

# **JUMPSTARTING THE HONG KONG BILL OF RIGHTS IN ITS SECOND DECADE? THE RELEVANCE OF INTERNATIONAL AND COMPARATIVE JURISPRUDENCE**

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## **A. INTRODUCTION**

When I look back on the first decade or so of the Hong Kong Bill of Rights, it is difficult not to feel a certain satisfaction at the developments since 1991, but at the same time I feel somewhat disheartened. There is no doubt that the advent of, and subsequent litigation and activism around, the Hong Kong Bill of Rights Ordinance and its international progenitor, the ICCPR (the latter in constitutional garb before and after 1997), has had a significant impact in many areas of Hong Kong law and practice. The coming of the Bill of Rights brought with it a wide-ranging policy review in many areas, and some of the detritus of legal history was swept away as the result of judicial pronouncements of inconsistency, and subsequent legislative reform. The Bill of Rights also gave stimulus to the enactment of detailed legislation in other fields, above all in relation to different forms of discrimination. The courts of Hong Kong have become reasonably familiar with relevant international materials, with judgments regularly drawing on the jurisprudence of the United Nations treaty bodies (in particular the Human Rights Committee) and, more extensively, the jurisprudence of the European Convention on Human Rights, as well as human rights and constitutional law from many national courts.

Yet despite these important changes, it is hard not to feel disappointed and frustrated. Notwithstanding the grand promises of the international instruments, the people of Hong Kong are still not permitted to elect their own executive government and legislature on the basis of the universal and equal suffrage embodied in the ICCPR; the treatment of "outsiders" in Hong Kong -- whether they be of Chinese or non-Chinese ethnic origin -- is not subject to full scrutiny against international human rights standards; the government regularly refuses to implement the considered pronouncements of international expert bodies which have found violations of international human rights standards in Hong Kong; Hong Kong governments under both British and Chinese sovereignty have steadfastly refused to establish a Human Rights Commission that could provide accessible remedies for a range of human rights violations; the non-violent expression of political opposition to the monopoly of political power of the Communist Party by desecrating the national flag is a criminal offence; and the final determination of a person's human rights lies potentially not with the independent and impartial tribunal promised by the ICCPR but with a non-transparent political process that is characterised by expediency and lack of accountability,

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an instance that does not need to be invoked very frequently to exercise its baleful influence and some of whose members feel free to pronounce publicly on the merits of issues that may come before them while at the same time refusing or not being permitted to reveal their advice and conclusions.

Many of these factors are beyond the control of the Hong Kong courts, and responsibility for them now lies with the political masters of the Hong Kong people in Beijing and Hong Kong. Declaring large and important areas off limits to external and independent review by the courts has been a favourite and effective method of governance on controversial issues. Nevertheless, a significant part of the work of the courts in the public law field has involved the legitimation of actual and alleged violations in some of these off-limits areas, the courts being forced to declare particular laws and policies to be lawful (or at least not unlawful), without being able to subject them to substantive human rights scrutiny - though it must be admitted that in many instances the courts appear very content to provide such endorsement.

My purpose in this paper is to look at some aspects of the way in which the courts have approached Bill of Rights and related human rights issues over the years, and to identify some areas where there may yet be potential for the revitalisation or expansion of the Bill of Rights and the international human rights regime imported into Hong Kong law by article 39 of the Basic Law. It is not intended to be a comprehensive review or account, but is rather a selection of issues which seem to me to illustrate important points about the way the courts have approached, or could approach the protection of human rights.

## **B. HONG KONG BILL OF RIGHTS CASE LAW: AN OVERVIEW**

The early days of the Bill of Rights, when Silke VP of the Court of Appeal in *R v Sin Yau-ming*,<sup>1</sup> announced the arrival of an “entirely new jurisprudential approach”, now seem a long time ago. That initial enthusiasm, accompanied by a wide-ranging review of evidentiary presumptions in legislation and a number of judicial findings of violations of the Bill of Rights, was subsequently tempered by the “realism and good sense” of Lord Woolf (speaking for the Privy Council) in *Attorney General v Lee Kwong-keut*, who was concerned that, “while the Hong Kong judiciary should be zealous in upholding an individual’s rights under the Bill[ of Rights]”, “disputes as to the effect of the Bill [of Rights]” should “not be allowed to get out of hand”.<sup>2</sup> This note of caution has become one of the most frequently invoked passages in Hong Kong Bill of Rights jurisprudence, and it heralded an era in which accepted ways of doing things -- even those decades or centuries old -- were assumed to be consistent with modern ideas of human rights, and generally not to require a fresh and close look in the light of those standards.

The cases that have come before the courts have been enormously varied, ranging across the civil and criminal areas, from the claimed rights of prisoners to have access to newspaper racing supplements and of taxi drivers to engage in rude behaviour to more weighty cases, such as those involving challenges to criminal law and procedure, laws relating to the post-release supervision of offenders and detention under mental health legislation, the political system, the right of persons to engage in forms of political and social

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<sup>1</sup> (1991) 1 HKPLR 88, at 107 (CA)

<sup>2</sup> (1993) 3 HKPLR 72, at 100 (PC)

protect, town planning and corporate and securities regulatory schemes, immigration and family cases, and cases involving different types of discrimination.

The record of the Hong Kong courts has been a mixed one, both of technique and outcome. Overall, the Hong Kong case law does not display the "insouciant judicial activism" and the "inflationary effect" that one commentator (James Allan, at one time a Hong Kong law lecturer) has used to characterise the New Zealand courts' record under the New Zealand Bill of Rights Act 1990, a contemporary of Hong Kong Bill of Rights.<sup>3</sup> Nor does it in general display the "constipated legalism" which Conor Gearty feared the United Kingdom Human Rights Act 1998 might face in the courts after its entry into force.<sup>4</sup>

On the positive side, the Hong Kong courts have been prepared to endorse the rhetoric of human rights and to state that it is appropriate to adopt a generous approach to the interpretation of rights and to read exceptions narrowly. In addition, they have been open to consideration of a range of international source material and comparative case law that barely figured at all in the pre-1991 case law.

