HONG KONG'S BILL OF RIGHTS:

Two Years Before 1997

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PREFACE

Since 1992 the Faculty of Law of the University of Hong Kong has held an annual Seminar to review developments under the Bill of Rights Ordinance and the impact it has had on the legal system since its enactment in June 1991. The Seminar on 24 June 1995 is the latest in the series. This is also the first time the Seminar is co-organized by the newly established Centre for Comparative and Public Law. This Seminar has not only been a review of developments under the Bill of Rights, but also it has been a preview -- a projection into the likely areas of development in the final two years leading up to 1997. The Seminar looked at topics such as the compatibility of the Bill of Rights with the new constitution -- the Basic Law -- which will come into effect on 1 July 1997.

Since the Seminar, the Courts have handed down several important decisions. On 5 July 1995, the Court of Appeal allowed the Attorney General's appeal in *R v Ming Pao Newspaper Ltd* (1995) CA, Mag App No 514 of 1994 (discussed in the papers of Johannes Chan and Andrew Bruce). It involved a challenge to the constitutionality of s 30(1) of the Prevention of Bribery Ordinance, which prohibited the disclosure, without lawful authority or reasonable excuse, to any person of any detail of an investigation of a suspected or alleged offence under the Prevention of Bribery Ordinance. The Court held, in a somewhat perfunctory manner, that corruption was an insidious evil and the ICAC must be given wide powers to combat this evil. Accordingly, s 30(1) of the Prevention of Bribery Ordinance, which has long been criticized as a press-gagging provision, was held to be necessary for the protection of public order and for the respect of the rights and reputation of others and hence consistent with article 16 of the Bill of Rights. It is disappointing that

the Court did not even attempt to analyze the various constituents and the scope of the offence. The respondents have appealed to the Privy Council, which granted special leave to appeal in November 1995.

On 27 July 1995, the Privy Council handed down its judgment in *Chan Chi-hung v R* [1995] 2 HKC 721. The issue in this case is whether a defendant convicted of a criminal offence is entitled to the benefit of a lesser penalty under article 12(1) of the Bill of Rights when the offence for which he was convicted was amended and replaced by two different new offences with different maximum sentences. (This issue is discussed by Johannes Chan and Andrew Bruce.)

There are two different approaches: one based on a textual comparison between the old and the new offences, and the other focused on the conduct of the defendant. The Court of Appeal has been sharply divided on the proper approach. The Privy Council has settled the matter, favouring the approach that focused on the conduct of the defendant. Recognizing that the International Covenant on Civil and Political Rights springs from a consensus of many countries, including many non-common law countries which adopt a less linguistic and analytical approach to the interpretation of constitutional instruments, the Privy Council is alive to the fact that the common law linguistic analysis may not be appropriate to the interpretation of the ICCPR. Hence, apart from approaching the interpretation by the textual linguistic approach characteristic of the common law, it also adopted a broad and purposive approach by examining the purposes and the underlying policies of article 12, accepting that some degree of anomaly depending on the accidents of timing may have to be tolerated in giving effect to the principle of non-retrospectivity in article 12. It concluded that there would be no difference in result by adopting either approach in this particular case.

This is a well-written and well-reasoned judgment. The Privy Council has displayed the kind of intellectual analysis and sensitivity one would expect from a court of final appeal. Regrettably, it is exactly this kind of intellectual analysis that is lacking in many of our Court of Appeal's decisions.

On 31 July 1995, Waung J delivered his long-awaited judgment in *R v Town Planning Board, ex parte Kwan Kong Company Ltd* (1995) HCt, MP No 1675 of 1994. This is the latest contribution from the court on the scope of article 10 of the Bill of Rights (which is a controversial subject addressed by Philip Dykes in his paper). In the earlier decision of *R v Town Planning Board, ex parte Auburntown Ltd* (1994) 4 HKPLR 194, Rhind J held that the preparation and promulgation of town plans was a legislative process and hence article 10 was not engaged because the process did not involve a determination. However, had it not been a legislative process, Rhind J held that there would have been a violation of article 10, as the Town Planning Board, in hearing an objection to a draft town plan, was plainly not an independent and impartial tribunal. In *R v Town Planning Board, ex parte Kwan Kong Company Ltd*, upon a concession from the Town Planning Board, the court refused to follow Rhind J and held that the preparation and promulgation of town plans could not be a legislative process.

Nonetheless, Waung J dismissed the application on a more fundamental ground. He challenged the jurisprudence on the proper approach to the interpretation of the Bill of Rights. He refused to follow *R v Sin Yau-ming* (1991) 1 HKPLR 88 and *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 77, arguing that there was no constitutional document in Hong Kong protecting human rights. It was wrong to depart from the textual interpretation of the Bill of Rights, and the jurisprudence of international human rights bodies and domestic courts on their constitutions would only be of relevance in very exceptional circumstances. This is the first attempt to overthrow the well-recognized approach of broad and purposive interpretation of the Bill of Rights. It raised questions of far-reaching implications, and brings into sharp focus the differences between a restrained common law textual approach and the more proactive judicial approach in international human rights law. With respect, this decision will alienate Hong Kong from the family of international human rights law, and is a retrograde step in the protection of human rights in Hong Kong. Not surprisingly, the unsuccessful applicant has lodged

an appeal.

On 31 October 1995, Keith J delivered his judgment in *Re Association of Expatriate Civil Servants of Hong Kong* (1995) HCt, MP No 3037 of 1994 (referred to in the paper of Johannes Chan). He reaffirmed that any departure from fundamental rights protected by the Bill of Rights must be justified by the Government by cogent and persuasive evidence. On article 21(c) of the Bill of Rights, he held that the right of access to the civil service included access to the terms and conditions of service as well as the opportunities for promotion enjoyed by other civil servants. However, a restriction of the right of access to the civil service would not amount to an infringement of article 21(c) if the restrictions could be justified by the test of proportionality and minimal interference.

Another important decision is the judgment of the Court of Appeal in *Lee Miu-ling v Attorney General* (1995) CA, Civ App No 145 of 1995, 24 November 1995 (referred to in the paper of Gladys Li). The appellants argued that the functional constituency election system was discriminatory and a violation of article 25(b) of the ICCPR because: (a) the appellants were denied an additional vote in any functional constituency because of their status (or lack of status); and (b) there was a great disparity in the weight of a vote in different functional constituencies due to the enormous difference in size of each functional constituency. The Court of Appeal rejected the first argument on the ground that the functional constituency election system was protected by article VII(3) of the Letters Patent and hence not open to challenge by the ICCPR as applied to Hong Kong. It rejected the second argument on the ground that the appellants, not being entitled to vote in any functional constituency, did not have standing to challenge the disparity in the weight of a vote in different functional constituencies. Interestingly, the functional constituency election system was strongly criticized for being a violation of article 25 of the ICCPR by the Human Rights Committee at its recent hearing of the United Kingdom's Fourth Periodic Report on Hong Kong. At the time of writing it is unknown whether the appellants will take the case further to the Privy Council.

These developments seem to testify to the prediction of the contributors that criminal law and administrative law are likely to be the two principal areas for further development under the Bill of Rights. Development in these areas in the past year, as well as the important constitutional challenge to the functional constituency election system, are outlined and discussed in this Volume. This Volume contains edited and updated versions of the papers presented at the 1995 Seminar. It offers, we hope, a scholarly analysis of the most important developments in the past years, and a varied picture of further developments under the Bill.

Finally, we should not end this Preface without mentioning the recent controversies generated by the statement of the Legal Sub-group of the Preliminary Working Committee of the People's Republic of China and the statement of Sir T L Yang, the Chief Justice, on the Bill of Rights. The Legal Sub-group, in a statement dated 17 October 1995, proposed that sections 2(3), 3 and 4 of the Bill of Rights Ordinance not be adopted as the laws of the Hong Kong SAR as they were inconsistent with the Basic Law, and that the earlier versions of six pieces of legislation which have been amended or repealed in order to bring them in conformity with the Bill of Rights be reinstated. Sir T Liang, in a public statement made on 17 November 1995, expressed his scepticism on the Bill of Rights. His view, though strongly criticized by the legal profession and academics, is regrettably shared by some members of the judiciary. Both statements have generated heated debates on the future of the Bill of Rights. In late November 1995, the Hong Kong Government issued an official statement in reply to Sir Ti Liang's criticisms of the Bill of Rights.

On the day before the Chief Justice's written statement, on 16 November 1995, a statement on the Bill of Rights by Benjamin Liu JA, who is the Chairman of the Local Judges Association, had been published in *Ming Pao*. This statement was entitled "The Past, the Present and the Future of the Hong Kong Bill of Rights Ordinance". Finally, on 1 December 1995, the Hong Kong Bar Association released a paper on its views on the status and effect of the Bill of

Rights Ordinance.

It is not possible in this Volume to discuss in any detail these latest developments. We have, however, reproduced in English the controversial statements, and responses thereto, in Appendices A-E.

We would particularly like to thank Scott Wilkens, Alice Iu, Monnie Lee, Nancy Choi, Eliza Li, Veronica Yiu, Rita Wai, Estella Ng, Eddie Leung, Raymond Lam, Henley Chan, C K Lam, Jennifer Van Dale, Anna Hung and other colleagues and administrative staff members of the Faculty for their assistance. We gratefully acknowledge the financial support of the Hong Kong Research Grants Council for this Faculty's project on the Hong Kong Bill of Rights, of which this publication forms a part.

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December 1995

Note: Subsequent to the completion of this publication, all cases cited as unreported have appeared in the *Hong Kong Public Law Reports*.

THE HONG KONG BILL OF RIGHTS 1991-1995: A STATISTICAL OVERVIEW

JOHANNES M M CHAN[1]

What impact has the Bill of Rights had on our legal system since the Bill's coming into effect in June 1991? There are, of course, many different ways to answer this question. Now, five years down the road, we are in a position to attempt some statistical analysis. This analysis is the focus of this paper.

The statistics given in this paper are based on the number of cases reported in the *Bill of Rights Bulletin*.[2] The survey covers the period

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I am grateful to Miss Sharon Man for her assistance in preparing the statistics and the Tables in this paper, and to Mr Andrew Byrnes for his valuable comments to an earlier draft of this paper.

2 A Byrnes and J Chan (eds), *Bill of Rights Bulletin*, v 1, n 1 (Oct 91) to v 3, n 4 (Dec 95). The original version of this paper, which was presented in the Bill of Rights Seminar in June 1995, covered the period up to April 1995. The figures have since been corrected, adjusted and updated. For a summary of major cases decided after April 1995, see the Preface to this Volume.

between June 1991 and December 1995. While the *Bill of Rights Bulletin* probably provides the most comprehensive coverage of Bill of Rights cases which is available to the public, the coverage is by no means exhaustive, especially at the level of Magistrates Courts. The statistics below should be read subject to such limitation. On the whole, the relative figures are more informative than the absolute figures, and the overall pattern and the trend of development are more revealing than individual items.

GENERAL TREND

Table 1[3] provides an annual breakdown of the number of Bill of Rights cases since June 1991. In the period surveyed there were 247 cases which raised Bill of Rights arguments.[4] The legal profession has been quick in raising Bill of Rights challenges, as shown by the large number of Bill of Rights challenges in the first six months after the Bill of Rights came into effect (8 June 1991). The number of cases dropped slightly in 1992, remained at approximately 50 cases per year in 1993 and 1994, and dropped to 25 in 1995. Table 2 provides a breakdown of the Bill of Rights cases into different categories. As expected, 74% of the cases are criminal cases,

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[3] Tables 1-13 immediately follow the text of this essay. See, infra at 37-76.

[4] In this paper, I have treated an appeal case separately from the case at first instance. Thus, a case at the Magistrates Court and its appeal to the High Court are counted as two cases. This is necessary in order to get a clearer picture of the effect of the Bill of Rights at different levels of courts.

showing that the Bill of Rights has had its main impact in criminal law. Indeed, the successful challenge to the presumptions contained in the Dangerous Drugs Ordinance[5] in *R v Sin Yau-ming*[6] triggered a large number of similar challenges under article 11(1), thus explaining the domination of criminal cases, and particularly challenges to statutory presumptions at the early stage of the history of the Bill of Rights. (See Tables 7 and 7B) Although the number of Bill of Rights cases dropped in 1995, the nature of Bill of Rights challenges has been more wide-ranging, including a number of important challenges to the constitutional and administrative system in Hong Kong with far-reaching implications. There were also some civil challenges at the early stage, but their number (excluding administrative law cases) dropped soon after as a result of the Court of Appeal decision in *Tam Hing-yee v Wu Tai-wai*.[7] (See Table 2A) In *Tam Hing-yee*, the Court of Appeal held that the Bill of Rights did not apply to inter-citizen disputes. This decision has been subject to strong academic criticism.[8] Critics pointed out that the drafting

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5 Cap 134.

6 (1991) 1 HKPLR 88.

7 (1991) 1 HKPLR 261.

8 See, for example, A Byrnes and J Chan, *Bill of Rights Bulletin*, v 1, n 2 (Dec 1991), pp 1-4; J Chan and Y Ghai, "A Comparative Perspective on the Bill of Rights", in J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Singapore: Butterworths, 1993), at pp 23-26; A Byrnes, "The Hong Kong Bill of Rights and Relations between Private Individuals", in J Chan and Y Ghai (eds), *The Hong*

history of section 7 of the Bill of Rights Ordinance[9] suggests that section 7 could be interpreted in different ways, but the Court of Appeal decided to interpret it in a manner in which it, as admitted, did not fully implement the International Covenant on Civil and Political Rights.[10] *Tam Hing-yee* also severely restricts the scope of some articles of the Bill of Rights which are obviously directed at inter-citizen disputes, such as the right to a fair hearing in civil proceedings, the right to found a family, freedom of marriage and the rights of children.

INTER-CITIZEN DISPUTE

Tam Hing-yee has effectively halted the development of the Bill of Rights in the civil/private law context, as can be witnessed by the dramatic decrease in the number of civil cases after 1992 (See Table 2A). In 1992, a few women from the New Territories indigenous population who were denied their succession claim to their late

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Kong Bill of Rights: A Comparative Approach (Singapore: Butterworths, 1993), at pp 80-91; N Jayawickrama, "Interpreting the Hong Kong Bill of Rights", in W Angus and J Chan (eds), *Canada-Hong Kong: Human Rights and Privacy Law Issues* (Toronto: Joint Centre for Asia Pacific Studies, 1994), at pp 76-79.

9 Cap 383.

10 (1991) 1 HKPLR at 267, lns 14-23. See A Byrnes, "The Hong Kong Bill of Rights and Relations between Private Individuals", in J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Singapore: Butterworths, 1993), at pp 80-91.

father's estate under Chinese customary law applied for legal aid with a view to mounting a Bill of Rights challenge against the then section 13 of the New Territories Ordinance.[11] Their application was rejected, mainly on the ground that it involved an inter-citizen dispute and that there was no realistic chance of success below the Court of Appeal level.

In this respect, the decision in *L v C*[12] is of interest. In *L v C*, the applicant, "L", was a single mother who commenced proceedings seeking various forms of relief against the respondent, "C", whom L claimed to be the putative father of L's illegitimate child. L applied for custody, periodic payments for her son and other financial relief under the Guardianship of Minors Ordinance.[13] The respondent, C, argued that L's application for financial relief should be made under the Affiliation Proceedings Ordinance,[14] and that the application was already time-barred under section 4 of the Affiliation Proceedings Ordinance.[15] The time limit applied only to applications by

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11 Cap 91. The then section 13 provided that:

> "[I]n any proceedings in the High Court or the District Court in relation to land in the New Territories, the court shall have power to recognize and enforce any Chinese custom or customary right affecting such land."

12 (1994) 4 HKPLR 388, [1994] 2 HKLR 93.

13 Cap 13.

14 Cap 181.

15 Section 4 of the Ordinance provided that an application must be made within 12 months of the child's birth.

illegitimate children.

In reply, the applicant argued that section 4 of the Affiliation Proceedings Ordinance had been impliedly repealed by the Parent and Child Ordinance,[16] which intended to eliminate the distinction between legitimate and illegitimate children. The applicant, L, further argued that the time limit, which did not apply to applications by legitimate children, was inconsistent with articles 20 and 22 of the Bill of Rights, which, respectively, guarantee the rights of the child and the right to equal protection of the law. The court upheld the applicant's arguments, and found, albeit obiter, that the time-bar was discriminatory against an illegitimate child and inconsistent with the Bill of Rights.

L v C involved an inter-citizen dispute between the mother of an illegitimate child and the putative father over the right to maintenance of the illegitimate child. *Tam Hing-yee* was not referred to in the judgment, and arguably the case was decided *per incuriam* on this point. On the other hand, it is a nice illustration of the absurdity or the simplicity of *Tam Hing-yee*, which focused on the formal status of the parties and not the substantive nature of the claim. In *L v C*, had there not been a time limit which did not apply to similar applications for legitimate children, the applicant would have had no difficulty in applying for maintenance for her illegitimate child. Although the parties involved are two private individuals, the evil lay in the legislation which discriminates against children born out of wedlock. This is a classic case of state intervention, which would have attracted State responsibilities in international human rights law.

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16 Cap 429.

In this respect, *L v C* is consistent with the international jurisprudence of human rights, and arguably the better approach. There was no appeal from the judgment of the High Court. However, had *Tam Hing-yee* been raised in this case, it would have had the effect of depriving an illegitimate child's mother of a remedy against discriminatory legislation. This unfair situation will persist until the Court of Appeal or the Privy Council has an opportunity to reconsider *Tam Hing-yee*.

ADMINISTRATIVE LAW AND PUBLIC AUTHORITY

Another notable development since 1992 is the steady increase in the number of Bill of Rights cases in administrative law (see Table 2A). Litigants have challenged the decisions of many Government departments and statutory bodies, including the Immigration Department, the Inland Revenue Department, the Town Planning Board, the Building Authority, the Securities and Futures Commission, and the Obscene Articles Tribunal. In none of these cases did the parties dispute that the decisions challenged were made by the Government or a public authority. How far the Bill of Rights will apply beyond these obvious organizations is unclear. Up until now, there have been only two decisions on the meaning of "public authority". In *R v Hong Kong Polytechnic, ex parte Jenny Chua Yee-yen,*[17] the applicant sought judicial review of a decision of the Academic Appeals Committee of the Polytechnic requiring her to withdraw from her studies because of unsatisfactory performance. She

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17 (1992) 2 HKPLR 334.

argued that she had been denied a right to a fair hearing and a right to counsel of her choice because Rule 1.8 of the Students Appeals Rules permitted her to be represented by only one person, thereby denying her of the right to be represented by a barrister, who has to be accompanied by his instructing solicitor. Mayo J held without elaboration that the Hong Kong Polytechnic was a public authority for the purpose of the Bill of Rights.[18] It follows that all tertiary institutions in Hong Kong are public authorities and their operation is subject to the scrutiny of the Bill of Rights, although it is still unclear whether some aspects of the operation of the tertiary institutions might be private and hence fall outside the scope of the Bill of Rights.

One example of the difficulties is the administration of scholarships whose terms may discriminate regarding sex or race. For example, Regulation 5 of the Citizens' Scholarships offered by the Chinese Temples Committee (to the University of Hong Kong) provides that "candidates must be of Chinese origin (in case of candidates of mixed origin the father must be Chinese) and intend to reside permanently in Hong Kong". And, Regulation 3 of the Taiwan Ladies Association Bursaries provides that "the bursaries shall be awarded to three female undergraduates reading for a first degree in any Faculty."

On the one hand, it can be argued that the University, as a public institution, shall not administer any scholarship with discriminatory terms. Accepting or continuing to accept scholarships

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[18] (1992) 2 HKPLR 334 at 341, referring to: *Griffiths v Smith* [1941] AC 170; *The Johannesburg* [1907] P 65; and *R v Manners* [1976] 2 All ER 96.

on such terms when the University is in a position to refuse these terms of the scholarships may suggest that the University has taken sufficient steps to expose itself to the scrutiny of the Bill of Rights. On the other hand, it may be argued that the University is acting merely as a trustee administering privately the donated funds in accordance with the intention of the settlor. This is private law, rather than public law, and hence the University, in administering the scholarships, is not acting as a "public authority".[19] After all, it must be in the public interest to encourage scholarship donation, and if there is no restriction in private law on the terms a donor could draw up for his trust fund, why should there be restrictions simply because the trust fund is to be administered by a public body? It remains to be seen what attitude the court would take on this issue if it is called upon to do so. In some countries there are specific legislative exemptions for charitable or educational activities, and similar exemptions exist in the Sex Discrimination Ordinance,[20] and the Disability Discrimination Ordinance.[21] Nonetheless, the Bill of Rights has already made a positive impact by prompting some tertiary institutions to review the terms of their scholarships.

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19 This argument finds support in *Re Canada Trust Co and Ontario Human Rights Commission* (1987) 42 DLR (4th) 263: the court held that the scholarships concerned arose out of a trust and was not "service" or "facilities", which would attract the scrutiny of the Ontario Code of Human Rights.

20 Ordinance No 50 of 1995, ss 48, 50.

21 Ordinance No 86 of 1995, ss 50, 51.

DISCIPLINARY PROCEEDINGS

The scope of the application of the Bill of Rights has also been a subject of conjecture in the context of professional discipline. In *Hong Kong Bar Association v Anthony Chua*,[22] the respondent was charged with two disciplinary offences, namely, advertising contrary to paragraph 101 of the Code of Conduct of the Bar Association of Hong Kong, and failure to discharge the duties of a barrister in accordance with paragraph 10(a) of the same Code. The respondent argued that paragraph 101, which imposes restrictions on professional advertising, was inconsistent with the guarantee of freedom of expression under article 16 of the Bill of Rights. The Disciplinary Tribunal held that "public authority" in section 7 of the Bill of Rights Ordinance included only those bodies entrusted with the discharge of governmental or quasi-governmental functions affecting the public at large. The Bar Association was a self-governing professional association made up of private individuals who mutually agreed to abide by the Code of Conduct as governing their professional conduct and etiquette in the form existing from time to time. Thus, notwithstanding the element of public interest in the promulgation of the Bar's Code of Conduct, the Bar Association was a private club and the disciplinary proceedings were nothing more than an inter-citizen dispute. Hence, it held that the Bill of Rights had no application to the promulgation of the Code of Conduct by the Bar Association.

Is the Bar Association a private club when it enacts its Code of Conduct? The arguments of the Disciplinary Tribunal can apply to

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22 (1994) Barristers Disciplinary Tribunal, 15 September 1994.

almost every professional body. The arguments would have more force if the Code concerned only membership fees or election of office bearers. But when the Code concerns professional conduct and ethics; when the Code sets the standards by which the conduct of practising barristers is to be governed; when membership is compulsory for anyone who wishes to practise as a barrister; and when violation of the Code may lead to disciplinary action which may result in disqualification or suspension of practice; the argument that it was a private club seems artificial. The Disciplinary Tribunal distinguished between promulgating and enforcing the Code of Conduct, a distinction which is hardly convincing. There are powerful arguments that the Bar Association, either in promulgating its Code of Conduct or in enforcing it, is a "public authority" within the meaning of section 7 of the Bill of Rights Ordinance. Among other things, the costs of disciplinary proceedings may be recovered from general revenue; the decisions of disciplinary proceedings are subject to judicial review; compliance with the Code is conducive to the maintenance of public confidence in the integrity of the profession and the administration of justice; disciplinary proceedings may result in the deprivation of livelihood of a barrister; and, the Bar has been entrusted by statute to regulate a statutory monopoly.

NATURE AND OUTCOME OF THE BILL OF RIGHTS CHALLENGES

Table 4 shows the outcome of the Bill of Rights challenges. A challenge is regarded as successful if the court accepts that there is a violation of the Bill of Rights or that a legislative provision is

inconsistent with the Bill of Rights, irrespective of the final outcome of the case. If there is more than one Bill of Rights challenge in a single case and the court found a violation of the Bill of Rights in respect of some legislative provisions but upheld other provisions challenged, the case is regarded as successful for the purpose of these statistics. It can be seen that the number of unsuccessful challenges is almost twice the number of successful challenges. Of the 202 cases (those with known results) studied, only 73 cases have been successful, representing an overall success rate of about 36% only. The actual overall success rate may be even lower if one considers that out of the 73 successful cases, 29 of them involved one article, namely, article 11(1) of the Bill of Rights on the presumption of innocence. (See Table 8B)

A breakdown according to the level of courts reveals a similar pattern of low success rate (Table 5). The success rate at the High Court (38%) and at the Magistrates Courts (33%) is more or less the same as the overall average success rate, whereas there is a slightly higher success rate at the District Court (46%). The low success rate at the Magistrates Courts (33%) should be seen in the context that the Bill of Rights was sometimes raised almost as a kind of incantation without any obvious merits at all. If one excludes these cases where the Bill of Rights point is clearly untenable, the success rate at the Magistrates Courts is probably higher than the present figure suggests.

The same argument does not hold for the Court of Appeal, as most of the frivolous arguments should have been filtered. Nonetheless, the success rate at the Court of Appeal is the lowest of

all courts (29%), and is significantly lower than the overall average success rate. This finding suggests that lower court judges tend to be more liberal in applying the Bill of Rights than the Court of Appeal judges. It also confirms the general impression that, on the whole, the judiciary, and particularly the Court of Appeal, has adopted a conservative, and sometimes even a contemptuous approach to Bill of Rights arguments, notwithstanding the rhetorical adherence to a broad and purposive approach.

The high unsuccessful rate in Bill of Rights cases is partly due to the adoption by our courts of a very low standard of scrutiny in considering the constitutionality of statutory provisions.[23] In many cases, vague and sweeping grounds of justifications are accepted without the support of cogent and persuasive evidence or even without detailed reasoning.[24] While the Court of Appeal was more ready to strike down impugned legislation in the early days of the Bill of Rights, the dominant approach in recent Court of Appeal cases reveals a lack of detailed and intellectual analysis of legal arguments despite

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[23] See, for example, *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 261; *Attorney General v Hui Kin-hong Harry* (1995) 5 HKPLR 100; *R v Iu Tze-ning* (1995) 5 HKPLR 94; *R v Ming Pao Newspaper Ltd* (1995) 5 HKPLR 13.

[24] See, for example, *Attorney General v Hui Kin-hong Harry* (1995) 5 HKPLR 100; *R v Ming Pao Newspaper Ltd* (1995) 5 HKPLR 13; *Lee Miu-ling v Attorney General* (1995) CA, Civ App No 145 of 1995, 24 Nov 1995; *Building Authority v Business Rights* (1994) 4 HKPLR 43. Compare the decision of the Privy Council in *R v Chan Chi-hung* (1995) 5 HKPLR 1, [1995] 2 HKC 721. The change in attitude may also partly be explained by the change in composition of the Court of Appeal.

the fact that such analysis is characteristic of the judgments of the Supreme Courts of many other jurisdictions. On the whole, most decisions of the Court of Appeal are intellectually disappointing. This may partly be explained by the reservations held by a number of appellate judges on the Bill of Rights,[25] and partly by the predominant, and sometimes undue, emphasis on having cases decided expeditiously rather than exploring and developing the law and jurisprudence for the benefit of posterity.

