

Ten years of the Bill of Rights and the ICCPR in Criminal Proceedings[#]

by

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- 1 Has it really been 10 years? I realise that it is fashionable to criticise the Government. (There is much to criticise.) However, I think that when things are taken over a 10 year perspective, taking matters as whole, the impact of the Bill of Rights and the International Covenant on Civil and Political Rights on criminal proceedings in Hong Kong has been very positive: both as a matter of style and substance. There is a good deal of scope for a modest bout of self-congratulation. We haven't done half bad. It could have been considerably worse. We could have done better but, after careful reflection, perhaps not a whole lot.
- 2 Is this, therefore, a love-poem to the Governments (both colonial and, arguably, less colonial) that have administered Hong Kong for the last ten years? Certainly not. Not the least reason for this is the fact that the administration of the criminal law – and thus the application of the Bill of Rights and the ICCPR - is not wholly an executive matter. When it comes to criminal litigation, the executive is a party to the litigation. While it is the party that is primarily responsible for the initiation of criminal proceedings and is thus critical to the equation, it remains a party. It is important in examining the impact of the Bill of Rights and the ICCPR to look at the performance of other parties in the proceedings. I use 'parties' in the broader sense here and I include the judiciary in this equation. Indeed, while I do not agree with each and every decision of the judiciary in its application of the Bill of Rights and the ICCPR, I would venture to suggest that the shining star (or Most Valuable Player or Man of the Match) has been the judiciary. The performance of the other parties to the criminal litigation triangle: the prosecution and the defence have been

This paper is respectfully dedicated to a man who I prosecuted: Ng Kung-siu. He was one of the accused who was charged in the flag case (*Ng Kung-siu & Anor* (1999) 2 HKCFAR 442, [1999] 3 HKLRD 907, [2000] 1 HKC 117). His commitment to the cause of human rights was never in doubt. I never met him other than in the context of that case. I think I would have disagreed with some of the substance of what he believed and much of the methods which he adopted. Such disagreements never diminished my respect for him.

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patchy in their performance. Their performances range from the dismal to the brilliant.

- 3 One final preliminary point should be made here. The impact of the ICCPR and the Bill of Rights on criminal proceedings cannot and must not be viewed in isolation from the operation of the criminal justices system as a whole. The effectiveness of the protections afforded by the Bill of Rights and the ICCPR depend to a very large extent on the quality of the criminal justice system. Let us not fool ourselves. Even if we had the most perfectly framed human rights laws imaginable, if those who represent the parties and, perhaps in particular the defence, are bumbling or inexperienced fools, then the whole thing is to little or no avail. Imagine human rights legislation with an inept or corrupt judiciary. The same goes for an inept or corrupt law-enforcement system or prosecution service. Realistically, a weak link in the system – in some respects, any weak link - has the potential to degrade the whole system.
- 4 Another critical ingredient in the mix is that the ‘ordinary’ criminal laws are in reasonable shape. I use ‘ordinary’ with some diffidence because of the potential problems with definition and classification. I propose to ignore those in this paper. It is critical that the laws which render certain conduct liable to criminal sanction be accessible and predictable (which is of itself a component of human rights). Such laws must also be relevant and, dare I say, sensible to the community. This concept is not limited to what one might call the human rights component of the analysis (*e.g.* that the laws are not discriminatory). They must also be relevant to the community and its real values.¹ For example, laws must be up to date. Adjectival laws² must also be appropriately just and predictable. The system must be accessible. It must be accessible to not only the parties but also that take part as lesser players such as witnesses. It must be accessible to the public either directly or through the press. Press coverage of criminal proceedings is vital both in terms of quality and quantity because few members of public have the leisure or the desire to go and watch criminal proceedings by themselves. Indeed, for better or worse (perhaps, more accurately, for better AND worse), the press is an important

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- 1 In using the phrase ‘real values’ I am seeking to take a shot – whether cheap or otherwise – at the tendency in some societies (one of which is Hong Kong) to fail to distinguish between the values which the community actually hold as opposed to those which it is considered proper to hold in public.
- 2 The appropriately pompous phrase for the laws of procedure and evidence.

instrument though which the public make judgements about the nature of the criminal justice and the manner in which human rights operates in the system.

