Fulfilling Hong Kong's International Obligations through Labour Law – Working Hours Report

Cliff Lui, 2007

Pre-meta

This paper will examine Hong Kong's international law obligations stipulated in Article 7 of the International Covenant of Economic, Social and Cultural Rights and the measures in place which recognise those rights. It will then study Hong Kong's work-practices and conclude whether the measures in place adequately recognise the rights stipulated in Article 7 of ICESCR.

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1 Introduction

> "Every one in Hong Kong is obsessed with business, so it is no surprise that office workers are expected to work exceptionally long hours – often not going home in the evening and sleeping under their desks – and that they are expected to work a minimum of a six day week."
>
> *ASA International (a recruitment consultancy)*

Hong Kong came third highest in the number of working hours out of 48 countries surveyed by the International Labour Organisation in 2005.[1] Of all developed jurisdictions, Hong Kong stands out as one without statutory provisions regulating the working hours of its labour force.[2] The imposition of working hour limits has internationally been understood to ensure a safe and healthy working environment and adequate rest or leisure time. Over the last decade, hours limits have increasingly come to be seen as a way of advancing policy goals of allowing workers to balance their paid work with their family responsibilities and other aspects of their lives, promoting productivity and healthy social interaction. This paper will study where Hong Kong stands in fulfilling its international law obligations concerning workers' rights to healthy working conditions and reasonable working hours.

2 Hong Kong's International Law Obligations

Hong Kong is party to the ICESCR and ILO, both of which recognise the negative consequences of excessive working hours and so impose upon states a duty to protect their workforce from them.

2.1 The International Labour Organization

The ILO, being an international body, recognised that excessive working hours posed a danger to workers' health and their families and, as early as 1919, has adopted progressive standards on working time. The following instruments, amongst others, are recognised by the ILO to ensure high productivity while safeguarding workers' physical and mental health:

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[1] Key Indicators of the Labour Markets, 4th ed., ILO, Geneva, 2005

[2] Hong Kong Confederation of Trade Unions: http://www.hkctu.org.hk/english/contentr.php?orgtopicid=282 accessed 25 April 2007. 73% of the population work 46+ hours a week. 42% work 51+ hours a week – South China Morning Post 30 April 2007.

- C1 – Hours of Work (Industry) Convention, 1919
- C30 – Hours of Work (Commerce and Offices) Convention, 1930
- C47 – Forty-hour Week Convention, 1935
- C116 – Reduction of Hours of Work Recommendation, 1962
- C106 – Weekly Rest (Commerce and Offices) Convention, 1957
- C155 – Occupational Safety and Health Convention, 1981
- C187 – Promotional Framework for Occupational Safety and Health Convention, 2006

The Hong Kong Government has not ratified any of these conventions but they could be used as a guide when LegCo comes around to drafting a law to regulate working hours in the future. The Government's practice is to agree to ratification only after relevant legislation has been put in place. Under the doctrine of separation of powers, ratification is not solely controlled by the Executive – legislative support is also necessary. The two-tier voting system in the Legislature composed of functional constituencies and a directly elected body compounds the difficulty of legislating provisions because a motion cannot be carried without the majority vote of both houses.

2.2 International Covenant on Economic, Social and Cultural Rights

Article 39 of the Basic Law provides that: "ICESCR ... shall be implemented through the laws of Hong Kong." ICESCR is one of the two human rights conventions to which Hong Kong is bound, providing important legal obligations in the field of labour law. ICESCR not only puts Hong Kong under an obligation to implement its provisions, but also to periodically report on the status of their implementation.

Article 7 of ICESCR provides for state parties to recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- Safe and healthy working conditions;
- Rest, leisure and reasonable limitation of working hours...

There are many ways for state parties to "recognise" such rights. According to General Comment 3 issued by the United Nations,[3] "all appropriate means" should be used to satisfy the various obligations, notwithstanding that "the realisation of the relevant rights may be achieved progressively". Measures which may be considered "appropriate" for the purposes of article 2(1) include administrative, financial, educational and social measures, but legislative measures are preferred.

[3] The nature of States parties obligations (Art. 2, ¶1): .14/12/90. CESCR General comment 3.

