding be undertaken? Yesterday we were talking about a "trial within a trial" mechanism, but could you please elaborate? When civil society in Jakarta was drafting a proposal to government concerning anti-torture they were not entirely sure of the technical aspects or justifications for these mechanisms.

Margaret Ng Ngoi-yee, Hong Kong: Usually the police beat up a detained person with the goal to extract a confession. That statement will be produced in court as evidence. If the prosecution presents this statement as part of "admissible" evidence, the court immediately requires the prosecution to prove that the arrested person made this voluntarily. If the accused doesn't challenge the admissibility of the evidence, that is the end of the matter. Even so, the prosecutor is obliged to go through certain formalities (set questions such as "Did you induce...pressure...force"). If the accused challenges the admissibility of the evidence in the same trial (voir dire), the court must first address the voluntariness of statement. The defendant will begin by explaining why it wasn't voluntary ("I was beaten up, threatened with arbitrary detention, my family was threatened, I was denied food, etc."). This is followed by examinations and cross-examinations of witnesses and involved parties. The court will decide then and there if the evidence is inadmissible on the grounds of the suspect being coerced or forced. If the evidence is deemed inadmissible, the prosecution will not be allowed to produce it when arguing their case. Otherwise, the statement may be "admissible" but would not qualify as very strong or damning evidence. These days, the voluntariness of confessions is not so debatable since confessions are video recorded.

2. Jan Ole Haagenen, RCT: Let's discuss countries in Asia instead and perhaps less about Hong Kong where there are, admirably, greater safeguards for rule of law and democracy. What recommendations would you [Margaret] have for parliamentarians? What should the relationship between parliamentarians and civil society look like?

Margaret Ng Ngoi-yee, Hong Kong: It is important to ensure human rights in any community are not the business only of human rights defenders. In Hong Kong, we're fortunate that human rights are ever-present in debates in parliament and Legco. The (relatively) democratically elected Legco has always kept an eye on that and are very sensitive to reports and complaints of humiliating treatment. A Security Panel monitors the police force, so questions are asked, questions such as "What is the policy governing strip searches? Are people kept overnight in police stations?" The government always attempts to avoid such questions but meetings with the Legco are open (reporters are present) so there is a lot of attention. This is a highly political process – constituents will hear and discredit the authorities if the government cannot satisfactorily account for its actions. Human rights groups act as advisors/experts and make recommendations to the Legco concerning the contravention of human rights. This is also Hong Kong's international obligation, to watch and criticise or commend what occurs in other countries. Frank discussions are important to a true understanding of why it is wrong to strip search unnecessarily. There are complaint mechanisms to individual members of the Legco. Human rights groups and the press work

together with the Legco to be catalysts for discussion and change. Although I have appealed a lot to what Hong Kong currently looks like, I believe that if you can aspire to such a condition in your respective countries, you might achieve a great deal for the protection of human rights.

3. Bijo Francis, AHRC: Acceptance of confession as evidence is prohibited by statute ("inadmissible") in many common law systems, regardless of voluntariness, or rendered very weak evidence. The exception is where a confession statement is recorded by a judicial officer, and only when the person in question requests to do so. Testing the veracity of such material is essential. It is important to convey to legislators here today that, globally, the acceptability of suspect statements have been diluted, precisely because of the abuses the admissibility of such documents as evidence exposes the individual to. In many Asian countries, the suspect's family is threatened – this makes the suspect very pliant to whatever the desires and whims of the authorities are.

Margaret Ng Ngoi-yee, Hong Kong: I agree that protections are being challenged by threats external to the state/non-state actors. The rise of national security (in the face of terrorism, particularly) has permitted abuse of laws and other constitutional safeguards, for instance. Any accused person must be given an opportunity to defend himself (this principle is central to notions of fair trial and presumption of innocence). It is difficult to resist the argument of "national security". Hong Kong's anti-terror law waters down civil rights.

Erik Wendt, RCT: What can the legislature do? We invite deputations from the public. When we discuss the fairness of torture complainant systems, external organisations with experience are asked to join the Legco and give evidence directly (this is a more inclusive, consultative and thorough process).

4. Eran Wickramaratne, Sri Lanka:

a) As a legislator, I wish to talk about how humiliating treatment creates public opinion/awareness in HK. We have very few women in our parliament, and male politicians are not checked for laughing at the issue of stripping suspected prostitutes. Such disrespect for the female person instead exacerbates the poor condition of human rights, a philosophy and belief system that emphatically asserts the inherent dignity and equal worth of the human person.

b) I would like to raise another interesting observation. In Hong Kong, you have institutions and no "fair" or "ideal" elections. In Sri Lanka, we may have elections, but this is rendered farcical in the face of "no institutions". I would rather be [in] Hong Kong!

c) Partnership between parliamentarians and civil society – we need a paper with proper recommendations and laws that better include non-state representatives in decision-making. Unfortunately, civil society in Sri Lanka is beaten down.

