

and other virtues associated with the rule of law are better served by objective than subjective intention. Finding the actual intent of a composite body must always be problematical. The notion of a constitution — and the Basic Law will undoubtedly be a constitution¹⁴ — as an organic instrument which grows with the changing political and moral ideas of the community it governs is simply more attractive than the concept of a document dogmatically restricted to the meanings imposed by its makers at a particular point in time.

The appropriate style and method of interpretation of the Basic Law is a matter of vital importance to governance of the SAR, though it has as yet received scarcely any attention from constitutional lawyers in Hong Kong. It raises fundamental and complex issues such as autonomy, democracy, the separation of powers, authority, legitimacy, and the proper role of judges; to foreclose debate by the apparently simple expedient of asking the framers what they intended would greatly impoverish the territory's constitutional law and theory. SAR courts will be confronted with no more urgent question when they begin their work in 1997 than their attitude towards the ascertainment of meaning in the Basic Law.

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The Green Paper on Equal Opportunities for Women and Men: An Exercise in Consultation or Evasion?

In August of this year, the Hong Kong government issued the *Green Paper on Equal Opportunities for Women and Men*, thus initiating a period of public consultation on what, if any, steps should be taken to eliminate sex discrimination in Hong Kong. As that period has only recently ended, it will likely be some time before the results of the consultation and government's response are made public.

However, the *Green Paper* itself can be studied now. It warrants a critical examination, as it is a telling example of Hong Kong government's attitudes and strategies, not only toward the specific issue of sex discrimination, but also toward the more general question of public consultation on government policy. Indeed, in the absence of democracy, the practice of consulting the public has often been pointed to as a source of legitimacy for the Hong Kong government. As Norman Miners has observed, '[s]ince it cannot assert its right to rule because it has won an election, government takes great pains to emphasize that changes in policy are not the arbitrary dictates of an imperial master, but are

¹⁴ Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman Asia, 2nd ed 1993), pp 68–9.

rather the outcome of the fullest possible discussion with the groups most likely to be affected.¹

Of course, the extent to which government and its policies gain legitimacy through public consultation depends largely on the way that it conducts such consultation. Does government seek to educate the public in an objective manner, fairly representing not only government's views, but also opposing opinions? Does it present to the public all of the reasonable options for reform, or only those which government has already decided to pursue? In short, does government truly seek to inform and consult the public, or merely to convince the public of its own views and to justify policies that were formed quite independently of the consultation exercise?

While these questions could be asked of any public consultation exercise, they are particularly appropriate with regard to the *Green Paper on Equal Opportunities*, which was issued under rather special circumstances. In December 1992, the Legislative Council (the only arguably representative institution at that level of the Hong Kong legal system) voted unanimously in favour of a motion that the Hong Kong government request the United Kingdom to extend to Hong Kong the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW').² In so voting, the Legislative Council expressed clear support, not only for the principle of sexual equality, but also for government intervention to eradicate discrimination, including the enactment of anti-discrimination legislation applicable to the private sector.³

However, government refused to implement the Legislative Council's vote, insisting that it must first consult the public by means of 'a Green Paper on the need for action to ensure equal opportunities for men and women in society.'⁴ This insistence on additional consultation beyond the Legislative Council's unanimous vote is itself a good reason to scrutinize the *Green Paper*, as it raises genuine questions about the sincerity of the consultation exercise. After all, government certainly has been willing to accept the vote of the Legislative Council as representing public opinion on other issues (such as

¹ Norman Miners, *The Government and Politics of Hong Kong* (Oxford University Press, 5th ed 1991), pp 187-8.

² *Hong Kong Hansard* 1992, pp 1451-89 (16 December 1992). The motion gained the support of all those who voted; the only abstentions were by the three 'ex-officio' members of the Legislative Council who are also government officials. *Ibid*, p 1488.

³ The motion speech of Ms Emily Lau made clear that CEDAW would require positive steps to eliminate discrimination, including the enactment of anti-discrimination legislation in the areas of employment, advertising, and the provision of credit, goods and services: *ibid*, p 1454. The Legislative Council reiterated its support for such measures on 8 December 1993 when it agreed to a motion by Mrs Peggy Lam urging government to introduce CEDAW as soon as possible and to establish a Women's Commission to co-ordinate the implementation of the Convention and to monitor the enactment and enforcement of anti-discrimination legislation. See the draft Official Record of Proceedings of the Legislative Council, sitting on 8 December 1993, pp 85-123.

