Paper No. 29

National Security (Legislative Provisions) Bill : Issues relating to Article 39 of the Basic Law

This paper explains:

(1) whether under BL 84 the HKSAR courts are bound by English precedents that were decided before and after the Reunification; and

(2) the relevance of international human rights jurisprudence to the adjudication of cases by the HKSAR courts in light of the local cases of *Sin Yau Ming* and *Chong Fung Yuen*;

(3) the extent to which provisions in the ICESCR are aspirational and not binding; and

(4) whether requirements in the international covenants and conventions referred to in BL 39 which have not been incorporated in local legislation are not applicable to Hong Kong.

I. Binding force of English precedents

Relevant Basic Law provisions

2. BL 84 provides that:

> "The courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions."

3. BL 18 provides that the laws in force in the HKSAR shall be the Basic Law itself, laws enacted by the HKSAR legislature, and "the laws previously in force in Hong Kong" as provided for in BL 8. It also provides for the application of a limited number of national laws in Annex III to the Basic Law.

4. "The laws previously in force in Hong Kong" are defined in BL 8 to include the common law, rules of equity, ordinances, subordinate legislation and customary law to the extent they do not contravene the Basic Law and have not been amended by the HKSAR legislature.

Are the pre-Reunification English cases binding?

5. It is clear that if the pre-Reunification English cases are part of the common law "previously in force in Hong Kong" under BL 8, they were preserved by BL 18 as "the laws in force in the HKSAR" in accordance with which the HKSAR courts shall adjudicate cases under BL 84.

6. Prior to 1 July 1997, the Hong Kong courts were bound by decisions of the Judicial Committee of the Privy Council and, in practice, by decisions of the House of Lords on questions of English law applicable in Hong Kong. Hong Kong judges have never been formally bound by decisions of the English Court of Appeal or of other English courts, although in practice they were generally respected and followed.[1]

7. As for the post-Reunification position, the Court of Appeal has held in *Bahadur v Secretary for Security* [2002] 2 HKC 486 at 495B – D that "decisions of the Privy Council delivered before the resumption of sovereignty over Hong Kong by the PRC continue to be binding since the resumption of sovereignty on all courts of the HKSAR, save for the Court of Final Appeal. That is because decisions of the Privy Council represented part of the common law of Hong Kong. They were therefore part of the laws enforced in Hong Kong when the Basic Law came into operation and were preserved by art 8 of the Basic Law."

Are the post-Reunification English cases binding?

8. BL 84 expressly authorizes the HKSAR courts to "refer to precedents of other common law jurisdictions". Professor Yash Ghai opines that BL 84 "may be cited to show that the Hong Kong common law was intended to be contrasted with other systems, including the English."[2]

9. The Court of Final Appeal has replaced the Privy Council as the highest court of the HKSAR since the Reunification. Therefore, the Privy Council's decisions made after 1997 are not binding. The Court of Final Appeal assumes the role as the fountain of common law for Hong Kong.

10. Although English precedents are no longer binding, it is clear that the HKSAR courts will continue to seek guidance from them, especially those of the Privy Council and the House of Lords which are influential throughout the common law world.

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1 For detailed discussion, see Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3rd ed., 1998), pp 84 – 85.

2 Yash Ghai, *Hong Kong's New Constitutional Order*, (2nd ed., 1999), p 368.

II. Relevance of international human rights jurisprudence

11. In *R v Sin Yau-ming* (1991) 1 HKPLR 88, it has been held that in interpreting the Bill of Rights Ordinance considerable assistance could be gained from the decisions of common law jurisdictions with a constitutionally entrenched Bill of Rights (in particular Canada and the United States), from the general comments and decisions of the Human Rights Committee under the ICCPR and the Optional Protocol to the ICCPR, and from the jurisprudence under the European Convention on Human Rights. The Court of Appeal has made it clear that although none of these are binding, in so far as they reflect the interpretation of articles in the ICCPR and are directly related to Hong Kong legislation, these sources are of the greatest assistance and should be given considerable weight.

12. The Court of Final Appeal has not in its judgment of *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 discussed the relevance of international human rights jurisprudence, but it has reaffirmed that "the courts should give a generous interpretation to the provisions in Chapter III [of the Basic Law] that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong's separate system".

III. Extent to which ICESCR is aspirational and not binding

13. The International Covenant on Economic, Social and Cultural Rights, as applied to Hong Kong, is binding on the HKSARG as a matter of international law.