Margaret Ng Ngoi-yee, Hong Kong: Human rights defenders are often seen as troublemakers. I've been standing for elections in the legal functional constituency. Some people say I'm on the bad side of Beijing and that won't be good for trade and our economy – and so on and so forth. Human rights defenders' participation in politics also becomes more precarious by the day, even in Hong Kong, which cannot claim to represent the rest of Asia. We must constantly invent methods and means to support and strengthen each other while doing our work, both as human rights workers/organisations and as morally convicted parliamentarians.

5. Pushpa Bhusal, Nepal: In Nepal, the Maoist cadres petitioned the Supreme Court, which ruled against and ordered the executive to release them (quite a progressive move). I want to hear more about the relationship between three powers. What can the judiciary do to make effective decisions against the government?

Margaret Ng Ngoi-yee, Hong Kong: I would name independence of judiciary as the most important to rule of law. But how do we maintain the independence of the judiciary? Judiciary cannot speak for itself outside court. It is civil society that protects it; civil society is an irreplaceable component in this process of maintaining the independence of the judiciary. And every legislature has a strong reason to protect its judiciary. In 1999, the issue of children of mainland Chinese being able to vote in Hong Kong came up. The judiciary referred to Beijing. This interpretation process compromised the autonomy of Hong Kong courts. Usually, in cases of human rights abuses, it is the citizen or individual waging a case against a government possessed of overweening power. The people must then decide what their bottom line is: law (an established, objective standard, or rule of law) or political correctness (always deferring to authority, or rule of Rex, which may be a monarch, an autocrat, a powerful political party or a corrupt bureaucracy).

At any rate, it's a given that rule of law is ironclad (ultimate transgression to not). But in parts of Asia, the price for observing rule of law is high: it might cost you your business, livelihood, family, freedom, health and/or life. There was an incident in which a foreign domestic helper wanted to apply for a Permanent Resident's permit after living in Hong Kong for 7 years. Yet many locals worried that if the court set precedent and allowed her to become a Permanent Resident, many foreign workers would rush to settle in Hong Kong, where salaries and the average standard of living is high. There was a movement against the lawyer who represented this foreign domestic worker. And when you represent a client, it is not on behalf of your political party or affiliation; yet this was used as criticism against my party. Hong Kongers therefore can be hypocritical and turn on their own beliefs (right to have legal representation) when their own interests are compromised. There is no solution but vigilance – civil society must also watch itself and the congruity of its own actions, or risk harming the same civil, political and economic liberties they today freely enjoy.

6. Bijo Francis, AHRC: There have been examples of the Indian legislature cooperating with the AHRC. The Bill on Torture for Bangladesh has been proposed.

The time frame was 7-8 days, and this bill is today being debated in Parliament. Our Member of Parliament wasn't sure how far the bill would go, but at least it has passed the first stage. A law needed to be drafted, so section by section it was written by the legislature and the AHRC. The Lok Sabha debated hardly 30 minutes after 9.30pm, and the law against torture was passed last year with hardly any debate – barely 362 words to deal with the enormous issue of torture! It was a farcical exercise. Since it was a central decision, it needed to be run past the upper house too. Non-Government Organisations have been putting pressure on the upper house to approve this law too. A Parliamentary Select Committee was formed to call for objections and suggestions (critique and sample legislature to see what they would like to see as law against torture). They suggested a comprehensive review of the existing draft which included the definition of law, definition of torture and that described properly degrees of severity of torture. This Alliance should be used as a platform for further collaborative efforts. This is a responsibility civil society should also shoulder. No legislator is going to come around to ask for help on his or her own initiative.

Margaret Ng Ngoi-yee, Hong Kong: Interestingly, legal professionals compose a working group that explains judgements of court that require the reformation of complaint processing mechanisms. The Legco constantly involve the legal fraternity— cooperation between legal profession and the parliamentarians are crucial. I was going to ask what the relationship is between parliamentarian and electorate in your countries. If you do not do your duty, your electorate should not vote him in. Then again, this assumes a completely rational or at least single-minded electorate, which of course is not the case anywhere.

7. Kanyarat Wiphatawat, Thailand: So judges should be independent and accountable. Should parliaments appoint judges? Why should judges have the power to decide when not elected by the power (admittedly in America some elected, some appointed, but we are speaking of Asia).

Margaret Ng Ngoi-yee, Hong Kong: The common law answer to this question is that judges do not have personal power, only power as given by law. They are there to interpret and judge by law. Whether or not they have exceeded their powers is obvious in the judgement itself. Judgements must therefore be reasoned, and should be subject to appeals. I still favour appointment of judges but making the process as open, fair and competitive as possible to ensure security of tenure. And do remember that judges make evaluations based on an existing corpus of statutes. The legislature still bears the responsibility of creating or altering laws.