HONG KONG'S BILL OF RIGHTS

Problems & Prospects

Faculty of Law
University of Hong Kong

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Introduction

Raymond Wacks

MORE than one hundred of the world's constitutions contain Bills of Rights. Since Canada adopted its Bill in 1960 the subject has been fairly widely debated in the Commonwealth. Those in favour of this device have generally looked for inspiration to the United States Bill of Rights, the United Nations Declaration of Human Rights and its covenants, and to the European Convention on Human Rights and Fundamental Freedoms (which has repeatedly exposed the gaps and fragility of the English law's protection of human rights). They stress the need for a standard by which the substantive law can be measured.

Bill sceptics

Those who oppose a Bill of Rights - especially in Britain - normally do so on three rather different grounds. Some argue that the common law provides an adequate and more flexible means of safeguarding liberty. Others express misgivings about the courts having the ultimate power to determine what rights we have. Thirdly, it is alleged that the rights contained in declarations such as the International Covenant on Civil and Political Rights (ICCPR) are vague, incoherent, and in mutual conflict.

The first is a somewhat quixotic view. The second has more substance. The protection of the legislature is prererred to that of the judiciary. In the United Kingdom, this argument normally rests on the "democratic" nature of Parliament, its openness, and its access to a wider range of public opinion than is available to judges who are, in any event, stigmatised as conservative, establishment or executive-minded, out of touch, and generally poorly equipped to make "political" decisions.

Those who prefer the judges normally do so not on the ground that they trust them, but that a court is the proper forum for the impartial determination of a citizen's rights. However, their arguments necessarily go much further. They believe that it would bring Britain into line with many other countries, that it would have an important educative effect, that it would provide a more efficient method of protecting human rights than resorting to the European Court of Human Rights at Strasbourg (where Britain's dirty laundry is periodically washed) and so on.

The third argument has a certain bite. The very idea of natural rights was regarded with

derision by Bentham: "simple nonsense... nonsense upon stilts ... terrorist language". The incoherence, especially of economic, social and cultural rights, seems to be an almost inevitable consequence of the generality they seek to capture. Moreover, human rights seem to hunt in pairs: a right is frequently accompanied by an exemption. But few doubt that the rhetoric of declarations must be, in the words of Mr Justice Bhagwati, the distinguished former Chief Justice of India, "positivised and particularised".

Taking rice seriously

The concept of human rights is an enduring one, to be found in the writings of medieval Christians, the Stoics, and in the great works of Hinduism, Islam, and Judaism. It is, however, only in the 17th and especially the 18th century that something approximating to the modern conception of human rights begin to emerge in the writings of Grotius, Hobbes, Locke and Pufendorf. The ideas, particularly of Locke, found expression in the American Declaration of Independence of 1776, that there are "certain unalienable rights which all men have been endowed by their creator, including life, liberty and the pursuit of happiness". Similarly the French Declaration of the Rights of Man and the Citizen (1789-1795) reflcted the ideas of Locke and Rousseau.

In the aftermath of the Holocaust, a succession of United Nations initiated declarations and conventions crystallised the idea of the inherent rights of mankind.

Does the protection of rights actually address the real problems of starvation, poverty, and human suffering? Human rights in their modern form are Eurocentric; how successfully can they be applied to Third World countries? Though the motivation in support of the protection of human rights is generally admirable, is the conceptual framework adequately sound? Can an objective basis for moral norms be found? Is it possible to avoid the associated problems of moral relativity and subjectivism? Is rights-talk pertinent in the public law context: if I have a right, presumably someone must have a duty. Who? The state? Are human rights not, as both Bentham and Marx saw them, selfish, individualistic things?

This is not the place to do more than mention these difficulties, to which must be added several others concerned with the domestic application of international human rights norms and the inescapable shadow of the socialist suspicion of human rights and all they represent. The Bill of Rights Ordinance 1990 may, along with British sovereignty, expire in 1997. The papers that follow attempt to address some of these questions.

Hong Kong

Torpor has always characterised Hong Kong's approach to the protection of human rights. So, in 1976, while the colony took a halting step towards a primitive form of participatory democracy - the number of "unofficials" (23) exceeded the number of "official" members (20) for the first time - the international community was making historic strides in the development of human rights jurisprudence. Two important covenants came into force. The ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were in the same year ratified by the Government of the United Kingdom in respect of the United Kingdom and dependent territories, including Hong Kong.

For 14 years, therefore, Hong Kong has basked in the ostensible protection of most of the terms of these Covenants. And if the impact of the covenants has in many jurisdictions been limited, in Hong Kong it has been at best negligible. The response of civil libertarians was therefore an inevitably uncertain one to the provision in Annex I to the Sino-British Joint Declaration of 1984 (echoed in Article 39 of the Basic Law) that the covenants as applied to Hong Kong shall remain in force after 1997. And this apprehension is compounded by the fact that the People's Republic of China is a party to neither covenant.

In March 1990 the Hong Kong Government issued the Draft Hong Kong Bill of Rights Ordinance 1990 and invited comments from members of the public. On 31 March 1990 the Faculty of Law of the University of Hong Kong held a seminar to consider some of the major questions arising from the Government's proposal. The brief papers presented at the seminar (including one by Albert Chen) have been revised for publication in this booklet. It is hoped they may contribute to the debate about how best to protect liberty in Hong Kong both before and after 1997.

The proposed Bill of Rights gives effect in Hong Kong's domestic law to the relevant provisions of the ICCPR as applied to the territory. The nature, content, and possible effects of this device are the main concerns of the eight papers that follow. None of the contributors is under any illusions. They all recognise the limitations of a Bill of Rights. None conceives it to be a panacea. None expects it to be a magic wand which will ensure that overnight our liberties will be safeguarded. Indeed, the very description of the suggested enactment as a Bill of Rights is suspect. It lacks two constitutional features normally associated such an instrument: that it should have primacy over other laws, and that the courts should have the power to interpret it and to declare legislation invalid if it violates the Bill of Rights.

As already mentioned, the usual arguments for and against a Bill of Rights, especially

in the United Kingdom, tend, ultimately, to turn on the (perennial) question: which is the safer institution to protect our rights: the courts or Parliament? It is, of course, more than ironic that while British governments have "given" almost all former colonies Bills of Rights, they have not considered it necessary for one to be enacted in Britain itself.

Whatever view one may take of the position in the United Kingdom, there are at least three important characteristics that distinguish Hong Kong from its colonial master. First, we are not, and are not likely to become, a parliamentary democracy in the full-blown British sense. Thus the preference expressed in the United Kingdom for politicians rather than judges interpreting our Bill of Rights rings hollow here. Secondly, the resumption of Chinese sovereignty poses a number of difficulties, not least of which is precisely how and by whom the terms of the Basic Law are to be interpreted. Thirdly, Hong Kong has an (admittedly circumscribed) opportunity to create a "new order"; many former colonies (eg India, Sri Lanka, Jamaica, the United States) enacted Bills of Rights as a kind of "fresh start".

Even if one has misgivings about the need for a Bill of Rights in the United Kingdom, and even if one prefers the enactment of carefully drafted legislation to the often rhetorical language of such declarations, such reservations in Hong Kong - with its unelected, unaccountable legislature - seem misplaced. Indeed, it may be ingenuous (if not dangerous) to advance an argument of this kind. It is the legislature itself that needs to be controlled! Whether the judges are the most suitable arbiters when it comes to issues concerning our rights is another question that proponents of traditional bills of rights must answer. Might it not be better to entrust such matters to some sort of council or commission along the lines of the French Conseil Constitutionnel? Such a body would have a number of advantages over a court. It could, for example, comprise individuals who represent a broader section of the community. It would have an opportunity to consider matters in advance, formulate and develop ideas about individual rights, and so on. This possibility still merits careful consideration in Hong Kong, but I suspect that it is unlikely to find favour with civil libertarians if only because of the problems it might engender about its composition. It may resemble too closely the Basic Law Committee of the Standing Committee of the National People's Congress! In our rather special circumstances it would be preferable to entrust our courts with the task of interpreting the Bill of Rights.

It is, in the end, a matter of will. Our statute book already bristles with enactments that would offend the draft Bill of Rights. The Government has recently produced a list of twenty ordinances which contain "posible inconsistencies" with the proposed Bill. These include the Public Order Ordinance's stop and search provisions and its restrictions on

public meetings, the law on homosexual acts, police powers under the Police Force Ordinance, executive powers (especially of deportation and removal) under the Immigration Ordinance, and, perhaps most controversially, the powers conferred on the ICAC by the Prevention of Bribery Ordinance. Not surprisingly, the ICAC has launched an energetic campaign to seek exemption from those provisions of the Bill of Rights that would hamper its ability to control the corruption which afflicts Hong Kong. The Governor has stated that no exceptions will be made. Battle has been joined

But this lists neglects the positive rights that appear to be granted under the Bill of Rights (eg the right of privacy) which call for the enactment of legislation where the common law is inadequate or silent. There are, moreover, certain laws (eg police powers to demand proof of identity under the Immigration Ordinance) which, though they may not directly infringe the Bill of Rights, constitute a serious violation of civil liberties.

Acknowledgements

To maximise the extent to which these papers might serve some useful purpose before the conclusion of the brief "consultation period", this book was produced with speed, if not haste. I am very grateful to the contributors for their help and co-operation in meeting the tight deadline. Surviving errors, solecisms, and infelicities are entirely my fault. I am willing to provide evidence in mitigation.

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Thanks too to Yash Ghai and Albert Chen who organised the Seminar at which the papers were presented and enthusiastically discussed. And to Mr CS Shum who attended efficiently to the detailed arrangements for the Seminar which, against all expectations, attracted almost 250 participants. The Seminar was the brainchild of Peter Rhodes, indefatigable Dean of the Faculty of Law. Especial thanks to him.

Bills of Rights
Comparative Perspectives

Yash Ghai

ONE of the most remarkable developments of the second half of this century has been the almost universal acceptance of human rights. It is specially remarkable since these rights are regarded as universal transcending various cultural traditions as well as fundamental (and thus are meant to enjoy a superior status under both domestic and international law). A number of international legal instruments have been adopted to establish universal standards of human rights and impose obligations on states and international organisations. These instruments constitute a significant derogation of national sovereignty, although not all the states would accept that they are accountable to the international community for the manner in which they observe human rights in relation to their own citizens.

While the idea of human rights itself has been uncontroversial, there has been a great deal of debate on the contents of human rights. The debate has arisen primarily because of differences in ideological perspectives on the priority of different kinds of rights and on the mechanisms to secure them most effectively. In the formative years of the international instruments, particularly the two Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the battle was engaged primarily between the advocates of civil and political rights, as led by the western states, and the advocates of social and economic rights led by the Soviet Union. Central to the debate was the role of the state in the economic and social life of the nation, and its responsibility to redress social and economic injustices. The advocates of social and economic rights did not deny the importance of civil and political rights (although they were clearly uneasy with their historical connections with market economies), but argued that they could not be meaningful when large sections of the community had neither the educational nor financial means to enjoy them. These means had to be provided by the state, since the disparities themselves were the function of the market. In that sense they did object to some of the civil rights, to the extent that they circumscribed remedial action by the government.

The advocates of civil and political rights, particularly those with a passionate commitment to the market, were less than enthusiatic about social and economic rights which they saw as interfering with the allocations of the market, but even others more sympathetic

to the claims of justice, were uneasy with the jurisprudential implications of accepting these rights. If they were rights, how would they be enforced? What standards would be employed? Who were the beneficiaries of the rights? The goals implicit in social and economic rights, they argued, were better regarded as policies, the moral responsibilty of the state, not rights of individuals or groups. In the end a compromise of sorts was achieved as set out in the two Covenants, but the very fact that each set of rights was embodied in a separate document shows that a conceptual unity eluded the drafters.

The developing countries were on the fringes of this debate. In a sense it spoke neither to their traditions of thought nor contemporary realities. In more recent years, as we have passed to what are frequently (but misleadingly and not profitably) called third generation rights, have the developing countries taken a more active part in international discussions, and in fact led the way in the debates on the so-called right to development. The right to development is in many ways outside the scope of our present discussions, but the emphasis that the developing countries place on them seek to highlight the point that human rights have to be situated in actual contexts, not viewed as abstractions. Sometimes their position has been interpreted as either denying the universality of human rights or at least asserting the primacy of economic rights over political or civil rights.

Human Rights and Decolonisation

These international developments had their counterpart in domestic law. The postwar period was also the era of decolonisation, itself based on the fundamental right to self-determination. In most cases, an essential part of the process of decolonisation was agreement on and the promulgation of a constitution, bedevilled by ideological and ethnic conflicts. (This did not apply in the case of India, Pakistan and Burma, where the "independence" constitution was left to Constitutent Assemblies, but the very partition of the subcontinent into these three states was deemed a sufficient basis for the solution of ethnic differences). The multi-ethnic nature of many Third World states was highlighted by the difficult and protracted negotiations on the independence constitution. An important issue that arose in numerous instances was the method to secure the protection of minorities, who were fearful of the transfer of power to a local community from whom they were distanced by language, religion or geography. Separatism (as in the Indian subcontinent) or devolution (as in Canada) was the response, but not, surprisingly, at first, bills of right. This was in part because the British, who were among the first imperialists to decolonise, had neither a history of nor confidence in bills of rights (compare the French or US decolonisations which established

bills of rights). The decolonisations immediately after the war did not provide for bills of rights; in fact the British poured cold water over the proposals of the Indian Congress for a bill of rights. When the Indians, after independence, devised their own constitution they gave pride of place to a bill of rights, and Pakistan followed and in time also Sri Lanka (just as the bill of rights in the Republic of Ireland is a product of the Irish themselves, and not of the departing British consititutional instruments). The Indian enthusiasm for bills of rights did not yet convert the British to it, and in 1957 Ghana was allowed to proceed to independence with only a rudimentary protection of human rights.

The British attitudes to bills of rights changed, however, as a result of the ethnic problem in Nigeria.[1] Some ethnic groups had lobbied for a federal constitution to ensure for each major ethnic group autonomy over its internal affairs. The British were opposed to such fragmentation, largely on economic grounds. A commission appointed to enquire into the problem recommended a bill of rights as the solution. Ironically, from having previously such contempt for a bill of rights, the British turned to it as a panacea for what has proved to be the most enduring of constitutional and political problem of the third world, that of ethnicity. The British attitudes were no doubt also influenced by its then recent adherence to the European Convention of Human Rights. The Convention became, not surprisingly, the model for bills of rights in colonies which acquired independence subsequently. (Previously the model was Indian; it influenced the bills of rights in W Samoa, Malaya and Singapore). Henceforth the presumption was that a bill of rights would be included as part of the constitution, unless the local leaders were opposed to it, as in Tanganyika. However, the objection of local leaders would be overruled if the British considered that a bill of rights was essential to a satisfactory constitutional settlement, especially to accord assurance to minorities, as in Kenya and Zimbabwe. It became customary for the British to include justiciable bills of rights in the constitution at the self-governing stage of a colony, a few years ahead of independence.

The tendency towards the adoption of the bill of rights was reinforced by the fact that by now decolonisation was speeded up under the pressure, if not actual sponsorship, of the United Nations for which, having adopted the Universal Declaration of Rights, human rights had become an article of faith. In practice few colonies resisted bills of rights; the nationalist struggle for independence was premised on the right to self-determination, which the nationalist leaders regarded as the most fundamental of rights. The opposition to colonial rule

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1. A good account of the changing British attitudes towards the formal protection of human rights in the colonies is to be found in S. de Smith, The New Commonwealth and Its Constitutions, London, Stevens and Sons, 1964, pp. 162-215)

entailed as well a commitment to democratic rights. But the advocacy of human rights may in many cases have been strategic, and not based necessarily on a commitment to these rights.

India, with a social and economic system greatly in need of reform, was, along with the Irish Republic, the first state to give serious consideration to the dilemmas of human rights. It sought to balance civil and political rights with social and economic rights, principally through the non-justiciable Directive Principles of State Policy which cast obligations on state institutions to pursue goals of social justice and equality. The combination of legally enforceable political rights with non-justiciable directives of policy -- the domestic analogue of the two UN Covenants -- has been now widely adopted (examples are Nigeria, Sri Lanka, Papua New Guinea, Bangladesh). It has provided the basis on which a compromise has been struck between proponents of different emphases in development.

It has generally been assumed that there is no basic incompatibility between the two sets of rights, but the Indian experience shows that there is considerable tension between them. Legislation to implement the directives of policy was repeatedly struck down by the Indian Supreme Court as violative of political and civil rights (provoking an amendment of the Constitution in 1951 to disapply the supremacy of fundamental rights to laws providing for state acquisition or redistribution of property). The scope for the derogation from these rights to implement the directive principles was further extended in 1971 to include all fundamental rights. At first the Supreme Court held that the amendment was unconstitutional as undermining the basic features of the Constitution (Minerva Mills v. India (1980))[2] but later changed its mind (Sanjeev Coke Manufacturing v. Bharat Coking Coal Ltd. (1983))[3]. These cases highlight the debates concerning the priority between rights, especially in developing countries, and show that allegations of conflicts between individual and social justice are not always red herrings spawned by autocratic leaders (although sometimes they can be, as I argue below).

The ready acceptance of bills of rights by nationalist leaders did not necessarily imply a genuine commitment to the values implicit in them, much less the restrictions on the scope and purpose of public power that they establish. Some African leaders have said that they accepted constitutional safeguards only because otherwise independence would have been jeopardised. Most of them resented the implication that with the departure of the colonial power, it was necessary to have a bill of rights to ensure fair administration and democratic practices. The record of the effectiveness of human rights in the former colonies has, on the

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2. (1980) 3 SCC 625

3. (1983) 1 SCC 147

whole, been poor. There are undoubtedly exceptions, particularly in the Caribbean and despite occasional lapses, India. Even here, the relatively good record of human rights is due only in small measure to justiciable bills of rights. The norm, however, has been the gradual attrition of human rights. Military rule has replaced civilian rule in many countries. Several other countries have moved towards one party states, with massive restrictions on the right of association and expression, the concentration of state power and the weakening of civil society. Elsewhere press censorship is rampant, and detention without trial is common.

The relative ineffectiveness of bills of right can be explained both in terms of the constitutional status of the bills as well as the broader context in which they operate. To take the second factor first. In many third world countries, there has been a disjunction between between political and economic power. Civil and political rights reached their maturation in Europe at a time when the those who controlled the economic resources of the country had also achieved dominance over state power. They deployed their power over other classes not primarily through the apparatus of the state but through the market, by virtue of their superior economic means. In such circumstances negative rights of liberty and the rule of law, circumscribing the role of the state, are easy to ensure. The disjunction between economic and political power in the new states, particularly marked in Africa, means that the resources and apparatus of the state are deployed for accumulation and reproduction, giving a primacy to political power which makes its regulation problematic. State power is enhanced and its control rendered difficult. Because so many of the ways in which the state is harnessed to the process of personal aggrandisement or class accumulation are illegal and improper, a full and impartial process of the law is scarcely possible.

There are also more objective reasons also for the difficulties in implementing human rights. Many of the new states are fragile with weak national unity. The legitimacy of the government and frequently of the states is constantly questioned. Several of them are riven by acute ethnic conflicts and it appears sometimes as if the only way to maintain the integrity of the state is through the use of armed force. There is also widespread poverty which means that the governments claim to be preoccupied with the problems of economic development and give short shrift to demands of human rights, while to the bulk of the people burdened with the problem of eking out a living and cowed by decades of authoritarianism, human rights do not appear to have the urgency which it has for the middle classes, for whom rights are important for both pragmatic as well as ideological reasons. While it is, on the whole, quite right to treat the justifications of the leaders of many of the developing countries for the denial of human rights with a heavy dose of scepticism, we cannot deny that human rights are easier to enforce in more settled political and economic conditions. Nor is it always

possible to argue that respect for human rights would in itself reduce problems of national disaffection and disunity.

The second reason why it has proved easy to dispense with many human rights lies in the status and formulations of bills of rights themselves. Most states have not had to face Hong Kong's difficulties of entrenching a bill of rights; their bills of rights are an integral part of the constitution, and consequently enjoy a superior status. However, most bills of rights provide for escape clauses or derogations, whether in somewhat general terms as in the Indian-type bill or the more detailed specifications as in the bills influenced by the European Convention. Judges have generally taken a somewhat literal approach to these provisions for derogations, eroding the substance of the right. A good example is the Privy Council decision from the Caribbean state of Antigua, Attorney-General v. Antigua Times (1976).[4] The case concerned the validity of a law imposing a fee for licences that newspapers had to obtain. The respondent had argued that the fee was intended to put a curb on the right of expression protected by the Constitution. The court held that the respondent had failed to rebut the presumption that the fee was a means to raise revenue. But was it justified to raise revenue in this way? The relevant section does not so provide, expressly at least, and US case law has held that fees on constitutionally protected rights are impermissible. But the Privy Council held that since the Constitution provided that restrictions could be imposed on the right of expression "in the interests of defence, public safety, public order, public morality or public health", and since the revenue raised from the fee was likely to be used for these purposes, the fee was justified! The Privy Council made no attempt to examine the purposes for which the right of expression is constitutionally protected or the reasons for and the scope of derogations.

The second major problem is that most constitutions provide for declarations of emergency when many of the rights are either further qualified or abrogated. Once an emergency is in operation, the powers of the executive are greatly increased; it acquires the power to legislate in key areas of human rights. It is customary under emergency regulations for the government to have the power to detain a person without charges being brought against him/her and without a trial. Judicial protection against the abuse of these extensive powers has been minimal. The decision to proclaim an emergency is made by the federal government, and courts have refused to review the correctness of the decision on the basis that the executive is best placed to know the situation involving security and that its decisions must be presumed to be taken in good faith (a position strengthened by the House of Lords

4. [1976] AC 16

in the CSSU v. Minister for the Civil Service (1984))[5]. The trend was to some extent set by the Privy Council in Bhagat Singh v The King Emperor (1945)[6], where it refused to review the circumstances leading up to the declaration of an emergency.