14. Article 2.1 of ICESCR provides as follows.

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

15. The question of the extent to which ICESCR may be "promotional" or "aspirational" was addressed in paragraphs 5 to 22 of a paper submitted to the AJLS Panel on 18 September 2001 (see Annex). As that paper emphasizes, that question is ultimately for the HKSAR courts to decide. The current Bill does not, and cannot, change the nature and extent of the applicable international obligations referred to in Article 39 of the Basic Law.

IV. International obligations not incorporated in domestic legislation

16. If any of the international obligations referred to in Article 39 of the Basic Law have not been incorporated in domestic law, they nevertheless remain binding on the HKSARG at the international level. The Government must comply with those obligations in devising its acts and policies, or it will be in breach of them.

Department of Justice
April 2003

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Annex

For discussion on
18 September 2001

PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES OF THE LEGISLATIVE COUNCIL

Paragraph 27 of the Concluding Observations of the United Nations Committee on Economic, Social and Cultural Rights

Introduction

This paper informs Members of the views of the Administration on paragraph 27 of the Concluding Observations of the United Nations Committee on Economic, Social and Cultural Rights ("the Committee") issued on 11 May 2001 on the Report submitted by the Hong Kong Special Administrative Region ("the HKSAR") under the International Covenant on Economic, Social and Cultural Rights ("the Covenant").

Background

2. The hearing on the Report submitted by the HKSAR took place on 27 and 30 April 2001 in Geneva. The Hong Kong delegation which was led by the Secretary for Home Affairs comprised 10 officials from the Department of Justice, Education and Manpower Bureau, Health and Welfare Bureau, Housing Bureau, and Home Affairs Bureau. The delegation presented the report and answered the Committee's questions.

3. The Concluding Observations of the Committee were issued on 11 May 2001. The Committee identified 11 positive aspects of the report, including for instance, the withdrawal of reservations to Articles 1 and 7 of the Covenant, the fact that the Human Rights Unit of the Department of Justice frequently consults the Committee's General Comments and the assurance that all rights enshrined in the Covenant contain certain justiciable aspects and that the Covenant is invoked in Hong Kong courts.

4. The Committee also expressed several concerns and made a number of suggestions and recommendations in the Concluding Observations.

Paragraph 27 of the Concluding Observations

5. Of particular concern to the members of this Panel is the statement made by the Committee in paragraph 27 of the Concluding Observations which reads as follows:

> "The Committee reminds the HKSAR that the provisions of the Covenant constitute a legal obligation on the part of the States parties. Thus, the Committee urges the HKSAR not to argue in court proceedings that the Covenant is only "promotional" or "aspirational" in nature."

The meaning of the terms 'promotional' or 'aspirational' in the judgments

6. The opinion that the Covenant was "promotional" or "aspirational" in nature was expressed by the Courts in the context of three immigration cases[1] which involved applications for judicial review of removal orders issued by the Director of Immigration against persons who had no legal right to stay in Hong Kong.

7. The provision in issue under the Covenant in all three cases was Article 10(1) of the Covenant, which provides that the "widest possible protection and assistance should be accorded to the family, which is the fundamental group unit of society".

8. The Courts considered the effect of the application of three international covenants, namely, the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on the Rights of the Child ("CRC") and the Covenant in those cases, noting that there are reservations under the ICCPR and the CRC in respect of the application

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[1] Chan Mei Yee v Director of Immigration HCAL 771/1999; Chan To Foon & Others v Director of Immigration HCAL 58/1998; Mok Chi hung & Another v Director of Immigration [2001] 2 HKLRD 125.

of immigration legislation relating to persons who do not have the right to enter or remain in Hong Kong.

9. The Courts took the view that the effect of those reservations under the ICCPR and CRC is that the provisions under the respective convention and covenant cannot be invoked so as to affect, as regards any person not having the right to enter and to remain in Hong Kong, any immigration legislation governing his entry into, stay in or departure from Hong Kong.

10. No similar reservation has been entered in respect of the Covenant. In the opinion of the Courts, this may be due to the "promotional" or "aspirational" nature of the Covenant.