- 5 The point that I seek to make about the quality of the criminal justice system is not limited to extreme cases of such matters as incompetence or inadequate framework. The point is also valid within systems where one sees basic competence and a reasonable structure. There has to be a human rights culture. It is no good making comparisons between Hong Kong and, say, North Korea. The feel-good result that this is (hopefully) guaranteed to produce is about as equally irrelevant as making a comparison between Hong Kong and some of the countries with long and well-developed human rights traditions. Of course Hong Kong is not going to fare as well in such a comparison. But that fails to address the issue of the basis of the comparison.
- 6 What this brings us to is that we have to define what we want and expect from our human rights system. This is a point which I consider to be important not only in the context of the criminal justice system but in a wider context. While there is a universal component to the notion of what we want and expect from such a system, the plain truth is that there is also a values-driven component. There is also an issue of who decides the latter component. Perhaps the Flag Case³ demonstrates this best. Article 19 of the ICCPR makes it plain that rights to freedom of expression may be limited in circumstances which are justifiable and justified. The debate in that case was really only to what extent (if any) the restriction on freedom of expression imposed in that case was justified. Whatever one's views about the outcome of the case, the point I seek to make is to ask to what extent it ought to be for the Court to decide the outcome of the values part of the equation. I will return to this issue in a moment, but perhaps there are two not wholly satisfactory answers to this problem. The first is that it is plain that our system provides a legal framework which for the most part leaves it for the courts to decide the outcome – including that part which is value-driven. The second is that, to adapt Winston Churchill's joke about democracy, that it is the worst system in the world except when one considers the alternatives.
- 7 For the participants in Hong Kong's criminal justice system, the enactment of the Hong Kong Bill of Rights Ordinance and the related constitutional entrenching

³ *Ng Kung-siu & Anor* (1999) 2 HKCFAR 442, [1999] 3 HKLRD 907, [2000] 1 HKC 117.

apparatus was to extend the boundaries of meaning to the phrase the shock of the new. Not only was this a statement in legislative form of universal human rights norms but it was powerfully enforceable. Prior to enactment the ICCPR had been ‘applied’ to Hong Kong by our former colonial masters. That had limited effect in the sense that (in theory) it was a matter to be considered in the making of policy and especially legislative policy. It was also an interpretative tool available to the courts when faced with ambiguous legislation. Under this rule, the courts when faced with ambiguous legislation could proceed on the assumption that the legislature had intended the legislation under scrutiny to have the meaning which would accord with the ICCPR. The reality was that this tool was rarely used.

- 8 Suddenly everything was different. Human rights with teeth. The overall effect of the Ordinance and its entrenching provisions was to empower the courts to interpret laws (NOT just legislation) in a manner which was consistent with the Bill of Rights or the ICCPR⁴ or, in effect, repeal such laws which could not be so interpreted. In other words, suddenly Hong Kong had express legislation provisions which had at least the potential to *directly* and *immediately* affect the outcome of litigation. Suddenly, our criminal justice system and its participants had to learn a whole new set of skills.
- 9 Suddenly a knowledge of human rights law in other counties became something more than a ticket to genteel but certain academic oblivion. There was perhaps one sometimes undesirable outcome to all of this: the rise of the human rights expert.⁵ We learned a lot from many of those – especially those who came to us from overseas to share their experience and expertise. Many did a lot to de-mystify the topic. However, the undesirable outcome was that, at least in the short and medium term, many of the participants in the system placed too much reliance on the few. That was an unavoidable expedient in the short term. However, I think this reliance on the expert (alleged or real) has had the effect over the last ten years to inhibit

⁴ The way this was done is that the measure of human rights compatibility for laws which existed at the time of the coming into operation of the Hong Kong Bill of Rights Ordinance was the Bill of Rights in that Ordinance and for laws enacted after that date the test was whether the law was consistent with the ICCPR ‘as applied to Hong Kong’. The provisions in the Letters Patent made it beyond the powers of the Hong Kong legislature to enact legislation which was inconsistent with that version of the ICCPR.

⁵ Another less well known and interesting immediate result was that the Department of Justice and the Judiciary appeared to use the advent of the Bill of Rights as an excuse to expand and post-grabbing was the order of the day. Quite how the judiciary was going to recruit specialist human rights judges has yet to be explained. And if that is ever explained I will be even more fascinated to learn how they planned to use them.

the inculcation of a wider knowledge of human rights in the profession. It had the effect of creating the feeling that human rights law is some separate and arcane branch of the law as opposed to what I believe it should be: recognised as an integral and fundamental part of our everyday administration of the criminal justice system. Like many areas of the discipline of the law, there is a real place for specialists in the human rights area. I guess what I am trying to say is that we seemed to have overdone it.