⁴ Statement of the Secretary for Education and Manpower, *Hong Kong Hansard* 1992, p 1457 (16 December 1992).

Governor Patten's recent proposals regarding elections to the Legislative Council).

Moreover, government's sudden insistence on public consultation on CEDAW marked a dramatic shift in its approach to international conventions in general (which normally are not the subject of widespread public consultation) and to this convention in particular. CEDAW was ratified by the United Kingdom in 1986 and has been applied to numerous other British dependent territories. It was not extended to Hong Kong at that time because Hong Kong government specifically requested that it not be applied here until it had an opportunity to assess its implications. Unfortunately, government made no commitment as to when it would complete this assessment and the consideration process has now dragged on for more than seven years. Moreover, government has conducted its assessment of CEDAW almost entirely in secret, making no effort to consult the public or even to inform it as to the progress of its review.⁵ When pressed by women's organizations and the United Nations Human Rights Committee, the government would only respond that it was still 'actively considering' the matter.⁶

Thus it appears that the initiative to issue the *Green Paper on Equal Opportunities* was not any long-standing commitment by government to public consultation, but rather government's need of a reason for not immediately acceding to the unanimous vote of the Legislative Council. Under these circumstances, it is particularly appropriate to scrutinize the *Green Paper* and to consider whether it constitutes a sincere effort to consult the public — or rather simply an attempt to obtain negative responses and an excuse for refusing to honour the Legislative Council's views.

A good place to begin such an examination is with the areas of discrimination in employment and discrimination in the New Territories. For these are two areas in which Hong Kong women have long maintained that sex discrimination is causing real hardship. They are also areas in which specific proposals for reform have been or are being considered by government. Thus, the manner in which government has consulted the public may have a real effect upon any reforms that are adopted.

⁵ Prior to the publication of the *Green Paper*, the only attempt by government to publicize its review of CEDAW occurred in the spring of 1992 when it announced the creation of an Inter-departmental Working Group on Sex Discrimination, made up entirely of government officials. While the main focus of the Working Group was sex discrimination in employment, the question of whether CEDAW should be extended to Hong Kong was also within its terms of reference. However, if the written findings of the Working Group are any indication, its work can best be described as a non-investigation. The findings consist of six pages (with no specific sources cited other than population censuses) and basically repeat Hong Kong government's long standing position that sex discrimination is not serious in Hong Kong and should not be addressed with legislation. The findings also argue against the extension of CEDAW to Hong Kong (in two very brief and unsubstantiated paragraphs): 'Findings of Working Group on Sex Discrimination in Employment' (December 1992).

⁶ *Third Periodic Report by Hong Kong under Article 40 of the International Covenant of Civil and Political Rights* (1989), para 26. A similar position was taken two years later in the update to this report: *Third Periodic Report by Hong Kong under Article 40 of the International Covenant of Civil and Political Rights: An Update* (March 1991), para 89. (These reports are reproduced in A Byrnes and J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993) at p 419 and p 437.)

Sex discrimination in employment

Unfortunately, the *Green Paper*'s chapter on employment contains numerous biased and conclusionary statements that appear to be designed not to consult the public, but rather to persuade it to adopt the government's own well-known view that sex discrimination is not a significant problem in the Hong Kong labour market and need not be addressed with legislation.

For, example, government confidently asserts that: 'The tight labour market in Hong Kong ... has left little scope for employers to adopt discriminatory practices.'⁷ No authorities or other evidence are cited to support this statement. When asked for the source (at a forum with women's organizations), government representatives would only state that this was the opinion of an unnamed 'government economist.'⁸ However, government has declined to respond to a written request for the name of this economist, the data on which he or she relied, and an opportunity to interview him or her.⁹ Moreover, even if government could produce an economist to take credit for this 'opinion,' this would hardly justify the manner in which the *Green Paper* has presented it — which is not as a statement of opinion at all, but rather as an undisputed statement of fact.

