

Maintenance of the Bill of Rights

The legal sub-group of the Preliminary Working Committee long ago decided that the Hong Kong Bill of Rights Ordinance ('BORO') is to be amended before it operates in the Special Administrative Region. Further, certain other ordinances, most noticeably the Public Order Ordinance and the Societies Ordinance, are to extend through 1997 only in the form they took before amendments designed to render them consistent with the Bill of Rights were passed. This controversial decision has been endorsed by Chinese officials, the Preparatory Committee, the Chief Executive-designate, Mr Tung Chee-hwa, and the Standing Committee of the National People's Congress. It is arguable, however, that this exercise is as legally futile as it is politically damaging.

The proposal is that ss 2(3), 3, and 4 of BORO be repealed.

Section 2(3) reads:

In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected purposes.

Exception has been taken to the word 'incorporation,' and indeed the drafters might be blamed for a careless choice of word. The ordinance does of course 'incorporate' the Covenant in one sense, but it may be more precise to say that it 'implements' the Covenant by enactment of its provisions. Repeal of the subsection would not, however, in any way affect judges' interpretive approach to the Bill of Rights: they may still refer to the long title, which uses the word 'incorporation,' and they are obliged in any event to follow a purposive interpretation of an ordinance. The purpose of BORO being to implement the Covenant, that is the objective they would seek to further in cases involving the Bill of Rights.¹

Section 3 reads:

- (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that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.

¹ See Bokhary JA in *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* (1996) CA, Civ App No 260 of 1995: 'the purpose of the Hong Kong Bill of Rights Ordinance ... is, as its long title tells us, the incorporation of the Covenant into our law. And, as section 2(3) of the Ordinance provides in terms, regard is to be had to that purpose in interpreting and applying the Ordinance. Clearly, such interpretation is essential if such incorporation is to be effective. And if it is not effective, then the whole purpose of the Bill will be defeated.'

This simply sets out a principle of the common law, and its removal would not affect the usual relationship between prior and later statutes.²

Section 4 is another interpretation provision:

All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

It does not set the ordinance above subsequent ordinances, which is the apparent reason for its proposed repeal. Laws made after 8 June 1991, when BORO came into operation, are unconstitutional if they infringe, not BORO, but the Covenant. Before 1 July this is achieved through Art VII(5) of the Letters Patent.³ From 1 July it will be achieved through Art 39 of the Basic Law, which requires that the Covenant as applied to Hong Kong remain in force.⁴ Regardless, however, of these matters, the obligation to construe domestic legislation consistently with relevant treaties is already recognised in the practice of the Hong Kong courts, and repeal of s 4 would be ineffective.

Those ordinances which were amended to make them proof against the Bill of Rights, if extended to the SAR in their pre-amendment form, will be vulnerable in the ordinary way to challenge on the ground of their inconsistency with the Bill — or, if they are then regarded as post-Bill legislation, on the ground of their inconsistency with the Covenant as applied to Hong Kong. Restoring their pre-1991 versions, and amending BORO, will have achieved nothing except arouse local apprehensions and international concern — and demonstrate the extent to which prominent Hong Kong citizens are prepared to accept without demur whatever views, flawed or not, are insisted upon by Chinese officialdom.

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² Andrew Byrnes suggests that an SAR judge might refuse to recognise the repealing effect of BORO, once s 3(2) has gone, in a case challenging pre-1991 legislation which has not been the subject of a prior decision. See '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* (Oxford: Clarendon Press, forthcoming in 1997). However, an inconsistency will remain between ordinances, and judges must either recognise that the latest expression of the legislature's will is supreme or invent some unprecedented alternative solution.

³ Note 1 above: 'what entrenches the Bill is the provision in the Letters Patent prohibiting any legislative inroad into the Covenant as applied here. The Bill is (as we said in *The Queen v Chan Chak-fan* [1994] 2 HKCLR 17 at p 23) the "embodiment" of the Covenant as applied here. And it can only be that if it is interpreted so as to conform with the Covenant as closely as possible.'

⁴ This is perhaps conjectural, given the difference in wording between BL39 and the Letters Patent. The SAR courts would nevertheless be amply justified in applying the ICCPR as a standard by which to measure the validity of all statute law in the SAR.