- 10 The first few years following the coming into operation of the Bill of Rights produced what for me remain the classics for Hong Kong in human rights litigation. The starting point has to be *Sin Yau-ming*.⁶ This was a challenge to certain presumptions of fact enacted under the Dangerous Drugs Ordinance, Cap 134. These were said to have violated the presumption of innocence. It is to be noticed that the presumption of innocence (which was found in Article 11 of the Bill of Rights) is expressed in unqualified terms. However, the Court of Appeal was prepared to accept that even rights expressed in such terms may be derogated from if the provision is found by the Courts to be rational and proportionate. That accorded with precedent. However, that leads to the second remarkable thing about this case. The Court took account of not just jurisprudence from other jurisdictions but also other materials. The Court read and cited widely. Keeping their options open, they held that they would not be bound by overseas jurisprudence and indeed the members of the Court took what they considered the most helpful and relevant aspects of overseas jurisprudence. The Court held that where the law under scrutiny was said to derogate from a right guaranteed under the Bill of Rights, it was for the Crown (as it then was) to justify the derogation. One means of doing so was the calling of evidence but later cases made it plain⁷ that this was but one way in which the Crown could support contentions that an impugned provision was justified. What is interesting is that the Court actually held some of the presumptions under scrutiny were unable to be read in a manner consistent with the presumption of innocence as guaranteed under the Bill of Rights. Accordingly the Court held that such presumption was deemed to be repealed.

⁶ [1992] 1 HKCLR 127. At the risk of being accused of waxing too eloquent, I venture the opinion that *Sin Yau-ming* stands up well as classic of *all* human rights jurisprudence.

⁷ *E.g.* the Privy Council in *A-G v Lee Kwong-kut* [1993] AC 951, 2 HKCLR 186.

- 11 The immediate effect of the Court's decision was electric. The Court of Appeal had actually held that a law was inconsistent with the Bill of Rights and that it was deemed to be repealed. Looking back the decision does appear to be both obvious and correct. However, at the time there were those who saw the implications and considered that law-enforcement life as we know it was over. In many respects they were right. What was not appreciated was that this was no bad thing. Human rights had, in a sense, arrived in Hong Kong. Looking back, I think that as important as the result was, the reasoning and the style adopted and standards set by the court: view matters widely and take the best of what overseas jurisdictions have to offer and adapt what is suitable to Hong Kong. Moreover, where it was held that the impugned law was inconsistent with the Bill of Rights, it was for the executive to justify the impugned law - if it could.
- 12 Subsequent cases followed *Sin Yau-ming* and there then followed a fairly thorough judicial review of presumptions and deeming provisions. *Sin Yau-ming* was approved and followed in the Privy Council in *A-G v Lee Kwong-kut*.⁸ Few could disagree with the result in that case but I must say that, at least for me, it did not follow the standards of scholarship and erudition set by the judgments in *Sin Yau-ming*.
- 13 Perhaps the next case of significance was concerned with freedom of expression. This was the Privy Council decision in *Ming Pao Newspapers Ltd & Others v A-G of Hong Kong*.⁹ The impugned provision restricted reporting of ICAC investigations at certain stages. The most overlooked aspect of this important decision is that all of the scholarship in the advice of the Privy Council about freedom of expression is *obiter*. This was because the Privy Council held that on the proper construction of the impugned provision the accused could not have been guilty as charged. The importance of this is that it underlines that a so called human rights case in the context of criminal proceedings remains criminal proceedings and this fundamental point was taken up for the first time in the whole history of the case by the Law Lords themselves.
- 14 *Ming Pao* had a good deal more to say about the importance of the policy adopted by the legislature being highly relevant to the analysis of the proportionality of the impugned provision. The Privy Council recognised, picking up a thread in *A-G v*

⁸ [1993] AC 951, 2 HKCLR 186.

Lee Kwong-kut,¹⁰ that a degree of deference must be accorded to the policy choices that the executive and legislature face in framing such legislation. However, following the line of analysis which started with *Sin Yau-ming*,¹¹ rationality and proportionality still ruled the day.