However, despite these promising signs of openness, the outcomes in the cases tend to give the lie to the rhetoric that pervades the cases. There has been relatively little exploration of the theoretical basis of the Covenants in general or of the rationale for specific rights in cases in which those rights have been at issue. The courts frequently give great and in some cases undue deference to the decisions of the executive and legislature -- a deference based on notions of separation of powers and (implicitly at least) on the democratic legitimacy of such institutions as opposed to the court, in a political context in which the factual democratic underpinnings for such an approach have been deficient. Despite endorsing the need to read restrictions on protected rights narrowly, the courts have generally been prepared to accept almost any articulated government objective as sufficient, and in reviewing the "necessity" of restrictions of rights do not really subject laws and policies to any particularly searching scrutiny to assess their proportionality. While international sources are frequently cited and followed as often as not, sometimes the citation is selective and fails to refer to highly relevant and authoritative material that might lead to a different outcome.

Looking back, what strikes me is how few successful challenges there have been under the Bill of Rights regime, at least after the first year or two of its operation during which time evidentiary presumptions and some of the operations of the criminal justice system were found vulnerable to attack.

Perhaps the point can be illustrated by asking the following question:: Can you name five cases since 1997 in which a superior court in Hong Kong has upheld a Bill of Rights/ICCPR claim (and the judgment was not subsequently overturned on appeal or "displaced" by an NPC interpretation)?

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<sup>3</sup> James Allan, "Take Heed Australia - A Statutory Bill of Rights and Its Inflationary Effect" (2001) *Deakin Law Review*, [www.austlii.edu.au/au/journals/DLR/2001/7.html](http://www.austlii.edu.au/au/journals/DLR/2001/7.html) (visited 8 January 2002).

<sup>4</sup> Conor Gearty, "What Are Judges For?", Inaugural lecture delivered at King's College London, 11 December 2000, [www.kcl.ac.uk/kings\\_college/depsta/la/events/00-01/gearty\\_lecture.lecture.pdf](http://www.kcl.ac.uk/kings_college/depsta/la/events/00-01/gearty_lecture.lecture.pdf) (visited 8 January 2002)

There are a number of possible explanations for the fact that the Bill of Rights/ICCPR appears largely to have spent its force, viz:

- the major human rights problems in the legal system have been ironed out over the years, as the result of judicial findings and legislative reforms, so that the lack of successful challenges reflects a healthy, human rights observing legal system with no major problems
- the most serious actual or potential violations are in effect off-limits to substantive review by the courts on human rights grounds
- the courts have retreated from the mildly activist and interventionist approach taken in the early cases and are now prepared to address only egregious violations of human rights under the constitutional standards, a perspective that has not been helped by the power (actual and potential) of the NPC Standing Committee to bring the Hong Kong courts into line if they should take a too assertive approach in some areas of human rights.

All of these may have played a role in bringing about the present situation. The dearth of successful challenges is due in part to the fact that, even when a court considered that there was a violation of an international standard, the law or practice in question had effectively been removed from the coverage of the Bill of Rights/ICCPR – the areas of immigration and the political system are the two major instances. However, this is not the whole explanation by any means -- the courts have been slow, even reluctant, to uphold challenges, and many that succeed in the lower courts are overturned by higher levels of the judicial hierarchy.

These impressions of the Hong Kong case law -- and there are some exceptions to these overall trends – are not just a lament that the courts have not implemented a more liberal agenda in human rights matters (though I believe that it is unfortunate that they have not), but as matters relevant to important issues of judicial technique and of giving effect in full plenitude to norms accepted not only under international law, but as the fundamental law of the Hong Kong SAR.

The following sections seek to justify the general comments made above by reference to specific examples, at the same time indicating areas where a more expansive approach more in harmony with international law could be taken.

### **C. THE COURTS AND THE USE OF INTERNATIONAL JURISPRUDENCE**

On the whole, the Hong Kong courts have been generally receptive to international and comparative material being put before them in Bill of Rights cases, though the extent of that consideration has been largely dependent on the knowledge and diligence of counsel in individual cases. Yet the approach taken by the courts in response to the international material has varied. In some cases the courts have been prepared to follow the international jurisprudence; in others they have not done so (in some cases the international jurisprudence provides only general guidance and does not help particularly in deciding a specific case). My impression is that, after first few years of the Bill of Rights, courts have tended to invoke international jurisprudence when it supports restrictive readings of rights

and expansive readings of exceptions, and ignored it or put it to one side if it supports a broader reading of a right or a narrower construction of a restriction than the court is inclined to adopt.

One of the earliest cases to fail to give appropriate weight to the international jurisprudence was *Tam Hing-ye v Wu Tai-wai*,<sup>5</sup> in which the Court of Appeal held that the Bill of Rights Ordinance had no application to legislation regulating private legal relations. The court made no reference to the obligations under the ICCPR (which the Ordinance was expressly intended to implement); there was also no reference to actual drafting history of the Ordinance. Yet it was very clear that the ICCPR obliges States parties to ensure that protection is provided against violations of specific rights by the private actors, and that the Bill of Rights Ordinance should have been interpreted in light of those obligations.<sup>6</sup>

There are a number of cases in which the Hong Kong courts have adopted a more limited reading of the scope of the guarantees relating to criminal proceedings than has the European Court of Human Rights. One instance is the question whether a particular sanction constitutes the determination of a “criminal charge”. Sometimes the Hong Kong courts narrower reading has limited the scope of protection available to persons relying on the Bill of Rights, as for example with the refusal by the courts to consider fixed penalty traffic offences<sup>7</sup> as “criminal”, or to hold that the confiscation of the proceeds of drug trafficking<sup>8</sup> or the imposition of treble damages penalties in insider dealing cases<sup>9</sup> involve

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<sup>5</sup> (1991) 1 HKPLR 261, [1992] 1 HKLR 185

<sup>6</sup> See generally Byrnes, “The Application of the Hong Kong Bill of Rights to Relations between Private Individuals”, in J Chan and Y Ghai (eds), *Hong Kong’s Bill of Rights: A Comparative Perspective* (Singapore: Butterworths Asia, 1993) 71-105 and “Recalcitrant debtors’ in a town ‘pollinated by gold’: Hong Kong’s first Bill of Rights judgment” (1991) 21 *HKLJ* 377-398.

