

# Hong Kong's Bill of Rights Experience and its (Ir)Relevance to the ACT Debate over a Bill of Rights

*Andrew Byrnes*

The Australian National University

[T]he glass through which we view the interpretation of the Hong Kong Bill [of Rights] is a glass provided by the Covenant. We are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give 'full recognition and effect' to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred.<sup>1</sup>

While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public.<sup>2</sup>

In 1991, two years after the suppression of the pro-democracy movement in China in June 1989, Hong Kong acquired a constitutionally entrenched Bill of Rights based on the International Covenant on Civil and Political Rights (ICCPR).<sup>3</sup> This Bill of Rights, introduced in the last few years of Hong Kong's existence as a Crown Colony of the United Kingdom, has survived its country's transition to a Special Administrative Region of the People's Republic of China; along the way it has generated the largest body of English language national case law on the ICCPR, and has had an important impact on law and policy making in this geographically small region of over six million people.<sup>4</sup>

But what is the relevance of the experience of a small enclave on the southern coast of China—which was the product of 150 years of British colonial rule and which was facing a return to the rule of an oppressive totalitarian system when it adopted a Bill of Rights—to the deliberations in the Australian Capital Territory (ACT) over whether it should adopt some form of Bill of Rights?

Other than for those who have a specific interest in Hong Kong or China, or who are determined comparativists, this experience may seem remote and of little practical interest compared with the recent Bills of Rights from South Africa, New Zealand and the United Kingdom. If one were to pursue a car analogy, perhaps one would see the South African Constitution as the Rolls Royce of Bills of Rights, the UK Human Rights Act as the finely tuned Jaguar (built with European parts), the New Zealand version as the souped-up Mini, and the Hong Kong version might come in as a Lada, under-powered and irrelevant.

But my task is not to attempt to sell you some rather downmarket model as new or best for the ACT. One thing that is clear about bills of rights and constitutions is that the most vibrant and effective ones have deep roots in the societies they are to serve, however much they may draw on international standards or on other models. Even so, Hong Kong is one of only three common law jurisdictions of which I am aware that has directly incorporated the ICCPR into its domestic law—and the jurisprudence under the Hong Kong Bill of Rights is still the largest body of detailed

English language case law on the ICCPR before national courts.<sup>5</sup> Should the ACT adopt a Bill of Rights based on the ICCPR, it may be useful to be aware of that extensive resource.

When considering whether to adopt a bill of rights and the form it might take, it is important neither to neglect the range of available experiences, nor to examine only a few instances. A concentration on only a few examples of bills of rights has tended to dominate the Australian (and ACT) discussion. There are after all more than 50 common law jurisdictions which have Bills of Rights, and which have had them for some time. It might be thought to be modish and somewhat blinkered to look only at a very limited range of these, even if the British, New Zealand, Canadian and South African examples seem closest to us in time or comparable social contexts.

In this paper I will briefly discuss the following:

- The historical and political background to the Hong Kong Bill of Rights
- The Hong Kong Bill of Rights regime
- The most important substantive issues considered in the formulation of the Hong Kong Bill of Rights
- The impact of the Hong Kong Bill of Rights
- The most important issues arising from litigation under the Bill of Rights
- An overall assessment of the Hong Kong Bill of Rights and reflections on that experience for the ACT debate.

## **The historical and political background to the Hong Kong Bill of Rights<sup>6</sup>**

Hong Kong was a British colony for over 150 years before its return to China on 1 July 1997. The resumption of the exercise of sovereignty by China in 1997 was the result of an agreement entered into between the British and Chinese governments in 1984 (the Sino-British Joint Declaration), which set out a scheme under which Hong Kong would become a special administrative region of China, with a high degree of autonomy in a number of areas. One of the concerns of many Hong Kong people, and of the British government, about the return of Hong Kong to China was that it might lead to a system under which the rule of law and the provision for human rights would not be as well protected as under British administration (although the period of British administration had its own problems, ranging from the failure to accord meaningful democracy to Hong Kong people to a variety of repressive laws still on the statute books into the 1990s).

The British negotiators were successful in persuading the Chinese government to agree to a wide range of protections for Hong Kong's existing legal system, as well as providing explicit protection for a number of human rights. In addition, the Joint Declaration provided that a number of international human rights treaties that had been extended to Hong Kong by the United Kingdom (in particular, the two International Covenants on Human Rights) would continue to apply to Hong Kong and be implemented through the laws of the Special Administrative Region (SAR).

The years following the signing of the Joint Declaration (JD) saw the preparation of a new basic law for Hong Kong which would set out in a law of the Chinese National People's Congress the detailed instantiation of the scheme laid down in the JD, including the protections of human rights and freedoms. The drafting of the Basic Law was nearing its final stages when, in June 1989, the Tianamin Square massacre took place, profoundly shocking the Hong Kong community.

As part of its response to the June 1989 repression, the British government proposed a package of measures, one of which was the proposal for the enactment of a Bill of Rights of Hong Kong. The announcement was not welcomed by China, which (correctly) saw it as an adverse judgment on the actions of the Chinese authorities, and an expression of concern about the future of human rights in Hong Kong that was shared not only by the British government but also by a large number of people in Hong Kong.

Given the politically contentious nature of the proposal, the British government faced the challenge of putting forward a model that would survive the transfer of sovereignty, as far as was possible. A solution was found both in the provisions of the Sino-British Joint Declaration, which provided that the two International Covenants would continue to apply to Hong Kong, and in a provision in the draft Basic Law of the Hong Kong Special Administrative Region (which eventually became Article 39 of the Basic Law as finally adopted).<sup>7</sup> The British government proposed that a bill of rights based on the ICCPR be introduced, which would effectively incorporate the provisions of the ICCPR as applied to Hong Kong into the domestic laws of Hong Kong.

The incorporation was to take place at two levels. First, a provision would be included in the constitutional Letters Patent, the British prerogative instrument that provided the constitutional framework for the government of Hong Kong. This provision stipulated that no law of Hong Kong should be inconsistent with the ICCPR as applied to Hong Kong. This was to apply to any law enacted after its commencement, and was thus prospective in operation. While this instrument would fall away with the resumption of sovereignty, it was to be replaced by the new Basic Law of the Hong Kong SAR. Accordingly, the wording of the new provision inserted in the Letters Patent was close to that contained in the corresponding provision of the Basic Law, Article 39. This was intended to ensure a seamless transition so far as constitutional entrenchment of the ICCPR was concerned.

