The Impact of the Bill of Rights Ordinance and the ICCPR on Hong Kong Civil Law

1. In 1995 George Edwards and Andrew Byrnes published the proceedings of a June 1994 seminar entitled "Hong Kong's Bill of Rights 1991-1994 and beyond". It included a speech by Gladys Li QC, just 5 pages long, simply entitled "The Non-Impact of the Bill of Rights in the Civil Area." I have just re-read that Chapter, which contains a short but devastating catalogue of fundamental weaknesses in Hong Kong's approach to a Bill of Rights, which meant that by 1995 it has had no – or almost no - impact in the area of civil law. All of the weaknesses identified by Gladys Li remain weaknesses. Those who are feeling sleepy or restless this morning can therefore be assured that the present paper also will be a short one.

2. I propose to review each of the weaknesses identified by Gladys Li 7 years ago, and then consider whether the position regarding the impact of the Bill of Rights in the civil law area has changed since then.

3. The obvious fundamental weakness is that the Bill of Rights was deliberately designed not to apply to inter-citizen disputes. Section 7 (1) of the Bill of Rights Ordinance states that "This Ordinance binds only – (a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority." The original first draft of the Bill of Rights would have applied it to all persons whether acting in a private or public capacity, but this provision was removed following a campaign by business interests.

4. In Tam Hing Yee v Wu Tai-Wai [1992] 1 HKLR 185, the Director of Legal Aid, on behalf of a judgment creditor, was seeking to enforce a judgment against a judgment

debtor who had left the address placed on the court record without leaving any forwarding address. The Director applied for and was granted a prohibition order under Section 52E(1)(a) of the District Court Ordinance (Cap. 336) prohibiting the respondent from leaving Hong Kong. At the hearing of an application to extend the prohibition order the District Court judge refused to do so on the ground that the provision prohibiting persons from leaving Hong Kong was inconsistent with Article 8(2) of the Bill of Rights which guaranteed the freedom to leave Hong Kong. On appeal the Court of Appeal held that the prohibition order related to a dispute between private individuals and that the Bill of Rights by virtue of Article 7 of the Bill of Rights Ordinance had no application to such inter-citizen disputes. It went on to hold that in any event the right to leave Hong Kong guaranteed by Article 8 was subject to restrictions necessary for the protection of others which included the prohibition order sought.

5. This decision goes beyond merely excluding inter citizen disputes. It appears to exclude from the ambit of the Bill of Rights not only the inter-citizen disputes themselves, but also statutory provisions which create rights of private citizens inter se.

6. In June 1997, the Legislative Council enacted the Bill of Rights Amendment (Ordinance) 1997[1] (a private members' bill introduced by legislator Lau Chin-sek, to reverse the effect of Tam Hing Yee). The Ordinance commenced operation on the date of its publication in the *Gazette*. Unfortunately, the operation of the Ordinance was

[1] See Ordinance No. 107 of 1997, *Hong Kong Government Gazette,* 30 June 1997, *Legal Supplement No. 1,* A3895.

then almost immediately suspended by the Provisional Legislative Council[2] and it was subsequently repealed.

7. The practical effects of this exclusion can perhaps be seen most clearly in the field of racial discrimination.

8. Article 22 of the Bill of Rights, under the rubric "Equality before and equal protection of law" provides that:-

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

9. The Hong Kong Government has enacted the Sex Discrimination Ordinance, which outlaws sex discrimination in both public and private sectors. It has however resolutely refused to enact any comparable law outlawing racial discrimination. The net effect of this refusal and of Tam Hing Yee is that race discrimination in the public sector is officially outlawed, but in the private sector it remains legal.

10. One of the few civil cases in which the Bill of Rights has had a substantial impact concerned discrimination based on national origin in the public sector. In Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR [1998] 1 HKLRD 701 the Court of Final Appeal held that large parts of the Hong Kong

[2] See Legislative Provisions (Suspension of Operation) Ordinance 1977, *The Government of the Hong Kong Special Administrative Region Gazette,* 18 July 1997, *Legal Supplement No. 1,* A329.

Government's "localisation" policy, designed to reduce the proportion of the civil service which was expatriate, was unlawful as it was in breach of Article 22 of the Bill of Rights. This important case thus had a significant impact within the civil service.