Similarly, the *Green Paper* asserts that the persistent differential between male and female earnings in Hong Kong can be explained by the following 'variables': '(a) differences in specific job requirements; (b) differences in physical or other capabilities; (c) differences in education attainment; and (d) differences in length of service and experience.'¹⁰ Thus, the *Green Paper* does not even acknowledge the *possibility* that sex discrimination could be even one of the variables contributing to pay differentials. Once again, no authority is cited for this list of 'variables' and government has since admitted that it has no evidence supporting the claim that these factors can explain any (let alone all) of male/female wage differentials in Hong Kong.¹¹

Equally unsettling is the fact that the *Green Paper* fails to cite any of the evidence of discrimination that has been submitted to government over the past several years. For example, the *Green Paper* acknowledges the undeniable fact that job advertisements regularly specify whether males or females may apply. But there is no mention of the evidence that these advertisements tend

⁷ *Green Paper on Equal Opportunities for Men and Women* (hereinafter '*Green Paper*'), p 18.

⁸ This was the response given by the Secretary for Home Affairs to a question posed by the Hong Kong Association of Business and Professional Women at a forum on 29 September 1993.

⁹ This request was made by me on behalf of the Public Affairs Committee of the Hong Kong Association of Business and Professional Women, in a letter dated 10 October 1993 to Ms Susie Ho, for the Secretary for Home Affairs, at par 3a-b. Government made no response to this letter until 17 December 1993 when it sent a letter that failed to provide the requested information.

¹⁰ *Green Paper*, p 17.

¹¹ This was admitted by the Secretary for Home Affairs in response to a question by the Hong Kong Association of Business and Professional Women at a forum held on 29 September 1993. A follow-up letter to government repeating the question also generated no supporting evidence.

to segregate women into particular industries and into low-paying jobs with little opportunity for advancement.¹²

Similarly, in its discussion of pay differentials, government has omitted any reference to the evidence that women are frequently paid less than men even when employed in precisely the same positions and where it is highly unlikely that government's list of 'variables' could explain the differential. For example, government's own reports show that male tellers employed in Hong Kong banks are on average paid \$9,146 per month, while female tellers are on average paid only \$8,099 per month.¹³ There are clearly no 'differences in specific job requirements' between male and female tellers. Nor is there any evidence to indicate that male tellers have consistently greater levels of education or experience than female tellers.

However, the most disappointing (and incriminating) failure of the *Green Paper's* chapter on employment is its wholly inadequate description of the types of anti-discrimination legislation that could be used as a model for Hong Kong. The *Green Paper* provides almost no detailed information regarding actual legislation used in other countries. Rather, it describes anti-discrimination legislation as falling into three very general categories: a soft 'mediation-oriented' approach (with no penalties for employers who violate the law); a 'more adversarial approach' (under which victims can seek remedies from courts or tribunals); and a 'punitive approach' (which imposes penalties on employers who violate important provisions of the law).¹⁴

This description is far too general and uninformative to generate any significant public commentary (except perhaps from feminist and human rights groups who have done their own research well ahead of the *Green Paper*). Moreover, government's rigid categorization of legislative options is misleading, as it implies that Hong Kong would have to choose between a model based strictly on mediation (with no effective enforcement) and a model based entirely on adversarial proceedings, which is likely to be perceived by the public as generating excessive litigation. In fact, it is possible to adopt a mixture of these models, with mediation serving as the initial remedy and adversarial proceedings reserved for those limited cases in which mediation fails. Criminal sanctions can also be very effective for certain violations (such as the publication of a discriminatory job advertisement).

¹² See, eg, Ho Suk-ching, 'The Position of Women in the Labour Market in Hong Kong: A Content Analysis of the Recruitment Advertisements' (1985) 10 *Labour and Society* 334.

¹³ Census and Statistics Department, Hong Kong Government, *Report on Half-yearly Survey of Wages, Salaries and Employee Benefits* (March 1993), Volume II, pp 23-4. The table indicates female employees received lower average compensation than male employees in 17 of the 22 positions for which a comparison is possible. Women earned more than men in only two positions and earned substantially the same in three positions. (In the remaining positions it was not possible to make a comparison, either because salaries were not reported for both men and women or because there was a difference in average number of working hours per day or days per month.)

¹⁴ *Green Paper*, pp 18-19 and 51.

In short, the *Green Paper's* chapter on employment is hardly the model of an effective consultative document. It is plainly biased in favour of government's views, frequently presents government opinions as 'facts,' and omits the real information and options for reform that the public should be considering.