The second component of the Bill of Rights regime was the enactment of an ordinary piece of legislation, the Hong Kong Bill of Rights Ordinance 1991. This statute incorporated almost verbatim the terms of the ICCPR as applied to Hong Kong, and provided that all laws should, as far as possible, be interpreted in a manner that was consistent with the Bill of Rights. If that were not possible, then any pre-existing law that was inconsistent with the Bill of Rights would be repealed to the extent of the inconsistency.<sup>8</sup>

The Letters Patent amendment and the Ordinance commenced operation on 8 June 1991. Thus the Ordinance operated both prospectively and retrospectively as an interpretation provision, but only retrospectively in relation to the repeal of legislation. The Letters Patent operated from 8 June 1991 to invalidate any law enacted after that date that was inconsistent with the ICCPR standards.

The dual track arrangement continued after 1 July 1997, when the Basic Law entered into force on the resumption of sovereignty by China over Hong Kong. While there were amendments to the Bill of Rights Ordinance to cure what some critics regarded as elements giving it an elevated status over other pieces of ordinary legislation, the removal of the provisions seems to have had no real impact on the interpretation and application of the Ordinance.<sup>9</sup> Article 39 of the Basic Law constitutionalised the provisions of the ICCPR, but also those of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labour conventions applicable to Hong Kong. While there was some debate over whether Article 39 provided an enforceable guarantee or merely mandated the legislature to ensure that the law of Hong Kong provided protection for the rights guaranteed under the Covenants, the courts have taken the view that Article 39 may be directly invoked in litigation before the courts and that legislation can be invalidated on the ground that it is inconsistent with the standards set out in the Article. In addition to Article 39, the

Basic Law (especially in Chapter III) contained a number of specific guarantees of human rights, some of which overlapped with guarantees in the Covenants/Bill of Rights Ordinance, others of which went beyond those contained in the Bill of Rights Ordinance.<sup>10</sup>

The Bill of Rights was thus a top-down initiative formulated by the British administration in response to the events of 1989. There was relatively little opportunity for local input into the substantive content of the Bill of Rights, since the British took the view that political imperatives meant that any Bill of Rights had to stay close to the wording and obligations under the ICCPR, which the Chinese had agreed would continue to apply after 1997. There was relatively little debate over the issue of economic, social and cultural rights, the government dismissing the idea that they be included with the traditional arguments about the different natures of the two categories of rights. The question of whether the Bill of Rights should bind private parties was one issue on which there was considerable discussion and lobbying, as was the issue of remedies.

## Description of the Hong Kong Bill of Rights regime

As outlined earlier, there were two essential components of the Hong Kong Bill of Rights regime:

### *Pre-1 July 1997*

- (a) the Hong Kong Bill of Rights Ordinance (Cap 383) was applied to repeal any inconsistent pre-8 June 1991 legislation and as an interpretive provision for all legislation;
- (b) a constitutional amendment to the Letters Patent was applied to all post-8 June 1991 legislation.

### *From 1 July 1997*

- (a) the Hong Kong Bill of Rights Ordinance (which still applied to pre-8 June 1991 legislation) continued as an ordinary law, with some minor amendments;
- (b) Article 39 of the Basic Law provided that the two International Covenants would continue in force and that no law of Hong Kong could limit the rights guaranteed more than was permitted by those treaties as applied to Hong Kong.

Thus from 8 June 1991, the ICCPR was given constitutional status in Hong Kong: it functioned as an interpretive rule for all legislation, past and future, and in effect overrode earlier legislation and later inconsistent legislation.

Notwithstanding this protection, there were some significant limitations on the scope of the Bill of Rights regime, largely derived from reservations entered to the ICCPR when the United Kingdom ratified the treaty and extended it to Hong Kong. The most important areas were in relation to immigration decisions and the political structure of government, particularly the non-elected Executive Council and non-democratically elected Legislative Council, both of which were effectively ruled off limits to Bill of Rights review by explicit provisions in the Ordinance and the Letters Patent.

## The most important substantive issues considered in the formulation of the Hong Kong Bill of Rights

### *Nature and scope of human rights guarantees in the Bill of Rights*

As noted above, when Hong Kong acquired its Bill of Rights, the British government decided to limit the rights it guaranteed to the traditional catalogue of civil and political rights contained in the ICCPR. Although there were a number of proposals that economic, social, and cultural rights be included as well, they were not. There were a number of reasons for this outcome: the holding of traditional ideas about the nature of economic, social, and cultural rights in comparison with civil and political rights; there was less widespread advocacy for inclusion of these rights; and the major perceived threats in a post-1997 Hong Kong were felt to be in relation to traditional civil and political rights and freedoms. The provisions of the ICESCR were added to the constitutional catalogue of rights with the advent of the Basic Law on 1 July 1997, although the approach taken by the courts in a number of cases to date has meant that these rights have not had a major impact through litigation in the courts.<sup>11</sup>

During the debate on the drafting of the Bill of Rights, there was virtually no discussion of rights other than those contained in the international treaties and no serious push for the inclusion of home-grown rights or formulations that went beyond the standard catalogue. This was due in large part to the British assessment that the Bill of Rights would be less of a political target and less likely to be cut back after 1997 if it adhered to those rights which the People's Republic of China had explicitly agreed to continue to observe after 1997. (Particular rights of importance to some groups in Hong Kong were also included in the Basic Law, so it was not considered necessary to push for their recognition in a Bill of Rights.)

As the United Kingdom had not accepted the individual complaints procedure under the ICCPR (either generally or in respect of Hong Kong), and the individual complaints procedure under the European Convention on Human Rights (which the UK had accepted) did not extend to Hong Kong, the prospect of adverse judicial or quasi-judicial findings under international treaties was not a major consideration in defining the content of the Bill of Rights. While the possibility of adverse comments from treaty bodies during reporting procedures was relevant, by 1991 these had not played a major role in influencing Hong Kong's political debate on human rights issues.

