

The Influence of the Strasbourg Court's jurisprudence in Hong Kong
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A. Hong Kong's transition

Hong Kong, a British colony since 1841, became a Special Administrative Region of the People's Republic of China on 1 July 1997. While under British rule, its legal system followed the English model, applying the common law supplemented by locally enacted Ordinances and United Kingdom enactments applied to Hong Kong. The final appellate Court was the Privy Council in London and there was no written constitution.

Upon its transition to a Special Administrative Region (HKSAR), Hong Kong acquired a written constitution known as the Basic Law² which provides that its way of life is to remain unchanged for 50 years³ and that the HKSAR is to exercise a high degree of autonomy, enjoying executive, legislative and independent judicial power, including that of final adjudication.⁴ The Hong Kong Court of Final Appeal (HKCFA) was established to exercise that power,⁵ replacing the Privy Council. The Basic Law provides that the HKSAR shall safeguard the rights and freedoms of residents and others in the Region in

¹ Permanent Judge of the Hong Kong Court of Final Appeal. The author reserves all rights.

² The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, promulgated on 4 April 1990, entering into force on 1 July 1997.

³ Art 5.

⁴ Art 2.

⁵ Art 82.

accordance with law.⁶ The applicable law comprises the laws previously in force in Hong Kong (including the common law, rules of equity and pre-existing legislation) as well as laws subsequently enacted by the HKSAR, unless inconsistent with the Basic Law.⁷ The Basic Law also invalidates laws enacted by the HKSAR legislature which contravene the Basic Law⁸ and authorises the HKSAR courts to interpret the provisions of the Basic Law in adjudicating cases.⁹ The HKSAR's constitution therefore enshrines the rule of law and confers the power of constitutional review on the courts, making it their duty to invalidate any legal provisions found to be inconsistent with the Basic Law.

B. Constitutionally protected human rights

A centrally important feature of the Basic Law is that it guarantees fundamental human rights and freedoms. Chapter III provides, among other things, for equality before the law; freedom of speech, of the press and of publication; freedom of association, assembly, procession and demonstration; freedom of the person and protection against arbitrary or unlawful arrest, detention or imprisonment and unlawful search; the prohibition of torture and arbitrary or unlawful deprivation of life; freedom and privacy of communication; freedom of movement within the HKSAR and freedom to travel and to enter or leave the Region; freedom of conscience and to participate in religious activities in public; freedom to engage in academic, artistic and cultural activities; the right to confidential legal advice, access to the courts, choice of lawyers and to

⁶ Art 4.

⁷ Arts 8 and 18. Several National laws listed in an Annex are exceptionally made applicable to the HKSAR.

⁸ Art 11.

⁹ Subject to a duty to refer questions arising in adjudication concerning foreign affairs, defence or the relationship between the Central Authorities and the HKSAR for interpretation by the Standing Committee of the National People's Congress: Arts 19 and 158.

judicial remedies, together with the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel; the right to social welfare benefits in accordance with law; and freedom of marriage and the right to raise a family.

Additionally, Article 39 of the Basic Law imports into the constitution the International Covenant on Civil and Political Rights (ICCPR)¹⁰ as applied to Hong Kong. In June 1991, the provisions of the Covenant were given domestic effect as the Hong Kong Bill of Rights (BOR) by enactment as part of the Hong Kong Bill of Rights Ordinance (BORO) in anticipation of the Basic Law coming into effect in 1997. BORO continues to have effect (subject to insignificant modifications) after the transition. There is considerable overlap between Part III of the Basic Law and the BOR, but certain rights contained in the latter, not mentioned in the Basic Law, are thereby given constitutional protection. They include the prohibition of cruel, inhuman or degrading treatment or punishment, the right to a fair and public hearing, the presumption of innocence and the privilege against self-incrimination which have received attention in the Hong Kong courts.

Article 39 goes on to provide that: “The rights and freedoms enjoyed by Hong Kong residents¹¹ shall not be restricted unless as prescribed by law” and that “Such restrictions shall not contravene the provisions of the preceding paragraph of this Article [which requires the implementation of the ICCPR through HKSAR laws].” The Basic Law thus gives constitutionally guaranteed status to the BOR and requires the HKSAR Courts to exercise their power of

¹⁰ It also refers to the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to the HKSAR, but their discussion falls outside the scope of this paper.

