INTERNATIONAL HUMAN RIGHTS IMPLICATIONS OF *VOIRE DIRE* DISCRIMINATION: CRITICAL EXAMINATION OF CONTEMPORARY LANGUAGE QUALIFICATIONS IN CRIMINAL PROCEEDINGS

ARTICLE

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I. Introduction

In the fall of 2011, I was a visiting J.D. student at City University of Hong School of Law in Kowloon, Hong Kong. The professor of my Hong Kong Legal Systems class required that each student attend one trial proceeding of their choice. I sat in on murder trial at the High Court of Hong Kong,[1] which felt familiar. It had all the characteristics of a trial in a common law jurisdiction including: the jury, defense counsel, prosecution, judge and courtroom officials. In fact, it was *too* familiar. I understood the arguments from defense and prosecution and the directives of the judge. With the help of the court-appointed translator, I even understood the responses of the defendant when he took the stand. Yet, I was in a foreign country, where most people did not speak my language.

While in Hong Kong, I often struggled to communicate with people but in this Hong Kong courtroom I had little trouble understanding. Even though I was in a

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[1] The High Court is comprised of the Appellate Court and Court of First Instance. The reference here is to the Court of First Instance, in which the trial process of criminal cases begins.

foreign land, where experience and common sense taught me that most residents and citizens spoke Cantonese[2], the proceedings were in English, adjudicated by an English judge and argued by two English attorneys. However, the defendant and witnesses were Chinese. All questions and answers required translation by an interpreter on-sight at trial. Instinctively, I imagined myself back in the U.S. and contemplated my response if I was a witness or defendant in a criminal proceeding and the language spoken was not English. I immediately felt disgruntled by a feeling of confusion and inequity. That feeling inspired me to investigate language requirements in legal proceedings particularly in places where the vast majority of individuals do not speak the language chosen by the court where they are prosecuted.

Hong Kong and Puerto Rico and their respective criminal court proceedings exemplify the residual effects of colonial rule and associated language discrimination. As addressed at length below, the criminal procedures in Hong Kong and Puerto Rico's federal court are conducted in English, which imply the exclusion of a majority of the population from jury service. In Hong Kong, over 96% of the population is not able to speak English at the level required for a courtroom setting.[3] In Puerto Rico, it is estimated that over 90% of its citizenry is denied access to jury service based on the English language requirements in the federal courts.[4] In these procedures, a selective group of jurors is chosen based on the knowledge of the English language; creating a jury that does not properly represent the society.[5]

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[2] Cantonese is a dialect that people use for oral communication in Hong Kong and its neighboring Guangdong province in the PRC. Putonghua (or Mandarin) is the official spoken language of the PRC and Taiwan. Mandarin is based on the dialect in Beijing. Although very different, Mandarin and Cantonese are similar in lexicon, syntax and grammar. The PRC using simplified characters, while Hong Kong and Taiwan use standard (or classical) characters. The difference is not significant enough to prevent people of different areas from understanding each other's written Chinese.

[3] Population Aged 5 and Over by Usual Language, 2011 Population Census – Summary Results, 39, Census and Statistics Department, Hong Kong Government, 2011, *available at* http://www.censtatd.gov.hk/products_and_services/products/publications/statistical_report/population_and_vital_events/index_cd_B1120055_dt_latest.jsp (last visited on November 12, 2012); John Bacon-Shone and Kingsley Bolton, *Bilingualism And Multilingualism In The HKSAR: Language Surveys And Hong Kong's Changing Linguistic Profile*, in *Language and Society in Hong Kong*: *A Reader* 25, 37 (Hong Kong Open University Press, 2008) (4% of population in 2003 survey self-reported that they know English 'very well').

[4] Hon B. Shin & Rosalind Bruno, Language Use and English-Speaking Ability: 2000, U.S. Census Bureau Brief, Oct. 2003, at 5, www.census.gov/prod/2003pubs/c2kbr-29.pdf (reporting that 2000 Census found 71.9% res*Id*ent of Puerto Rico spoke English less than 'very well'); (But scholars estimate 90%) *See* also José Julián Alvarez González, Law*, Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 Law & Ineq. 359, 368 (1999).

[5] As discussed further in this article, the jury venire language restrictions in these two countries, do not apply to all adjudications of the aforementioned jurisdictions. They only apply in roughly 65% of Hong Kong cases. In Puerto Rico, they are limited to cases adjudicated in federal courts. *See*: Department of Justice, The Government of the Hong Kong Special Administrative Region, Percentage of criminal cases conducted in Chinese, available at http://www.doj.gov.hk/eng/stat/index.htm (last visited November 15, 2012)**;** Edelmira L. Nickels, English in Puerto Rico, 24 World Englishes 227, 234 (2005).

The purpose of this article is to examine the important implications of voire dire qualifications on litigation outcomes and, ultimately, on human rights. Jury procedures are unique to common law jurisdictions and hold particular significance in the context of criminal proceedings.[6] Although international human rights law does not recognize the 'right' to a jury trial, for countries that adopt those procedures, it requires that they are provided without discrimination and that they don't impede the right to a fair trial.[7]

As triers of fact, jurors play a vital role in the outcome of cases. However, these triers of fact are imperfect because prejudices and innate tendencies inevitably play an integral role in their interpretation of the positions asserted by attorneys in a case. The notion that jurors are impressionable, imperfect fact finders, who integrate subjectivity into their objective mandate is recognized by practitioners and judges and is even integrated into safeguards of black letter law and procedure.[8]

Language, like race, sex, national origin and other defining human characteristics, plays a significant role in influencing human perception. In some United States ("U.S.") jurisdictions, such as New Mexico, legislators and courts have recognized how restrictions imposed by language requirements violate antidiscrimination laws and impartiality requirements. In response, lawmakers have implemented accommodations for non-English speaking jurors by providing interpreters during the proceedings.[9] However, most state courts in the U.S. exclude potential jurors based on their inability to speak English sufficiently.[10] Many contemporary common law courts have yet to make sufficient steps in avoiding crippling barriers imposed by language requirements in courts.

This article poses that language based discrimination in criminal proceedings by jury violates international human rights law under the International Covenant on Civil and Political Rights. The governments of the U.S. and Hong Kong both justify, in part, the language discrimination requirements with unique historical contexts and important national interests. I believe such justifications don't have merit, particularly when the discriminated group comprises a disenfranchised

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[6] Even though juries are not part of international law, jury systems have reemerged among civilist countries like Spain and Russia in some criminal proceedings. Also, the Supreme Court of Japan has explored the possibility of reviving its experiment with the institution. Neil Vidmar, *The Common Law Jury,* 62 SPG Law & Contemp. Probs. 1 (1999).

[7] *See* International Covenant on Civil and Political Rights art. 2(1), Mar. 23, 1976, 999 U.N.T.S. 171.

[8] *See* Birnbaum, et al*., Jury Selection*, 217 PLI/Crim 59, 63. ("Obviously, the type of people who sit on the jury, together with their pre-existing attitudes, opinions and prejudices, will profoundly influence how they will perceive the ev*Id*ence and the arguments made by you and your adversary.").

[9] N.M. CONST. art VII sec. 3; *See* also *State v. Rico*, 132 N.M. 570, 573 (2002) ("a trial court shall not excuse a juror on the basis of an 'inability to speak, read or write the English or Spanish languages' absent a showing that accommodating that juror will create a substantial burden or otherwise fall within the exception prov*Id*ed within Article VII, Section 3 itself.").

[10] *See* Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 Harv. C.R.–C.L. L. Rev. 133, 202 (2001).

majority. Resolving these types of concerns is not out of reach. Without proper considerations and changes to trial by jury procedures in order to accommodate language diversity, people in Puerto Rico and Hong Kong become victims of violations of the international human rights to (1) be free from discrimination based on language; and (2) a fair and impartial trial.

In the first part of the article, I will present the international authority, both Hong Kong and Puerto Rico, are subject to in order to establish a legal basis for the positions herein included.

Part III examines the significance of voire dire and jury composition in determining outcomes of criminal cases. This understanding will help show the extent to which the exclusion of certain groups has an impact on overall jurisprudence; and, ultimately, on fairness and impartiality. Part IV, analyzes whether language ability is an immutable characteristic thus designating those with particular language ability a distinct group. In part V, I apply the international law norms and assertions, presented in previous sections, to case studies and the case law of these two countries. Finally, I conclude with recommendations that ensure compliance of international human rights in Hong Kong and Puerto Rico, while balancing the practical concerns particular to those regions.

II. International Human Rights Legal Authority

Before entering into the particularities of how language requirements in criminal proceedings violate international human rights, it is necessary to frame the position under an legal authority; the international norms to which both governments subject to.

A. Language Discrimination

Under Article 2 of the International Covenant on Civil and Political Rights ("ICCPR"), all state parties are required to ensure that all individuals within its jurisdiction are not discriminated against based on certain characteristics, including language.[11] Contemporary scholars tie a state's consideration of language rights to its values of tolerance, coexistence and integration.[12] They agree, particularly in the international context, "there can be no serious doubt that a person's language, which may or may not be her mother tongue, is a defining aspect of her human identity".[13] Under current international human rights law, exclusion based on a defining human characteristic such as language is no longer permissible.This paper does not argue that a state should not limit the languages for the execution of its affairs. Efficiency

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[11] International Covenant on Civil and Political Rights art. 2(1), Mar. 23, 1976, 999 U.N.T.S. 171.

[12] Fenand De Varennes, *Equality and Non-discrimination: Fundamental Principles of Minority Language Rights*, 6 Int'l J. on Minority & Group Rts., 307 (1999).