Table 6 looks at the cases from another perspective, namely whether the cases involve a challenge to a particular legislative provision. A major change brought by the introduction of the Bill of Rights regime is its restrictions on the common law notion of supremacy of Parliament. As Silke VP eloquently stated:[26]

> "I accept, and it is not a matter of controversy, that we should view the Hong Kong Bill as being sui generis. Sections 3 and 4 which I have set out above make it clear that all existing and all new legislation is required to be consistent with the Covenant. Therefore the Covenant becomes supreme. Not the legislature."

Thus, after the introduction of the Bill of Rights, the scope for challenging the constitutionality of legislation, which is extremely

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[25] For example, Yang CJ, Litton JA and Liu JA have expressed reservations on the Bill of Rights on various occasions. See Appendix B and D to this volume.

[26] *R v Sin Yau-ming* (1991) 1 HKPLR 88 at 106. This statement was challenged by Waung J in *R v Town Planning Board, ex parte Kwan Kong Company Ltd* (1995) 5 HKPLR 261, [1995] 3 HKC 254 See also the Preface to this Volume.

limited under the common law,[27] has been significantly broadened. Hence, it is not surprising that 75% of the Bill of Rights cases involve a challenge to the constitutionality of legislative provisions. The remaining 25% of the cases involve non-legislative challenges, such as a challenge to admissibility of evidence or a complaint of a denial of a fair trial, particularly the right to speedy trial.

RETROSPECTIVE REPEAL AND THE UNCERTAIN STATUS OF IMPUGNED LEGISLATION

Under section 3 of the Bill of Rights Ordinance, any legislation which is inconsistent with the Bill of Rights will stand repealed as of 8 June 1991. As soon as the Bill of Rights was enacted, it was pointed out that such retrospective repeal could be a disaster.[28] It meant that convictions could be set aside many years later when the offence for which a defendant was convicted is found to be inconsistent with the Bill of Rights. This worry is confirmed in *R v Kwok Hing-man*.[29] In *Kwok Hing-man*, 386 criminal convictions for the offence of unlawful

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27 Unlike the position in England where it is not possible to challenge the constitutionality of an Act of Parliament, it was possible in Hong Kong to challenge the constitutionality of a statutory provision even before the introduction of the Bill of Rights, on the ground that the statutory provision concerned was ultra vires the Letters Patent or, until 1986, was inconsistent with an Act of Parliament applicable to Hong Kong.

28 See, for example, A Byrnes and J Chan (eds), *Bill of Rights Bulletin*, v 2, n 3 (September 93), pp 1-2.

29 (1994) 4 HKPLR 186.

possession[30] entered between 8 June 1991 and the date of the judgment of the Privy Council in *Attorney General v Lee Kwong-kut*[31] had to be expunged on the ground that the offence for which they were convicted was a nullity. The Court of Appeal took the exceptional step of consulting every judge of the Court and decided, as a matter of policy, that it would grant leave to appeal out of time where a person is convicted of an offence which has since the conviction been declared to be inconsistent with the Bill of Rights and repealed with effect from 8 June 1991.

In *R v Chong Ah-choi*[32] the Court of Appeal reversed the decision of Judge Lugar-Mawson and held that the offence of possession of an offensive weapon without satisfactory explanation under section 17 of the Summary Offences Ordinance was inconsistent with article 11(1) of the Bill of Rights. This is a common offence in the Magistrates Courts, and the decision of the Court of Appeal will re-open all criminal convictions for this offence between 8 June 1991 and 4 October 1994. The implications of retrospective repeal may be even more far-reaching in the administrative law context. What would be the position of convictions for disciplinary offences if the disciplinary tribunal is constituted in such a way that it is inconsistent with the Bill of Rights? Would administrative decisions made pursuant to a legislative provision still stand after the provision concerned has

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30 Contrary to s 30 of the Summary Offences Ordinance (Cap 228).

31 (1993) 3 HKPLR 72.

32 (1994) 4 HKPLR 375.

been repealed by the Bill of Rights? As time passes, the problem of retrospective repeal will become more acute. This is a pressing problem, and it is imperative that the Government immediately address this issue and consider seriously options such as prospective repeal.

Tables 9 and 10 set out the provisions which have been found by various courts to be inconsistent with the Bill of Rights (according to the level of courts and to alphabetical order of legislation impugned). 49 statutory provisions have been found inconsistent with various articles of the Bill of Rights (Table 10), whereas 77 statutory provisions have been upheld.[33] (See Table 12) Two related problems emerge. The first problem is the uncertain status of a legislative provision which has been found to be inconsistent with the Bill of Rights and declared repealed by an inferior court whose decision is not binding on other courts. There are cases where different courts have come to different conclusions on the constitutionality of a particular provision,[34] and the confusion

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[33] Different subsections of the same section are treated as different provisions for the purpose of calculation. Thus, s 35(1) and s 35(2) are counted as two different provisions, whereas s 35A and s 35A(1) are counted as one provision.

[34] See, for example, *R v Lau Sai-miu* (1992) Mag, ST No 78 of 1992, 19 March 1992, and *R v Choi Kai-on* (1992) Mag, NK 216756 of 1991, 10 Mar 1992, on s 19 of the Gambling Ordinance (Cap 148). See also *R v Ko Chi-yuen* (1992) 2 HKPLR 310 and *R v Wong Ma-tai (No 1)* (1992) 2 HKPLR 490 on the applicability of article 11(1) of the Bill of Rights to post-conviction proceedings; the position has since been clarified by the Court of Appeal: *R v Ko Chi-yuen* (1994) 4 HKPLR 152.

persisted until the matter was clarified by the Court of Appeal. Nonetheless, this is by no means a situation unique to the Bill of Rights. Lower court judges often differ in their interpretation and application of a statutory provision, and the redress is a quick reference to the appellate court for an authoritative decision. What is peculiar with the Bill of Rights is merely that the general character of its provisions may give more room for disagreement. It is submitted that a speedy mechanism or a special appellate procedure should be seriously considered so as to shorten as much as possible the period of legal uncertainty.

The second, related, problem is that many provisions which have been found to be inconsistent with the Bill of Rights by the lower courts have not been considered by the higher courts. In the meantime, the legislative provision remains on the statute book and it becomes difficult to ascertain the exact status of the legislative provision concerned. In *R v Ming Pao Newspaper Ltd*,[35] the defendants were charged with an offence of disclosure of details of an ICAC investigation without lawful authority or reasonable excuse, contrary to section 30 of the Prevention of Bribery Ordinance. Mr

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See also the conflicting Court of Appeal decision on article 12 of the Bill of Rights, the position of which has now been clarified by the Privy Council: *R v Chan Chi-hung* [1995] 2 HKC 721.

35 (1995) Mag, Case No ESS10075-10078 of 1994, 16 February 1995. The ruling of the Magistrate was reversed by the Court of Appeal on 5 July 1995: (1995) 5 HKPLR 13 (CA). On 7 Nov 1995, the Privy Council granted the defendants special leave to appeal.

Sinclair held that section 30 was inconsistent with the guarantee of freedom of expression under article 16 of the Bill of Rights and was hence repealed. As soon as the judgment was delivered, the press was at a loss as to the extent to which they could publish either the fact of the existence of or details of ICAC investigations. The Government stated that it would continue to prosecute any member of the press who violated section 30 of the Ordinance, notwithstanding its repeal. Not surprisingly, the Government's stance has been criticized for being a contempt of court.

The problem is aggravated by the difficulty of discovering decisions at the lower courts, some of which are quite well-reasoned.[36] The unsatisfactory position was criticized by Nazareth JA in *R v Anastasius Chiu*:[37]

> "We feel bound to say that this stance of the authorities is less than satisfactory. However well-reasoned and convincing the judgment of a subordinate court, there must remain the risk of it being reversed by a superior court. The implications and consequences of such a reversal can hardly be acceptable. Of course, it may be possible to discount such a risk, and it seems that it is not *Lau Shiu-wah* [(1991) 1 HKPLR 202] that is relied upon but rather the view taken by the Attorney General and his staff. *That hardly provides a better basis upon which to rest the repeal of a statutory provision and provide for its publication and proof. Until Mr Saw's statement in court, neither the court nor the appellant's legal advisers were in a position to know that*

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[36] The *Hong Kong Public Law Reports* is the only set of law reports in Hong Kong which covers significant decisions at Magistrates Courts.

[37] (1994) 4 HKPLR 457.

> *the presumption was to be regarded in practical terms as having been repealed. It must surely be within the competence of the authorities to accord the repeal of statutory provisions effected by the operation of the Bill of Rights, certainty, publicity and facility for proof of the sort required in respect of repeal effected directly by legislation.* We observe in that regard that there are in just the 1991 Volume of the *Hong Kong Public Law Reports* numerous decisions of judges of the District Court and of magistrates on Bill of Rights challenges to particular statutory provisions. Doubtless there are also provisions which the Attorney General is satisfied do not permit of a construction consistent with the Bill of Rights Ordinance and are therefore repealed by s 3(2)." (emphasis added)

The Rule of Law requires the existence of some means whereby members of the public and their legal advisers would be able to ascertain whether a particular provision in the statute book still exists. It is essential that steps be taken either to formally "repeal" the provision by deleting it from the statute book, or to make some annotations to the provision that it has been found to be inconsistent with the Bill of Rights and hence its existence is at least open to doubt. Tables 9-12 provide a starting point by setting out those provisions which have been considered by the courts and respectively found to be consistent and inconsistent with the Bill of Rights.

THE MOST POPULAR BILL OF RIGHTS ARTICLES

Finally, Table 7 breaks down Bill of Rights cases according to articles invoked. It can be seen that articles 10 and 11 have attracted the largest number of cases: 17% of all challenges involved article 10, and 48% involved article 11. Article 10 provides a right to a fair hearing; article 11 sets out in more detail the specific guarantees for

a fair hearing in criminal process. A more detailed breakdown shows that article 11(1), which guarantees the presumption of innocence, is the most frequently invoked article (Table 7B), and more than half of the challenges under article 11(1) have been successful (Table 8B).[38] This reflects, to some extent, the widespread, and sometimes indiscriminate, use of presumptive provisions in the laws of Hong Kong.

There are also a significant number of challenges under article 5(1), which have not been as successful (Tables 8 and 8A). Most of the challenges deal with the question whether strict liability offences are consistent with the guarantee of personal liberty and security. The main controversy is whether article 5 permits a review of the substantive content of the elements making up an offence, or whether it is a mere procedural guarantee.[39] The position is partly clarified by the Court of Appeal in *Attorney General v Fong Chin-yue*[40] which held that where a court reaches the conclusion, after applying the

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38 The figure of total number of cases under individual articles in Table 8 is smaller than that in Table 7 because in some cases the court found it unnecessary to decide on the articles raised.

39 See *R v Hui Lan-chak* (1992) 2 HKPLR 423 and *R v Hui Kwok-fai* (1993) 3 HKPLR 752 on the one hand (procedural guarantee only, no substantive review), and *R v Wong Lai-shing* (1993) 3 HKPLR 766, *R v Hung Wai-shing* (1993) Mag, FL No 4217 of 1992, 8 Feb 1993 and *R v China State Construction Engineering Corporation* (1994) Mag, ESS No 3879 of 1994, 10 November 1994, Mr Acton-Bond, on the other (substantive review permitted).

40 (1994) 4 HKPLR 430.

criteria laid down in *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong*,[41] that an offence imposes strict liability, then such a provision will not be inconsistent with the Bill of Rights. At the same time, the court read in a defence of honest and reasonable belief. While the decision clarifies the position that strict liability offences are not per se inconsistent with the Bill of Rights, it leaves open a number of important questions, such as whether all strict liability offences should be construed so as to incorporate a defence of honest and reasonable belief, and what the position would be if such a defence is not permitted by the clear language of the statute.[42] *Attorney General v Fong Chin-yue* was not referred to at all by the Court of Appeal in *R v Law Chi Wai*,[43] when the Court of Appeal held that the Bill of Rights did not invalidate any legislation providing for an absolute offence.

Another interesting observation is that there has been an almost equal number of successful and unsuccessful challenges under article 12, which guarantees the right to the benefit of the lesser penalty (Table 8). Most of them are Court of Appeal decisions dealing with

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41 [1985] AC 1. The criteria include a general presumption of mens rea which must be clearly displaced; whether the offence is truly criminal in character; whether it deals with an issue of social concern; and whether the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

42 For a more detailed criticism, see A Byrnes and J Chan (eds), *Bill of Rights Bulletin*, v 3, n 2 (Oct 94), pp 30-32.

43 [1995] 3 HKC 446 at 448.

the offence of unlawful possession of forged banknotes or credit cards. The factual background of these challenges is quite similar. When the offence was committed, it carried a maximum penalty of, for example, 14 years' imprisonment. Before conviction or sentence, the law was amended by breaking down the offence into two different offences. These two offences were: (a) simple possession -- which carries a lighter sentence; and (b) possession with intent to defraud -- which usually carries a higher maximum sentence of, for example, 14 years' imprisonment.

The question is whether the defendant is entitled to be sentenced at the lower maximum. The Court of Appeal has been sharply divided on this issue. Some judges took the view that since the law before amendment did not distinguish between simple possession and possession with intent, the latter offence being created by the amendment, the proper offence for comparison after amendment is the offence of simple possession. Therefore the defendant should be sentenced on the lower maximum.[44] Some judges disagreed, partly because the lower maximum, usually 3 years' imprisonment, was clearly inadequate to reflect the gravity of the offence. They took the view that if the facts of the case revealed an intent to defraud, then the proper offence for comparison should be the new offence of possession with intent to defraud and hence the defendant would not

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[44] See *R v Tai Yiu-wah* (1994) 4 HKPLR 56; *R v Sze Yung-sang* (1993) 3 HKPLR 211; and *R v Faisal* (1993) 3 HKPLR 220. Appellate judges who took this view include Silke VP, Macdougall VP, Penlington JA, Mortimer JA and Power JA.

be entitled to the benefit of the lesser sentence.[45] As a result, the law has become very messy and the outcome of any challenge on this ground depends on the composition of the particular division of the Court of Appeal. The position has now been clarified by the Privy Council. In *R v Chan Chi-hung*,[46] the Privy Council held that the proper approach is to consider which of the new offences the defendant would have been charged with, according to his conduct, had he committed the offence after the amendment, rather than to compare legalistically and textually the old and the new offences.

A final observation is that there are a couple of important cases raising the issue of non-discrimination. The question of preferential treatment was first raised in *R v Man Wai-keung (No 2)*.[47] In this case, the defendant was convicted of a criminal offence. His appeal was successful, but the Court of Appeal ordered a retrial. Under section 83XX(3)(a) of the Criminal Procedure Ordinance,[48] a successful appellant who was ordered a retrial had no right to apply for legal costs. No such restriction applied to a successful appellant who was not ordered a retrial. The defendant argued that the restriction was inconsistent with articles 10, 11(1), 11(4) and 22 of the Bill of Rights, either taken alone or in conjunction with article 1

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45 See *R v Chan Chuen-kam and others* (1993) 3 HKPLR 215; *R v Wan Siu-kei* (1993) 3 HKPLR 228; *R v Chan Chi-hung* (1993) 3 HKPLR 243. Judges who took this view include Litton JA, Kempster VP, and Bokhary JA.

46 (1995) 5 HKPLR 1, [1995] 2 HKC 721.

47 (1992) 2 HKPLR 164, [1992] 2 HKCLR 207.

48 Cap 237.

of the Bill of Rights. Eventually the Court of Appeal decided in his favour on the basis of equality before the court under article 10, rather than on the general provision of equality before the law under article 22 of the Bill of Rights. The principle was pithily expressed by Bokhary J (as he then was):

> "Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need."[49]

The same principle was followed in *R v Crawley*[50] in the context of article 22 of the Bill of Rights. In this case the defendant unsuccessfully argued that section 14 of the Fixed Penalty (Traffic Contraventions) Ordinance, which made the registered owner of a private vehicle liable for certain traffic offences, was discriminatory when the same law did not apply when the motor vehicle concerned was owned by the Crown. The court found that the difference in treatment between vehicles owned by the Crown and other vehicles was rational and proportionate to the needs which justified it. The

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[49] (1992) HKPLR at 179, [1992] HKCLR at 217.

[50] (1994) 4 HKPLR 62 at 70-71.

principle of equality and non-discrimination was also raised in *L v C*[51] and in *Lee Mui-ling v Attorney General (No 2)*.[52] *Lee Mui-ling* involved an unsuccessful challenge to the system of functional constituencies provided for under the Legislative Council (Electoral Provisions) Ordinance. The efficacy of the functional constituencies system, which excluded about 1 million people from the right to vote in the functional constituencies and which allowed for a large variation in the number of voters between the various functional constituencies, was upheld, firstly by the High Court and then by the Court of Appeal, on the basis that the functional constituencies election system has been expressly provided for by article VII(3) of the Letters Patent and therefore not open to challenge by article VII(5) of the Letters Patent.

Articles 1, 21 and 22 of the Bill of Rights came up in another recent case, *Re Association of Expatriate Civil Servants of Hong Kong*,[53] which involves a challenge by a number of expatriate civil servants to various decisions taken in pursuance of the Government's localisation policy in the Civil Service. The same principle that any difference in treatment must pursue a legitimate objective and satisfy

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51 (1994) 4 HKPLR 388, [1994] 2 HKLR 93. For a discussion of *L v C*, see pp 9-11 supra.

52 (1995) 5 HKPLR 181 (HCt). See also Gladys Li, "The Right to Vote and to be Elected: Through the Looking-Glass", infra at pp 109-123. The applicants' appeal was rejected by the Court of Appeal on 24 Nov 1995: (1995) CA, Civ App No 145 of 1995. See also the Preface to this Volume.

53 (1995) HCt, MP No 3037 of 1994, 31 Oct 1995.

the requirement of proportionality and minimal impairment of fundamental rights was upheld.

THE FUTURE

The Bill of Rights is entering its fifth year. Over the years it has exerted its greatest influences in the areas of criminal procedure and fair trial. In the years to come, while criminal cases will still dominate Bill of Rights litigation, there is likely to be an increasing number of important cases in administrative law, particularly on article 10 of the Bill of Rights, and in the area of equality and non-discrimination. The year 1995 has witnessed the emergence of a number of Bill of Rights challenges which carried far-reaching implications in terms of law and policies, such as the challenges to the constitutionality of the functional constituency election system and to the policy of localization within the civil service. It is likely that in the coming years the court will face more challenges where the demarcation between law and policy is not entirely clear, as this is an inevitable trend once broad constitutional provisions are introduced.

On the other hand, the potential and full implications of the Bill of Rights do not seem to have been fully explored yet. There are still many articles of the Bill of Rights which have generated scarcely any useful case law (see Table 7). Professor Yash Ghai argued in his paper that there are great similarities and overlap between the provisions of the Bill of Rights and the Basic Law, and that the Bill

of Rights forms part of the Basic Law.[54] Irrespective of whether the Bill of Rights can survive the change of sovereignty, one of its most important contributions (or potential contributions) is the body of case law it has and will have generated before 1997. Given the similar nature and, in some cases similar language between the provisions of the Bill of Rights and the Basic Law (such as the right to be presumed innocent and the right to speedy trial),[55] the body of jurisprudence developed under the Bill of Rights may provide useful guidelines and precedents in the interpretation of the Basic Law after 1997. At the very least, the Bill of Rights jurisprudence may highlight the nature or scale of problems we may have to face after the Basic Law has come into effect. For instance, without the case law under article 11(1) of the Bill of Rights, it would have been difficult to predict the impact article 87 of the Basic Law would have had on the various types of presumptive provisions in the Hong Kong law. If our courts today are going to strike down a reverse onus provision for being inconsistent with article 11(1) of the Bill of Rights, our court is likely to strike down the same provision under article 87 of the Basic Law after 1997. The Bill of Rights gives us an extra few years to prepare for the impact the Basic Law is going to have on our legal system. In this sense, the Bill of Rights has contributed positively to the smooth

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[54] Y Ghai, "The Compatibility of the Bill of Rights Ordinance with the Basic Law", infra at pp 125-147.

[55] Article 87 of the Basic Law provides that:

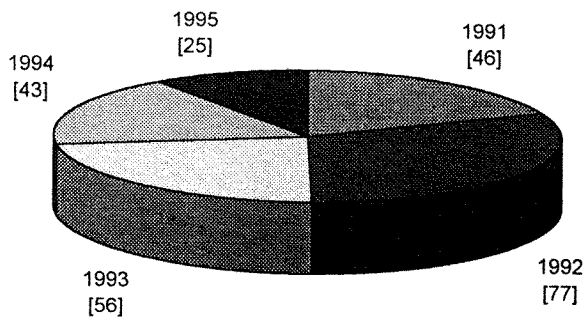
> "anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs."

transition of our legal system. It also means that judges and lawyers have a special role to play in defending the Bill of Rights and in laying down general principles under the Bill of Rights. They are defending not only fundamental rights and liberties under the present regime, but also they are laying grounds for their protection in the coming years. Unfortunately, this mission has at best been half-fulfilled, in light of the conservative outlook and half-hearted commitment of the judiciary to the Bill of Rights as well as their unpreparedness for the inevitable challenges the Basic Law would bring to our legal system in less than 18 months. No doubt, the Bill of Rights, and eventually the Basic Law, will require a reassessment of the traditional relationship or demarcation between the judiciary and the executive.

Index to Chan Appendix

Table 1

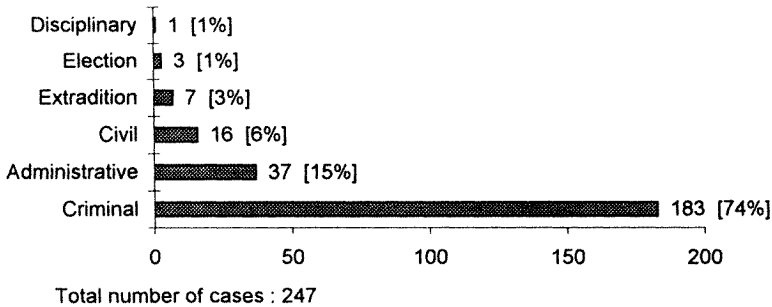
Number of Cases Raising Bill of Rights Issues (June 1991 to Dec 1995)



Total number of cases : 247

Table 2

Cumulative Number of Bill of Rights in Each Category



Total number of cases : 247

Table 2A

Annual Breakdown of Bill of Rights Cases by Category (from June 1991 to Dec 1995)

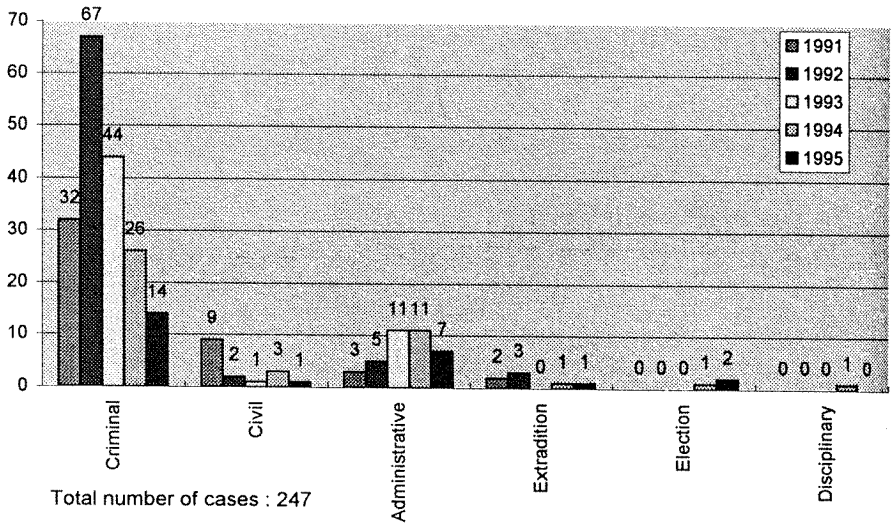
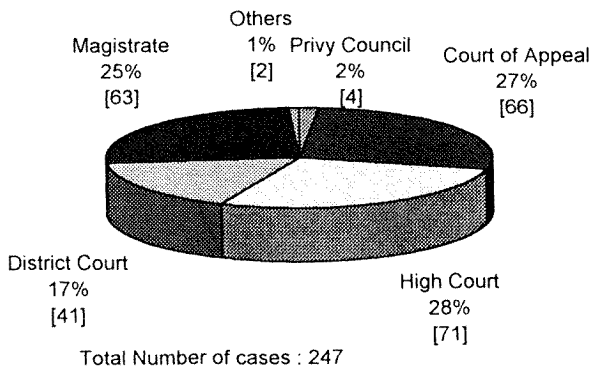


Table 3

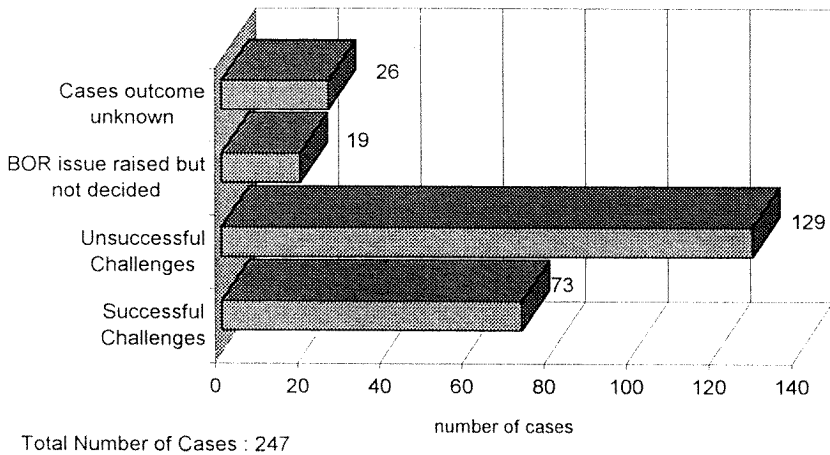
Number of Bill of Rights Cases As Decided by Different Levels of Courts



Total Number of cases : 247

Table 4

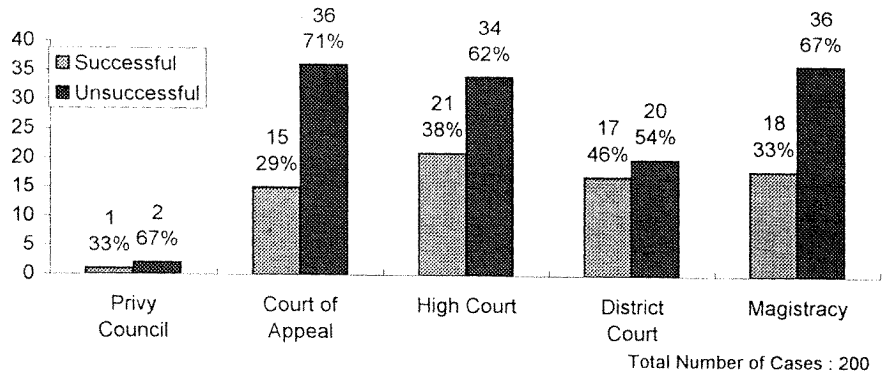
The Overall Outcome of Bill of Rights Challenges



Total Number of Cases : 247

Table 5

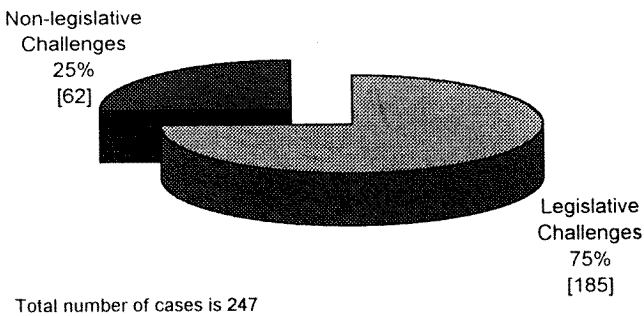
Outcome of Bill of Rights Challenges in Different Courts



Note . The total number of cases is smaller than the total number of successful and unsuccessful cases in Table 4 because there are two cases not decided by the court (one by the Barristers' Disciplinary Tribunal and one by a Licensing Court.).