The extent to which the courts carry these presumptions can be illustrated by the Malaysian case of Ningkan v. Govt. of Malaysia (1970)[7] where the Privy Council, following a majority in the Malaysian Supreme Court, upheld the bona fides of the government in declaring an emergency, ostensibly for security reasons, when it was quite notorious that the real reasons were its displeasure with the chief minister of Sarawak and the wish to get rid of him by the use of extraordinary measures. The Privy Council tried belatedly, in one of its last decisions from Malaysia to redeem itself, when in Teh Cheng Poh v. Public Prosecutor (1980)[8], it gave, albeit the faintest of hints, that an emergency may have to be justified before the court, a position the West Indian courts have taken since 1967 (Charles v. Philips and Sealey)[9].

Similarly the courts have refused, for the most part, to review the exercise of the powers of the executive once an emergency has been declared; here again we have to thank British judges, for the precedent set by the House of Lords in Liversidge v. Anderson [1946] [10] which despite the criticism, academic and judicial, it has received, is a long time a-dying, at least in some Commonwealth jurisdictions. It can be said, in general terms, that the courts have taken a restrictive view of the rights of detainees and other victims of state power when reviewing the exercise of executive discretion in emergencies, but it is only fair to say that in recent years courts in Zambia, Zimababwe and India (and indeed the Court of Appeal in Singapore in Chng Suan Tze v. Minister of Home Affairs (1988))[11] have frequently adopted interpretations favourable to the detainee.

Many governments have taken advantage of the latitude allowed them by the courts to rule through emergency powers; some countries entered into independence with emergency

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5. [1985] 1 AC 374

6. LR 58 1A 169

7. [1970] AC 379. I have tried to show the duplicity of the Federal Government in "The Politics of the Constitution: Another Look at the Ningkan Litigation" in M. Singh (ed.), Comparative Constitutional Law (Lucknow, Eastern Book Co., 1989).

8. [1980] AC 458

9. 9 WIR 299

10. [1946] AC 206

11. [1989] 1 KLJ 69

regulations (eg. Zimbabwe) or emergency type legislation (e.g. Singapore and Malaysia). These countries have inherited and used the tools of oppression perfected by the British colonial authorities. The Malaysian government has been so trigger-happy in proclaiming emergencies that it appeared at one point to have lost count, as is illustrated by the Teh Cheng Poh case. The emergencies have resulted in massive denials of human rights. Since important powers of the government are exercised through these regulations rather than through the constitution, the regulations have become the real constitution of these countries.

Another factor which has weakened human rights arises not so much from the bills themselves as the judicial process to which they are fastened. One can understand the dilemma of courts when they are confronted with constitutional challenges to legislative and executive action. Lacking democratic credentials of their own and rooted in somewhat alien traditions, they are vulnerable to nationalist attacks. Hence they take refuge in doctrines of judicial restraint. But between judicial restraint and judicial abdication there is a difference which has proved too subtle for most judiciaries. The courts have developed a number of devices which enable them to find for the government -- the presumption of constitutionality, the unchallengability of executive determinations of political or security necessities, the placing of heavy onuses on the citizen and the unwillingness of the courts to look too closely at facts which might embarrass the government. Few courts have engaged in a debate on the nature and purposes of human rights.

The judicial role

The judicial role has been weak, in part because the political environment has not been hospitable to judicial activitism. Political leaders in many developing countries, under attack for the record of their governments on human rights, have launched a counter-offence. At the international level, they have opposed to the increasing elaboration of human rights the concept of the right to development. The primary emphasis in this concept is on economic development, and the relation between the rich and the poor states. It calls for the transfer of resources from the rich to the poor states, and implies that for securing civil rights to their citizens, the poor states need larger external resources and quicker economic development. The right to development is also an attempt to re-assert state sovereignty over questions of human rights.

At the domestic level as well, the arguments of the primacy of economic development have been used to justify qualifications or abrogations of civil rights. The process of economic development requires high level of savings and redistribution of resources from one

group to another as well as from one sector to another, which cannot be done on a consensual basis. It is true that the Soviet Union was able to industrialise rapidly owing to the coercion of the peasantry, but the recent turmoil there and elsewhere in eastern Europe shows the limits of this strategy. Few developing countries have been able to expand economically and socially through the curtailment of human rights. There is now reaction in many countries against authoritarianism as it has failed in its self-proclaimed mission of social and economic development. The arguments of national unity have also been raised. The need for political stability and national integration (precarious in so many countries), is invoked, as I have already mentioned, in some instances to justify restrictions on human rights. I do not intend to enter into the debate as to the conflicts between or priority of different rights, but content myself with two observations. I think that there is a tendency on the part of liberal advocates of human rights to dismiss these claims too imperiously. On the other hand, these justifications are frequently invoked on spurious grounds as means to increasing authoritarianism in the service of a particular regime or government.

The detractors of human rights do not employ only these defensive arguments. They have also gone on attack, trying to occupy the high ground of philosophy and ethics. They have attacked the foundations of human rights, as rooted in western experience, glorifying the selfishness of individualism, alienated by and yet dependent on an impersonal market and state. They say that human rights respond to the problems of the individual who has been alienated from the community. He/she seeks his/her identity from within himself or herself, in an autonomy from the community, since the community no longer provides a basis of identity and social action. The abstraction of the individual from the community is proof of the spiritual poverty of the west. The cultural traditions of the east are rooted in the richness and primacy of the community. Individuals find their identity in interpersonal relationships, in the ties of reciprocity, and in affirmations of values that cohere in the community. Duties and obligations are as important as rights. The primacy of the community is a better means towards the achievement of human dignity and the fulfillment of the human purpose. An uncritical advocacy of the rights of the atomised individual is calculated to undermine traditional concerns and mechanisms of ensuring human welfare and dignity.

Here again I want to avoid entering the debate on this complex and emotive controversy, save for a few general and (I hope) cautious remarks. It seems to me that there is considerable merit in the analysis I have set out in the preceding paragraph, notwithstanding that it has been presssed in the service of authoritarianism. Modern civil and political rights are very much the product of western experience and philosophy. There is no doubt in my mind that contemporary bills of rights are an enormous imposition of western

political and cultural values on many peoples living in economic and social circumstances that have fashioned a different ethic. I was particularly and uncomfortably aware of this dilemma when I participated in the drafting of independence constitutions in some Pacific island states (where the penetration of state authority and commercial economy was still rudimentary). I say dilemma because the bills of rights form part of a constitutional settlement that also reinforces the modern state forms. The colonial rule, which begins the process of the rupture of the individual and the community, reaches some sort of culmination with independence when the state, freed from colonial constraints and displacing the community as the primary unit of rights and obligations, claims an independent legitimacy of its own. It is not obvious to me that the community can provide the safeguards for human dignity when faced with the power and pretensions of the modern state. For that reason, a bill of rights needs to be part and parcel of the arrangements that call a developing country into statehood.

Hong Kong

What relevance do these comparative perspectives have for a bill of rights in Hong Kong? Most of my analysis has focused on developing countries and it may be argued that Hong Kong has a highly developed economy, superior educational standards, and an excellent infrastructure. But Hong Kong shares many characteristics with developing countries: the colonial experience and now a species of decolonisation, religion and culture, particularly the strength of community institutions, huge income disparities, and relatively undeveloped political institutions. There are debates about the primacy of economic or political rights, many groups preferring the right to pursue their economic activities and maintaining the prosperity of Hong Kong to the demands of political rights that might disrupt that (and their) prosperity by too rapid an internal social mobilisation or by incurring the displeasure of China--debates which echo those of some of its neighbours. There is ambiguity about the social role of law and hesitations about challenge to authority.

In many former colonies, the legal artefacts fashioned by the colonialists have been pressed into service by the new regimes to stifle debate, freedom of the press, the right of association and competitive politics. The common law has proved a fragile reed in the face of these extensive statutory bases for arbitrariness. So a priority for Hong Kong must be a thorough and careful examination of present legislation to eliminate broad and untrammelled discretions and to ensure that amendments are made to bring them in line with the standards of human rights. Experience elsewhere shows that while a bill of rights can be an important means to protect human rights, it would be wrong to place too much confidence in it. To be

really effective it requires an infrastructure of support. This consists in a significant part in popular consciousness of the importance of human rights. Human rights must be valued for what they are, not as a means to more immediate economic and social goals. There is perhaps too much of a tendency in Hong Kong to see the bill in purely defensive terms, as a bulwark against excesses from the mainland, rather than as affirmations of human dignity. The values of human rights will begin to permeate the culture of Hong Kong only when its people feel sufficiently moved by the hardships inflicted on the Vietnamese boat people or the shootings of pro-democracy supporters in Burma and Nepal or the daily and pervasive injustices against the blacks of South Africa that they would take to the streets in protest as they did over the events of last June.

A second aspect of the supporting infrastructure is the number of voluntary agencies who are prepared to fight for various human rights, through lobbying, campaigns, assistance to victims of human rights abuses, and litigation. An individual on his or her own is frequently unwilling or unable to take on the state. Voluntary groups help raise consciousness of rights and document their violations. Their activities serve to monitor the observance of human rights by the government and in due course to force it into self-restraint. A bill of rights also needs active pluralistic politics; it both enables such politics and is sustained by it.

While the courts will remain the ultimate guardian of the bill, they cannot, as experience shows, be relied on to be the primary guardian. The vagaries and vicissitudes of litigation, to say nothing of the casuistry of judicial reasoning, counsel primary reliance on other institutions and mechanisms. Apart from popular education and voluntary organisations, informal means of complaints and their redress should be provided, e.g. through strengthening an office like the ombudsman or establishing an independent human rights commission (which combines functions of education, enforcement and facilitates litigation) as is argued in this volume by David Clark.

It is just as well to caution oneself against the consequences of too effective an enforcement of the bill of rights, although it is unlikely that Hong Kong will suffer the consequence sometimes ascribed to human rights legislation in US, Canada and Europe, that of overlegalisation. Public issues get increasingly cast in legal terms, and are frequently resolved only through litigation. In any event the threat of litigation is constantly present, and serves to weaken the political process in policy making. The result is a major shift in power to lawyers and courts. Not every one is happy with this shift, as many see lawyers and courts as allied to the powerful and wealthy sections of the community and principally committed to the protection of their interests. It is not for a newcomer like me to comment on the ethos

of the legal profession here, but it would not be an unreasonable assumption that, given the dominance of commercial and financial sectors, they provide the main market for legal services and thus shape the organisation and orientation of the profession. Class interest litigation and public interest firms have yet to hit Hong Kong; these sometimes help in some measure to redress the advantages the propertied and well-connected enjoy in our system of rights and litigation.

The concern with this economic orientation is reinforced by the bias of the proposed Ordinance which is based on the ICCPR, and is biased towards the market and individual rights. One can understand the reasons given by the government for the exclusion of social, cultural and economic right, but the Basic Law itself is deficient in the protection of these rights. Indeed its philosophy of "two systems" (coupled with slow progress to democracy) may well entrench the dominance of present wealthy groups. I think that there is reason to be concerned about the ideological orientation of the bill, and its potential to pre-empt social and economic policies for a more just society in Hong Kong.

The Bill of Rights: Some Basic Constitutional Considerations

P J Dykes

A. THE OBJECTIVE OF THE BILL OF RIGHTS

THE purpose of any meaningful Bill of Rights is to enhance the status of basic rights and freedoms and secure them for the benefit of present and future generations, so far is practicable, within a given constitutional framework. Our instructions as persons asked to draft the Bill of Rights for Hong Kong were, putting it simply, to do just that.

Bills of Rights come into existence for a variety of reasons. Very often, the initiative for having a Bill of Rights is political. Sometimes they come about because of sheer constitutional enthusiasm. But motives for having a Bill of Rights are really of no concern to those charged with the drafting. They must draft in such a way as to ensure that the Bill achieves its purpose - the enhancement of rights and freedoms - but make sure that it is also a constitutionally competent document. Failure to do either of these things means that the product - the Bill of Rights - is flawed and the objective has not been attained.

B. CONSTITUTIONAL CONSTRAINTS

The formal constraints within which we have drafted the Bill are the existing limitations on the powers of the Governor and the Legislative Council to enact constitutional laws, and the Basic Law. It may not be surprising that they both of them presented problems of a similar nature to the drafters.

The real problem was of course, entrenchment of the Bill of Rights. Entrenchment would ensure for the Bill the legal supremacy which would be required to make sure the rights and freedoms which it protected stay protected for as long as is possible. The techniques for entrenching a Bill of Rights are well known. They range from incorporation of the Bill of Rights in solid constitutional documents such as in the USA to protection through the most basic of democratic institutions, the referendum.

In Hong Kong the options for entrenchment before 1997 were basically [i] amending the constitutional documents or inviting the UK government to create through an Order in Council or Imperial Act a new source of legal authority in order to place the Bill of Rights above all other local laws or [ii] devising local constraints for the Legislative Council whereby the passage of legislation which was inconsistent with the Bill of Rights was made procedurally difficult and highly public. We were naturally attracted to the second option. But there was a difficulty right on our doorstep before we went on to consider the compatibility of this option with the Basic Law.

C. THE COLONIAL LAWS VALIDITY ACT

This Act was passed by Parliament in 1865 in order to avoid doubts that had arisen as to the legislative competence of colonial legislatures. Putting the matter very simply, the effect of the 1865 Act was that Legislative Councils in the colonial world were split into two categories for the purposes of the Act. In the first group were legislatures which were "representative" which meant that more than one half of the members were elected. "Representative" legislative councils had the power to enact laws relating to their own constitution, powers and procedure. It was therefore open to a unicameral legislative council to enact a law so that it would become bicameral and vice versa; measures could be enacted in a representative legislative council requiring special majorities to repeal them or overcoming some other kind of procedural inhibition. In the second group of legislatures were the poor cousins, the non-representative legislative councils. These, by necessary implication under the terms of the Act of 1865, were incapable of changing their constitution without some express Imperial authority such as an Order in Council or an amendment to the Letters Patent. Hong Kong is a non-representative legislature under the 1865 Act.

We decided therefore that self-imposed checks on the legislature which were designed to protect a Bill of Rights, such as special majority voting or the delayed passage of amendment bills, were likely to be characterised as the kind of things which only a "representative" legislature could achieve. Going this way meant that we would fall foul of the 1865 Act unless we asked the UK Government to amend the Act and exempt us from its application as far as taking these steps to protect the Bill of Rights was concerned. This was considered but rejected not because we did not think the Britain would slacken the constitutional reins if requested, but because of the implications for the health of the Bill of Rights under the Basic Law if we sought to impose formal constraints on the powers of the SAR Legislature or in fact if we did anything which was likely to be construed as such.

D. THE BASIC LAW

As I observed above, the task of the drafters was to try and produce a document which would enhance human rights in Hong Kong in the long term. This meant trying, at the very least, to produce a draft which would be consistent with the Basic Law.

The way into the Basic Law for any ordinance enacted before 1997 is Article 8 which says that any law previously in force "shall be maintained" unless it is inconsistent with the Basic Law. The ultimate arbiter at the national level of the constitutional validity of laws in force in Hong Kong after 1997 will be the Standing Committee of the National People's Congress under the terms of Articles 157-159 of the Basic Law. The NPC can revise inconsistent laws to make them consistent or, more drastically, it can declare that they shall be of no effect. A Bill of Rights for Hong Kong would have to conform to the Basic Law if it was to have any long term prospects. To do this, it would have to survive in the first place the constitutional rites of passage under Article 8 of the Basic Law at midnight on 30 June 1997.

We therefore opted for article 39 of the Basic law as the means of securing the Bill of Rights for the future. We have taken as our starting point the constitutional commitment there to implement through the laws of Hong Kong the provisions of the ICCPR as applied to Hong Kong. What better way of doing that than through a justiciable Bill of Rights which reproduces the ICCPR as applied to Hong Kong, even if this means reproducing the reservations? We noted also that the second paragraph of this article committed the future SAR government to the constitutional principle that, whatever rights and freedoms were enjoyed by the residents of Hong Kong, whether under a Bill of Rights, an ordinance or the common law, they could not be abridged save by a law which was consistent with the permissible limitations on the rights and freedoms recognised under the ICCPR. The SAR government could repeal a Bill of Rights therefore but they were bound to put something in its place which was at least as effective.

We decided that our goal of securing the rights and freedoms under the Bill of Rights could be achieved by asking the British Government to amend the Letters Patent along the lines of article 39. That is to say, to recognise that the Legislative Council will not have the legal competence in the future to enact laws which are not consistent with the ICCPR as applied to Hong Kong. The precise wording of the amendment is not a matter for us but is something for the British Government.

E. FEATURES OF THE BILL OF RIGHTS

So much for form and the constitutional imperatives. What about the content of the Bill?

(a) It reproduces the ICCPR almost verbatim. The only modifications we have made we think fairly reflect the fact that Hong Kong is and will always be something less than a State. This accounts, for example, for the omission of article 24(3) of the ICCPR - the right of a child to acquire a nationality - which is something which is beyond the competence of the Hong Kong Government today and the SAR after 1997. To have left that provision in the Bill of Rights would have sounded lofty but would have been a legal and political impertinence.

(b) We have a preamble to the Bill of Rights. These are not common nowadays but can still be used on important occasions such as this in order to make an important statement which is basically that the Bill has its origins in international instruments and is not just another ordinance.

(c) The overriding and interpretation clauses - clauses 3 & 4. Here we expressly repeal all laws in Hong Kong which the Legislative Council is capable of repealing which and which are inconsistent with the Bill of Rights. Courts are enjoined to "read down" existing legislation whenever possible to preserve it if it can be construed against the Bill of Rights without inconsistency. This is in order to make sure that the baby is not thrown out with the bathwater when judges review legislation against the Bill of Rights.

(d) The characterisation of a breach of the Bill of Rights as a tort - clause 6(1). We wanted it to be beyond a doubt that a breach of the Bill of Rights would give rise to a claim for damages at the very least. We therefore decided to create a new statutory tort.

(e) The competence of all courts and tribunals to apply the Bill of Rights - clause 6(2). We rejected the idea of a special Bill of Rights court or special Bill of Rights forms of action. We particularly did not like the idea of instanter referrals from lower courts to the High Court in cases where Bill of Rights issues arose. We thought that might tend to make the Bill of Rights a remote or precious law, rather than a law which was genuinely accessible and in daily use in the courts.

(f) Extension to third parties - clause 7. We have created new rights and

obligations which affect personal relationships between private citizens. We felt here that by binding everyone in Hong Kong we would help secure the health and vigour of the Bill of Rights. The problem is of course though that in fact we create a new tort of breach of a right to privacy. It would affect all bodies that hold information about us. However we took heart from the fact that there would appear to be growing acceptance of the fact that the common law is defective is not affording some degree of protection to a person's private life and we were further encouraged to note that the Law Reform Commission has embarked on a reference relating to privacy.

International Human Rights Law and Domestic Hong Kong Law

Roda Mushkat

WILL the Bill of Rights enhance the implementation in Hong Kong of international legal norms pertaining to human rights?

The answer hinges on the determination of three essential factors:

1. The degree to which the international rules have been incorporated in or have influenced national and local legislation;

2. Whether such rules are fully implemented in actual practice;

3. The establishment of workable enforcement procedures by which members of the domestic community may seek redress of violations and deficiencies.

I. Incorporation in the Domestic Law

A. The Relationship between International Law and Domestic Law in Hong Kong

Before ascertaining the extent of incorporation of human rights law in the Hong Kong law, it may be useful to review the general relationship between international law and domestic law.

There is no constitutional provision either in British or Hong Kong law stating the relationship between international law and domestic law. The basic proposition which has been established by British judicial practice is that customary international law forms part of the common law of England - and hence is applicable as part of the law of Hong Kong - while conventional international law - consisting of treaties, conventions and other international agreements - requires formal incorporation.

1. The Status of Customary International Law in Hong Kong Courts

More specifically, British courts and their colonial counterparts have adopted with respect to customary or general international law at least the rhetoric of what is known as the

"incorporation doctrine." Declared by British courts as early as 1737[1] and codified by Blackstone in his Commentaries on the Laws of England, the doctrine provides that "the law of nations, in its fullest extent, was part of the law of England." In a passage which merits quotation, Blackstone enunciated that "[t]he Law of Nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted to its full extent by the common law, and is held to be part of the law of the land. And those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not considered to be introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the Kingdom, without which it must cease to be part of the civilised world."[2] The most recent categorical affirmation of the doctrine can clearly be attributed to Lord Denning M.R. and Shaw L.J. in the Trendtex Trading Corp. Ltd. v Central Bank of Nigeria.[3]

Yet, two major constraints overshadow substantial implementation of the doctrine. First, since under British constitutional law, as effective in Hong Kong, legislative acts are paramount, a rule of common law would yield before an Act of Parliament in a British court or an Ordinance in a Hong Kong court.

Secondly, British and Hong Kong courts are limited in their power to neglect precedent and apply new or modified international law. Hence, it is quite possible for English law and international law to take divergent paths. It is a moot question whether judges will follow the emphatic statements of Lord Denning and Shaw LJ[4] that international law did not know a rule of stare decisis - and that "the English courts must at any given time discover what the prevailing international rule is and apply that rule" and that where international law had changed the court could implement that change "without waiting for the House of Lords to do it." A degree of scepticism is not unjustified.