[13] Theodore Schilling, *Language Rights in the European Union*, 9 German L.J. 1219, 1226 (2008).

and pragmatism in many cases demand language requirements. But, in so doing, groups who speak the *lingua franca* of the country are advantaged and those that do not speak the language(s) chosen by the state are disadvantaged. International human rights law requires that in order to properly govern a balance must be struck between the interests of the State and those disadvantaged due to the language they speak.[14]

Traditionally, states have taken one of two approaches: 1) eliminationist or assimilationist approach; or 2) the accommodationist approach. The first approach aims to eliminat minority languages[15] so as to homogenize or 'unify' the country.[16] This "one language, one State" approach is highly divisive and destructive to States with significant numbers of minority (or disadvantaged) citizens.[17] Generally, the eliminationist or assimilationist approach violates international human rights under the ICCPR.

The accommodationist approach properly furthers tolerance of human differences and promotes the peaceful coexistence of diverse populations with various linguistic backgrounds. This approach is not devoid of practical considerations but merely requires that those disadvantages by national language adoption be accommodated as much as is *reasonably possible* given conditions within the State.[18] Thus, when a very small minority of people speak a certain language, substantial leniency should be given to a country with limited resources to accommodate that group. As the representation of the disadvantaged group increases in numbers, so do the expectations and international human rights requirements regarding the adaptation of those groups.

The *Oslo Recommendations Regarding the Linguistic Rights of National Minorities* articulates the proper approach States should take in recognition of international law relating to language rights.[19] It proclaims that denial of public services to accommodate those disadvantaged by the State's language adoption is particularly unreasonable when the number of those disadvantaged is "significant".[20] Recommendation 14 reads, "[p]ersons belonging to national minorities shall have

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[14] De Varennes, *supra n.* 12, at 309.

[15] I use 'minority language' to describe those who speak a language that is disadvantaged via political and societal constructs. Traditionally, those that are disadvantaged are usually a minority group- which is how , but, as described in this paper, the disadvantaged in this context are a majority of the community.

[16] De Varennes, *supra* n. 12, at 308.

[17] *Id.*

[18] *Id*. at 309.

[19] The Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory *N.* , available at http://www.osce.org/hcnm/67531?download=true (last visited November 13, 2012). This paper was published and disseminated by the Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM) in 1998.

[20] *Id.*

adequate possibilities to use their language in communications with administrative authorities especially in regions and localities where they have expressed a desire for it and where they are present in significant numbers."[21]

Exclusionary procedures during voire dire based on language patently violates the ICCPR's rules against discrimination based on language language. Such exclusionary methods are particularly egregious, however, when the exclusions conform to the violative policies under the eliminationist approach in jurisdictions with a high percentage of the population falling within the disadvantaged group. Language exclusion in Puerto Rico's federal criminal court system and Hong Kong's criminal court system unreasonably accommodates the disadvantaged groups, specially because those disadvantaged comprise 90%+ of the population.[22]

B. Impartial Jury Trial Requirements

Under Article 14 of the ICCPR all persons are ensured equality before the courts and are entitled to a fair and public hearing by an independent and impartial tribunal.[23] Unfortunately, the ICCPR did not define what qualifies as an independent and impartial tribunal, nor did it express how a jury system approach conforms to this standard. Because the jury system is utilized by only a fraction of the countries under the ICCPR, impartiality as a doctrine has not been clearly defined or uniformly implemented.[24] The U.S. and Hong Kong are among the few jurisdictions still practicing the English common law jury system.[25] Considering the similarities between the systems, shared historical roots[26] and breadth of U.S. law regarding impartiality, the U.S. courts' standards with regards to impartiality of jury venires are instructive and useful in analyzing the impartiality of the common law jury systems in Hong Kong and Puerto Rico. U.S. common law will be used to analyze whether impartiality of a jury panel has be undermined under the ICCPR.

In the U.S., judicial interpretation of a hearing by an impartial tribunal has required that a jury panel consist of a 'fair cross-section' of the community.[27] The concept of impartiality requires that a proper functioning system construct jury panels that

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[21] *Id.*

[22] *See* Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 Harv. C.R.-C.L. L. Rev. 497 (2011); Also *See* Ming K. Chan, *The Imperfect Legacy: Defects in the British Legal System in Colonial Hong Kong*, 18 U. Pa. J. Int'l Econ. L. 133, 135 (1997).

[23] International Covenant on Civil and Political Rights art. 14(1), Mar. 23, 1976, 999 U.N.T.S. 171.

[24] Vidmar, *supra n.* 6 (estimates have shown that twenty-five countries still use the common law jury system, but only in a few countries including the U.S., Ireland, Hong Kong and British Commonwealth does the system remain widely used).

[25] *Id.*

[26] Both the Hong Kong common law jury system and American common law jury system stem from English law. *See* V*Id*mar, *supra n.* 6.

[27] *Thiel v. Southern Pac. Co*., 328 U.S. 217 (1946).

contain a body truly representative and not the organ of a special group or class.[28] Courts have recognized that it is unreasonable to require jury panels to comprise of the same demographic proportions as the society they represent. Contemporary notions of juries properly representing society require that prospective jurors be selected without systematic and intentional exclusion of any distinct group.[29] The exclusion of certain groups from the jury pool undercuts the concept of a trial by jury, which presupposes a jury drawn from a pool broadly representative of the community as an assurance of diffused impartiality.[30] In *Swain v. Alabama*, the court stated that "the exclusion from jury service of otherwise qualified groups, not only violates our Constitution, but is at war with our basic concepts of a democratic society and representative government".[31]

In the U.S., to determine if the courts voire dire has failed to draw a jury pool which properly reflects a cross-section of the community, one must consider the following: (1) there must be a recognized 'distinctive' group excluded from jury panel; (2) the representation of the group in the panel is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusions of the group in the jury-selection process.[32] It is important to note that both in the U.S. and Hong Kong courts have determined that claims of unfair or unreasonable exclusionary procedures may be justified by important government interest.[33] Section IV discusses whether such justification survives scrutiny and sufficiently rebuts a claim of violation of international.

The two main limiting factors in this analysis are (A) what is considered a 'distinctive' group; and (B) how to determine whether the representation of jury composition is fair and reasonable in relation to the number of persons in the community.

1. Distinctive Group

In order to establish a 'distinctive group' for purposes of meeting the requirements of Duren Test, the court must show the group has (a) a defining and limiting factor; (b) a common thread or basic similarity in attitude, ideas or experience; and (c) a community of interest such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process.[34]

In this article, there are two distinctive groups proffered for consideration: First, those characterized by the language they speak; The second group, is more

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[28] *Glasser v. U.S.*, 315 U.S. 60 (1942); *Johnson v. Louisiana*, 406 U.S. 256 (1975).

[29] *Thiel*, 328 U.S. at 220.

[30] *Id.* at 227.

[31] 380 U.S. 202, 226-227 (1965).

[32] *Duren*, 439 U.S. at 367-368; *Bates v. State*, 3 S. 3d 1091 (Fla. 2009).

[33] *See Duren*, 439 U.S. at 367-368; Re Cheng Kai Nam, [2002] 2 HKLRD 39.

[34] *Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983).

interpretative and contextual, but is important to address nonetheless. In both Hong Kong and Puerto Rico, as shown infra, there is substantial correlation between language ability and a low sociopolitical status. This second group is the politically disenfranchised class outside the upper echelon of those with higher educational, social and economic backgrounds. The intimacy with which language ability and social status are tied justifies consideration.

Courts in the U.S. have been reluctant to recognize distinctive groups whose characteristics, unlike race or sex, are not immutable.[35] In *United States v. Armbury*, an Oregon district court stated it would not recognize as distinctive groups those "based solely on language, residency, or citizenship".[36] Although race and sex are the two most accepted characteristics that identify a distinctive group, courts have recognized other distinctive groups beyond those characteristics including Jews,[37] Native Americans of the Shoshone and Arapaho tribes[38] and even the Amish.[39]

Although courts are seemingly resistant to find a distinct group, absent permanent characteristics, in *Thiel v. Southern Pac. Co.* the court found lower income workers to be a distinctive group.[40] Even though class is not recognized as a permanent characteristic, particularly in the U.S., the court held that a jury venire giving majority representation to one class or occupation and discriminating against other occupations or classes met the requirements necessary to show a court's failure to ensure a fair cross-section venire.[41]

2. Representation of the Community

The second prong to the Duren Test requires that the petitioner show a discriminatory effect reflected in an underrepresentation of one group in the jury venire. Courts have used two approaches to determine this effect: (1) the absolute disparity test; and (2) the comparative disparity test.[42] The first measures the difference between percentage group representation in the community and percentage in the jury pool.[43] The second test measures the decrease in likelihood

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[35] Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded*, 64 Stan. L. Rev. 1503, 1526 (2012).

[36] 408 F. Supp. 1130, 1134-1135 (D. Or. 1976).

[37] *See United States v. Gelb*, 881 F.2d 1155, 1161 (2d. Cir. 1989).

[38] *See United States v. Tranakos*, 690 F. Supp. 971, 976-977 (D. Wyo. 1988).

[39] *See State v. Fulton*, 566 N.E.2d 1195, 1201 (Ohio 1991).

[40] *Thiel*, 328 U.S. 217, 222 ("business men and their wives constituted at least 50% of the jury lists[.] Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of $4 a day and would be excused for that reason.").

[41] *Id.* at 219.

[42] Motomura, *supra n.* 35.