Table 6

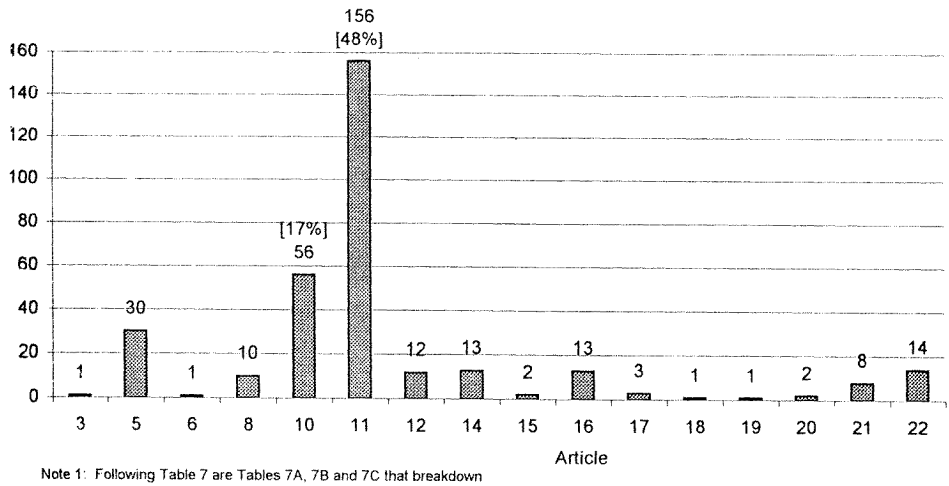
Nature of Bill of Rights Challenges



Total number of cases is 247

Table 7

Breakdown of Bill of Rights Challenges According to the Article Raised



Note 1: Following Table 7 are Tables 7A, 7B and 7C that breakdown cases under Articles 5 & 11 and Sections 3,6,7,11,13,14

Total Challenges : 323

Note 2: The number of challenges is larger than the number of cases, as more than 1 article may be invoked in any one case.

Table 7A

Breakdown of Challenges under Article 5 of the Bill of Rights

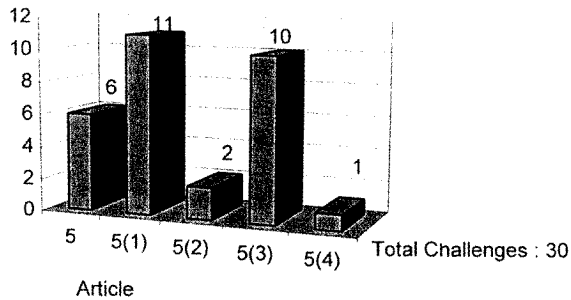


Table 7B

Breakdown of Challenges under Article 11 of the Bill of Rights

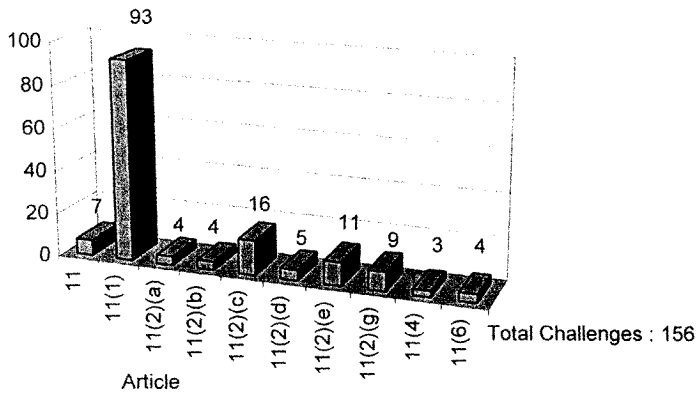


Table 7C

Breakdown of Challenges
under Different Sections of the Bill of Rights Ordinance

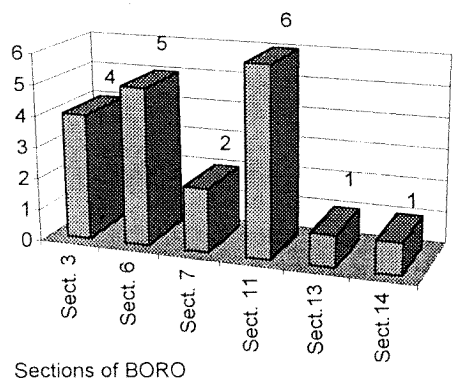
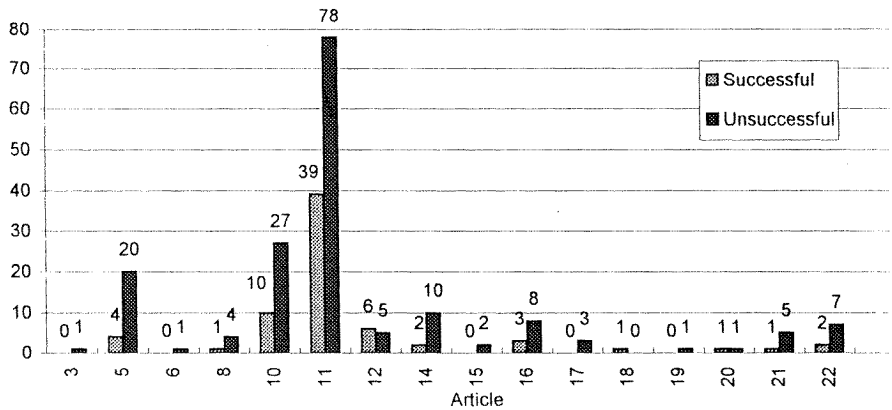


Table 8

Outcome of Bill of Rights Challenges Under Each Article of the Bill of Rights



Note: The figures here are lower than the corresponding figures in Table 7 because in some cases the court has not decided on the Bill of Rights challenges.

Table 8A

Outcome of Bill of Rights Challenges Under Article 5

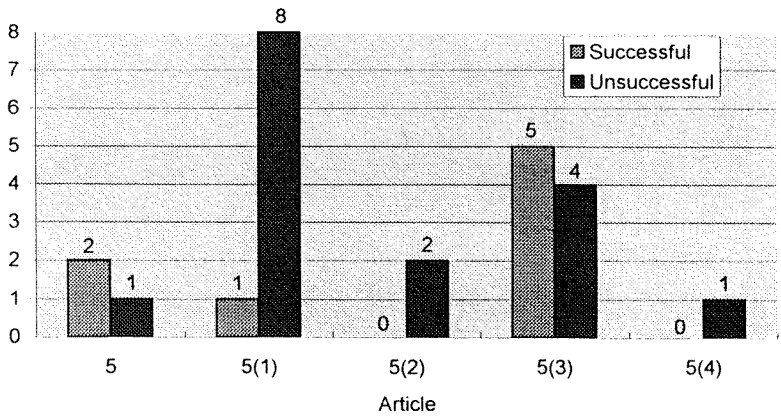


Table 8B

Outcome of Bill of Rights Challenges Under Article 11

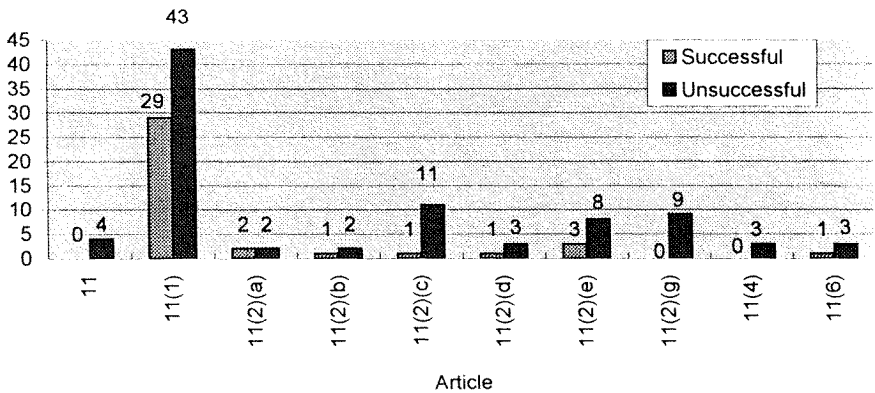
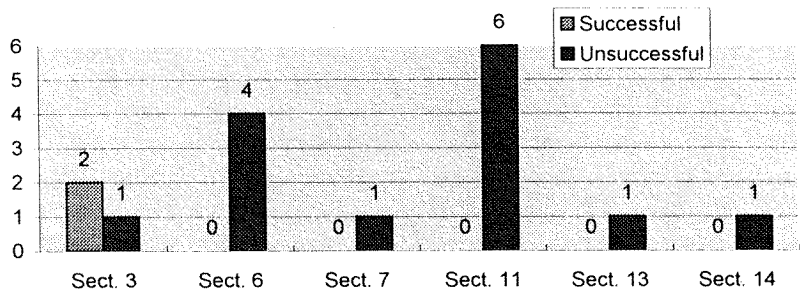


Table 8C

Outcome of the Bill of Rights Challenges Under Different Sections of the Bill of Rights Ordinance



Sections of the BORO

Table 9

The following provisions have been considered and found by the Court to be *inconsistent* with the Bill of Rights and have therefore been repealed:
(according to the level of courts)
(**Case** - please refer to the corresponding number in Case Reference [Table 13])

Court	Provisions repealed	Cap	Case	Article(s)
PC	s30 Summary Offences Ord	228	8	11(1)
CA	s76 Crimes Ord	200	162	12(1)
CA	s76(1) Crimes Ord	200	179	12(1)
CA	s76A Crimes Ord	200	117	12(1)
CA	s88XX(3)(a) Criminal Procedure Ord	221	158	10
CA	s46(c) Dangerous Drugs Ord s46(d) Dangerous Drugs Ord s47(1)(c) Dangerous Drugs Ord s47(1)(d) Dangerous Drugs Ord s47(3) Dangerous Drugs Ord	134	175	11(1)
CA	s4(4) Massage Establishments Ord	266	14	11(1)
CA	The words 'or being unable to give satisfactory account of his possession thereof', s17 Summary Offence Ord	228	76	11(1)
HCt	Affiliation Proceedings Ord	183	35	22
HCt	s47(1)(b) Dangerous Drugs Ord s47(2) Dangerous Drugs Ord	134	64	11(1)
HCt	s47(1)(c) Dangerous Drugs Ord	134	153	11(1)
HCt	s52(1)(e) Dangerous Drugs Ord	134	222	14
HCt	s25(1) Drug Trafficking (Recovery of Proceeds) Ord s25(4)(a) Drug Trafficking (Recovery of Proceeds) Ord s25(4)(b) Drug Trafficking (Recovery of Proceeds) Ord	405	9	11(1)
HCt	s18(2) Electoral Provisions Ord [1]	367	40	21
HCt	s24(1)(b) Firearms & Ammunition Ord	238	177	11(1)

[1] The court held that it was not necessary to reach a concluded view on the BoR, but a strong case has been made out that the 10-year residency requirement (s18(2)) is inconsistent with Art 21 of BoR

HCt	s11E(2)(d) Lifts & Escalators (Safety) Ord.	327	146	10
HCt	s25(2) Prisons Ord.- Prison Rules 56,77 & Standing Orders 397	234	18	16
DCt	s168E Companies Ord s168T Companies Ord.	32	61	12(1)
DCt	s46(c) Dangerous Drugs Ord. s46(d) Dangerous Drugs Ord. s47(1)(c) Dangerous Drugs Ord. s47(1)(d) Dangerous Drugs Ord. s47(3) Dangerous Drugs Ord.	134	140	11(1)
DCt	s46(c) Dangerous Drugs Ord. s46(d) Dangerous Drugs Ord. s47(1)(c) Dangerous Drugs Ord. s47(1)(d) Dangerous Drugs Ord. s47(3) Dangerous Drugs Ord.	134	165	11(1)
DCt	s52E(1)(a) District Court Ord.	336	241	8
DCt	s4(2) Drug Trafficking (Recovery of Proceeds) Ord. s4(3) Drug Trafficking (Recovery of Proceeds) Ord.	405	213	10,11(1)
DCt	s24 Firearms and Ammunition Ord.	238	133	11(1)
DCt	s77 Inland Revenue Ord.	112	20	10
DCt	s53(7F)(b) Landlord & Tenant (Consolidation) Ord.	7	125	11(1)
DCt	s10(1)(a) Prevention of Bribery Ord.[2]	201	96	11(1)
DCt	s25 Prevention of Bribery Ord.	201	145	11(1)
DCt	s29(6)(a)(i) Theft Ord.	210	130	11(1)
Mag	s63 Criminal Procedure Ord.	221	216	11(1),(2)(e)
Mag	s40(a) Dutiable Commodities Ord.	109	45	11(1)
Mag	s9(1) Fixed Penalty (Criminal Proceedings) Ord.	240	193	11(2)(a)
Mag	s18 Gambling Ord. s19(2) Gambling Ord. s19(4) Gambling Ord.	148	192	11(1)
Mag	s19(2) Gambling Ord.[3]	148	127	11(1)

[2] This decision was reversed by the Court of Appeal in *R v Hui Kin Hong Harry*.

[3] There are a couple of inconsistent decisions on this section. The CA held that this section was consistent with the BOR in *R v Choi Kai On* (1994)4 HKPLR 105.

Mag	s38A(2) Immigration Ord.	115	69	11(1)
Mag	The words "and to imprisonment for 2 years" s18(1)(b) Import & Export Ord.	60	100	5,10.11(1)
Mag	s18A(2) Import & Export Ord. s35A(2) Import & Export Ord.	60	178	11(1)
Mag	Regulation 3(1) & (5) Import & Export (Carriage of Articles) Regulations - Sub. Leg.	60	136	11(1)
Mag	s104 Magistrates Ord.	227	131	11(6)
Mag	s17A(1) Prevention of Bribery Ord.	201	33	5(1),5(3), 8,10, 11,22
Mag	s17A Prevention of Bribery Ord. s17B(5) Prevention of Bribery Ord.	201	237	8.10
Mag	s30 Prevention of Bribery Ord.	201	159	16
Mag	s30 Summary Offence Ord.	228	6	11(1)
Mag	s30 Summary Offence Ord.	228	111	11(1)
Mag	s30 Summary Offence Ord.	228	228	11(2)(c)
Tri	s35A(3) Legal Practitioners Ord	159	28	10,10,s7(1)

Table 10

The following provisions have been considered and found by the Court to be *inconsistent* with the Bill of Rights and have therefore been repealed:
(according to the alphabetical order of the Ordinances)
(**Case** - please refer to the corresponding number in Case Reference [Table 13])

Provision(s) repealed	Court	Case	Article(s)
Affiliation Proceedings Ord. (Cap 183)			
s4	HCt	35	22
Companies Ord.(Cap 32)			
s168E & T	DCt	61	12(1)
Crimes Ord. (Cap 200)			
s76	CA	162	12(1)
s76(1)	CA	179	12(1)
s76A	CA	117	12(1)
Criminal Procedure Ord. (Cap 221)			
s63	Mag	216	11(1),(2)(e)
s88XX(3)(a)	CA	158	10
Dangerous Drugs Ord.(Cap 134)			
s46(c)			
	CA	175	11(1)
	DCt	140	11(1)
s46(d)	DCt	165	11(1)
	CA	175	11(1)
	DCt	140	11(1)
s47(1)(b)	HCt	64	11(1)
s47(1)(c)	DCt	165	11(1)
	CA	175	11(1)
	DCt	140	11(1)
	DCt	165	11(1)
s47(1)(d)	HCt	153	11(1)
	CA	175	11(1)
	DCt	140	11(1)
s47(2)	HCt	64	11(1)
s47(3)	DCt	165	11(1)
	CA	175	11(1)

Provision(s) repealed	Court	Case	Article(s)
s52(1)(e)	DCt DCt HCt	140 165 222	11(1) 11(1) 14
District Court Ord.(Cap 336) s52E(1)(a)	DCt	241	8
Drug Trafficking (Recovery of Proceeds) Ord. (Cap 405) s4(2) s4(3) s25(1) s25(4)(a) s25(4)(b)	 DCt DCt HCt HCt HCt	 213 213 9 9 9	 10,11(1) 10,11(1) 11(1) 11(1) 11(1)
Dutiable Commodities Ord. (Cap 109) s40(a)	Mag	45	11(1)
Electoral Provisions Ord.[1] (Cap 367) s18(2)	HCt	40	21
Firearms and Ammunition Ord. (Cap 238) s24 s24(1)(b)	 DCt HCt	 133 177	 11(1) 11(1)
Fixed Penalty (Criminal Proceedings) Ord. (Cap 240) s9(1)	Mag	193	11(2)(a)
Gambling Ord (Cap 148) s18 s19(2) s19(4)	 Mag Mag Mag Mag	 192 192 127 192	 11(1) 11(1) 11(1) 11(1)
Immigration Ord. (Cap 115) s38A(2)	Mag	69	11(1)
Import & Export Ord. (Cap 60) s18(1)(b) the words "and to imprisonment for 2 years" s18A(2) s35A(2) Regulation 3(1) & (5) - Import & Export (Carriage of Articles) Reg.	 Mag Mag Mag Mag	 100 178 178 136	 5,10,11(1) 11(1) 11(1) 11(1)

[1] The court held that it was not necessary to reach a concluded view on the BoR, but a strong case has been made out that the 10-year residency requirement (s18(2)) is inconsistent with Art.21 of BoR.

Provision(s) repealed	Court	Case	Article(s)
[Sub Leg]			
Inland Revenue Ord (Cap 112)			
s77	DCt	20	10
Landlord & Tenant (Consolidation) Ord (Cap 7)			
s53(7F)(b)	DCt	25	11(1)
Legal Practitioners Ord (Cap 159)			
s35A(3)	Tri	28	10,16,s7(1)
Lifts & Escalators (Safety) Ord. (Cap 327)			
s11E(2)(d)	HCt	146	10
Magistrates Ord (Cap 227)			
s104	Mag	131	11(6)
Massage Establishments Ord (Cap 266)			
s4(4)	CA	14	11(1)
Prevention of Bribery Ord [2] (Cap 201)			
s10(1)(a)	DCt	96	11(1)
s17A	Mag	237	8,10
s17A(1)	Mag	33	5(1),5(3),8, 10,11,22
s17B(5)	Mag	237	8,10
s25	DCt	145	11(1)
s30	Mag	159	16
Prison Ord. (Cap 234)			
Prison rules 56,77 & Standing Order 397	HCt	18	16
Summary Offence Ord (Cap 228)			
s17, the words "or being unable to give satisfactory account of his possession thereof"	CA	76	11(1)
s30	PC	8	11(1)
s30	Mag	6	11(1)
s30	Mag	111	11(1)
s30	Mag	228	11(2)(c)
Theft Ord. (Cap 210)			
s29(6)(a)(i)	DCt	130	11(1)

[2] This decision was reversed by the Court of Appeal in *R v Hui Kin Hong Harry*.

Table 11

The following provisions have been once considered by the court and found *consistent* with the Bill of Rights:

(according to the level of courts)

(**Case**- please refer to the corresponding number in Case Reference [Table 13])

Court	Provisions	Cap	Case	Article
PC	s75 Crimes Ord s76 Crimes Ord	200	51	12(1)
PC	s25(1) Drug Trafficking (Recovery of Proceeds) Ord s25(4)(a) Drug Trafficking (Recovery of Proceeds) Ord s25(4)(b) Drug Trafficking (Recovery of Proceeds) Ord	405	10	11(1)
CA	s27(1) Buildings Ord	123	16	10,14,22
CA	s55(1) Crimes Ord	200	246	11(1)
CA	s2(1) Dutiable Commodities Ord s3 Dutiable Commodities Ord s17 Dutiable Commodities Ord s46 Dutiable Commodities Ord	109	5	11(1)
CA	s2(1) Dutiable Commodities Ord s3 Dutiable Commodities Ord s17 Dutiable Commodities Ord s46 Dutiable Commodities Ord	109	201	11(1)
CA	s19(2) Gambling Ord	148	74	11(1)
CA	s37K(1) Immigration Ord	115	47, 113	10,11,11 (1),22
CA	s37C Immigration Ord	115	101	11(1)
CA	s18A(2) Import & Export Ord. s35A(2) Import & Export Ord.	60	218	10,11,22
CA	s111 Lifts & Escalators (Safety) Ord s11G Lifts & Escalators (Safety) Ord	327	147	10
CA	s10(1)(a) Prevention of Bribery Ord	201	97	11(1)
CA	s30 Prevention of Bribery Ord	201	160	16
CA	s7 Public Order Ord s13 Public Order Ord	245	184	16,17

	s18 Public Order Ord			
CA	s33 Securities & Futures Commission Ord	24	172	5(1),14
CA	s24 Supreme Court Ord	4	174	5(4)
CA	s29(6)(a)(i) Theft Ord	210	41	11(1)
HCt	s145(1) Companies Ord s145(2) Companies Ord s145(3) Companies Ord s145(3A) Companies Ord	32	238	11(2)(a), 14-16
HCt	s12B Criminal Procedure Ord	221	166	5(3)
HCt	s76(1) Criminal Procedure Ord	221	141	5(1),11
HCt	s47(1)(a) Dangerous Drugs Ord s47(1)(b) Dangerous Drugs Ord s47(2) Dangerous Drugs Ord	134	153	11(1)
HCt	s18(2) Electoral Provisions Ord	367	42	21
HCt	s14(1) Fixed Penalty (Traffic Contravention) Ord	237	79	10,11(1)
HCt	s37C(1)(a) Immigration Ord	115	99	11(1)
HCt	s17C Immigration Ord	115	149	8,14
HCt	s18A(2) Import & Export Ord.	60	176	11(1)
HCt	Road Traffic (Driving Offence Points) Ord	375	198	11(6)
HCt	s21B Supreme Court Ord	4	240	8,s3
DCt	s24 Buildings Ord s27 Buildings Ord	123	15	10,14,22
DCt	s123 Crimes Ord	200	98	5(1)
DCt	s94A Criminal Procedure Ord	221	133	11(1)
DCt	s20 Drug Trafficking (Recovery of Proceeds) Ord s21(4) Drug Trafficking (Recovery of Proceeds) Ord	405	34	14
DCt	s20(4) Evidence Ord	8	170	11(2)(e)
DCt	s22A Evidence Ord	8	78	11(2)(e)
DCt	s37C(1)(a) Immigration Ord s37C(2)(b) Immigration Ord	115	195	11(1)
DCt	s37K(1) Immigration Ord s37K(2) Immigration Ord	115	134	11(1)
DCt	s37D(1)(a) Immigration Ord s37D(2) Immigration Ord	115	137	11(1)
DCt	s71(2) Inland Revenues Ord	112	19	10,22
DCt	s75(3) Inland Revenues Ord s75(4) Inland Revenues Ord	112	20	22,10

DCt	s75(4) Inland Revenues Ord	112	19, 20	10,22
DCt	s17 Summary Offence Ord	228	220	11(1)
Mag	s5(1) Copyright Ord s9 Copyright Ord	39	211	11(1)
Mag	s137(2) Crimes Ord	200	72	11(1)
Mag	s137(2) Crimes Ord	200	121	11(1)
Mag	s94A Criminal Procedure Ord	221	200	11(1)
Mag	s94A Criminal Procedure Ord	221	155	11(1)
Mag	s19(1)(c) Gambling Ord	148	192	8
Mag	s19(1)(c) Gambling Ord	148	127	11(1)
Mag	s19(2) Gambling Ord	148	30	11(1)
Mag	s19(2) Gambling Ord	148	65	11(1)
Mag	s19(1) Gambling Ord s19(2) Gambling Ord	148	129	11(1)
Mag	s5 Gambling Ord s6 Gambling Ord	148	210	5(1)
Mag	s38A Immigration Ord	115	89	11(1),22
Mag	s14 Import & Export Ord s35A Import & Export Ord s34 Import & Export Ord	60	155	11(1)
Mag	s35A Import & Export Ord	60	194	5(1),11(2)(g)
Mag	s35A(2) Import & Export Ord	60	92	11(1)
Mag	s16A(1) Import & Export Ord	60	212	11(1)
Mag	s18A(s) Import & Export Ord	60	56	11(1)
Mag	s102 Magistrates Ord	227	116	5(3)
Mag	s67 Public Health & Municipal Services Ord	132	214	11(1)
Mag	s17(4) Public Order Ord	245	75	16,17
Mag	s18 Public Order Ord	245	60	17
Mag	s8 Road Traffic (Driving Offence) Points Ord	375	197	11(6)
Mag	s42(3) Road Traffic Ord s42(4) Road Traffic Ord	374	142	11(1)
Mag	s63(1) Road Traffic Ord s63(6) Road Traffic Ord	374	139	11(2)(g)
Mag	s17 Summary Offences Ord	228	123	11(1)
Mag	s7(1)(b) Trade Description Ord s9(2) Trade Description Ord	362	102	11(1)
Mag	s12(1) Trade Description Ord.	362	138	11(1)
Lcen	s10B(a) Moneylenders Ord	163	232	10

Table 12

The following provisions have been once considered by the court and found *consistent* with the Bill of Rights:
(according to the alphabetical order of the Ordinances)
(**Case** - please refer to the corresponding number in Case Reference [Table 13])