<sup>7</sup> *R v Wan Kit-man* (1992) 2 HKPLR 728; [1992] 1 HKCLR 224; *R v Crawley* (1994) 4 HKPLR 62

<sup>8</sup> *R v Ko Chi-yuen* (1994) 4 HKPLR 152. The High Court and District Court had reached contrary conclusions (though these arguments were not referred to in the Court of Appeal’s judgment: *R v Ko Chi-yuen* (1992) 2 HKPLR 310 at 321-322 (HCt) (confiscation proceedings under the Drug Trafficking (Recovery of Proceeds) Ordinance are not “criminal” within the meaning of article 11 of the Bill of Rights); *R v Wong Ma-tai* (1992) 2 HKPLR 490 at 506 (DCt) (such proceedings are criminal within the meaning of article 11 of the Bill of Rights). Nor did the Court of Appeal refer to the decision of the European Commission of Human Rights on this issue in the context of article 7 of the European Convention, which divided the Commission: *Welch v United Kingdom*, Application No. 17440/90, Report of the Commission of 15 October 1993. The European Court subsequently held that the proceedings involved the imposition of a criminal penalty: *Welch v United Kingdom*, Judgment of 9 February 1995, Series A, No. 307-A, 20 EHRR 247. *Welch* was applied by the District Court in *R v Chan Suen-bay* (1995) 5 HKPLR 345, [1995] 1 HKC 847, in holding that a disqualification order imposed on a company director involved the imposition of a “penalty” within the meaning of art 12(1) of the Bill of Rights.

<sup>9</sup> *R v Securities and Futures Commission, ex p Lee Kwok-hung* (1993) 3 HKPLR 1. Jones J, while accepting that the term “criminal proceedings” under article 11 of the Bill of Rights had to be given an autonomous interpretation, concluded that provisions of insider trading legislation which permitted a tribunal to impose a financial penalty of up to three times the amount of profit made by the person concerned were not “criminal”. In so finding, he placed considerable emphasis on the legislature’s intention to avoid having insider dealing made a criminal offence under Hong Kong law: (1993) 3 HKPLR at 28. One may compare this result with *Schemmer v Property Resources Ltd* [1975] 1 Ch 273, in which the English High Court held that the U.S. Securities and Exchange Act 1934 was a “penal” statute for the purposes of conflict of laws classification, and the decision to similar effect of the District Court of Hong Kong in *Nanus Asia Co Ltd v Standard Chartered Bank* [1988] HKC 377. See also *Société Stenuit v France*, European Commission of Human Rights, Application No. 11598/85, Report of 30 May 1991, 14 EHRR 509. See now In *Insider Dealing Tribunal v Shek Mei Ling* [1999] 2 HKC 1, at 5 Lord Nicholls (for the Court of Final Appeal) noted that an order under s 23(1)(c) is “comparable to a fine. Its purpose is to deter insider dealing, and it seeks to do so by leaving a person who engages in such conduct substantially out of pocket ... an insider dealer can be subjected to a substantial penalty order even though he himself gained no profit.” In *Dato Tan Leong v Insider Dealing Tribunal* [1999] 2 HKC 83, at 94 Mortimer VP wrote that the IDT fulfils “a quasi criminal function. Its task was not only to inquire into, but also to determine, wrongdoing. Having done so, it had to impose penalties.” Godfrey JA wrote (at 101): “The legislature, in Hong Kong, has not made insider dealing a criminal offence.

the imposition of a “criminal penalty”, despite European or other authority that suggest that they should be so considered.

Similarly, in relation to the right guaranteed by article 11(2)(g) of the Bill of Rights (article 14(3)(g) ICCPR) of “a person charged with a criminal offence ... not to be compelled to testify against himself or to confess guilt”, the Hong Kong courts have failed to follow international jurisprudence on the question of whether this right may provide protection against the use of statements made by an accused during the investigative or post-charge/pre-trial phase. In an early case,<sup>10</sup> Jones J held that the guarantee only applied to trial proceedings. This was followed in a number of subsequent cases and the same view was recently affirmed by the Court of Final Appeal, which held that article 11(2)(g) provided only a “testimonial immunity” and had no application to pre-trial investigations.<sup>11</sup>

Yet, as was pointed out in academic commentary at the time,<sup>12</sup> this was not the position that the European Court of Human Rights had taken in a number of cases (though the wording of the European Convention is somewhat different), and not consistent with the view apparently held by the Human Rights Committee of the corresponding provision of the ICCPR. Whatever the view finally taken by the courts, the comment made in 1997 still holds good: “It is disappointing that this important point seems to have been determined in Hong Kong by at least three courts, none of which appears to have been aware of the contrary international authority or the academic commentary on the issue”.<sup>13</sup>

A recent case, *HKSAR v Coady*,<sup>14</sup> provides an illustration of more than neglect of international authority, but rather of a concerted attempt to advance a restrictive interpretation of a guarantee, without a full review of the international jurisprudence. In *Coady* the Court of Appeal considered the question of whether a murder conviction based on the defendant’s intention to cause grievous bodily harm (and not to *kill*) was consistent with the Bill of Rights, in particular the protection against arbitrary imprisonment in article 5(1) (article 9(1), ICCPR), the right to equality before the courts in article 10 of the Bill of Rights (article 14(1) ICCPR), and the right to be presumed innocent in article 11(1) of the Bill of Rights (article 14(2) ICCPR).

The Court, in a judgment delivered by Keith JA, rejected the challenge on all grounds. But it appears to have gone out of its way to advocate a restrictive interpretation of article 5(1) Bill of Rights (article 9(1) ICCPR).<sup>15</sup> The Court argued that the guarantee did not permit challenges to *substantive* criminal offences on the ground that to imprison a person for commission of particular acts was “arbitrary” or not “in accordance with grounds established by law” in the sense that it was unreasonable or unfair; rather the guarantee was

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But it requires a Tribunal constituted under Cap 395 to sit in public ... and empowers it to make penal orders against those found guilty of insider dealing (s 23(1)).”

<sup>10</sup> *R v Allen, ex p Tse Chu-fai* (1992) 2 HLPLR 266, at 273-277 (affirmed on appeal on other grounds: 2 HKPLR 283)

<sup>11</sup> *HKSAR v Lee Ming-tee and another*, [2001] HKCFA 27, 3 May 2001.

<sup>12</sup> *Bill of Rights Bulletin*, vol 4, no 2, February 1997, at 28.

<sup>13</sup> *Id* at 29.