[43] *See United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996).

that a member of the group will be called for jury duty. This is calculated by taking the absolute disparity number and dividing it by the group's percentage in the overall population.[44] Although the Supreme Court of the U.S. has yet to explicitly endorse one test over another, the absolute disparity test is more frequently used.[45]

In *Taylor v. Louisiana*,[46] under the absolute disparity test, the Supreme Court of the U.S. found the exclusion of women from jury panel did not meet the fair cross-section requirement because although 53% of persons eligible for jury service were women in Louisiana, less than 1% of the 1,800 persons listed as potential jurors chosen were female.[47]

Also using the absolute disparity test, the court in *Duren* held that a representation of women less than 15% violated the fair cross-section requirement;[48] and because only 14.5% of the persons chosen for the venire were women lead the court to a conclusion that "[s]uch a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community requires the conclusion that women were not fairly represented".[49]

3. Important Governmental/National Interests

Notwithstanding a violation under the Duren Test, the exclusion of a distinctive group due to systematic exclusion survives with 'adequate justification.'[50] The exclusions must be narrowly tailored with the governmental interest. To that effect it must manifestly and primarily advance that interest.[51] "States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions."[52] Generally these government interests take the form of substantive interests as well as administrative convenience.[53] In *Sugarman v. Dougall*,[54] the court held that the exclusion of noncitizens from political participation was justified by a significant governmental interest of self-governance.[55] In another case, the court

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[44] *Id*.

[45] Motomura, *supra n.* 35.

[46] 419 U.S. 522 (1975). (The Louisiana Constitution at the time excluded women from jury service, unless the women volunteered to serve. Petitioner objected to the jury selection based on the exclusion of women as a group which violated the 'fair cross-section' requirement).

[47] *Id.* at 524.

[48] *Duren*, 439 U.S. at 361.

[49] *Id.* at 366.

[50] *Id.* at 368 n. 26.

[51] *Id.* at 367-368.

[52] *Id.*

[53] Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community"*, 69 S. Cal. L. Rev. 155, 197 (1995).

[54] 413 U.S. 634 (1973).

[55] *Id.* at 647-648.

upheld an exclusion of felons from juries based on the significant interest to rely upon law-abiding citizens as jurors.[56] With regard to administrative convenience, courts have required a weightier justification than for substantive government interests.[57] The *Duren* court stated that relief of administrative burdens on courts fails to justify exclusionary selection procedures without an individual showing of extreme hardship.[58]

C. Jurisdiction of ICCPR

Before moving into the substantive arguments of this paper, it is important to establish that Hong Kong and Puerto Rico (as a U.S. territory) fall under the jurisdiction of the ICCPR. The ICCPR is a legally binding treaty, and the parties to the treaty are obligated to implement its provisions. Each State-party agreed to adopt legislation within its jurisdiction that would give effect to the rights listed in the treaty. A State-party's breach of the ICCPR is a violation of international law. As shown below, sice both regions are subject to the jurisdiction of the ICCPR, the utilization of discriminatory procedures for jury venires based on language and the exclusion of certain groups from jury participation, undermines the impartiality of the trial, thus violating international human rights law.

1. Hong Kong

In 1976, Great Britain adopted the ICCPR (with restrictions) and extended it to Hong Kong.[59] Although England transferred Hong Kong to the jurisdiction of the Peoples Republic of China ("China") in 1997, Hong Kong affirmatively included the provisions of the ICCPR. It also retained its ability to enter into international treaties as a separate entity from China, barring some restrictions.[60] Article 39 of the Basic Law (the Constitution of Hong Kong) explicitly states that Hong Kong is a member to the ICCPR and is a member under its 'world city' status.[61] The

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[56] *United States v. Greene*, 995 F.2d 793, 798 (8th Cir. 1993).

[57] *Duren,* 439 U.S. at 369. (The court held that the administrative convenience achieved by exempting women based on their preclusive domestic duties and associated administrative court and societal costs with sparing women for jury services was insufficient justification for excluding women from the venire. The Court instead required more substantial reasons to justify the procedures).

[58] *Id.*; *See* also Motomura *supra n.* 35.

[59] Legislative Council Report LC Paper No. CB(2)308/11-12(06) available at http://www.legco.gov.hk/yr11-12/english/panels/ca/papers/ca1121cb2-308-6-e.pdf (last visited November 13, 2012).

[60] Basic Law art. 152. ("The Hong Kong Special Administrative Region may, using the name "Hong Kong, China", participate in international organizations and conferences not limited to states.").

[61] Basic Law art. 39. ("The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.") *See* also *supra n.* 62.

Basic law also generally permits Hong Kong to enter into international treaties to which China is not a party.[62] Questions over the technical authority of the ICCPR, however, remain unclear.[63]

Since 1997, there remains a debate concerning the interplay between Hong Kong's right to self-govern via judicial independence and China's rights as the sovereign over Hong Kong. In a 2011 decision, Hong Kong's highest court, Court of Final Appeal, delivered an opinion and held that Hong Kong's historical stance on sovereign immunity standards must change to conform to China's.[64] The courts grounds for its usurpation of Hong Kong's historical stance on sovereign immunity standards was based on Article 158 of the Basic Law which vests power of interpretation of all laws to China's political body, and not Hong Kong.[65] "[A]s a matter of legal and constitutional principle, it is not open to the HKSAR courts to [determine a legal doctrine of state immunity]."[66] Legal scholars have interpreted this decision as supporting China's agenda to limit Hong Kong's judicial and political autonomy, including international relations, in furtherance of its effort to unify the two regions and subsume Hong Kong into China.[67] However, as of now, Article 39 of the Basic Law remains intact and binding.

2. Puerto Rico

The United States became a party to the ICCPR in 1992.[68] Nevertheless, many federal court cases have held that the ICCPR is not binding on courts in the United States because the U.S. Senate opted not to make the document self-executing when they ratified the treaty.[69] To date, the Senate has not incorporated the provisions of the ICCPR into domestic law.[70] By denying that the document is self-executing the

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[62] *Id*. ("The Central People's Government shall, where necessary, facilitate the continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member.").

[63] Hong Kong Human Rights Commission, List of issues for the Pre-sessional Working Group to be taken up in connection with the cons*Id*eration of the third periodic report of China: The Special Administrative Region of Hong Kong concerning the rights covered by the article 1 – 28 of the International Covenant on Civil and Political Rights (ICCPR) (July 2012).

[64] Democratic Republic of the Congo & Ors v. FG Hemisphere Associates LLC, [2011] 4 HKC 151.

[65] Basic Law art. 158. ("The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.").

[66] [2011] 4 HKC 151 at 226.

[67] Chan, Cora, *State Immunity: Reassessing the Boundaries of Judicial Autonomy in Hong Kong*, 4 Public Law 601 (2012).

[68] 11 A.L.R. Fed. 2d 751 (Originally published in 2006).

[69] *Id.*: *See* also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) ("Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.").

[70] 11 A.L.R. Fed. 2d 751 (Originally published in 2006).

U.S. government's actions do not affect whether or not the merits of a case are in violation of the ICCPR.

In, *Igartua De La Rosa v. United States*, the court was asked to address whether the U.S. Government's denial of Puerto Rican citizens ability to vote for the U.S. president was in violation of Article 25 of ICCPR stating that every party must ensure its citizens the right to vote.[71] The court did not address the merits of the case stating that the ICCPR was not self-executing and did not apply to U.S. domestic law.[72]

Nonetheless, the U.S. Constitution articulates that treaties ratified by the U.S. are the Supreme law of the land and pursuant to Article IV, § 3 of the Constitution. Since Puerto Rico is a territory of the U.S., federal laws apply to Puerto Rico.[73] Thus, the Puerto Rican federal court system is subject to the laws articulated under the ICCPR.

III. Important Impact of Jury Venire on Outcome of Cases

As articulated in a practitioners guide "the single most important aspect of a trial is a selection of the jury".[74] The jurors are the ones who decide the case. For purposes of jury selection, a practitioner is coached and trained to identify and exclude people among the venire she believes will be least likely to side with her argument.[75] It is no secret among practitioners that the people chosen during the jury selection process bring with them pre-existing attitudes, opinions, and prejudices that will profoundly influence their decision-making.[76]

What scholars and practitioners, in particular, are most eager to understand is (1) who will be more inclined to either favor the defendant or plaintiff/prosecution; and (2) how to identify these people from observing or talking to them.[77] Empirical

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[71] 32 F.3d 8 (1st Cir. 1994)

[72] *Id.* at 10 ("Appellants' contention that their right to vote in the pres*Id*ential election is secured by Article 25 of the International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967) (entered into force Sept. 8, 1992), is without merit. Even if Article 25 could be read to imply such a right, Articles 1 through 27 of the Covenant were not self-executing, *See* 138 Cong.Rec. S4784 (daily ed. Apr. 2, 1992), and could not therefore give rise to privately enforceable rights under United States law").

[73] U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.); U.S. Const. art. IV, §3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

[74] Birnbaum, *supra n.* 8.

[75] Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 Am. J. Trial Advoc. 285, 286 (1995).

[76] Birnbaum, *supra n.* 8, at 64.

[77] *Id.*

data has confirmed that certain demographics play a significant role in influencing a person's likelihood to favor plaintiff or defense. In one study that sampled 400 respondents in California, given 5 fact patterns, the results revealed that, among groupings of age, sex, race, and income, demographic characteristics can be highly predictive in some cases, particularly regarding race.[78] The results support practitioner's belief that human characteristics over an aggregate sample size correspond with tendencies and response behavior.

When certain characteristics are grounds to categorically exclude people from serving as juries, however, those people and corresponding characteristics that inform tendencies and perceptions are also excluded. As Justice Marshall articulated this very concept in *Peters v. Kiff*:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience… unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[79]

Thus far, case law in the U.S. has prevented exclusion based on various characteristics, mainly consisting of race, sex and economics.[80] "Today, underrepresentation of distinctive groups is typically far less marked, leaving courts unsure of when a deck of jurors is so stacked as to give rise to a prima facie fair cross-section violation."[81] Similar to sex and race, language is a characteristic vital to human perception.