Provisions	Court	Case	Article(s)
Buildings Ord. (Cap 123)			
s24	DCt	15	10,14,22
s27	DCt	15	10,14,22
s27(1)	CA	16	10,14,22
Companies Ord. (Cap 32)			
s145(1)	HCt	238	11(2)(a),14-16
			11(2)(a),14-16
s145(2)	HCt	238	11(2)(a),14-16
			11(2)(a),14-16
s145(3)	HCt	238	
s145(3A)	HCt	238	
Copyright Ord. (Cap 39)			
s5(1)	Mag	211	11(1)
s9	Mag	211	11(1)
Crimes Ord. (Cap 200)			
s55(1)	CA	246	11(1)
s75	PC	51	12(1)
s76	PC	51	12(1)
s123	DCt	98	5(1)
s137(2)	Mag	72	11(1)
	Mag	121	11(1)
Criminal Procedure Ord. (Cap 221)			
s12B	HCt	166	5(3)
s76(1)	HCt	141	5(1),11
s94A	DCt	133	11(1)
	Mag	200	11(1)
	Mag	155	11(1)
Dangerous Drugs Ord. (Cap 134)			
s47(1)(a)	HCt	153	11(1)

s47(1)(b)	HCt	153	11(1)
	HCt	64	11(1)
s47(2)	HCt	153	11(1)
	HCt	64	11(1)
Drug Trafficking (Recovery of Proceeds) Ord. (Cap 405)			
s20	DCt	34	14
s21(4)	DCt	34	14
s25(1)	PC	10	11(1)
s25(4)(a)	PC	10	11(1)
s25(4)(b)	PC	10	11(1)
Dutiable Commodities Ord. (Cap 109)			
s2(1)	CA	5	11(1)
	CA	201	11(1)
s3	CA	5	11(1)
	CA	201	11(1)
s17	CA	5	11(1)
	CA	201	11(1)
s46	CA	5	11(1)
	CA	201	11(1)
Electoral Provision Ord. (Cap 367)			
s18(2)	HCt	227	21
Evidence Ord. (Cap 8)			
s20(4)	DCt	170	11(2)(e)
s22A	DCt	78	11(2)(e)
Fixed Penalty (Traffic Contravention) Ord. (Cap 237)			
s14(1)	HCt	79	10,11(1)
Gambling Ord. (Cap 148)			
s5	Mag	210	5(1)
s6	Mag	210	5(1)
s19(1)	Mag	129	11(1)
s19(1)(c)	Mag	192	8
	Mag	127	11(1)
s19(2)	Mag	65	11(1)
	Mag	129	11(1)
	CA	74	11(1)
	Mag	30	11(1)
Immigration Ord. (Cap 115)			
s17C	HCt	149	8,14
s37C	CA	101	11(1)
s37C(1)(a)	HCt	99	11(1)

	DCt	195	11(1)
s37C(2)(b)	DCt	195	11(1)
s37D(1)(a)	DCt	137	11(1)
s37D(2)	DCt	137	11(1)
s37K(1)	CA	47,113	10,11,11(1),2
	DCt	134	2
s37K(2)	DCt	134	11(1)
s38A	Mag	89	11(1),22
Import & Export Ord (Cap 60)			
s14	Mag	155	11(1)
s16A(1)	Mag	212	11(1)
s18A(2)	Mag	56	11(1)
	HCt	176	11(1)
	CA	218	10,11,22
s34	Mag	155	11(1)
s35A	Mag	155	11(1)
	Mag	194	5(1),11(2)(g)
s35A(2)	Mag	92	11(1)
s35A(2)	CA	218	10,11,22
Inland Revenues Ord (Cap 112)			
s71(2)	DCt	19	10,22
s75(3)	DCt	20	22,10
s75(4)	DCt	20	22,10
	DCt	19	10,22
Lifts & Escalators (Safety) Ord (Cap 327)			
s11I	CA	147	10
s11G	CA	147	10
Magistrates Ord (Cap 227)			
s102	Mag	116	5(3)
Moneylenders Ord (Cap 163)			
s10B(a)	Lcen	232	10
Prevention of Bribery Ord (Cap 201)			
s10(1)(a)	CA	97	11(1)
s17A	Mag	237	8,10
s17A(1)	Mag	33	8,5(1),5(3),10, 11,22
s17B(5)	Mag	237	8,10
s30	CA	160	16
Public Health & Municipal Services Ord (Cap 132)			
s67	Mag	214	11(1)

Public Order Ord (Cap 245)			
s7	CA	184	16 17
s13	CA	184	16 17
s17(4)	Mag	75	16 17
s18	CA	184	16 17
	Mag	60	17
Road Traffic (Driving Offence Points) Ord (Cap 375)			
s8	HCt	198	11(6)
	Mag	197	11(6)
Road Traffic Ord (Cap 374)			
s42(3)	Mag	142	11(1)
s42(4)	Mag	142	11(1)
s63(1)	Mag	139	11(2)(g)
s63(6)	Mag	139	11(2)(g)
Securities & Futures Commission Ord (Cap 24)			
s33	CA	172	5(1),14
Summary Offence Ord (Cap 228)			
s17	DCt	220	11(1)
	Mag	123	11(1)
Supreme Court Ord (Cap 4)			
s21B	HCt	240	8
s24	CA	174	5(4)
Theft Ord (Cap 210)			
s29(6)(a)(i)	CA	41	11(1)
Trade Description Ord (Cap 362)			
s7(1)(b)	Mag	102	11(1)
s9(2)	Mag	102	11(1)
s12(1)	Mag	138	11(1)

Table 13

Case Reference

No.	Case (Cases on Appeal have been put consecutively)	Year	Court	Provision(s) challenged
1	AG v Alick Au Shui Yuen	1991	HCt	11(2)(d)
2	AG v Charles Cheung Wai Bun	1992	HCt	5(3)
3	AG v Charles Cheung Wai Bun	1993	PC	11(2)(c)
4	AG v Fong Chin Yue and others	1993	Mag	5(1)
5	AG v Fong Chin Yue and others[1]	1993	CA	11(1)
6	AG v Lee Kwong Kut	1991	Mag	11(1)
7	AG v Lee Kwong Kut	1992	CA	11(1)
8	AG v Lee Kwong Kut	1993	PC	11(1)
9	AG v Lo Chak Man	1992	HCt	11(1)
10	AG v Lo Chak Man	1993	PC	11(1)
11	AG v New Times Limited	1993	CA	10
12	AG v South China Morning Post	1991	HCt	16
13	AG v Tang Yuen Lin	1994	CA	11(2)(a)
14	AG v Wong Yan Fuk	1993	CA	11(1)
15	Building Authority V Business Rights Ltd	1993	DCt	10,14,22
16	Building Authority v Business Rights Ltd	1994	CA	10,14
17	Cheung Ng Sheong, Steven v Eastweek Publisher Ltd and another	1995	CA	16(2),16(3)
18	Chim Shing Chung v Commissioner of Correctional Services	1995	HCt	16(2)

[1] This case goes with *R v Wang Shi Hung*. Since they have independent action numbers, they are considered as separate cases.

19	Commissioner of Inland Revenue v Eekon Enterprises Ltd	1995	DCt	10,22
20	Commissioner of Inland Revenue v Lee Lai Ping, the Administratrix of the Estate of Lui Kim Kei, deceased, formerly trading as Leung Lee Seafood Wholesale	1993	DCt	8,10,22
21	de Kantzow v The Appeal Tribunal	1991	CA	10
22	Duty Free Shoppers HK Ltd v Wong Kwong Pong	1991	HCt	11(2)(g)
23	Duty Free Shoppers HK Ltd v Wong Kwong Pong	1991	CA	5
24	Ever Sure Investments v AG	1992	HCt	10
25	Extramoney Ltd v Chan, Lai, Pang & Co (a firm)	1992	HCt	16
26	Ho Hin Wah v Commissioner for Inland Revenue	1992	DCt	8,12
27	Ho Pong 280 Management Ltd	1992	CA	11(1)
28	HK Bar Association v Anthony Chau	1994	Tri[2]	10,16,s7(1)
29	HK Stationery Manufacturing Co. Ltd. v Worldwide Staionery Manufacturing Co.	1991	HCt	10
30	R v Tsang Hing Man	1991	Mag	11(1)
31	R v Lau Kwok Hung	1991	HCt	5(3)
32	In the Matter of the Stock Exchange of HK Ltd and In the Matter of s50 of the Securities and Futures Ordinance	1991	HCt	18
33	In re Nattrass	1994	Mag	5(1),5(3),8,10,11,22
34	In re Reiner Jacobi	1991	DCt	14
35	L v C	1994	HCt	20,22

[2] The case was heard in Barristers Disciplinary Tribunal.

36	Le Tu Phuong & Dinh T B Chinh v Director of Immigration	1994	CA	s6.11(1)
37	Lee Miu Ling and Law Pui v AG	1995	CA	21
38	Ngai Man v Commissioner of ICAC	1992	CA	8,14
39	R v Alagon	1992	Mag	14
40	R v Alfred Li Kwok Lun	1992	HCt	11(1)
41	R v Anatasius Chiu	1994	CA	11(1)
42	R v Apollonia Liu. ex parte Lau San Ching	1994	HCt	21
43	R v Apollonia Liu, ex parte Lau San Ching	1994	CA	21
44	R v Apollonia Liu, ex parte Lau San Ching (1995)	1995	HCt	21
45	R v Au Shun Sang	1992	Mag	11(1)
46	R v C and H	1993	Mag	22
47	R v Chan Chak Fan	1994	CA	11
48	R v Chan Chak Fan and Chan Yiu Cheung	1993	DCt	10,11(2)(b) &(e)
49	R v Chan Chi Hung	1993	DCt	12(1)
50	R v Chan Chi Hung	1993	CA	12(1)
51	R v Chan Chi Hung	1995	PC	12(1)
52	R v Chan Cho Ming	1991	Mag	11(1)
53	R v Chan Chuen Kam & others	1993	CA	12(1)
54	R v Chan Fuk Lee	1991	DCt	11(1)
55	R v Chan King Hei & Ors	1995	CA	5(2)
56	R v Chan Kiu Tung	1992	Mag	11(1)
57	R v Chan Kwok Tung & Chan Siu Muk	1993	CA	11(4)
58	R v Chan Lan Po	1994	DCt	11(1)
59	R v Chan Lui Tat	1992	Mag	11(2)(c)
60	R v Chan Sau Sum & others	1993	Mag	17
61	R v Chan Suen Hay	1995	DCt	12(1)
62	R v Chan Suk Man	1992	Mag	11(1)
63	R v Chan Wai Ming	1991	HCt	5(3)

64	R v Chan Wai Ming (No 2)	1992	HCt	11(1)
65	R v Chan Wing Pu	1992	Mag	11(1)
66	R v Cheng Pui Kit	1991	Mag	11(1),5(1)
67	R v Cheng Pui Kit	1991	CA	5(1),11(1)
68	R v Cheung Tam Hung	1993	Mag	10.11(2)(e)
69	R v China State Construction Engineering Corporation	1994	Mag	11(1)
70	R v Chiu Kam Tu & Wong Yuk Lam	1994	HCt	10,11(2)(b)
71	R v Chiu Te Ken[3]	1993	HCt	11(2)(c)
72	R v Choi Bik Wan	1993	Mag	11(1)
73	R v Choi Kai On	1992	Mag	11(1)
74	R v Choi Kai On	1994	CA	11(1)
75	R v Choi Yiu Cheong & To Kwan Hang	1993	Mag	16,17
76	R v Chong Ah Choi & others	1994	CA	11(1)
77	R v Chong Ka Man	1993	Mag	5(1),10,11 (1)
78	R v Chow Chai Sang	1994	DCt	11(2)(e)
79	R v Crawley	1994	HCt	10,11(1)
80	R v Commissioner of Inland Revenue, ex parte Patrick Shiu	1994	HCt	14
81	R v Deputy District Judge Timothy Lee, Chow Po Bor	1993	HCt	10,11(2)(b)
82	R v Deputy District Judge Timothy Lee, Chow Po Bor	1993	CA	10
83	R v Director of Immigration, ex parte Cheung Kuk Ching	1993	HCt	19,20
84	R v Director of Immigration, ex parte Hai Ho Tak	1994	CA	s11
85	R v Director of Immigration, ex parte Wong Chung Hing & others	1994	CA	s11

[3] This case goes with *R v David Chiu Tat Cheung*. Since they share the same action number, they are considered as one case only.

86	R v Director of Immigration, ex parte So Kam Cheung & others	1993	HCt	s11
87	R v Director of Immigration, ex parte Lau Shek To & others	1993	HCt	s11
88	R v Director of Immigration, ex parte Wong King Lung &others	1993	HCt	s11
89	R v Dragages et Travaux	1993	Mag	11(1),22
90	R v Eddie Soh Chee Kong	1991	HCt	14
91	R v Flickinger	1993	DCt	10,11(2)(c)
92	R v Fong Chi Chung	1992	Mag	11(1)
93	R v Fong Fu Ching & another	1993	DCt	5(3),10,11(2)(c)
94	R v Fung Shu Shing	1992	DCt	10,11(2)(c)
95	R v Fu Yan	1992	CA	11(2)(d)
96	R v Harry Hui Kin Hong	1994	DCt	11(1)
97	R v Harry Hui Kin Hong	1995	CA	11(1)
98	R v Hui Kwok Fai	1993	DCt	5(1),10,11(1)
99	R v Hui Lan Chak & others[4]	1992	DCt	5,11(1),11(2)(g)
100	R v Hung Wai Shing & others	1993	Mag	5,10,11(1)
101	R v Iu Tsz Ning	1995	CA	11(1)
102	R v Joshi	1992	Mag	11(1)
103	R v Kevin Egan	1993	HCt	10
104	R v Ko Chi Yuen	1992	HCt	11(1)
105	R v Ko Chi Yuen	1994	CA	11(1)
106	R v Kwan Kwok Wah & others	1992	DCt	11(2)(c)
107	R v Kwok Hing Man	1994	CA	s3(2)
108	R v Kwok Wai Chun	1992	Mag	14,s6
109	R v Lai Kai Ming	1993	CA	12(1)
110	R v Lai Kai Wing	1991	CA	11(2)(b) & (c)
111	R v Lai Kwok Sin	1991	Mag	11(1)
112	R v Lai Tai Tai	1992	HCt	11(1)

[4] The appellant had appealed to CA but the appeal was not included here because it involved no BoR issues.

113	R v Lai Yiu Pui	1994	CA	11
114	R v Lam Chau On	1991	HCt	11(1)
115	R v Lam Chi Chiu	1992	Mag	11(2)(a)
116	R v Lam Chung Shu	1991	Mag	8
117	R v Lam Kwok Keung	1993	CA	12(1)
118	R v Lam Shun & Lam Chi Chun	1992	CA	11(1),11(2)(d),s14
119	R v Lam Tak Ming & Lam Ho Ming	1991	DCt	5(2),10,11(2)(c)
120	R v Lam Wan Kow	1992	CA	11(1),(4)
121	R v Lam Wing Nin	1992	Mag	11(1)
122	R v Lam Yau Kee	1992	CA	11(1)
123	R v Lau Chi Yung	1992	Mag	11(1)
124	R v Lau Fai Ling	1992	Mag	11(1)
125	R v Lau Kung Shing & Tan Jui Chih	1993	DCt	11(1)
126	R v Lau Kwok Hing & others	1993	DCt	5(1)
127	R v Lau Ming Fai & others	1992	Mag	11(1)
128	R v Lau Po Tung	1992	CA[6]	11(1)
129	R v Lau Sai Miu	1992	Mag	11(1)
130	R v Lau Shiu Wah	1991	DCt	11(1)
131	R v Lau Shuk Man & another	1993	Mag	11(6)
132	R v Lau Ting Fan	1992	HCt	5(3)
133	R v Lau Ting Man	1991	DCt	11(1)
134	R v Lau Wan Chung	1992	DCt	11(1)
135	R v Law Chung Cheung	1995	HCt	11(2)(c)
136	R v Lee Hing Shum	1991	Mag	11(1)
137	R v Lee Kin Fai & Shum Wai Sun	1992	DCt	11(1)
138	R v Lee Ping Yau	1992	Mag	11(1)
139	R v Lee Tak Cheung	1992	Mag	11(2)(g)

[5] This case goes with *R v Chan Chak Fan.* They are considered as separate cases because they have independent action number.

[6] It is unclear whether this case was heard by the CA or the HCt. We infer it to be the CA from the action number.

140	R v Leung Ping Lam	1991	DCt	11(1)
141	R v Leung Tak Choi	1995	HCt	5(1)
142	R v Leung Yung Yau	1992	Mag	11(1)
143	R v Li Kwok Wa & Chiu Chi Kwong	1992	CA	11(1)
144	R v Li Tat	1993	CA	11(1)
145	R v Liew Kwok Shan William	1995	DCt	11(1)
146	R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company Limited	1994	HCt	10
147	R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company Limited	1995	CA	10
148	R v Lo Chak Man (No.2)	1994	HCt	10
149	R v Lo Hon Hin	1993	HCt	8,14
150	R v Lo Shut Fo	1992	DCt	22
151	R v Lo Wai Keung	1992	DCt	10
152	R v Lorrain Osman	1991	HCt	10,11
153	R v Lum Wai Ming	1992	HCt	11(1)
154	R v Lum Wai Ming	1993	CA	11(1)
155	R v Ma Man Ho & others	1991	Mag	11(1)
156	R v Mak Siu Shing	1992	HCt	10,11
157	R v Man Kit Man	1991	HCt	11(1)
158	R v Man Wai Keung	1992	CA	10,11
159	R v Ming Pao Newspapers Ltd & others	1995	Mag	16
160	R v Ming Pao Newspapers Ltd & others	1995	CA	16
161	R v Mirchandani	1992	CA	11(2)(d)
162	R v Mohammad Faisal	1993	CA	12(1)
163	R v Ng Chi Keung	1991	Mag	11(1)
164	R v Ng Kam Fuk	1992	DCt	10,11(2)(e)
165	R v Ng Po Lam	1991	DCt	11(1)
166	R v Ng Yiu Fai	1992	HCt	5(3)
167	R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd	1994	HCt	10,16

168	R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd	1994	CA	10.16
169	R v Peter Wong Wai Pong[7]	1993	Mag	10,11(2)(a)
170	R v Purkayastha	1992	DCt	11(2)(e)
171	R v Securities & Futures Commission, ex parte Lee Kwok Hung	1993	HCt	5,11(2)(g),14,15,16
172	R v Securities & Futures Commission, ex parte Lee Kwok Hung	1993	CA	5(1),14
173	R v Shun Shing Construction Co Ltd	1992	Mag	11(1)
174	R v Sin Hoi	1992	CA	5(4),s6(2)
175	R v Sin Yau Ming	1991	CA	11(1)
176	R v So Kwok Wing & Ma Hing Ming	1993	HCt	11(1)
177	R v So Sai Fong & Cahn Wai Lam	1992	HCt	11(1)
178	R v Suen Shun	1992	Mag	11(1)
179	R v Sze Yung Sang	1993	CA	12(1)
180	R v Tai Yiu Wah	1994	CA	12(1)
181	R v Tang Shui Kwan	1992	Mag	11(2)(c)
182	R v Thomas Chow Tat Ming, ex parte Eric Chan Po Ming[8]	1994	HCt	21
183	R v Thomas Chow Tat Ming, ex parte Richard Fung Chan Ki[9]	1994	HCt	21
184	R v To Kwan Hang & Tsoi Yiu Cheong	1994	CA	16,17

[7] This case goes with *R v Tse Kim Ho*. Since they have independent action numbers, they are considered as separate cases.

[8] This case goes with *R v Apollonia Liu, ex parte Lau San Ching*. Since they have independent action numbers, they are considered as separate cases.

[9] ibid

185	R v To Tai Yau	1991	Mag	11(1)
186	R v Town Planning Board, ex parte Auburntown Ltd	1994	HCt	10
187	R v Town Planning Board, ex parte Auburntown Ltd	1994	CA	10
188	R v Town Planning Board, ex parte Kwan Kong Co Ltd.	1995	HCt	10
189	R v Town Planning Board, ex parte Real Estate Developers Association of HK	1996	HCt	10
190	R v Town Planning Board, ex parte Wing On Company Ltd	1996	HCt	10
191	R v Tran Viet Van	1992	HCt	11(1)
192	R v Tsang Wai Chung & others	1991	Mag	11(1)
193	R v Tse Kim Ho	1993	Mag	10,11(2)(a)
194	R v Tsui Shek Law & others	1991	Mag	5(1),11(2)(g)
195	R v Tsui Tsz Fat	1992	DCt	11(1)
196	R v Tung Chi Hung	1991	DCt	11(2)(c),11(6)
197	R v Wan Kit Man	1991	Mag	11(6)
198	R v Wan Kit Man	1992	HCt	11(6)
199	R v Wan Siu Kei	1993	CA	12(1)
200	R v Wan Yin Man	1991	Mag	11(1)
201	R v Wang Shi Hung[10]	1994	CA	11(1)
202	R v William Hung	1992	HCt	5(3),11(2)(c)
203	R v William Hung	1993	CA	11(2)(c)
204	R v Wright, ex parte Lau Wing Wo	1993	HCt	10
205	R v Wong Cheung Bun	1992	HCt	11(2)(d)
206	R v Wong Chiu Yuen	1992	DCt	5(3),11(2)(c)
207	R v Wong Far	1992	Mag	11(1),11(2)(g)

[10] This case goes with *Attorney General v Fong Chin Yue & others*. Since they have independent action numbers, they are considered as separate cases.

208	R v Wong Hiu Chor	1992	CA	11(1)
209	R v Wong Kwai Fun	1992	CA[11]	10,11,22
210	R v Wong Lai Shing	1993	Mag	5(1)
211	R v Wong Leung Fung	1993	Mag	11(1)
212	R v Wong Man Kwong	1992	Mag	11(1)
213	R v Wong Ma Tai	1993	DCt	10.11(1)
214	R v Wong Moon Ting	1995	Mag	11(1)
215	R v Wong Sik Ming	1994	DCt	10
216	R v Wong Wai	1994	Mag	11(1),11(2)(e)
217	R v Yeung Chi Chiu & another	1994	DCt	10,11(2)(e)
218	R v Yeung Chu Tim	1992	CA	10,11,22
219	R v Yeung Yee Hing	1995	Mag	11(1)
220	R v Yiu Chi Fung	1991	DCt	11(1)
221	R v Yu Chi Lun	1991	Mag	11(1),11(2)(g)
222	R v Yu Yem Kin	1994	HCt	5,14,22
223	R v Yuen Chun Kong[12]	1992	CA	11(1),11(4)
224	Re Association of Expatriate Civil Servants of Hong Kong & others	1995	HCt	21
225	Re Chan Mo Lin & Others	1994	HCt	10
226	Re Jenny Chua Yee Yen & the HK Polytechnic	1992	HCt	10
227	Re Lee Miu Ling	1994	HCt	21,s13
228	Re Leong Chi Hung & Crawford McKee Esq, Principal Magistrate	1992	Mag	11(2)(c)
229	Re Ming Yuen Villa	1993	Mag	10
230	Re Ng Hung Yiu & Government of the United	1992	HCt	11(2)(e)

[11] It is unclear whether this case was heard by the CA or the HCt. We infer it to be CA from the action number.

[12] This case goes with *R v Lam Chau On.* Since they have independent action numbers, they are considered as separate cases.

	States of America			
231	Re Pham Si Dung	1993	HCt	11(2)(e)
232	Re Rich Sir Ltd	1991	Lcen	10
233	R v Lau Hung Kwok (No.2)	1992	HCt	5(3)
234	Re Suthipong Smittacharatch & United States	1992	HCt	10,11(2)(e), 22
235	Re Thanat Phakitithat & the Government of the United States of America	1994	HCt	14
236	Re Thanat Phakitithat & the Government of the United States of America	1995	CA	s6,10
237	Re Tin Sau Kwong	1994	Mag	8,10
238	Re Tse Chu Fai Ronald & Re an Investigation under Section 143(1)(c) of the Companies Ordinance	1992	HCt	11(2)(g),14, 15,16
239	Re Tse Chu Fai Ronald & Re an Investigation under Section 143(1)(c) of the Companies Ordinance	1992	HCt	5
240	Sun Ching Yee v Wong Shum	1991	HCt	8,s3
241	Tam Hing Yee v Wu Tai Wei	1991	DCt	8,s3
242	Tam Hing Yee v Wu Tai Wei	1991	CA	8,s3
243	United States of America v Johnny Eng	1991	Mag	3,6,10,11(2)(g)
244	United States v Ng Hung Yiu	1992	HCt	11(2)(e)
245	Re X	1991	DCt	22
246	R v Law Chi Wai	1995	CA	11(1)
247	R v Cheung Ka Fai	1995	CA	s6

Notes:

Case - The cases include only local Bill of Rights cases (excluding human rights cases).

Year - The year refers to the judgment year.

Lcen- in Licencing Court

THE BILL OF RIGHTS AND THE CRIMINAL LAW: RECENT DEVELOPMENTS

ANDREW BRUCE[1]

This paper surveys important developments of the last year concerning the Bill of Rights in the field of criminal law.

The cases discussed herein demonstrate the importance and wide-ranging implications of the advice of the Privy Council in *Attorney General v Lee Kwong-kut.*[2] The framework for analysing Bill of Rights issues in the criminal context given in *Lee Kwong-kut*, even though such analysis may be *obiter,* has been taken to heart in the cases that have been decided in the past year. One of the clear messages of *Attorney General v Lee Kwong-kut* is that it is for the courts of Hong Kong to work out their own solutions using their own values to problems raised in relation to the Bill of Rights and that they should do so in a pragmatic and practical way. Hong Kong courts have demonstrated in recent times that this message has been well and

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1 Senior Assistant Crown Prosecutor, Attorney General's Chambers. The views expressed in this paper are those of the author. The views expressed do not necessarily reflect the position of the Hong Kong Government.

2 (1993) 3 HKPLR 72, [1993] 1 AC 951.

truly received and has been acted upon.[3] Some of the results of this may not cause much joy for some with specific agendas to push and who would argue for virtually universal, virtually immutable human rights standards. However, one of the dominant (albeit not always explicitly stated) themes in recent cases is that a balance must (and can) be struck between the values enshrined in the Bill of Rights and the circumstances -- at least in the context of the criminal law and law enforcement -- in which Hong Kong finds itself.

Recent cases in Hong Kong also demonstrate a casting off of the juridical security blanket of reference to Canadian authority. That, in part, is because the Privy Council said it is alright to do so.[4] However, this is more because of the recognition that the solution to Hong Kong problems under the Hong Kong Bill of Rights are likely to be found in Hong Kong and not Ottawa. The same can be said for European and United States decisions. However, because of the same attraction for judges steeped in common law traditions, I am not sure that it can be said that European decisions ever received the same degree of consideration as those from Canada. I am not at all sure that this security blanket will altogether disappear if, as I predict, we will see more cases fought on the basis of the guarantees in articles 5(1), 10 and 22 of the Bill of Rights. That is because the Canadian

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3 Numerous examples may be seen in decisions of the courts in the last year. However, probably the leading case which demonstrates this is *R v Hui Kin-hong Harry* (1995) CA, Crim App No 52 of 1995, 3 April 1995.