Status of ICESCR in Hong Kong

The United Nations Commission on Human Rights' position is that ICESCR is legally binding and imposes a legal responsibility on its signatories to recognise the rights stipulated therein. Despite this, Hong Kong courts have consistently ruled under a dualist system, i.e. conventions such as ICESCR cannot grant rights until domestic legislation has been promulgated relating to those rights stipulated therein. It therefore appears that notwithstanding para.9 of *General Comment 9* which describes parts of ICESCR as being self-executing or directly applicable, aggrieved individuals cannot use ICESCR as if it were a law against the Government or their employers.[4] This stance has been supported by Hong Kong's Court of Final Appeal, which realised that, unlike the International Covenant on Civil and Political Rights (ICCPR), which is directly incorporated into domestic legislation, ICESCR is instead incompletely recognised in various legislative provisions and promotional measures.[5] The High Court of Hong Kong has repeatedly stressed that ICESCR is a 'promotional' covenant and does not grant rights under domestic law.[6]

2.3 The Motivation behind ICESCR Article 7 Rights

> "In 2004, [the Hong Kong Federation of Youth Groups] received more than 3,000 requests for assistance from people who felt lonely; of these, 70% were primary school students. Some of them wanted to talk to counsellors until their parents would go off work because their parents had to work for long hours. Is this the Hong Kong we want to live in?"
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> *Audrey Eu, Legislative Council, 7 June 2005*

It is internationally recognised that excessive working hours poses health risks.[7] Prolonged fatigue without adequate rest is correlated with obesity.[8] Fatigue in certain occupations such as driving and machinery-related work can be fatal. A survey conducted by the Hong Kong Storage and Transportation Industry Staff Association showed that

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[4] The treatment of ICESCR varies across jurisdictions. For example, in *K v L* BGE 125 III 277, the Swiss Federal Supreme Court referred to CESCR General comment No 3, para.5, in a case involving the question of whether article 8 of the ICESCR guaranteeing the right to strike was a directly effective provision of the treaty for the purposes of Swiss law. The court held that the guarantee was directly applicable in Swiss law, following the general comment and the views of writers.

[5] *Ho Choi Wan v Hong Kong Housing Authority* [2005] 4 HKLRD 706 at 727

[6] See *Chan To Foon v Director of Immigration* HCAL 58/1998, where Hartmann J concluded that ICESCR was promotional and aspirational.

[7] For a worrying assessment of potential health risks arising from long working hours, see: A. Spurgeon; J. Harrington; Cooper; L. Cary, "Health and safety problems associated with long working hours: a review of the current position", *Occupational and Environmental Medicine,* 1997, 54(6), 367-375.

[8] Association between sleeping hours, working hours and obesity in Hong Kong Chinese: the 'better health for better Hong Kong' health promotion campaign, *International Journal of Obesity* (2007) 31, 254–260

almost 60% of the respondents admitted that they sometimes or often dozed off while driving. Among them, 8.4% admitted that accidents had occurred as a result.[9] In 2002, a study conducted by the Kyushu University in Japan found that the likelihood of people who work 60-hour weeks suffering from heart diseases was two times higher than those who work 40-hour weeks. The EU has also recognised emerging illnesses such as stress, depression and anxiety to arise out of work and excessive hours.[10] Aside from health risks and associated costs, excessive working hours deprive workers of the balance between work and life, straining marriages, families and interpersonal relationships.[11]

The economic implications of regulating working hours are complex, and are often used to both justify and resist working time controls.[12] The Hong Kong government consistently argues that controls would reduce Hong Kong's competitiveness, but such an argument is weakened when only two countries in the world work more hours than Hong Kong.[13] With Hong Kong workers toiling more hours than its Asian neighbours and other financial capitals, the Government seems to assume its workforce is competing with the less developed economies of Thailand and Malaysia based on the number of working hours. Research has found that absenteeism and general fatigue indirectly caused by excessive working hours affect the productivity of businesses and the quality of work produced.[14]

3 Does Hong Kong Recognise Article 7 Rights?

Responding to criticism by the United Nations,[15] the Hong Kong government has maintained that "Article 7 rights are protected by some 16 legislative provisions, most

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[9] Submission of the Hong Kong Confederation of Trade Unions to the United Nations Committee on Economic, Social and Cultural Rights on Implementation of the International Covenant on Economic, Social and Cultural Rights in Hong Kong Special Administrative Region of the People's Republic of China, April 2005.