### *Implementation model*

A central issue for the Hong Kong Bill of Rights (as for any bill of rights) was whether the Bill would be judicially enforceable, perhaps in conjunction with other institutions, or whether an aspirational bill of rights that could inform judicial decision-making and public action but not allow the courts to override legislation was a preferable option. While the drafters were aware of the different models (in particular the constitutional bills of rights in the United States and Canada, and the statutory, non-repealing New Zealand version of a bill of rights), there was relatively little discussion of the different options. The decision was taken to introduce a Bill of Rights that would enable the courts to repeal legislation which was either inconsistent with the Bill of Rights Ordinance, or unconstitutional and of no effect under the Letters Patent and, ultimately, the Basic Law. Unlike the debates that have taken place in other liberal democracies, there was relatively little heated discussion about the usurpation of the power of the democratically-elected legislature by unelected judges. This is partly explained by the fact that the legislature had never been fully elected on the basis of universal and equal suffrage (and still is not). Ironically the broader scope of the power to strike down legislation, which already

existed under the Letters Patent, but which had been rarely exercised, was given to judges at a time when the legislature was gradually becoming more democratic in its composition.

The power to apply the Bill of Rights and to declare legislation repealed or unconstitutional was conferred on all courts: where a relevant question arose in proceedings before the court, the court was empowered to decide the issue, and issues of constitutionality were not reserved to a superior court. In effect, of course, given the rules of precedent, lower courts were not bound by decisions of inferior courts, and any issue of moment ended up in the one of the superior courts.

One of the concerns that was expressed about the enforcement of the Bill of Rights through the courts was whether this would limit the effective access of victims of violations to remedies. This was not of major concern where the Bill of Rights was to be used as a 'shield' (for example, as a defence in criminal proceedings, where the defendant was already before the court and could obtain legal aid in appropriate cases). However, if the Bill of Rights were to be used as a sword—to ground a cause of action—then the cost of obtaining legal representation and the usual rule that the losing party paid the other party's costs could constitute significant impediments to access to the courts for persons other than well-off individuals or corporations. Particularly at the early stage of the Bill of Rights, when the scope of the Bill of Rights might be unclear, these barriers might retard the development of the case law under it and limit access to remedies in cases of significant violation.

Various proposals were made to alleviate this. They included proposals that the normal rules of costs not apply in Bill of Rights cases, and that the court should only be empowered to award costs in exceptional cases. Further, the establishment of a fund to provide financial assistance for the bringing of Bill of Rights cases, along the lines of the Court Challenges Fund set up by the Canadian Government following the adoption of the Canadian Charter, was also proposed. Although the Government rejected these proposals, it did make provision for legal aid to be available for certain categories of Bill of Rights cases. However, most of the civil cases which were brought were not able to draw on these funds.

A further major proposal intended to increase the accessibility of remedies as well as to contribute to the broader understanding and application of the Bill of Rights was the establishment of a Human Rights Commission, with a structure and functions rather similar to the Australian Human Rights and Equal Opportunities Commission. This body was to have educational and research functions, but also the power to receive complaints and to carry out inquiries. The Hong Kong Government rejected this proposal, both because it was concerned that this would antagonise China further, and also because it was unwilling to have an independent body that would have the power to scrutinise government practices and decisions in this way. While an Equal Opportunities Commission was later set up to help implement anti-discrimination legislation passed in 1995, the Government has continued to resist the idea of a Human Rights Commission with a broader mandate.

### *Applicability of the Bill of Rights*

A central issue during the drafting process was the scope of application of the Bill of Rights: should it bind only to the government and public bodies, or should it cover everyone, so that private individuals or corporations could also be held to account if they breached a person's human rights? Conversely, who should be beneficiaries of the Bill of Rights? Should the Bill of Rights limit the rights under the Bill to natural persons or should corporations also be able to assert rights in appropriate cases?

The original draft of the Bill of Rights Ordinance was expressed so as to bind everyone, and was not restricted to government or public bodies. This gave rise to some concern amongst sectors of the business community, who were worried that the Bill of Rights Ordinance would impose on them wide-ranging obligations regarding the collection and use of personal data as a result of the right to privacy, and in relation to non-discrimination in employment and other areas in general. A strident campaign spearheaded by the Hong Kong and Shanghai Bank, advised by Lord Lester of Herne Hill QC, was successful in limiting the broad application of the Bill.<sup>12</sup> The result was that the Bill of Rights Ordinance was expressed to bind only 'government and public authorities'.<sup>13</sup>

Nevertheless, since the Bill of Rights Ordinance was expressed to repeal any inconsistent legislation, the Government assumed that it would still have some impact on legal relations between private individuals, where those relations were defined by legislation which was in conflict with the Bill of Rights Ordinance. This assumption proved incorrect, when the Court of Appeal subsequently held, wrongly in my view, that the Bill of Rights Ordinance had no application in cases involving private citizens even where these were defined by legislation, even if this meant that the effect of the legislation was different in its application to citizen-citizen relations and Government-citizen relations.<sup>14</sup>

Given that the Bill of Rights Ordinance was to apply to the actions only of the 'government and public authorities', the scope of that phrase was of some importance. The Bill of Rights Ordinance contained no definition of 'public authorities', and problems have subsequently emerged in relation to bodies which might reasonably have been thought to be public bodies, such as public universities,<sup>15</sup> or which exercise public and sometimes statutory functions, such as professional disciplinary bodies.<sup>16</sup> While it may be difficult to define all conceivable cases, it would have been helpful either to draw up a list of relevant bodies, or to attempt to define the types of bodies that were intended to be covered.

The question of whether the rights holders under the Bill of Rights Ordinance should only be natural persons or should include all juridical persons was resolved in favour of allowing all legal persons to invoke the rights guaranteed by the Bill of Rights.<sup>17</sup> While some of the rights guaranteed were inapplicable to corporations, others were not, and it was expected that corporations would be likely to make use of rights such as freedom of expression and the right of access to court to challenge various regulatory schemes, including defamation laws, the actions of regulatory bodies such as the Securities and Futures Commission, and planning and development processes. These predictions were realised in practice.