¹¹ Basic Law Art 41 extends enjoyment of the rights and freedoms of Hong Kong residents to other persons in the HKSAR.

constitutional review in respect of domestic laws inconsistent with the ICCPR-based rights and freedoms.¹²

C. The pre-transition search for guidance

The Hong Kong courts had no previous experience of interpreting and applying such provisions. They immediately set about seeking guidance from established bodies of jurisprudence. Three pre-transition decisions are notable.

In September 1991, in the light of the guaranteed presumption of innocence, the Court of Appeal¹³ had to decide on the validity of statutory (rebuttable) presumptions deeming a defendant guilty of the far more serious offence of drug trafficking upon proof of his or her possession of specified quantities of the relevant drugs. While the jurisprudence of the European Court of Human Rights (ECtHR) was said to be “of the greatest assistance” and to be given “considerable weight”, the Court of Appeal preferred to look principally to Canada, a fellow common law jurisdiction with its Charter of Rights and Freedoms, adopting the proportionality analysis espoused by the Canadian Supreme Court in *R v Oakes*.¹⁴ As Chief Justice McLachlin recently explained,¹⁵ this requires a restriction of a claimant’s rights to be justified first by showing that it has a pressing and substantial objective and secondly, that it is proportionate, meaning that it has a rational connection with that objective; it minimally impairs that right; and there is a proportionality between the deleterious and salutary effects of the law. The ECtHR’s decision in *Salabiaku*

¹² *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 454-455; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 at [25-29]; *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at [53] and [58]; *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 [60].

¹³ *R v Sin Yau Ming* (1991) 1 HKPLR 88.

¹⁴ [1986] 26 DLR (4th) 200.

¹⁵ “*Proportionality, Justification, Evidence and Deference: Perspectives from Canada*” (Paper in Hong Kong Judicial Colloquium 2015, see “Publications” in www.hkcfca.hk).

*v France*¹⁶ was considered less appropriate as guidance because of the supra-national status of the Court.

Next came the 1993 decision of the Privy Council in *Attorney-General of Hong Kong v Lee Kwong-kut*,¹⁷ another case involving the presumption of innocence. The approach in *R v Oakes* was not favoured, being regarded as involving a “somewhat complex process” thought to be unnecessary in “the vast majority of cases”. Instead, the Privy Council resorted to the concept of “reasonableness”, holding that the Court should simply ask itself “whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like” and if so, hold that no contravention has occurred. This was therefore an approach narrowly focussed on the presumption of innocence, utilising a broad “reasonableness” standard.

In the third case, *Ming Pao Newspapers Ltd v Attorney-General of Hong Kong*,¹⁸ the Privy Council considered a newspaper’s freedom of expression challenge to a provision making it an offence to disclose details of an investigation into a suspected offence under the Prevention of Bribery Ordinance. The Privy Council noted that the freedom was guaranteed by BOR Art 16 in terms virtually identical to the provisions of Article 10 of the European Convention on Human Rights (ECHR)¹⁹ and adopted key aspects of the ECtHR’s approach to free expression (citing primarily United Kingdom cases in the Strasbourg Court). Thus, it noted that any restrictions on the

¹⁶ (1988) 13 EHRR 379.

¹⁷ [1993] AC 951.

¹⁸ [1996] AC 907. The case turned on the interpretation of the section in the Ordinance but the constitutional issue was fully discussed.

¹⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms (1953).

freedom of expression had to be narrowly interpreted²⁰ and that any such restrictions had to be proportionate to the aims sought to be achieved.²¹ Moreover, it adapted the ECtHR's principle of the margin of appreciation²² to its position as a Court sitting in London and accordingly gave weight to the Hong Kong Court's assessment of the public interest in local conditions.