<sup>14</sup> [2000] 2 HKC 12 (CA)

<sup>15</sup> Article 9(1) provides: “(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

limited to ensuring that “the laws relating to arrest and detention have been complied with or applied fairly.”<sup>16</sup>

This interpretation was based on the fact that the primary focus of the article appeared to be arrest and detention pending trial, and thus at first sight it seemed inapt also to apply to detention or imprisonment following conviction for a criminal offence. Keith JA bolstered this conclusion by reference to the lack of international case law under the ICCPR:<sup>17</sup>

“Such research as we have been able to conduct has not revealed any case in which the distinction which we are inclined to draw has been rejected, i.e. the distinction between those laws which relate to arrest and detention (for which judicial scrutiny under Art. 5(1) is permissible) and those laws for which arrest and detention is authorised if they are broken (for which judicial scrutiny under Art. 5(1) is not permissible). Indeed, we think that the decision of the Human Rights Committee in *Hugo van Alphen v. The Netherlands* (Communication No. 305/1988, General Assembly Official Records, 45th Session, Supplement No. 40, 1990) supports rather than contradicts the distinction which we are inclined to draw.”<sup>18</sup>

He further sought to distinguish earlier Hong Kong appellate authority which had accepted that the notion of substantive “arbitrariness” that had been expounded by the Human Rights Committee in *Van Alphen* should apply more generally. He concluded:<sup>19</sup>

“A remand in custody, for example, may be struck down if it is an unreasonable application of the law which permits detention pending trial. But we do not see why Art. 5(1) of the Bill of Rights would justify the striking down of a remand in custody if the law permitting detention pending trial can be objectively justified and has been applied reasonably in the instant case – simply because one or more of the ingredients of the offence which the defendant is alleged to have committed cannot be objectively justified. At the risk of repeating ourselves, such an offence can be objectively justified unless it infringes one of the other rights protected by the Bill of Rights, such as the presumption of innocence.”

This approach to the interpretation of article 9(1) seems unduly technical, does not read the rights guaranteed generously, and neglects to consider other relevant sources that suggest that the article be read more broadly. For example, the Human Rights Committee, as long ago as 1982 adopted a *General comment* on article 9, in which it stated:<sup>20</sup>

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<sup>16</sup> [2000] 2 HKC at 21

<sup>17</sup> [2000] 2 HKC at 22

<sup>18</sup> He also referred to the similar guarantee under the European Convention on Human Rights noting that: “The jurisprudence on Art. 5 of the ECHR supports the distinction which we are inclined to draw. Thus, in a number of cases, the courts have scrutinised laws relating to arrest and detention for their compatibility with Art. 5 of the ECHR. Examples are *Winterwerp v. The Netherlands* (1979-80) 2 EHRR 387, *Monnell and Morris v. The United Kingdom* (1988) 10 EHRR 205 and *Kemmache v. France* (No. 3) (1995) 19 EHRR 349. However, no case was cited to us in which the courts have scrutinised laws for which arrest and detention are authorised if they are broken for their compatibility with Art. 5 of the ECHR.”

<sup>19</sup> [2000] 2 HKC at 22

<sup>20</sup> UN Doc HRI/GEN/I/Rev 5 (2001), available at [www.unhchr.ch](http://www.unhchr.ch)

“1. Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.”

The Committee has taken a similarly broad approach to the interpretation of article 9(1) in its decisions under the First Optional Protocol to the Covenant.<sup>21</sup> While these sources do not directly address the issue raised, they do suggest that the ICCPR does permit substantive review under article 9(1) of a substantive criminal offence for which imprisonment is imposed (and that does not involve a violation of one of the other articles of the ICCPR).

Finally, in the flag desecration case which came before the Court of Final Appeal in 1999, there was extensive citation to the court of a wide array of international and comparative materials. The case, *HKSAR v Ng Kung Siu*,<sup>22</sup> turned on the issue of whether a law criminalising the desecration of the Chinese national and HKSAR regional flags was “necessary” for the protection of “*ordre public*”, within the meaning of article 19 of the ICCPR. While the international and comparative case law (and State practice) is divided on this issue and the concept of *ordre public* is elusive one, the court found that the criminalisation of this quintessentially political speech was a justifiable restriction on the exercise of freedom of expression.

Although many international and national cases were cited to the court,<sup>23</sup> in its judgment the court referred to a range of national cases, but did not refer to the decisions of the UN Human Rights Committee on freedom of expression.<sup>24</sup> While these did not directly concern the issue of flag desecration, they did deal with the approach to determining whether limitations on the enjoyment of the right to freedom of expression were permissible, and arguably applied a more stringent test than that applied by the Court of Final Appeal in this case.<sup>25</sup> While the case was a controversial one, it is another example of the tendency of the

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<sup>21</sup> “The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. The Committee has already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that an interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render ineffective the guarantees of the Covenant [Views on case No. 195/1985 (Delgado Páez v. Colombia), adopted on 12 July 1990, paragraphs 5.5 and 5.6; No. 314/1988 (Bwalya v. Zambia), Views adopted on 14 July 1993, paragraph 6.4.]” *Oló Bahamonde v Equatorial Guinea*, Communication No. 468/1991, views of 20 October 1993, para 9.2, UN Doc CCPR/C/49/D/468/1991 (1993).

<sup>22</sup> [2000] 1 HKC 117

<sup>23</sup> See [2000] 1 HKC at 120-124

<sup>24</sup> Such as the *Ballantyne* case involving the permissibility of French-only laws for commercial advertising in Quebec or the case of *Faurisson v France* (dealing with Holocaust denial legislation).

<sup>25</sup> The Court of Final Appeal reversed the judgment of the Court of Appeal, which had held that the HKSAR government had failed to demonstrate that the restriction was a necessary one: [1999] 2 HKC 10.



Hong Kong courts to adopt a more restrictive interpretation of rights guarantees than to lean towards broad and generous interpretations.

And sometimes what appear to be relevant international standards are simply not cited. One important example is in relation to the ongoing right of abode controversy in which the decision of the Court of Final Appeal in *Ng Ka Ling* was in effect overturned (now described as “displaced”) by an “interpretation” adopted by the Standing Committee of the National People’s Congress. This legislative involvement in the judicial process and some of the claims made in that context raise concerns about whether the use of this power by the NPC would in some or all cases fall foul of the right to court and a fair hearing guaranteed by article 14(1) of the ICCPR, which arguably binds China in relation to the HKSAR.<sup>26</sup> But that provision has been cited in none of the right of abode judgments in the Court of Final Appeal.