Discrimination in the New Territories

The New Territories provides some of the most shocking examples of sex discrimination in Hong Kong, including enforcement of male-only succession to land, the policy of granting 'small house' entitlements only to indigenous males,¹⁵ rules limiting or excluding women's political participation in rural elections, and alleged intimidation of those New Territories women who lobby for reform. The New Territories is also one area where government has finally indicated its willingness to support limited reforms, having just recently introduced the New Territories Land (Exemption) Bill which, while not abolishing male-only succession to land, would exempt non-rural land from Part II of the New Territories Ordinance (through which Chinese customary law has been enforced) and make it easier for landowners to exempt rural land as well.

Thus one would expect that a nine chapter *Green Paper* on sexual equality would have included at least one chapter devoted solely to the New Territories and that government would have used the *Green Paper* as an opportunity to obtain public views on its proposed reforms. But government has done quite the opposite, providing no comprehensive discussion of the discrimination suffered by New Territories women and no information whatsoever about its recent proposals.

In fact, the *Green Paper* includes as little information as possible about the New Territories, burying the few references to it within a variety of different chapters. For example, if a member of the public wishes to read about male-only succession to land, she will not find any indication in the table of contents as to where it is discussed. If she searches, she will find that it has been hidden away in Chapter 6, entitled 'Private, Family, and Financial Matters' (an interesting place to put a discussion of what can only be described as clear discrimination under the law). And even there, she will find only the most cursory discussion, less than two pages devoted to the combined issues of male-only succession to land and small house entitlements.

Nowhere in this brief and buried discussion does the *Green Paper* mention the hardship that these laws have caused women deprived of houses and land

¹⁵ Under the government's 'small house policy', an 'indigenous villager' who is inadequately housed may apply for permission to erect a small house within his village. A 'small house' is exempted from the need to submit building plans to the Buildings Ordinance Office for approval. However, for purposes of the small house policy, the definition of 'indigenous villager' is restricted to *males* who are at least 18 years old and who are descended through the *male* line from a resident in 1898 of a recognised village: *Green Paper*, pp 35-6.

(or the profits therefrom) that might otherwise have been their property. Nowhere does it mention the fact that the rules of Chinese customary law enforced in Hong Kong have been abolished in all other Chinese societies in the world, including the PRC, Taiwan, and Singapore. And nowhere does the *Green Paper* mention that the public has for many years misunderstood the scope of these laws, commonly believing that male-only inheritance applied only to land occupied by indigenous residents (when in fact it applies to all New Territories land not specifically exempted) and that the prohibition on female inheritance could be overcome by means of a will (when in fact wills bequeathing this land to females are generally not probatable under the law).¹⁶

But the most shocking omission is the failure of the *Green Paper* to discuss the various options for reforming these laws. There can be no question but that government was considering specific proposals for reform at the time that the *Green Paper* was issued. For less than three months later it introduced the New Territories Land (Exemption) Bill (having already briefed the Executive Council on it and any other options under consideration, received the Executive Council's instructions to move forward, and drafted the bill and supporting documents). Yet government deliberately chose not to discuss this proposal (or any alternatives under consideration) in the *Green Paper*. Instead it included only a brief and cryptic statement that government 'is now in the process of reviewing this aspect of the New Territories Ordinance relating to the inheritance of land.'¹⁷

The failure to include in the *Green Paper* any of the specific proposals that were under consideration by government flies in the face of its claim before the Legislative Council that it could not move forward on CEDAW without widespread public consultation. Indeed, a more accurate indication of the importance government places on public consultation (at least in the area of women's rights) can be found in the Legislative Council Brief on the New Territories Land (Exemption) Bill. Under the heading 'Public Consultation,' only two brief paragraphs appear. One simply indicates that the Housing Authority (which is hardly a member of the public) has urged early legislative measures to resolve doubts as to title to flats. The other paragraph states, that: '[w]e have sounded out the Heung Yee Kuk on our proposal ... [and it] has indicated that it is prepared to give support to the Bill.'¹⁸

Thus, private meetings with the Heung Yee Kuk (a group that has its own long tradition of sex discrimination) were the full extent of public consultation on government's 'answer' to one of the most blatant examples of sex discrimination in Hong Kong. There was no discussion in the *Green Paper*, no

¹⁶ Carol Jones, 'Addendum to Part V of the Report of the Hong Kong Council of Women on the Third Periodic Report by Hong Kong under Article 40 of the ICCPR' (unpublished).

¹⁷ *Green Paper*, p 35.

¹⁸ Home Affairs Office, 'Legislative Council Brief, New Territories Land (Exemption) Bill,' 15 November 1993, p 4.

consultation with New Territories women, and no consultation with the many organizations that have been making submissions to government on this issue for the past several years.