[10] Adapting health and safety at work to a changing world, *Social Agenda* (2006) 14, 15-16

[11] See, e.g. G. Daniels and S. French, Regulating Work Life Balance – http://uin.org.uk/content/view/70/66/ accessed 30 April 2007.

[12] Few studies have directly investigated the financial consequences of long working hours. For an illuminating USA perspective, see: http://www.cdc.gov/niosh/topics/workschedules/abstracts/dawson.html, accessed 28 April 2007.

[13] Key Indicators of the Labour Markets, 4th ed, ILO, Geneva, 2005 – finding that of 48 global locations surveyed, only three places have workers working more than 2,000 hours each year and Hong Kong came third place, just after Thailand and Malaysia, at 2,398 hours.

[14] See The State of Work-Life Balance in Hong Kong 2006, Community Business, Hong Kong

[15] Concluding Observations of the Committee on Economic, Social and Cultural Rights (Hong Kong): China, 21 May 2001, at p.4: recommending that HKSAR "review its policy" in relation to paid weekly rest time, rest breaks, maximum hours and overtime pay rates.

notably the Employment Ordinance (Cap.57), and various promotional measures."[16] The main promotional provisions are the "numerous activities to promote the employment benefits and protection conferred by the Employment Ordinance, and to promulgate the adoption of good people management practices that are employee-oriented, fair, and promote equality as between employees".[17]

The main issue with the Government's contention is that despite the legislative and promotional arrangements it claims to be in effect, the number of hours worked has skyrocketed. Out of 48 countries surveyed by the ILO, save for Thailand and Malaysia, Hong Kong workers work the longest hours – 51.3 hours per week on average.[18] It is not a question of whether the measures taken are effective but that there are too few measures which deal with issues only tangential to regulating working hours within reasonable limits.

Article 7 of ICESCR obligates states to recognise workers' rights to adequate rest and healthy working conditions. Recognition can take the form of both non-statutory and statutory measures, but the UN recommends legislative recognition because Article 7 rights are intrinsically "human rights" and legislative measures better protect the "most vulnerable and disadvantaged groups in society".[19] To more fully recognise Article 7 rights, jurisdictions across the world have legislated provisions including:

- Normal hours limits;
- Overtime provisions;
- Maximum hours limits;
- Rest periods; and
- Holidays (annual leave and public holidays)

This section will compare Hong Kong's recognition of the Article 7 rights with, *inter alia*, that of Singapore and the United Kingdom. Culture and labour practices are often inseparable, and Singapore, with its metropolitan Asian-Chinese ethnic majority makes for suitable comparison. The United Kingdom has enacted working hours legislation in accordance with the European Union Working Time Directive but only reluctantly.

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[16] Second report of the Hong Kong Special Administrative Region, Peoples' Republic of China, under the International Covenant on Economic, Social and Cultural Rights response to the list of issues presented by the Committee on Economic, Social and Cultural Rights on 21 May 2004, pp.8-9.

[17] *ibid*., page 8

[18] *ibid*. note 1

[19] See General Comment 9, ¶¶8,-10

3.1 Common Law

> "The whole course of legal authority consistently recognises a duty which rests on the employer, and which is personal to the employer, to take reasonable care for the safety of his workmen"
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> *Wilsons & Clyde Coal Company Ltd. v English* [20]

One of the most ancient implied terms in contract is the duty of the employer to provide safe conditions of work, It is internationally recognised that excessive working hours are harmful to health, but is the common law effective in protecting workers from the adverse consequences of working too many hours? In *Johnstone v Bloomsbury Area Health Authority*,[21] the English Court of Appeal refused to strike out the plaintiff doctor's claim that the working hours required of him by the Health Authority were such as to put the latter in breach of its duty to take reasonable care for his health and safety. Compensation for psychiatric injury in the form of stress was first awarded by the courts in England in 1995,[22] and has since proved to be a popular cause of action.[23] Cases now regularly settle at over £200,000.[24]