This selective listing of a number of instances in which relevant international material has not been cited or given appropriate weight is not intended to be a general indictment of the record of the courts in this regard. There are many cases in which courts have looked at such material and done their best to give effect to relevant international jurisprudence in the context of particular cases. But some of the omissions have been important, the more so because of the level of the judicial hierarchy at which they have occurred.

#### **D. ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE JUSTICIABILITY AND DIRECT APPLICABILITY OF THE ICESCR UNDER ARTICLE 39 OF THE BASIC LAW**

One of the significant developments in human rights protection that the Basic Law brought was the constitutionalisation not only of the ICCPR -- which had, after all, enjoyed constitutional status since 1991 -- but of the ICESCR and various international labour conventions as applied to Hong Kong. As such Hong Kong is one of the very few jurisdictions with a common law history in which the ICESCR is part of domestic law.<sup>27</sup>

The Economic Covenant has suffered neglect at the international level and at the national level when compared with the ICCPR and similar catalogues of civil and political rights, though increasing attention has been given to the ICESCR and the rights it guarantees in the last decade or more. Much of this attention has concentrated on showing that the differences between civil and political rights (clear, enforceable, negative rights, not implicating the state in additional expenditure) and economic, social and cultural rights (vague, aspirational, positive rights, requiring expenditure by the state) are overstated and that, contrary to accepted wisdom, economic and social rights under the ICESCR are indeed

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<sup>26</sup> See Andrew Byrnes, "From the outside looking in: the role of international standards and procedures in bolstering citizens' right of access to national courts and tribunals", paper presented at Conference on Civil Rights Protection and Judicial Justice, organised by Research Center for Human Rights and Chinese Center for Legal Studies in collaboration with the Faculty of Law, University of Hong Kong, Beijing, 16-17 October 1999.

<sup>27</sup> I leave aside here the issue of whether the treaties referred to in article 39 are justiciable before the courts or whether the article was simply an injunction to the Legislature to implement those treaties in Hong Kong law. The courts have certainly taken the view that the ICCPR can be directly invoked, and the same would seem to apply to the other treaties mentioned in the article, at least to the extent that the provisions of those treaty are in themselves "self-executing" or "directly applicable".

capable of being applied by a court in an individual case in important respects (and have been for years in many cases).<sup>28</sup>

Until recently, little use has been made of the ICESCR in the Hong Kong courts. Yet potentially it offers protection additional to that guaranteed by the ICCPR and other rights guarantees contained in the Basic Law. Of particular importance is that fact that the reservations made by the United Kingdom when it ratified the treaty in respect of Hong Kong in 1976 and continued when China took over the obligations of the UK in 1997 are not as broad as those entered in respect of the ICCPR. In particular, there is no reservation in relation to immigration legislation, a reservation which limits the application of the ICCPR, the CERD Convention, the CRC, and the CEDAW Convention to Hong Kong. Thus, to the extent that the provisions of the ICESCR are considered to embody enforceable rights, they potentially permit the rights scrutiny of various immigration laws and policies that have been immunised from review domestically under the Bill of Rights and the ICCPR, and internationally under the other human rights treaties.

Efforts have been made to invoke the ICESCR in support of cases in which one member of a family seeks entry to Hong Kong to join other family members who are lawful residents. Article 10 of the ICESCR is the provision that has been relied on.<sup>29</sup> It provides:

" The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses."

Applicants in a number of cases have argued that article 10 entitles them to the favourable exercise of discretion by the Hong Kong immigration authorities to enable family reunion, a view shared by the UN Committee on Economic, Social and Cultural Rights (CESCR). All have been unsuccessful on this issue. While the argument based on article 10 appears to have been put to the courts in general terms (without specific reference to the practice of the CESCR), the cases have run aground on the view the courts have taken of the nature of the ICESCR and the rights guaranteed by it.

In the first case to raise the issue, *Chan Mei Yee v Director of Immigration*,<sup>30</sup> Cheung J held that the ICESCR was promotional and aspirational and that the rights embodied in it could not be enforced before the Hong Kong courts. The judge found support for this view in academic commentary on the Covenant:

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<sup>28</sup> See Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?" (1996) 21(3) *Brooklyn Journal of International Law* 679-798 (and sources cited)

<sup>29</sup> See also Article 2 of ICESCR which provides that:

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

<sup>30</sup> *Chan Mei Yee v Director of Immigration*, CFI, Cheung J, 13 July 2000

"Paul Sieghart in his book on *'The International Law of Human Rights'* compared the ICCPR and the ICESCR. In respect of ICCPR, the author stated that the obligations imposed on the States are absolute and immediate. They are absolute because they are not expressed as being limited either by the resources available to the State, or by reference to the means to be employed in performing them. They are immediate in that each State is bound to take the necessary steps to secure the human rights and fundamental freedoms concerned from the moment the treaty comes into force for that State. In respect of the ICESCR, the obligations are qualified rather than absolute in that they are limited to the maximum of the resources available to the State parties to appropriate means. The obligations are also progressive rather than immediate as they call for steps to be taken with a view to achieving progressively the full realization of the rights concerned."

Sieghart accepted that "however qualified and progressive though they may be, all these are still binding obligations in international law" (*pages 57-62*)."

Henry J. Steiner in a more recent book (1996) titled *"International Human Rights in Context"* stated that inter-dependence of the civil and political rights and the economic social and cultural rights has always been part of the United Nation doctrine. At page 284, the author stated that :

"9. ... The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être* of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question."<sup>31</sup>

"In *'Human Rights in the World'*, 4th Edition by Robertson & Merrills, the authors stated that the ICESCR is what is known as a promotional convention, that is to say, it does not set out rights which the parties are required to implement immediately, but rather lists standards which they undertake to promote and which they pledge themselves to secure progressively, to the greatest extent possible, having regard to their resources. As already indicated, this difference in the obligation results from the very nature of the rights recognised in this Covenant. The authors pointed out that a comparison of ICCPR and ICESCR reveals a major difference in the way their respective provisions are formulated. The rights contained in the ICCPR are stated in the classic form "everyone has the right to ..." or "no one shall be subject to ...". In

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<sup>31</sup> In fact the extract quoted from paragraph 9 is from the Committee on Economic, Social and Cultural Rights, *General comment No 3* on the nature of State obligations under the ICESCR.