D. After the transition

In the first human rights case to reach the HKCFA,²³ it was the ECtHR-influenced approach in the *Ming Pao* case rather than the approach in *Lee Kwong-kut* mentioned above that was adopted. The defendants had deliberately defaced the national and regional flags and displayed them at a public demonstration shortly after the transition. The question was whether statutory provisions making it an offence publicly and wilfully to defile those flags were compatible with freedom of expression guaranteed by BOR Art 16. That Article makes it clear that the right is not absolute, stating that its exercise may be subject to restrictions provided by law and necessary for respect of the rights or reputations of others and for the protection of national security or of public order (*ordre public*), or of public health or morals. While recognizing that such restrictions must be narrowly interpreted, the HKCFA held that it was a legitimate aim of the legislation to protect the national and regional flag as a unique symbol of national unity and integrity; that the flag desecration law fell within the permitted "public order (*ordre public*)" restriction as a function of the "time, place and circumstances"; and that, being a limited exception which left

²⁰ *The Observer and The Guardian v UK* (1991) 14 EHRR 153.

²¹ *James v UK* (1986) 8 EHRR 123.

²² *Ibid* and *Handyside v UK* (1976) 1 EHRR 737.

²³ *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442.

other modes of expressing similar sentiments untouched, it did not go beyond what was proportionate to achieving that legitimate aim.

Since then, the HKSAR Courts have frequently taken into account principles developed by other courts and international institutions²⁴ in the interpretation and application of Hong Kong's constitutional rights and freedoms. Among them, the jurisprudence of the ECtHR has proved to be by far the most fertile source. Of course the Strasbourg Court plays a supra-national role under an international treaty in relation to States Members of the Council of Europe who provide its Judges. It obviously functions quite differently from the HKCFA which is a court of final adjudication in a domestic forum. Sometimes, such differences may make it inappropriate to take the path followed in Strasbourg. However, because of its highly developed and accessible body of decisions, the ECtHR's jurisprudence has proved to be highly illuminating on how provisions closely comparable to those found in Hong Kong's Basic Law and BOR may be understood and applied.

The appropriateness of the Hong Kong courts taking account of established principles of international jurisprudence in interpreting Chapter III of the Basic Law and the BOR was acknowledged in the HKCFA's decision in *Shum Kwok Sher v HKSAR*.²⁵ Reiterating this in *Koon Wing Yee v Insider Dealing Tribunal*,²⁶ Sir Anthony Mason NPJ stated: "The decisions of the Strasbourg Court on provisions of the Convention which are in the same, or substantially the same terms, as the relevant provisions of the BOR, though not binding on

²⁴ Including decisions of the House of Lords and United Kingdom Supreme Court on the Human Rights Act 1998; the Canadian Supreme Court, the South African Constitutional Court, the United States Supreme Court and the European Court of Justice, as well as Communications of the Human Rights Committee.

²⁵ (2002) 5 HKCFAR 381 at [59].

²⁶ (2008) 11 HKCFAR 170 at [27].

the courts of Hong Kong, are of high persuasive authority and have been so regarded by this Court.”

Writing extra-judicially,²⁷ Sir Anthony Mason noted that reference to a body of comparative law is often helpful, pointing out that: “The questions of law and principle which a court of final appeal is called upon to decide are often susceptible of having more than one viable answer. Inevitably there are choices to be made. In many instances, relevant choices have been made, sometimes differing choices, by courts of other jurisdictions. Apart from these choices, the reasoning behind the choice may provide useful assistance.”

Moreover, as he explained, it is important that the HKCFA’s decisions are seen to conform to internationally accepted judicial standards: “Hong Kong’s reputation as an international financial centre depends upon the integrity and standing of its courts. Further, in the context of Hong Kong’s relationship with the Central Government in Beijing, it is important that the decisions of the Hong Kong courts reflect adherence to the rule of law in accordance with internationally adopted judicial standards.”

It has therefore been most valuable for the Hong Kong courts to be able to refer to the well-developed jurisprudence of the ECtHR. The existence of a substantial body of English case-law dealing with ECHR rights via the United Kingdom’s Human Rights Act 1998 in a common law setting familiar to the Hong Kong courts, adds to the attraction. It has been especially beneficial to take note of certain general principles developed by the ECtHR, as I endeavour to illustrate as follows.

²⁷ “*The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong*” (2007) 37 HKLJ 299 at 302-303.