Problems on Using the Common Law

In respect of lawsuits concerning breaches of duty and negligence, employers now realise that managing in a way which results in harm is becoming more and more expensive. This provides an incentive on them to take steps to monitor workplace stress and potential physical strain through, perhaps, better working hours. However, reliance on the employer's duty to provide a healthy workplace in contract or tort law is unsatisfactory because it requires the aggrieved employee to take action himself and only after injury. Doing so will undoubtedly lead to strained workplace relations and potential dismissal without cause.[25] Case law suggests that excessive hours to an extreme degree must be proved before the employer can be seen to have breached the contract. This undermines the rationale behind the regulation of working hours, which is to protect the physical, mental and social wellbeing of the workers and *avoid* the consequences of excessive working hours. A post-facto solution that reduces job security is an

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[20] [1938] AC 57

[21] [1991] 2 WLR 1362

[22] *Walker v Northumberland CC* [1995] 1 All ER 737

[23] Trades Union Congress, *"Focus on Union Legal Services"*, 1997

[24] UNISON, *Stress at Work*, 2002

[25] See note 47 below

unsatisfactory solution. It is submitted that statutory regulation with objective criteria would provide a more solid basis for protecting workers' rights to health and reasonable working hours.

3.2 General Categories of Article 7 Rights

The ICESCR obligates states to recognise workers' rights to adequate rest and healthy working conditions. The Employment Ordinance contains various provisions which pertain to those purposes. This paper shall study those provisions that cover workers in general. Provisions covering specific classes of workers, e.g. maternity leave, etc. will not be included. Of the general categories (refer to section 3 above), Hong Kong only has provisions for holidays and rest Periods.

3.2.1 Holidays & Rest Periods

Holidays aim to ensure sufficient rest and recreation opportunities throughout the year to preserve the health of workers and ensure that they remain able to perform their jobs. At the same time, annual holidays serve the goal of facilitating work/life balance by allowing workers to devote uninterrupted periods of time to their families and recreational activities.

International Standards

The Weekly Rest (Industry) Convention, 1921 (No.14) and Weekly Rest (Commerce and Offices) Convention, 1957 (No.106) require a rest period of at least 24 hours each week, preferably fixed to coincide with customary days of rest. Exceptions from this entitlement are to be compensated with an equivalent rest period.

The ILO Holidays with Pay Convention, 1970 (No.132) requires an annual paid holiday of not less than 3 weeks whereby they receive their wages before the vacation. This annual vacation can be divided, but one period must consist of at least two uninterrupted weeks.

Public holidays and connected compensation are not addressed by the ILO.

Hong Kong Provisions

Part IV of the Employment Ordinance (§§17-21) provides that one rest day is to be granted every seven days. Unfortunately, this is a weak provision and is easily circumvented in practice – §20 of the EO provides that an employee *may* work on a rest day at the employer's request. Given the negligible bargaining power of employees, many workers are compelled to work for more than six days a week to improve their job

security and avoid conflicts with colleagues and supervisors. Another problem arises from the fact that part IV of the Employment Ordinance can only protect workers who are in a continuous contract of service. Workers who do not satisfy the requirements under Schedule 1 of the EO are not eligible to the weekly rest days.[26]

Part IV of the EO was recently invoked in the high profile case of in *Leung Ka Lau v The Hospital Authority*.[27] In that case, the employment contract stated that Sundays (or another day in lieu) were to be when doctors could take a break off work. Stone J held that 'work' included the time doctors were 'on call' within the hospital. The issue was that some doctors were on call within the hospital during their designated rest days and were not given other rest days in lieu. Stone J held that such an arrangement caused the Hospital Authority to be in breach of contract and statutory duty. It must be noted that although this case purports to give effect to the statutory entitlement of rest days, it only did so because the contract between the Hospital Authority and the doctors stipulated that a weekly rest day was to be given.