11. There probably remain other areas of unlawful racial discrimination within the public sector which have not yet been the subject of litigation. An obvious example is the work training programme for the unemployed run by the Labour Department, whose officials have stated quite openly that their programme is only for Cantonese speakers. However in this area this is at least a potential remedy provided by the Bill of Rights should an aggrieved person bring a case.

12. In the private sector, in contrast, it remains entirely lawful in terms of Hong Kong's domestic law to discriminate on grounds of race, colour or national or ethnic origin. Two years ago the South China Morning Post conducted an undercover investigation of bars in Wanchai which revealed that some bars did not admit Indians, while some had discriminatory admission policies whereby Europeans were admitted free while Chinese people were charged a $100 admission fee. There have also been numerous well-publicised instances of hotels charging surcharges based on the nationality of the guest, and of landlords refusing to let flats to persons of certain nationalities. The fact that persons who experience this kind of discrimination have no legal redress makes a mockery of Hong Kong's claims to be a " world city".

13. Another area in which the non-applicability of the Bill of Rights to inter-citizen disputes has a chilling effect on freedom of expression is that while it is legal to hand out a leaflet in the street, it may not be legal to do so in a shopping mall. An increasing proportion of shopping in Hong Kong as in other places now takes place inside

shopping malls, which are usually private property. Under existing law the owners of the malls or their agents are entitled to order persons distributing leaflets to leave and if necessary remove them as trespassers, and organisations including Amnesty International have been prevented from distributing leaflets in shopping centres. It could be well be argued that this is an unfair and unreasonable restriction on free speech and an effective Bill of Rights should protect the distribution of leaflets in these circumstances provided that it is done peacefully and without causing obstruction or nuisance.

14. Returning to racial discrimination, there is an argument that Article 22 of the Bill of Rights itself imposes a obligation on the Government to pass laws outlawing racial discrimination and that a person who suffers discrimination in the private sector and is left without a legal remedy because of the non-enactment of such laws could have a claim against the SAR Government. The argument would be that the Bill of Rights is binding on the Government, and that where Article 22 of the Bill of Rights states that " the law shall prohibit any discrimination on grounds such as race", this imposes a statutory duty on the Government to enact laws to prohibit such legislation. As 10 years have gone by since the Bill of Rights was enacted the Government has had ample time to do so. It could be said that (1) the government is in breach of this statutory duty to enact laws; (2) as a result a person who can prove that he has been the victim of race discrimination in the private sector is entitled to recover from the Government the damages which it could have recovered from the discriminatory private entity had the law required by Article 22 of the Bill of Rights been passed. It remains to be seen whether this argument will reach the courts and if so how it will be viewed.

15. One of the reasons why this argument and other significant Bill of Rights related arguments may never reach the courts is related to the second of the reasons identified by Gladys Li for the non-impact of the Bill of Rights: legal aid.

16. In Hong Kong more than in many jurisdictions High Court litigation is beyond the means of most people. Unless they can obtain legal aid a civil right theoretically guaranteed by the Bill of Rights remains a right in theory only and unenforceable in practice. The aim of the legal aid system is of course to overcome this problem, and since 1995, the Supplementary Legal Aid Scheme permits the Director of Legal Aid to waive the limit of financial resources in cases in proceedings where a breach of the Hong Kong Bill of Rights is an issue. To that extent the situation has improved since 1994.

17. However the Legal Aid Department is still often reluctant to grant legal aid for Bill of Rights related cases for a variety of reasons. Bill of Rights litigation tends to be particularly expensive with a high proportion of cases going to appeal. The proportion of successful challenges on Bill of Rights grounds is also quite low. However this led the Legal Aid Department early on to take an unreasonably restrictive attitude to Bill of Rights challenges.

18. A notable early example was Lee Miu Ling v Attorney-General (No. 2) (1995) 5 HKPLR 181 (HC), (1995) 5 HKPLR 585 (CA). That case was a challenge to the system of functional constituencies used for election to the Legislative Council. Article 21 of the Bill of Rights provides that :-

"Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions …. to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.."

19. Ms Lee Miu Ling challenged the legality of the Legislative Council election system on the ground that it did not provide for equal suffrage, since a minority of professional persons and others had two votes, one in a geographical constituency and one in a profession or occupation based functional constituency, while she and the majority of the population only had one vote based in a geographical constituency.