E. General principles

(a) Proportionality

Application of a proportionality analysis as the basis for determining the limits of non-absolute rights has become ubiquitous in the Hong Kong courts in line with the practice of the ECtHR and many other courts. The process involves asking whether a purported restriction of a guaranteed right pursues a legitimate aim; and if so, whether the restriction is rationally connected with achieving that aim and is no more than necessary for its achievement.²⁸

In cases where constitutional rights are said to be infringed by governmental socio-economic policy choices regarding the allocation of limited public funds, the HKCFA has tended, in considering proportionality, to replace the “no more than necessary” standard with the test of whether the executive’s action is “manifestly without reasonable justification”. That was the standard adopted in a case where higher obstetric fees for wives of Hong Kong residents visiting from the Chinese mainland were argued to be discriminatory;²⁹ and in another case where the Government’s drastic restriction of eligibility for welfare benefits was argued to have infringed the right to social welfare under the Basic Law.³⁰ The “manifestly without reasonable justification” standard was derived and adapted from the ECtHR’s approach to discrimination in state benefits in the context of the margin of appreciation.³¹

²⁸ Eg, *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [42]-[43].

²⁹ *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409.

³⁰ Basic Law Art 36, discussed in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950.

³¹ As explained by the UK Supreme Court in *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545 at [16]-[21], citing ECtHR decisions including *Stec v UK* (2006) 43 EHRR 1017 and *Carson v UK* (2010) 51 EHRR 369 at [61].

(b) “*Essence of the right*”

Some rights are of such a nature that the proportionality analysis needs qualification or may not be apt. For instance, it requires qualification in respect of the right to a fair and public hearing where the hearing process involves multiple steps. Guidance has been found in Strasbourg cases on ECHR Art 6(1)³² which show that the right is not absolute and may be restricted provided the restriction is not such as to impair “the very essence of the right”.³³ Those decisions establish that the proportionality principle does not require every element of protection to be present at every stage but can be given effect viewing the determination of a person’s rights and obligations as an entire process. It is sufficient if it is subject to control by a “court of full jurisdiction” so that the openness and fairness requirement is satisfied overall.³⁴

Drawing upon a series of cases culminating in *Goodwin v United Kingdom*,³⁵ the HKCFA also found (in a case involving a post-operative male to female transsexual person³⁶) that in relation to the right to marry,³⁷ given the nature of the right, it was appropriate to assess the validity of the restriction by asking whether it impairs “the very essence of the right” rather than subjecting it to the usual proportionality analysis.

³² In materially the same terms as BOR Art 10.

³³ *Chow Shun Yung v Wei Pih* (2003) 6 HKCFAR 299 at [37.1], citing *Ashingdane v UK* (1985) 7 EHRR 528 at [57].

³⁴ *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237; referring to *Albert and Le Comte v Belgium* (1983) 5 EHRR 533 at [29]; and a series of English cases including *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430.

³⁵ (2002) 35 EHRR 18.

³⁶ *W v Registrar of Marriages* (2013) 16 HKCFAR 112.

³⁷ Basic Law Art 37 and BOR Art 19(2); which are materially the same as ECHR Art 12.

(c) *Absolute and non-derogable rights*

Guidance was found in the ECtHR's jurisprudence³⁸ when the HKCFA held³⁹ that the prohibition of torture and cruel, inhuman or degrading treatment or punishment was absolute and non-derogable, taking such cases outside the scope of the proportionality principle and limiting the effect of a treaty reservation to the ICCPR provisions subsequently enacted in BORO.

(d) *"Prescribed by law"*

The phrase "prescribed by law" appears frequently in the ECHR⁴⁰ as a condition of validity of any purported restriction on a fundamental right. Those words are used in the same context in Article 39 of the Basic Law which, as we have seen, gives constitutional protection to the provisions of the ICCPR as applied to Hong Kong. They also appear in particular Articles of the BOR.⁴¹ The ECtHR's jurisprudence has been found helpful in explaining that the phrase mandates the principle of legal certainty, requiring the restrictive law to be accessible and sufficiently precisely defined to indicate how individuals should regulate their conduct, while retaining the law's necessary flexibility; and making it insufficient to restrict guaranteed rights and freedoms by granting officials general discretionary powers.⁴²

³⁸ Including *Soering v UK* (1989) 11 EHRR 439 at [88]. Communications of the Human Rights Committee were also much relied on.

³⁹ *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 at [108]-[111].