4 *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72, [1993] 1 AC 951 ("at least in the vast majority of cases", says Lord Woolf).

jurisprudence in these fields is fairly highly developed.[5]

On a day to day operational basis in the conduct of criminal litigation, there remains an air of mystery in the minds of legal practitioners and law enforcement officers concerning the Bill of Rights in particular and human rights in general. This manifests itself in the number of panic-ridden calls I get from counsel (both from within Chambers and on fiat) when a "Bill of Rights" point is raised in the case which they are conducting. In discussing these matters with counsel it is usually suggested that this is such a remote and specialised area that either a "Bill of Rights expert" should come and argue the case or that such an "expert" should do the research and prepare their argument for them. The implication of all this is that while the Bill of Rights appears in the statute books and is formally part of the law, it is viewed as remote and inaccessible and that it is all too hard. There remains a pressing need to continue to de-mystify the Bill of Rights amongst lawyers and law enforcement officers.

A. *THE CASES: BURDEN OF PROOF AND ARTICLE 11(1)*

There are two cases which exemplify the clear message that I take from cases decided over the last year. The cases are: *R v Chong Ah-choi and others*[6] and *Attorney General v Hui Kin-hong.*[7] The message is that Hong Kong through its courts will decide what the

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5 See, eg, *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1; *R v Swain* (1991) 63 CCC (3d) 481.

6 (1994) 4 HKPLR 375.

7 (1995) CA, Crim App No 52 of 1995, 3 April 1995.

Bill of Rights means and how it impacts on Hong Kong.

Chong Ah-choi and others concerned charges under section 17 of the Summary Offences Ordinance[8] of possession of an offensive weapon. One of the appellants pleaded guilty. The others were found guilty after trial. In the early hours police were called to outside a karaoke lounge and saw four men. Two were holding metal bars. One was holding a metal pipe. The fourth was holding a slab of wood. One asserted that he had the iron bar for fun. They were charged with having in their possession offensive weapons, and were unable to give a satisfactory account of the possession thereof.

On appeal, the accused argued that the requirement to give a satisfactory explanation was inconsistent with the Bill of Rights. The basis of the argument was that this involved a reversal of the onus of proof and was thus inconsistent with article 11(1) of the Bill of Rights. The court had little difficulty in holding that the provision was inconsistent with article 11(1). The issue from start to finish was whether the derogation from article 11(1) was permitted or justified. The Court of Appeal held that it could not be justified. The route (or, possibly, routes) that the Court took to arrive at that conclusion is interesting. The Court of Appeal took its test from *Lee Kwong-kut*.[9] This involves asking whether "in the end" it remains the primary responsibility of the prosecution to prove guilt to the required standard and whether the exception from article 11(1) is reasonably imposed. The greater the departure from this test, the more difficult

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8 Cap 226.

9 (1993) 3 HKPLR 72.

it is to justify.

The passage quoted from *Lee Kwong-kut* also refers to cases where the exception to article 11(1) comes in the form of matters which are presumed. The Court of Appeal held that it failed the test in relation to matters which were presumed. I am not sure how the matter was argued but it does seem that whatever section 17 may mean, there is nothing presumed in the relevant part of the section. The Court of Appeal held that it failed that test in any event. The Court of Appeal seems to have been saying that the requirement to justify possession was to prove the second element of the other mode of committing an offence under section 17 -- possession for an unlawful purpose. (It is plain that the prosecution bore the burden of proof for both elements of this mode of committing an offence under section 17.)

The requirement imposed by section 17 of the Ordinance was held to have failed the derogation tests, and miserably so. The court held that the provision was not of sufficient importance to override the principles enshrined in article 11(1). What the Court of Appeal seems to have said is that the impugned part of section 17 was a backdoor means of proving possession of the offensive weapon for an unlawful purpose. The court seems to think that it is relatively easy to prove that the possession was for an unlawful purpose. Whether that be right probably does not matter in the end. However, what is probably more important is what the court went on to do. First, it held that section 17 created two offences and severed the provision so that the part of section 17 which does not offend the Bill of Rights survives. This is the first major use of the device of severing Bill-

inconsistent legislation rather than holding the whole of such a provision to be inconsistent and thus repealed. Second, it is interesting that the court went on to consider the effect of the Bill of Rights on section 33 of the Public Order Ordinance. The offence created by section 33 is possession of an offensive weapon without lawful authority or reasonable excuse. The Court of Appeal appeared to support the proposition that the notion of proof of the lawful authority or reasonable excuse placed the offence in the category of cases set out in *R v Edwards*.[10] This line was, in broad terms, held in *Lee Kwong-kut* to be a permissible derogation of the rights guaranteed under article 11(1). Reliance was placed on the definition in section 2 of the Public Order Ordinance which, the Court of Appeal suggested could be read down to include, in essence, articles designed "for hurting people". While the Court of Appeal did not hold that section 33 of the Public Order Ordinance passed Bill of Rights muster, it certainly indicated how it would approach the matter.

Finally, what comes out of *Chong Ah-choi* clearly is that the Court of Appeal took to heart the notion put forward in *Lee Kwong-kut* that of critical importance to the equation is the importance of the legislation and the seriousness of the criminal problem to be addressed. Bokhary JA observed when holding that part of section 17 failed under the Bill of Rights:

> "[Prosecutions] for the summary offence created by section 17 simply bear no comparison whatsoever with, for example, cases involving cancerous activities such as drug trafficking and corruption and the ill-gotten proceeds of such activities."

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10 [1975] 1 QB 27.

While one may argue that a woman unaccompanied in a lift in a public housing estate and in justified fear of being a target for robbery might have a different view about the relative importance of people with offensive weapons, it is plain that the court is there setting its priorities and is suggesting that in more serious areas of criminality more extensive derogations from article 11(1) might be contemplated.

R v Hui Kin-hong takes this notion of the courts of Hong Kong setting priorities, foreshadowed in *R v Chong Ah-choi,* one step further in a number of senses. First, in *Hui Kin-hong,* the Court of Appeal makes this notion of priorities more explicit. Second, the court took account of the practical realities of corruption cases, or, perhaps more accurately, cases brought under the Prevention of Bribery Ordinance. Mr Hui[11] was charged with an offence under section 10(l)(a) of the Prevention of Bribery Ordinance. Before he was arraigned counsel for the accused submitted that section 10(l)(a) was inconsistent with the Bill of Rights and was thus repealed. The argument was primarily based on the argument that section 10(l)(a) is inconsistent with article 11(1) of the Bill of Rights. That section 10(l)(a) imposes a burden on the accused to establish facts on the balance of probabilities was never in dispute. The entire debate before the District Court and, later, the Court of Appeal, was whether, consistent with authority, section 10(l)(a) was a justifiable derogation from article 11(1) or not. The submission that it was not a justifiable

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[11] Mr Hui was, at the time of writing, an accused person. He was tried before the District Court, convicted and sentenced to 3 years and 3 months imprisonment.

derogation succeeded before the District Court and the Attorney General appealed by way of case stated. The appeal was heard by the Court of Appeal.

The essence of section 10(1)(a) is that it is an offence for a Crown Servant to "maintain a standard of living above that which is incommensurate with his present or past official emoluments" unless "he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living." This oversimplifies the law because of the existence of section 10(l)(b), which renders other conduct closely related to section 10(l)(a) an offence. There is abundant authority for the proposition that whether or not two offences are created, they may be pleaded in the same count in an indictment or charge sheet without being held to be duplicitous. Critical to the case was the true nature of the offence and a correct analysis of the elements thereof. The important reason was that the Attorney General as appellant was anxious to stress the extent of the burden on the prosecution in such a case, bearing in mind what the Privy Council had said in *Lee Kwong-kut,* that whether exceptions to article 11(1) will be justifiable will depend *primarily* on whether the primary responsibility for proving guilt remains on the prosecution.

Relying on an earlier Privy Council decision of *Mok Wei-tak v R*,[12] the Court of Appeal held that the offence was maintaining a standard of living which could not be explained -- the burden of explaining it being on the accused. The Privy Council in *Mok Wei-tak* and also in *Lee Kwong-kut* recognised that in reality this meant proving the absence of corruption. However, as the Court of Appeal

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[12] [1990] 2 AC 333.

observed, that did not leave the prosecution with a simple case of proving Micawber's formula for misery: expenditure simply greater than income. That was not a formality in most cases and required, in essence, a significant or unreasonable disproportion between expenditure and income.[13] In other words, the disproportionality must be sufficiently egregious to call out for an explanation. Bokhary JA recognised that what the prosecution had to prove was more complex, making the fullest allowance for the extended investigatory powers of the ICAC. Later in his judgment Bokhary JA noted that once the expenditure had reached a threshold level of unreasonable incommensurateness, the smaller the disproportion, the easier it would be to give an explanation.

Against the nature of the elements of the offence which the prosecution was held to have to prove, Bokhary JA observed that in the normal run of things, the person best able to prove the existence of an explanation of excess expenditure over emoluments would be the defendant. The standard was described as the "mere" balance of probabilities.

The Court of Appeal recognised that the provision in section 10 was placed there to meet the difficulty, verging on impossibility, in proving direct corruption by civil servants. The difficulty was described as inherent.

It is right to recall that in the early parts of the judgment that the Court of Appeal referred to the nature of corruption in Hong Kong as

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[13] See, in particular, *Attorney General v Ho Pui-yee* [1981] HKLR 110, where the Privy Council establishes this notion of unreasonable disproportionateness.

"cancerous". This was a reference back to *Chong Ah-choi*. In coming to its conclusion the court considered: the nature of corruption in the Hong Kong context; the realities of presenting these cases to the courts; and where the primary burden of proof lies. The court overturned the decision of the District Court. Although the decision in *Chong Ah-choi* was not analysed in this way, I do not think that the results would have been different had they been. What made the difference? Both section 17 of the Summary Offences Ordinance and section 10 of the Prevention of Bribery Ordinance require an explanation to the court by the accused once primary facts are established. Although it would be idle to pretend that it is as difficult to detect offensive weapons cases as it is to detect either section 10 offences or direct civil service corruption, and equally it cannot be pretended that there is a parity of ease of proof, I believe the critical distinguishing factor was the perception of the nature of one problem over another and the priority accorded to one offence over the other. Does that mean that as murder is more serious than either offences under discussion that presumptions as to elements of murder are now justified (or, perhaps justifiable). The answer is clearly[14] no. But, the Court of Appeal gave itself room for manoeuvring to assess Bill of Rights issues which come before it in a wider context: the "substance and reality" approach of Bokhary JA. Both from a human rights perspective and from a more general perspective, the decision in *R v Hui Kin-hong Harry* intriguingly blends black letter law and

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[14] I do not want to be a hostage to fortune here. If the Hong Kong Government did so in, say, some crime wave or the like, then there might be an argument.

policy. In analysing Bill of Rights cases, the Court of Appeal -- if it continues down this road -- sets its face against not only the tabulated legalism of the old, but also against substituting a new form of such tabulated legalism for the old. The Court of Appeal seems far more interested in principles and policy than the strictures of black letter law -- even black letter human rights law.

The same stress on the seriousness of the problem (as opposed to the seriousness of the crime as such) may be seen in *R v lu Tze-ning*[15] where the Court of Appeal held that section 37C(2)(b) of the Immigration Ordinance[16] was consistent with article 11(1) of the Bill of Rights. Section 37C provided for an offence of being a member of the crew of a vessel in Hong Kong with unauthorised entrants (the politically -- and legally -- correct term for illegal immigrants) and that it is a defence for the crew member to prove that he did not know *and* had no reason to suspect that any illegal immigrant would be carried on the vessel. Penlington JA held that this provision passed Bill of Rights muster. In doing so he took account of the seriousness of the problem created by illegal immigration into Hong Kong and that it was "well nigh impossible" for the prosecution to prove that the accused knew the fact referred to in section 37C(2)(b).

B. THE CASES: STRICT LIABILITY

Despite the fact that offences of strict liability and absolute liability (the precise classification or borderline can be the subject of debate

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15 (1995) CA, Crim App No 428 of 1994, 7 April 1995.

16 Cap 115.

elsewhere) form, at least in numerical terms, the vast majority of criminal offences in Hong Kong, the issue has only surfaced in the Court of Appeal on one occasion. In *Attorney General v Fong Chin-yue and others*[17] the accused had been charged with offences which were held, as a matter of construction, to be strict liability. At trial, the magistrate held that offences of strict liability were inconsistent with the Bill of Rights and dismissed the charges. On appeal by case stated, the Court of Appeal observed that the fact that an offence is of strict liability does not of itself render it inconsistent with the Bill of Rights. In the context of offences of strict liability, there is nothing in the Bill of Rights which requires that the prosecution prove either that the accused intended to commit the conduct rendered criminal by the offence or had knowledge relevant to the offence. Further, nothing in strict liability offences violates the guarantees in article 11(1). The Court of Appeal implied into the offences -- which were held to be offences of strict liability -- a defence of honest and reasonable belief. The burden of establishing this was on the accused reminiscent of what the High Court of Australia was prepared to imply into some offences in *Proudman v Dayman.*[18] Where the offences are of the type which the Court of Appeal considered in this case -- where some element of knowledge was relevant -- the law seems to be now fairly settled. What may remain for debate are offences where by statute a defence of honest and reasonable belief is explicitly excluded. An example of that occurs in section 42(2) of the Road Traffic Ordinance

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17 (1994) 4 HKPLR 430.

18 (1941) 67 Crim LR 536.

which says, in the context of an offence of permitting another to drive without a licence "that it shall be no defence to prove that the person charged did not know that the driver was not the holder of a driving licence." The interesting thing may be how *Fong Chin-yue* impinges on such an offence. Severance of the offending part? A recognition that offences of either extremely strict or absolute liability are necessary? As Yogi Berra[19] said, "it ain't over 'til its over". I suspect it ain't even begun.

C. THE CASES: ARTICLE 12

Article 12 of the Bill of Rights has given rise to litigation in two distinct areas. The first concerns retrospective penalties. This is an important area and requires careful study because the implications -- both for the rights of the individual and the rights of the community to deter serious criminal conduct and set standards -- are great. The second, and more arcane, concerns changes in penalties and the right to the benefit of any reduced penalty created thereby. This is, frankly, a case study in a good and noble idea which was stretched (whether logically or not) to its extreme (and a silly extreme at that) and is the kind of thing which has the potential to give human rights a bad name.

Retrospective penalties came into sharp focus in a decision of Judge Britton in *R v Chan Suen-hay*.[20] The accused pleaded guilty to offences of dishonesty. The conduct which gave rise to those

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19 Baseball player and torturer of the English language.

20 [1995] 1 HKC 847.

offences occurred in 1988, which pre-dated the enactment of section 168E of the Companies Ordinance. That empowers the court to disqualify, for up to 10 years, a person from being a company director, etc, without leave of the court. The sting for present purposes is found in section 168T of the Ordinance, which extends to conduct giving rise to the offence which wholly occurred before the enactment of the Part containing section 168E.[21] Against that, the second sentence of article 12 prohibits a heavier penalty being imposed than the one which was applicable at the time when the criminal offence was committed. The issue was simple. Is what is done under section 168E a penalty? As the judge observed, if it is, then the retrospective effect of section 168E is repealed. If it is not, then unattractive as a retrospective law might be, it is good law.

The position of the prosecution is that this was not a penalty but a consequence of a civil nature and hence outside article 12. Reliance was placed on a previous case[22] on article 11(6) which prohibits punishment again for the same offence. Deputy Judge Britton rightly held that the present case gave rise to the same issue in substance. In the previous case, the High Court held that disqualification from driving because of an accumulation of driving points under the road traffic legislative scheme was not a penalty but a civil consequence and thus did not violate article 11(6). That view was supported by Canadian jurisprudence, which recognises that a civil punishment having penal effect is not decisive. The prosecution drew an analogy

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21 The power to disqualify where section 168T is relied upon is limited to 5 years.

22 *R v Wan Kit-man* [1992] 1 HKCLR 224.

between confiscation under the Drug Trafficking (Recovery of Proceeds) Ordinance[23] which has also been held to be consistent with the Bill of Rights.[24] Reliance was placed on the various modes in which such an order could be obtained and those pointed to the essentially civil nature of the disqualification. At the forefront of the argument for the prosecution was that the object of this legislation was to rid Hong Kong of directors who had been convicted of crimes of dishonesty and was for the protection of the public.[25]

The arguments for the accused focused on the discretionary nature of the order for disqualification. There was discretion as to whether the order should be made at all or, if made, as to the length of the disqualification. This, it was said, demonstrated that the disqualification was, in truth, penal in nature. Scottish authority for the proposition that discretion implies penalty was cited.[26] The argument was that the court should look behind the appearance and look to the realities of the situation.

The court held that the existence of discretion was decisive and that the disqualification was hence a penalty and inconsistent with article 12. It was described as "clearly punitive". The problem is that the learned judge does not say why discretion means penalty and

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23 Cap 405.

24 *Ko Chi-yuen* (1994) 4 HKPLR 152.

25 There remain those who are surprised that it should be asserted that directors of Hong Kong companies should be persons of good character.

26 *Coogans v McDonald* [1994] SLT 279.

nothing else. While it is true that the authorities relied upon by the prosecution only deal with mandatory disqualifications or confiscations, it seems to me that this is not to the point. The view of the judge is, with appropriate respect, simply argument by assertion. The learned judge then goes on to say that a "broad and purposive approach" is required. No argument with that. What is the result of that? The learned judge says that the purpose of article 12 is "to ensure that no one shall suffer a heavier penalty than that which existed at the time when the offence was committed." No argument with that. However, it does not answer the question which the judge correctly posed: Is this a penalty? The judge correctly observes that if the prosecution is correct, the fact of a shoplifting before the Japanese occupation could be relevant. That is entirely right. It is a shame that the judge did not stop at this point to wonder what the discretion was placed there for.

The learned judge held that this was a penalty and thus protected by article 12. He invited the prosecution to appeal. There has not been an appeal and there will not be an appeal[27] in this case. Not the least reason for this is that the learned judge said that even if he had held that this was not a penalty and was, as the prosecution argued,

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[27] There is an interesting question as to the correct mode of taking this matter on. The words of the case stated provision in section 84 of the District Court Ordinance demonstrate that this procedure is inapt. We could not use the powers of the Attorney General to apply for a review of sentence under Part IV of the Criminal Procedure Ordinance because that would be to deny the very position which the prosecution took in this case: it is not a sentence. Received wisdom is that the correct approach would have been judicial review.

a civil consequence, he would not have imposed a disqualification in any event on the merits. While it may be assumed that the Hong Kong Government necessarily accepts the correctness of the decision in relation to article 12, it is to be recognised that this is not an easy area of the law. Those directors, liquidators, etc, who have previous convictions for dishonesty which occurred before the coming into operation of this Ordinance should not yet breathe wholly easily. Although I do not have the formal authority of the Hong Kong Government to say this, I think there is one exception: the director who has a conviction for shoplifting before the Japanese occupation may breathe easily.

The second aspect of article 12 concerns the right of an accused to obtain the benefit of a reduced penalty. The issue arose out of changes to those parts of the Crimes Ordinance[28] which concern forgery and like offences. That part was in essence gutted and replaced by offences which broadly reflect the Forgery and Counterfeiting Act 1981. Under the old legislation, there was an offence with a fairly hefty penalty. An example is possessing forged dies. That attracted a penalty of 7 years.[29] That was repealed. An offence of possessing a false instrument with intent to (in essence, defraud) was created and an offence of possessing a false instrument *simpliciter* was created. The offence with intent carried 14 years. The offence of simple possession carried 3 years. The accused in each of

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28 Cap 200.

29 No specific intent was required under this section. However, if one was proved that was a relevant factor in aggravation of penalty.

these cases committed his conduct when the old law was in place but was sentenced after that had been repealed and the new law was in force. (You will notice that behind this tortured prose is an effort to avoid conceding that one provision was a direct replacement for the other.) The argument went that under the third sentence of article 12 the accused was entitled to be sentenced on the basis of the 3-year limit because this was the benefit of a reduced penalty.

Some quora of the Court of Appeal held that this argument was right and some said it was not. There are some interesting problems of *stare decisis* raised in this series of decisions. One of these cases[30] finally went to the Privy Council and at the date of writing the decision of their Lordships Board has not been given. Whatever the outcome, it seems to me that there cannot be anyone who could argue that when the legislature enacted the new forgery provisions, they intended that those who had committed offences which would have, on their facts, fallen within the more serious category, should by reason of the third sentence in article 12, fall into the less serious category of punishment. No one has attempted that feat of advocacy. The argument for these forgers has been on the basis: "don't look at me, that's what article 12 says and that's what he should get." I suspect that if you had put this scenario to the framers of the International Covenant on Civil and Political Rights, that it would somehow have been excluded.

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30 *R v Chan Chi-hung* [1993] 3 HKPLR 243. The Privy Council held that if the conduct of the accused fits into the more serious offence had he been charged after the enactment, he would not be entitled to the benefit of a lesser penalty: *Chan Chi-hung v R* [1995] 2 HKC 721. See Preface to this Volume.

E. THE CASES: THE RIGHT OF THE ACCUSED TO BE INFORMED IN A LANGUAGE HE UNDERSTANDS OF THE NATURE OF THE CHARGE AGAINST HIM

It is right to recognise that the official language of the courts of Hong Kong is an issue of great importance. It is an issue which excites understandable passion and not a great deal of consensus other than that there should be a greater use of Chinese in the courts of Hong Kong. After that is agreed there is a wide range of opinions as to the means by which this is to be achieved, the pace of it and so on. It is an area where wise and well-meaning people can and do disagree -- often strongly so.

Enter on to this stage a man who received a summons to go to court. The summons was in English -- an official language of the court which issued it. The man was a Chinese.[31] He finally came to court and the magistrate then presiding caused the summons to be read out in Chinese. He pleaded not guilty and the matter was set down for trial. The matter came on for trial. At trial the presiding magistrate (who was not the magistrate who had caused the summons to be read to the accused in Chinese) stayed the proceedings because he held that the right to be "informed promptly and in detail in a language he understands of the nature and cause of the charge against him" had been violated. The Attorney General appealed by case stated.

The appeal was reserved to the Court of Appeal. The Court of

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31 There was some debate in this case as to whether this man spoke English and to what extent.

Appeal placed great reliance on the fact that that charge had been read to the accused in Chinese. With respect to the Court of Appeal, it is not plain whether the matter was decided on the basis that what happened was not a violation of article 11(2)(a), it was a violation but was an acceptable derogation, or it was a violation but the remedy (the stay of proceedings) granted under section 6 of the Bill of Rights Hong Kong Ordinance was misconceived. A similar provision appears in the European Convention on Human Rights.[32] It would appear on the European authorities that what occurred here would not have been regarded as a violation of the European provision.[33] The Court of Appeal accepted without too much difficulty that a permanent stay of proceedings was misconceived. There was no evidence that the accused had suffered any prejudice by the course of action.[34] The Court of Appeal noted the movement towards the greater use of Chinese in the courts of Hong Kong and that soon summonses will be issued in both English and Chinese.

What the Court of Appeal did not deal with is that even in a perfectly bilingual legal system the problem does not go away. It matters not to a person who speaks only Russian or Vietnamese that

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32 Article 6(3) of the European Convention on Human Rights.

33 See *Brozicek v Italy*, European Court of Human Rights, Judgment of 19 December 1989, Series A, No 167, 12 EHRR 371 and *Kamasinski v Austria*, European Court of Human Rights, Judgment of 19 December 1989, Series A, No 168, 13 EHRR 36.

34 Indeed the magistrate refused the application of the prosecution to cross-examine the accused as to whether he had suffered any prejudice.

a summons served on him is in English *and* Chinese. If the position of the magistrate was held to be correct (that such a summons is a nullity) then the criminal who is lucky enough not to speak Chinese or English and who is proceeded against by summons[35] in Chinese or English or both enjoys a virtual immunity from prosecution. In short, despite what was asserted in the headlines and editorials, this case did not have very much to do with the greater use of Chinese in the courts. The problem would have arisen no matter what the language of the accused was, provided it was a language other than that of the summons. The problem will simply cut down -- by about 95% -- when the system is bilingual.

F. CONCLUSIONS

Many of the points I would seek to make at this stage have already been made. In the sphere of human rights and the criminal law the courts have demonstrated with the utmost clarity a concern for a combination of broad principle (as opposed to tabulated legalism) and the practical reality of Hong Kong. It is in maintaining this balance that the courts have developed a larger theme of Hong Kong solutions to Hong Kong problems. To me that theme applies to the majority of cases whatever the result -- for or against the Attorney General, for or against the accused. No doubt the courts will continue to be vigilant to ensure that practicality and the particular needs of Hong Kong do not wrongly override the principles enshrined in the Bill of

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[35] The person who is arrested is informed of the charges in a different way. This issue only really arises in summons cases.

Rights. Tentatively: so far so good.

ARTICLE 10 OF THE BILL OF RIGHTS: ITS IMPACT ON ADMINISTRATIVE LAW, AND RECENT DEVELOPMENTS

PHILIP J DYKES[1]

Article 10 of the Bill of Rights provides:

"Equality before courts and right to fair and public hearing

All persons shall be equal before the courts and tribunals. *In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.* The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." (emphasis added)

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[1] Barrister. Former Assistant Solicitor General, Attorney General's Chambers.

[Eds] The discussion in this paper should be read subject to *R v Town Planning Board, ex parte Kwan Kong Co Ltd* (1995) HCt, MP No 1675 of 1994, which was delivered after this paper was written. See Preface to this Volume.

1. Article 10 of the Bill of Rights is based on article 14 of the International Covenant on Civil and Political Rights ("ICCPR"). In the administrative law context, the most important part of the article are the words:

> "In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

2. In the context of international human rights jurisprudence, the most useful source for guidance to the legal content of the article is the case law of the European Commission of Human Rights and the European Court of Human Rights on the first sentence of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").[2] That sentence of article 6 reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The drafting history of this article makes clear that it is based on early drafts of article 14 of the ICCPR.

3. The right under article 10 of the Bill of Rights can be summarized as a right to *judicial procedure* in the circumstances covered by the article. It is not the same thing as access to a court.

4. Case law of the European Commission of Human Rights makes

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2 European Treaty Series, No 5, vol 213, p 221 (1953).

clear that article 6 of the European Convention is not limited to private law disputes.

5. In order for article 10 of the Bill of Rights to be engaged in an administrative law context there has to be a determination of rights and obligations.