ICESCR, the articles adopt a different formulation, usually "the State parties to the present covenant recognize the right ..." or "the State parties to the present covenant undertake to ensure ...". In other words, an undertaking or a recognition by States rather than the affirmation of a right inherent in the individual as such."

The judge concluded that "[t]he way in which the ICCPR and ICESCR are formulated clearly supports the argument that the latter covenant is promotional in nature. However, even though it is promotional in nature, it does not mean that the ICESCR cannot be used as a framework in which government decisions or discretions are to be considered."

The decision and the reasoning articulated in *Chan Mei Yee v Director of Immigration*, has been followed in the two subsequent cases to raise the issue before the Court of First Instance. In *Mok Chi Hung v Director of Immigration*<sup>32</sup> Cheung J once again had to address the issue. In essence he followed his earlier decision, but added:<sup>33</sup>

"The ICESCR is promotional in nature but it still can be used as a framework in which government's decisions or discretions are to be considered. See further a discussion on the nature of the ICESCR in *Human Rights in International Law : Legal and Policy Issues* edited by Theodor Meron, pages 210-217. The ICESCR is also not incorporated into Hong Kong law. Unlike the two other conventions, there is no reservation in relation to immigration matters. However, the Court of Appeal in *Hai Ho-tak* held that even in the absence of the reservation the Director is entitled to implement lawful decisions in matters relating to immigration because of the unique position faced by Hong Kong. The decision in *Hai Ho-tak* is binding on me."

In a later case, *Chan To Foon v Director of Immigration*,<sup>34</sup> the issue was considered by another judge, Hartmann J, who endorsed the conclusion of Cheung J that the ICESCR was promotional and aspirational. On this occasion, however, some additional material was before the court in the form of a general comment by the Committee on Economic, Social and Cultural Rights (the independent expert body established in order to monitor the implementation of the Covenant). In its *General comment 9 (1998) (the domestic application of the Covenant)*,<sup>35</sup> the Committee had addressed the issue of what steps were required to ensure that how the rights contained in the Covenant were effectively guaranteed at the national level.

The section of the *General comment* cited by the court (which referred to it inaccurately as "commentary on the Covenant by the United Nations High Commissioner on Human Rights") is para 9,<sup>36</sup> which deals with the question of whether a person affected by an administrative decision have a legitimate expectation of compliance with a treaty obligation by the decision-maker. The applicant had argued that such an expectation did arise under Hong Kong law.

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<sup>32</sup> *Mok Chi Hung v Director of Immigration* [2001] 1 HKC 281

<sup>33</sup> [2001] 1 HKC at 291

<sup>34</sup> *Chan To Foon v Director of Immigration* CFI, Hartmann J, 11 April 2001

<sup>35</sup> Committee on Economic, Social and Cultural Rights, *General comment No 9*, UN Doc HRI/GEN/1/Rev.5, at 58

<sup>36</sup> *Id* at para 9: "... those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making ..."

Hartmann J rejected the argument that such an expectation could arise in this case under the ICESCR, both because of the promotional nature of the Covenant and the fact that reservations on immigration matters had been entered to other treaties such as the ICCPR and CRC which contained immediately enforceable rights. He commented in relation to the view expressed in: *General comment No 9*:

"But while the UN High Commissioner on Human Rights [sic] is an authoritative commentator, it must be remembered that it is no more than an interpretation, akin to the academic texts, and does not, in my view, undermine (or radically alter) the aspirational nature of the Covenant. It may, therefore, be said that certainly administrative authorities will give due consideration to the requirements of the Covenant in respect of immigration matters but, in accordance with the progressive nature of the Covenant, that will occur when the social imperatives permit."

How do the views contained in these cases square with the current international law on the issue, in particular as regards the direct effect of the ICESCR? Unfortunately, both the reasoning and the conclusions of the court in all three cases are at odds with the authoritative statements of the relevant international committee and run counter to recent judicial practice in other countries in which the ICESCR has been received into domestic law as it has in the case of Hong Kong.

First of all, a comment on the status of *General comments* by the Committee on Economic, Social and Cultural Rights. Hong Kong courts have noted the importance of the *General comments* of the Human Rights Committee in interpreting the Hong Kong Bill of Rights and, *a fortiori*, the provisions of the ICCPR itself.<sup>37</sup> In *Sin Yau-ming*, Silke VP in the Court of Appeal stated:<sup>38</sup>

"In interpreting the Bill of Rights Ordinance considerable assistance can be gained from the decisions of common law jurisdictions with a constitutionally entrenched Bill of Rights (in particular Canada and the United States), from the general comments and decisions of the Human Rights Committee under the ICCPR and the Optional Protocol to the ICCPR, and from the jurisprudence under the European Convention on Human Rights. While none of these are binding, in so far as they reflect the interpretation of articles in the ICCPR and are directly related to Hong Kong legislation, these sources are of the greatest assistance and should be given considerable weight."

Courts of other countries have taken a similar view, describing *General comments* and views of the Human Rights Committee as a "major source for interpretation of the ICCPR",<sup>39</sup> and its

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<sup>37</sup> For an overview of the status of the output of the United Nations treaty bodies and their use by national courts, see International Law Association, Committee on International Human Rights Law and Practice, *Interim report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals*, prepared for the 70<sup>th</sup> ILA Conference, New Delhi 2002, January 2002 (prepared by Andrew Byrnes as Co-Rapporteur)

<sup>38</sup> *R v Sin Yau-ming* (1991) 1 HKPLR 88, at 107, [1992] 1 HKCLR 127, at 141.