Part VIII of the Employment Ordinance mandates employers to grant employees statutory holidays on various days of the year, with substitutes if that day is already a public holiday. Holidays are paid for if the employee has been employed under a continuous contract for three months prior to that holiday concerned.

Part VIIIA entitles employees who have been in continuous employment for 12 months to paid annual leave. The leave entitlement begins with 7 days and increases per year of service up to 14 days (9 years of service).

Comparative Provisions and Findings

Both UK and Singaporean legislation provide for a weekly rest day, which do not exhibit the weakness inherent in the Hong Kong statute.[28] Employees in UK and Singapore unequivocally entitled to weekly rest (or equivalent rest in lieu), unless the worker is a member of an excepted class of workers.[29] Employees working on a rest day are entitled to overtime pay.

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[26] Whether an employee is under a continuous contract of service is calculated in a technical manner. For example, where an employee works 4 consecutive weeks at 20 hours for the first 3 weeks and 18 hours for the 4th week, he is no longer considered to be under a continuous contract of employment – see schedule 1, EO. See further: *Lui Lin Lam & Others v Nice Creation Development Ltd* [2006] 3 HKLRD 655

[27] HCA 1924/2002

[28] See §11, Working Time Regulations 1998, UK and §36, Employment Act, Singapore

[29] For excepted workers, see section 4.1 below.

The number of public holidays stipulated in the EO (12 days) is comparable to other jurisdictions worldwide.

Although Hong Kong falls short of international standards in the provision of paid annual leave, its statutory leave provisions are comparable with other Asian jurisdictions. Japan has 10 days, South Korea and China have about 2 weeks. Singapore has annual leave provisions starting from 7 days and adding one day per continuous year of service up to 14 days accruing after 3 months of continual service.[30] UK legislation provides for 4 weeks of paid annual leave but differs to both Singaporean and Hong Kong law in one important respect in that rights to paid annual leave accrue immediately upon employment.[31]

3.2.2 Normal Hours Limits (not provided in Hong Kong)

Normal hours constitutes working time where no overtime is payable. The ILO initially mandated a maximum normal working time limit (non-overtime hours) of 48 hours, subsequently reducing it to 40 hours.[32] Of Hong Kong's closer Asian neighbours, China, South Korea, Singapore and Japan have all enacted normal hours limits (UK does not have maximum normal time limits but instead maximum overall time limits). These weekly hour limits do not necessarily apply to every workweek – instead, legislation permits the limit to be averaged over a certain reference period so extra hours can be worked within individual weeks of a reference period. For example, in Singapore, workers can negotiate for the reference period to extend to 2 weeks.[33] UK's reference period is 17 weeks.[34] Where hours averaging applies, legislation may also specify an upper limit on the number of hours that can be worked within a reference period. In Singapore, a maximum of 88 hours can be worked in 2 weeks or 48 hours in one week.

3.2.3 Overtime Provisions (not provided in Hong Kong)

Overtime pay discourages employers to work their employees beyond the stipulated normal hours and overtime limits serve to ensure that workers have adequate

[30] See §43(1) of the Employment Act, Singapore.

[31] See §13(2)(c) and (3) of the Working Time Regulations 1998, UK for regulations on annual leave generally. See additionally the Working Time (Amendment) Regulations 2001, UK which acknowledges the June 2001 European Court of Justice judgement which held that: "[Article 7(1) of the Working Time Directive] does not allow a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer."

[32] 40 Hour Week Convention, 1935 (No.47) and the Reduction of Hours of Work Recommendation, 1962 (No.116)

[33] See §38, Singapore Employment Act, Singapore

[34] See §4(3) Working Time Regulations 1998, UK. This can be extended to 52 weeks by written agreement.

time for their lives outside employment. International conventions specify circumstances in which overtime (exceptions to normal hours limits) can be permitted. They also require overtime rates to be at least 25% over the regular rates of pay.[35]

Neither the UK nor Hong Kong has an overtime regime, so work beyond contractual hours is generally not remunerated. That contrasts with the labour laws of China, South Korea, Singapore and Japan, which mandate overtime pay for work done exceeding contractual hours at or below 50% over the ordinary wage. China, South Korea and Singapore have statutory limits on the maximum overtime that an employee can work from around 7-18 hours a week.[36]