### *Remedies and the nature of proceedings*

One of the most important issues relating to remedies was the nature of the power of the courts to declare a statute repealed or unconstitutional on grounds of inconsistency with the Bill of Rights/ICCPR standards. Normally, a finding that a statute has been repealed by a later statute would take effect from the time the later statute commenced operation (in this case 8 June 1991); similarly, a finding of unconstitutionality of a statute would take effect from the time of the enactment of the statute. Since a challenge to a statute may take place years after the commencement of the statute, there was concern that a declaration of repeal or invalidity that related back to the enactment of the statute might lead to serious consequences. For example, if it were held that a criminal provision was invalid, then all convictions under that provision would be unlawful. Some supporters of a broad reading of the Bill of Rights were also concerned that the possibility of this type of impact might even deter the courts from taking an expansive view of the rights guaranteed in the Bill of Rights.

The possibility of granting the courts the power to declare a finding of repeal or unconstitutionality was raised, drawing on Canadian experience in this regard.<sup>18</sup> However, no explicit power permitting the courts to declare the prospective operation of their rulings was included in the Bill; although such a remedy might in theory be open to the courts, they have not taken this route. Where the courts find that a statute was repealed by the Bill of Rights Ordinance, they take the view that the repeal takes effect from 8 June 1991. In a number of cases, this has meant that earlier convictions under the law have been quashed some considerable time after the event, a course of action made possible by permitting an extension of time to appeal.<sup>19</sup>

Another important issue was the nature of the remedies that could be granted by a court. The question arose about whether the courts should be given a general remedial power on the one hand, which would effectively allow them to grant the remedies that they were already empowered to grant. On the other hand, it was asked whether the Bill of Rights should contain a more detailed remedial provision, which might permit the courts to fashion new remedies going beyond the remedies they were already empowered to grant or accustomed to granting. For example, ordering reemployment or affirmative action measures, or even to address directly the issue of whether evidence obtained as the result of a violation of the Bill of Rights should be excluded in criminal cases. The solution adopted was to give the courts a general remedial power, leaving it to them to interpret it as they thought fit.

A final issue related to the question of damages in judicial review actions brought against the government. While in theory, damages were available in judicial proceedings, they had been rarely, if ever, granted. On the government side, there was concern that the Bill of Rights might lead to awards for damages; on the other, there was concern that, unless it were made explicit that the courts could award damages in judicial review proceedings involving Bill of Rights claims, the courts would follow their usual practice of not awarding damages in such cases. The outcome was essentially to reaffirm the existing jurisdiction of the courts to grant remedies of the kind they already employed in the particular proceedings in which a Bill of Rights point was raised.<sup>20</sup> The courts have not been particularly adventurous in construing this remedial provision, and have not drawn on it to fashion innovative remedies but have rather tended to apply the same types of remedies as they were already used to granting. These have included stays of proceedings, declarations of repeal or inconsistency, the quashing of convictions, and so on.

## The impact of the Hong Kong Bill of Rights

### *Predictions and concerns*

There was much opposition expressed to the introduction of a Bill of Rights, some of it familiar to anyone involved in debates about almost any bill of rights, while other concerns were more particular to the Hong Kong situation. For example, Henry Litton QC, who subsequently served as a Justice of Appeal, and both a permanent and non-permanent judge of the Hong Kong Court of Final Appeal, described the first draft of the Bill as 'a law which aims not only at curbing current undesirable practices, but proceeds at one fell swoop to change much of the present system of law'.<sup>21</sup> In relation to discrimination he suggested that the Bill 'not only irons out the creases but burns up much of the fabric as well'. He also criticised the inclusion of 'bizarre' provisions such as the prohibition against slavery (taken from article 8 of the ICCPR) and terms 'expressed in bad French' (referring to the inclusion of the term '*ordre public*' in a number of the limitation clauses of the Bill of Rights). He subsequently further criticised the Bill for 'the importation of concepts and vocabulary alien to the [Hong Kong] legal system'. There were similar concerns expressed by others, including some judges after its enactment, about the possibility that the courts would be swamped and that the Bill of Rights would become a criminals' charter.<sup>22</sup>

### *The impact in fact*

The introduction of the Bill of Rights has had significant effects on law and policy in Hong Kong. Most of the concerns about an explosion of unmeritorious and vexatious litigation have proved unfounded, and the political and legal system has shown itself readily able to cope with the challenges that an enforceable constitutional Bill of Rights have raised. One can reasonably argue that the quality of public-policy making and legislation has been enhanced by the requirement to comply with the Bill of Rights. Concerns that unelected judges would gladly arrogate power to themselves (or conversely that they would fail to rise to the challenge) have not been borne out by the history of the Bill of Rights. The Hong Kong case law does not display the 'insouciant judicial activism' and the 'inflationary effect' that commentator, James Allan, (at one-time a Hong Kong law teacher), has used to characterise the New Zealand courts' record under the New Zealand Bill of Rights Act 1990, a contemporary of Hong Kong Bill of Rights.<sup>23</sup> Nor does it in general display the 'constipated legalism' which Conor Gearty feared the United Kingdom Human Rights Act 1998 might face in the courts after its entry into force.<sup>24</sup> Rather there has been a cautious deployment of the Bill of Rights by the courts, upholding challenges to very clear cases of violation, but otherwise being fairly deferential to executive and legislative choices, and viewing existing law in many cases as amply guaranteeing the rights provided for in the ICCPR.

### *Policy making*

One of the most important effects of the Bill of Rights was felt in the period prior to its entry into force. Knowing that the Bill was coming, the civil service, in particular the Attorney-General's Chambers, took the opportunity to prepare themselves for the impact of the Bill of Rights on government activities by undertaking a wide-ranging review of the statute book in conjunction with responsible policy departments. Government lawyers were also specifically trained so that they would be prepared to respond to the challenges of the Bill of Rights as they arose in the courts (this included building up the international and comparative human rights library resources almost from scratch). The review of laws involved the identification of a number of provisions and areas of the law where there were almost certain conflicts with the Bill of Rights, and others where there were some doubts about compatibility.<sup>25</sup> Some of these were subsequently amended; in other cases the Government decided to await decisions from the courts rather than amend laws ahead of litigation. There was sometimes a difference of view between the government lawyers and the policy department over whether there was indeed a conflict or, more commonly, whether the policy interests served by the existing law outweighed the possibility of a finding of invalidity.<sup>26</sup>

As time passed, the government generally became less enthusiastic about adopting expansive or particularly generous readings of rights guarantees, and devoted more attention to articulating the justification for limitations or restrictions on rights.<sup>27</sup> This reflected in part the importance of the policy interests that departments considered were at stake, and was made possible by the more cautious decisions of the courts after an initial period in which it seemed that the courts might be more expansive in their interpretations and more demanding in their scrutiny of proffered government justifications than they eventually proved to be.