DETERMINATION OF RIGHTS AND OBLIGATIONS

6. Case law of the European Convention distinguishes between individual rights and obligations on the one hand, and rights and obligations which are incidental to citizenship and are not therefore private rights, on the other hand. The former are protected; the latter are not. An individual has the right to the protection of article 10 of the Bill of Rights in a challenge to his tax bill. Article 10 of the Bill of Rights does not come into play if, however, he chooses to challenge his liability as a citizen to comply with demands by the tax authorities that he should supply details of income and assets for the purposes of an assessment.

7. Case law of the European Convention has helped identify "rights and obligations" in the administrative law context by identifying situations where article 6 of the European Convention has been engaged:

i. Disputes over access to, or membership of, a profession licensed by public authorities;

ii. Disputes over entitlement to social security benefits;

iii. Disputes over compulsory purchase and other expropriation procedures which have an impact on

interests in or over land;

iv. Disputes over the grant or revocation of licences granted by public authorities permitting an individual to enter into, or carry on with, a particular economic activity.

8. There has to be a "determination". In the administrative law context this means a decision which has direct and, subject only to rights of review or appeal, final legal consequences for the parties.

9. Not all administrative decisions having direct legal consequences are necessarily "determinations". For example, an administrative decision to suspend a licence pending a full inquiry will not be a "determination" of the right to carry on with the licensed activity if there are in existence procedures whereby the affected licensee can challenge the decision to suspend the licence temporarily or the licence is assured of a speedy hearing of the full inquiry.

10. A good test of whether there has been a "determination" is the existence of legal sanctions consequent upon the administrative decision, eg penalties for doing an act without a licence when a licence is required by law.

A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

11. A *tribunal* is an authority which has power to decide legal disputes. Its decisions are binding on the parties. A tribunal can be a single decision-maker or can be composed of several decision-makers.

12. There is no requirement of competence under article 6 of the European Convention. Therefore, there is no case law on the subject.

In the administrative law context, competence under article 10 of the Bill of Rights is probably a requirement that the tribunal be properly equipped to deal with the subject matter of the dispute.

13. The requirement of *independence* means independence from the parties to the dispute and the ability to formulate its own opinion about facts and matters in dispute. It also means that its decision cannot be reviewed except by a court or tribunal that is also independent.

14. In the administrative law context, the European Convention has shown that it does not require a formal division between tribunals and the executive such as is the constitutional norm for judicial appointments. So long as there are checks and balances which work to ensure actual independence then the fact that a tribunal is *appointed by a public body* which may have an interest in its determinations is not necessarily fatal to its independence.

15. The requirement of *impartiality* means that members of tribunals must have no preconceptions or views about a dispute. There must be no individual or collective bias. This is a subjective requirement.

16. The requirement of impartiality also means that a tribunal must be composed in such a way as not to give the appearance of partiality. A tribunal which had as a member a close relative of a party to proceedings before it would not be impartial. This is an objective requirement.

17. The requirement that the tribunal be *established by law* is a requirement that guards against the establishment of ad hoc administrative tribunals by the executive.

THE IMPORTANCE OF RIGHTS OF REVIEW AND APPEAL

18. The jurisprudence of the European Convention makes clear that the requirements of article 6 of the European Convention are satisfied so long as at some stage in the determination of a dispute over rights and obligations a tribunal which is competent, independent and impartial is able to make a conclusive determination of the right or obligation in question. It is important to bear in mind that article 10 of the Bill of Rights has this horizontal aspect.

19. In the administrative law field, this practice means that a tribunal which does not wholly fulfil the requirements of article 10 of the Bill of Rights can nonetheless finally determine rights and obligations so long as there is a right of appeal on the merits. This right of appeal is often a right of appeal to a court but it may be to another administrative body.

20. Where there is no right of appeal on the merits from a body which does not comply with the requirements of competence, impartiality and independence there will be a violation of article 10 of the Bill of Rights. Where there is only a right of appeal on a point of law or a right only to judicial review of the tribunal's determination, the requirements of article 10 of the Bill of Rights may not be met in a particular case.

ARTICLE 10 OF THE BILL OF RIGHTS IN ACTION

21. The High Court and the Court of Appeal reviewed article 10 in the following three important cases:

(i) *R v Town Planning Board, ex parte Auburntown Limited*;[3]
(ii) *Business Rights Ltd v The Building Authority*;[4] and
(iii) *R v Lift Contractor's Disciplinary Board, ex parte Otis Elevator Company (HK) Ltd.*[5]

22. In *R v Town Planning Board, ex parte Auburntown Limited*,[6] the applicant sought judicial review of a decision of the Town Planning Board to draw up an interim development permission area plan under the Town Planning Ordinance[7] which regulated use of land in the New Territories. The applicant owned land adversely affected by restrictions in the plan designating land "green belt". The applicant's case was that its "right" to use land had been subject to an adverse determination by the TPB which was composed of "official" members such as the Secretary for Planning, Environment and Lands and the Principal Town Planner. The Town Planning Board was neither independent nor impartial. Therefore, there had been a violation of article 10 of the Bill of Rights.

23. The case was decided in favour of the Town Planning Board. It was held that the making of draft development permission area plans was a legislative function delegated to the Town Planning Board and there was therefore no "determination" of private law rights such as to engage article 10. Those rights were only engaged when a

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3 (1994) 4 HKPLR 194.

4 (1994) 4 HKPLR 43.

5 (1995) CA, Civ App No 184 of 1994, 11 April 1995.

6 (1994) 4 HKPLR 194.

7 Cap 131.

landowner sought to be exempted from the application of the general legislative scheme by making an application for planning permission. In the event of a refusal by the Town Planning Board, there was a right of appeal to the Town Planning Appeal Board which was an independent tribunal.

24. In *Business Rights Ltd v The Building Authority*, the appellant owned a plot of land in Shek O village. He built a 3 storey house on it without first obtaining permission from the respondent. The appellant refused to comply with the respondent's requirement that the building be demolished. The Building Authority then obtained a closure order from a District Court judge who was bound to make such an order if satisfied that the respondent had established that the appellant had been given notice and that it was necessary to close the building to carry out the demolition works.

25. The appellant appealed against the order of the District Court judge on the basis that the "rubber stamping" by the judge of the decision of the respondent, coupled with the fact that the only avenue of appeal against a closure order was to a tribunal which had as one of its members a nominee of the respondent, meant that article 10 of the Bill of Rights had been infringed.

26. The appeal was dismissed because the Court of Appeal determined that no "right" protected by article 10 of the Bill of Rights existed. When the closure order was made, the appellant's right to develop his land within the scheme of control set by the respondent under the authority of the Buildings Ordinance[8] had been determined by the respondent's earlier adverse decision not to permit the illegal

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[8] Cap 123.

structure to remain. Although the demolition order was made on the authority of a District Court judge the making of the order was not a judicial act.

27. Two of the judges (Power VP and Litton JA) observed that simply because the Building Authority could nominate a tribunal member did not mean that the tribunal was not independent and impartial. The third judge (Nazareth JA) expressly dissociated himself from these observations.

28. In *R v Lift Contractor's Disciplinary Board, ex parte Otis Elevator Company (HK) Ltd Civil*,[9] the respondent had successfully argued in the High Court that the Disciplinary Board appointed by the Director of Electrical and Mechanical Services under the provisions of the Lifts and Escalators Ordinance[10] to inquire into infractions of safety regulations infringed article 10 of the Bill of Rights. The Director of Electrical and Mechanical Services appealed.

29. The High Court judge found that the Board was not an independent tribunal because the Director, who was empowered to appoint a Board for the purpose of an inquiry, was also required to be a member of the Board or to send a representative to take his place on it.

30. In the Court of Appeal, counsel for the Director did not seek to argue that the finding of the judge at first instance -- that the Board was not independent -- was wrong. Instead, counsel argued that right of appeal to the High Court against a determination of the Board

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9 (1995) CA, Civ App No 184 of 1994, 11 April 1995.

10 Cap 327.

under section 11I of the Lifts and Escalators (Safety) Ordinance[11] provided the article 10 guarantee because under the Rules of the Supreme Court, Order 55, rule 3(1), an appeal to the High Court was an appeal by way of re-hearing.

31. The Court of Appeal accepted the correctness of counsel's argument for the Director, and noted that demands of flexibility and efficiency in making decisions in the health and safety context meant that there was often good reason for having a first tier decision-making body that was not "independent and impartial".

32. Two of the judges (Litton JA and Nazareth JA) expressed regret that counsel for the Director had not argued that requirements of article 10 of the Bill of Rights could have been fulfilled if the Director took administrative measures to distance himself (or his representative) from the business of prosecuting the charge. Liu JA made it clear that he was only prepared to allow the appeal on the basis of the existence of a right of appeal to the High Court.

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[11] Cap 327.

THE RIGHT TO VOTE AND TO BE ELECTED: "THROUGH THE LOOKING-GLASS"

GLADYS LI QC[1]

*E*very lawyer with Marxist tendencies who aspires to resolve the irresolvable contradictions which practice of the law in this jurisdiction constantly throws up should have near at hand a copy of *Through the Looking-glass* by Lewis Carroll. There one can find an apposite quotation for every event or situation. The passage which springs most readily to my mind as an appropriate comment on where we are today with article 21 of the Bill of Rights is this exchange between Alice and the White Queen:[2]

The White Queen	"It's very good jam".
Alice	"Well, I don't want any *to-day,* at any rate."
The White Queen	"You couldn't have it if you *did* want it.. . . The rule is, jam to-morrow and jam

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1 Barrister. Chairperson, Hong Kong Bar Association. Deputy Chair, JUSTICE.

2 From L Carroll, *Through the Looking-glass* (London: Macmillan, 1934), Chapter 5, "Wool and Water".

yesterday -- but never jam *to-day*."

Alice — "It *must* come sometimes to 'jam to-day'".

The White Queen — "No, it can't.. . . It's jam every *other* day: to-day isn't any *other* day, you know."

BACKGROUND MATERIAL

Article 21 of our Bill of Rights is, as you all know, our domestic version of article 25 of the International Covenant on Civil and Political Rights (ICCPR)[3]. Article 21 provides as follows (article 25 wording where different bracketed):

> "Every permanent resident [citizen] shall have the right and the opportunity without any of the distinctions mentioned in article 1(1) [article 2] and without unreasonable restrictions--[:]
>
> (a) [T]o take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) [T]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) [T]o have access, on general terms of equality, to public service in Hong Kong [his country]."

Article 25 is strikingly similar to article 21 of the Universal

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[3] The ICCPR was adopted by the United Nations General Assembly on 16 December 1966: *United Nations Treaty Series*, vol 999, p 171.

Declaration of Human Rights (UDHR).[4] For those of you, like myself, who have dipped into, rather than made a systematic study of, the various human rights instruments, there is a helpful chapter in McGoldrick's *The Human Rights Committee*[5] which contains a brief account of the origins and the drafting of the two Covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[6] and the ICCPR.

The Human Rights Commission, which was established by the Economic and Social Council of the United Nations under article 68 of the United Nations Charter, had as one of its first tasks the drafting of an International Bill of Rights. This resulted in a draft Declaration which became the UDHR which was adopted by the United Nations General Assembly on 10 December 1948.[7] At the same time, a draft Covenant was produced by another working group of the Commission which much later developed into the two Covenants.

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4 The UDHR was adopted 10 December 1948, GA Res 217A (III). Reproduced in A Byrnes & J Chan (eds), *Human Rights & Public Law: Human Rights Sourcebook* (Singapore: Butterworths 1993), at pp 238-242.

5 D McGoldrick, "The Origins, Drafting, and Significance of the International Covenant on Civil and Political Rights" in *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1990) pp 3-43.

6 The ICESCR was adopted by the United Nations General Assembly on 16 December, 1966: *United Nations Treaty Series*, vol 993, p 3.

7 D McGoldrick, supra note 5.

Article 21 of the UDHR declares:

"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

Therefore, this article explicitly refers to the right of the individual as being "to take part in the government of his country". It also expresses in the clearest possible terms that the legitimacy of a government is based upon the will of the people and that the will of the people is to be derived from elections by universal and equal suffrage.

The answer to the question why a different wording should have been adopted in article 25 of the ICCPR is probably to be found in the *travaux préparatoires* of the ICCPR. I must confess that I have not attempted the task of going through them but reference to Bossuyt's *Guide to the Travaux Préparatoires* shows that a proposal to use the words "to take part in the Government of the State" was rejected in favour of the more general wording.[8]

The Human Rights Commission completed its work on the draft

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[8] M Bossuyt, *A Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987), at pp 471-478.

Covenants in 1954 and in sessions held from 1954 to 1966, the Third Committee of the UN General Assembly scrutinised the draft Covenants, article by article.

During the session of the Third Committee at which this article was adopted, the representative of the United Kingdom delegation is recorded as saying in giving the delegation's position on the article:

> "Of all the principles set forth in article [25] which were basic to the British system of democracy none was more important than that of universal and equal suffrage; it would therefore bear restatement even at the cost of repetition. It should be made clear, however, that the use of the word 'equal' did not imply that each vote should be guaranteed identical weight by means of some kind of proportional representation in the electoral system. According to the Annotations each State had its own electoral system. The more direct system was better suited to the United Kingdom than proportional representation. Of course, each vote carried equal weight in the sense that there was only one vote per person and it was cast for a member of the House of Commons who had exactly the same rights and duties as any other member."

In December 1966, the United Nations General Assembly adopted and opened for signature the two Covenants. Upon signing the ICCPR in September 1968, the United Kingdom Government expressed the following reservations:

> "First, the Government of the United Kingdom declare their understanding that, by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail.

> Secondly, the Government of the United Kingdom declare that:
> ...
>
> (c) In relation to Article 25 of the Covenant, they must reserve the right not to apply:
>
> (i) Sub-paragraph (*b*) in so far as it may require the establishment of an elected legislature in Hong Kong . . .
>
> (ii) Sub-paragraph (*c*) in so far as it applies ... to the employment of married women in the Civil Service of ... Hong Kong".[9]

Upon ratification in May 1976, the United Kingdom maintained the declaration in respect of article 1 made at the time of signature. However, in the time between signature and ratification, the United Kingdom or possibly the Hong Kong Government had come to terms with whatever difficulty they had had in applying sub-paragraph (c) to the employment of married women in the Civil Service of Hong Kong because this reservation was dropped. Instead, the United Kingdom Government reserved the right not to apply sub-paragraph (b) of article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.

I do not dwell on articles 1, 2 and 3 of the ICCPR here, but it is important to recognise the extent of the obligations put upon the States Parties to the Covenant to implement its provisions and to remember this aspect because in "domesticating" the ICCPR in the

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[9] Reproduced in P Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), at p 464.

Bill of Rights and turning them into enforceable rights, albeit against government and public authorities only, the wording of the articles in the ICCPR have had to be altered. I would only observe in relation to the first reservation of the United Kingdom Government that it does not appear to have any bearing on the article under discussion.

"VERY GOOD JAM"

I interpose to observe that the United Kingdom Government has acceded to a number of international instruments in which political rights had been expressed in similar terms to article 25. The Sovereign (White Queen) had in fact recognised that it was very good jam. The view has been put about that at various points in Hong Kong's history, the people of Hong Kong (Alice) have said "I don't want any *to-day* at any rate", mostly in the immediate aftermath of the War and much later on, in 1987-1988. From the reservation expressed by the United Kingdom Government to the application of article 25(b) which was ultimately reproduced in section 13 of the Bill of Rights Ordinance, we can see clearly that our White Queen was telling us that we couldn't have jam if we *did* want it, the rule being jam tomorrow and jam yesterday but never jam today.

GENERAL COMMENT ON THE CONTENT OF ARTICLE 21(B)

The rights in article 21 are declared to be the rights of every permanent resident, unlike most of the other rights enshrined in the Bill which extend to everyone.

Although article 21(b) does not refer in terms to any particular body in respect of which there must be genuine periodic elections, nor

does article 21(a) refer in terms to taking part in the government of the State, it has not been suggested that the right to vote and be elected would be satisfied by providing genuine periodic elections only to bodies which play no executive or legislative role in government. Thus, it would be very difficult to sustain an argument that article 21(a) and 21(b) would be satisfied solely by elections to District Boards even though they are now wholly elected.

The right to participate in public affairs and to do so by electing freely chosen representatives is widely recognised both in relation to international instruments and domestic constitutions or charters to be rights of fundamental importance.

> "The political freedoms discussed . . . are fundamental in two senses. Individual 'self-government' is crucial to individual autonomy and dignity. And only where there is authentic popular sovereignty can the individual hope to enjoy the other rights enshrined in the Covenant as well as the economic, social, and cultural rights guaranteed in the other Covenant."[10]

Albeit in the context of the United States Constitution, Mr Justice Black, in delivering the majority opinion of the Supreme Court in *Wesberry v Sanders*,[11] expresses similar sentiments (at 492):

> "No right is more precious in a free country than that of having

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10 K J Partsch, "Freedom of Conscience and Expression, and Political Freedoms", in L Henkin (ed), *The International Bills of Rights* (New York: Columbia University Press, 1981), pp 209-245 at p 244.

11 376 US 1, 11 L ed 2d 481, 84 S Ct 526.

> a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

To like effect in the context of section 3 of the Canadian Charter of Rights and Freedoms is the statement of McLachlin CJ in the case of *Dixon v British Columbia*:[12]

> "Viewed in its textual context, the right to vote and participate in the democratic election of one's government is one of the most fundamental of the Charter rights. For without the right to vote in free and fair elections all other rights would be in jeopardy."

LEE MIU-LING AND LAW PIU V ATTORNEY GENERAL[13]

THE CHOSEN BATTLE-GROUND

When a challenge to the functional constituency system for inconsistency with article 21(b) of the Bill of Rights was first discussed, the present functional constituency system was no more than a twinkle in the Governor's eye. In fact, it may have been so

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12 (1989) 59 DLR (4th) 247 at 257.

13 (1995) HCt, MP No 1696 of 1994, 21 April 1995. [To be reported in (1995) 5 HKPLR].

> [Eds] The Court of Appeal rejected the appeal of Lee Miu-Ling: *Lee Miu-ling v Attorney General* (1995) CA, Civ App No 145 of 1995, 24 November 1995. In December 1995, the Court of Appeal failed to grant leave to appeal to the Privy Council. See Preface to this Volume.

long ago that the electors of Bath had not even cast those fateful votes. The then functional constituency system was estimated to enfranchise no more than 114,000 of whom roughly 70,000 were registered to vote and the geographical constituencies had an eligible electorate of around 3.7 million of whom approximately 1.94 million were registered. The functional constituencies returned 21 members to the Legislative Council and the geographical constituencies 18 from 9 double-seat constituencies, with the balance of the Legislative Council consisting of 18 appointed and 3 "ex officio" members.[14]

By the time that Lee Miu-ling had finally been successful in obtaining legal aid and the proceedings launched, the legal landscape had changed. The Letters Patent had been amended to provide for a fully elected Legislative Council consisting of 20 members to be returned by geographical constituencies, 30 by functional constituencies and 10 by the Election Committee. More importantly, article VII(3) of the Letters Patent had been amended to provide:

> "Nothing in this Article shall be construed as precluding the making of laws which, as regards the election of the Members of the Legislative Council, confer on persons generally or persons of a particular description any entitlement to vote which is in addition to a vote in respect of a geographical constituency."[15]

What had been article VII(3) was displaced to become article VII(5).

> "The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the

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14 R Daryanani (ed), *Hong Kong 1994: A Review of 1993* (Hong Kong: Hong Kong Government, 1994) pp 26-28.

15 Hong Kong Letters Patent 1994.

> Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong."[16]

The electoral laws, the subject of challenge, had changed. The franchise of the old functional constituencies remained much the same but the 9 new functional constituencies, it was estimated, enfranchised an additional 2.7 million voters. The eligible electorate in geographical constituencies had been increased by the lowering of the voting age to 18 and it was estimated that the eligible electorate had therefore increased to 3.9 million[17], leaving approximately 1 million eligible to register for voting who had no entitlement to register in any functional constituency. Also, an Election Committee constituency was established with an electorate consisting of District Board members for which the method of election was to be a single transferable vote system.

A question also arose as to whether Lee Miu-ling was now eligible to register as a functional constituency elector in the ninth new functional constituency, the Community, Social and Personal Services functional constituency. So Mr Law Piu, who was a retired person, was joined as a party. In the end, the argument proceeded on the basis that Lee Miu-ling was not qualified to register in any functional constituency.

Of course, for every Legislative Council election, the landscape has been changing but this was the first time the electoral laws

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16 Hong Kong Letters Patent 1994.

17 R Daryanani (ed), *Hong Kong 1995: A Review of 1994* (Hong Kong: Hong Kong Government, 1995) pp 35-38.

provided for a fully elected Legislature.

THE ARGUMENTS

In the end, the arguments turned on a few points, leaving a lot of grounds unexplored.

For the plaintiffs, it was argued that it was possible to have a functional constituency system which did not infringe article 21(b) so long as the system enfranchised all who would be eligible to vote in geographical constituencies and so long as, whatever the functional groupings, the system ensured rough equality in terms of the size of constituencies. Reference was made to the *travaux préparatoires* for the discussion which had taken place on the meaning of the words "universal and equal suffrage" and in particular to the requirement that each vote carried equal weight. We also drew on the Canadian jurisprudence in the context of challenges to the drawing of electoral boundaries, the cases of *Dixon*[18] and *Re Electoral Boundaries Commission Act*[19] in the Canadian Supreme Court, to argue that relative equality of voting power was embraced in the notion of equal suffrage. Essentially, the case put was that it was for the government to justify *this* functional constituency system excluding as it did approximately 1 million eligible voters and with grossly disparate sizes of electorate in the functional constituencies.

For the government, reliance was put on the amendments to the

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18 *Re Dixon and Attorney General of British Columbia* (1989) 59 DLR (4th) 247.

19 [1991] 1 SCR 158, 81 DLR (4th) 16.

Letters Patent and the fact that the Sovereign had unfettered power to amend the Letters Patent in any way she chose, that the ICCPR recognised that different states are at different stages of political development and account of that had to be taken in the context of Hong Kong. Of central importance to the government's argument was the effect of the United Kingdom reservation that there was no right to have elections to the Legislative Council at all. Of course, the arguments were put much more elegantly than this.

Although reference was made to the origins of the functional constituency system and the supposed rationale as articulated in the *Green Paper* of 1984[20] and the *White Paper* of 1984[21], no attempt was made to defend the system as being a reasonable restriction on the right to vote.

THE DECISION

Perhaps the most significant aspect of the decision of Keith J was the acceptance of the principle that article 21(b) of the Bill of Rights would require that every permanent resident be accorded the same number of votes of equal weight in electing members of the Legislative Council. However, he decided that the plaintiffs had no standing to challenge the disparate sizes of the electorates in the

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[20] Hong Kong Government, *Green Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Hong Kong Government, 1984).

[21] Hong Kong Government, *White Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Hong Kong Government, 1984).

functional constituencies since they were not themselves eligible to register in any functional constituency. Even if that were wrong, he held that as the purpose of the functional constituency system was to give different sectional interests a voice of their own in the Legislative Council and as these different sections would inevitably vary in size, at this stage in the political development of Hong Kong, the variation in size could be justified.

He accepted the plaintiffs' argument that so far as the Legislative Council was concerned, once the Legislature was to be elected, section 13 of the Bill of Rights Ordinance did not save a system of election which infringed article 21(b).

The knock-out punch against the plaintiffs' case was article VII(3) of the Letters Patent. This was somewhat surprising since it had not been argued for the government that any particular paragraph of article VII dominated any other. Yet this was precisely the effect of Keith J's decision that article VII(3) expressly mandated the passing of electoral laws which derogated from the "one man, one vote" principle and that article VII(3) could not read as consistent with article VII(5) of the Letters Patent. This is of course a pure point of construction.

THE EFFECT

The plaintiffs, like Alice, had dared to say that sometimes it must come to jam today. But the White Queen has arranged matters such that today never comes. That is the effect of Keith J's decision. Article VII(3) mandates this most basic aspect of the content of the right to vote, and that is that.

The case is under appeal so I cannot say much more on the matter for now, except to turn back to the *Looking Glass* world.

Alice "There's no use trying . . . one *can't* believe impossible things."[22]

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[22] From L Carroll, *Through the Looking-glass* (London: Macmillan, 1934), Chapter 5, "Wool and Water".

COMPATIBILITY OF THE BILL OF RIGHTS AND THE BASIC LAW

YASH GHAI[1]

I. THE BILL OF RIGHTS ORDINANCE

(A) THE CONTENTS OF THE ORDINANCE

The Bill of Rights Ordinance ("Ordinance")[2] was enacted in June 1991. It follows very closely the substantive terms of the International Covenant on Civil and Political Rights ("Covenant") which was applied to Hong Kong in 1976. The Covenant was applied to Hong Kong by the British with some reservations, eg, that the legislature and the executive would not necessarily be democratic or based on one person one vote. The Ordinance is based on the Covenant without those provisions to which Britain had entered a reservation.

The rights guaranteed by the Ordinance are many.[3] Some of

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1 Sir Y K Pao Professor of Law, University of Hong Kong.

2 Cap 383.

3 These rights are the: (1) entitlement to the rights of the Ordinance without discrimination such as those based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; (2) right to life; (3) prohibition of torture, inhuman treatment, slavery or imprisonment for inability to fulfil a contractual obligation; (4) right to liberty and security of the person; (6) right of persons deprived of their liberty to be treated with humanity and respect;

these rights appear to be granted in absolute terms, while others may be limited by criteria laid down in the Ordinance. The only truly absolute rights are the prohibition against torture, inhuman treatment and slavery or servitude, and imprisonment for failure to fulfil a contract. Some others may seem absolute, but reasonable restrictions on them are allowed (eg, the right to equality or the presumption of innocence). Some rights are protected against arbitrary restriction or deprivation (eg, right to life, or unlawful interference with privacy, family, home or correspondence). Others may be restricted to protect national security, public order, public health, morals, or the rights

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(7) right to liberty of movement; (8) right to a fair hearing before a person may be expelled from Hong Kong; (9) equality before the courts and the right to a fair and public hearing; (10) prohibition of retrospective criminal offences or penalties; (11) right to recognition as a person before the law; (12) protection of privacy, family, home, correspondence, honour and reputation; (13) freedom of thought, conscience, religion, association, opinion and expression; (14) right of peaceful assembly; (15) right to marry and found a family, prohibition of forced marriages, and equal rights of spouses in marriage; (16) right of every child to the protection of law as is justified by his or her status, and to registration after birth and to a name; (17) right of every permanent resident to take part in the conduct of public affairs, directly or through chosen representatives; to vote and contest elections; and to have equal access to the public service; (18) right of minority communities to enjoy their own culture, profess their religion and use their own language; and (19) equality before and equal protection of the law, so that there may be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

and freedoms of others. These are: freedom of movement, freedom to manifest one's religion or beliefs, freedom of expression, right of peaceful assembly and the freedom of association.