3.2.4 Maximum Hours Limits (not provided in Hong Kong)

These are the ultimate limits on working time of which Hong Kong has no provisions for. The ILO views normal hours limits as the primary restriction on working hours and overtime hours as exceptional, therefore maximum limits are not a central theme. China, South Korea and Singapore already have normal hours limits and maximum overtime limits, effectively providing maximum hours limits. Japan has no maximum hours limits. UK regulations prescribe a maximum working week of 48 hours averaged over up to 52 weeks.[37]

3.2.5 Rest Breaks (not provided in Hong Kong)

Although the ILO does not provide for rest breaks, labour laws commonly provide for them during the working day to allow workers to take a break from continuous work and to take meals.

The Hong Kong Labour Department issued a "Guide on Rest Breaks" in July 2003 to encourage employers and employees to work out through consultation suitable rest break arrangements to meet operational needs of the business.[38] However, Hong Kong labour law does not provide for rest breaks, and workers in some industries, e.g. container dispatchers or car park attendants, have to work continuously for more than 10

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[35] See the Hours of Work (Industry) Convention, 1919, Hours of Work (Commerce and Offices) Convention, 1930, and Reduction of Hours of Work Recommendation, 1962.

[36] Singapore prohibits overtime work exceeding 72 hours a month – §38(5) of the Employment Act. Overtime rate is calculated as 12 times the worker's monthly basic rate of pay divided by 52 times 44 hours - §38(6).

[37] See §4(1), Working Time Regulations 1998 UK

[38] The Guide was prepared by the Committee on Occupational Safety and Health under the Labour Advisory Board (LAB)

hours without a rest or meal break.[39] Continuous work in some occupations resulting in fatigue or monotony can lead to fatal accidents. Hong Kong does not stand alone in its lack of provisions for rest breaks. China does not have legislative provisions for rest breaks, but Singapore mandates a 45 minute meal break,[40] South Korea: a 30 minute rest break, Japan: 45 minutes and UK: a 20 minute rest break and additionally, at least 11 hours of consecutive rest per day.[41]

4 Effectiveness of Legislation

A primary concern in legislating working hours is the effectiveness of the measures used. As described in section 3.2.1 above, weak legislative provisions are easily circumvented. The setting up of statutory provisions is only a first step in recognising Article 7 rights under ICESCR. Government policy and the actual wording of the statutes are major forces behind the strength of statutes.

4.1 Exceptions Generally

Exceptions to working time regulations are necessary to keep society functioning at times where work unexpectedly arises. However, if drafted to exclude a large section of society or otherwise too widely, legislation may lose its force. For example, society would be less desirable if doctors decided to exercise their rights strictly and not work during certain periods. §38(2) of the Singapore Employment Act provides for exceptions to working hour limits in the case of accidents; work essential to the life of the community; national defence; urgent machinery work, etc. In the UK, part III of the Employment Act 1998 provides for more exceptions: that working time regulations do not apply to the transportation and marine industry; workers with autonomous decision-making powers and other workers where their duties inevitably conflict with regulated working time. Given these exceptions, however, §24 provides that compensatory rest shall be given to safeguard a worker's health and safety, striking a balance between the needs of society and individual workers.

Interestingly, Singapore's comprehensive statutory recognition of Article 7 rights only apply to workmen and employees in receipt of a regular salary of less than S$1,600

[39] Hong Kong Confederation of Trade Unions: http://www.hkctu.org.hk/english/contentr.php?orgtopicid=282 accessed 25 April 2007

[40] See §38(1)(i), Employment Act

[41] See §12, Working Time Regulations 1998 UK

(HK$8,200) per month. Moreover, under §41A, the Commissioner for Labour may exempt an employee or class of employees from the working time regulations as he thinks fit. In this regard, its working time regulations appears to pertain to only lower income workers and does not aim to promote Article 7 rights among others. Though this may alleviate problems that may be encountered in industries requiring more hours per-capita and irregular hours, it does not serve to protect the rights of all workers in accordance with ICESCR, nor does it avoid the health and social problems associated with excessive working hours caused to those outside the statutory ambit.