Two other limiting factors or exceptions proper to the automatic applicability of customary international law by municipal courts exist under British practice.

First, the "Act of State" doctrine may prevent an English court from applying a rule of customary international law. Thus, domestic courts will accept acts of the executive

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1. Buvot v Barbuit (1737) 25 E R 777 (per Lord Talbot)..

2. Blackstone, Commentaries on the Laws of England (15th edn., 1809), Book IV, Ch. 5, p. 67.

3. [1977] 2 WLR 356, at pp. 365-66 (per Lord Denning M.R.: "...it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law"); See too p. 388 (per Shaw LJ).

4. Loc.cit.

performed as a matter of policy in the course of its relations with another State (e.g., a declaration of war, an annexation of territory or an act or reprisal) and will not declare them to be invalid despite the fact that a breach of international law may have occurred.[5]

Secondly, and closely related, is the acceptance by the courts as binding the view of the executive as to the existence of certain legal situations in the international sphere (e.g., recognition of foreign States or governments, territorial sovereignty, existence of a state of war, entitlement to diplomatic status, etc.), irrespective of whether or not the certified executive position is in agreement with the international law position.[6]

To the more specific belief that on matters concerning foreign relations the State "cannot speak with two voices"[7] and that "sound policy requires that the courts of the King shall act in unison with the Government of the King"[8] one may add the tradition of British/Hong Kong judges to stay aloof from political questions as much as possible and their general [unjustified] reluctance to rule on questions of international law.[9]

There are of course problems of incorporation which are inherent in the nature of customary international law, including the difficulties encountered in ascertaining the existence of rules of customary international law, the vagueness of formulation of such rules (many of which take the form of permissions rather than mandatory rules) and their inappropriateness when applied to individuals (as distinct from States).

2. Application of Customary International Human Rights Law in Hong Kong

It is evident from the above discussion that stating that customary or general international law is part of the common law would offer little reassurance to Hong Kong people seeking judicial recognition of their international human rights,[10] particularly if the

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5. See generally Phillips and Jackson, O. Hood Phillips's Constitutional and Administrative Law, 7th edn. (Sweet & Maxwell, 1987) at pp. 278-81.

6. See Wade and Bradley, Constitutional and Administrative Law, 10th edn. (Longman, 1985) at pp. 314-5.

7. Government of the Republic of Spain v SS Arantzazu Mendi [1939] AC 256, at p. 264 (per Lord Atkin); see also British Airways v Laker Airways [1984] QB 142.

8. Taylor v Barclay (1828) 57 ER 769, at p. 772.

9. See, for example, Buttes Gas and Oil Co. v Hammer [1982] AC 888 (HL).

10. It may be instructive in this connection to refer to R v Secretary of State of Foreign and Commonwealth Affairs ex parte Pirbhai and Others [unreported judgment] where a distinction was drawn by Woolf J between international legal rules concerning sovereign immunity which

decision in In re an Application by Wong Chun-Sing and Ng Fook-Yin for Judicial Review[11] is indicative of the local judicial approach. Rejecting a claim for judicial review based on Article 10 of the Universal Declaration of Human Rights, the Court held that the Declaration - which in the light of strong evidence constitutes part of customary international law[12] - did not have the force of law in Hong Kong and therefore could not be enforced by the courts.[13]

Yet, although the Hong Kong court in Wong and Ng did not even consider whether international norms embedded in Universal Declaration of Human Rights could be relied upon for the purpose of statutory interpretation, an early local authority could have been furnished to support judges so inclined. In the decision In the Matter of an Arbitration between the Osaka Shosen Kaisha and the Owners of the S.S. Prometheus[14] - well-known for the authoritative statement included therein that international law is "law" - the Hong Kong court applied customary international law as an aid in the interpretation of a term in a contract between private parties.

3. The Status of Treaty Obligations in Hong Kong Domestic Law

In contrast with the position of customary international law, treaties are not directly received into English law and are incapable of constituting a rule of law for the courts in the absence of legislative implementation.[15]

This basic premise has been transplanted into Hong Kong law. Indeed, as early as 1880, the Supreme Court of Hong Kong, sitting as a Full Court in the Status of the French

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have "undoubtedly been adopted and incorporated into English law" and "rules or principles of international law, for example relating to human rights, which are no part of our domestic law and the domestic courts cannot apply or interpret them in the same way as they apply and interpret domestic law."

11. [1984] HKLR 71.

12. See "The Legal Status of the Universal Declaration of Human Rights" in Lillich and Newman, eds., International Human Rights: Problems of Law and Policy (Little, Brown & Co., 1979) pp. 56-66.

13. See note 11 above at pp. 74-5.

14. (1906-8) 2 HKLR 207, at p. 222.

15. See the most recent restatement of this constitutional principle in J.H. Rayner Ltd. v Department of Trade and Industry and Others and Related Appeals; Maclaine Watson & Co. Ltd. v International Tin Council [1989] 3 WLR 969 at pp. 980 (per Lord Templeman), 1001-2 (per Lord Oliver).

Mail Steamers[16] rejected an attempt to distinguish the position of Hong Kong in relation to the domestic application of treaties on the ground that it was a Crown Colony. The Court relied on the Parliament Belge[17] to affirm that "no treaty by the Queen with a foreign Power can affect the rights and privileges of the Queen's subjects within Hong Kong except under the sanction of an Act of Parliament or of a local ordinance or probably an order of the Queen in Council."

That treaties have no effect on local law unless incorporated into it was confirmed by the Privy Council in the celebrated case of Winfat Enterprises (HK) Co. Ltd. v Attorney General of Hong Kong[18]. The appellants in the case challenged a refusal by the Hong Kong government of a building permission and the amount of compensation following compulsory purchase by the Government as contrary to the terms of the Peking Convention of 1898. The Privy Council held that the stipulation against expropriation contained in a bilateral treaty such as the 1898 Peking Convention could not create rights enforceable by individuals in municipal courts. A similar ruling was adopted more recently by the Hong Kong High Court in The Home Restaurant Ltd. v The Attorney General[19] with respect to a contention (entitlement to renewal of Crown lease without payment of premium) based on the Sino-British Joint Declaration (para. 2, Annex III). The Court held that the Sino-British Joint Declaration and its Annexes being a treaty was not justiciable. Nor for that matter did the Government's announced intention to implement the Joint Declaration give rise to a justiciable legitimate expectation (it was impossible to determine the Government's policy without a detached examination of the Joint Declaration and its annexes which, as a treaty, was not justiciable).

Yet, while an unincorporated treaty cannot found a cause of action, authorities are available to support the observation made by a well-known expert, Dr F A Mann, that when the occasion or necessity arises, English courts are "in principle neither unable nor unwilling to look at, construe, and give effect [even] to treaties which have not been adopted by Parliament."[20] Indeed, it may be noted that in relation to civil liberties, English judges have demonstrated a willingness to consider and be influenced by international treaties or

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16. The Daily Press, January 12, 1880.

17. (1878-79) 4 PD 129.

18. [1985] 1 AC 733.

19. [1987] HKLR 237.

20. Mann, Foreign Affairs in English Courts (Clarendon Press, 1986) at p. 87; see the cases cited by Mann at pp. 87ff.

more specifically the European Convention on Human Rights although it has not been incorporated into English law.[21] Judges are particularly inclined to take into account the terms of a treaty, including an unincorporated one, when the provisions of the primary legislation were "fairly capable of bearing two or more meanings, and the court in pursuance of its duty to apply domestic law, was concerned to divine and define the true and only meaning."[22]

Still, little guidance may be derived in this respect from the British judicial scene. As noted by one observer, "from the perspective of counsel seeking to introduce treaties into the legal argument, the attitude of the British courts is a lottery. The approach will vary from judge to judge; and the case law to date shows striking and unacceptable inconsistency."[23]

4. Application of International Conventional law of Human Rights in Hong Kong

Most significantly, two major international conventions on human rights apply in Hong Kong. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were ratified by the United Kingdom on 20 May 1976 and, subject to certain reservations have been extended to Hong Kong[24] (The reservations pertain to the right to self determination, custodial procedures, freedom of movement or immigration restrictions, expulsion of aliens, policies concerning acquisition of nationality or right of abode and the right to free election).

Thus, as a party to the ICCPR, the United Kingdom is bound under international law "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognized in the Covenant. It is further bound "[w]here not already provided for by existing legislative or other measures... to take the necessary steps, in accordance with its constitutional processes and with the provisions of the ... Covenant, to adopt such legislative measures as may be necessary to give effect to the rights recognized in the ... Covenant."

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21. See the cases cited by Higgins, "United Kingdom" in Jacobs and Roberts, eds., The Effects of Treaties in Domestic Law (Sweet & Maxwell, 1987) at p. 135; See also Dale, "Human Rights in the United Kingdom" 25 ICLQ 292 (1976); and Duffy, "English Law and the European Convention on Human Rights" 29 ICLQ 585 (1980).

22. R v Secretary of State for the Home Department Ex parte Brind and Others [1990] 1 All ER 469, at p. 477 (per Lord Donaldson MR).

23. See Higgins, note 21 above, at p. 131.

24. See Wilson, ed., Multilateral Treaties Applicable to Hong Kong (Attorney General's Chambers, 1984).

Its obligations under the Covenant also include ensuring that "any person whose rights or freedoms as ...recognized are violated shall have an effective remedy" and that "the competent authorities shall enforce such remedies when granted."

In relation to economic, social and cultural rights, the United Kingdom has assumed, in accordance with the ICESCR, an international obligation "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 .. Covenant by all appropriate means, including particularly the adoption of legislative measures."

Neither covenant has, however, been incorporated into Hong Kong (or United Kingdom) law. The British Government has adopted the approach that it was giving effect to its treaty obligations by seeking to ensure that domestic law was not inconsistent with the relevant conventions.[25] With respect to British Dependent Territories, the representative of the United Kingdom to the United Nations Human Rights Committee stated recently[26] that provisions of the ICCPR were "given effect through various legal instruments," including constitutions, local legislation, applicable English legislation and case law. In addition "laws enacted in dependent territories were examined by the Government of the United Kingdom which had powers to require their amendment or to disallow them if they were found to conflict with the treaty obligations of the United Kingdom."

Such glib assurances notwithstanding, the fact remains that unless a treaty is incorporated into domestic law by legislation, the courts cannot enforce rights guaranteed under the treaty.[27] Nor can executive authorities be compelled to take account of such a treaty and their decision cannot be impeached when they fail to do so.[28] It is arguable, therefore, that the United Kingdom has not discharged its international legal obligations under

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25. See summary of the UK position as reflected in the report submitted in August 1977 to the UN Human Rights Committee, in Marston, "United Kingdom Materials on International Law 1978" XLIX BYIL 360 (1978); see also note 22, above.

26. See Discussion by the Human Rights Committee of Second Periodic Report of United Kingdom Related to Dependent Territories, Press Release HK/2273, 4 November 1988, at p. 4; see also Commentary on the Draft Hong Kong Bill of Rights Ordinance 1990 (March 1990) [hereafter: "Commentary"], Sec. 5 at p. 2.

27. See notes 15-19 above.

28. See R v Secretary of State for the Home Department Ex Parte Fernandez, repr. in 78 ILR 371 (1988).

the Covenants.[29] It may in fact have failed to comply with a general duty to incorporate international treaties into domestic law.

B. A Duty to Incorporate?

To state it more explicitly, under one of the most fundamental rules of international law[30] treaties must be executed in good faith in accordance with their content and purpose (pacta sunt servanda). It is, therefore, legitimate - in fact essential - to inquire whether certain ways of dealing with treaty obligation under domestic law are compatible with this basic requirement (although, in strict terms the rule governs relations between States).

International jurists,[31] relying on the Advisory Opinion of the Permanent Court of International Justice in the Exchange of Greek and Turkish Populations case,[32] have maintained that States are under general duty to bring internal law into c[1]onformity with international obligations which, in certain circumstances, imports a duty to pass the necessary legislation.

Further support is thus lended to the argument raised earlier that the United Kingdom has not performed its obligations under the human rights covenants in good faith, and that such obligations will only be duly complied with upon the incorporation of the treaties into the domestic law. It may be added, as pointed out by Jayawickrama, that while some constitutional constraints may operate in the United Kingdom itself to obviate the need for incorporation, none exist in Hong Kong and indeed even in the United Kingdom results are transient.[33]

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29. See discussion in Jayawickrama, "Hong Kong and the International Protection of Human Rights" in Wacks, ed., Civil Liberties in Hong Kong (Oxford University Press, 1988) pp. 51-55.

30. Codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).

31. See, for example, Starke, Introduction to International Law, 10th edn. (Butterworths, 1989) at p. 89; Partsch, "International Law and Municipal Law" in Encyclopedia of Public International Law, Vol. 10 (North-Holland, 1987) at pp. 238-257; and references therein.

32. PCIJ Series B, No. 10, p. 20 (1925).

33. See note 29 above, at pp. 52-3, 54.

C. What Constitutes "Incorporation"?

Basically, incorporation may be 'direct' and 'indirect.' It is said to be the former when a treaty becomes an integral part of the legislation itself, for example by including it in a schedule attached to the statute. Indirect incorporation or incorporation by reference may take two forms: the treaty may be mentioned in the statute itself, usually in the Preamble or the statute may make no reference to the treaty yet extrinsic evidence may be provided to show that the statute was designed to incorporate the treaty.

D. The Effects of Incorporation

A treaty which has been incorporated becomes part of the law of the land and hence justiciable in the courts of the land. Clearly, as commented upon by Higgins, "those that are incorporated in terms - by being appended to a Statute, and forming the substantive part of the Statute - have the most unequivocal status in domestic law."[34] Yet, in the English legal system - and its Hong Kong counterpart - even incorporated treaties have no special position and enjoy no higher status than other statutes. Thus, in accordance with the lex posterior rule of construction, a later statute on the same subject matter may prevail over an earlier one incorporating an international treaty. In other words, an unambiguous piece of legislation which conflicts with obligations undertaken by the State in a treaty may still be applied by the courts notwithstanding incompatibility with the treaty terms.

It should be added, however, that there is in English law a presumption that legislation is to be so construed as to avoid inconsistency with international law.[35] Accordingly, where the provisions of a statute implementing a treaty are capable of more than one meaning and one interpretation is compatible with the terms of the treaty while others are not, it is the former approach that will be adopted. By the same token, where the words of the statute are unambiguous the courts have no choice but to apply them irrespective of any conflict with international agreements.[36]

Arguably, such an approach is at variance with notion of incorporation as an introduction of a treaty into the legal system of a state without altering its international and

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34. See note 21 above, at p. 129.

35. Maxwell, Interpretation of Statutes, 12 edn., p. 183; see also note 22 above, at p. 477 (per Lord Donaldson MR).

36. See Salomon v Commissioners of Customs and Excise [1967] 2 QB 116.

contractual nature.[37] Of course, entrenchment of treaty provisions in the incorporating statute - namely providing that it would prevail over prior conflicting legislation and over subsequent legislation - will ensure a more "proper" incorporation. Without entering the debate as to whether entrenchment is possible under British constitutional law, it may be pointed out that the United Kingdom Parliament had legislated in the past to divest itself of sovereignty[38] and, as observed by Lord Denning, has not subsequently endeavoured to reclaim it ("freedom once conferred cannot be revoked").[39] Nor would entrenchment dilute Chinese sovereignty since the implementation of the International Covenant on Civil and Political Rights in the Hong Kong Special Administrative Region in a manner consistent with the objective to minimise future legislative encroachments is clearly sanctioned under Article 39 of the PRC's Basic Law for the Region.[40]

E. Incorporation in the Hong Kong Draft Bill of Rights Ordinance

That the Draft Bill of Rights reflects a desire to incorporate the International Covenant on Civil and Political Rights is beyond doubt. Such an objective can be clearly gleaned from the Preamble to the Draft. Predictably, the Hong Kong Government - in an effort to reinforce the impression that the International Covenant has in fact been implemented since its ratification and extension to Hong Kong through "a combination of common law, legislation and administrative measures"[41] - has been anxious to stress that the purpose of the Bill is "to implement further the International Covenant on Civil and Political Rights as applied to Hong Kong" [emphasis added]. The Preamble nonetheless reaffirms the undertaking included in the Covenant "to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the

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37. Apart from the fact that on the international level the State might incur responsibility for breach of international law and could not seek shelter behind its domestic law; see Article 27 of the Vienna Convention on the Law of Treaties; Article 13 of the 1949 Draft Declaration on the Rights and Duties of States, YBILC 1949, 286; and relevant court jurisprudence extracted in Henkin and Others, International Law. Cases and Materials (West Publishing, 1980) p. 114.

38. For example, Section 4 of the Statute of Westminster 1931; the European Communities Act 1972, Sections 2(1), 2(4).

39. Blackburn v Attorney General [1971] 1 WLR 1037, at p. 1040.

40. For a discussion of appropriate methods of entrenchment for the Hong Kong's Bill of Rights, see J Chan, "Entrenchment" The New Gazette (March 1990) pp. 37-42.

41. Commentary, Section 5.

Covenant."

At the same time, the drafters have not opted for "direct" incorporation, preferring instead to enact the treaty terms independently - although "following closely the text of the ICCPR"[42] - and revise them in the light of reservations entered by the United Kingdom with respect to the treaty application to Hong Kong.

In adopting this mode of incorporation, the drafters may have reinforced judicial trends of "provincialism" namely looking at the domestic legal instrument rather than the treaty as an international document subject to international standards of interpretation.[43] Admittedly, the Draft Bill of Rights endeavours to preserve the link with the ICCPR by stipulating that "[i]n interpreting and applying this Ordinance, the rules of interpretation applicable to other Ordinances may be disregarded and regard shall be had to - (a) the fact that the purpose of this Ordinance is to implement further the International Covenant on Civil and Political Rights as applied to Hong Kong; and (b) the international origin of that Covenant and the need for uniformity in interpretation of rights recognised in that Covenant and similar rights recognised in other international agreements." And as elaborated in the Commentary, "when the courts are giving a meaning to words which are not defined, they should look to the Covenant for guidance and also to decisions by courts or like bodies that have interpreted the Covenant, or similar words from other human rights treaties."[44] Yet, it may be reiterated that English and Hong Kong courts would only look at a treaty if they are convinced that language of the statute is not unambiguous.[45]

Finally, it may be noted that no incorporation of any type has been attempted with respect to the International Covenant on Economic, Social and Cultural Rights or for that matter of other human rights related treaties applicable to Hong Kong including the international labour conventions.[46] The reason advanced in the Commentary to the Draft Bill of Rights Ordinance, namely that the rights contained in the ICESCR cannot be easily enforced in the courts,[47] suggests a rather narrow conception of incorporation of treaties as mere causes of action while ignoring their significance as legally relevant rules of decision.

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42. Ibid., Section 6.

43. See Higgins, note 21 above, at p. 137.

44. Commentary, Section 12.

45. See note 36 above and related text.

46. See enumeration in Jayawickrama, note 29 above, at pp. 34-5.

47. Commentary, Section 7.

It should be pointed out that the incorporation of a treaty also means that in situations where public policy governs legal relations courts may be bound to consider the treaty commitments as an ingredient in the public policy of the State in the same way as the laws and applicable legal precedents and, to the extent appropriate, give such policy judicial effect.[48]

To conclude the analysis of the effect on human rights protection in Hong Kong of incorporation in the Draft Bill of Rights Ordinance of the International Covenant on Civil and Political Rights, the following observations may be offered:

The Bill of Rights, as an incorporating instrument, focuses attention on the authoritative character of the relevant international obligations under the ICCPR and on the necessity for their fulfilment.

The adoption of a Bill or Rights which follows closely the wording of the articles in the international Covenant should make judges (at all levels) feel more secure - with the backing of international jurisprudence and international authoritative interpretation - and less timid to review legislation and develop their own jurisprudence.

In fact, one could not forecast with any measure of precision the influence of such a Bill of Rights in the hands of judges who are inclined and ready to exhaust all possibilities to protect the rights of the individuals.

Yet, even an open and internationally minded judiciary should be helped by a proper constitutional setting, including a formal recognition of the supremacy of human rights with respect to the rights laid down in the Bill of Rights and the amendment of the Constitution to include judicial right to review legislation and administrative acts and strike out as invalid local laws and practices which infringe applicable international human rights conventions.

II. Implementation

Of course the fact that human rights are enumerated in a Bill of Rights or even a constitution and that these legal instruments use the phraseology of international conventions is no proof in itself that the rights thereby proclaimed or defined do exist or are respected. There is often a remarkable discrepancy between constitution and practice and sufficient examples may be furnished of similar articles remaining only on paper.

It is not possible, therefore, to ascertain whether the proposed Bill of Rights would enhance the implementation of international human rights in Hong Kong on the basis of the

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48. See Schachter, "The Charter and the Constitution: The Human Rights Provisions in American Law" in Lillich and Newman, International Human Rights, note 12 above, at pp. 37-42, 72-77.

document itself. An investigation must be conducted into how the general, abstract norms are being made concrete in simple statutes, administrative regulations and decisions, judicial decisions as well as private contracts.

It may be pointed out that while the courts are generally perceived as the guardians of individual rights, efforts of implementation may extend beyond the scope of the judiciary and include the establishment of civil liberties bureaus[49] and ombudsmen.[50]

III. Enforcement

Yet enlightened goals and available options and institutions for implementation of rights are of limited value in the absence of effective enforcement mechanisms by which members of the domestic community may seek redress of violations and deficiencies.

Unfortunately, the proposed Bill of Rights has made insufficient contribution in this respect. Notwithstanding the binding force of the Bill with respect to Governmental authorities, existing restrictions on actions against the Crown have not been lifted nor have new mechanisms been introduced to enable people to sue the Crown for violation of human rights.[51] Characterising breaches of the Bill of Rights as civil wrongs, as distinct from crimes, also means the imposition of restraints applicable under the Common Law to actions in torts, for example, with respect to locus standi and burden of proof.