Nevertheless, the pre-commencement review and its consequences, and the (at least) formal incorporation of human rights criteria in the review of new policy and legislative proposals, were significant benefits that followed from the Bill of Rights.

### *Impact on the courts*

Although the courts of Hong Kong already had the power to declare legislation unconstitutional on the ground that it was inconsistent with Hong Kong's colonial constitution, the Letters Patent, the grounds on which this might occur, and the times it had occurred, were relatively few. The introduction of a broadly-worded Bill of Rights thus represented something of a departure for both the Hong Kong legal community more generally and the judiciary in particular. Judges informally expressed concerns about the unfamiliar role that they saw themselves as having to perform under a Bill of Rights, and were concerned about the need to exercise caution in scrutinising and possibly overturning legislative decisions.

The courts' approach to the Bill of Rights was characterised by an initial burst of activity and openness to relatively generous interpretations, which has given way over time to a less generous approach. The approach taken overall is less radical than the courts have been in either Canada or New Zealand, something which reflects the general tenor of the judiciary's approach in most other areas in British Hong Kong and also in post-1997 Hong Kong.

As was expected, the first wave of Bill of Rights issues came in criminal cases, though a number of Bill of Rights civil cases were argued. Figures compiled by Johannes Chan show that there were some 250 cases in the first four years, of which about 75% were criminal cases.<sup>28</sup> Approximately 36% of those cases succeeded on the Bill of Rights point, nearly half of those involving challenges to reverse onus provisions. This meant that there was some increased work for the courts, but as most cases in which Bill of Rights issues were raised were already underway, the increased level of work does not seem to have been a significant impediment to the work of the courts. After these early years, the number of cases has tapered off, and though there is still a steady stream of cases, not many of these will succeed. For example, in 2002 there were about 30 cases where a Bill of Rights point was argued, of which about 20 raised substantial points, and only eight succeeded.

An important effect of the Bill of Rights was the widening of the horizons of the courts to include regular reference to international and comparative human rights material. The most important international sources were the case law under the European Convention on Human Rights and the jurisprudence of the United Nations human rights treaty bodies. Extensive reference was also made to Canadian Charter jurisprudence and New Zealand case law, as well as to cases from other international and national jurisdictions.<sup>29</sup>

### *The Legislature*

The work of the Legislature has also been significantly affected by the Bill of Rights. Following the enactment of the Bill of Rights, human rights criteria became an explicit part of the examination of many pieces of legislation, and this has continued to be the case.<sup>30</sup> This, combined with the discussion in the Legislative Council of Hong Kong's report to United Nations treaty bodies and the conclusions of those bodies on Hong Kong's record, has meant that the government is regularly under pressure to ensure that it articulate a clear justification for any legislative proposals that appear to trench upon rights protected by the Bill of Rights and, since 1997, the Basic Law.

## The most important issues arising from litigation under the Bill of Rights

Over the years, many issues have come before the courts in both criminal and civil cases: these have ranged from the meritorious to the quixotic. Initially, the overwhelming majority of Bill of Rights issues predictably arose in criminal proceedings but, over the years, a significant number of issues have arisen in civil proceedings (criminal proceedings still give rise to regular Bill of Rights claims). Many of the challenges that were brought initially involved areas which had been identified as likely to be challenged, although inevitably there have been some surprises.

The initial impact of the Bill of Rights in the courts of Hong Kong had two important dimensions.<sup>31</sup> First, it led to the cleaning up of various items of legal detritus in the form of archaic offences<sup>32</sup> and, most importantly, the repeal or refinement of a large number of provisions which contained reverse onus clauses, many of which were held to be inconsistent with the presumption of innocence.<sup>33</sup> Second, it had system-wide impacts, the two most important being: a considerable improvement in the case management of criminal cases due to the Damoclean sword of cases being dismissed as the result of a violation of the right to trial within a reasonable time; and a widening of legal aid provision because of concern that cases would be permanently stayed if accused who were entitled to legal assistance under the Bill of Rights were not entitled to this under the existing system of legal aid.

In the years since the enactment of the Bill of Rights, there have been hundreds of cases, criminal<sup>34</sup> and civil<sup>35</sup>, in which Bill of Rights points have been raised, although it should be said that the success rate has tended to decline over time. There have been a significant number of cases in which Bill of Rights challenges have succeeded, resulting in the dismissal of a case, the reinterpretation of legislation, declarations of repeal or constitutionality; and in some cases leading to a legislative revision of the challenged provisions.<sup>36</sup> Some of the more interesting or important successful challenges include:

- challenges to reverse onus provisions in criminal statutes which place the legal burden of disproving a fact essential to liability on the accused (these have been either declared repealed or interpreted so as to impose only an evidentiary burden on the accused);<sup>37</sup>
- challenges to strict liability criminal provisions, which have led to the courts' reading into some offences of strict liability a requirement of at least a minimal *mens rea*;<sup>38</sup>
- a challenge to the failure of the electoral system to observe the requirements of universal and equal suffrage (although this was then found to be constitutionally immunised from challenge);<sup>39</sup>
- challenges to vesting the Chief Executive with the power to set minimum terms of imprisonment for juvenile offenders sentenced to life imprisonment,<sup>40</sup> and the statutory regime permitting detention 'at the Governor's/Executive's pleasure';<sup>41</sup>
- challenges to retrospective criminal offences relating to the disqualification of directors;<sup>42</sup>
- challenges to unreasonable residence requirements on the right of persons to stand for election;<sup>43</sup>
- applications to stay trials on the ground of a violation of the right to trial without undue delay, lack of availability of legal aid, or the unavailability of crucial witnesses.<sup>44</sup>