In Hong Kong, there are no general exceptions to rights conferred under the EO, save the requirement for a continuous contract of service, which is easily circumvented in practice.[42]

4.2 Opt-out Clauses

The UK only implemented working time regulations five years after it was first adopted at EU-level in 1993, and only after considerable debate and reluctance. In its belief that flexible labour markets are better for the economy, UK allowed individuals not wishing to be protected by statute to sign themselves out of it (an opt-out).[43] Although such a choice may only be initiated and terminated by the employee himself, its existence is a source of considerable controversy. Businesses in the UK generally argue that the opt-out provides freedom of choice for employees and that increased labour flexibility reduces unemployment. Other EU member states oppose the continued existence of the opt-out, citing that it gives the UK an unfair competitive advantage within the EU and that it is bad for workers' health. Indeed, there have been cases where unscrupulous employers offer employment only on the condition that the employee opts out or that terms that are more disadvantageous are given to those who do not opt out, reducing the strength of the 'freedom of choice' argument.[44] It is also important to note that due to the opt-out clause, UK workers work eight hours more per week than other EU member states on average.[45]

Despite the criticisms mounted against UK's opt-out clause, such a clause may actually be necessary as a stepping-stone to reasonable limitation of working hours if it is

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[42] See note 26 above

[43] §5, Working Time Regulations, 1998 UK

[44] Trades Union Congress, *Unpublished EU report exposes working time abuse in UK*, 2 December 2003.

[45] J. Lambert, *Flexible Working*, 2004

to be accepted by Hong Kong's business-centric political climate and long-hours culture. The UK experience suggests that if abuses of the opt-out can be reduced, such a provision may promote freedom of choice within the workforce, allowing employees to be more flexible in their approach to work in a global economy, which is essential in Hong Kong. One halfway house suggestion by the EU Finnish Presidency of 2005-2006 was to cap weekly maximum hours to a healthy limit even for those who have signed an opt-out. Such a measure would allow opt-outs, but still protect workers from the adverse effects of excessive working hours – the aim of Article 7 of ICESCR. Another measure to curb abuse is to clearly make it unlawful for employers to include an opt-out clause ancillary with the employment contract (this is not done in the UK).

4.3 Dismissal without Cause

It is important that employees who exercise their entitlements under working time arrangements do so without fear retribution. Under §101A of the UK Employment Rights Act 1996, if the employee can show that: (i) the primary reason for dismissal is that he refused to comply with a requirement imposed by the employer in contravention of the Working Time Regulations 1998; or (ii) he refused to forgo a right conferred on him by those Regulations; or (iii) other connected matters, then the employer will be deemed to have unfairly dismissed the employee.[46]

Contrasted with the Hong Kong and Singaporean terms for dismissal, which can be without cause,[47] the UK framework is stronger in protecting workers from employers wishing to strip them of their rights under the working time regulations.

4.4 Enforcement and penalties

Enforcement in the UK is split between different authorities. The requirements on the maximum week and night work are enforceable by the Health and Safety Executive, the Civil Aviation Authority, Vehicle and Operator Services Agency or local authority inspectors. Employers can be prosecuted as with other safety legislation under the Health and Safety at Work Act 1974. Under §33(3) of the Working Time Regulations, the penalty for conviction (both summary and on indictment) is a fine of

[46] Where there is a complaint, it is for the employer to show the reason for the dismissal (including redundancy) – §98, Employment Rights Act, 1996. Remedies under chapter II of the 1996 Act include reinstatement and compensation.

[47] See §§6-7 of the Employment Ordinance, HK and §§10-11 of the Employment Act, Singapore.

£400 (HK$6,200). Claims over rest periods, breaks and holidays may be taken by individual workers to Employment Tribunals.

In Singapore, enforcement is done by the Commissioner of Labour and appointed inspectors who have the power under Part XIII of the Employment Act to enter any place of employment and enquire into the conditions of employment of the employees. Under §53 of the EA, employers who do not comply with the working time legislation are liable to fines up to S$2,000 (HK$10,300) and/or imprisonment up to one year.