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49. See, for example, Civil Liberties Bureau in Japan which is a functioning organ of the Ministry of Justice with central staff, over 250 offices across the nation and a system of volunteer workers ('Civil Liberties Commissioners') empowered to investigate, collect information and provide warnings and advice on all types of infringement of human rights. Noted in Skoler, "World Implementation of the UN Standard Minimum Rules for the Treatment of Prisoners" extracted in Lillich and Newman, ibid., p. 224, 234.

50. For a general review of different systems of ombudsmen, see Caiden, The International Handbook of the Ombudsman, 2 Vols: Evolution and Present Function; Country Surveys (Greenwood Press, 1983); It may be interesting to note the recently established ombudsman (or more accurately, "Commissioner for the Protection of Civil Rights)" in Poland whose jurisdiction extends not only to examining the legality of activities of Polish administrative bodies but also an assessment "from the point of view of ethics and morality" - see Letowska, "The Polish Ombudsman (The Commissioner for the Protection of Civil Liberties)" 39 ICLQ 206-217 (1990).

51. Consideration is said however to be given by the Hong Kong Government to possible revision of the Crown Proceedings Ordinance. See report by A Ho, "Laws Needed to Protect New Bill of Rights" South China Morning Post 16 March 1990, p. 1.

It is also regrettable, and without legitimate justification,[52] that while new legislation, common law and administrative practices and procedures will be liable to challenge under the Bill from the time of its enactment as law, a two-year freeze period is proposed on the invalidation of existing statutory law for inconsistency with the Bill of Rights.

Finally, it should be emphasised that incorporation of the International Covenant of Civil and Political Rights in the Bill of Rights does not in itself guarantee access of Hong Kong people to international institutions for the enforcement of human rights. The position remains that in the absence of United Kingdom ratification of the 1976 Optional Protocol to the International Covenant on Civil and Political Rights, individuals subject to the jurisdiction of the United Kingdom are deprived of the opportunity to submit complaints directly to the UN Human Rights Committee. At the same time, the United Kingdom continues to be internationally responsible, pursuant to Article 40 of the International Covenant on Civil and Political Rights, for submission of periodic reports to the Human Rights Committee on the measures it has adopted which give effect in Hong Kong to the rights recognised in the Convention and on the progress made in the enjoyment of those rights.

Needless to say that the fact that China has not acceded to the International Covenants - and hence is not subject to international obligations arising under the Covenants[53] - should have alerted decision-makers to the need to devise, well before 1997, an effective system of human rights protection in Hong Kong.

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52. See discussion in Byrnes, "The Iceman Cometh? The Government's Proposal for a Frozen Bill of Rights" in this volume. See also Ching, "Years of Neglect Put Our Rights in Doubt" South China Morning Post 23 March 1990, p. 29.

53. Note, however, that under the Sino British Joint Declaration, Annex I, Section XI, Paragraph 3, as incorporated in Article 152 of the Basic Law, "[i]nternational agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region." Specifically, "[t]he 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." [Article 39, Basic Law].

The Content of the Bill of Rights

Nihal Jayawickrama

THE obligation to enact a Bill of Rights in Hong Kong flows from the International Covenant on Civil and Political Rights. That covenant requires each state party to ensure that any person whose rights or freedoms as recognized in that covenant are violated shall have an effective remedy within the legal system of the state[1]. In Hong Kong, which has a common law legal system, a person will have an effective remedy only if and when those rights and freedoms are incorporated in the domestic law. When the United Kingdom ratified the covenant in 1976, it automatically assumed that obligation in respect of Hong Kong. But it took no action to perform that obligation. In fact, by its own admission, it did not even tell the people of Hong Kong anything about their rights under the covenant until the middle of last year[2].

Why then is it seeking to do so now ? It would be naive to believe that, after nearly 15 years, the government has suddenly decided, out of an abundance of generosity, to abandon some of its power. It would be equally naive to imagine that what motivated the British administration was the desire to institutionalise human rights so that the inhabitants of the future SAR can defend themselves against the might of an enormous totalitarian state. The truth, I suspect, is much more prosaic and pedestrian. A year ago, the UN Human Rights Committee - the body established to monitor the performance of obligations under the covenant - insisted on knowing from the British government why, when it had provided legal remedies for violation of the covenant's provisions in nearly all its dependent territories - from Gibraltar to the Falkland Islands to Bermuda - it had not done so in Hong Kong[3] ? And it wanted an answer in writing within the year. In October 1989, the British government reported to the committee that the Governor of Hong Kong had announced that same month

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1. Article 2(3).

2. In November 1988, the government informed the UN Human Rights Committee that no publicity had been given in Hong Kong to the covenant. See Supplementary Report on Dependent Territories, paragraph 162.

3. Summary Record of the 855th meeting of the Human Rights Committee held on 3 November 1988, CCPR/C/SR.855.

that legislation for a Bill of Rights would be introduced in July 1990, under which "anyone who believes that his civil or political rights, as defined in the covenant, have been violated, will be able to seek redress in the courts"[4]. In November this year, when the British representative faces the Human Rights Committee, with a copy of Hong Kong's Bill of Rights in his hands, he no doubt expects a far less gruelling experience than on the previous occasion.

But does the draft Bill of Rights Ordinance measure up to that promise ? There are at least three essential requirements that need to be satisfied if it is to keep faith with that undertaking:

1. The Bill of Rights must be applicable to the legislature since the law-making process is the ultimate source of governmental power.
2. The Bill of Rights must be justiciable through a remedy that is flexible enough to respond to the many and varied demands that are likely to be made on it.
3. The Bill of Rights must contain a clear statement of rights defined in accordance with the provisions of the covenant.

Are these requirements satisfied in the draft Bill ?

1. The Bill is not applicable to the legislature.

(a) Existing law

It is declared in the Bill that its provisions shall not apply to existing law for a period of 2 years[5]. This means that the Bill of Rights is denied the legal effect that every law made by the legislature acquires automatically upon its enactment, namely, priority over all previously enacted laws[6]. Therefore, after the Bill is enacted, a person who believes that his rights have been violated by a previous law will not be able to seek redress in the courts. The Bill of Rights will have no immediate impact on the life of the community. Nothing will be changed upon its enactment.

The decision to freeze the application of the Bill of Rights to existing law is unique

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4. Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights, October 1989, paragraph 12.

5. Section 1(2).

6. It is a rule of common law that when there is a conflict between two laws made by the same legislative body, the later law is deemed to have repealed the earlier law to the extent of the inconsistency. This is known as the doctrine of implied repeal.

to Hong Kong. When the UK government drafted a Bill of Rights for Montserrat a few months ago, it did not introduce a freeze period[7]. Nor did it do so in respect of the Falkland Islands a few years ago[8]. Yet both those colonies have a legal system very similar to ours. In neither of those colonies did the government argue that time was required to clear the statute book of all offending laws before the Bill of Rights became operative[9]. No one in those regions conjured up visions of a dreadful "legislative vacuum" which has now begun to haunt Hong Kong. In both those territories, the Bill of Rights applied immediately to existing law, but the Governor of each was authorised to modify such laws in order to bring them into conformity with the new standards[10].

To attempt during a "freeze period" to determine whether or not certain provisions in existing law would contravene the Bill of Rights is a futile exercise because no two lawyers are likely to agree on the probable effect of a statutory provision examined in the abstract. It is a futile exercise because what ultimately matters is not the view of lawyers, but the judgment of the court in a real live case brought before it.

(b) Subsequent laws

The Bill of Rights will not apply to subsequent laws[11]. As explained with such candour in the commentary on the draft Bill:

15. If it is possible that a Hong Kong law, made after the Bill of Rights becomes

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7. The Montserrat Constitution Order 1989 which was made on 19 December 1989 and laid before Parliament on 8 January 1990. I am grateful to Dean Peter Rhodes for drawing my attention to this Order and to the Legal Division of the Commonwealth Secretariat for responding so promptly to my request for a copy of it.

8. The Falkland Islands Constitution Order 1985.

9. In fact, the representative of the UK government assured the Human Rights Committee in November 1988 that a "body for consideration and monitoring of the laws of territories had its head office in London". That body "ensured that laws adopted in the territories were in keeping with the provisions of the international instruments to which the United Kingdom was a party and, if it found that a law was contrary to the provisions of an instrument such as the covenant, for example, it could request that the law should be amended or repealed. In practice, if there was any doubt, the government of the territory concerned was so informed, amendments were proposed and the problem usually solved". Summary Record of the 856th meeting of the Human Rights Committee held on 3 November 1988, CCPR/C/SR.856, paragraph 14.

10. See, for example, The Montserrat Constitution Order 1989, s.5.

11. Section 4(1) states that a subsequent law shall "to the extent that it admits of such a construction, be construed as being subject to this Ordinance".

> law, can be given a meaning that does not restrict a right or freedom guaranteed in the Bill of Rights, then the law should be given that meaning. If a provision in such a law can only be given a meaning which restricts the rights and freedoms guaranteed in the Bill of Rights, then clause 4 will not prevent that provision from operating.

Clause 4, therefore, is nothing more than a rule of interpretation. It is not intended that the Bill of Rights should prevent the legislature from making a law which infringes a protected right or freedom. Therefore, a person who believes that his rights have been violated by a new law will not be able to seek redress in the courts. There will be no change in the existing situation. The legislature will continue to be unfettered.

This provision, too, is unique to Hong Kong. The Montserrat Bill of Rights, for instance, is entrenched in the constitution. Its provisions apply to, and regulate, the law making process. So does the Falkland Islands Bill of Rights.

(c) Executive or administrative action

One consequence of not applying the Bill of Rights to legislative action is that it will probably have no effect on executive or administrative action either. A public officer exercises only powers which are conferred on him by law. If when his conduct is impugned, he is able to establish that he has acted in terms of the relevant law, the court will have no opportunity to pronounce on his conduct since it will have no power to examine the validity of that law.

For instance, a decision made under the Public Order Ordinance to ban a demonstration, or a directive under the Film Censorship Ordinance prohibiting the exhibition of a film, will be incapable of being submitted to scrutiny by the court if the relevant officers have acted in accordance with law. If, however, they had acted contrary to the relevant law, the Bill of Rights will be irrelevant since relief can be obtained through an application for judicial review by invoking the ordinary principles of administrative law.

Therefore, a person who believes that his rights have been violated by administrative or executive action will rarely be able to seek redress in a court.

(d) Private action

As a consolation, the Bill of Rights assures us that it will bind all persons acting in a private capacity[12]. Having regard to the fact that it does not bind the legislature and will

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12. Section 7.

rarely inhibit the executive, this provision has all the appearances of a red herring. In any event, private persons who kill, torture or imprison others are subject to the criminal law, and if there was indeed a compelling need to enable their victims to recover damages in respect of these acts, there must surely be a method simpler than the enactment of a Bill of Rights.

Even those who for long have agitated for the equal treatment of the sexes, particularly in the matter of employment, will find that Article 23 is deceptively devious: it does not prohibit discrimination, but says that "the law shall prohibit any discrimination"[13]. A person who feels that she is the victim of a discriminatory act will, therefore, have to wait for that law before she can obtain redress in the courts.

2. No effective remedy is provided

A violation of a right or freedom is said to be actionable as a tort[14]. While an action in tort may be of some use in the private sector, it would be a wholly inappropriate remedy to deal with violations by public authorities. Consider, for example, any of the following situations:

- a pregnant prisoner under sentence of death who invokes Article 2: the right to life;
- a convicted prisoner under sentence of corporal punishment who invokes Article 3: freedom from degrading punishment;
- an unconvicted person held in custody who claims the right to bail under Article 5(3), or the right to release under Article 5(4);
- a person required to surrender his passport under the Prevention of Bribery Ordinance who invokes Article 8(2): freedom of movement;
- a person who questions the "independence" of a tribunal under Article 10;
- an accused person who claims that a criminal law is retrospective in nature and therefore violates Article 12;
- a prisoner who argues that under Article 14 he is entitled to send an uncensored letter to his solicitor or even to a newspaper editor;
- a person who invokes Article 16 to challenge the censorship of a film scheduled to be screened at the Hong Kong International Film Festival;
- an illegal immigrant facing deportation who argues that separation from her husband

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13. The Montserrat Bill of Rights itself prohibits discriminatory treatment, i.e. different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, etc.

14. Section 6(1).

and child violates Article 20: the right to family life;

- a solicitor from a country other than the UK, Canada, Australia, New Zealand, Singapore or Zimbabwe who contends that the Legal Practitioners Ordinance is discriminatory in nature and therefore offends Article 23.

In none of these cases would an action in tort be an effective remedy

Alternatively, section 6(2) appears to suggest that the question of a violation may be raised in a pending court proceeding. But such questions may, and often do, arise independently of any proceedings pending in a court. In many of the examples cited earlier, it would be necessary to institute proceedings in a court to vindicate the relevant protected right.

Section 6(2) also permits the question of the violation of a protected right to be raised and determined in any court or tribunal in Hong Kong. The usual procedure in other countries is to require such questions to be referred for determination by the High Court. If the question of a violation can be raised and argued in the lowest tribunal in the territory, not only will it take an inordinately long time, as the question is reargued at every level of the judicial heirarchy, for the final decision to be reached, but there may soon be a multitude of conflicting judgments from ill-equipped subordinate courts and tribunals throughout the territory.

No reason is offered why the standard remedy provided for in other Bills of Rights throughout the Commonwealth has been rejected. It is a remedy devised by the British Foreign Office in the early 1960s; a remedy which has proved both effective and expeditious, and which offers us the benefit of 30 years of shared judicial wisdom. It is a remedy which entitles any person who alleges that any right has been, is being, or is likely to be contravened, to apply to the High Court for redress. The High Court is vested with jurisdiction to hear and determine that application, and to make such orders, issue such writs, and give such directions as it may consider appropriate to enforce that right.

There is no explanation offered why that remedy, which was included in the Montserrat Bill of Rights in January 1990, is denied to the inhabitants of Hong Kong in March 1990. In the result, can it be said that anyone who believes that his rights are violated will truly and effectively be able to seek redress in the courts ?

3. The content of the rights is seriously flawed

The most exacting task that faces any draftsman is the definition of substantive rights. This task becomes more difficult as the years go by and the volume of case law on human

rights grows. Having participated in more than one such exercise myself, I can assure you that I speak from experience. But the draftsman of the Hong Kong Bill of Rights has not allowed himself to be bothered by such trivialities. He has discovered the secret of producing an instant Bill of Rights by doing what we all do everyday of our lives here in the Law Faculty: photocopy the covenant, cut it up and paste it, photocopy it again and then send it to the printing room. And thus, as future historians will surely record, the Hong Kong Bill of Rights was produced. Part II is the mirror image of the treaty obligations set out in the covenant - or almost

If life could be as simple as all that, we would not need a Bill of Rights. Consider, for instance, some of the consequences of this technique:

(1) Article 9(1) of the covenant states that "No one shall be deprived of his liberty except on such grounds as are established by law". The obligation imposed by this provisioon of the treaty is to ensure that pre-existing law defines the grounds on which a person may be arrested or detained. If this treaty obligation is to be translated into a justiciable domestic right, those grounds must be entrenched in a Bill of Rights. Accordingly, Article 56(1) of the Montserrat Bill of Rights provides that no person shall be deprived of his personal liberty except in any of the following cases:

(a) in execution of the sentence or order of a court;

(b) upon reasonable suspicion that he has committed, is committing or is about to commit a criminal offence;

(c) in the case of a minor, for the purpose of his education or welfare;

(d) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(e) for the purpose of preventing the unlawful entry of that person into Montserrat or for the purpose of effecting the expulsion, extradition or other lawful removal from Montserrat of that person or the taking of proceedings thereto.[15]

Our Bill of Rights, on the other hand, merely repeats the treaty obligation: 'No one shall be deprived of his liberty except on such grounds as are established by law"[16]. In Hong Kong, therefore, unlike in Montserrat, it will be possible for the legislature

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15. These grounds are set out in greater detail in Article 56(1) of the Montserrat Bill of Rights.

16. Article 5.

to prescribe by law, from time to time, whatever grounds the government suggests, and authorise whomsoever the government desires, be it the police, the secretary for security, or the commissioner of the ICAC, the chief secretary, the attorney general, or the vice chancellor, to order the arrest and detention of any person for any length of time. Where then is the right to liberty ?

(2) The converse is also true. For example, under the covenant, the freedom of expression may be restricted to protect national security, public order, public health or morals, or the rights and reputations of others. The draft Bill merely reproduces this provision[17], ignoring the fact that there are other legitimate governmental interests, such as maintaining the authority and independence of the courts, which are now recognized as interests which need to be protected. Or is it intended that under the regime that will be created by the Bill of Rights the courts of Hong Kong should no longer have the power to deal with contempt of court ?

(3) By mechanically reproducing the covenant, the draftsman has, perhaps unwittingly, relieved the National Peoples Congress of the Peoples Republic of China of a problem to which it has been addressing its mind since June last year. The exercise of several rights, says the draft Bill, may be restricted in the interests of "national security"[18]. "National security" is then defined to mean not "security of Hong Kong", but as "including the security of Hong Kong". The security of some other country is also made a relevant consideration. Is it that restrictions may be imposed on certain legitimate activities such as free expression, peaceful assembly, association, movement, and criminal trials in Hong Kong, in order to protect the security interests, perhaps of the United Kingdom now, and later of China ? In that respect, the draftsman may have succeeded in introducing into Hong Kong the twin offences of "subversion" and "counter revolutionary activity", so vital for the protection of Chinese security, not through the Basic Law but, ironically, through our own Bill of Rights.

(4) In Hong Kong alone of all the dependent territories, the right to private ownership of property has not been included in the Bill of Rights. The right to seek asylum abroad is also not recognized. Both these rights were enunciated in the Universal Declaration of Human Rights. They were then omitted from the covenants as a result of the political compromise which was reached between the liberal democracies and the

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17. Article 16.

18. Articles 8, 10, 16, 18, and 19.

socialist states at the height of the cold war in order to secure broad acceptance of these two instruments. That political compromise has little relevance in the contemporary world; and still less in the Hong Kong of the 1990s. Yet the draftsman appears to be anxious to perpetuate it.

(5) The excuse that the draftsman was only indulging in a scissor-and-paste exercise cannot, however, justify the omission of the first right recognized in both covenants: the right of self-determination. Without apology or explanation, the most fundamental of all rights which a permanent resident of Hong Kong is entitled to by virtue of his status as an inhabitant of a non-self-governing territory has been omitted. This right would entitle him to participate in deciding, for instance, whether to accept the draft Basic Law, or whether to approve the pace and nature of political reform proposed for the territory: crucial matters that vitally affect not only his own future, but also the future of this territory and of those to whom it will be a home in the years that lie ahead. It is significant that the UK government did not omit this right in the Bills of Rights provided for Montserrat and the Falkland Islands, or even for Gibraltar. Or perhaps I am being unduly harsh. The real explanation may be much simpler. When the right to life was being pasted, self-determination may have flown out of the window.

4. The tragi-comic "reservation" clauses

The unique and misconceived character of the draft Bill is maintained right to the end by the inclusion of a part entitled "Reservations". Reservations have hitherto never formed part of a law, whether in Hong Kong or elsewhere. The legislature may include "provisos", or "exceptions", or even "explanations", but never "reservations". A "reservation" is entered by a government when signing or ratifying a treaty so as to avoid accepting an obligation which, for the time being, the government does not wish, or is unable, to perform.

The comic or hilarious aspect of the "reservations" arises from the fact that several substantive rights declared in Part II are immediately nullified by the corresponding reservations in Part III. Why, in the first place, the draftsman bothered to include the substantive right, is not clear. Equally hilarious is the statement in section 11 that "The governmant reserves the right to continue to apply . . ." Since the "government" will not be enacting this law, should not the government have asked the Legislative Council to grant it the authority to do a particular thing instead of brashly asserting that it has arrogated to itself the power to do so.

The tragic aspect of the "reservations" is that they seek to take away the rights and freedoms of the most vulnerable sections of the community: prisoners, juveniles, aliens and minorities. Prisoners may be excluded from the application of the Bill of Rights "for the preservation of custodial discipline". Juveniles in custody may be denied the protective measures designed to preserve human dignity in places of detention. The expatriate population will be denied the benefit of the minimum safeguards against arbitrary expulsion from the territory. And, in Hong Kong, the advocacy of national, racial or religious hatred will not be prohibited by law.

It is significant that while most of the reservations entered by the United Kingdom to the covenant, which are still operative, are in respect of Monserrat and the Falkland Islands too, the Bills of Rights provided for those two colonies do not contain any reference whatsoever to such reservations. In the circumstances, a serious question as to the government's credibility must arise in the light of its claim that provision for these reservations have to be included in the Hong Kong Bill of Rights because they are still operative in respect of this territory.

5. Conclusion

To describe the draft Bill as a Bill of Rights is to do violence to language. A properly drafted Bill of Rights might have been able to develop a human rights culture in Hong Kong, to create a human rights consciousness within the next seven years, so that when this territory is absorbed into a totalitarian regime, it will carry with it a unique indentity that will distinguish the two systems in one country. But all that the proposed Bill of Rights will do is to raise, and then frustrate, the aspirations of the community in such a manner that soon it may have nothing but contempt for the whole concept of human rights.

Only the genuine product can serve the purpose. The draft Bill has the appearance of a Bill of Rights, but it is not a Bill of Rights. It is like a fake Rolex watch. It looks so much like the real thing. But it is not the real thing.