20. Research compiled for this case showed that the inequalities in the Legislative Council voting system were indeed grotesque. While Ms Lee and her co-plaintiff, retired smallholder Law Piu, had one vote each in the 1995 Legislative Council election, property developer Robert Ng of Sino Land controlled a total of 42 votes through his control of companies registered to vote in constituencies which permitted corporate voting. Other businessmen also controlled large numbers of votes. However legal aid for Ms Lee to bring her challenge was refused by the Legal Aid Department, and was only granted on appeal to a registrar of the High Court. Interestingly, while Ms Lee's challenge ultimately failed, it did so only after the colonial Government deliberately and retrospectively amended Hong Kong's letters patent, under which the colonial governor held office, to exclude the organisation of the Legislative Council elections from the ambit of the Bill of Rights. Ms Lee was not refused legal aid on means grounds, so her case would not have been treated any differently following the changes to means tests in Bill of Rights cases introduced the following year.

21. The reluctance of the Legal Aid Department to grant legal aid in Bill of Rights cases is part of a wider reluctance to grant legal aid for administrative law challenges to Government action. As a result of my experience in practice dealing with such cases I consider that legal aid applications in this area are often rejected after superficial examination and on the basis of ethnic and cultural prejudices. I am not alone at the Hong Kong Bar in having represented clients whose legal aid applications for judicial review of Government action have been refused, but have then been granted on appeal to a registrar, and where as soon as papers have been served on the Department of Justice the relevant Government Department has conceded all the relief which my client was seeking and not contested their claim. Of course to be able to appeal to a Registrar the applicant who has been refused has to find a lawyer willing to appear without fee on the hearing of that appeal. And even appealing to a registrar is no guarantee of obtaining legal aid.

22. It should perhaps be said that in the few cases where large corporations which do not share the financial problems of the average litigant have relied on the Bill of Rights to challenge Government action against them they have not had a higher success rate than individual litigants. A notable unsuccessful challenge by a corporation was R v Lift Contractors' Disciplinary Board ex parte Otis Elevator Co (HK) Ltd. (1995) 5 HKPLR 78. A person fell down the shaft of a lift maintained by Otis as contractor. The Director of Electrical and Mechanical Services convened a disciplinary board to hear charges of negligence against Otis. The chairman appointed was an assistant director in a division of the Department of Electrical and Mechanical Services as chairman of the board. Otis challenged this on the basis that Article 10 of the Bill of Rights guaranteed the right to a hearing by a fair and impartial tribunal, and that as an employee of the prosecuting department the chairman appointed could not be said to

be impartial. They succeeded at first instance before Penlington J.A. sitting as a judge of the High Court, only to lose in the Court of Appeal where the majority held that the accepted unfairness was cured by the existence of a fair appeal, on the basis that the appointment of a partial chairman was not inherent in the scheme for such disciplinary boards, but was a one-off mistake.

23. Another invocation of the Bill of Rights by a corporation was Ma Wan Farming Ltd v Chief Executive in Council (1998-99) 8 HKPLR 386. The applicant brought judicial review proceedings in relation to a decision by the Chief Executive in Council to undertake road works which had the effect of dividing its farming land into quarters. One ground of review was that the procedure for objecting to the road works was not a fair one, and so was in breach of the provision of Article 10 of the Bill of Rights that everyone shall be entitled to a fair hearing in the determination of his rights and obligations in a suit at law. The Court of Appeal upheld the decision of Keith J. at first instance that the objection procedure was not the determination of the rights and obligations in a suit at law. It held that it was "an executive decision of high policy content" with only "a tenuous connection" with the applicant's claim for monetary compensation for land resumption.

24. A further reason for the limited impact of the Bill of Rights in the civil field is the specific exclusion by Section 11 of the Bill of Rights Ordinance of immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation. Insofar as any successful challenges have been brought to the administration of immigration control – and they have been few and far between – they have been based on traditional common law principles and not on the

Bill of Rights, or under Articles of the Basic Law which do not have counter-part in the Bill of Rights.