### *Unsuccessful challenges*

There have also been many unsuccessful Bill of Rights challenges to important statutory schemes, including:

- challenges to the offences of desecrating the Chinese national flag and Hong Kong SAR flag; these offences were upheld as legitimate restrictions on freedom of expression in the interests of promoting public order (*ordre public*);<sup>45</sup>
- challenges to the laws on freedom of assembly in the context of demonstrations in public places;<sup>46</sup>
- challenges to the offence of murder where intention to do grievous bodily harm is the *mens rea* required by both a primary<sup>47</sup> and secondary<sup>48</sup> offender;
- challenges to offences on the ground that they are too vague to satisfy requirements of legality (in particular predictability);<sup>49</sup>
- challenges to the offence of contempt by scandalising the court;<sup>50</sup>
- challenges to the manner in which the disciplinary powers of the Law Society, the Bar Association, and other professional bodies are exercised;<sup>51</sup>
- challenges to the constitution and powers of various administrative tribunals involved in the determination of rights in areas such as building and planning, securities regulation, and licensing bodies;<sup>52</sup>
- challenges to the imposition of mandatory life sentences for murder;<sup>53</sup>
- challenges to the powers of search, seizure, and questioning (in light of the rights to privacy and the right not to incriminate oneself).<sup>54</sup>

### **An overall assessment of the Hong Kong Bill of Rights and reflections on that experience for the ACT debate**

A number of conclusions can be drawn from the decade-long experience of the HK Bill of Rights. First, the lack of a Human Rights Commission, the high costs of litigation and the costs rules, and the limitations on legal aid still restrict access to the courts, and thus the opportunities to seek remedies for violations through the courts, most particularly in the areas of civil law. Second, due to the reservations imported into the Bill of Rights regime, there are significant areas of great importance that are unable to be challenged under the Bill of Rights, in particular the areas of immigration and fundamental features of the political system. As these are areas where there are clear and systematic violations of human rights, the exclusion of these areas from Bill of Rights scrutiny is a major limitation upon the protection it provides. Third, over the decade, the judiciary has taken a fairly cautious approach to interpreting the human rights guarantees; there have been few system-shaking judgments. Finally, the Bill of Rights has not provided a significant means for challenging gross disparities of wealth or power, or for confronting other systemic manifestations of disadvantage; not even the inclusion of economic, social, and cultural rights from 1 July 1997 has yet really made a contribution in this regard.

On the positive side, the introduction of the Bill of Rights was a catalyst for the review of much legislation that was seriously in need of revamping and modernising. It generated legislative protection in areas where there was little or no existing protection of rights, in particularly the areas of privacy and data protection, and anti-discrimination law. It helped to stimulate public discussion of human rights issues, ensured that human rights criteria became a standard part of the legislative scrutiny process, and introduced human rights as an important factor in the development of public policy and decision making. This happened in many areas,

of which the public debate over legislation to implement Article 23 of the Basic Law that took place in 2002–2003 (resulting in the withdrawal of the draft legislation by the Hong Kong administration) has been an extremely important example.

What relevance, then, is there in this for the ACT's deliberations on a bill of rights? I offer a number of thoughts. First, it is important to articulate the vision or conceptual and political framework which underlies a bill of rights. This is important not just to aid the eventual process of legal interpretation, but for the bill of rights to achieve a high degree of legitimacy in the community; an important goal as a bill of rights inevitably will be under attack when it is invoked to justify decisions involving the protection of those whom many believe do not deserve to benefit (the 'criminals' charter' attack). Second, it is important that a bill of rights cover those areas in which it is perceived that there may be serious and systematic violations of human rights; it is important to extend coverage to economic, social, and cultural rights, notwithstanding the challenges those rights present. Third, it is important to seize the moment and to realise that, even with the introduction of a non-entrenched bill of rights (in theory open to amendment), this may be a one-off opportunity, so inclusiveness and flexibility should be the touchstones of the form and content of such a bill.

Finally, it is not just only, or perhaps even, the instrument itself which is crucial in determining the effectiveness of a Bill of Rights, but the institutions (including the courts, and also critically the executive and the legislature) which have the job of applying and observing it. A broad bill of rights can be interpreted narrowly, as has been the case by and large in Hong Kong, and a limited bill of rights can be interpreted expansively, as has been the case in New Zealand. It is true that all institutions of government have a responsibility to give effect to a bill of rights in their activities. However, it is frequently the case that executive governments, even those which enthusiastically introduce bills of rights, may lose enthusiasm, and then it is the courts which play a critical role in setting the tone for how government should approach the implementation of a Bill of Rights.

## Endnotes

- <sup>1</sup> V.P. Silke in *R v Sin Yau-ming* (1991) 1 HKPLR 88 at 107; [1992] 1 HKCLR 127 at 141.
- <sup>2</sup> Lord Woolf in *Attorney General (HK) v Lee Kwong-kut* (1993) 3 HKPLR 72 at 100; [1993] AC 951 at 975 (PC).
- <sup>3</sup> The Bill of Rights and other documents referred to in this paper can all be found in A. Byrnes & J. Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Butterworths Asia, 1993).
- <sup>4</sup> For a general overview of the background to the Bill of Rights and the first six years of its operation, see A. Byrnes, 'And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights' in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Clarendon Press, 1999), chapter 9, pp. 318–91.
- <sup>5</sup> See A. Byrnes 'Jumpstarting the Hong Kong Bill of Rights in its Second Decade? The Relevance of International and Comparative Jurisprudence', paper presented at conference on *A Decade of the Bill of Rights and the ICCPR in Hong Kong: Review and Prospects*, Hong Kong, 12 January 2002, [www.hku.hk/ccpl/pub/conferences](http://www.hku.hk/ccpl/pub/conferences).
- <sup>6</sup> See generally P. Dykes 'Hong Kong Bill of Rights 1991: Its Origin, Content and Impact' in J. Chan & Y. Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Perspective* (Butterworths, 1993), p. 39.
- <sup>7</sup> Article 39 provides:  
The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.  
The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