The Iceman Cometh? The Government's Proposal for a Frozen Bill of Rights

Andrew Byrnes

A. INTRODUCTION

WHEN the Government announced its decision to adopt a Bill of Rights for Hong Kong based on the International Covenant on Civil and Political Rights (ICCPR), it promised that "[a]nyone who believes that his civil or political rights, as defined in the Covenant, have been violated, will be able to seek redress in the courts".[1] However, the Government also made it clear that there would be a "limited period" during which laws already in force at the time the Bill commenced operation would be immune from challenge in the courts. The Hong Kong Bill of Rights Bill 1990 implements the decision to impose a freeze by providing that the Ordinance, once in force, will not override pre-existing legislation for a period of two years after the Bill commences operation (ss. 1(2), 3(1) and 3(2)).

In this paper I shall look briefly at the desirability and necessity of the proposed freeze and some of the issues raised by the way in which the government proposes to implement it. I shall be making the following arguments:

1. The record of the UK and Hong Kong governments in implementing the guarantees of the ICCPR into Hong Kong law and practice has been characterised by delay, neglect and inertia; accordingly, the people of Hong Kong are entitled to insist that any further delay be clearly demonstrated to be necessary in the public interest and not unduly broad.
2. The proposed freeze is excessive in its length and scope.
3. A blanket freeze immunising all pre-existing legislation will not necessarily eliminate major inconsistencies between Hong Kong law and the ICCPR.
4. There are less restrictive means than the proposed freeze available for reconciling the government's legitimate administrative needs with the rights of Hong Kong people;
5. There is a urgent need for the courts to develop a substantive and substantial human

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1. Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights (October 1989), para. 12.

rights jurisprudence; the proposed freeze will delay rather than advance the achievement of this goal.

6. The distinction drawn in the draft Bill between pre-existing legislation (which will be immune from challenge) and pre-existing common law rules (which will not) is likely to give rise to considerable difficulties and uncertainties.

In conclusion I argue that, if any freeze is to be adopted, it should be much narrower in scope and more limited in duration.

B. THE FREEZE IN THE LIGHT OF THE GOVERNMENT'S TRACK RECORD ON IMPLEMENTATION OF THE COVENANT

While the freeze will protect only existing laws from challenge and will not apply to new legislation, the effect of such a freeze is that Hong Kong people will continue to suffer violations of important human rights in a number of areas, until the government amends the offending laws or the freeze period ends.

The justification for the proposed freeze is that time is needed to carry out "a comprehensive review of all existing Hong Kong laws to remove any areas of doubt about their full compatibility with the Bill of Rights";[2] the freeze period will thus allow "any unnecessary uncertainties" to be avoided. (One might also add in support of the need for a freeze that time is needed for the judiciary, legal profession and community to familiarise themselves with the Bill and for basic information about it to be made more generally available, though bringing a case is brought is probably the most powerful incentive for familiarising oneself with the area.)

The proposal that continuing violations of human rights be given a blanket immunity from court challenge for a substantial period deserves short shrift from the people of Hong Kong. As others have pointed out,[3] the suggestion that existing Hong Kong laws may not be in conformity with the Covenant represents something of a *volte face* on the part of the U.K. and Hong Kong governments. The Covenant was extended to Hong Kong in 1976 and since that time the Human Rights Committee, the international body which monitors the implementation of the Covenant, has been assured on a number of occasions that the laws and

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2. Id.

3. See, e.g., Ching, "A long wait for the right action", South China Morning Post, 10 November 1989, 25.

official practices of Hong Kong are in conformity with the Covenant.[4] It is only now, when there is a genuine opportunity for the people of Hong Kong to challenge that view, that the government has begun to suggest that such statements were perhaps not entirely accurate after all.

Of course, very few governments are fully candid or particularly self-critical when describing their human rights records to international bodies such as the Human Rights Committee. In fact, the Hong Kong government's responses to the criticisms and requests for further information made by the Committee have, if anything, been far better than those of many other governments.

Nevertheless, the Government is not entitled to ignore the fact that for more than a decade it has maintained that Hong Kong laws are in conformity with the ICCPR. In the light of those statements, Hong Kong people can justifiably demand that any further restrictions on their full enjoyment of those rights be as narrow and for a short a period of time as the Government can clearly demonstrate is necessary to serve the public interest (not just the administrative convenience of the civil service). After all, the government's continuing failure to implement the Covenant fully and to make available domestic legal remedies for violations of the rights guaranteed by it is a clear breach of the obligations it has assumed under that instrument.

One can readily accept that there may be areas in which Hong Kong law and policy fails to measure up to the standards of the ICCPR and that permitting challenges to pre-existing laws immediately may lead to considerable confusion and inconvenience if they are declared invalid. This is, of course, an inevitable consequence of any effective Bill of Rights. However, a freeze for two years applicable to all existing laws is the easy way out for the Government: there are a number of other methods whereby the community's entitlement actually to enjoy its guaranteed rights might be better balanced against the administration's concerns about the creation of operational vacuums if laws are declared invalid.

C. WILL A BLANKET FREEZE BE PARTICULARLY EFFECTIVE?

The Government itself appears to accept that even a comprehensive review of all Hong Kong laws will not eliminate all inconsistencies between Hong Kong law and the Covenant

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4. In the initial and second reports of the U.K. dealing with the position in the dependent territories: UN Docs CCPR/C/1/Add.37 (1978) and CCPR/C/32/Add. 14 and Add. 15 (1988).

for the indefinite future - individual cases often raise unanticipated issues and human rights guarantees are dynamic, their interpretations evolving with changing attitudes and circumstances. Thus, the Government's goal is, presumably, the more realistic one of identifying and amending those laws which, on present estimations, probably violate the Covenant.

However, it is by no means clear that a period of two years from the commencement of the Ordinance is necessary to identify such laws, or that a blanket immunity for all existing laws will ensure that government departments identify and amend offending laws by the end of that period. Certainly, the Government's track record in reviewing laws for their consistency with a number of international instruments suggests that, for some departments, the freeze period may provide yet another pretext for delaying the necessary reforms.

Apart from bureaucratic inertia, there are a number of reasons why laws which do not comply with the ICCPR might not be amended within the freeze period. Policy departments may be reluctant to change laws and policies which they consider to be satisfactory or desirable, even in the face of legal advice that they are likely to be declared invalid when challenged. Immigration and law enforcement agencies, for example, frequently take a different view of the extent of human rights guarantees than do government legal advisers.

Furthermore, politicians may be reluctant to abrogate laws which are popular with large sections of the community until compelled to do so by a court decision holding the laws invalid. A blanket freeze in such cases may do no more than postpone the inevitable court challenge, thereby delaying further the full enjoyment of the rights the Government is obligated to guarantee.

It should also be noted that it is often difficult to determine *in abstracto* whether a particular law violates human rights norms; a possible conflict may only be perceived when an individual case raising a specific situation arises. Delaying the opportunity for cases to be brought before the courts will thus mean that a certian number of violations will continue without redress.

One of the clear aims of the Bill of Rights (and the proposed amendment to the Letters Patent) is to encourage the development of a solid body of case law in the Hong Kong courts before 1997 in the hope that much of this will be carried over beyond that date. To achieve that goal, there must by then be a substantial body of jurisprudence. The generation of case law takes time - one thing which Hong Kong does not have a lot of before 1997 - and it is therefore important to give the courts the opportunity to grapple with major human rights issues as soon as possible. Most of the significant issues relate to the the consistency of existing laws with the Covenant; a freeze will delay their being raised in court.

D. ALTERNATIVES TO A BLANKET FREEZE

1. Specific limited exemptions for individual laws

One alternative the Government could adopt would be to exempt specific pieces of legislation from the operation of the Bill for a limited period. Many of the most egregious violations of the Covenant are already well-known to the Government and the public; many of them were the subject of comments by members of the Human Rights Committee in November 1988 or have been criticised by individuals and groups in Hong Kong. Indeed, the Government has already commenced reviewing the law in a number of areas where it appears that Hong Kong Law violates the Covenant.

Government departments should be able to identify other areas in which current laws and policies may conflict with the Covenant by the time the Bill of Rights enters into force. One would have expected them to have been identified already in inter-departmental consultations when the Government was preparing its reports to the Human Rights Committee. If that was not done, then the relevant departments will have had almost a year from the time of the announcement of the Government's decision to the time when the Bill enters into force. That should be ample time to identify additional areas in which there appear to be conflicts.

Thus, there seems to be no compelling reason why the Government could not identify most of the problem areas by the time the Bill of Rights enters into force. If time does not permit amendment of the legislation concerned, it could be exempted specifically from the operation of the Bill for a specified period (of no more than one year), with the possibility of one renewal of an exemption by the legislature if the review process takes longer than anticipated.[5]

The advantage of this approach is that it places the onus on the Government to identify the specific areas in which reform is needed, while permitting it a reasonable period within which it must amend the relevant laws and policies. If it needs more time, then it will have to explain to the public through the Legislative Council why it is that it has been unable to reform the law within the period provided.

If there is to be a freeze, it should last no longer than one year from the passage of

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5. See, for example, the approach adopted under section 40 of the Australian federal Sex Discrimination Act 1984 (Cth). This permitted inconsistent State laws to be exempted for a period of a year at a time from the operation of the federal statute which would otherwise have rendered them invalid.

the Bill through the legislature. If there are to be exemptions of pre-existing laws, these should be limited in time and scope. The Bill should permit exemptions for no more than a year at a time, and specific laws should be exempted, rather than a blanket exemption adopted.

2. The Bill as a "shield" but not a "sword"

Another option which the Government could adopt to limit the extent of challenges to existing laws and policies while still permitting the enjoyment of some of the rights guaranteed in the Covenant would be to allow the Bill to be used as a "shield" but not a "sword" during the freeze period. In other words, a person could raise as a defence to government action an argument that the Government was infringing the Bill of Rights and the action was therefore invalid. However, a person would not be able to initiate a court action seeking to have a law declared invalid unless some action had been taken against him by the Government.

This approach, proposed in the draft Australian Bill of Rights of 1985 (eventually not adopted), is not without its problems. However, it does allow a person to invoke against the Government the very rights which the Government has undertaken to respect in a case where the Government has made a positive decision to take action against her in violation of those rights.

3. Delaying the effect of a declaration of invalidity

a. An automatic delay between judgment and its taking effect

Other countries have adopted various methods of providing governments with time to fill an operational vacuum when a piece of legislation is struck down on constitutional grounds. The Bill could, for example provide that the judgment of invalidity does not take effect for a period of three or more months, thus giving the government the benefit both of the court's finding and a reasonable opportunity to remedy the offending law. There appears to be no reason why such a device could not be adopted in Hong Kong. It would in many ways provide the Government with the protection it claims it needs while vindicating the human rights of Hong Kong people.

b. Giving the courts a discretion to delay judgment from taking effect

Another interesting method of avoiding the operational vacuum that can follow a declaration of invalidity was proposed in the draft Australian Bill of Rights. That Bill proposed to give a court the power to limit its holding to the case before it where the court was satisfied that grave public inconvenience or hardship would be caused by the legislation in question being declared invalid. However, in such a case the legislature was given a period of 3 months to repeal or amend the offending statute; if it failed to do so within that period, the court's declaration of invalidity would then take effect.[6] Similar provision is made in the present Austrian constitution.[7]

Conferral of such a power involves a number of difficult political and legal questions and may not be an appropriate model to adopt. Nonetheless, it would be one way, during a transition period, of allowing individuals to vindicate their rights through the courts while allowing government the opportunity to amend offending legislation without administrative chaos.

E. RATIFICATION OF THE OPTIONAL PROTOCOL

One other way in which the Government could avoid the operational vacuums it fears, while still allowing complaints of human rights violations to be adjudicated upon, would be to ratify the Optional Protocol to the Covenant. This would allow the Human Rights Committee to give its view on individual cases, without automatic invalidation of any offending statute as a matter of domestic law. Thus, the Government would be able to respond to the individual case by adopting appropriate amendments. The Optional Protocol could be ratified generally or only in relation to acts done prior to the expiry of the freeze period.

Such a step would provide Hong Kong people with access to independent international adjudication of their human rights claims similar to that enjoyed by the inhabitants of the UK and other dependent territories. However, the political dimensions of ratifying the Optional Protocol in view of China's opposition to accepting international adjudication of human rights

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6. Australian Bill of Rights Bill 1985, s. 14

7. Austrian Constitution, art. 139(5), in Blaustein & Flanz, Constitutions of Countries of the World (Oceana, 1985), vol. I; K. Heller, Outline of Austrian Consitutional Law (Kluwer, 1989) 22-25.

claims are likely to rule this choice out as a matter of *Realpolitik*.

F. PRE-EXISTING STATUTE LAW AND PRE-EXISTING COMMON LAW

The freeze will apply to all statute law in force (or enacted) at the time the Ordinance commences operation. These laws will be immune from challenge under the Ordinance for two years after its commencement. The draft Ordinance provides that, once the freeze ends, pre-existing laws must be interpreted consistently with the Ordinance if possible and, if such a construction is not possible, the prior enactment is repealed to the extent of any inconsistency. Subsequent legislation will be subject to the Bill immediately it is passed, although the efficacy of the Bill in the face of directly inconsistent subsequent legislation is open to doubt.

The draft Bill draws a distinction between "enactments" in force at the time the Bill commences operation and other laws in force at that time. The intention is to permit common law rules to be challenged immediately on the ground that they violate the Bill of Rights.

The distinction seems a curious one and could lead to considerable difficulties. First, there may be important areas (such as contempt of court) still largely regulated by the common law where common law rules are inconsistent with the ICCPR. These would presumably be liable to attack under the Bill of Rights. If well-established rules are held to be invalid, then the courts may create and be faced with an operational vacuum similar to those the Government claims will arise when statutes are declared invalid.

Secondly, in many cases offending common law rules and immune statutory provisions may be closely interdependent. If the common law rule upon which a statute is based is declared invalid, this may impair the effectiveness of a statute in various ways. For example, under the present law of domicile in Hong Kong a married woman still has the domicile of her husband. This rule clearly violates the Bill of Rights (Art. 23 among others) and would therefore be invalid from the time the Bill entered into force. The effect of the Bill of Rights on this rule would presumably be that a court would recognise that a maried woman has the capacity to acquire an independent domicile, a position brought about by statutory reform in a number of Commonwealth jurisdictions.

However, various statutory provisions are based on the premise that a husband and wife have the same domicile and the destruction of the basis for that assumption could have unanticipated effects on the operation of the statute, for example, under the provisions of the *Matrimonial Causes Ordinance*, cap.179, relating to the recognition of foreign divorces.

There are doubtless many other instances of this sort of problem and the issue almost certainly needs to be given more detailed attention.

G. CONCLUSION

In this paper I have argued that a blanket freeze on the invalidation of existing legislation for inconsistency with the proposed Bill of Rights is both undesirable and unnecessary to achieve the legitimate aims of the administration. It fails to take due account of the strong claim that Hong Kong people have to "Human Rights Now" and ignores a number of less restrictive alternatives which would achieve the Government's goals without continued denial of the full enjoyment of human rights by the people of Hong Kong.

The Government cannot claim that it has no realistic alternative to the type of freeze it has proposed. Other countries have adopted a range of means that are much more effective in meeting governments' legitimate administrative needs without unduly abrogating the human rights of their citizens. The Hong Kong government should consider the adoption of similar methods in the case of the Bill of Rights.

Entrenchment of the Bill of Rights

Peter Wesley-Smith

ENTRENCHMENT of a law is a technique by which that law acquires some measure of superiority over, or special force in relation to, other legislation.

There are various forms of entrenchment.[1] First, a law might be declared inviolate, unalterable, incapable of amendment in any respect according to the laws of the legal order. This is substantive entrenchment. Only a revolution, a shift in the Grundnorm of the system, could amend or replace such a law. Alternatively, a law might be capable of amendment but only by a specified procedure more difficult to satisfy than the normal procedure for amending law. This is procedural entrenchment. A restriction might be as to manner, for example requiring a special majority in the legislature or submission of the bill to the electors, or as to form, for example requiring a particular terminology. Another (or perhaps the same) device might be instructions to judges through a radical interpretation provision. Sir William Wade has asserted: "All that need be done in order to entrench any sort of fundamental law is to secure its recognition in the judicial oath of office."[2] A further suggestion is to persuade the judges to issue a practice statement that they would disallow any legislation which conflicted with a Bill of Rights.[3] Neither of these last solutions has been proposed in the Hong Kong context.

Under the present constitution of Hong Kong there are several methods by which a Bill of Rights might be entrenched. First, an Act of Parliament could declare that the Hong Kong Bill of Rights shall not be amended by the Hong Kong legislature or shall be amended only by some special manner or form. Secondly, Her Majesty the Queen could insert such provisions in the Letters Patent, the principal document in Hong Kong's written constitution. Thirdly, perhaps a local ordinance could entrench itself or another ordinance; whether this is a genuine possibility will be discussed in a moment.

It should be noted that the Hong Kong Act 1985 does not appear to be relevant here. The Act enables Her Majesty by Order in Council to make provisions, and to enable the

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1. See generally Joseph Jaconelli, Enacting a Bill of Rights: The Legal Problems (Oxford: Clarendon, 1980), ch VI.

2. Constitutional Fundamentals (London: Stevens, 1980), p 37.

3. Ibid, citing Wallington and McBride, Civil Liberties and a Bill of Rights, p 86.

Hong Kong legislature to make provisions, for repealing or amending any Act of Parliament or instrument under an Act so far as it is part of the law of Hong Kong. Insertion of an entrenchment clause by this means, by Order in Council or ordinance under the Hong Kong (Legislative Powers) Order 1989, would probably not be regarded as a proper use of the power conferred. Further, it might not be thought consequential on or connected with the Joint Declaration, as the Act requires.

It would also be as well to mention two recent assertions in antipodean courts which lend support to the notion that legislatures like Hong Kong's cannot violate fundamental human rights. Sir Robin Cooke in New Zealand has flown a kite proclaiming that the common law contains guarantees which no legislature in a common law system can override,[4] and in a couple of Australian cases it has been suggested that the phrase "peace, order, and good government" might restrict legislative power over certain civil liberties.[5] Although these ideas are worth watching, both are contrary to long-standing and high-ranking authority and it is unimaginable that the courts in Hong Kong would adopt them.

There is no doubt little prospect of an Act of Parliament providing for entrenchment. It is intended, however, to amend the Letters Patent such that the rights and freedoms set out in the Hong Kong Bill of Rights Ordinance shall not be affected in a manner inconsistent with the International Covenant on Civil and Political Rights as applied to Hong Kong. Without knowing the precise wording of this measure it would be foolhardy to comment on its effect.

Turning now to entrenchment by ordinance, the first question is whether the Hong Kong legislature could provide that the Bill of Rights Ordinance shall never be amended at all. Such a provision would amount to "effacement", a self-denial of continuing authority in certain areas, and this is clearly impermissible.[6]

Secondly, there is the possibility of indirect or quasi-entrenchment. The government proposes "that each Ordinance made after the Bill of Rights becomes law will, as a matter of practice, contain a provision requiring the rest of the Ordinance to be subject to the Bill

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4. See John L Caldwell, "Judicial Sovereignty - A New View" [1984] NZLJ 357.

5. See Jeffrey D Goldsworthy, "Manner and Form in the Australian States" (1987) 16 MULR 403, 424-5; N K F O'Neill, "Constitutional Human Rights in Australia" (1987) 17 Fed LR 84, 120-1.

6. Re the Initiative and Referendum Act [1919] AC 935; see Peter Wesley-Smith, "Legal Limitations upon the Legislative Competence of the Hong Kong Legislature" (1981) 11 HKLJ 3, 14-17.

of Rights".[7] (Alternatively, an appropriate revision of the words of enactment might be made or an annual ordinance passed reaffirming or re-enacting the Bill of Rights.) But if such a provision were not included, deliberately or inadvertently, in subsequent ordinances there would be no protection for the Bill.

Thirdly, it might be thought that under section 5 of the Colonial Laws Validity Act 1865 the Hong Kong legislature could impose a manner and form restriction vis-a-vis subsequent legislation. Section 5 grants to every representative legislature full power to make laws respecting the constitution, powers, and procedure of the legislature itself, provided such laws are passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or colonial law for the time being in force. But there are two obstacles to relying on section 5. One is that the legislature is not now a representative legislature, defined as a colonial legislature comprising a legislative body of which one half are elected by inhabitants of the colony. In 1991, we have recently been assured, 18 members of the Legislative Council will be directly elected from districts and 21 will be elected from functional constituencies, a clear majority in the Council elected by inhabitants of the colony. (The Council will have 61 members inclusive of the Governor.) Even so, the functional constituencies have very small electorates and, though they comprise inhabitants of the colony, members from such constituencies might not count towards the figure needed to achieve a representative legislature. The other obstacle is that the manner and form limitation refers only to laws respecting the constitution, powers, and procedure of the legislature, not to laws affecting civil and political rights.[8] Thus even to delay passage of the Bill of Rights Ordinance until 1991, or its re-enactment in that year, would not be effective to secure entrenchment.

Can the Hong Kong legislature as presently constituted impose a particular manner of enacting legislation on certain subject-matter? The orthodox answer would, I do not doubt, be No, for two reasons.

First, it might seem to involve in effect an amendment to the Letters Patent, specifically article 7(1) which grants to the Governor, by and with the advice and consent of the Legislative Council, power to make law for the peace, order, and good government of the colony. But that power, it might be argued, is not affected by a manner and form

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7. Commentary on the Draft Hong Kong Bill of Rights 1990, para 15; see March Hunnings, "Constitutional Implications of Joining the Common Market" (1968-9) 9 Common Market LR 50, 60, cited by Jaconelli (note 1 above), p 169.