IV. Language: Distinct Group and Cultural Identity

For language to qualify as a distinct group characteristic, one must establish than an exclusion based on language undermines the impartiality of a trial to such an extent that venire no longer represents a fair cross-section of society. One can adopt the U.S. common law factors and show that those excluded for reason of language have: (a) a defining and limiting factor; (b) a common thread or basic similarity in attitude, ideas or experience; and (c) a community of interest such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process.[82]

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[78] Denove & Imwinkelried, *supra n.* 78, at 298.

[79] 407 U.S. 493, 503-504 (1972).

[80] Motomura, *supra* n. 35.

[81] Richard M. Re, *Jury Poker: A Statistical Analysis of the Fair Cross-Section Requirement*, 8 Ohio St. J. Crim. L. 533, 533 (2011).

[82] *Willis,* 720 F.2d at 1216.

A. Language has a Defining and Limiting Factor

The limiting factor associated with language is a person's limitation of communicating in the obligatory language. This happens particularly when a possible juror is monolingual or 'functionally monolingual'.[83] Language has been at the forefront of many political as well as educational controversies. Debates over ballots, courtroom translators, administration of public services in more than one language, as well as bilingual education have been hotly debated, in part, because those who speak a language that is discriminated against or otherwise excluded cannot fully participate in the social and political discourse.[84]

Much of the opposition for including language among characteristics such as race and sex to satisfy the basis of establishing a distinct group for purposes of the fair cross-section requirement or equal protection, relies on the argument that language ability is impermanent or mutable.[85] Unlike race and sex, the limiting factor can change over the course of a lifetime.[86] However, case law demonstrates that permanence is not required to identify distinctiveness for purposes of establishing a distinctive group.[87] Instead, just as one may lapse in and out of religious devotion or convert to another faith, language skills can be acquired, lost and re-learned over time. The language characteristic should be framed and understood in a similar vein as religious tolerance, existing on a continuum of associated cultural traits woven into the fabric of communities.[88]

B. Common Thread

The second prong to qualify as a distinct group requires that the characteristic be a common thread across a group of people so that it is the basis for similarity of its attitudes, ideas or experiences. In *Taylor v. Louisiana*, the court found that women met this distinctive group requirement because as a gender, "women bring to juries their own perspectives and values that influence both jury deliberation and result".[89] In *Duren*, the court found women to be a distinctive group because they

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[83] 'Functionally monolingual' as it is used here refers to those who understand a few words of a second language or can even converse at a superficial level, but with regards to circumstances that require significant depth of understanding such as in the courtroom or on government documentation, they rely on only one language; *See* Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 Harv. C.R.-C.L.L. Rev. 497 (2011).

[84] Rodríguez, *supra n.* 10.

[85] *Id.* at 142.

[86] Nancy Faires Conklin & Margaret A. Lourie, *A Host of Tongues: Languages and Communities in the United States*, 86 Am. Anthropologist 150 (1983).

[87] *See Gelb*, 881 F.2d at 116.

[88] *See Rodríguez*, *supra n.* 8, at 142.

[89] 419 U.S. 522 n. 12.

were "sufficiently numerous and distinct from men".[90] With regards to race, for purposes of the fair cross-section analysis, courts have found that a person of one race is sufficiently distinct from a person of another.[91]

In her article Cristina M. Rodriquez articulates the complexity of language and proffers her explanation as to why language has yet been adequately defined as a legal category.

> It is at once a tool of communication, a lens through which people orient themselves to the world, and a symbol of allegiance to a culture. It shapes the amorphous concept of identity and organizes the concrete details of our lives. Language thus proves difficult to formulate as a legal construct because it is unclear whether to treat language as culture, ethnicity, or behavior.[92]

Many sociolinguists opine that language and identity are intimately linked.[93] Language defines cultural identity through communities which are defined largely at birth.[94] Courts in the U.S. have historically recognized that a person's language informs his or her ideas, experiences and perceptions of the world. In *Meyer v. State*, the court stated:

> [t]o allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.[95]

In addition, many scholars find that language has become a symbol of ethnicity. Where at one time ethnic affiliation depended on geographical proximity and shared occupations, in contemporary society it is defined in terms of a need for political and social support in pursuit of common interest.[96] Sociolinguist Joshua Fishman notes, "[s]ince language is the prime symbol system to begin with and since it is commonly relied upon… to enact and call forth all ethnic activity, the likelihood

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[90] Duren, 439 U.S. at 371.

[91] *See Holland v. Illinois*, 493 U.S. 474, 494 (1990)

[92] *Id.* at 133-134.

[93] Ralph Fasold, *The Sociolinguistics Of Society*, Oxford and New York: Basil Blackwell, at ix (1984).

[94] *See* Conklin & Lourie, *supra n.* 86.

[95] 187 N.W. 100, 102 (1922) 262 U.S. 390, (1923).

[96] John J. Gumperz & Jenny Cook-Gumperz, *Introduction: Language and the Communication of Social Identity, in* Language and Social *Id*entity 1 (John J. Gumperz ed., 1982).

that it will be recognized and singled out as symbolic of ethnicity is great indeed.[97]

Courts have also tied language ability and race/ethnicity together. "It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[98]

While this paper does not forward the argument that language should be a proxy for race, our aim is to show is that in contemporary society, similar to sex and race, language is a characteristic intrinsic to human identity and those who speak a certain language are sufficiently distinct from those that speak another. As Justice Kennedy stated in *Hernandez*, "[j]ust as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn."[99]

C. Community Not Represented if Excluded

While support exists to show that language and race are intimately connected, which would endorse the fact that people with certain language abilities form a distinct group, due to their differences they must remain distinct. Unlike race or sex, linguistic differences bear directly on an individual's ability to participate in the social and public discourse.

For language exclusions, the communities not represented are those who speak the excluded language; particularly those who *only* speak the excluded language such as monolinguals or those 'functionally monolingual'. Often, in English-only or historically colonial jurisdictions, language is learned or attained and is perceived as a commodity.[100] Language-based differences have become indicators of social status in the community as well as a key in ascending the social ladder.[101] Scholars further this argument and believe that separation of language from government and private/personal sectors 'suggest a desire to preserve status hierarchies much as the characterization of domestic violence and sexual harassment as part of the personal sphere reinforces gender hierarchies.[102] Thus, exclusions based on language not only sequester those that speak certain languages, but in some jurisdictions those exclusions disenfranchise a specific class of citizens.

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[97] Joshua A. Fishman, *Language and Ethnicity*, *in* Language, Ethnicity and Intergroup Relations 15, 25 (Howard Giles ed., 1977).

[98] *Hernandez v. New York*, 500 U.S. 352, 371 (1991).

[99] *Id.*

[100] Rodríguez, *supra n.* 8, at 168.

[101] Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English,* 77 MINN L. REV. 269, 352 (1992).

[102] Rodriguez, *supra n.* 8, at 169.

V. Analysis of Case Studies

The following subsections detail substantively how the language requirements of Hong Kong's criminal courts and Puerto Rico's federal criminal court violate: (1) Article 2 of the ICCPR right providing freedom from discrimination based on language; and (2) Article 14 of the ICCPR right of a defendant to a fair hearing by an impartial tribunal.

A. Puerto Rico

1. History and Introduction

Following Spain's cession of Puerto Rico to the U.S., in 1900 the U.S. Congress enacted the Organic Act of 1900, more commonly known as the 'Foraker Act'.[103] This Act recognized Puerto Rico as a territory and established the United States District Court for the District of Puerto Rico.[104] The second Organic Act, the Jones Act of 1917, simultaneously granted U.S. citizenship to the people of Puerto Rico and required that all district court jurors in Puerto Rico "have sufficient knowledge of the English language to enable [them] to serve as juror[s]."[105] The Jones Act of 1917 was replaced in 1968 by the Jury Selection and Service Act (JSSA).[106]

The JSSA applies to all federal courts of the U.S. and articulates prerequisites for federal jury service, which include language limitations. It states, in part, that a person is not qualified for jury service in any federal court if he or she does not speak English or "is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form".[107] The JSSA prohibits exclusion of any citizen from jury service based on race, color, religion, sex, nation origin, or economic status".[108] Despite its efforts to ensure that jury pools are drawn from a "fair cross section of the community,"[109] by excluding those who do not speak English at adequate levels, the JSSA violates international law under the ICCPR by (1) discriminating against those based on inability to speak the English language, and (2) systematically discriminating and excluding a majority of the citizens of Puerto Rico, catastrophically undermining

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[103] Organic Act of 1900 (Foraker Act, ch. 191, 31 Stat. 77 (1900) (repealed 1917).

[104] *Id.* § 34. "Puerto Ricans" in this article will refer to res*Id*ents of Puerto Rico and those ethnically Puerto Rican.

[105] Organic Act of 1917 (Jones Act), ch. 145, §44, 39 Stat. 966 (1917) (repealed 1968).

[106] 28 U.S.C § 1865(b) (2006).

[107] *Id.* § 1865(b)(1)-(3).