25. From 1 July 1997 the coming into force of the Basic Law meant that many of the rights set out in the Bill of Rights were also contained in that Law. Sections 3 and 4 of the Bill of Rights Ordinance were not adopted as part of the laws of the HKSAR at the handover. There was thereafter no requirement on the Hong Kong courts to interpret new legislation so as to be in conformity with the Bill of Rights. At the same time HKSAR v Ma Wai Kwan David & Ors [1997] 2 HKC 315 confirmed that the Basic Law was a constitutional document.

26. Article 39 of the Basic Law provides that :-

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region".

27. The Bill of Rights is the mechanism whereby the ICCPR is applied in Hong Kong. In formulating Bill of Rights challenges since 1 July 1997, it is often appropriate to do so in terms of a breach of Article 39 of the Basic Law and of a breach of the ICCPR as applied to Hong Kong.

28. An example of successful use of the Basic Law to challenge existing administrative arrangements in the electoral field was in Chan Wah v Hang Hau Rural Committee & Ors [2000] 1 HKLRD 411. In this case the Court of Final Appeal held, confirming decisions of the lower courts, that the system of election of village representatives,

whereby only so called "indigenous villagers" i.e. persons who had a male ancestor resident in the village in 1898, were entitled to vote, was in breach of Article 39 of the Basic Law and Article 21 of the Bill of Rights (the same article invoked by Lee Miu Ling, above).

29. This case will have a major and beneficial impact on an important area of Hong Kong Government. The entrenched electoral privileges given to indigenous New Territories villagers had became an anachronism in a Hong Kong where most New Territories inhabitants live in high rise flats, and had perpetuated local government power in an unrepresentative and often corrupt favoured group. Persons who had lived their whole life in a village, like Mr Chan Wah, were not allowed to vote to choose their representative. Despite this the Government joined forces with the rural committees which had excluded Mr Chan from being a voter and another non-indigenous villager who had not been permitted to be a candidate. The Court of Final Appeal granted declarations that the Secretary for Home Affairs must not approve any person elected as a village representative of the two villages concerned under the electoral arrangements used for the 1999 village elections as being inconsistent with the Bill of Rights, and also with the Sex Discrimination Ordinance due to the limitation of voting to male villagers.

30. Another recent case which involved the Bill of Rights and is already having a beneficial impact on freedom of expression was Cheng Albert & Anor v Tse Wai Chun Paul [2000] 4 HKC 1. This clarified the ambit of the defence of fair comment in an action for defamation. The Court of Final Appeal, reversing the Court of Appeal, held that a comment which fell within the objective limits of the defence of fair comment could lose its immunity from action for defamation only by proof that the Defendant did not genuinely hold the view that he expressed. The purpose and

importance of the defence of fair comment were inconsistent with its scope being restricted to comments made for particular reasons or particular purposes, some being regarded as proper and others not. The presence of other motives was not a reason for excluding the defence. In reaching its decision the court emphasised that the right of fair comment was a most important element in free speech and that freedom of speech was constitutionally guaranteed by the Basic Law. The courts should adopt a generous approach so that the right of fair comment on matters of public interest was maintained in its full vigour.

31. This case arguably widened the ambit of the defence of fair comment beyond its previously recognized boundaries. Apparently conflicting dicta by Lord Diplock in Horrocks v Lowe [1975] AC 135 were distinguished and in effect disapproved. It can therefore be seen as a rare case in which the Court of Final Appeal has successfully broadened the scope of an essential right in Hong Kong. It is an interesting contrast with the criminal case of R v Ng Kung Siu & Anor [2001] 1 HKC 117 (the "flags" case), which was also concerned with the limits of freedom of expression, and in which Bokhary J. commented that the restriction on free expression represented by the criminalisation of flag desecration represented the "outer limit of constitutionality" and that permissible restrictions on free expression stopped there. The role of the court as a guarantor of free speech in this defamation context is particularly welcome in view of the frequent abuse of defamation proceedings by the Singapore Government to suppress political dissent, and the admiration which is still sometimes heard in Hong Kong for the Singapore model.

32. In conclusion the position in 2001 is that the Bill of Rights has had some impact in the civil law field. The position is not as uniformly negative as it was when Gladys Li

spoke in 1994. The cases described above in the field of elections and libel will have significant and worthwhile consequences. Overall however the position remains that the impact has been modest, but it can no longer be described as negligible.

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