towards a common law of the world. It will be a privilege to be a part-time member of a Hong Kong judiciary which, while cementing the rule of law here, may contribute significantly to that process.

*Robin Cooke**

The Status of the Bill of Rights in the Hong Kong Special Administrative Region

The Bill of Rights Ordinance came into force on 8 June 1991. According to s 2(3), the purpose of this ordinance was to incorporate the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) into the laws of Hong Kong. Section 3 provides that all pre-existing legislation, ie legislation that existed on 8 June 1991, should be construed consistently with this ordinance. Accordingly, language which does not permit such a construction shall be repealed to the extent of the inconsistency. Section 4 provides that all subsequent legislation shall be construed consistently with the ICCPR as applied to Hong Kong.

On 23 February 1997, the Standing Committee of the National People's Congress (NPCSC) declared, pursuant to Art 160 of the Basic Law, that ss 2(3), 3, and 4 of the Bill of Rights Ordinance would not be adopted as laws of the Hong Kong Special Administrative Region (HKSAR).

Peter Wesley-Smith has argued forcefully that the non-adoption of these sections would have no effect on the operation of the Bill of Rights.[1] With or without s 2(3), the object of the ordinance is obvious in light of its preamble, its long title, the fact that its substantive rights provisions are virtually identical to those of the ICCPR, and that each article in the Bill of Rights actually contains a reference to the corresponding provision in the ICCPR. Also, because ss 3 and 4 are no more than codifications of long-established common law principles of interpretation, the courts could easily reach the same or similar conclusions in their absence.

There is an alternative route to the conclusion that the Bill of Rights Ordinance will continue undiminished in the HKSAR notwithstanding the decision of the NPCSC.

Art 18 of the Basic Law sets out the sources of law in the HKSAR. They include, inter alia, laws previously in force in Hong Kong as defined in Art 8. In *HKSAR v David Ma*, the Court of Appeal held that the laws previously in force in Hong Kong referred to the laws which existed on 30 June 1997.[2]

* Lord Cooke of Thorndon is a non-permanent judge of the Court of Final Appeal.
1 Peter Wesley-Smith, 'Maintenance of the Bill of Rights' (1997) 27 HKLJ 15.
2 [1997] HKC 315, 329F-G (Chan CJHC); 348A (Nazareth VP); and 362C-E (Mortimer VP).

In R *v Kwok Hing-man*,[3] the appellant was convicted of the offence of being found in possession of property reasonably suspected of being stolen or unlawfully obtained, contrary to s 30 of the Summary Offences Ordinance. The conviction was entered after the Bill of Rights Ordinance had come into effect but before s 30 was found to be inconsistent with Art 11(1) of the Bill of Rights by the Privy Council in AG *v Lee Kwong-kut*.[4] After s 30 was declared to be repealed, the appellant asked the Attorney General to expunge his criminal record and to destroy the relevant files, photographs, and fingerprint records. The Attorney General refused, pointing out that it was not 'in the public interest to allow cases dealt with under a law subsequently declared repealed to be effectively re-opened months or years after the original proceedings were concluded.'[5]

The appellant then applied for leave to appeal out of time. His case was intended to be a test case, as it was discovered that 386 persons were in a similar position. The Court of Appeal affirmed that the repeal of any legislation which was inconsistent with the Bill of Rights took effect from the commencement of the Bill of Rights Ordinance, that is, 8 June 1991. Therefore, the appellant was convicted of an offence which no longer existed at the date of his offence. The only issue was whether the court should grant leave to appeal out of time. As this was a matter of discretion, the court took the unusual step of consulting all the Court of Appeal judges, eventually coming to a policy decision that leave would be granted in these circumstances, notwithstanding the desirability for finality in the criminal process.

Thus, any legislation inconsistent with the Bill of Rights will be repealed, to the extent of that inconsistency, as of 8 June 1991. *When* the inconsistency is discovered matters not. In other words, all pre-existing legislation which is inconsistent with the Bill of Rights no longer existed on 30 June 1997, even where the inconsistency was discovered after 30 June 1997. Such legislation cannot be 'laws previously in force in Hong Kong' and therefore cannot be adopted as a law of the HKSAR.

A similar argument applies to subsequent legislation. Any subsequent legislation which is inconsistent with the ICCPR as applied to Hong Kong will contravene Art VII(5) of the Letters Patent and will be ultra vires the Legislative Council. Such statutory provisions will be null and void as if they had never been enacted. They did not exist on 30 June 1997, regardless of when the inconsistency was discovered.[6]

3 (1994) 4 HKPLR 186.
4 (1992) 2 HKPLR 94 (CA); (1993) 3 HKPLR 72 (PC).
5 (1994) 4 HKPLR 186, 189.
6 In any event, if these statutory provisions are inconsistent with the ICCPR as applied to Hong Kong they would be struck down by Art 39 of the Basic Law.