⁴⁰ Including in ECHR Art 5 (liberty and security), Art 9 (manifestation of religion or beliefs), Art 10 (freedom of expression) and Art 11 (freedom of assembly).

⁴¹ Including in BOR Art 15 (manifestation of religion or beliefs) and Art 18 (freedom of association). Additionally, BOR Art 5(1) (liberty and security of the person) and Art 10 (fair and public hearing) use the term "established by law" which has been held to mean the same thing: *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381.

⁴² *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 and *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at [62]; citing decisions including *Sunday*

(e) Autonomous meaning

Certain guarantees, both in the ECHR and in Hong Kong's constitutional instruments, are applicable only in specified types of cases, such as those involving a criminal charge. Thus, in Hong Kong, the right to a fair and public hearing⁴³ applies only to persons facing a "criminal charge" or involved in "a suit at law". Similarly, the right to be presumed innocent only applies to persons "charged with a criminal offence".⁴⁴ The HKCFA has adapted the ECtHR's approach,⁴⁵ holding that these categories have an autonomous meaning in the Basic Law and BOR with the nature of the proceedings determined as a matter of substance and not simply by the legislature's or executive's definition, for otherwise, constitutional rights could easily be side-stepped.⁴⁶

(f) Positive duties

The question of whether constitutional rights impose proactive, positive duties on the government has not arisen in many decisions in Hong Kong. However, in relation to the freedom of peaceful assembly, the HKCFA held⁴⁷ that a positive duty lies on the executive authorities to take reasonable and appropriate

Times v. UK (1979) 2 EHRR 245; *SW v UK* (1995) 21 EHRR 363 at 398; *Hashman and Harrup v UK* (1999) 30 EHRR 241

⁴³ BOR Art 10.

⁴⁴ BOR Art 11.

⁴⁵ Eg, *Engel v The Netherlands (No 1)* (1979-80) 1 EHRR 647 at [81]; *König v Federal Republic of Germany* (1979-80) 2 EHRR 170 at [88]; *Ravnsborg v Sweden* (1994) 18 EHRR 38; *AP & Others v Switzerland* (1998) 26 EHRR 541 [39].

⁴⁶ *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at [31]; *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 at [75].

⁴⁷ *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 at [22]-[24].

measures to enable lawful assemblies to take place peacefully, drawing on the ECtHR's decision in *Plattform "Ärzte Für Das Leben" v Austria*.⁴⁸

F. Concepts from a different legal system

Particular care is sometimes needed where a common law court refers to ECtHR and international jurisprudence regarding concepts which may be differently interpreted in a civil law system. This arose in *Lam Siu Po v Commissioner of Police*,⁴⁹ where a constitutional challenge was mounted under BOR Art 10 (on the right to a fair and public hearing) against a regulation prohibiting professional legal representation before a police disciplinary tribunal. The question was whether BOR Art 10 applies to such proceedings. That Article is identical to ICCPR Art 14 and relevantly confers the right on a person involved in "the determination of ... his rights and obligations in a suit at law". The ECHR equivalent (Article 6(1)) confers the right on a person facing "determination of his civil rights and obligations". The drafting history⁵⁰ suggests that no difference was intended between the two formulations and that the reference in the ECHR to "civil rights and obligations" was intended, on civil law assumptions, to confine application of the right to determinations of private law but not to cover persons involved in public law proceedings or in disputes between civil servants and the State as employer. This was not at all evident to the common lawyer. Having traced the ECtHR's progressive extension of ECHR Art 6(1) protection to cover proceedings involving public law questions generally and civil servants in particular, culminating in the Grand Chamber decision in *Vilho Eskelinen v Finland*,⁵¹ the HKCFA held that

⁴⁸ (1991) 13 EHRR 204 at [32] and [34].

⁴⁹ (2009) 12 HKCFAR 237.

⁵⁰ Traced in *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 at [58]-[65], drawing on *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430.

⁵¹ (2007) 45 EHRR 43; recently restated in *Baka v Hungary* (2015) 60 EHRR 12 at [77].

BOR Art 10 applies to proceedings before a police disciplinary tribunal, consistently with Strasbourg jurisprudence.