8. R D Lumb, The Constitutions of the Australian States (Brisbane: University of Queensland Press, 3rd ed 1972), p 93; Lumb, "Fundamental Law and the Process of Constitutional Change in Australia" (1978) 9 Fed LR 148, 169-70.

restriction, at least one that did not involve the consent of a body outside Governor and LegCo such as the electors or set an impossibly high standard such as a 90 per cent majority in the legislative chamber. The power to make law is fully retained, provided only that the legislature follow the required procedure. By article 12 the Governor and LegCo must, when making law, observe directions contained in the Royal Instructions, but the Royal Instructions do not specify, for example, a simple majority in LegCo.[9] The Council may under clause 23 make standing orders for the regulation of its own proceedings, but it can bring them into line with the ordinance simply by amending Standing Order 35(1), and this would not involve repugnancy to Letters Patent, Royal Instructions, or other instructions from the Queen.

The Privy Council in Chenard v Arissol [10] said that "A power to make ordinances for the peace, order and good government of a colony does not authorise alteration of the constitution or powers of the colonial legislature". This seems emphatic, but it was obiter, ex cathedra, and did not refer to a colonial legislature's procedures, which is the rubric for manner and form restrictions. The peace, order, and good government formula for legislative authority has elsewhere been described as connoting "the widest law-making powers appropriate to a Sovereign",[11] and modern academic opinion, at least, regards the sovereign UK Parliament as capable of imposing procedural limitations on itself.[12] In my textbook on Hong Kong's constitutional law I wrote that, as a non-representative body, the Hong Kong legislature cannot now limit itself by a special manner and form, "for that would be to alter its own constitution"[13] - but you can't believe everything you read in books. "Constitution"

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9. Cf clause 22, requiring a majority of votes for all questions proposed for debate.

10. [1949] AC 127, 132.

11. Ibralebbe v R [1964] AC 900, 923. Lumb (1978; note 8 above), p 170, says that the constitutional alteration elements of the power to make law for peace, order, and good government are more comprehensive than those conferred by s 5 of the Colonial Laws Validity Act. The Privy Council's remarks in Bribery Commissioner v Ranasinghe [1965] AC 172, 198 led one commentator to conclude that "a Parliament which has by its own act imposed procedural conditions upon the legislative process is no more limited, bound, fettered, or non-sovereign than a legislature which has such conditions bequeathed to it in a constitutional instrument": Geoffrey Marshall, Constitutional Theory (Oxford: Clarendon, 1971), p 56. Thus for the Hong Kong legislature to impose procedural conditions upon itself need not be regarded as a limitation of its power to legislate for the peace, order, and good government of Hong Kong.

12. See, eg, George Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 LQR 591.

13. Constitutional and Administrative Law in Hong Kong (Hong Kong: China and Hong Kong Law Studies, 1987-8), vol 2, p 276.

in this context refers to composition, not procedures.[14]

Secondly, section 5 of the Colonial Laws Validity Act might seem by implication to prohibit a non-representative legislature from making laws affecting its constitution, powers, and procedure. But the purpose of section 5, the Privy Council has ruled, is "to confer rights, not to take them away. No right is conferred by section 5 on any non-representative legislature to make laws respecting the constitution, powers or procedure of that legislature ... but, if any such legislature has power from another source to make laws which touch any of these matters, those powers are not affected by the Colonial Laws Validity Act, 1865".[15] If it is correct that article 7(1) of the Letters Patent is the source which confers the power, section 5 of the Act is immaterial.

In my view it is certainly arguable that the present constitution does not prevent the Hong Kong legislature from imposing a special manner on itself for the amendment of the Hong Kong Bill of Rights Ordinance. But the more conservative view asserted by the Privy Council might well be preferred. This does not necessarily apply, however, to limitations merely of form.

There have been a number of attempts to provide that a statute such as a Bill of Rights shall not be amended except by legislation expressed in a certain form. Section 4 of the Statute of Westminster is a well-known example, though it is ineffective, the British courts have opined, if a contrary intention is displayed in a subsequent Act of Parliament without complying with the formal requirement.[16]

Section 2 of the Canadian Bill of Rights 1960 states that "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe ... any of the rights or freedoms herein recognised and declared..." This might be either an interpretation provision or a limitation of form. The draftsman thought it a rule of interpretation abrogating the rules that a particular statute overrides a general statute and that a later statute overrides an earlier one. "Parliament," he wrote, "has not said that its own powers are any the less, nor that a future parliament must not enact a conflicting law. Parliament has said only that certain intentions shall not be imputed to it unless a

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14. Taylor v AG of Queensland (1917) 23 CLR 457, 468.

15. Chenard v Arissol [1949] AC 127, 133.

16. British Coal Corporation v R [1935] AC 500, 520; Manuel v AG [1983] 1 Ch 77.

special form of words is used."[17] This does not differ, he went on, from the rule, similar to the rule in section 66 of our cap 1, that an ordinance does not apply to the Crown unless it is expressly stated therein that the Crown is bound. Normally an interpretation provision succumbs to a clear contrary intention, whether expressed in the specified form or not.[18] But this is not the view taken of section 2 by the Canadian courts,[19] though an inconsistent statute is not invalid but merely "inoperative". If treated as a limitation of form, section 2 ought to render conflicting statutes void.[20] However regarded, the Canadian Bill of Rights is entrenched in the sense that no subsequent statute which derogates from it can take effect unless the legislature makes an express declaration that it is to be overridden.

Clause 5 of the Human Rights Bill 1973 in Australia was modelled on the Canadian Bill of Rights[21] but the bill was not passed and thus we have no judicial commentary on its effect. Similarly the Australian Bill of Rights 1985 never acquired legislative force. It stipulated that where a subsequent Act "does not provide, by express words of plain intendment, that its provisions, to the extent to which they are in conflict with the Bill of Rights, are to prevail over the Bill of Rights, then - (a) that Act ... does not have any operation". This clause, according to one commentator, "leaves unimpaired Parliament's power expressly to repeal or amend legislation and ... does not require any 'magic formula' to be complied with before an express repeal or amendment was recognized".[22]

The Canadian provision has been hailed as "the formula for a very effective blending of judicial and parliamentary powers, a formula that stimulates appropriate judicial activism in favour of the specified rights and freedoms of the citizen, and yet still gives the last word to an ordinary majority in the democratically elected Parliament of Canada, if Parliament should choose to speak the last word by its normal legislative process".[23] It may be that a

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17. See W R Lederman, Continuing Canadian Constitutional Dilemmas (Toronto: Butterworths, 1981), p 417.

18. M J Detmold, The Australian Commonwealth: A Fundamental Analysis of its Constitution (Sydney: Law Book Co, 1985), p 218.

19. R v Drybones (1969) 9 DLR (3d) 473; R v Miller and Cockriell (1976) 70 DLR (3d) 324, 329. Cf Winterton, "Can the Commonwealth Parliament Enact 'Manner and form' Legislation?" (1980) 11 Fed LR 167, 185.

20. Peter W Hogg, Constitutional Law of Canada (Toronto: Carswell, 2nd ed 1985), p 644.

21. Winterton (note 19 above), p 169.

22. N K F O'Neill, "The Australian Bill of Rights Bill 1985 and the Sovereignty of Parliament" (1986) 60 ALJ 139, 146.

23. Lederman (note 17 above), p 418.

similar formula has been recognised by the English courts in the European Communities Act 1972. Section 2(4) provides that any enactment passed or to be passed shall be construed and have effect subject to sub-section (1), requiring rights etc from time to time created in Community law to be recognised, available, enforced, allowed, and followed. This section, according to one academic opinion, "does not say that Parliament cannot enact legislation which is in conflict with Community obligations. It denies effectiveness to such legislation by controlling the way in which ... the courts must both construe and give effect to it .... The future statute is not invalidated, its consequences are limited".[24] In Macarthys v Smith[25] Lord Denning asserted that Community law prevails, even over inconsistent subsequent legislation, unless Parliament deliberately and expressly legislates contrary to it.[26] In effect a requirement of form has been laid down and must be complied with if the courts are to permit the continuing authority of Parliament, or to recognise its true intention in a later statute, to legislate inconsistently with Community law. In the recent Factortame case[27] the House of Lords took the view that directly enforceable Community rights prevailed over anything to the contrary in an Act of 1988. It was not a question of the validity of the Act but of its interpretation.[28] In such cases, it has been said, "the courts are sometimes able to unchain themselves from the strict logic of substantive formalism and make it give way to common sense and the real and obvious intentions of the various Parliaments".[29]

It is suggested, therefore, that a suitably worded provision, whether perceived as an interpretation section or a limitation of form, could be adopted in Hong Kong preserving the Bill of Rights from amendment by any legislation which did not clearly and unmistakably announce an intention to override it.[30] Such a provision would not conflict with the Letters

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24. J D B Mitchell, S A Kuipers, and B Gall, "Constitutional Aspects of the Treaty and Legislation Relating to British Membership" (1972) 9 CMLR 134, 143-4.

25. [1979] 3 All ER 325; [1981] QB 180.

26. See T R S Allan, "Parliamentary Sovereignty: Lord Denning's Dexterous Revolution" (1983) 3 Oxford Journal of Legal Studies 22; Joseph Jaconelli, "Constitutional Review and Section 2(4) of the European Communities Act 1972" (1979) 28 ICLQ 65.

27. [1989] 2 WLR 997.

28. Nigel P Gravells, "Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?" [1989] Public Law 568, 580.

29. O'Neill (note 22 above), p 146.

30. Detmold (note 18 above), p 216; cf McCawley v R (1920) 28 CLR 106 (PC).

Patent.

Plainly the Hong Kong Bill of Rights Bill has not attempted this form of entrenchment. Clause 4(1) requires construction of a subsequent enactment in accordance with the ordinance, so far as such a construction is possible. Clause 2(3) invites the judges to disregard rules of interpretation applicable to other ordinances when interpreting and applying the Bill of Rights Ordinance. But there is no command that later enactments be applied so as not to infringe the Bill of Rights except where those enactments expressly declare their intention to conflict with it; that is, the formula contained in the Canadian Bill of Rights has not been adopted. There is no suggestion that a later statute might be inoperative or "disapplied". Judges may disregard the normal rules of interpretation, including the rule that later statutes repeal existing statutes, but only when interpreting and applying the Bill of Rights Ordinance - yet the primary focus of the interpretive exercise, when a later enactment is alleged to be inconsistent with the Bill of Rights, must be that later enactment, not the Bill itself. In regard to that statute, lex posterior derogat priori. So if it does not admit of a construction consistent with the Bill it will stand and the rights and freedoms with which it conflicts will be overridden.

Entrenchment will thus have to depend on the promised amendment to the Letters Patent. This provision will presumably restrict the legislative authority of the Hong Kong legislature such that the International Covenant "as applied to Hong Kong" in the Bill of Rights (and by other means) will continue to be in effect until 1 July, 1997. On that day the Hong Kong Bill of Rights Ordinance, as a law previously in force, will continue in operation so far as it is consistent with the Basic Law. As Johannes Chan has written, "The source of entrenchment would be extinguished by 1997, but the Bill of Rights would persist"[31] Thereafter the Basic Law, through article 39, will provide the entrenchment mechanism.

It must be noted that this is the absolute form of entrenchment, so far as the SAR legislature is concerned. Only the NPC, under article 159, may amend the Basic Law and only the NPC could moderate article 39 to permit the local legislature to derogate from the Bill of Rights.

It has been reported that Chinese officials have expressed concern about the Bill of Rights because the provisions of the international covenants and the labour conventions shall, in the words of article 39, "be implemented through the laws of the HKSAR", not through the laws of the pre-1997 government. This objection is misguided, since article 18 of the Basic Law states that the laws of the HKSAR shall include the laws previously in force in

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31. "A Bill of Rights", The New Gazette (Law Society of Hong Kong), March 1990, p 37.

Hong Kong as stipulated in article 8, and the laws previously in force in Hong Kong include ordinances not inconsistent with the Basic Law. In so far as the Bill of Rights Ordinance implements the ICCPR it will not be inconsistent with the Basic Law, and indeed, as Mr Chan says, it will reflect the true intention of article 39.[32]

I have argued in this paper that resort to the Letters Patent for entrenchment of the Bill of Rights was not necessary, for the Hong Kong legislature, acting alone, has the requisite authority. Entrenchment by ordinance through a limitation as to form would not be contrary to the Letters Patent, it is not prohibited by the Colonial Laws Validity Act, and precedents exist in Canada and the United Kingdom. This technique was not chosen, however, perhaps for fear - though I think misplaced - that it would be inconsistent with the Basic Law.[33] There is no doubt that entrenchment can be achieved through amendment of the Letters Patent, and after June 30, 1997 article 39 of the Basic Law will prevent legislative interference with the Bill of Rights.

This is not necessarily desirable. It is a claim by today's law-makers that tomorrow's law-makers lack wisdom. The more flexible approach of a limitation merely of form, which would allow political processes full rein, might well be thought preferable to absolute entrenchment.

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32. Ibid, p 38.

33. The argument is that section 2 of Annex II ("The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present") would be violated by a provision requiring, say, a special majority before an ordinance could amend the Hong Kong Bill of Rights Ordinance. (Note that the words "at least", which could be crucial to the point under discussion, do not, I am advised, appear in the Chinese version.) This may be so for a limitation as to manner - though Johannes Chan, ibid, p 38, disagrees - but it has no application to the device of entrenchment by form adopted in the Canadian Bill of Rights.

Enforcement of the Bill of Rights

Albert H.Y.Chen

BROAD declarations of substantive rights are meaningless in the absence of a good system of procedure and remedies whereby such rights can be effectively enforced. From this point of view, clause 6 of the Hong Kong Bill of Rights Bill 1990, which deals with "remedies for contravention of Bill of Rights", may be considered one of the most important provisions in the Bill. This paper attempts a preliminary study of this clause with reference to enforcement provisions in the Bills of Rights of other Commonwealth jurisdictions.

Before turning to the comparative materials, I want first to consider the wording of clause 6 on its own. Three main points emerge from its express language. First, a violation of the Bill of Rights in relation to any person is actionable as a tort. Secondly, if

(1) proceedings within the jurisdiction of a particular court (or tribunal) are brought before it,

(2) the court has power to grant a particular remedy or relief or make a particular order in those proceedings "whether by virtue of sub-section (1) or otherwise,"

(3) a violation or "threatened violation" of the Bill of Rights "is relevant" in such proceedings, and

(4) the court considers it appropriate and just in the circumstances to grant the remedy or relief or make the order, then the court can grant the remedy or relief or make the order. Thirdly, the fact that particular proceedings relate to the Bill of Rights does not automatically take them outside the jurisdiction of a court or tribunal.

One of the main issues arising from clause 6 concerns the designation of a violation of the Bill of Rights as a tort. This represents a very novel approach in the drafting of the enforcement provision of a Bill of Rights. As subsequent parts of this paper will show, this approach has not been adopted in the Bill of Rights of other Commonwealth jurisdictions.

Making a violation of the Bill of Rights a tort is not without advantages. In particular, since the provision creates a cause of action in relation to such a violation, the relevance of the Bill of Rights will not be confined to criminal or civil proceedings, or proceedings in administrative law, in which it is alleged by one side that a law relied on by the other side is void because it is inconsistent with the Bill of Rights. In other words, the Bill of Rights

is not only relevant to a challenge to a law as a collateral issue in criminal prosecutions or proceedings based on a cause of action independent of the Bill of Rights, but the Bill of Rights confers rights which may be directly enforced by an action in tort.

A second advantage of making a violation of the Bill of Rights a tort is that the usual remedies in the law of tort are available in respect of the violation. Such usual remedies include damages (including exemplary damages) and injunctions, although under the Crown Proceedings Ordinance, an injunction cannot be granted against the Crown.[1] Compared with the situation in some other jurisdictions in which it is not clear from the constitutional Bill of Rights whether damages might be awarded for a violation, the approach used in clause 6(1) of the Hong Kong Bill of Rights Bill represents an improvement. And as the Hong Kong Bill of Rights is binding on private persons as well as the Government, the tort provision facilitates the enforcement of the Bill of Rights particularly as among private persons. The law of tort is, by its very nature, regulatory of the relationship between private persons.

There are, however, also disadvantages in the approach used in clause 6(1). The first problem one encounters is that it is doubtful under clause 6 as it stands whether a violation of the Bill of Rights is actionable otherwise than as a tort. This is closely connected with the second problem, which is whether remedies which are not normally granted in tort actions are available in an action alleging a violation of the Bill of Rights. As regards this second problem, it might be argued that clause 6(2) resolves the question. It is difficult however to be convinced that clause 6(2) is wide enough to empower the court to grant any remedy it considers appropriate in an action not based on a cause of action independent of clause 6. I shall therefore examine clause 6(2) more closely.

The main elements of clause 6(2) have been separated and set out above. Reading clause 6(2) on its own, it seems that it is designed only for situations in which a violation of the Bill of Rights arises as a collateral issue in criminal proceedings or in proceedings based on a cause of action independent of the Bill of Rights Ordinance. It empowers the court to grant remedies in respect of the violation provided that the court already has power under existing law to grant the remedy "in such proceedings," i.e. the type of proceedings in which the violation of the Bill of Rights is now raised as a collateral issue. But clause 6(2) in itself does not create any new cause of action in respect of violations of the Bill of Rights, and it follows therefore that it does not empower the court to grant any remedy directly (as distinguised from indirectly when dealing with a collateral issue) in respect of such violations.

When clause 6(2) is read together with clause 6(1), it seems that the scope of clause

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1. S 16, cap 300, LHK 1964 ed.

6(2) is extended to cover not only proceedings brought independently of the Bill of Rights Ordinance but also proceedings brought under clause 6(1) as well. However, the point here is that clause 6(1) covers only tort as a cause of action for violations of the Bill of Rights. Therefore, it may be concluded that cluase 6(2) does not empower the court to grant any remedy where a person seeks to bring an action otherwise than in tort to complain about a violation of the Bill of Rights where the violation is the sole cause of action rather than a collateral issue. In other words, clause 6(2) does not seem to allow the court to grant a remedy other than remedies normally available for torts if an action to enforce a right in the Bill of Rights is brought and the cause of action does not exist independently of the Bill of Rights Ordinance.

The third problem arising from the designation of a violation of the Bill of Rights as a tort is that it might not be desirable, from the policy point of view, to render the Government liable in tort, and hence normally in damages, for every violation of the Bill of Rights. In other Commonwealth jurisdictions, the distinction between private law wrongs and constitutional wrongs is established, and while courts may have the discretion to award damages in relation to violations of constitutional rights by the government, there is no general rule that damages are normally available for or may be claimed as of right in relation to a violation of the Bill of Rights.[2] Clause 6 may therefore not only preclude in certain circumstances the grant of appropriate remedies in respect of violations of the Bill of Rights, but also require the grant of an inappropriate remedy in respect of certain violations by the Government.

Most of the problems discussed above can be solved simply by removing the designation of a violation of the Bill of Rights as a tort, while preserving the principle that such a violation may be a cause of action independently of other exising laws and procedures. Furthermore, clause 6(2) should be made more flexible by empowering the courts to grant

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2. For example, in Canada, the rule before the enactment of the Canadian Charter of Rights and Freedoms was that damages could be awarded for constitutional violations if the violations also happened to constitute private law wrongs: see Gerald-A Beaudoin (ed), Charter Cases 1986-87 (Cowansville: Les Editions Yvon Blais, 1987), p 248. After the Charter was introduced, courts have begun "to explore the possibilities for damage awards when Charter rights are infringed" (Neil R Finkelstein and B M Rogers (eds), Charter Issues in Civil Cases (Toronto: Carswell, 1988), p 54), and to develop criteria as to when it is appropriate and just to award damages for such infringement: ibid, p 52. It is however still uncertain whether individual government officials can be personally liable in damages for breach of Charter rights: ibid, p 54; Charter Cases, op cit, p 249. For the position in Jamaica, see note 12 below and the accompanying text. In the United States, it was only in 1970 that the Supreme Court decided that damages could be awarded for a breach of the Bill of Rights in the USConstitution: Peter W Hogg, Constitutional Law of Canada (Toronto: Carswell, 2nd ed 1985), pp 697-8.

appropriate remedies in both cases where violations of the Bill of Rights is raised as a collateral issue and cases where the violation is itself the cause of action. The remainder of this paper seeks to demonstrate that the approach recommended in this paragraph is indeed that adopted in more than twenty Commonwealth countries.

Three representative kinds of enforcement provisions in Commonwealth Bills of Rights will be looked at below. They are:

(1) the enforcement provision in the Indian Constitution 1949. The Bill of Rights in the Indian Constitution may be considered the first full Bill of Rights in Commonwealth constutitions.

(2) the enforcement provision in the constitutions of Jamaica and Belize. The Bills of Rights in Jamaica and Belize, including the enforcement provisions therein, belong to and are typical of Bills of Rights in a family of constitutional Bills of Rights originating from the Bill of Rights in the pre-independence Nigerian Constitution 1959. The Bills of Rights in at least twenty-five Commonwealth countries, including African, Carribean and Pacific Islands states, belong to this family.[3]

(3) the enforcement provision in the Canadian Charter of Rights and Freedoms 1982. The Canadian Charter is a recent Bill of Rights in a large and highly developed Commonwealth jurisdiction and the jurisprudence surrounding it is growing rapidly. The enforcement provision in the draft New Zealand Bill of Rights 1985 is also a direct reproduction of the Canadian provision.[4]

The Indian provision

Part III of the Constitution of India is a Bill of Rights and the part is entitled "fundamental rights". The enforcement of these constitutional rights is expressly provided for in articles 32 and 226 of the Constitution. Article 32 provides a "constitutional remedy" for the enforcement of rights. The article guarantees "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by" Part III of the Constitution. Furthermore, it empowers the Supreme Court "to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by" Part III. Under article 226, the High Court is similarly empowered to issue

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3. Sir William Dale, The Modern Commonwealth (London: Butterworths, 1983), p 185.