15 The final case to which I wish to refer is the Flag Case.¹² The reasoning and approach of the Court of Final Appeal in this case will set the agenda and parameters of debate in ICCPR cases for years to come. It is first to be noticed that this was an ICCPR case – at least in part. I say in part because although the debate before the Court of Final Appeal formally centred around the application of Article 19 of the ICCPR as applied to Hong Kong, it is not to be forgotten that there is in the Basic Law itself a guarantee of freedom of the press.¹³ The Basic Law provision might be argued to be narrower in scope than Article 19 of the ICCPR in that it covers only freedom of the press and publication whereas Article 19(2) the ICCPR speaks of freedom of expression in very wide terms. By contrast the very wide Article 19(2) has the qualification of Article 19(3) whereas Article 27 of the Basic Law is expressed in unqualified terms.

16 The Flag Case was also a post 1997 case and placed a sharp focus on the performance of the Court of Final Appeal as a court which applies human rights norms.

17 The Flag case is a landmark case in so many ways. I can only list the landmarks rather than analyse them in depth. They include:

- The discussion on the meaning of *ordre public*. The Court noted that the expression used in Article 19 of the ICCPR is not merely "public order" but "public order (*ordre public*)". The inclusion of the words "*ordre public*" makes it clear that the relevant concept is wider than the common law notion of law and order. The Court accepted that, first, its boundaries cannot be precisely defined. Secondly, the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples include: prescription for peace and good order; safety; public health; aesthetic

⁹ [1996] AC 906, 6 HKPLR 103.

¹⁰ [1993] AC 951, 2 HKCLR 186.

¹¹ [1992] 1 HKCLR 127.

¹² *Ng Kung-siu & Anor* (1999) 2 HKCFAR 442, [1999] 3 HKLRD 907, [2000] 1 HKC 117.

¹³ Article 27 of the Basic Law.

and moral considerations and economic order (consumer protection, etc.). Thirdly, the concept must remain a function of time, place and circumstances.

- The Courts has to strike a balance between protecting the right guaranteed and laws inconsistent with that right. That balance was to be attained by the rationality and proportionality rubric.
- The Court appears to have accepted that in appropriate circumstances a consideration of materials other than the usual reference to statutes and jurisprudence should be undertaken.

18 The sample cited above does not wholly represent a fair sample of Bill of Rights and ICCPR litigation in a criminal law context. There are also the hundreds of first instance applications of these cases and perhaps those tended to be a little more pro-prosecution than was necessarily healthy. However, on the whole our courts did remarkably well in crafting a response to the new human rights framework that they were presented with.

19 How did the other players in the criminal justice system do? Part of the problem is that while the judiciary's performance is largely a matter of reading the law reports, the contribution of the prosecuting authorities, the legal profession and the law enforcement agencies is less easy to document and even less easy to measure. As to the prosecution authorities, decisions to prosecute and critical decisions within the conduct of an individual case are matters of legal professional privilege. In my experience, in many ways, little changed with the advent of the Bill of Rights. This was not because there was no will to change but that so much of the decision making in the day to day operations of the prosecuting authority requires very little express reference to the ICCPR because 'ordinary crime' is litigated (and should be litigated) in precisely the same way as has been going on or years. In the area of the conduct of main-stream criminal litigation, at most the advent of the Bill of Rights and the ICCPR affected day-to-day matters at the margins. Even where there was an allegation of a human rights violation, often there were competing allegations of fact to resolve before the human rights issue could be resolved and this was usually a matter for the courts to resolve. For the most part, in such a situation there is nothing wrong in letting the courts resolve such a competition of assertions.

- 20 It there was any change brought about by the Bill of Rights in relation to the conduct and performance of the prosecution and defence, it was in the area of increased disclosure of materials to the defence. There is at least a respectable argument that this was happening anyway. The general right vested in the accused to disclosure has as its origins the right of the accused to a fair trial.¹⁴ The right to a fair trial was hardly an invention of the Bill of Rights or the ICCPR. Probably the answer is that the advent of the Bill of Rights helped the process of evolution along. That is perhaps implicit in *Re Chow Po-bor & Anor*¹⁵ where Mayo J suggested that the right to disclosure might also derive from the equality guarantees in Article 10 of the Bill of Rights and the right in the accused to be given adequate facilities in the preparation of his defence under Article 11(2)(b). Evidence for the proposition that this development was happening anyway might come from the fact the most of the leading and recent cases on the topic are from England.
- 21 Most of the express consideration of human rights matters by the executive arose in the context of the development of legal policy. There was a thorough review of pre-Bill of Rights legislation to weed out many of the worst presumptions and other oddities and repeal or replace with some less bad. The record of challenges to matters such as presumptions of fact which were amended to something less nasty indicate that the judgment of the executive and legislature which proposed and enacted such changes to be pretty good – at least in the sense of predicting what would be acceptable to the courts.
- 22 My own experience of the police at the time of the enactment of the Bill of Rights was that they initially thought that the advent of such legislation would produce the end of civilisation as they knew it. I suspect that the repeal of certain of the presumptions in the Dangerous Drugs Ordinance in *Sin Yau-ming* probably confirmed this view. However, I also believe that the reality is that the police came to accept that all that was required was refinements to practices and approaches. The efforts to comply with matters such a privacy legislation required gargantuan efforts by the law enforcement agencies. While I think that there are problems there, on the whole the police are much, much better in this area than was formerly the case.