Apart from these grounds, a restriction is in principle valid if it is made in or provided under law and it is reasonably connected to or necessary for the legitimate objective it is aimed at ("rational") and is proportionate to that objective, ie, that it is not unnecessarily extensive or wide ("proportionality"). Thus a law which restricts the movement of a person for health reasons must relate to the necessity of preventing the spread of a dangerous and contagious disease. Or the right to assembly can only be restricted if an assembly poses a real threat to law and order; the Court of Appeal has said that this right does not confer a right of assembly on those who conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that those so assembled will commit a breach of the peace or will by such conduct provoke other persons to commit a breach of the peace.[4] A restriction must also be imposed in good faith and not arbitrarily -- which is indeed a general principle of administrative law.

There is now a great deal of case law and scholarly writing on the limits of the restrictions. A balance is struck between the rights of individuals and the needs of society and administration. On the whole, courts are reluctant to override restrictions if otherwise good administration or law and order are seriously adversely affected. The general approach has been set out recently by the Privy Council when it is said that "the issues involving the Hong Kong Bill should be

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4 *R v To Kwan-hang; R v Tsoi Yiu-cheong* (1994) 4 HKPLR 356.

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. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature".[5]

That case concerned the presumption of innocence, and the Privy Council held that it was proper to require a defendant to prove that he did not know that the goods of another person that he was holding at that person's request were the proceeds of drug trafficking.

It is in line with that approach that the Court of Appeal has upheld the provisions which impose the burden on a defendant who has in his possession cargo in circumstances that give rise to a reasonable suspicion that there is intent on his part to export the cargo without a manifest, of disproving that intent.[6] The court reasoned that smuggling was sufficiently serious to justify the restriction on the presumption of innocence; and that the restriction was rational, as being connected to the suppression of smuggling, and that it was proportionate to that objective. More recently, the Court of Appeal has held that the provisions in the Prevention of Bribery Ordinance which impose on a civil servant, who has assets in excess of what can

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5 *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72 at 100.

6 *R v Wong Hiu-chor and others* (1992) 2 HKPLR 288.

be expected to accrue from his salary, to prove that he did not obtain them unlawfully, are valid. It recognised that the provision was a serious limitation on the presumption of innocence but balanced that with the gravity and incidence of corruption.[7]

The effect of the provisions about restrictions on rights is that they ensure that the government must act reasonably and in good faith, and that the legislature must carefully assess social needs and impose restrictions no wider than strictly necessary to meet these needs. In this way the rules about restrictions ensure efficient but fair administration.

Section 5(1) provides for wider restrictions in the situation of an emergency.[8] An emergency can be called only for serious threats to the "nation" (which presumably means the Hong Kong Special Administrative Region ("HKSAR") in this context). The restrictions must be provided under law, and must be rational and proportionate, although the courts are likely to allow the legislature and the executive wider latitude in determining what is rational and proportionate than in ordinary times.

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7 *R v Hui Kin-hong, Harry* (1995) CA, Crim App No 52 of 1995, 3 April 1995.

8 Section 5(1) provides:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken which derogate from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law."

Section 5(2) imposes further limits on the extent to which restrictions may be placed on rights during an emergency. First, they must not be inconsistent with Hong Kong's obligations under international law (other than the Covenant itself). Secondly, they must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Thirdly, the following rights cannot be derogated from (apart from any limitations expressly allowed in the Ordinance itself): the right to life; protection against torture or inhuman treatment; protection against slavery or servitude; prohibition against imprisonment for breach of contract; prohibition against retrospective criminal offences or penalties; the right to recognition as a person before the law; and the freedom of thought, conscience and religion.

(B) THE STATUS AND EFFECT OF THE ORDINANCE

Although the purpose of the Ordinance is to implement the Covenant, it does not enjoy any special status. It is an ordinary Ordinance of the legislature, whose effect on other laws is determined by the normal rules of the common law. This means that laws passed before enactment of the Ordinance will be affected by it, but that future laws will not. A general rule is that those who have to interpret different laws or statutes -- whether administrators or judges -- should aim to interpret them in such a way that the laws or statutes are consistent with one another. But if it is not possible to so interpret them, then the later statute will prevail over the previous. These rules of interpretation are expressly incorporated in the Ordinance. Section 3 says of legislation prior to the Ordinance:

"(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 inconsistency, repealed."

Section 4 deals with the effect on legislation passed after the Ordinance and says:

> "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."

The effect of this section is that while attempts will be made to interpret subsequent legislation in such a way that it does not conflict with the Ordinance (since the Ordinance sets out the Covenant as applied to Hong Kong), if the legislation is clearly in conflict with the Ordinance, that legislation and not the Covenant will apply.

The Ordinance does not therefore in any way limit the powers of the legislature. However, an amendment to the Letters Patent made at the same time as the Ordinance was passed gives a superior status to the Covenant. That amendment now appears as article VII(5).[9]

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[9] "The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is

The Letters Patent therefore entrench the Covenant and not the Ordinance directly. In a case where the validity of post-1991 legislation is in question, the court may look, for convenience, to the Ordinance as an authoritative account of the Covenant as applied to Hong Kong within the terms of the Ordinance. But in law it is the Covenant which might affect the application of a post-1991 Ordinance, and not the Bill of Rights Ordinance. This position was taken by the High Court in *R v Lum Wai-ming*[10], which concerned the validity of a post-Bill of Rights Ordinance legislation -- the Dangerous Drugs (Amendment) (No 2) Ordinance -- which referred to the Letters Patent and not the Ordinance to determine the validity.

Even if it may be argued that the Letters Patent entrench the Ordinance, the position after 30 June 1997 will be that the Ordinance will lose the protection of the Letters Patent which under article 8 of the Basic Law will cease to be part of the law of the HKSAR. The Ordinance will be ordinary legislation. It will not control subsequent legislation and will not by itself restrict the legislative competence of the HKSAR legislature. In fact, the validity of its own provisions will be determined by the Basic Law, which will be superior to ordinary legislation. After 30 June 1997 the validity of all laws will be determined by the Basic Law, not the Ordinance.

It may well be that the Ordinance will be regarded as the implementation of the ICCPR in accordance with article 39. If so, it will indeed enjoy a special status under the auspices of the Basic Law.

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inconsistent with that Covenant as applied to Hong Kong."

10 (1992) 2 HKPLR 182, [1992] 1 HKCLR 221.

I discuss below some implications of this position.

II. THE HUMAN RIGHTS PROVISIONS OF THE BASIC LAW

The continued application of the Ordinance after 30 June 1997 depends on its compatibility with the Basic Law. Article 8 provides that all pre-1 July 1997 Ordinances will continue to apply unless they are incompatible with the Basic Law. Article 160 gives the Standing Committee of the National People's Congress ("NPCSC") the power to determine, on the establishment of the HKSAR on 1 July 1997, which Ordinances (or parts thereof) are inconsistent with the Basic Law. Therefore it is necessary to examine if the Ordinance is inconsistent with the Basic Law. In order to do so it is necessary to see if the Ordinance is inconsistent with any of the provisions of the Basic Law, particularly its own provisions for the protection of rights, and whether it limits the powers of the legislature and the executive given under the Basic Law.

The Basic Law protects rights in two ways: (a) it lists specifically a number of rights; and (b) it provides protection through the "indirect" incorporation of the Covenant (article 39). Chapter III of the Basic Law lists a number of rights, but further rights are provided in other parts of the Basic Law. Most of the rights are available to all residents of HKSAR.[11] Some are restricted to

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[11] The following rights are available to all Hong Kong residents: (1) equality before the law; (2) freedom of speech, press and publication; (3) freedom of association; (4) freedom of assembly, of procession and of demonstration; (5) the freedom to join trade unions and to strike; (6) the freedom and liberty of the person; (7) prohibition of torture; (8) prohibition of unlawful

permanent residents with a right of abode.[12] Others are restricte permanent residents who are Chinese nationals who have no rig abode elsewhere. In addition, the indigenous inhabitants of the Territories enjoy some special rights.

Most rights are expressed in absolute terms. Those which not may have a formula "in accordance with the law" (the rig vote and stand for elections; the right to social welfare) or a refer to "unlawful" or "arbitrary" (freedom and liberty of person; pri of home or correspondence). It may be assumed that despite

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or arbitrary deprivation of life; (9) privacy of person and hc (10) the freedom of movement within the HKSAR and to e or leave Hong Kong; (11) the freedom of conscience religious belief and practice; (12) the freedom of occupat (13) the right to engage in academic research, literacy artistic creation and other cultural activities; (13) the freedo marriage and the right to raise a family; (14) the protectio the law and the legal process (including access to confide legal advice and legal service, access to courts, and to jud remedies including against the executive authorities and t personnel); (15) the presumption of innocence; (16) the rig a speedy and fair trial; (17) common law procedural safegu in civil and criminal trials; (18) the right to own and e property and protection against its confiscation wit compensation; (19) and the right to social welfare. In addit the Basic Law protects the role of non-governme organisations in religion, education, health, culture and sp

[12] The additional rights of permanent residents are those to s for and vote in elections; and in principle only they ma appointed to public services.

absolute language, rights may be qualified. The criteria for restrictions are to be found in the second paragraph of article 39 to which I now turn, one of which is that restrictions must be prescribed by law.

The second method of protection is by stipulating that the Covenant as applied to Hong Kong shall remain in force and that it shall be implemented through the laws of the HKSAR (article 39). The second paragraph of the article goes on to say that:

> "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the preceding paragraph of this Article."

The result of article 39 would therefore seem to be that the rights in the Covenant as applied to Hong Kong are to be enforced in the HKSAR and that they are to be implemented through domestic laws. And secondly, that the restrictions on rights must, to be valid, satisfy the criteria established in and under the Covenant. The Covenant is therefore entrenched and acts to limit the legislative and executive powers of the HKSAR.

Like the Ordinance, the Basic Law also provides for restrictions on rights in an emergency. Article 18 says that if the NPCSC decides to declare a war or decides "by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity and is beyond the control of the government of the Region", it may declare an emergency and apply the "relevant national laws" in the HKSAR. The grounds for declaring an emergency are thus similar to those under the Ordinance. But without a detailed examination of the relevant Chinese law, it is difficult to say whether the permissible

restrictions are also similar. Article 18 seems to assume that national emergency laws will apply only after the HKSAR's emergency laws have failed to bring the situation under control.

Finally, there are some restrictions on rights that are expressly authorised under the Basic Law. There are various derogations from the principle of equality, as there are different categories of residents bearing different rights (including indigenous inhabitants of the New Territories). One person-one vote type of democracy has been postponed beyond the foreseeable future. And, article 23 requires the HKSAR to enact laws which would have the effect of restricting various rights -- those of free expression, assembly, and political participation.[13]

Many of the restrictions implied in this article would be justified under the normal rules for limitations on rights, although the blanket prohibition on contacts of HKSAR bodies with foreign political bodies may be questionable under international rules. However, even here a great deal will depend on how "political" is defined (as the Basic Law allows HKSAR non-governmental organisations "in fields such as

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[13] Article 23 reads:

> "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies."

education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organisations" to "maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organisations": article 149). The restrictions allowed under this article also depend on how widely sedition or state secrets, etc, are defined. It must be remembered that under article 23 these laws are to be made by the HKSAR, that article 11 says that the HKSAR cannot make any laws which contravene the Basic Law, and that article 39 is to the effect that no restrictions on rights should contravene the Covenant as applied to Hong Kong.

III. THE COMPATIBILITY OF THE ORDINANCE WITH THE BASIC LAW

Before turning to this question, it may be useful to state some general conclusions that flow from the above discussion.

(1) There is considerable overlap between the rights given in the Ordinance and the Basic Law. However, the overlap does not result in the inconsistency of the Ordinance with the Basic Law. It is not unusual in most legal systems (including China and Hong Kong) to have overlaps.

(2) In some respects, the rights in the Ordinance and the Basic Law supplement one another. In so far as the Basic Law has rights not provided under the Ordinance (these include rights to jury trial, property and social welfare) this poses no problem as far as the consistency between them is concerned.

(3) The fact that the Ordinance has rights which are not

mentioned expressly in the Basic Law (these include the prohibition against slavery and servitude, the right to recognition as a person, and the rights of minorities) does not create an inconsistency since the Basic Law provides that "Hong Kong residents shall enjoy other rights and freedoms safeguarded by the laws of the HKSAR" (article 38). In this way the Basic Law recognises that Hong Kong residents may enjoy rights and freedoms additional to those specified in the Basic Law itself.

(4) However, it is not clear that the Ordinance confers any rights which are additional to the Basic Law. For apart from expressly specifying some rights, the Basic Law incorporates in article 39 all the rights in the Covenant as applied to Hong Kong (which are the rights in the Ordinance). Article 39(2) makes it clear that restrictions of rights under the Basic Law must meet the same criteria as that in the Ordinance -- thus there are no inconsistencies which might otherwise arise from differential scope of limitations.

(5) It is necessary to refer to those provisions of the Basic Law which might be seen to conflict with the Ordinance.

(a) One of them is the protection of the traditional rights of the indigenous inhabitants of the New Territories (which may not be consistent with the equality provisions of the Ordinance). The only justification for these rights appears to be that they are historical, but it is unlikely that that would be a sufficient justification under the Ordinance.

(b) The various provisions on the exclusive rights of Chinese nationals who are permanent residents of Hong Kong without a right of abode in a foreign country might seem at first sight to be a

violation of the equality provisions of the Ordinance. However, these special rights are not difficult to justify either under general principles of preference for nationals in political rights prevailing in almost all states or on rational grounds (as only persons with unequivocal links to the HKSAR should exercise these rights). It is probable therefore that these provisions do not conflict with the Ordinance.

(c) There may be a clash between the Ordinance and article 23; whether there is would depend on the way in which article 23 is implemented. Most of the restrictions implicit in article 23 would be justifiable under the tests of legitimate objectives, rationality and proportionality. Doubt may remain about the ban on political ties with foreign political organisations or bodies. Unless "ties" is defined to include all contacts, that ban too may be justifiable under the Ordinance.

It could be argued that when the HKSAR legislates to implement article 23 it has to be mindful of article 39 (since its own legislative power has to be exercised within the framework of the Basic Law, article 11). If this line of approach is valid, then it is the ICCPR which governs article 23 and not the other way around. Since the Ordinance is an authoritative statement of the ICCPR as applied to Hong Kong, it can also be regarded as governing article 23.

However, we have to consider the possibility when some part of article 23 cannot be implemented without a violation of the ICCPR (or the Ordinance), as is likely with the prohibition on political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies. This conflict could be handled in one of three ways. First, it may be argued that as article

39 appears after article 23 it takes precedence over article 23. Second, as article 23 is quite specific in terms of the kind of laws that the HKSAR must enact, it may derogate from the guarantees of article 39. Both these arguments are based on the specific rules of interpretation. The third approach would be to establish the broad purposes of the Basic Law. One of its principal purposes is to preserve the Hong Kong way of life and rights and freedoms that go with it. Restrictions on ties with foreign political bodies should be consistent with that purpose. Undoubtedly, if the purpose of those ties is to undermine stability or other people's rights in Hong Kong or China, the restrictions would be justified. This kind of purposive approach seems a good way to maintain the integrity of Hong Kong's systems that are guaranteed under the Basic Law in accordance with article 31 of the PRC Constitution and the principle of "one country and two systems".

(d) There may be some clash between the respective provisions on emergency powers. I have argued above that the reasons for the invocation of emergency are not in conflict, but the actual powers that may be exercised may conflict -- but this depends on the relevant national laws to be applied. If one takes the line that national laws will be applied only after all HKSAR powers (including emergency powers) have been exercised and found wanting, the two sets of emergency powers can be regarded as sequential (this will obviate some conflicts). In so far as powers under relevant national laws are wider than would be permissible under the Ordinance, the validity of these powers would be determined by the Basic Law and not the Ordinance. In this way one can argue that the restrictions on

emergency powers in the Ordinance refer to the powers exercisable by the HKSAR government in the ordinary way, but that these restrictions are ousted once greater powers are authorised by the NPCSC. In this approach, even on this point there is no conflict.

(e) If these attempts to reconcile the Basic Law and the Ordinance are rejected, it does not follow that the whole of the Ordinance is inconsistent with the Basic Law, and must therefore be repealed. The repeal is only to the extent of the inconsistency. It is a well accepted norm of jurisprudence that only those parts are repealed which are inconsistent, unless of course the statute would make no sense without the parts which are repealed. This view was adopted by the Court of Appeal in *R v Sin Yau-ming*[14] and implicitly by the Privy Council in *Attorney General Lee Kwong-kut*.[15]

(f) Article 39 of the Basic Law maintains in force the Covenant as applied to Hong Kong and requires its implementation in the laws of Hong Kong. The Ordinance does precisely that. It would be strange for the NPCSC to repeal the Ordinance, and for the HKSAR legislature to give effect to the Covenant (as it is required to do) in identical or largely identical form as the repealed Ordinance.

The better view is that the Ordinance is not only consistent with the Basic Law but that it is an implementation of the ICCPR in accordance with article 39. In that case it will indeed enjoy a superior status, and governs other legislation, previous as well as subsequent. In that case conflicts between it and the provisions of the Basic Law

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[14] (1991) 1 HKPLR 88, [1992] 1 HKCLR 127.

[15] (1993) 3 HKPLR 72. See also *R v Chong Ah-choi* (1994) 4 HKPLR 375.

will be inconsistencies internal to the Basic Law and to be dealt with in accordance with rules to resolve them.

(g) Even if the Ordinance is repealed, the Covenant will remain in force under article 39. Thus all the rights under the Ordinance will still apply, even if not through the Ordinance. All the laws of Hong Kong will remain subject to the Covenant.

(h) The conclusion in law therefore is that the Ordinance does not contravene the Basic Law.

D. POLITICAL CONSIDERATIONS

Finally, it is necessary to examine a number of arguments that have been raised against the continued application of the Ordinance. These arguments are based on what may be called "political factors", as I recognise that the interpretations of the Basic Law must be undertaken within a broad rather than a narrow legalistic framework.

(a) It is sometimes alleged that the Ordinance has affected significant changes in the legal and political system of Hong Kong contrary to the Joint Declaration and the Basic Law. Various laws have been held to be invalid as a consequence of its enactment, and some key legislation has been amended to remove administrative controls over rights of assembly, procession, association, and regulate the powers of the Independent Commission Against Corruption. The Ordinance has also altered the balance between the judiciary on the one hand and the legislature and the executive on the other. It has been alleged that these changes violate the provision (and understanding) of the Joint Declaration that "the laws currently in force in Hong Kong will remain basically unchanged" (article 2(3))

and that "the current social and economic systems in Hong Kong will remain unchanged, and so will the life-style" (article 2(5)). The Basic Law also has several references to the maintenance of previous laws and systems (eg, articles 5, 8, 18, 19, 40, 65, 81, 86, 87, 91, 94, 144, and 145). A related allegation is that the Ordinance and its consequences have seriously weakened executive authorities, and thus violate the Basic Law principle of an "executive led" political system.

These arguments need to be assessed carefully. The Basic Law has itself preserved expressly many features of the "previous system" (especially in providing a powerful executive, and in the economic and social systems). "Executive led" is not a term of art, and its structure and implications are to be gathered from the specific terms of the Basic Law, rather than from other modes of interpretation or arguments from principles. References to "previous laws" or "systems" are used in the Basic Law with varying effects: in some instances they are intended to entrench a previous law (as with the rights in civil and criminal trials, article 87); in other instances they are to provide guidance to the HKSAR (eg, 108, low tax policy); sometimes they are to indicate broad parameters of policies or relationships (as with education or the role of NGOs). Nor is the Basic Law a charter for total conservation of old laws and institutions. It establishes, for Hong Kong, an ambitious political agenda whose implementation requires fundamental changes from the old colonial system both during and after the transitional period. More generally, it is important to distinguish essentials from mere matters of detail as to change, and the essentials are to be gleaned from the General Principles in the Basic Law and China's Basic Policies to Hong Kong

from the Joint Declaration. It will be clear from them that the protection of human rights is fundamental to both. The Basic Law guarantees many rights as well as entrenching the Covenant. The enactment of the Ordinance and the revision of various laws, far from undermining the logic of the Basic Law, is in strict conformity with and furtherance of its objectives.

(b) Another argument is that the Ordinance has created uncertainty in the law due to the litigation that has resulted, particularly in areas where law and order may be affected (eg, presumptions of innocence, delays in trials, rights of refugees). It is an inevitable result of the introduction of legal guarantees of rights that doubts on the validity of some previous laws will arise, and, as in Hong Kong, where the question of rights can be litigated even in lower courts, that differing views on this question may be advanced. The experience of other countries which have introduced a Bill of Rights in recent years illustrates this: India, Canada, New Zealand, UK (through its membership of the European Convention of Human Rights), etc. However, their experience also shows that after the first few years many doubts and controversies are settled as the administration and courts develop general principles. This appears to have happened in Hong Kong as well. The Privy Council and the Court of Appeal have begun to establish these principles, emphasising the need to balance the rights of residents with the overall good of society.

Certainty is also enhanced by two other factors: (a) many provisions that may be regarded as of doubtful validity have already been litigated; and (b) the Hong Kong administration has, after

several years of study, identified ordinances which may be in conflict with the Ordinance and amended most of them. These developments have narrowed the scope of uncertainty.

In one way it is good for the smooth transition of sovereignty that these controversies are settled now. For they can arise even under the Basic Law; indeed two of the most litigated rights, the presumption of innocence (concerning the burden of proof) and fair and speedy trial, are also provided in the Basic Law (I am grateful to Johannes Chan for drawing my attention to this point).[16] And under article 39 (2), restrictions on the rights of residents can be challenged by reference to the Covenant. If all these questions were to arise for the first time after the transfer of sovereignty, it would indeed affect the smooth transition and may give the impression that it is only after the establishment of the administration of Hong Kong under Chinese sovereignty that rights have begun to be infringed. It is strange that the case for certainty is made by those who also support the concept of "executive led" and "current laws" remaining unchanged -- more potent sources of legal uncertainty being harder to imagine. And what do they say to massive changes in another Hong Kong system, the economy, with radical legislation governing the securities market and corporation, detracting from the "executive led" nature of commercial companies!

(c) It is sometimes argued that the effect of the Ordinance, through legislative changes and judicial decisions, is such that administration will become difficult as important executive powers will cease to exist. There is very little evidence for this. Numerous

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16 See p. 34, Note 55 supra.

countries, with rights more extensive than in the Ordinance, have experienced no particular difficulties. On the contrary, the legal protection of rights has assured the people and increased their loyalty to the state. The Ordinance has been in force for nearly four years, but there is no sign of a breakdown in administration. The senior courts have shown a cautious attitude towards the application of the Ordinance. Key police powers have remained intact as have those of the Independent Commission Against Corruption. If in future it is considered necessary to assume powers that have been repealed, the HKSAR legislature will not be prevented by the Ordinance from doing so. As has been mentioned before, the validity of such legislation will be governed by the Basic Law only. Legislation will need to be enacted under article 23 when undesirable political links of Hong Kong organisations with foreign organisations will be banned.

(d) The courts of the HKSAR will not be bound by the decisions of the Hong Kong courts or the Privy Council. They will be of persuasive authority, but the Court of Final Appeal will be free to depart from them if it is convinced that they were wrongly decided. It is also important to remember that after 30 June 1997 the ultimate responsibility for the interpretation of the Basic Law will lie with the NPCSC.

(e) The repeal of the Ordinance will not revive legislation which has been amended or declared by courts to be invalid (this follows from the general principle of the common law as well as Cap 1). It will be necessary for the legislature to enact fresh legislation -- which it can also do even if the Ordinance is not repealed, since the

Ordinance will not apply directly to it.

(f) Thus little will be achieved by the repeal of the Ordinance. On the other hand, its repeal will confuse the people, cast doubt on the scope of article 39 of the Basic Law, and create uncertainty in the law. But, in political terms, it will be interpreted as evidence of the lack of commitment of China to rights and freedoms of the residents of Hong Kong and thus ultimately to the Basic Law and "One Country, Two Systems". It will also send the wrong signals internationally.

IV. SUMMARY CONCLUSION

It would seem therefore that on both legal and political grounds, it would be a mistake to repeal the Ordinance. Colonialism has rightly been associated with the oppression of the people. The Ordinance seeks to restore to the people the rights that colonialists took away. It would be unfortunate if the resumption of sovereignty over Hong Kong by China were seen to be marked by a similar oppression.

CONCLUDING REMARKS

ANDREW BYRNES[1]

In the four years since the entry into force of the Bill of Rights, much has been achieved. This has been the result of efforts taken by many actors: the administration, the legislature, the courts, and especially non-governmental organisations which have consistently pushed each of these to further efforts. Yet it is important not to rest on one's laurels or, using Gladys Li's metaphor, to be content just with jam. Despite the efforts that have been made and the very real achievements, serious problems persist and need to be addressed with commitment and vigour.

THE STANCE AND INFLUENCE OF THE COURTS

Today we have focused primarily on the courts and litigation involving the Bill of Rights. Of course, we all know that litigation is only one aspect of the implementation of a Bill of Rights, indeed of any human rights legislation. Yet it is a critical arena because of the authoritative nature of the pronouncements of the courts and the influence that they wield on administrators, legislators and the community. The decisions of the courts have an important impact, a sort of washback effect, since the timid or hesitant legislator or the generous or hard-line administrator will take their cue from the tone set by the courts. A conservative reading of human rights guarantees

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that does not give effect to the spirit of a Bill of Rights may encourage reluctant or hostile administrators to dig their heels in on issues or to play it safe, their stance legitimated by the approach of the courts. A generous and expansive reading of human rights standards may encourage administrators to go further than they might otherwise have felt able to.

Today we have heard different assessments of the stance adopted by the courts; some of us have used the term "conservative", while Andrew Bruce would perhaps choose "cautious" and "sensible". Nevertheless, there is agreement that the courts have not shown a particularly great willingness to declare laws repealed on the ground of inconsistency with the Bill of Rights. Some believe that this attitude is inconsistent with the letter and spirit of the Bill of Rights in the light of its international origin and the relevant international case law. Others applaud the restrained approach of the courts.

The increasingly cautious or conservative approach of the courts has had a significant influence on the preparedness of the administration to give effect to the full scope of the guarantees. After all, if the Hong Kong courts are likely to reject a challenge to a provision -- assuming that the practical hurdles to bringing such an action are overcome -- then there is no compelling reason for the law to be changed if it is otherwise satisfactory. That the Hong Kong courts might have misinterpreted the international guarantees or failed to give them the interpretation that an international body might have given them is largely a matter for academic debate and of limited practical relevance, since it is the Hong Kong courts' pronouncements that are authoritative and there is no recourse to the Human Rights

Committee under the Optional Protocol for an independent international assessment of compliance with ICCPR obligations.

THE STILL NEGLECTED AND UNRESOLVED ISSUES

Despite the considerable discussion of the Bill of Rights since its enactment in 1991, there are a number of important substantive issues relating to its coverage about which nothing has been done and, so far as the government is concerned, nothing appears likely to be done.