4.5 Empirical Data

Economic activity data on the national scale pertaining to the effectiveness of working hours regulation is scant due to the sheer scale of the undertaking. However, where studies have been conducted,[48] actual hours were judged to have fallen substantially in response to working time limits. Studies in Germany and France showed that actual hours decreased by 88-100% of the change of normal hours. It appears that working hours regulation does have an effect on actual hours, but other economic nuances such as changes in productivity and wage rates have not been ascertained.

5 Conclusion

Hong Kong's employment policy, far from favouring sustainable development through regulation, seeks higher productivity through deregulation and a more flexible labour market. The Government has resisted legislating measures to control working hours arguing on the basis of "positive non-interventionism", i.e. keeping taxes low and limiting government expenditure to the provision of essential services, in accordance with article 5 of the Basic Law, which guarantees a free trade, free enterprise and low tax regime for at least 50 years. This stance has been criticised by the United Nations as "having a negative impact on the realization and enjoyment of the economic, social and cultural rights of Hong Kong's inhabitants, which has been exacerbated by globalization."[49]

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[48] See ch.5 of *Working Hours: Latest Trends and Policy Initiatives*, available at OECD website

[49] Concluding Observations of the Committee on Economic, Social and Cultural Rights (Hong Kong): China, 21 May 2001, at p.2

The Government has insisted that working hours and rest days are matters to be negotiated privately between the employee and employer and so should not be subject to administrative or statutory intervention. This is unconvincing, as employment contracts are usually not negotiated by parties with more or less equal bargaining power. The result is that terms are usually dictated in the employer's favour and so working hours are left unregulated.

Though there exist private common law routes through which employees can garner compensation for injuries sustained through excessive working hours, that must not be a reason for inaction on the part of government to recognise its international-law obligations. A one-off compensation after an injury has occurred does not fulfil the purpose of regulated working hours, which is to facilitate a sustainable, productive workforce.

Current statutory measures implementing rest days are easily circumvented in practice and do not fulfil their purpose. The Government must be cautious of drafting flaws in any proposed working time bill to prevent any abuse by employers who believe that working excessive hours is conducive to the bottom line. Exceptions to working hour limitations must be drafted to balance the needs of society with the needs of individual workers.

It is recognised that social norms must change together with the law for statutory regulation to have its desired effect. Hong Kong has a pervasive culture of long working hours where many stay at their place of work simply to avoid being the first one to leave. In addition to regulating working time, the Government must be sure to transform the culture of long working hours by informing employees and employers of their rights, obligations, risks of working excessive hours as well as the socio-economic benefits of a reasonable cap on working time.

In making these observations, it is also recognised that certain structural elements of the Hong Kong labour law system are not conducive to reform. For instance, without a strong trade union culture or approved collective bargaining rules, it is not easy for a single aggrieved worker to challenge an employer on his own, especially when the employer can dismiss without cause. The implementation of better union protection and codification of enforceable collective bargaining will balance the negotiating table so

employees do not have to submit to dictated terms in the employer's favour every time.[50] The two-tier voting system enshrined in Annex II of the Basic Law combined with Hong Kong's business-centric political system is not conducive to reform despite strong political support.

The idea of regulating working hours is not new. In fact, the first relevant Convention was adopted by the ILO in 1919 and has subsequently been ratified by 52 countries.[51] Hong Kong's response to United Nations criticism on its lack of recognition of Article 7 rights is unconvincing in light of both empirical evidence and lack of relevant legislation compared to its Asian neighbours and the United Kingdom. In a global 24-hour economy which forever expects more responsiveness from employees, excessive working hours have come to be internationally recognised to contribute to ill health, reduced productivity and social maladies. By not taking any measures to ensure reasonable rest, leisure and limitation of working hours, the government of Hong Kong not only puts employees' physical, mental and social wellbeing at risk, it also falls foul of its international legal obligations under article 7 of ICESCR.

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[50] The Polytechnic University of Hong Kong was pressured by trade unions to launch a three-shift system for security guards in 2006. Without trade unions, such a move would be difficult.

[51] See Hours of Work (Industry) Convention (No. 1); Forty-hour Week Convention (No. 47), etc.