Why? Perhaps it was because the government feared that groups outside the Heung Yee Kuk might demand more comprehensive reforms, and might remind government that its proposed legislation does not even begin to alleviate the discrimination suffered by women in the New Territories. Indeed, the proposed bill represents a deliberate decision by government to permit the continuation of male-only inheritance of rural land, as well as the policy of allowing only males to enjoy the small house entitlement. This decision, like government's refusal to support the extension of CEDAW to Hong Kong, is directly opposed to the wishes of the Legislative Council, which has urged government to repeal those legislative provisions that are discriminatory against women in their right of succession to both rural and non-rural land.¹⁹

Government's proposed bill also does not address discrimination against women in New Territories rural elections. In approximately one-third of the 690 villages in the New Territories, indigenous women are not even permitted to stand for election as Village Representative. Their right to vote in these elections is also curtailed: some villages permit only males to vote for Village Representative, while others permit only the 'head of household' to vote, effectively excluding most women. The result is that there is presently only *one* female Village Representative.²⁰

The *Green Paper* acknowledges the existence of these policies but refuses to admit that they constitute discrimination. Even more outrageous is government's cheerful assurance that at the next level of election, for Rural Committee Chairmen, '[t]here is no discrimination against women ... under the constitutions of the Rural Committees.'²¹ The *Green Paper* fails to point out that since the Rural Committee Chairmen are elected from amongst the Village Representatives (for which, as noted above, women's rights to vote and stand for election are severely restricted), there is no need to use these committees' constitutions to achieve discrimination. Not surprisingly, at the time the *Green Paper* was released, *all* of the Rural Committee Chairmen were (as the title suggests) men. Similarly, the Heung Yee Kuk, government's statutory advisory body on New Territories matters, has only four female Councillors, out of a total of 143.²² Thus these important local institutions are entirely male-dominated and provide women with no opportunities to lobby for change. Indeed, New Territories women who have attempted to speak out

¹⁹ See draft Official Record of the Proceedings of the Legislative Council, sitting on 13 October 1993, pp 114-52.

²⁰ *Green Paper*, p 9.

²¹ *Ibid.*

²² *Green Paper*, p 10.

against discrimination have reported to members of the Legislative Council that they have been pressured and even threatened not to do so.²³

In view of such clear evidence of sex discrimination in Hong Kong, a sincere consultation document would have acknowledged that discrimination is a problem and proposed detailed reforms for public comments. Instead, government has used the *Green Paper* to attempt to discredit and de-emphasize the evidence of discrimination. Moreover, it has not suggested any specific proposals for reform and actually concealed its plan for changing land inheritance in the New Territories (a plan which is more aimed at re-assuring urban developers as to the value of their investments than at removing discrimination).

The inadequacies of the *Green Paper* are too obvious to be accidental. It could only be the product of a determined effort to avoid or substantially delay the ratification of CEDAW and the enactment of anti-discrimination legislation — all under the guise of 'public consultation.' The *Green Paper* clearly did not fool local women's organizations, who have described it as 'highly misleading' and 'pointless.'²⁴ But these organizations are already well informed about the true extent of sex discrimination and are therefore in a good position to recognize the *Green Paper* for what it is. It remains to be seen if the rest of the public can do so as well.

At present, the only available indication of the results of the public consultation is the recent concession by the Secretary for Home Affairs that the overwhelming majority of submissions were in favour of the extension of CEDAW to Hong Kong and that in light of this '[i]t would be difficult for [government] to come up with credible arguments not to extend CEDAW.'²⁵ Thus it appears that the unanimous vote of the Legislative Council in December 1992 was, indeed, representative of the views of the general public. It is a shame that government refused to accept that vote, thereby delaying the ratification of CEDAW by at least an additional year. We can only hope that government will now move more swiftly and with a more positive attitude — not only with respect to CEDAW's ratification, but also with respect to its complete and wholehearted implementation.

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²³ See, eg, the speech by Mr Simon Ip, Member of the Legislative Council, draft Official Record of Proceedings of the Legislative Council, sitting on 13 October 1993, p 130.

²⁴ 'The Coalition of Women's Organizations' Opinions on the Green Paper on Equal Opportunities for Women and Men' (November 1993), p i. (The Coalition that produced this document includes twelve local women's organisations.)

²⁵ *South China Morning Post*, 31 December 1993, p 2.

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