It can therefore be seen that, even after the establishment of the HKSAR, the Bill of Rights (along with the ICCPR) is still relevant as a yardstick for determining what the 'laws previously in force in Hong Kong' are. Pre-1997 statutory provisions will not be adopted as law if they are found to be inconsistent with the Bill of Rights after 1 July 1997. Instead, they may either be considered repealed as of 8 June 1991 if they contravene the Bill of Rights, or deemed null and void following enactment after 8 June 1991 if they are considered inconsistent with the ICCPR as applied to Hong Kong. This position remains the same whether the NPCSC declares the non-adoption of ss 2(3), 3, and 4 of the Bill of Rights, or, indeed, whether the entire Bill of Rights is adopted.[7]

With the coming into force of the Basic Law, one may ask: does it matter whether the Bill of Rights is still relevant? Most challenges previously made under the Bill of Rights may be made under the Basic Law.[8] While this is generally true, there are two reasons why resort to the Bill of Rights is preferable.

First, it is unclear to whom the Basic Law applies. As a constitution of the HKSAR, it will no doubt bind the government.[9] In contrast, the Bill of Rights binds the government *and* public authorities.[10] 'Public authority,' however, is not defined. In *Hong Kong Polytechnic University v Next Magazine*, [11] Keith J held that:

> In my view, for a body to be a public authority within the meaning of s 7(1) of the Bill of Rights Ordinance, it is not sufficient for it to be entrusted with functions to perform for the benefit of the public and not for private profit: there must be something in its nature or constitution, or in the way in which it is run, apart from its functions, which brings it into the public domain. It is unnecessary for me to identify what that might be: it may take the form of public funding, of a measure of governmental control or monitoring of its performance, or some form of public accountability. But something which brings it into the public domain there must be.

7 In *Association of Expatriate Civil Servants of Hong Kong v The Chief Executive* (1998) CFI, AL No 90 of 1997, Keith J held, in the context of disciplinary action against public officers, that 'art 103 [of the Basic Law] could not have contemplated the maintenance of a system which contravened the Bill of Rights.'

8 The language of the two instruments is quite different. For a comparison between the Bill of Rights and the Basic Law, see Yash Ghai, 'The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region' (1995) 1 Journal of Chinese and Comparative Law 30.

9 In *De Klerk v Du Pressis* (1995) (2) SA 40, the South African court held that the fundamental rights and freedoms enshrined in the South African Constitution were protected against State action only. What constitutes State action should, of course, be liberally construed: see *Operation Dismantle Inc v R* [1985] 1 SCR 441, 455; *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573.

10 Bill of Rights Ordinance, s 7(1).

11 (1996) 6 HKPLR 117, 122-3.

In the end, Keith J held that Hong Kong Polytechnic University was a public authority. On appeal,[12] the Court of Appeal assumed without actually deciding that the university *was* a public authority within the meaning of the Bill of Rights Ordinance; it also refrained from pronouncing a different test for determining whether a body was a public authority. Whatever definition is to be given to the term 'public authority,' it must mean something other than the government. In this context, the Bill of Rights Ordinance may have a wider scope of application than the Basic Law.

Second, under Art 160 of the Basic Law, ultimate power to interpret the Basic Law is vested in the NPCSC. It further provides that HKSAR courts may also interpret the Basic Law in areas which lie within the limits of the autonomy of the region. However, the article is unclear as to whether the power of interpretation of HKSAR courts is exclusive or concurrent. Given that the power to interpret the Basic Law is regarded as a symbol of sovereignty, it is unlikely that the NPCSC will relinquish this power.

Nonetheless, it is probable that, within the limits of the HKSAR's autonomy, the NPCSC will refrain from exercising its concurrent (and overriding) powers of interpretation, while still retaining the power to do so. On the other hand, the final power of interpretation of the Bill of Rights is vested in the HKSAR courts. Therefore, in appropriate cases, the HKSAR courts may be able to avoid referring such questions of interpretation to the NPCSC provided that the issue can be defined and decided on the basis of the Bill of Rights only. For example, Art 23 of the Basic Law may be avoided if the offence of subversion as stated in the Crimes Ordinance is struck down as inconsistent with Art VII(5) of the Letters Patent (and Art 19 of the ICCPR). In other words, if the Court of Final Appeal decides that an interpretation of Art 23 is *unnecessary*, no question affecting the relationship between the Central Government and the HKSAR will be involved, thus a literal reading of Art 158 would render this decision final.[13]

Johannes Chan[*]

[12] *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* (1997) 7 HKPLR 286. The tenor of the judgment seems to be that, should it have been necessary to decide the question, the Court of Appeal would have held that the university was *not* a public authority. However, this does not resolve the question of what constitutes a 'public authority' within the meaning of the Bill of Rights Ordinance.

[13] Art 160 provides that the duty to refer a question of interpretation to the NPCSC only arises if the courts of the HKSAR, in adjudicating cases, *need* to interpret certain provisions of the Basic Law.

[*] Associate Professor, Department of Law, University of Hong Kong.