[108] *Id.* § 1862.

maintenance of a fair and impartial jury venire. It is important to note that although the exclusionary language requirements only apply to district court cases and not Puerto Rico Commonwealth cases (where most cases are heard), the District Court for Puerto Rico heard 481 cases in 2011.[110]

2. Demographics

Technically, Puerto Rico has two official languages. In 1993, it became law in Puerto Rico that Spanish and English are the official languages of the territory.[111] Realistically, however, Spanish is the language of the people.[112] Spanish is exclusively used as language of communication in schools while English is merely offered as a second language or in foreign language classes.[113] In fact, there is a resistance for the inclusion of English into the Puerto Rican vernacular as many teachers oppose English or bilingual instruction in the classroom.[114] Scholars have attributed this opposition to an attempt to resist 'Americanization' of Puerto Rico and the notion held by many Puerto Ricans that bilingualism threatens one's "Puertorriqueñidad" or "puertoricanness" by disrupting the most important trait tied to their contemporary cultural identity, Spanish.[115] Even returning migrants from the U.S. who have been raised as Puerto Rican but have returned from the mainland "[o]ften are not considered to be 'real' Puerto Ricans by island residents and may be criticized for their limited Spanish proficiency or their use of non-standard varieties of English".[116]

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109 28 U.S.C § 1861 (2006).

110 United States Court, U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending (Including Transfers) During the 12-Month Periods Ending March 31, 2010 and 2011, 62, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D00CMar11.pdf (last visited November 11, 2012).

111 P.R. Laws Ann. tit. 1, § 59 (1993) ("Spanish and English are established as official languages of the Government of Puerto Rico. Both languages may be used, indistinctively, in all departments, municipalities or other political subdivisions, agencies, public corporations, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico.").

112 José Julián Álvarez González, *Law, Language and Statehood: The role of English in the great state of Puerto Rico*, 17 Law & Ineq. 359, 363 (1999).

113 *See* Arlene Clachar, *Ethnolinguistic Identity and Spanish Proficiency in a Paradoxical Situation: The Case of Puerto Rican Return Migrants*, 18 J. Multilingual & Multicultural Dev. 107, 108 (1997).

114 Amílcar Antonio Barreto, *Speaking English in Puerto Rico: The Impact of Affluence, Education and Return Migration*, 7 Centro J. 5, 6 (2000) ("Studies show that to this day teachers in Puerto Rico still harbor a strong cultural resistance towards the United States and much of that resistance is aimed at the teaching of the English language. Teachers of English as a second language are often viewed as agents promoting cultural defection despite the recognition that knowledge of English is a marketable skill.").

115 Amílcar Antonio Barreto, *Statehood, the English Language, and the Politics of Education*, 34 Polity 89, 90 (2001). *See* also William C. Schweers & Jorge A. Vélez, *To Be or Not To Be Bilingual in Puerto Rico: That Is the Issue*, 2 Tesol Q. 23, 26-27 (Autumn 1992).

116 Alice Pousada, *The Mandatory Use of English in the Federal Court of Puerto Rico*, 20 Centro J. 136, 139 (2008).

Data analysis has revealed that resistance of English is not only supported on cultural grounds but empirically as well. In the 2000 U.S. census, only 17.6% of the population of Puerto Rico, over 18 years of age, indicated they speak English very well.[117] Because these questionnaires were in Spanish, scholars believe that the numbers are conflated and instead estimate less than 10% of adult citizens of Puerto Rico speak English at a level adequate to participate in a federal jury venire.[118] That equates to roughly 90% of the population systematically excluded by the JSSA from any jury service in a federal court in Puerto Rico.

On the other hand, there is little dispute that knowledge of and comfort with English is necessary for socioeconomic mobility in Puerto Rico.[119] Bilingual Puerto Ricans have better job prospects and generally make more money than those who do not speak English.[120] Knowledge of English in Puerto Rico has become a "symbol of class differentiation".[121] Many wealthier Puerto Ricans enroll their children in expensive private schools where English is the language of instruction and those of the lower economic echelon either do not have access to English instruction or do so in a very limited capacity and never attain fluency.[122] Thus, in addition to the systematical exclusion of 90% of the citizenry from the jury venire in Puerto Rico's federal court, those who meet the language ability requisite consist mainly of Puerto Ricans from upper education, economic and social backgrounds, unlikely to be representative of the community as a whole.

3. Case Law

The First Circuit addressed the concern of a Sixth Amendment violation requiring the jury venire be comprised of a fair cross section of society in *U.S. v. Benmuhar*.[123]

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[117] Hyon B. Shin & Rosalind Bruno, Language Use and English-Speaking Ability: 2000, U.S. Census Bureau Brief, Oct. 2003, at 2, www.census.gov/prod/2003pubs/c2kbr-29.pdf (last visited November 15, 2012).

[118] *See* Álvarez González, Law*, supra n.* 112, at 368; *See* also Se discrimina al usar el inglés en algunos tribunales de Puerto Rico?, NYDailyNews.com, Feb. 24, 2009, http:// www.nydailynews.com/latino/espanol/2009/02/25/2009-02-25_se_discrimina_al_usar_ el_ingls_en_alguno-2.html?page=1 (stating that pursuant to a University of Puerto Rico study, more than nine out of every ten Puerto Ricans cannot speak English at an advanced level and accordingly cannot participate in federal juries).

[119] Pousada, *supra n.* 116, at 138 ("Viewed simultaneously as a tool of economic advancement and an instrument of *Id*eological repression, English is perceived by many Puerto Ricans as a necessary evil that poses a threat to Spanish and Puerto Rican culture."); *See* also, Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 Harv. C.R.-C.L. L. Rev. 497 (2011).

[120] Edelmira L. Nickels, *English in Puerto Rico*, 24 World Englishes 227, 234 (2005) ("English-speaking skills highly and positively correlate with income level.").

[121] *Id*. at 230.

[122] Barreto, *supra n.* 115, at 95 (discussing how private schools continued to teach in English after Spanish became the language instruction in public schools, but these "schools charge tuition rates beyond the reach of ordinary Puerto Ricans").

[123] 658 F.2d 14 (1st Cir. 1981).

The *Benmuhar* court did not resolve however whether language ability constituted a basis for defining a distinct group or whether there was underrepresentation of that group in the jury venire. It assumed arguendo that those elements were met.[124] Nonetheless, in the application of the *Duren* test, the court found that there was no Sixth Amendment violation because the JSSA's English proficiency requirement advanced significant state interests and the regulation was narrowly tailored to those interests.[125] Those included: uniform use of national language in national courts, trial alternatives for litigants, providing nonresident non-Spanish speaking citizens use of the district court, providing easy access for members of the Attorney General's staff, smooth transition for transferring federal judges and avoidance of translation distortions.[126]

The Court *in US v. Aponte-Suarez* upheld the *Benmuhar* decision and stated, "the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language".[127] In subsequent cases that involve the same issue, courts have upheld the ruling of *Benmuhar*.[128]

Courts remain consistent in their decisions that, in spite of concerns that allege jury venire's composition is unrepresentative of a fair cross section of the community, national interests requiring that federal courts use English also require that jurors retain sufficient levels of English before being qualified to serve. In the district court case of *U.S. v. Ramos Colon*, the court stated, "the use of English in its proceedings, and the language qualification requirements of jurors, which follow as the logical consequence thereof, is not merely a question of convenience or practicality but is a constitutional imperative".[129]

4. Violations and Accommodations

In this section there are two main substantive arguments (1) notwithstanding the justifications posited by the courts of the U.S., the systematic exclusion of non-English speakers during voire dire violates articles 2 and 14 of the ICCPR, to which the U.S. is a party; and (2) the justification put forth as to validating language exclusions are without merit because the national interests of maintaining use of English in federal proceedings and including Spanish speakers in the jury venire are not mutually exclusive. By the incorporation of Spanish interpreters to aid Spanish-

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124 *Id.*

125 *Id.* at 20.

126 *Id.*

127 905 F.2d 483, 492 (1st Cir. 1990).

128 *See United States v. Dubon-Otero*, 292 F.3d 1 (1st Cir. 2002).

129 415 F.Supp. 459 (D.P.R. 1976).

speaking jurors –an existing resource already in place within the Puerto Rican federal court system – English can still be used as a main language without excluding 90% of the population functionally monolingual in Spanish.

i. ICCPR

Article 2 of the ICCPR prohibits, among other things, discrimination based on language.[130] The JSSA exclusion of qualification for jury service when a person is "unable to read, write and understand the English language with a degree of proficiency to fill out satisfactorily the juror qualification form"[131] patently violates article 2.

In Puerto Rico, the selection of jurors for venires follows strict procedural steps pursuant to 28 U.S.C. § 1863(a). This section provides that each district court must enact a jury plan in accordance with the JSSA. Step 1, the Clerk of the Court maintains a 'Master Jury Wheel' which is a list of names randomly selected from a list of registered voters in the Commonwealth of Puerto Rico.[132] Once the names are drawn (Step 2), step 3 is to send those individuals a Juror Qualifications Questionnaire and instructions.[133] Step 4, returned Juror qualifications are screened for age, citizenship and English language requirements.[134] Step 5, 'qualified' jurors are summoned to a jury orientation session where individuals are questioned to determine their English language ability.[135] Step 6, those jurors who cannot understand English proficiently enough to serve, are excluded.

The exclusionary approach adopted by district court of Puerto Rico in steps 4 through 6 of the jury selection process, contravene Article 2 because exclusions are, on its face, based on language ability. Furthermore, according to the standards articulated by the *Oslo Recommendations*, this exclusion is particularly egregious because not only does the violation disadvantage a 'significant' percentage of the population, it disadvantages over 90% of the population. Puerto Rico's district court procedures unreasonably deny accommodations for the disadvantaged majority of Puerto Ricans and improperly deny them human rights protected under Article 2 of the ICCPR.

According to Article 14 of the ICCPR, regardless if the proceeding is a jury trial or not, state parties are obligated to ensure that its citizens enjoy the right to a fair

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130 International Covenant on Civil and Political Rights ar. 2(1), Mar. 23, 1976, 999 U.N.T.S. 171.

131 28 U.S.C. § 1865(b) (2006).