4. J B Elkind and A Shaw, A Standard for Justice - A Critical Commentary on the Proposed Bill of Rights for New Zealand (Auckland: Oxford University Press, 1986), pp 139-40.

directions, orders or writs (including the writs specified above) for the enforcement of any of the rights conferred by Part III and for any other purpose.

Applications under articles 32 and 226 are not the only means by which the fundamental rights provisions may be brought into operation: for example, they may also be enforced by way of defence to legal proceeedings brought against an individual, or by proceedings seeking a declaratory judgment under ordinary law.[5] The significance of the two articles is however that they provide new channels for seeking relief and express powers on the part of specific courts to provide remedies for the enforcement of fundamental rights. Moreover, the right to bring proceedings under article 32 "is itself made a fundamental right, being included in Part III,"[6] and is therefore immune from being overriden by ordinary legislation. Thus article 32 has been hailed as "the cornerstone of the entire edifice set up by the Constitution," "the most important [article in the Constitution] - an article without which this Constitution would be a nullity," "the very soul of the Constitution and the very heart of it."[7]

The enforcement provisions in Jamaica and Belize

In discussing Bills of Rights in constitutions of Commonwealth countries generally, Sir William Dale set out in full the Bill of Rights in the 1981 Constitution of Belize as "a typical example of the contemporary Commonwealth Bill of Rights".[8] The enforcement provision of the Belize Bill of Rights is contained in section 20. Its main features may be outlined as follows.

(1) If any person alleges that the provisions of the Bill of Rights "has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress."

(2) The Supreme Court shall have original jurisdiction to hear and determine such

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5. Durga Das Basu, Introduction to the Constitution of India (New Delhi: Prentice-Hall, 6th ed 1976), p 104.

6. Loc cit.

7. Loc cit.

8. Dale, note 3 above, p 168.

application and may make "such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of" the Bill of Rights. The Supreme Court may however decline to exercise this power "if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

(3) If in any proceedings in any other court, "any question arises as to the contravention of any of the provisions of" the Bill of Rights, that court "may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court" (unless the first court is of the opinion of the raising of the question is merely frivolous or vexatious). After the Supreme Court has given its decision upon the question, the court in which the question arose "shall dispose of the case in accordance with that decision."

(4) A determination of the Supreme Court under section 20 may be appealed to the Court of Appeal.

(5) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by or under section 20.

The enforcement provision of the Bill of Rights in the Jamaican Constitution 1962 is section 25 of that constitution. The content and language are extremely close to section 20 of the Constitution of Belize as summarised above. As the Jamaican Constitution has a longer history than Belize's and Jamaica is a relatively larger jurisdiction, the operation of the constitutional provisions has been elucidated in academic writing and case law. Thus as Dr Lloyd Barnett explains, the question of enforcement of rights guaranteed by the Bill of Rights may arise either directly on an application for redress under section 25 or indirectly in other legal proceedings.[9] In the latter case the court would apply the normal principles and discretions as to remedies applicable to the type of proceedings with which it is concerned.[10]

On the other hand, where an application is made under section 25 itself, the procedure is governed by the Judicature (Constitutional Remedies) (No. 2) Rules 1963. The rules provide that a person who alleges that a fundamental right "has been, is being or is likely" to be contravened in relation to him may seek redress "by filing a writ of summons claiming

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9. Lloyd G Barnett, The Constitutional Law of Jamaica (Oxford: Oxford University Press, 1977), p 433.

10. Loc cit.

a declaration of rights and praying for an injunction or other appropriate order." But where the applicant alleges only that a fundamental right "has been or is being" contravened, the application may be made "by motion to the court supported by affidavit." Where the Attorney-General is not a party and an application is made directly to the court for the enforcement of a fundamental right, the plaintiff must file additional copies of the relevant documents, which the registrar must send to the Attorney-General for his information.[11]

Commenting on the reference to "other appropriate order" in the rules, Dr Barnett suggests that the usual prerogative orders of mandamus, certiorari, prohibition and the prerogative writ of habeas corpus may be issued in appropriate cases. He goes on to point out that an order for the payment of damages may also be made "particularly in those cases where at common law the infringement of the individual's right could have been enforced by an action for damages."[12]

The Canadian provision

I now turn to the enforcement provision in the Canadian Charter of Rights and Freedoms 1982. This is section 24(1)[13] of the Constitution Act, 1982 which reads as follows:

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

This provision is much shorter and simpler than the standard enforcement provision in Commonwealth Bills of Rights as exemplified by the Belize and Jamaican provisions discussed above. The case law and secondary literature on the enforcement of the Canadian Charter is however voluminous, but the following points are worth noting:

(1) Section 24 creates a novel cause of action[14] and "a new remedy for breach of the

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11. Ibid, p 429.

12. Ibid, p 432.

13. S 24(2) provides for the possibility of exclusion of evidence obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter. Whether a similar provision should be adopted in Hong Kong is an important question which will not however be dealt with in this paper.

14. Charter Issues, note 2 above, p 48; Elkind and Shaw, note 4 above, p 139.

Charter."[15] It is however not the exclusive remedy; pre-existing channels for seeking redress for violations of constitutional rights continue to be available.[16] Such pre-existing avenues include, for example:

(a) an action for a declaration that a piece of legislation is invalid;

(b) an application for judicial review of a decision taken under allegedly invalid legislation.

(c) A constitutional issue may arise collaterally in criminal or civil proceedings in which legislation relied upon by one side is claimed to be invalid by the other.[17]

Nevertheless, section 24(1) is the sole remedy in cases of breach of the Charter for which the usual pre-existing means of raising a constitutional issue are not available or cannot be used satisfactorily.

(2) Requirements as to standing or locus standi for the purpose of an application under section 24(1) are contained in the sub-section itself. The word "anyone" in the provision would include a corporation.[18] A connection betwen the applicant and the alleged Charter violation is necessary.[19] In particular, a violation of the applicant's right, and not merely that of somebody else's, is necessary. Furthermore, the infringement of rights must have occurred already; an apprehended future infringement is not sufficient. From this point of view, the standing requirements under section 24 are in fact stricter than those under some other remedies. For example, under pre-existing law, an action for a declaration that a statute is unconstitutional may be brought by a person who is not directly affected by the statute. A declaration or quia timet injunction may be obtained in respect of an apprehended violation of rights. And in certain circumstances the prerogative writs (certiorari, prohibition, habeas corpus) may be applied for by a third party.[20]

(3) It is well-established that the phrase "court of competent jurisdiction" in section 24(1) means that the application under the sub-section must be made to a court which is not

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15. Hogg, note 2 above, p 693.

16. Peter W Hogg, Canada Act 1982 Annotated (Toronto: Carswell, 1982), p 64.

17. Ibid, p 65. See also Hogg, note 2 above, p 693.

18. Hogg, note 16 above, p 64; Charter Cases, note 2 above, p 68.

19. Charter Cases, note 2 above, p 77.

20. Hogg, note 16 above, p 65; Hogg, note 2 above, p 695.

subject to jurisdictional restrictions which would deny it jurisdiction over the subject matter in issue or the parties to the application.[21] However, there are conflicting opinions as to whether the court must also have jurisdiction independently of the Charter to grant the particular remedy sought.[22] The more conservative intrepretation is that section 24(1) does not confer new authority on a court to grant a remedy other than those which it has power to grant under pre-existing law, but empowers the court to grant such remedies on new grounds (i.e. Charter violations).[23] On the other hand, the more liberal view is that "a court which is competent as to subject matter and parties is probably not confined to remedies which are within its usual jurisdiction; the section itself confers the authority to grant an appropriate remedy."[24] An example which has been given in this regard is that where a criminal court finds that a police officer's actions infringed the accused's Charter rights, it should have the power to reprimand the police officer or to refer his actions to a police discipline board.[25]

(4) Even if the conservative interpretation mentioned in the previous paragraph is adopted, it seems that the superior courts acquire a power under section 24(1) to fashion completely new remedies to deal with Charter violations.[26] As the Chief Justice of the Supreme Court of British Columbia points out, "[i]t can be argued that section 24 is so broad that, to quote Rothman JA of the Quebec Court of Appeal, 'it obviously was the intention of the framers of the Constitution that the Courts have enormous discretion to define remedies that [are] appropriate to the right violated.'"[27] However, the Canadian courts have been reluctant to date to go beyond the traditional remedies, such as damages, injunctions, declarations and

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21. Hogg, note 16 above, p 65; Hogg, note 2 above, p 695.

22. Charter Cases, note 2 above, p 153; Hogg, note 2 above, p 696.

23. Charter Cases, p 412.

24. Hogg, note 16 above, p 65; Hogg, note 2 above, p 696.

25. Hogg, note 2 above, p 697.

26. Neil Finkelstein, Laskin's Canadian Constitutional Law (Toronto: Carswell, 5th ed 1986), vol 2, p 1375; Hogg, note 2 above, p 693; B McLachlin, "The Charter of Rights and Freedoms: A Judicial Perspective" UBC Law Review, vol 23:3 (1989) 579, 589; Charter Cases, note 2 above, pp 233, 249, 416.

27. McLachlin, note 26 above, p 589.

prerogative remedies.[28] In criminal proceedings where Charter violations are used as a defence, the usual remedies include staying the prosecution, quashing the information or indictment, or acquitting the defendant,[29] apart from the exclusion of evidence expressly dealt with by section 24(2).

Conclusion

As mentioned earlier in this paper and demonstrated above, the provisions for the enforcement of Bills of Rights in many Commonwealth jurisdictioins have at least two features in common. First, a violation of the Bill of Rights is made a cause of action without however designating it as a tort. Secondly, the courts are empowered to grant appropriate remedies in relation to such a violation, not only when the matter arises collaterally in general criminal or civil proceedings, but also in cases where a violation of the Bill of Rights is the sole cause of action. It is submitted that these two ideas are worthy of implementation in the context of the Hong Kong Bill of Rights. If the standard Commonwealth enforcement provision is thought to be too elaborate in content and too complicated to implement - owing to the need to enact subsidiary legislation providing for the procedure for the new type of applications to the Supreme Court, then the Canadian provision should perhaps be seriously considered for adoption. Its advantages include its relative simplicity and the availability of case law and secondary literature relating to its interpretation and operation. Moreover, its adoption would not necessitate extensive re-drafting of clause

6. The following is a tentative proposal;

"6. Remedies for contravention of Bill of Rights

(1) A violation, infringment or denial of any right or freedom guaranteed by the Bill of Rights in relation to any person is actionable.

(2) A court or tribunal may, in proceedings within its jurisdiction in which a violation, infringment or denial, or threatened violation, infringement or denial, of any right or freedom guaranteed by the Bill of Rights is relevant, grant such remedy or relief or make such order as it considers appropriate and just in the circumstances.

(3) [no change is suggested]"

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28. Laskin, note 26 above, p 1375.

29. Charter Cases, note 2 above, p 234; Hogg, note 2 above, pp 695, 697.

Implementing the Bill of Rights: Three Modest Proposals. Or Taking the Bill of Rights Seriously

David Clark

General Observations

1. THE Bill should be strongly supported by the whole Legislative Council in order to give a strong lead to the public. The Bill may be the most important piece of legislation that the Council is ever asked to pass. If the Bill becomes a reality it will lead both to a modernization of the statute book, and to a significant strengthening of human rights in Hong Kong. Human Rights protection in Hong Kong is impressive and it must never be forgotten that Hong Kong is one of the few stable, prosperous and free Chinese societies anywhere. The maintenance of such a system is a compelling reason in support of the passage of the Bill.

2. Many of the criticisms of the Bill are ill-informed and do not take Hong Kong realities into account. Hong Kong is not a small island in the Caribbean or South Atlantic with a pre-industrial economy. Other British colonies are not facing the certain resumption of sovereignty by another state. For these reasons the Bill must be 1) a real Bill of Rights and 2) survive the handover in 1997. This explains why it must take the form of an ordinance and not be put into the Letters Patent. Ordinances will survive the changeover, the Letters Patent will not. A Bill put into the Letters patent would be supreme only until midnight June 30th, 1997 when the entire system would simply disappear.

Hong Kong's peculiar situation also explains why the Bill cannot include references to self-determination. This would both conflict with the Joint-Declaration and the Basic Law, and provoke a strong Chinese reaction, possibly amounting to direct intervention.

3. The main effect of a Bill of Rights is not to invalidate legislation or to prevent the legislature from passing legislation, though it will do this before 1997. The principal effect

of a Bill of Rights is to change the attitudes and behaviour both of public officials and the general public. A Bill of Rights is not intended to deal with the gravest crises, but will operate best in a settled and rational Society. Most abuses of Human Rights in a place like Hong Kong are minor. Hong Kong does not have a problem with torture, for example.

4. The main reason for passing the Bill is to strengthen the foundations of the existing legal system and thereby to reassure ordinary people that their rights will be protected. It is not a device to oppose China nor should it be seen in this light. There are good reasons for protecting Human Rights in the territory now. Despite the talk about emigration, the majority of people now living in Hong Kong will still be here in 1997. These people must not be forgotten. Human rights standards, and attitudes towards human rights protection, have not stood still since 1945. It would be a mistake to assume that because the present system has apparently worked well, nothing more needs to be done. Western democracies have never taken this view and many of them have actively pursued means to improve their already impressive human rights records. Hong Kong should not stand aside from these international trends.

5. There is nothing that the present administration can do to absolutely guarantee that the Bill will remain law after June 30th, 1997. What the administration has done is design a Bill that conforms to the Basic Law. There are no legal arguments presently available that indicate that the Bill is in conflict with the Basic Law. By avoiding such a conflict, the Bill should survive the handover. What will change in 1997 is that the proposed amendment to the Letters Patent to give the Bill superior status will cease to have legal effect at midnight on June 30th, 1997, unless the SAR Government and the Central People's Government agree to an amendment to the Basic Law that continues in force a similar provision for the SAR period.

The abolition of the Bill after 1997 would require an explicit act by the Standing Committee of the National People's Congress. The Standing Committee would have to "return" the law, i.e. declare that it conflicts with the Basic Law. The political impact on local confidence of such an act may readily be imagined. This decision, if taken, would be the responsibility of the Central People's Government and would only be taken, one assumes, after consulting the Basic Law Committee. Presumably, a prudent government would first consider the impact on the stability and confidence of the SAR before taking such a decision.

6. A Bill of Rights will fail in two situations. First, where the executive is sufficiently ruthless or unscrupulous that it simply ignores or manipulates the constitutional order. No

Bill of Rights can withstand such pressures. Second, if the society or, sections of the society, are so bitterly divided that the political process cannot reconcile them, the subsequent conflict may tear the social, economic, political and legal fabric apart. A Bill of Rights cannot survive in such conditions. Hong Kong does not face either of these problems at the moment.

On the other hand, if the executive does respect the constitutional order, and assuming that most citizens are law abiding, the Bill of Rights will be effective. To achieve this it must be recognised that the Bill of Rights not be condemned to remain an alien abstraction, that most people do not understand, let alone support. Only if the Bill and the values it stands for are brought into contact with the lives of ordinary people, and are supported by them, will the system survive.

On Implementation

A. Introduction

The forthcoming enactment of the Bill of Rights Bills 1990 must be matched by a determination to fully and effectively implement the Bill. As an experienced Canadian administrator pointed out in 1969:[1]

> ". . . it would be well to remember that declarations and statutes proclaiming human dignity and human rights are not enough. There must also be: (1) effective enforcement, (2) public education, and (3) strong administration, if people are to be accorded equal opportunity in fact as well as in theory."

The strategy recommended here assumes a political commitment on the part of the Government, the Legislative Council and the general public to take the Bill the Rights seriously. It would be a mistake to assume that the Bill will have little or no effect and merely exists for ceremonial purposes or to improve Britain's standing at the annual U.N. Human Rights Committee hearings in Geneva. The evidence from Canada shows that the

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1. Daniel J Hill, "The Role of A Human Rights Commission: The Ontario Experience", (1969) 19 University of Toronto Law Journal, 390, 401. See also Ian A. Hunter, "The Development of The Ontario Human Rights Code: A Decade in Retrospect", (1972) 22 University of Toronto Law Journal 237, 257: "Only by continual extension of the legislation, creative interpretation by Boards of Inquiry and the courts, and public sympahty and support will the language of the preamble be transformed from a pious slogan to a reality."

adoption of a Bill of Rights means that everyone has to grasp that it is a fundamental law[2] intended to be given a wide scope.[3] This objective manifests itself in the Hong Kong Bill in clause 2(3) where it is made clear that the ordinary rules of statutory interpretation may be disregarded.[4] The Bill will override all other laws that conflict with it, whether passed before or after it.[5]

B. Political entrenchment

One must assume that the Government introduced the proposal when it did in order to bolster sagging political confidence in the territory. This is a legitimate governmental objective and can be achieved only if the Bill becomes politically entrenched in Hong Kong. By this I mean that the system to be created by the Bill will actually touch the lives of ordinary people in Hong Kong. There are three ways in which the Bill of Rights could become a living reality in Hong Kong. They are: public education, a Human Rights Task Force, and a Human Rights Commission.

1. Education

Very few lawyers, judges, civil servants or citizens have a clear grasp of the central principles of a Bill of Rights system, let alone its details. Education should proceed at two levels. At the popular level, articles should be written by effective communicators who can convey the essential principles of the system with illustrative, concrete examples. These

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2. This is not the same thing as saying that it is a constitutional law. Modern common law systems recognise at three types of laws: constitutional, fundamental and ordinary.

3. Insurance Corporation of British Columbia v Heerspink (1982) 137 DLR (3d) 219, 229 (SCC); Re Winnipeg School Division No 1 (1985) 21 DLR (4th) 1, 3-4 (SCC).

4. The Canadian courts have taken the same approach. Narrow interpretations that defeat the purposes of the legislation are to be avoided: Action Travail Des Femmes v CNR Ltd (1988) 40 DLR (4th) 193, 209 (SCC).

5. Clause 3 of the Bill of Rights Bill. That clause refers only to laws in existence prior to the enactment of the Bill. Clause 4 does not make explicit that enactments made after the commencement of the Ordinance will be repealed to the extent that they are inconsistent with and cannot be reconciled with the Bill of Rights Ordinance. This should be done. It should be noted that even where Human Rights legislation does not contain a Clause 3 provision it will still be construed by the courts as ordinarily overriding other legislation, unless that later legislation explicitly states it is to be an exception to the Bill: Re Winnipeg School Division No 1 (1985) 21 DLR (4th) 1, 6 (SCC); Druken v Canada (1988) 88 CLLC 17, 024 (Fed CA).

articles should be published in the Chinese print media.

Serious consideration should also be given to insisting that all school children are taught some basic legal principles, including the central principles of, and assumptions underlying, the Bill of Rights. Not only will this reduce much of the mystery surrounding the system, attributable in part to the rather esoteric issues, such as entrenchment and supremacy, that have dominated the debate, it will also begin the process of building a political constituency in favour of the system. This could be done through the civic education programme, for which there are precedents. The ICAC's Community relations department has been active in the schools. Their experience could prove to be very useful. After the system is up and running, a continuing education role could be taken over by a Human Rights Commission.

At the second level Hong Kong needs a series of seminars in the next six months on each of the articles in the Bill as well as on key practical issues: e.g. methods of enforcement and court remedies. If there are insufficient experts in Hong Kong Canadians and Europeans should be invited to assist.

The reason for this second series of seminars is practical. The Government has indicated that all of the Laws of Hong Kong (all 32 volumes of them) will have to be examined to see if they conflict with the Bill. This can only be done by people who have a sound grasp of the meaning of the articles in the Bill. A subsidiary reason is that these seminars will have to deal with the kinds of working problems that the system will face, and will therefore be very useful for lawyers, judges and civil servants.

2. Human Rights Task Force

This would be a temporary body to be in existence for the duration of the "freeze period". Its function would be to identify any Hong Kong statute that may conflict with the Bill. This will be a massive and difficult task because all statutes and subordinate legislation will have to be scrutinised.

To give some less obvious examples of where questions may arise, the Midwives Registration Ordinance (Cap 162) s 7(1)(6) defines a midwife as a "she". Under our law a "he" includes a "she", but a "she" does not include a "he".[6] Is such an exclusion permissible? Does the Chinese Temples Ordinance (Cap 153) s 5 impose a restriction on the free exercise of religion or a racial criterion? Are the Governor's powers to licence churches

6. See Interpretation and General Clauses Ordinance (cap 1) s 7(1)

to perform marriages in section 4 of the Marriage Ordinance (Cap 181) an infringement of the free exercise of religion?

The Legal Department simply does not have adequate staff to handle this task. I suggest, therefore, that the Task Force include practising Lawyers and academics, both to speed up the process and thereby shorten the freeze period, and to give the process political credibility. Although the three government lawyers presently dealing with matter are very competent, there are not enough of them to undertake this onerous task. The Legal Department is already burdened by two 1997 undertakings: to localize and to translate the laws. In addition, it has suffered from a number of recent scandals that, rightly or wrongly, have undermined public confidence in it's abilities. Any further aspersions against the Department must be avoided in the public interest.