<sup>39</sup> *Maria v McElroy*, 68 F Supp 2d 206, 232 (EDNY 1999): "The Human Rights Committee's General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR."

decisions as being "persuasive",<sup>40</sup> or "of considerable persuasive authority"<sup>41</sup>, or of direct relevance" to issues of discrimination.<sup>42</sup> The nature of the CESCR and its general comments is in essence similar, and courts elsewhere have recognised the importance of those comments in the interpretation of the Covenant.<sup>43</sup>

Secondly, the discussion in the three cases does not do justice to the current international jurisprudence and analysis of the provision of judicial remedies for violations of economic, social and cultural rights. The only passage of the *General comment* cited by Hartman J in *Chan To Foon* refers to the question of legitimate expectations arising from the ratification of the treaty, yet the subsequent paragraphs provide stronger support for the argument that certain provisions of the ICESCR are not only justiciable, but also self-executing or directly applicable, and that "it is important to avoid any a priori assumption that the norms should be considered to be non-self-executing" (para 11). The relevant passage is worth quoting in full:

"... [T]here are some obligations, such as (but by no means limited to) those concerning non-discrimination, <sup>3/</sup> in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

### ***Justiciability***

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). ***While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.*** It is sometimes suggested that matters involving the

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<sup>40</sup> *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 461 (Court of Appeal, Smellie J) ("I agree also that the United Nations Human Rights Committee cases are persuasive")

<sup>41</sup> *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 405 (Court of Appeal, Eichelbaum CJ) ("a decision of the HRC must be of considerable persuasive authority")

<sup>42</sup> *Quilter v Attorney General* [1998] 1 NZLR 523, at 577 (Tipping J: "Thus, while in no way binding, the committee's approach to the concept of discrimination is of direct relevance to New Zealand jurisprudence on the subject.")

<sup>43</sup> The general comments and recommendations of the CESCR have been described as "of importance for the interpretation and jurisprudential development [of the Covenant] though they are not directly binding": *A and B v Regierungsrat des Kantons Zürich*, Judgment of 22 September 2000, § 2(g), Swiss Federal Supreme Court (*Bundesgerichtshof*) ("Diese Stellungnahmen sind zwar für die Auslegung und Rechtsentwicklung von Bedeutung, können aber keine direkte Verbindlichkeit beanspruchen").

allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

### ***Self-executing***

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered "non-self-executing" were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. ***It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.*** " (emphasis added)

The approach taken to date in relation to the justiciability of the ICESCR is thus at odds with the international jurisprudence and comparative national case law, and reflects thinking about economic, social and cultural rights which is decades old and which has been significantly undermined. Thus the courts need to take a more nuanced approach to the question, as have a number of other national courts.

For example, the Swiss Federal Supreme Court has considered the issue of the justiciability and self-executing nature of the ICESCR in a number of decisions. While the court has taken the view that the Covenant is programmatic in nature and is not in its entirety directly applicable before the national courts, it has accepted that particular provisions of the Covenant may be directly invoked.<sup>44</sup>

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<sup>44</sup> *K v L AG*, Judgment of 28 June 1999, Swiss Federal Supreme Court (*Bundesgerichtshof*), BGE 125 III 277, at 281 (reference to CESCR *General comment No 3*, para 5, in a case involving the question of whether article 8 of the ICESCR guaranteeing the right to strike was a directly effective provision of the treaty for the purposes of Swiss law; the court held that the guarantee was directly applicable in Swiss law, following the general comment and the views of writers).

Similarly, the Constitutional Court of South Africa, has drawn on the ICESCR in *Government of the Republic of South Africa and Others v Grootboom and Others*.<sup>45</sup>: In this case the South African Constitutional Court considered the meaning of the right of access to adequate housing contained in the South African Constitution. In interpreting that right the Court made extensive reference to the provisions of the ICESCR<sup>46</sup> and the work of the CESCR, including in particular the Committee's *General comment No 3* . There are many other instances of the ways in which particular aspects of economic social and cultural rights have been applied by national courts.

Thus, the ICESCR and its incorporation in article 39 of the Basic Law would appear to offer some opportunities (the right to education might provide some assistance for those children officially denied education by the Hong Kong government while their right of abode applications are pending, for example). But lest undue optimism be generated by these possibilities, it should be remembered that the rights in the ICESCR, even if directly applicable, may nevertheless be subjected to limitations in accordance with article 4 of the ICESCR.<sup>47</sup> As Hong Kong courts have generally had no real trouble in upholding claims by the state that limitations are necessary, it is unlikely to be much different under article 4 of the ICESCR.

## **E. THE POTENTIALLY ENLIVENING EFFECT OF THE HUMAN RIGHTS ACT 1998 (UK)**

In some ways the Bill of Rights has run into the sand. The major areas of inconsistency between the Bill of Rights/ICCPR such as immigration and the political system are rendered off bounds to legal challenges, and the fact that Bill of Rights issues can only be taken up through the courts and the limited access this involves are also a dampener (notwithstanding the theoretical availability of legal aid in some cases). A small trickle of cases has continued and will continue to come before the courts, raising the circumstances of individual criminal trials or other procedures. The failure of nearly every Bill of Rights case that has been heard by the superior courts in the last couple of years has also dampened enthusiasm for invoking the Bill of Rights.

Nevertheless, against this background the enactment and commencement of the UK Human Rights Act 1998 may have an enlivening effect on Bill of Rights litigation. Although the UK courts will be applying the European Convention standards and Hong Kong courts have already looked closely at Strasbourg jurisprudence in their consideration of Bill of Rights claims, the burgeoning volume of UK Human Rights Act case law is likely to have an impact on Hong Kong, for a number of reasons:

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<sup>45</sup> *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC)

<sup>46</sup> Article 11(1) guarantees "the right to an adequate standard of living ... including ...adequate food, clothing and housing".

<sup>47</sup> Article 4 provides:

"The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."



- First, Hong Kong courts have historically and understandably placed great emphasis on English case law and have tended in Bill of Rights cases to follow English cases laying down the common law when points in issue in Bill of Rights cases have been addressed them. This has been the case even when the English cases followed under the HK Bill of Rights are themselves inconsistent that with the Strasbourg jurisprudence. The imprimatur of an English judgment and the more detailed reasoning likely to support such a judgment is likely to be at least as persuasive, and possibly more so, than a European Court judgment.
- Secondly, the volume of cases likely to arise under the Human Rights Act means that a wide range of issues, many involving challenges to detailed statutory schemes and common law rules in a context similar to that of Hong Kong will be the subject of decision. These are more likely to come to the attention of Hong Kong practitioners and judges, and may as a result spawn new challenges in Hong Kong.

The upshot is likely to be that the European Convention as interpreted by UK judges will have more of a practical impact on Hong Kong human rights jurisprudence than it has had previously. It may also be the case that the Hong Kong courts may revisit case law where they have previously endorsed the English case law in preference to the Strasbourg jurisprudence, now that the English courts are following European case law -- a clear example of the relative status of English courage and the international bodies in the eyes of the Hong Kong courts, even in relation to international law issues.