¹⁴ *R v Ward* [1993] 1 WLR 619, 96 Cr App R 1; *R v Keane* [1994] 1 WLR 746; *R v Brown* [1998] AC 367, 1 Cr App R 66.

¹⁵ (1993) 3 HKPLR 101, 119.

- 23 The problem for all lawyers was learning new skills. In some respects many of us had to be dragged kicking and screaming into this new era. It seems (or it seemed at the time) that it was not just old dogs who were reluctant to learn new tricks. However, in terms of lawyers we are at least one generation on from those times and my feeling is that more and more we see the profession viewing human rights as part of the fabric of the law rather than some exotic add-on dealt with only by specialists.
- 24 There remains much to be done. One of great successes of the judiciary – the development of the concept of rationality and proportionality as a touchstone of determining whether Government inroads into human rights can be justified – carries with it some dangers. The problem with this concept is that it sounds so good and so fair and so reasonable. And it is: at least for the winning party. What no one must forget is who is deciding whether legislation which is said to restrict human rights is a rational and proportionate response. It is the unelected and appointed judiciary. Nothing I say is intended to denigrate the judiciary not the least because – at least for my money – they have done a pretty good job of resolving the problems that a human rights regime which gives powers of, in effect, repeal have thrown up. The judiciary in many jurisdictions is often charged with the task of resolving some of the intractable problems of society which legislatures are unable or unwilling to resolve. (If there is any doubt about that see *Roe v Wade*.¹⁶) Rationality and proportionality (and their new cousins balance and harmony) have a tendency to disguise the problem rather than illuminate it because of the feel-good components of such words. What they don't always answer is whether the resolution of the courts is truly rational, proportionate etc. Maybe it is that we trust judges more than politicians. Maybe as Hong Kong becomes more democratic in its governance the burden will be placed less on the shoulders of the judiciary.
- 25 In future I suspect that the human rights battles in the criminal law area are going to be fought out in areas such as disclosure by the prosecution and matters such as search and seizure. What may well become a sub-battlefield in the area of disclosure will be the impact of the privacy legislation. I am starting to see that legislation being used to justify non-disclosure. That would only not be somewhat

¹⁶ (1973) 410 US 113.

ironic but may generate some interesting litigation in the conflict between two human rights: the rights to a fair trial and to privacy. Maybe all we could ever hope for in that area will be balance between competing rights with a bit of rationality and proportionality thrown in for good measure.

- 26 Maybe it is a measure of my former life as a prosecutor but I am always best in relation to that which I cannot prove. I cannot prove that our human rights regime is becoming more a part of the fabric of the criminal law than it was when all of this started. However, I am pretty sure that it is. Maybe I should revert to that old prosecutor's trick of inviting the tribunal to use common sense as a substitute for evidence. It is common sense. Frankly I think what I really need to prove my case is an adjournment for another 10years.
- 27 I think we need to look at the way we litigate human rights issues. I think that there should be legislation to regulate this and to provide for remedies. There was in section 6 of the Hong Kong Bill of Rights Ordinance some attempt at this but a good deal of improvement of that provision could have been undertaken. I think that legislation requiring the court to be notified in writing in advance that a party may seek to take human rights points would also be constructive. That would give rise to the desirability of giving the Court clear powers to give directions in relation to this topic.
- 28 I am not optimistic that we will return to the standards of comparative scholarship that we first saw in *Sin Yau-ming*. Perhaps the insistence of the Court of Final Appeal on to parties to citing overseas jurisprudence and, perhaps, the continued use in that Court of a fifth judge from overseas will help.
- 29 We have made a start. I think – on the whole – it is a good start. I would venture that we are entitled to a little self-congratulation, but only for a brief moment. The challenge over the next 10 years is to build on the start that we have made. The changes will probably be less dramatic. Of one thing I am sure: they will be interesting.