There are lawyers outside the Department with competence in these matters and their help should be actively sought and used. The political difficulty will arise at the second stage of the screening process, that is, when some tough decisions will have to be made whether or not to amend certain laws that have been identified as probably in conflict with the Bill. This will doubtless result in some internal governmental debates that the Government would prefer take place away from the public gaze. The issue for the Government here is whether secrecy will assist the process or undermine it. If, as happened in Britain,[7] certain departments decided to take a risk and not amend a statute, on the grounds that if no one noticed then the department would still be able to use powers that contravened human rights standards, this might create a legal time bomb that could explode at a particularly inopportune time, e.g. July 1997.

Since human rights legislation does not operate retrospectively, it will not catch behaviour that begins and ends before the Ordinance comes into operation. But it will catch behaviour that began before the Ordinance commenced and is continuing.[8] One of the objectives of a freeze period should be to persuade the community to put its house in order so as not to fall foul of the legislation. One way this might be done is by creating a Human Rights Commission that would exercise an educational function from an early date. The objective is not only to revise the laws, but also to correct practices, so that once the full system comes into operation it will have achieved many of its objectives without resort to court proceedings.

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7. Golder v UK (1975) 1 EHRR 524.

8. Dalton v Canadian Human Rights Commission (1985) 15 DCR (4th) 548, 555-558 (FC TD); Re Latif and Canadian Human Rights Commission (1979) 105 DLR (3d) 607, 622-624 (Fed CA

If the government is to be true to the spirit of a Bill of Rights system, it must be prepared to reach out for expertise and not regard the screening of the statutes as a secretive in-house exercise. An in-house exercise will unnecessarily breed suspicions about its political motives and competence. This will hardly assist in promoting the system or in garnering the support of influential groups, such as the legal profession. The model for this activity should be the mixed membership of the Law Reform Commission. An effective screening process can help to prevent surprises. This is a major reason why the Canadian Charter of Rights and Freedoms of 1982 has not resulted in numerous invalidations of statutes.[9]

3. A Human Rights Commission

a. Origins

The idea of a Human Rights Commission in the Commonwealth was invented in Saskatchewan in 1947 and thereafter spread to Ontario in 1961. In the next decade and a half the institution was adopted by the other Canadian provinces and in 1976 Federal legislation was passed to create a national Human Rights Commission.[10] A year later New Zealand[11] took up the idea followed in 1981 by Australia[12] which expanded its commission in 1986.[13]

b. Objectives

The objectives of the Commissions are fourfold: education, standard setting, legislative

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9. According to one study, although the Canadian courts heard between 500 and 600 cases a year on the Charter between 1982-86, only in six cases was a statute invalidated: F.L. Morton, "The Political Impact of the canadian Charter of Rights and Freedoms", (1987) 20 Canadian J of Political Science 31, 36. The main reason for this low strike down rate seems to be the effectiveness of the prescreening of legislation: B.L. Strayer, "Life Under The Charter", [1988] Public Law 347, 355-356.

10. Human Rights Commission Act 1976-77 (Canada) (RSC 1985 C H-6) (Supreme Court Library). For an up to date list of Canadian provincial legislation see: Re Blainey (1986) 26 DLR (4th) 728, 746 (Ont CA).

11. Human Rights Commission Act 1977 (NZ) (Legal Dept Library).

12. Human Rights Commission Act 1981 (Cth) (c 24).

13. Human Rights and Equal Opportunities Commission Act 1986 (Cth) (c 125 of 1986) (Supreme Court Library and Legal Dept Library).

screening and dispute resolution. The rights created under the Commissions are process rights rather than substantive rights.[14] This seems that the thrust of the stem is to ensure that substantive rights are actually implemented by means of an appropriate institutional mechanism. The system assumes that substantive rights are provided for in other legislation. In Hong Kong's case in the Bill of Rights and perhaps other legislation as well.[15]
Each of these objectives will be briefly discussed:

1. Education

All Commissions are required to spread the word about human rights. One important avenue is the school system. The underlying assumption is that attitude change is always gradual and should be the result of persuasion rather than compulsion.[16] The Ontario Commission, for example, is heavily involved in providing material for school civics programmes in that province. Thus, films, books and articles have been produced for use in schools.[17] The same Commission has been involved in developing anunderstanding of human rights of by speeches, conferences, displays, radio and television advertisements, community work, newsletters and newspaper publicity.[18] The parallels here with the activities of the ICAC's Community Relations department are obvious.

2. Standard Setting

The Commissions also devise codes of conduct that are sent to a long list of private

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14. Peter H Bailey, "The Human Rights Commission: Tame Cat or Wild Cat?" (1986) 60 Australian Law Journal 123, 125.

15. See the Employment Ordinance (cap 57) which prohibits discrimination in the free exercise of Trade Union Rights (s 21B) and the dismissal of pregnant employees (s 15).

16. Ian A. Hunter, "The Development of The Ontario Human Rights Code: A Decade in Retrospect", (1972) 22 University of Toronto Law Journal 237, 239. The philosophy of gradualism explains why a human rights commission does not effect an overnight revolution in these matters since this would be too radical and disruptive.

17. Ian A Hunter, "The Development of The Ontario Human Rights Code: A Decade in Retrospect", (1972) 22 U of Toronto Law Journal 237, 250. Similarly, in Australia the Human Rights Commission developed the widely used "Teaching for Human Rights" which was adapted by the UN Centre for Human Rights in Geneva for use around the world: Bailey op cit p 130.

18. Daniel J. Hill, "The Role of A Human Rights Commission: The Ontario Experience", (1969) 19 University of Toronto Law Journal 390, 396.

and public organisations, providing standards against which behaviour is to be judged. It is assumed that most organisations and individuals wish voluntarily to comply with Bill standards but lack information as to how this might be done. Since the Commissions accumulate information about various practices, it is best able, in the light of its experience, to suggest standards that actually work in practice. By seeking to influence a wide range of public and private behaviour the Commission is more likely to reach and, thereby, influence more people than if these individuals sought legal advice. Such advice is likely to be expensive and therefore beyond the reach of ordinary people and small organisations. Clearly standard setting also has an educational role and may reinforce 1 above.

Like the ICAC, the Commission might suggest changes in licensing or other regulatory practices in order to promote non-discriminatory conduct. In Ontario, for example, the Commission persuaded the Government, when it began to license Employment Agencies, to insert as a condition of a licence, a prohibition of discriminatory conduct. In other instances a trade association voluntarily announced the adoption of such standards by its members.[19]

3. Legislative Screening

Many Commissions are specifically charged with the task of identifying any legislative provisions that they encounter in the course of their work that they think conflict with the Bill of Rights.[20] This may arise because, despite its best efforts, the Human Rights Task Force may miss provisions that are later discovered, in the light of practice, to be in conflict with the Bill.

The Commission should not be given the task of routinely scrutinising legislation before it is introduced into the Legislative Council for three reasons. First, the Commission should be seen to be independent of the other branches of government. Second, since the Legal Department will have to examine bills to see if they conflict with the Bill of Rights, the Commission should not be required to replicate this work. Third, neither the Commission nor the Attorney General should be required to certify that proposed legislation does not conflict with the Bill of Rights because with certificates might inhibit the capacity of the legislature freely to debate the matter.

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19. Daniel J. Hill op cit p 399.

20. Human Rights Commission Act 1977 (NZ) s 5(1)(e); J.B. Elkind, "The Human Rights Commission As A Law Determining Agency", [1984] New Zealand Law Journal 198.

4. Dispute Resolution

For the man or woman in the street this may prove to be the most important function of the Commission. The idea is to provide direct and easy access to the Commission for people who think that they have suffered a breach of their rights under the Bill or any other rights-related legislation. In the first instance the Commission has to decide if it has jurisdiction in the matter (see below) and then it may conduct an Ombudsman-like investigation. The underlying philosophy is that for many matters a conciliation style of complaint investigation is cheaper and more effective than court proceedings. Under such a system legal proceedings would be a last resort and not, as proposed under the existing draft Bill, a first and only resort.[21] The evidence suggests that a Commission is cheaper to operate and more likely to resolve more disputes than court proceedings.

It should also be recognized that in many instances there may be right and wrong on both sides. The Commissions recognise this, but a court is not able to do so. A judgment of a court assumes that if X is right, Y is wrong, with no room for gradations of right and wrong between them.

The evidence suggests that proceedings in private, which seek to persuade rather than compel, achieve more satisfactory outcomes, because they are private and because the system seeks to soften rather than harden positions.[22] Privacy permits the parties to speak fully and without the fear that what they say will be used in later legal proceedings. The Canadian experience indicates that the conciliator does not seek to allocate blame, so much as to solve the problem.[23] This is a difference that matters because it avoids the creation of psychological barriers to dispute resolution. It is no accident that in Ontario the Minister responsible for the Human Rights Commission is the Minister of Labour. A labour relations approach to dispute resolution, with which Hong Kong has much experience, seems more appropriate than court proceedings.

Where the parties refuse to meet there is power under some related Australian legislation for compulsory conferences. Such powers are used rarely but seem to be

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21. Commentary s 6.

22. John Hucker and Bruce C. McDonald, "Securing Human Rights in Canada", (1969) 15 McGill Law Journal 220, 226-227: "Accusations are avoided if possible, in order to prevent any hardening of positions which would frustrate the process."

23. Daniel J. Hill, "The Role of A Human Rights Commission: The Ontario Experience", (1969) 19 University of Toronto Law Journal 390, 392.

necessary in those infrequent cases where one or both of the parties is obdurate.[24] The Ontario approach involves the setting up of a formal board of inquiry in such cases, but like its Australian counterpart it is used only rarely.[25]

The conciliation approach is not only informal in its early stages, it also permits highly flexible solutions to disputes. The Commission may be abe to persuade the parties to agree to a flexible timetable for instituting changes that both protect rights and ease the impact on the organisation.

This approach is also on all fours with the concept of discrimination that has emerged in Canadian Law. When the courts consider whether certain behaviour is discriminatory they do not look at the intent of the parties, since requiring proof of intent would make the system unworkable.[26] Intent in these situations is very difficult to prove. Since the emphasis is not on assigning blame, but on dealing with the effects of discrimination, the legislation is directed at redressing socially undesirable conditions quite apart from the reasons for their existence.[27]

If conciliation fails, as it may do in some cases, the Commission may issue binding decisions. This will be necessary because the purpose of conciliation is not to effect a compromise that is merely acceptable to the parties, but which leaves intact the discriminatory behaviour that gave rise to the complaint in the first place. There are two reasons for this. First, the Bill of Rights will be a public law and everyone must obey it. Parties cannot be allowed to agree to ignore its terms. Second, the objective of the system is to eliminate behaviour that violates the Bill of Rights standards and this will not happen if the parties agree to ignore the objectives of the legislation. It follows therefore that where the parties cannot agree on a course of action that is in accord with the standards in the Bill of Rights, the Commission may have to hand down a binding decision.[28]

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24. Bailey op cit p 129 points out that in 10 years there have been only 100 compulsory conferences out of 7,500 complaints under the Race Relations Act 1975 (Cth).

25. As Hill op cit p 392 points out between 1962-1969 only 50 cases out of 12,000 went to a board of inquiry.

26. Robichaud v Canada (1987) 40 DLR (4th) 577, 581 (SCC); Janzen v Platy Enterprises [1989] 4 WWR 39, 70 (SCC).

27. Robichaud v Canada (1987) 40 DLR (4th) 577, 581 (SCC). See also: Saskatchewan Human Rights Commission v Odeon Theatres (1985) 18 DLR (4th) 93, 113 (Sask CA).

28. In Re Consumers' Distributing Co Ltd (1987) 36 DLR (4th) 589, 594, 596 (Ont HC) it was held that the Commission was not obliged to ratify an agreement between the parties where that agreement was not voluntary, fair or in accordance with Human Rights Code objectives. See also Human Rights and Equal Opportunity Commission Act 1986 (Cth) ss

Binding decisions by the Commission would be subject to appeal on matters of law.[29] and to judicial review.[30] It is worth noting that neither avenue to the higher courts is likely to result in a flood of cases since there is no evidence of this elsewhere. In New Zealand, for example, there have been only five cases since 1977. The reason for this low rate is simply that the Commission is highly respected and well led. The other reason is that very often the threat of a binding decision is sufficient to bring the parties to their senses. They prefer to be seen to have agreed to a course of action rather than have a decision imposed upon them.

C. Staffing and Organisation

The Commission must be independent of the executive. The executive appoints members for fixed terms and the legislature provides a budget. But the staff of the Commission, and especially the Commission members, must not be public officers. Independence of the government is essential in order to maintain the political credibility of the Commission, and so enhance its authority in the eyes of the public. This is one of the explanations for the success of the ICAC. It does not mean that the Commission would have an anti-government role. The second condition essential to success is that the Commission must be neutral. This is required to maintain the credibility of the Commission with both the public and private sectors.

Commissions vary in size. In Australia the state Commissions have three members, presided over by a person of judicial rank or a legal practitioner of not less than seven years standing.[31] The Ontario Commission is larger with six members on the Commission and thirty members of staff appointed by the provincial Chief Executive.[32] The term of office is normally between 5 and 7 years and none of the members is treated as members of the civil service.

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28 and 34.

29. Saskatchewan Human Rights Commission (1989) 52 DLR (4th) 253, 261-262 (Sask CA).

30. See for example: Board of School Trustees (1990) 62 DLR (4th) 512, 518-521 (NB CA); Ian A Hunter, "Judicial Review of Human Rights Legislation: McKay v Bell (1971) 18 DLR (3d) 1 (SCC)", (1972) 7 University of British Columbia Law Review 17-32.

31. Bailey op cit p 124.

32. Daniel G. Hill, "The Role of A Human Rights Commission: The Ontario Experience", (1969) 19 University of Toronto Law Journal 390, 391-392. New Zealand has 6 while the Canadian Commission has between 5 and 8.

d. Jurisdiction

This is a fundamental issue. Most Commissions are concerned with discrimination in both the public and private sectors in respect of jobs, housing and other forms of accommodation, services and advertising.[33] The problem with the Hong Kong Bill is that it is concerned only with discrimination in respect of political and civil rights.[34] The Government's reason for not implementing the International Covenant on Economic, Social and Cultural Rights (ICESCR) is that "in general they are not rights that can be easily enforced in the courts".[35]

The irony here is that when Britain extended the ICESCR to Hong Kong in 1976, it entered a reservation in respect of Article 7(a)(i) (Equal pay for equal work in the private sector).[36] Yet this is one of the most justiciable parts of the ICESCR since many countries have had a long and effective experience with equal pay legislation. Serious consideration should be given to implementing the second Covenant, especially as Article 39 of the Basic Law also requires its continuance after 1997.

There are several compelling reasons in support of this. First, the Government will probably have to do it eventually anyway. As time is short it would be better to do it now. It will be more efficient to screen the legislation once than to have to do it twice, once for each covenant. Second, by not doing it now the courts will have to decide whether certain practices infringe civil and political rights rather than economic, social and cultural rights. This will create unnecessary legal distinctions and take up court time to make decisions, which may well be rendered nugatory when the other covenant is implemented. Third, economic issues are issues ordinary people understand and, if the intention is to create a system that touches their lives, this class of rights must be embraced in the Bill of Rights. If they are not, not only would there be little for a Human Rights Commission to do, because its jurisdiction would be too restricted, it might also mean that the Bill would remain a

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33. See for example: Peter H Bailey, "The Human Rights Commission: Tame Cat or Wild Cat?", (1986) 60 Australian Law Journal 123, 124: Deals with discrimination on the basis of race, sex, and marital status, as well as physical handicaps, religion and mental impairment. In Australia 50% of the complaints relate to employment.

34. Commentary on the Draft Hong Kong Bill of Rights Ordinance 1990 (Hong Kong: Government Printer, March 1990) s 8 Art 1(2).

35. Commentary ibid p 2 para 7.

36. International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (Hong Kong: Government Printer, 1990) p 11. (Hereinafter Covenants)

remote abstraction, and no popular constituency would develop in favour of it. A political entrenchment strategy will therefore fail.

The Commission does not seek to eliminate all differences, since not all differences amount to an impermissible discrimination. Differences that can be justified as a reasonable occupational qualification are acceptable.[37] Thus, it would be permissible to advertise for a male model to model male clothes, but not to advertise for a male only to fill a post where the employees' sex is irrelevant to their ability to perform the function in question.[38] In other words, where the persons sex, for example, was relevant to the carrying on of an occupation it could be taken into account.[39] Similarly, where the conduct can be justified in good faith in the interests of the adequate performance of the work involved then it may be acceptable.[40]

The Commission would not have jurisdiction over law enforcement matters. These constitute the bulk of human rights complaints and are best dealt with by the courts, because they usually raise questions of legal interpretation and the law of evidence, both of which are best dealt with by trial judges. In practice these cases are likely to arise collaterally, i.e. as part of a criminal prosecution, rather than as part of separate proceedings. This is why the new Bill may not lead to a huge surge in court cases, though existing cases may, in some instances, become more complex.

e. Powers

The main power of the Commission would be to publicise practices which it considers to be discriminatory. This may be done either through the tabling of the annual report, which

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37. Hunter, "The Development ..." op cit p 241 notes that in 1968 amendments to the Ontario Code permitted differences where in any such case race, colour, creed, nationality, ancestry or place of origin is a reasonable occupational qualification. The New Zealand Bill of Rights Bill 1989 clause 18(2) provides that measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic origins or national origins, sex, marital status, or religious or ethical belief, do not constitute discrimination.

38. This example is given in s 15(3)(a) of the Human Rights Commission Act 1977 (NZ).

39. In Re McKale (1987) 37 DLR (4th) 47, 53 (Alta QB) a male and female nurse applied for a job in a hospital with a large number of chronically ill men. The female applicant was better qualified, but the male got the job since the nature of the work involved personal hygiene and male patients preferred a male nurse.

40. Saskatchewan Human Rights Commission v Saskatoon Professional Fire Fighters Union [1990] 1 WWR 481, 490 (SCC).

would then be debated by the Legislature, or by ad hoc press conferences or both.[41] These reports, like those of the Commissioner for Administrative Complaints, are not binding on the Government,[42] but nevertheless the reporting system assumes a government and legislature prepared to take them seriously and act upon them.

Aside from conciliation proceedings, consideration should also be given to allowing the Commission to adopt, at the request of particular clients with a sufficient interest, the role of advocate in court cases. This is by no means unusual,[43] and has the merit of providing a cheaper and more effective alternative to forcing clients to seek legal aid. The Commission should, therefore, be given standing to appear before any of the courts and tribunals in Hong Kong.

It would be a mistake to assume that the existing rules for standing in judicial review cases will be sufficient. The Canadian experience suggests that a generous approach to standing must be adopted since this best achieves the objectives of the system. Two examples may be apposite. In one recent case the applicant died before the case was decided but the Supreme Court of Canada went ahead and handed down a decision anyway.[44] In a second case from New Brunswick, a man was held to have standing in a case involving discrimination at a school even though he had no children at the school because he could show that he was in a class of persons whose children would be affected by the conduct complained of.[45]

Another option is to provide for a Tribunal that would make binding decisions where conciliation failed. This is the approach in Canada[46] and in Alberta, where a Board of inquiry is provided for.[47] It may be questioned whether Hong Kong needs a two tier system, but the advantage of it is that it avoids arguments about the impartiality of the Commission, which should not be involved in both conciliation and adjudication.

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41. Bailey op cit p 126.

42. Elkind op cit p 202.

43. Human Rights Commission Act 1977 (NZ) s 38 (Proceedings before the Equal opportunities Commission).

44. Saskatchewan Human Rights Commission v Moose Jaw [1990] 1 WWR 496, 502 (SCC).

45. Board of School Trustees (1990) 62 DLR (4th) 512, 526 (NB CA).

46. Canadian Human Rights Act 1976-77 ss 49-59.

47. Individual's Rights Protection Act 1980 ss 27-33.

4. Conclusion

My conclusion is in the nature of a question. Does Hong Kong really want to take Human Rights seriously? International experience suggests that those places where there is both a public commitment to human rights, and a matching set of institutions that provide citizens with effective avenues for investigating and remedying breaches of rights, are human rights standards up to international standards. There are many countries with wonderful Bills of Rights, but where the gaps between the promise and the reality is so great that the Bill can be regarded only as a political fantasy. A Human Rights Commission for Hong Kong could turn the Bill of Rights into a living reality.

UNIVERSITY OF HONG KONG
FACULTY OF LAW

SEMINAR ON THE HONG KONG BILL OF RIGHTS

Saturday, 31 March 1990

Room 726, Knowles Building, University of Hong Kong

0925 - 0930	*Welcome*	Mr P F Rhodes Dean, Faculty of Law University of Hong Kong
0930 - 0935	*Introduction by Chairman*	Dr Raymond Wacks Head, Department of Law University of Hong Kong
0935 - 0955	*The Bill of Rights From a Comparative Perspective*	Professor Yash Ghai (Sir Y K Pao Professor of Public Law) Department of Law University of Hong Kong
0955 - 1015	*Drafting a Bill of Rights: Some Basic Constitutional Considerations*	Mr Philip J Dykes Assistant Solicitor General Attorney General's Chambers
1015 - 1035	*International Human Rights Law and Domestic Hong Kong Law*	Dr Roda Mushkat Senior Lecturer, Department of Law University of Hong Kong
1035 - 1055	*The Content of the Proposed Bill of Rights*	Dr Nihal Jayawickrama Senior Lecturer, Department of Law University of Hong Kong
1055 - 1110	*Break*	
1110 - 1130	*The "Freeze Period"*	Mr Andrew Byrnes Lecturer, Department of Law University of Hong Kong
1130 - 1150	*The Problem of Entrenchment*	Professor Peter Wesley-Smith Department of Law University of Hong Kong
1150 - 1210	*The Mechanics of Implementation of the Bill of Rights*	Dr David Clark Senior Lecturer, Department of Political Science University of Hong Kong
1210 - 1245	*Discussion*