- <sup>8</sup> 1. All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.  
 2. All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.  
 4. Interpretation of subsequent legislation  
 All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be constructed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.
- <sup>9</sup> See Byrnes, *supra* note 4, pp. 335–37.
- <sup>10</sup> See Y. Ghai, 'The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region', *Journal of Chinese and Comparative Law* (1995), p. 30 and Y. Ghai, *Hong Kong's new constitutional order: the resumption of Chinese sovereignty and the Basic Law* (Hong Kong University Press, 2nd ed. 1999), chapter 10.
- <sup>11</sup> See Byrnes, *supra* note 5.
- <sup>12</sup> See generally A. Byrnes, 'The Application of the Hong Kong Bill of Rights to Relations between Private Individuals' in J. Chan & Y. Ghai (eds), *Hong Kong's Bill of Rights: A Comparative Perspective* (Butterworths Asia, 1993), pp. 71–105.
- <sup>13</sup> Section 7(1) of the Bill of Rights Ordinance provides:  
 This Ordinance binds only: (a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority.
- <sup>14</sup> *Tam Hing-ye v Wu Tai-wai* (1991) 1 HKPLR 261; [1992] 1 HKLR 185 (HKCA). In a 1995 decision the Court of Appeal seemed to accept the correctness of *Tam Hing-ye* and went on to apply the provisions of article 19 of the ICCPR as an aid to the development of the common law in relation to damages for defamation: *Cheung Ng Sheong Steven v Eastweek Publisher Ltd* (1995) 5 HKPLR 428. Just before the resumption of Chinese sovereignty in 1997, a private member's bill reversing the effect of *Tam Hing-ye* was passed by the Legislative Council, but was suspended and then repealed immediately after the handover.
- <sup>15</sup> See *Hong Kong Polytechnic University v. Next Magazine Ltd* (1996) 6 HKPLR 117 (HKHCt, Keith J). The Hong Kong courts have accepted that universities are public bodies for the purposes of judicial review proceedings: see, eg *Leung Chak Sang v Lingnan University* [2001] HKCFI 263.
- <sup>16</sup> In *Tse Wai Chun Paul v Solicitors Disciplinary Tribunal* [2001] HKCFI 854 (HKCFI), at paras 44–61, Hartmann J concluded after a detailed examination that the Solicitors Disciplinary Tribunal was not a public authority within the meaning of the Ordinance. This view was endorsed in the Court of Appeal by Le Pichon JA (with whom the other members of the Court agreed):  
*Tse Wai Chun Paul v Solicitors Disciplinary Tribunal* [2002] 4 HKC 1 (HKCA), at para 27: 'Suffice to say that, for my part, I am not persuaded that the judge's reasoning that the Tribunal is not a "public authority" was wrong in any respect.' See also *Hong Kong Bar Association v Chua* (1994) (1994) 4 HKPLR 637, 642 (Barristers Disciplinary Tribunal) (holding that the Bar Council was not a 'public authority' under the Bill of Rights Ordinance). The issue was left open in relation to the Hong Kong Society of Accountants in *Peter Po Fun Chan v Hong Kong Society of Accountants* [2002] HKCFI 78, para 24 (Hartmann J).
- <sup>17</sup> See generally J. Chan, 'The Applicability of the Bill of Rights to Bodies Corporate' *Hong Kong Law Journal*, 22 (1992), p. 269.
- <sup>18</sup> See *Reference re Language Rights under the Manitoba Act, 1870* [1985] 1 SCR 721; 19 DLR (4th) 1.
- <sup>19</sup> See *R v Lee Kwok-wa* (1992) 2 HKPLR 11 (CA) and *R v Lee Kwong-ming* (1992) 2 HKPLR 91 (HCt). Such a remedy would only be available in relation to cases which had not been finally concluded, for example by the final dismissal of an appeal, or by the expiry of the time for lodging an appeal or launching an action or judicial review proceedings. The Court of Appeal was prepared to allow an application to appeal out of time in the case, but if the lapse of time was too great, the courts may not be prepared to allow such applications.
- <sup>20</sup> Section 6 (1) provides:  
 A court or tribunal: a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and (b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant, may grant such remedy or relief, or make such order, in

respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.