G. Where the ECtHR's jurisprudence has not been resorted to

It is of course always necessary for the Hong Kong courts to be sensitive to the different role played by the ECtHR as a European supra-national Court and to recognize the limits of the guidance which can appropriately be derived from its jurisprudence. Two illustrations of areas where such sensitivity is required may be given.

(a) Margin of appreciation

The first involves the sometimes controversial doctrine of margin of appreciation whereby the ECtHR recognizes that in relation to certain Convention rights or certain aspects of such rights, the institutions of Member States should be afforded a discretion in setting the limits of such rights, whether because they are considered better placed to determine such limits, because there is a lack of consensus among Member States as to the proper limits, or for some other reason.

Concerns about how a national/supra-national relationship should be managed obviously do not exist in a domestic forum. However, analogous considerations do arise. In a case concerning mandatory life imprisonment sentences for murder which had received legislative scrutiny on several occasions, the HKCFA acknowledged that “when deciding constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature”, noting that this

approach is comparable to the doctrine of margin of appreciation at the supra-national level.⁵²

However, the limits of the analogy were recognized by the HKCFA in the right to marry case involving a transsexual person.⁵³ In three decisions between 1986 and 1998,⁵⁴ the Strasbourg Court had, on the basis of the margin of appreciation, declined to interfere with the United Kingdom's refusal to recognize the rights of such persons, stressing the absence of a European consensus as to the recognition of the legal rights of transsexuals. Then in the Grand Chamber's decision in *Goodwin v United Kingdom*,⁵⁵ the ECtHR held that there had been violations⁵⁶ of Ms Goodwin's rights and that social, medical and scientific changes had been such that the issue could no longer be left within the margin of appreciation.

In Hong Kong, it was argued that by analogy with the earlier ECtHR decisions based on a lack of European consensus, the HKCFA should not hold the Registrar of Marriage's refusal to permit the appellant to marry in her acquired gender to be unconstitutional because there was no popular consensus as to the rights of such individuals. The HKCFA rejected that argument, holding that there was no analogy to be drawn between any lack of popular consensus and the original lack of agreement amongst Member States. Moreover, while the evolution of a consensus might be a basis for expanding the scope of a right,

⁵² *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 at [102]-[105].

⁵³ *W v Registrar of Marriages* (2013) 16 HKCFAR 112.

⁵⁴ *Rees v UK* (1986) 9 EHRR 56; *Cossey v UK* (1990) 13 EHRR 622; *Sheffield and Horsham v UK* (1998) 27 EHRR 163.

⁵⁵ (2002) 35 EHRR 18.

⁵⁶ Of ECHR Art 8 (respect for private and family life) and Art 12 (right to marry).

majoritarian rejection of a minority's claim to guaranteed rights was held to be inimical in principle to fundamental rights.

(b) Remedies

Another area where it must be recognized that the ECtHR functions on a different plane involves the nature of the remedy for contravention. Upon a finding of unconstitutionality, the HKCFA determines the specific domestic legal consequences – obviously not the ECtHR's role in relation to the law of the Member State involved. The HKCFA is able to apply a range of remedies including remedial interpretation of an infringing statute by the techniques of severance, reading in, reading down and striking out⁵⁷ and declaring a provision invalid as inconsistent with the Basic Law with or without suspending such declaration of unconstitutionality.⁵⁸ Helpful guidance in relation to the latter relief was found in Canadian case-law.⁵⁹ The HKCFA also evolved a novel remedy whereby a provision which is not itself an infringing provision may be struck down so that the operative provision in the legislative scheme becomes compliant with the BOR.⁶⁰

H. Conclusion

As is apparent from this paper, the influence of the Strasbourg Court's jurisprudence has been extensive and highly beneficial in the development of the Hong Kong courts' own jurisprudence in the area of human rights. The ECtHR's importance to the establishment of a culture of human rights in Europe

⁵⁷ *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [57].

⁵⁸ *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441.

⁵⁹ *Re Manitoba Language Rights* [1985] 1 SCR 721; *R v Swain* [1991] 1 SCR 933 and *Schachter v Canada* [1992] 2 SCR 679.

⁶⁰ *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at [110]-[120].

is well known. As I hope this paper shows, its contribution towards the spread of that culture in other parts of the world is also of great value.

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