132 Elias R. Gutierrez, *Analysis and Evaluation of the Fairness Resulting from the Jury Selection Processes in the Federal District Court of Puerto Rico 2* (Sept. 2001) (unpublished manuscript), available at http://graduados.uprrp.edu/planificacion/faultad/elias-guitierrez/ERGJurySelection.pdf).

133 *Id.*

134 *Id.*

135 *Id.*

and public hearing by an independent and impartial tribunal.[136] Thus, when using U.S. case law definition of impartial jury trials, jury venires must comprise a fair cross section of the community to ensure impartiality.[137].

a. Monolingual Puerto Ricans as a 'Distinctive' Group

Monolingual or functionally monolingual Puerto Ricans, for purposes of the jury venire qualifications under JSSA, are limited in their ability to participate in the public forum, particularly as jurors in federal criminal proceedings, due to their language ability. Much like religion, which is offered extensive protection and accommodation, language is not an immutable characteristic and may change over time.[138]

Puerto Ricans attach significant cultural importance to speaking only Spanish.[139] As noted by one scholar, "Puerto Rico has never been a nation in the sense of a politically independent state; in the Puerto Rican context nation means a distinct cultural-linguistic unit."[140] Much of Puerto Rico is divided culturally by language ability.[141] Membership of the group is uniquely tied to use and nonuse of language.[142]

Fluency in English not only marks a cultural divide, but a class division as well.[143] Sociolinguists have fundamentally tied English language ability with socioeconomic class in Puerto Rico.[144] With such a uniquely clear cultural and economic division in Puerto Rico based on language ability, exclusion from the jury venire based on that ability meets the third prong of the *Willis* test as exclusion would disintegrate participation and representation of the excluded group in the jury panel.

b. Unreasonable Representation

Next, because the JSSA rules applied to the procedures of District Court of Puerto Rico effectively exclude all monolingual and functionally monolingual Spanish speakers, thus not one is represented on the jury venire, this element is met. Whether using an absolute disparity or comparative disparity analysis, the second prong of the *Duren* test fails.

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136 International Covenant on Civil and Political Rights art. 14(1), Mar. 23, 1976, 999 U.N.T.S. 171.

137 Thiel, 328 U.S. 217.

138 Rodriguez, *supra n.* 8, at 183.

139 Barreto, *supra n.* 115, at 90. *See* also William C. Schweers & Jorge A. Vélez*, To Be or Not To Be Bilingual in Puerto Rico: That Is the Issue*, 2 TESOL Q. 23, 26-27 (Autumn 1992)

140 Eugene V. Mohr*, Language, Literature and Journalism, in The American Presence in Puerto Rico*, 135, 137 (Lynn-Darrell Bender ed., 1998).

141 Nickels, *supra n.* 120, at 230.

142 Pousada, *supra n.* 116, at 139.

143 *Id*.

144 *Id*.

Furthermore, from a socioeconomic or class perspective, because the jury qualifications procedures exclude over 90% of the population,[145] and since language ability is fundamentally tied to social classes, there are strong indicia that lower social classes are unreasonably represented in the jury venire.

In *U.S. v. Ramos Colon*, petitioner argued that as a result of language exclusions the jury pool was improperly representative of the population. Petitioner's affidavit described a jury pool composed of 91.2% of upper class, 54.4% middle class and 9.7% of lower class, which was inversely proportional to the actual representation of those classes in society.[146] Applying a similar analysis in *Duren*, where the court concluded that if women, who comprise over half the population, represent less than 15% of the jury panel then the women were not fairly represented,[147] in *Ramos Colon*, because the lower classes represented 62%[148] of the population but only represented 9.7% of the jury panel, the court should have found under the absolute disparity test, the group was underrepresented.

Although the court in *Ramos Colon* failed to acknowledge this 'class warfare' claim, the court in *Thiel* not only recognized class implications of jury exclusions but also in regard to voire dire procedures cautioned "[t]he object is to devise a system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community."[149] The *Thiel* court found that jury selection and retention procedures regarding compensation effectively excluded those with living wages (i.e. the lower or working classes) and the court recognized that jury venire selection must accommodate and include "appropriate qualifications and exemptions…flexibly adjusted".[150]

c. Systematic Exclusion

Because the JSSA and the District court's jury plan procedures unequivocally exclude those unable to meet the English proficiency requirements, the element requiring systematic exclusion is met requiring a showing of systematic exclusion.

ii. Government Interests and Fair Cross Section are Not Mutually Exclusive

The justificaction of exclusionary language requirements on the basis of significant national interests to maintain collective use of English in federal

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145 Álvarez González, *supra n.* 112, at 368.

146 415 F.Supp. at 462.

147 439 U.S. at 366.

148 415 F.Supp at 462.

149 328 U.S. at 232.

150 *Id*.

proceedings misinterprets the source of the concern. The threat to impartiality does not derive from the use of English in the courtroom, but rather from the exclusionary procedures embedded in the JSSA and the jury plan of the District Court for Puerto Rico. Notwithstanding, at times, using English in the proceeding is merely a formality, as the defendant is usually a monolingual or functionally monolingual Spanish speaker[151] and the federal judges and most counsel are fully bilingual.[152] Solutions to exclusionary language requirements that affect impartiality can be utilized without undermining the national interests federal courts cling to.

Interpreters for non-English-speaking jurors offer an easy and accessible solution. First, because it does not require that the proceedings change the working language; English may continue to be the primary language. Second, jurors who do not speak English sufficiently will no longer be excluded from the jury venire as all testimony and court procedures will be translated by an interpreter for the non-English-speaking juror(s).

There are four major concerns with allowing non-English-speaking jurors access to interpreters during trial: (1) jury reliance on translation rather than English testimony or official English translation; (2) the accuracy of the translation; (3) presence of a thirteenth person during deliberation; and (4) the cost of or ability to administer interpretation.[153] Particularly, in Puerto Rico, the first two concerns are nonsensical because the district court already has a robust institution in place translating Spanish to English..[154] The quality of this translation is generally considered sufficient for evidentiary purposes.[155] The reverse would not pose any additional comprehension difficulty not already experienced by the court.

As to the third concern, the presence of a thirteenth person during deliberation has substantial support when analogizing the practice to the allowance of sign language interpreters for deaf jurors.[156] Furthermore, as it is extremely rare in Puerto Rico to have a non-Spanish-speaking juror on the panel,[157] a monolingual or functionally monolingual would not require the interpreter to enter the deliberation room because, jury would be speaking and deliberating in Spanish.[158]

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151 Pousada, *supra n.* 116, at 140.

152 Andrea Freeman, *Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico*, 20 Temp. Pol. & Civ. Rts. L. Rev. 179 (2010).

153 Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 Harv. C.R.-C.L. L. Rev. 497, 531 (2011).

154 Freeman, *supra n.* 152.

155 Gonzales Rose, *supra n.* 153, at 533.

156 *United States v. Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987)(Holding that the presence of a thirteenth person- a sign language interpreter for a deaf juror- was permissible and d*id* not pose conf*i*-*d*entiality problems or have any inhibiting influence of jury deliberation or deprive defendant of a fair and impartial jury trial).

157 Gonzales Rose, *supra n.* 153, at 534.

158 *Id*.; Also *See Cf. United States v. Morris*, 977 F.2d 677, 685-686 (1st Cir. 1992)(indicating that deliberating in Spanish in the United States District Court for Puerto Rico is acceptable and there is no requirement that jurors deliberation in English).

Finally, the argument of the extensive costs associated with providing this service outweighs the benefits is flatly groundless, as not only does the court already have the infrastructure and interpreter institution in place,[159] but also according to *Cf. Frontiero v. Richardson*[160] court, cost justifications are not persuasive when fundamental rights are implicated.[161]

The issuance of an interpreter for non-English-speaking jurors allows court proceedings to maintain English preeminence without undermining the integrity of the court and without violating Articles 2 and 14 of the ICCPR.

B. Hong Kong

1. History and Introduction

Prior to Hong Kong's transition from Britain to China in 1997, jurors were required to speak English in order to be eligible for jury service.[162] A listing of all eligible English-speaking citizens was compiled as the 'List of Common Jurors,' from which the court would choose jurors.[163] This English language requirement effectively disqualified much of Hong Kong's population from eligibility to participate as jurors.[164] Those who met the English requirement were limited to the educated elite, lay defendants were not likely judged by their peers. This significantly undermined contemporary notions that juries should represent a cross-section of the population.[165]

Today, Hong Kong has seen marked reform; court proceedings are no longer performed exclusively in English nor are all jurors required to speak English. The Basic Law, Hong Kong's constitutional document, establishes both Cantonese *and* English as the official languages of Hong Kong.[166] The Basic Law also gives discretion to the judges and magistrates to decide which language will be used in any given court proceeding.[167] Thus, all language-related procedures in a criminal proceed-

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[159] Freeman, *supra n.* 152 ("The transition to a bilingual court would be relatively simple due to the fact that the infrastructure for interpretation is already in place.").

[160] 411 U.S. 677 (1973).

[161] *Id.* at 690.

[162] Ming K. Chan, *The Imperfect Legacy: Defects in the British Legal System in Colonial Hong Kong*, 18 U. Pa. J. Int'l Econ. L. 133, 135 (1997).

[163] *Id.* at 135.

[164] *Id.*

[165] *Id.*

[166] Official Languages Ordinance (1997) Cap. 5, §3(1) (H.K.) ("The English and Chinese languages are declared to be the official languages of Hong Kong for the purposes of communication between the Government or any public officer and members of the public and for court proceedings").