The following are a couple of examples of how the UK Human Rights Act may lead to the opening up of some old and new issues under the Hong Kong Bill of Rights regime.

### **The test for bias**

One example is the law relating to bias of a tribunal. Despite attempts to encourage the HK courts to follow the test (accepted in the Australian case of *R v Webb* and other Commonwealth decisions, as well as the judgments of the European Court of Human Rights), the HK courts have until recently adhered to the test laid down in the House of Lords in *R v Gough*.<sup>48</sup> The choice has been between a test formulated in terms of a reasonable suspicion of bias (*Webb* and other cases) as opposed to a real danger of bias (*Gough*).<sup>49</sup>

Yet following the enactment of the Human Rights Act the English courts have addressed the question of whether the test under the European Convention is the same as that set out in *Gough*, or whether the test is closer to that set out in *Webb*. Although in most cases the different tests would lead to the same result, the English courts have now concluded that

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<sup>48</sup> *R v Gough* [1993] AC 646. Prior to 1997, of course, the decisions of the Privy Council were binding and the Privy Council had held, in relation to the Bill of Rights, that the *Gough* test was the applicable one: *Panel on Takeovers and Mergers v Cheng Kai Man William* (1995) 5 HKPLR 482 ,(1995) 3 HKC 517. After 1 July 1997, it is open only to the Court of Final Appeal to move away from this authority.

<sup>49</sup> The choice has been described as one between the existence of a real danger of bias as opposed to "a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the decision-making task had not been or would not be discharged impartially": *Francis Cheung and another v Insider Dealing Tribunal*, Court of Final Appeal, [2000] HKCFA 89, 22 November 2000

the test in *Gough* does not go as far as the European Court's interpretation of impartiality in article 6 of the European Convention. As a result, they have felt obliged to modify the applicable test to bring it into line with the Strasbourg case law. The leading case is *Director General of Fair Trading v Proprietary Association of Great Britain*,<sup>50</sup> in which Lord Woolf MR concluded (para 86):

"When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *Gough* is called for, which makes it plain that it is, in effect, no different from the test applied to most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a danger, the two being the same, that the tribunal was biased."

As the English courts have now embraced the European test,<sup>51</sup> and the matter was left open by the Court of Final Appeal,<sup>52</sup> it seems but a matter of time before the HK courts will follow suit. An ironic outcome, in view of the fact that the sources of normative guidance and their relative authority have not changed, at last not formally.

### ***Drittwirkung* - time to revisit *Tam Hing-ye*?**

The Human Rights Act applies to all public authorities - including the courts<sup>53</sup> -- with the result that the Human Rights Act will have an impact on relationships between private parties in so far as the courts are involved in making orders in litigation between private parties. This will apply not only in cases where legislation is being applied, but also to cases in which rules of common law and equity are applied.

The Human Rights Act thus unequivocally extends well beyond both the scope of the HK Bill of Rights as interpreted and the scope of the Bill of Rights as it was intended by the drafters so far as third party effect goes. In the well-known case of *Tam Hing-ye v Wu Tai-wai*, the Hong Kong Court of Appeal decided, incorrectly in my view, that the Bill of Rights Ordinance had no application to legal relationships between private parties, even where those relationships had been constituted by the intervention of the legislature in the form of a statute.<sup>54</sup> This was so, even though it was the intention of the drafters to ensure that the Bill of Rights did permit scrutiny of legislation as it affected legal relations between private parties. However, in the decade since it was decided, no attack has been made on the authority of that case.

However, it may now be opportune to revisit this issue. The fact that the UK courts are dealing with cases involving private parties under the admittedly slightly different provisions

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<sup>50</sup> [2000] All ER (D) 2425, 21 December 2000, Court of Appeal

<sup>51</sup> See also *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Modabl v British Athletic Federation* [2001] EWCA Civ 1447 (12 October 2001); *Glencot Development & Design Ltd v. Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15 (13 February 2001).

<sup>52</sup> *Francis Cheung and another v Insider Dealing Tribunal*, Court of Final Appeal, [2000] HKCFA 89 (22 November 2000)

<sup>53</sup> Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. In that context "public authority" includes a court or tribunal - s 6(3)(a) of the Act.

<sup>54</sup> See generally Byrnes, *supra* note 6.

of the Human Rights Act,<sup>55</sup> may stimulate advocates in HK to look once again at the possibilities that third party effect may offer.

But secondly, the governing constitutional standard is now the ICCPR. The ICCPR is not limited in its application to Hong Kong only to the acts of public authorities, but rather imposes a series of obligations on States to ensure that private individuals are protected against violations of particular rights by other private actors. Thus, whatever the status of *Tam Hing-ye*, for post-1991 legislation, it matters not that the relations governed by the legislation are between two private parties and not between the State and a private person - the question is whether the statute conflicts with the obligation of the State to provide inter-citizen protection. Indeed, it may also be inevitable that rules of the common law are challengeable under article 39, as the Covenant draws no distinction between the form that the rules that violate rights may take.

These are points which I have made before on a number of occasions and which have elicited no response. Yet I still entertain hopes that a proper understanding of the scope of the obligations under the ICCPR may yet inform the courts' approach to inter-citizen rights and subject them to the scrutiny which Hong Kong is obliged to give them.

## **F. CONCLUSION**

The above review might give an unduly negative impression of the potential that is left in the Bill of Rights and the various human rights guarantees contained in the Basic Law (both treaty-based and others). However, there are some stirrings which suggest that these sources can continue to make modest contributions to the protection of human rights in Hong Kong – the recent Court of Appeal judgment in the *Bahadur* case, the judgment of Bokhary PJ in *Ng Siu Tung* (and the solid endorsement by the majority in that case of the doctrine of substantive legitimate expectation), and the potential impact for the UK Human Rights Act and the development of case law in relation to the ICESCR and the rights guarantees of Chapter II of the Basic Law will hopefully provide opportunities. And yet the big issues – of democracy, immigration law, and the rule of law and the independence of the courts – remain essentially immune from local as well as international judicial scrutiny for conformity with human rights standards.

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<sup>55</sup> See, e.g., *Wilson v First County Trust Ltd* [2001] EWCA Civ 633 (2 May 2001), Case No: B2/1999/1073 (upholding challenge under Human Rights Act to provision of Consumer Credit Act which rendered unenforceable against the debtor of a credit agreement which did not contain accurate details of the amount of credit)