- <sup>21</sup> *South China Morning Post*, 3 April 1990, 29.
- <sup>22</sup> See Byrnes, *supra* note 4, at p. 353 n 107.
- <sup>23</sup> J. Allan, 'Take Heed Australia—A Statutory Bill of Rights and Its Inflationary Effect' *Deakin Law Review*, (2001), [www.austlii.edu.au/au/journals/DLR/2001/7.html](http://www.austlii.edu.au/au/journals/DLR/2001/7.html) (visited 8 December 2003).
- <sup>24</sup> C. Gearty, 'What Are Judges For?', Inaugural lecture delivered at King's College London, 11 December 2000, [http://www.kcl.ac.uk/depsta/law/events/00\\_01/gearty\\_lecture/lecture.html](http://www.kcl.ac.uk/depsta/law/events/00_01/gearty_lecture/lecture.html) (visited 8 December 2003).
- <sup>25</sup> See, for example, the statements by the Independent Commissioner for Corruption in 1992 and 1993: Peter Allan, 'Independent Commissioner Against Corruption' in G. Edwards & A. Byrnes (eds), *Hong Kong's Bill of Rights: The First Year* (University of Hong Kong, Faculty of Law, 1993), 11 at 13 (describing the strategy of the ICAC, viz. to propose amendments to legislation that was 'almost certainly inconsistent' with the Bill of Rights); B de Speville, 'Law Enforcement and the Independent Commission against Corruption', in W. Fong, A. Byrnes & G. Edwards (eds), *Hong Kong's Bill of Rights: Two Years On* (University of Hong Kong, Faculty of Law, 1994), 11 at 13 (describing the strategy of the ICAC in similar terms, viz. "to repeal or amend those elements of our Ordinances which were by consensus manifestly contrary to the Bill, and stay with the rest until the matter could be decided by the courts either in decisions or in unequivocal guidance").
- <sup>26</sup> For examples, see Byrnes, *supra* note 4, at pp. 342–48.
- <sup>27</sup> One particular matter of concern were occasions on which the Hong Kong Government informed the United Nations human rights treaty bodies that it accepted particular interpretations of the guarantees of the ICCPR, but then subsequently argued a different (and less generous) interpretation before the Hong Kong courts. This is an important area of government conduct that needs to be monitored, since the official rhetoric to the United Nations may not be consistent with instructions given to the government's lawyers in a particular domestic case.
- <sup>28</sup> J. Chan, 'Hong Kong Bill of Rights 1991–95: A Statistical Overview' in J. Chan & G. Edwards (eds), *Hong Kong's Bill of Rights: Two Years Before 1997* (Faculty of Law, University of Hong Kong, 1996), pp. 7–76.
- <sup>29</sup> J. Chan, 'Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence' *International and Comparative Law Quarterly* 47 (1998), p. 306; Byrnes, *supra* note 4, pp. 359–370. For a recent reaffirmation by the Court of Final Appeal, see *Shum Kowk Sher v HKSAR* [2002] 3 HKC 117, para 59 (HKCFA).
- <sup>30</sup> For some examples, see Byrnes, *supra* note 4, pp. 348–49.
- <sup>31</sup> For an early survey, see A. Byrnes, 'The Impact of the Hong Kong Bill of Rights on Litigation' in J. Sihombing (ed.), *Law Lectures for Practitioners 1992* (Hong Kong Law Journal, 1992), pp. 152–235.
- <sup>32</sup> For example, the offence of being in possession of property reasonably suspected of being stolen and of which the person does not give a satisfactory account to a magistrate: *Attorney General (Hong Kong) v Lee Kwong-kut* (1993) 3 HKPLR 72, [1993] AC 951 (PC).
- <sup>33</sup> The most important case—the first to reach the Hong Kong Court of Appeal—involved a challenge to a reverse onus clause: *R v Sin Yau-ming* (1991) 1 HKPLR 88. Similarly, the first case to reach the Privy Council, which adopted a different framework of analysis, also involved a reverse onus clause: *Attorney General (Hong Kong) v Lee Kwong-kut* (1993) 3 HKPLR 72, [1993] AC 951 (PC).
- <sup>34</sup> See generally A. Bruce, 'Ten years of the Bill of Rights and the ICCPR in Criminal Proceedings', paper presented at Conference on *A Decade of the Bill of Rights and the ICCPR in Hong Kong: Review and Prospect*, Hong Kong, 12 January 2002, [www.hku.hk/ccpl/pub/conferences](http://www.hku.hk/ccpl/pub/conferences).
- <sup>35</sup> P. Harris, 'The Impact of the Bill of Rights Ordinance and the ICCPR on Hong Kong Civil Law', paper presented at Conference on *A Decade of the Bill of Rights and the ICCPR in Hong Kong: Review and Prospects*, Hong Kong, 12 January 2002, [www.hku.hk/ccpl/pub/conferences](http://www.hku.hk/ccpl/pub/conferences).
- <sup>36</sup> See generally Byrnes, *supra* note 4, at pp. 370–89; J. Chan, *The Annotated Ordinances of Hong Kong: Hong Kong Bill of Rights Ordinance (Cap 383)* (Butterworths, 1999).

- <sup>37</sup> The leading cases are *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127 (HKCA) and *Attorney-General v Lee Kwong-kut* (1993) 3 HKPLR 72; [1993] AC 951 (PC).
- <sup>38</sup> *Attorney-General v Fong Chin Yue* (1994) 4 HKPLR 430, [1995] 1 HKC 21 (HKCA).
- <sup>39</sup> *Lee Miu-ling v Attorney-General* (No 2) (1995) 5 HKPLR 585, [1996] 1 HKC 105.
- <sup>40</sup> *Lai Wai Hung v Secretary for Security* [2002] HKCFI 1031 (HKCFI).
- <sup>41</sup> *Yau Kwong Man v Security for Security* [2002] 3 HKC 457 (HKCFI) (challenge succeeded under Basic Law, but not under ICCPR).
- <sup>42</sup> *R. v Chan Suen-hay* (1995) 5 HKPLR 345, [1995] 1 HKC 847 (disqualification order imposed on a company director involved the imposition of a criminal 'penalty' within the meaning of art 12(1) of the Bill of Rights [article 15, ICCPR]).
- <sup>43</sup> *Lau San Ching v Apollonia Liu* (1995) 5 HKPLR 23 (HKHCt).
- <sup>44</sup> See the many examples cited in Byrnes, *supra* note 4, at pp. 376–381.
- <sup>45</sup> *HKSAR v Ng Kung Siu Et Anor* [2001] 1 HKC 117 (HKCFA).
- <sup>46</sup> *R. v. To Kwan-hang and Tsoi Yiu-cheong* (1994) 4 HKPLR 356, [1994] 2 HKC 293 (Mag Ct); *HKSAR v Leung Kwok Hung* [2002] 4 HKC 565 (Mag Ct).
- <sup>47</sup> *HKSAR v Coady* [2000] 2 HKC 12 (HKCA).
- <sup>48</sup> *HKSAR v Pun Ganga Chanda* [2001] 2 HKC 192 (HKCA).
- <sup>49</sup> See, eg, *Shum Kwok Sher v HKSAR* [2002] 3 HKC 117 (HKCFA) (offence of misconduct in public office not so vague as not to be 'prescribed by law').
- <sup>50</sup> *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKC 24 (HKCA).
- <sup>51</sup> See, for example, *Tse Wai Chun Paul v Solicitors Disciplinary Tribunal* [2002] 4 HKC 1 (HKCA), affirming [2001] HKCFI 854 (HKCFI), *Hong Kong Bar Association v Chua* (1994) (1994) 4 HKPLR 637 (Barristers' Disciplinary Tribunal), and *Peter Po Fun Chan v Hong Kong Society of Accountants* [2002] HKCFI 78 (HKCFI).
- <sup>52</sup> See the examples cited by Byrnes, *supra* note 4, at pp. 385–389.
- <sup>53</sup> *HKSAR v Coady* [2000] 2 HKC 12 (HKCA); *Lau Cheong and another v HKSAR* [2002] 3 HKC 146 (HKCFA).
- <sup>54</sup> *R v Securities and Futures Commission, ex p Lee Kwok-hung* (1993) 3 HKPLR 39 (HKCA).