[167] Official Languages Ordinance (1999) Cap. 5, §5(1) (H.K.) [hereinafter *OLO (1999)*] ("A judge, magistrate or other judicial officer may use either or both of the official languages in any proceedings or a part of any proceedings before him as he thinks fit.").

ing remain dictated by judicial decision.[168] Judges and magistrates have discretion over imposing language requirements for jurors and whether the proceedings will be in English, Cantonese or both. Once the decision is made by the presiding judge, jurors are disqualified from jury service unless they have "sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings."[169] It is our understanding that, once the language is chosen, the procedures adopted by Hong Kong courts violate the ICCPR by (1) discriminating against citizens based on inability to speak the chosen language and (2) systematically discriminating and excluding a majority of the citizens of Hong Kong; thus, effectively undermining maintenance of a fair and impartial jury venire.[170]

2. Demographics

At the formation of the contemporary Hong Kong society, knowledge of English was confined to the Chinese elite, government officials and English expatriates.[171] The Treaty of Nanking was signed on August 29, 1842, in which China ceded Hong Kong to the United Kingdom.[172] From 1842 until 1997, the British implemented and controlled Hong Kong's government and legal structure.[173] Also, the english language was introduced and imposed as the language of government until 1974.[174]

Following campaigns led to close the 'language gap' between the government and the people; the Chinese language gained official status under the Official Language Ordinance of 1974.[175] However, for Great Britain to return Hong Kong back to China, provisions were stipulated under the Joint Declaration (the terms under which Great Britain would leave). These provisions established that English would still be used by "the executive authorities, legislature and judiciary as an official language of the Hong Kong Special Administrative Region (SAR)", although Chinese would also become an official language of Hong Kong.[176] Even though a vast majority of Hong Kong's residents do not speak English, it remains the predominant language of Hong Kong's legal system.[177]

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168 *Id*.

169 Jury Ordinance (1999) Cap. 3, §4(1), (2) (H.K.).

170 Although this paper focuses on the impact of the exclusionary language requirements on the majority Cantonese-speaking population of Hong Kong, the author recognizes the possibility, albeit unlikely circumstance, that the language requirements may also exclude English-speaking citizens of Hong Kong when Cantonese is chosen by the court.

171 John Bacon-Shone and Kingsley Bolton, Bilingualism and multilingualism in the HKSAR: language surveys and Hong Kong's changing linguistic profile, in *Language and Society in Hong Kong*: *A Reader* 25, 26 (Kingsley Bolton and Han Yang eds., Hong Kong: Hong Kong Open University Press 2008).

172 Yuhong Zhao, *Hong Kong: The Journey to a Bilingual Legal System*, 19 Loy. L.A. Int'l & Comp. L.J. 293 (1997).

173 *Id*.

174 *Id*. at 295.

175 *Id*.

176 *Id*.

177 *Id*. at 298.

Studies show that the remnants of this tradition linger in Hong Kong society today. A 2011 census determined that nearly 90% of Hong Kong's population speaks Chinese (Cantonese) for daily communication, while only 4% use English (the remaining 6% speak additional dialects of Chinese and other languages).[178] Although 96% of Hong Kong's population does not proficiently speak one of its official languages (English), within the legal profession and the judiciary "English is and remains the *lingua franca* and it sees no signs of fading".[179]

Among Hong Kong scholars there remains literature that supports the notion that Hong Kong's demographics consist of a tripartite community: the local Cantonese community; a mainland China community; and others.[180] The focus of this section concerns the majority group of "the mono-ethnic, mono-cultural and monolingual Chinese speech community with its members sharing behavioral and linguistic norms essentially determined by 'Chineseness'".[181]

Unlike Puerto Rico, English retains some populous support since Hong Kong's identity and economic prowess as an international trade center relies on its accessibility to the international community.[182] Since English remains the international language of trade, commerce, finance, shipping and aviation, Hong Kong policy continues to promote English as an official language.[183] English involves less animosity and, to some extent, it is embraced as a necessary tool to further the goals of the city.[184]

English speakers, however, continue to account for a limited class of Hong Kong's population, including barristers and judges as well as the highly educated, and expatriate populous.[185] Furthermore, additional jury requirements separate from language knowledge, require that jurors graduate from secondary school in order qualify for service.[186] Consequently, there remain constitutional and jurisprudential concerns regarding criminal defendants' access to a fair trial and due process. As one scholar notes, although the criminals accused are afforded a jury trial the jury

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178 Population Aged 5 and Over by Usual Language, 2011 Population Census – Summary Results, 39, Census and Statistics Department, Hong Kong Government, 2011, available at, http://www.statistics.gov.hk/pub/B11200552011XXXXB0100.pdf (last updated 21 February, 2012).

179 Phil C.W. Chan, *Important Decisions of Hong Kong Courts in 2002 (Part 1): Language Rights, Foreign Offenders' Sentencing, and Immigration and Refugee Laws*, 4 Chinese J. Int'l Law 219, 221 (2005).

180 Bacon-Shone and Bolton, *supra n.* 171.

181 *Id*. at 48

182 Zhao, *supra n.* 172, at 303.

183 *Id*.

184 Phil C.W. Chan, *Important Decisions of Hong Kong Courts in 2002 (Part 1): Language Rights, Foreign Offenders'Sentencing, and Immigration and Refugee Laws*, 4 Chinese J. Int'l Law 219 (2005).

185 *Id.*; Also *See* Bacon-Shone and Bolton, *supra n.* 171.

186 Law Reform Commission of Hong Kong, Criteria for Service as Jurors, 10 *available at* http://www.hkreform.gov.hk/en/docs/rjurors_e.pdf (June 2010) (last visited on November 12, 2012).

venire is not a fair cross section of the community.[187] This criticism states that a "jury selection mechanism that excludes the vast majority of the monolingual Chinese population can only result in a denial of justice".[188] The Hong Kong Department of Justice released statistics that showed that in 2011, in four of the six courts in Hong Kong (including the highest court) English was chosen as the language of the proceeding for over 65% of criminal cases.[189]

3. Case Law

Courts in Hong Kong have not yet addressed the exclusionary language requirements undermining impartiality of a jury. These courts maintain a consistent position on judge's discretionary use of language during proceedings. Discretion of judges on language of proceedings, pursuant to the Jury Ordinance requiring jury proficiency in the language chosen by the court, directs the exclusionary jury venire procedures adopted by the court based on language and is the source of the violation of the ICCPR.[190]

In *HKSAR v. Fu Chu Kan & ORS*,[191] a juror was dismissed for not understanding the word "solemnly" during oath-taking in English.[192] Not knowing one word during the oath-taking process shows the high standard of English required to serve on the panel.

In *Re Cheng Kai Nam*,[193] the court refused a petition by the defendant for proceedings conducted in Chinese (Cantonese) and for a bilingual judge.[194] The defendant claimed a violation of his right to a fair trial under the Basic Law and the ICCPR. He argued that a monolingual judge's accuracy during examination of key witnesses who were likely to testify in Cantonese, including the defendant himself, would be compromised by the need for translation.[195]

The court articulated two justifications for its rejection of the defendant's argument. First, pursuant to national unity interests and the Basic Law, which estab-

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[187] Zhao, *supra n.* 172, at 300 ("language proficiency standard inevitably results in a trial of an accused by his educational superiors who are not his peers in terms of social and economic status.")

[188] *Id*.

[189] Department of Justice, *supra n.* 3.

[190] Jury Ordinance (1999) Cap. 3, §4(1), (2) (H.K.).

[191] [2005] 4 HKC 1.

[192] *Id*. at 1 ("The judge then invited the remaining jurors to take their oaths first before reutnr to Mr. Koo and aksed him to take the oath again. But the same thing happened., Mr. Koo had to *See*k help from the same collegeu on the same word in the same way. Having consulted counsel in the absence of the jury, the judge discharged Mr. Koo from the panel for fear that his English standard might not be sufficient.").

[193] Re Cheng Kai Nam, [2002] 2 HKLRD 39.

[194] *Id.*

[195] *Id.*

lished a 'one country two systems' approach to maintain Hong Kong's common legal system, requires the preservation of English.[196] To maintain the common law in Hong Kong, judges and members of the judiciary from other jurisdictions must be recruited. The allowance of English as an alternative language to Cantonese in court proceedings furthers that national interest.[197] Second, the constitutional right for a defendant to use one language does not imply a reciprocal obligation on the court to speak and read that language used by the defendant.[198] Decisions on the language of the proceedings remain discretionary to judges and, as long as the litigant unable to speak the chosen language receives the free assistance of an interpreter, there is no violation.[199]

In *HKSAR v. Kong Lai Wah*,[200] in addressing considerations for determining the appropriate language of the proceeding, the court listed many factors including the language of the accused, the language of the witnesses, wishes and abilities of attorneys, legal and factual issues in dispute, and the language ability of the judge or judicial officer.[201] No consideration was made for resulting exclusionary procedures adopted from the chosen language on jury venires. Courts have dodged concerns over vulnerabilities to impartial jury venires due to the language restrictions.

4. Violations and Accommodations

The use of existing translation services aid monolingual Cantonese speaking jurors in English proceedings. This ameliorates human rights violations that undermine impartiality of a trial by jury.

i. ICCPR

Chapter 3, § 4 of the Jury Ordinance states that jurors must have "sufficient knowledge of the language in which the proceedings are to be conducted".[202] By the exclusion of potential jurors from service based on language, this section violates Article 2 of the ICCPR.

In Hong Kong, the Commissioner of Registration is empowered to compile a provisional list of jurors.[203] This list is compiled from applicants of Hong Kong identity cards who meet the qualifications under section 4 of the Jury Ordinance

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196 *Id.* at 45.

197 *Id.*

198 *Id.*

199 2 HKLRD 39, at 46.

200 [2009] 1 HKLRD 284.