11. In Chan Mei Yee v Director of Immigration, the Court after having taken into account the views of various legal experts, came to the view that the Covenant is 'promotional' in nature, in the sense that the obligations under the Covenant are progressive with steps to be taken by State parties with a view to achieving progressively the full realization of the rights concerned having regard to the maximum of its available resources.[2]

12. It was further held that, because of the unique position faced by Hong Kong, the Director of Immigration's decisions were lawful even in the absence of a reservation. The result is that provisions under the ICESCR cannot be invoked as the basis of legitimate expectation that the government would take the rights under the Covenant into account when immigration decisions were made against those who do not have a right to enter or remain in Hong Kong.

13. In Chan To Foon v Director of immigration, a similar view was expressed by the Court on the progressive nature of the Covenant:

> "Hong Kong may therefore recognise the rights protected by the ICESCR. But they are rights which, having regard to this Territory's existing social difficulties, may only be guaranteed progressively; that is, as and when those difficulties are overcome. Matters of immigration, our courts have

[2] At pages 23-5 of the judgment.

> recognised, remain a major problem. If unchecked, it is clear that, in the informed opinion of the Director, the problem will threaten the Territory's social fabric. **As a result, in respect of immigration matters, the Government of Hong Kong is unable at this time to guarantee the rights protected in the Covenant when they relate to matters of immigration**. I believe it may be taken that it is for this reason that no reservation was entered in respect of the ICESCR: it is an aspirational covenant, not one that creates absolute obligations." (Emphasis added.)[3]

Progressive realization of the rights as envisaged under Article 2(1) of the Covenant

14. The principal obligation under Article 2(1) of the ICESCR is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The concept of "progressive realization" has been explained in paragraph 9 of General Comment No.3 of the Committee[4]:

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

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3 Chan To Foon & Others, at page 29F-M.
4 Fifth session, 1990, [UN Doc.E/1991/23.

15. Indeed, the above passage had been referred to and relied on by the Courts in coming to the view that the Covenant is "promotional" or "aspirational" in nature.[5]

The views of the Administration

16. The Administration accepts that there is an obligation under international law to implement the rights under the Covenant. However, an international covenant is not part of the domestic law in the absence of its incorporation into the domestic legal system. Accordingly, the Administration considers that the international obligation to implement the rights in the Covenant does not create any domestic right or legitimate expectation that those rights would be taken into consideration by the Government in respect of immigration decisions on persons who do not have the right to enter or remain in Hong Kong.

17. The question of the precise nature of the Covenant may, in future arise in domestic legal proceedings in many different contexts. In each case in which it does arise, it must be our independent judiciary that decides that question. The courts will be best assisted in that task if all legitimate arguments are put to them by counsel appearing for the parties.

18. There are distinguished legal experts who hold the view that the Covenant is promotional in nature. Where the nature of the Covenant arises in legal proceedings, the courts may well be aided in their task by being informed of those views.

19. The Administration, and counsel acting for it, have a privilege to defend the government's position by the statement of every fact and the use of every argument that is permitted by the principles and practice of the law. That privilege is recognised in the Code of Conduct of the Bar of the Hong Kong Special Administrative Region. The Code of Conduct also contains express provisions as to the information that

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[5] Paragraph 9 of General Comment No.3 has been quoted in page 284 of Henry Steiner's book titled *International Human Rights in Context* which the Courts have referred to in Chan Mei Yee v Director of Immigration HCAL 77/1999, at page 24G-N and Chan To Foon & Others (ibid), at page 28K-S.

counsel is required to give to the Court.

20. A copy of the Concluding Observations issued by the Committee has already been sent to the Judiciary for its information by the Administration.

21. The Administration is committed to the implementation of its obligations under the Covenant and treats the Concluding Observations of the Committee with the greatest respect. The fact that it has taken steps to implement previous recommendations of the Committee has been noted by the Committee with appreciation.[6] The Administration will continue to take steps to achieve progressively the full realization of the rights under the Covenant in the manner envisaged by Article 2(1) of the Covenant.

22. The Administration's response to paragraph 27 of the Concluding Observations has previously been stated in the reply by the Secretary for Justice to the question asked by the Honourable Ms. Audrey Yu at the Legislative Council meeting on 20 June 2001. A copy of the relevant question and answer is attached at the Annex.

Department of Justice
September 2001

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[6] For instance, the Committee notes with satisfaction that the Equal Opportunities Commission is effectively carrying out its mandate without interference from the government and it also welcomes the establishment of the Women's Commission. It further notes with appreciation that training programmes are conducted for unskilled and unemployed workers and commends the HKSAR government for its efforts to provide adequate housing for Hong Kong residents: see paragraphs 6, 7, 10 and 11 of the Concluding Observations.