201 *Id.* at 289.

202 Jury Ordinance (1999) Cap. 3, §4(1), (2) (H.K.).

203 Jury Ordinance (1999) Cap. 3, §7 (H.K.).

(Cap. 3).[204] Language ability is specified on the list.[205] This information is then sent to the Registrar of the High Court who maintains it.[206] Once the judge has determined the use of language used in the proceeding, the Court of First Instance or a coroner may discharge any person summoned to serve as a juror who is unable to satisfy the court or the coroner that his or her knowledge of the language is sufficient.[207] Jurors are summoned by a random selection ballot process conformed by a panel of people directed by the judge.[208]

The compilation of the provisional list of jurors and then exclusion of those that do not sufficiently speak the language chosen by the judge, contravenes Article 2, because jury venire exclusions facially based on language ability meet the criteria of discrimination based on language. Just as in Puerto Rico, this violation is extraordinarily clear because the criteria exclude a high percentage of the population of Hong Kong – 96% of the Hong Kong citizenry and 90% of the monolingual Cantonese-speaking population – which exacerbates the unreasonableness of the policy.

a. Non-English-Speaking Hong Kong Citizens Are a 'Distinctive' Group

As discussed above, collectively, Cantonese-speaking monolinguals and functional monolinguals are a distinct group. Language and its limitations help define perceptions and world views. Just as Spanish informs their "Puertoricanness"[209] Cantonese and the ability and limitations of that language inform their "Chineseness."[210] Their language ability and the limitations associated with speaking and thinking only in that language is a limiting factor but it's also their common and shared experience. Scholars distinguish monolingual Cantonese-speakers from bilinguals in Hong Kong stating, "use of a second language accesses the perceived cultural norms of the group most associated with that language, especially its prototypic trait profiles, thus activating behavioral expressions of personality that are appropriate in the corresponding linguistic-social context".[211] Bilinguals are less limited than monolinguals in their access to other cultures.

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[204] Law Reform Commission of Hong Kong, Criteria for Service as Jurors, available at http://www.hkreform.gov.hk/en/docs/rjurors_e.pdf (June 2010) (last visited on November 12, 2012).

[205] Jury Ordinance (1999) Cap. 3, §4A(1)(a) (H.K.).

[206] *Id*.

[207] *Id*.; Also *See* Jury Ordinance (1999) Cap. 3, §4(2) (H.K.).

[208] Jury Ordinance (1999) Cap. 3, §13(1) (H.K.).

[209] Barreto, *supra n.* 115, at 90. *See* also William C. Schweers & Jorge A. Vélez, *To Be or Not To Be Bilingual in Puerto Rico: That Is the Issue*, 2 TESOL Q. 23, 26-27 (Autumn 1992).

[210] Bacon-Shone and Bolton, *supra n.* 171.

[211] Sylvia Xiaohua Chen, *Two Languages, Two Personalities? Examining Language Effects on the Expression of Personality in a Bilingual Context*, Chinese University of Hong Kong (Hong Kong), 2007.

Furthermore, similar to Puerto Rico, bilinguals regularly represent a high proportion of the jury venire. They are generally more educated and of a higher economic and social class than a vast majority of the monolingual or functionally monolingual population, usually the defendants.[212] Supported by the reasoning in *Thiel* that excluding or improperly burdening members of a certain socioeconomic class leaves a panel unrepresentative of the community, exclusions based on language perpetuating class discrimination should be quashed. The exclusion of monolinguals from the jury venire disallows a proper representation of that group. Thus, monolingual or functionally monolingual Cantonese speakers form a distinct group under the *Willis* test.

b. Unreasonable Representation

The Jury Ordinance requiring sufficient knowledge of the language chosen by the court in Hong Kong excludes 90% of the monolingual Cnatonese-speaking population when English is the chosen language.[213] Surely this will pass muster under a *Duren* absolute disparity analysis where the court found unreasonable representation when a group only representing roughly 50% of the population (women) comprises of less than 15% of the venire.[214] As noted above, most criminal cases in 2011 were conducted in Chinese, which means that the monolingual Cantonese-speaking population was unrepresented entirely in most criminal cases. When 90% of the citizenry is excluded from serving on juries, it is unreasonable to believe that that group excluded is represented on the venire. Furthermore, in accordance with the argument that speaking English at high proficiency or fluency levels is exclusively held by the elite,[215] as a class, Cantonese-speaking monolinguals or functional monolinguals are also unreasonably represented when English is chosen by the judge.

c. Systematic Exclusion

Systematic Exclusion element is met because the Jury Ordinance excluding jurors lacking the requisite knowledge of the language is a procedural rule, systematically implemented by the court.

ii. Promotion of Common Law and Fair Cross Section Are Not Mutually Exclusive

Hong Kong has maintained the British legal system as a way to ensure stability during the transition to China. However, it seems now that the remnants of the old

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212 Zhao, *supra n.* 172, at 300.

213 Bacon-Shone and Bolton, *supra n.* 171, at 37.

214 *Duren*, 439 U.S. at 366.

215 Chan, *supra n.* 162, at 135.

regime, with regard to language restrictions on juries in courtrooms, are a hindrance to jurisprudence and right to a fair trial. To maintain English as an official language, while less than 4% of the population speaks English at levels sufficient to serve on a jury is on its face problematic.

When petitioner asked, in *Re Cheng Kai Nam*, "Can you imagine the reaction if an Italian tried in Rome by a judge who does not speak Italian," the court rightly responded that Hong Kong and Rome have different histories.[216] Hong Kong's policy interest in maintaining English stems from practical considerations over fostering a bright economic future and respecting its history. These interests, however, do not necessarily compete against protecting the human rights of its citizens from discrimination and ensuring a fair and impartial jury.

Concerns over reliance and accuracy impose little obstacle as the courts in Hong Kong already rely heavily on interpretation and translation. As translation services are already pervasive within the Hong Kong legal system,[217] minimal additional resources would be needed to extend these services to jurors as well. As judge Hartmann stated in *Re Cheng Kai Nam*, "Hong Kong is not the only common law jurisdiction which preserves English as an official language of the courts even though the majority of the people are not native English-speakers. On a day-to-day basis in those courts, interpretation services must be used for those who speak the majority tongue".[218] Judge Hartmann recognizes that interpretation services offer an effective means of addressing the complexities if instituting language requirements in diverse and complex multilingual societies. Those same principles should be applied to jurors..

If implemented, Hong Kong courts could maintain the preeminence of English and maintain the judge's discretion in deciding the language of the proceedings without violating the ICCPR. Whether Hong Kong's interest in maintaining its British roots justifies the drawbacks, is a delicate and complex issue. Nonetheless, Hong Kong should find a way to better represent and protect the rights of the disenfranchised majority in criminal proceedings.

VI. Conclusion and Suggested Alternative Approach

In both Puerto Rico and Hong Kong, jury venire exclusions based on language violate both Article 2 and Article 14 of the ICCPR. The JSSA and the Jury Ordinance both adopt an eliminationist or assimilationist approach which improperly accommodates those disadvantaged by the government's favored language. The exclusionary jury venire procedures are particularly egregious due to the magnitude of the exclusion. The accommodation in the form of providing interpreters for jurors

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216 2 HKLRD at 46.

217 Zhao, *supra n.* 172, at 300-301.

218 *Id*.

is both reasonable and possible considering the infrastructure already exists. Also, because so many are in need of those services to properly participate in the public discourse.

When jury venires discriminate against and exclude individuals based on language ability and that exclusion eliminates a distinct group in the community, the fabric of the legal system is undone. Such high risk of misrepresentation ensures failure of impartiality.

The main concern of this paper is to address threats to a very vulnerable institution, the jury system. Although a workable and useful system that is gaining ground throughout the world, when abused or neglected, it can cause great inequity. As articulated in his interview, Judge Hubert Will reflects on important advice given to him when he was a student by Clarence Darrow, a leading attorney for the American Civil Liberties Union (ALCU): "[T]he single more significant skill that a trial lawyer had to develop was how to pick a winning jury. He thought most cases were over before the jury was sworn. I remember asking, '[y]ou mean before the evidence is presented or they have been told what the law is?' He said, '[t]hat's right young man".[219]

Courts in Puerto Rico have addressed this problem pretty extensively and this paper is offered to further the movement for change. The Human Rights Committee is scheduled to review U.S. compliance with the ICCPR. Hopefully, this issue will be addressed. As for Hong Kong, to the extent of the exclusion and negative implications on impartiality of the jury venire and rendering of justice, it is surprising that not more literature or case law has addressed this inequity and violation of international human rights. While it is recognized that there is less animosity towards the legal system's favor of English in Hong Kong than in Puerto Rico, the magnitude of exclusion and the relative simplicity of a resolution weaken justification for inaction.

Providing interpreters for jurors offers an effective resolution to the concerns of this issue because it will also suffice to maintain the respective government interests of the U.S. and Hong Kong. Hong Kong can maintain two official languages chosen at the court's discretion and the U.S. can maintain English as the official language in federal courts in Puerto Rico.

The major obstacle for change and action under the auspices of the ICCPR is convincing courts that monolingualism or functional monolingualism meets the requirements of a distinct group under law. Existing notions of how groups and communities are formed, however, reveals that language, like religion and other protected classes outside race or sex, help form associational identity. Also, as articulated in *Thiel*, "the jury system, that indispensable adjunct of the federal courts, calls for review to meet modern conditions… calling for appropriate standards flexibly adjusted".[220]

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[219] Jeffrey N. Cole & Robert E. Shapiro, *Interview with Judge Hubert L. Will*, Litigation, 31 (FALL 1993).

[220] *Thiel*, 328 U.S. at 232.