One important issue is the problem created by the decision of the Court of Appeal in *Tam Hing-yee v Wu Tai-wai*.[2] In that case the Court of Appeal -- determinedly ignoring the legislative history of the Ordinance, the international obligations and comparable constitutional provisions elsewhere -- held that legislation could only be challenged under the Bill of Rights Ordinance when the litigation involves government or a public authority. This was never intended to be the effect of the Ordinance. This interpretation has led to curious and unreasonable results, and means that the Bill of Rights Ordinance fails to give effect to important obligations under the ICCPR. Yet the government has apparently begun to suffer from a bout of (self-induced?) amnesia, never mentioning in any public discussion that the interpretation rejected by the Court of Appeal was exactly the interpretation intended by the administration and which the Legislative Council Ad Hoc Group on the Bill of Rights was told the Bill of

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2 *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 261, [1992] 1 HKLR 185; [1992] LRC (Const) 596 (CA), reversing *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 1 (DCt). See also J Chan at pp 9-10, supra.

Rights Ordinance would have. The government has no plans to remedy the position, and has opposed efforts to do so.

Another continuing problem is the effect of s 3(2) of the Ordinance which repeals inconsistent prior legislation with effect from 8 June 1991. The fact that legislation will be discovered to have been repealed years after the enactment of the Bill of Rights Ordinance has been viewed as giving rise to considerable practical problems, and possibly acting as a deterrent for courts in declaring legislation inconsistent with the Bill of Rights.[3] This issue has not been directly addressed by either the administration or the courts. Despite the many amendments made to legislation that has given rise to concerns about consistency with the Bill of Rights, the problem may well still rear its head.

Another important aspect of the Bill of Rights Ordinance which has not been addressed is the "off-limits" areas of the statute, that is, the important areas of immigration in which, in the view of some, the rights guaranteed by the ICCPR and other applicable treaties are violated on a systematic basis in Hong Kong.[4] The recent litigation

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3 See G McCoy, "Problems in Litigation" in George E Edwards and Andrew C Byrnes (eds), *Hong Kong's Bill of Rights: The First Year* (Hong Kong: Faculty of Law, University of Hong Kong, 1993), pp 49, 54-55. See also J Chan at pp 21-27, supra.

4 See the *Concluding observations of the Committee on Economic, Social and Cultural Rights*, adopted on 7 December 1994, UN Doc E/C 12/1994/22, reproduced in *Bill of Rights Bulletin*, v 3, n 3, at Appendix C; Byrnes, "Will the Government Put Its Money Where its Mouth Is? The Verdict of the UN Committee on Economic, Social and Cultural Rights on Hong Kong's

challenging the consistency of the Hong Kong electoral system with the guarantees of the Bill of Rights and the ICCPR discussed by Gladys Li,[5] is another example of how the administration in conjunction with the United Kingdom government has used its power (in this case in the context of the issuing of Letters Patent) to prevent a court from adjudicating on the merits of a clear violation of human rights.

Another related dimension is the administration's and courts' approach to international treaty obligations. Hong Kong is bound by many obligations to guarantee human rights. However, as these guarantees have not been directly incorporated into domestic law, individuals in Hong Kong cannot bring an action before the courts in direct reliance on them. In some cases, the administration has clearly violated these obligations, and has relied in challenges before the courts on their non-incorporation as part of domestic law, despite the administration's obligation under international law to give them effect. The courts, applying the traditional common law approach, have on the whole tended to allow the administration to pursue this path. There is thus a need to give legislative recognition to significant human rights obligations which do not form part of domestic law at present and which, therefore, the administration is free to interpret (sometimes wrongly) without possibility of legal challenge before the courts.

A further aspect of the impact of the Bill of Rights has been its

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Human Rights Record" (1995) 25 *Hong Kong Law Journal* 156.

5 See G. Li at pp 109-123, supra.

contribution to the development of a more coherent system of review of administrative decision-making. Hong Kong now has a more highly developed system of administrative law then it did some years ago and the Bill of Rights has been important in creating the stimulus for the creation of independent bodies such as the Administrative Appeals Board to review administrative decisions on the merits. Unfortunately, what seems to be lacking is a comprehensive policy across government in relation to the review of administrative decisions by competent, independent and impartial tribunals.

ENFORCEMENT OF THE BILL OF RIGHTS

There have been relatively few cases invoking the Bill of Rights in the civil area, for reasons of cost and other problems involved in bringing litigation. The lack of effective alternative procedures for pursuing Bill of Rights cases has been unfortunate. The jurisdiction of the Commissioner for Administrative Complaints extends to complaints of violation of the Bill of Rights insofar as these may amount to "maladministration", but the Commissioner does not have the power to grant binding remedies. Unfortunately, the important opportunity which Hong Kong had to have an accessible and effective remedial procedure in the form of a human rights commission appears to have been squandered, the result of lack of commitment on the part of the administration and, indeed, its active opposition to independent initiative to introduce such a measure.[6] Such is the commitment of

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[6] See the draft *Human Rights and Equal Opportunities Commission Bill*, prepared by legislator Anna Wu Hung-yuk in 1994, which the Governor refused to permit to be introduced

the Patten administration to the democratic process and public debate in the legislature that the Governor refused to allow an independent proposal to establish such a commission even to be introduced into the Legislative Council. Although Hong Kong will have an Equal Opportunities Commission sometime in 1996, this is an inadequate substitute, since it will be limited in its substantive coverage and in its power to ensure that remedies are made available. What is particularly unfortunate is that even now the government is resisting amendments proposed by legislator Anna Wu and the Bills Committee studying the various equal opportunities bills which would broaden the powers of the Equal Opportunities Commission so that it could consider whether international treaty obligations in the area of discrimination are being given full effect in Hong Kong. This is yet another example of the government's lukewarm attitude to ensuring that there are accessible and effective remedies for violations of human rights that they have undertaken internationally to guarantee.

EDUCATION ABOUT THE BILL OF RIGHTS AND THE DEVELOPMENT OF A HUMAN RIGHTS CULTURE

Last week, I had the pleasure of giving a talk to a group of social workers on the Bill of Rights and its relevance for social workers. My opening question was: "Who has read the Bill of Rights?" Not a single hand went up. This surprised me, because human rights education, including education about the Bill of Rights, is one of the

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into the Legislative Council: See George Edwards & Andrew Byrnes (eds), *Hong Kong's Bill of Rights: Two Years On* (University of Hong Kong Faculty of Law 1995), pp 83-140.

areas where government and non-governmental organisations have done a great deal since the enactment of the Bill of Rights. But perhaps this incident, if representative, shows that we need to redouble our efforts and to find other ways to reach broad sections of the community. So, while much has been done, clearly much more needs to be undertaken.

REMEDIES AGAINST DISCRIMINATION

I have already alluded to the next topic: the coming anti-discrimination legislation. As you know, legal protection against private discrimination was an area left out of the Bill of Rights Ordinance when the Ordinance was finally enacted. Although as originally drafted the Bill of Rights was to apply to all persons, this gave rise to concern that the equality guarantees contained in what is now article 22 of the Bill of Rights would operate as a general anti-discrimination law governing both public and private discrimination. That view was, in my opinion, misguided on legal grounds, but it prevailed and the Bill of Rights Ordinance was enacted so as to apply "only" to government and public authorities. However, the government committed at that time to consider the introduction of legislation which would cover discrimination by private actors as well as government and public authorities. This commitment is now coming partly to fruition. The administration's Sex Discrimination Bill is scheduled to be voted on by Legislative Council next Wednesday, possibly with amendments which would make it a more effective and

wide-ranging piece of legislation.[7] The proposed disability discrimination legislation -- once again a government bill -- will also be voted on by the end of the session.[8] Also before the Legislative Council will be a number of Bills proposed by Anna Wu dealing with discrimination on other grounds, including age, sexuality, family responsibility and race.[9] They are likely to come up for vote of the Legislative Council before the end of the session.[10] Once again, the progress of these Bills has been disappointing, since the government has opposed them on substantive and procedural grounds (some of them trumped-up and barely plausible) at every turn -- while loudly proclaiming its commitment to equality "in principle". What is needed is not a declared commitment in principle and opposition in practice -- the government's preferred strategy -- but support for practical and

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7 [Eds] See now the *Sex Discrimination Ordinance* (No 65 of 1995).

8 [Eds] See now the *Disability Discrimination Ordinance* (No 86 of 1995).

9 See the *Equal Opportunities (Family Responsibility, Sexuality and Age) Bill 1995*, the *Equal Opportunities (Race) Bill 1995*, and the *Equal Opportunities (Religious or Political Conviction, Trade Union Activities and Spent Conviction) Bill 1995*. The Bills appear in the *Hong Kong Government Gazette*, 30 June 1995, Legal Supplement No 3. These Bills were in substance the same as the earlier omnibus Bill introduced by Wu in 1994, the *Equal Opportunities Bill 1994*, which appears in the *Hong Kong Government Gazette*, 1994 Legal Supplement No 3.

10 On 2 August 1995 a motion to read these Bills a second time was defeated, with the official members of the Legislative Council voting against the motion.

effective measures, including legislation, to render real guarantees against discrimination.

HONG KONG AND UNITED NATIONS HUMAN RIGHTS TREATY BODIES IN THE COMING YEAR

Finally, I would like to give a preview of coming attractions regarding Hong Kong's appearance before United Nations human rights treaty bodies in the next six months. As you may know, the United Kingdom government (with Hong Kong officials as part of its delegation) will appear before two United Nations human rights treaty bodies this year. The first hearing, before the Human Rights Committee, is likely to be held in late October 1995,[11] following the imminent submission of the fourth periodic report in respect of Hong Kong under the ICCPR,[12] the treaty which is partly incorporated in Hong Kong law by the Hong Kong Bill of Rights Ordinance and article VII(5) of the Letters Patent in the form of the Bill of Rights. The second hearing will be in November 1995 before the Committee

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[11] [Eds] The Human Rights Committee considered the report in respect of Hong Kong on 19 and 20 October 1995. It adopted its *Concluding observations* at its 1469th meeting on 1 November 1995: UN Doc. CCPR/C/79/Add.57 (3 November 1995).

[12] The report was issued as UN Doc CCPR/C/95/Add.5 and HRI/CORE/1/Add.62, and published by the Hong Kong government: *Fourth Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights* (1995).

against Torture,[13] which will consider the initial report in respect of Hong Kong submitted under the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment.[14] This is an important occasion, as it will be the first and last occasion under British rule that Hong Kong will appear before this particular committee.

Both these hearings provide a useful opportunity to review positive developments and to identify the areas where improvements need to be made. It is important that not just the government but members of the community be involved in that debate and the reporting process.

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13 [Eds] The Committee against Torture reviewed the report, together with those of the United Kingdom and its other dependent territories on 17 November 1995.

14 [Eds] The report submitted by the United Kingdom government in respect of Hong Kong was contained in UN Doc CAT/C/25/Add.6, pp 70-97 and published by the Hong Kong government: *Initial Report by Hong Kong under Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1995).

APPENDICES A-E

APPENDIX A

PRELIMINARY WORKING COMMITTEE STATEMENT ON THE BILL OF RIGHTS[1]

In the 17th Meeting of the Legal Sub-Group of the Preliminary Working Committee (of the People's Republic of China) held on 15-17 October 1995, the Legal Sub-Group put forward the following preliminary views on the Hong Kong Bill of Rights Ordinance:

The members reiterated that protection of the rights and freedoms of Hong Kong residents is an important component of the basic policy of the Government of the People's Republic of China towards Hong Kong. This basic policy has been written into the Sino-British Joint Declaration and has been incorporated into the Basic Law of the Hong Kong Special Administrative Region. However, the British Government decided to ignore repeated reiterations by the Government of the People's Republic of China of its basic principles and chose to enact the Hong Kong Bill of Rights Ordinance which has an adverse effect on the implementation of the Basic Law. Members took the view that section 2(3) of the Bill of Rights Ordinance on the principles and purposes of the Bill of Rights, section 3 on the effect

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[1] [Eds] This translation from the original Chinese Press Release was prepared by Johannes Chan.

of pre-existing law and section 4 on interpretation of subsequent legislation are inconsistent with articles 8, 11 and 39 of the Basic Law. Accordingly, members recommended that sections 2(3), 3 and 4 of the Bill of Rights Ordinance not be adopted as the laws of the Hong Kong Special Administrative Region. As to other problems of the Bill of Rights Ordinance, members recommend that they be dealt with in future by the Government of the Hong Kong Special Administrative Region.

The British/Hong Kong Government, by introducing, without consulting the Government of the People's Republic of China, a series of amendments to the pre-existing laws of Hong Kong to bring them in line with the Hong Kong Bill of Rights Ordinance, has violated the principle under the Joint Declaration and the Basic Law that the laws previously in force in Hong Kong shall remain basically unchanged. Some of these major amendments will weaken the administration of Hong Kong and are not conducive to the maintenance of stability of Hong Kong. These amendments include the Societies (Amendment) Ordinance (Ordinance No 75 of 1992), Television (Amendment) Ordinance 1993 (Ordinance No 22 of 1993), Amendments to the Telecommunications Ordinance 1993 (Ordinance No 22 of 1993), Amendments to the Broadcasting Authority Ordinance 1993 (Ordinance No 22 of 1993), Public Order (Amendment) Ordinance 1995 (Ordinance No 77 of 1995), as well as LN No 251-255 of 1995 amending the subsidiary legislation made under the Emergency Regulations Ordinance. Members recommended to the National People's Congress Standing Committee not to adopt as part of the laws of the Hong Kong Special Administrative Region these major

amendments. In order to avoid any legal vacuum, members further recommended the adoption of the pre-amended version of these legislation as the laws of the Hong Kong Special Administrative Region.

17 October 1995

APPENDIX B

STATEMENT ON THE HONG KONG BILL OF RIGHTS ORDINANCE (CAP 383)

SIR TI LIANG YANG, CHIEF JUSTICE [1]

1. I have outside of court expressed some personal views on the Bill of Rights Ordinance. I repeat those views here to inform the general public of what I have said in private.

2. I have expressed the view that section 3(2) of the Ordinance does two things which cause concern:

   (1) It gives the judicial organ legislative power.

   (2) It in effect raises the status of the Ordinance above the ordinary ordinances so that in reality the Ordinance

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[1] [Eds] This statement was issued by the Judiciary on behalf of the Chief Justice. See the Preface of this Volume for a brief comment on the Statement of the Chief Justice.

occupies a position between the Basic Law (as from 1 July, 1997) and the ordinary statutes.

The New Zealand model may well be a more preferable solution.

In other words, section 3(2) raises a number of concerns from a jurisprudential point of view:

(1) The power to repeal is a legislative function and not a judicial function. Section 3(2) in effect gives the courts a legislative function though it does not specifically say so. A practical difficulty is that Magistrate A and Magistrate B may hold different views on the same issue in different cases. The resulting chaos need not be specified.

(2) The true effect of section 3(2) is to raise the Ordinance above Hong Kong's ordinary laws in spite of the fact that the Ordinance may be repealed or amended like any statute (unlike the Canadian Charter of Rights, which is incorporated into the Canadian Constitution.) So instead of a "two-tier" system (that is, the Basic Law and the ordinary laws), the Bill comes in between and creates a three tier system.

3. The gist of the views which I expressed (purely as my own) can

be outlined as follows:

(i) It is cause for concern that our Bill of Rights Ordinance does not preserve the demarcation between the Judiciary and the Legislature as clearly as does, for example, New Zealand's Bill of Rights Act which, as I understand it, requires their Executive to bring to their Legislature's attention any bill (that is, proposed legislation) which appears to be inconsistent with their Bill of Rights. Therefore, New Zealand's system may be preferable to ours.

(ii) While the Bill of Rights Ordinance (unlike the Letters Patent now and the Basic Law in future) cannot entrench anything against future repeal by ordinary legislation, it might be thought to give the Bill of Rights some quality higher than that of ordinary legislation. That too is cause for concern.

4. There is an obvious difference between, on the one hand, views so expressed and, on the other hand, conclusions reached in an actual case after mature consideration having heard counsel and deliberated with other members of the court hearing an appeal. That difference is too obvious to require elaboration. It is equally obvious that I, like every other judge, would faithfully apply the law as he finds it. The Bill of Rights Ordinance is part of the fabric of the laws of Hong Kong and will be given effect

to in the courts whenever the occasion arises in accordance with its provisions.

17 November 1995

APPENDIX C

STATEMENT ON THE BILL OF RIGHTS ORDINANCE[1]

The Government has carefully studied the Chief Justice's comments on the Bill of Rights Ordinance (BORO). It notes that the Chief Justice does not suggest that the BORO is inconsistent with the Joint Declaration or Basic Law. It welcomes the Chief Justice's acknowledgement that the BORO is part of the fabric of the laws of Hong Kong and his commitment that it will be given effect to in the courts. The Attorney General has been asked for his considered opinion on the specific points raised by the Chief Justice. His views are attached.

The Government would like to take this opportunity to re-state certain key points concerning the BORO.

STATUS OF THE BILL OF RIGHTS ORDINANCE

The BORO incorporates into the law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. It was drawn up with full regard to the Joint

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[1] Statement issued by the Attorney General's Chambers.

Declaration, the Basic Law and the experience of other jurisdictions that had or were contemplating such a law. It is a law to meet the specific circumstances of Hong Kong.

The Joint Declaration and the Basic Law both provide that the ICCPR as applied to Hong Kong shall remain in force. The Basic Law further provides, in Article 39, that the ICCPR shall be implemented through the laws of the Hong Kong Special Administrative Region (HKSAR). This is precisely what the BORO does — it is a law implementing the provisions of the ICCPR as applied to Hong Kong. This is entirely consistent with Article 39 of the Basic Law.

The BORO has a status no different to that of any other Ordinances. Pre-existing legislation inconsistent with it is repealed to the extent of the inconsistency but this does not mean that the BORO comes in between other Ordinances and the Basic Law. There is nothing in the BORO or the Letters Patent which gives the BORO any status superior to that of other Ordinances. Like other Ordinances it will be subject to the Basic Law. What is entrenched by the Letters Patent now and by the Basic Law after 30 June 1997 is the ICCPR not the BORO.

REVIEW OF LAWS

The BORO and the laws which have been amended in the light of it are fully consistent with the Joint Declaration and the Basic Law.

Restoring laws which have been found to be inconsistent with the BORO and therefore with the ICCPR would bring these laws into conflict with Article 39 of the Basic Law. This provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force and that rights shall not be restricted in contravention of the Covenant.

By the same token, to leave laws untouched which were inconsistent with the BORO and therefore with the ICCPR would bring them into conflict with Article 39 of the Basic Law after 1997.

Since 1991, the Legislative Council has enacted 36 amending Ordinances or orders to bring existing legislation into line with the BORO. The issues involved have been approached with realism, and good sense balancing the protection of rights and freedoms with other needs of society such as to deal with serious crime. The amendments that have been made have not undermined the Government's authority or ability to govern. There has been no breakdown of law and order. Hong Kong people exercise their rights and freedoms in a responsible manner.

THE BILL OF RIGHTS ORDINANCE AND THE COURTS

Pre-existing legislation inconsistent with the provisions of the BORO is repealed, not by the courts, but by the BORO itself. In enacting the BORO, the Government and the Legislature determined that the courts should have the authority to decide how the BORO should be

applied in specific cases. The courts have faithfully performed their role and implemented the BORO as enacted by the Legislature.

It is noted that challenges under the BORO have been primarily concerned with provisions of the criminal law relating to the principle that it is for the prosecution to prove the accused's guilt beyond reasonable doubt. Through decisions of the Court of Appeal and Privy Council, the principles applied to such provisions are now well established. In reaching these decisions, the courts have taken care to balance individual freedoms with the public interest.

The BORO enjoys widespread support within the community. It has made the rights protected by the ICCPR justiciable in the courts of Hong Kong. It is a vital component in the protection of civil liberties and enhances the rule of law in Hong Kong. There is absolutely no reason to tamper with the Ordinance.

ATTACHMENT TO APPENDIX C

The specific points made by the Chief Justice, and our comment on them, are as follows:

(1) "The power to repeal is a legislative function and not a judicial function. Section 3(2) in effect gives the courts a legislative function though it does not specifically say so. A practical difficulty is that Magistrate A and Magistrate B may hold different views on the same issue in different cases. The resulting chaos need not be specified."

COMMENT: The role of the courts under section 3 is to decide whether or not challenged legislation is or is not inconsistent with the Ordinance. If a court decides that there is inconsistency, it will go on to declare that the relevant provision has been repealed *by section 3(2)* to the extent of the inconsistency. The repeal of inconsistent earlier provisions is effected not by a judge in the course of deciding a particular case, but rather by the legislature through section 3(2) of the Ordinance. This is made plain by Silke VP in *R v Sin Yau-ming* (1991) 1 HKPLR 88, 104, [1992] 1 HKCLR 127, 138 when he said this:

> "It needs to be emphasised that the only duty of this, or any other court, considering legislation is to decide whether that legislation is or is not

> inconsistent with the Hong Kong Bill. This, or any other court, does not repeal legislation. That is done by the Hong Kong Bill itself. This, or any other court, does not redraft legislation or for that matter make suggestions for the form of future legislation."

The court's function in applying section 3(2) is no different to the court's function in applying the common law principle upon which section 3(2) is based. That principle is that where two pieces of legislation are inconsistent, the later law repeals the earlier one to the extent of the inconsistency. An example of the application of this principle is *L v C* (1994) 4 HKPLR 388, [1994] 2 HKLR 92 where the High Court ruled that the time limit for applying for financial relief under the Affiliation Proceedings Ordinance had been impliedly repealed by a subsequent Ordinance.

There are other contexts in which the court's function is to rule on the compatibility of different pieces of legislation. For example, there are numerous Hong Kong cases where a court has had to decide whether subsidiary legislation is inconsistent with the Ordinance under which it is made, and therefore invalid.

Regarding the alleged "practical difficulty" of conflicting decisions by magistrates on the same issue, this is (and has been in practice) easily resolved by the Crown appealing one of the decisions to a higher court in order to get an authoritative ruling. Conflicting decisions can and do arise on non-BOR issues and are resolved in the

same way. This is a feature of the existing legal system, continuation of which is guaranteed under the Joint Declaration and the Basic Law.

(2) "The true effect of section 3(2) is to raise the Ordinance above Hong Kong's ordinary laws in spite of the fact that the Ordinance may be repealed or amended like any statute (unlike the Canadian Charter of Rights, which is incorporated into the Canadian Constitution). So instead of a 'two-tier' system (that is, the Basic Law and the ordinary laws) the Bill comes in between and creates a three tier system."

COMMENT: The true legal effect of section 3(2) is that inconsistent pre-existing legislation is repealed to the extent of the inconsistency. However, this does not mean that the BORO comes in between other Ordinances and the Basic Law. There is nothing in the BORO or the Letters Patent which gives the BORO any status superior to that of other Ordinances. The position will be the same after 30 June 1997 when the Basic Law will replace the Letters Patent as Hong Kong's constitutional instrument. Then, as with all other Ordinances, the BORO will be subject to the Basic Law, rather than, as now, the Letters Patent.

(3) "It is cause for concern that our Bill of Rights Ordinance does not preserve the demarcation between the Judiciary and the Legislature as clearly as does, for example, New Zealand's Bill of Rights Act which, as I understand it, requires their Executive to bring to their Legislature's attention any bill (that is, proposed legislation) which appears to be inconsistent with their Bill of Rights. Therefore New Zealand's system may be preferable to ours."

COMMENT: The New Zealand Bill of Rights Act 1990 requires the Attorney General to bring to the legislature's attention any provision of a bill that appears to be inconsistent with the Bill of Rights. This requirement as to *proposed* legislation needs to be understood in the context of the New Zealand system, under which there is no constitutional impediment to the enactment of legislation restricting human rights. In Hong Kong, however, Article VII(5) of the Letters Patent (which mirrors Article 39 of the Basic Law) prohibits the enactment of any law after commencement of the Bill of Rights Ordinance which is inconsistent with the ICCPR as applied to Hong Kong.

So far as *existing* legislation is concerned, the New Zealand Act prohibits a court from holding any enactment to be impliedly repealed by reason of inconsistency with the Bill of Rights. That provision represented a deliberate policy choice by the new Zealand legislature based on a range of local political and other factors. Similarly, the approach in section 3 of the Hong Kong Ordinance was a deliberate policy choice by the Hong Kong legislature, made in 1991 in the light of the particular circumstances of Hong Kong. In arriving at that choice, a number of different models were considered, including but not limited to the New Zealand one. The New Zealand model is but one of several different Bill of Rights models operating throughout the world.

The repeal-by-reason-of-inconsistency approach in section 3 of the Hong Kong Ordinance was chosen to give the Ordinance a direct impact in relation to existing legislation. It is worth recalling in this respect that the Administration's original proposal for a two-year "freeze" period for existing laws, during which time suspect laws would be reviewed and amended, was rejected by the Legislative Council in favour of a one-year freeze for six key Ordinances only. The commonly held view at the time was that the protection of human rights afforded under the

Bill of Rights should be made fully available as soon as possible and that the authority for deciding whether local laws are consistent with the Bill should be the Judiciary not the Administration or the Legislature.

(4) "While the Bill of Rights Ordinance (unlike the Letters Patent now and the Basic Law in future) cannot entrench anything against future repeal by ordinary legislation, it might be thought to give the Bill of Rights some quality higher than that of ordinary legislation. That too is cause for concern."

COMMENT: It is unclear what point is being made here. The BORO is a piece of ordinary legislation just like any other statute in Hong Kong. There is nothing in the BORO or the Letters Patent which gives the BORO any status superior to that of other Ordinances. It is not entrenched and has no overriding effect in relation to future legislation. What is entrenched, before 1997 by the Letters Patent and after 1997 by the Basic Law, is the ICCPR as applied to Hong Kong. The direction in section 4 of the BORO that all future legislation shall, if possible, be construed

so as to be consistent with the ICCPR as applied to Hong Kong, merely reflects this position.

Attorney General's Chambers

November 1995

APPENDIX D

THE PAST, THE PRESENT AND THE FUTURE OF THE HONG KONG BILL OF RIGHTS ORDINANCE[1]

BENJAMIN LIU JA

1. A lot of people of Hong Kong, especially those who are pro-British, showed a lack of confidence on the future of Hong Kong during the Sino-British negotiation on the future of Hong Kong. In order to allay their fear, the then British Foreign Minister Sir Geoffrey Howe introduced into Hong Kong within the shortest possible time the Hong Kong Bill of Rights Ordinance so as to strengthen the promise of Hong Kong remaining unchanged for 50 years. The Bill of Rights[2] is not

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[1] [Eds] This translation from the Chinese version of the paper was published in *Ming Pao* on 16 November 1995. The paper was distributed at a dinner reception for the Judges' Association of the People's Republic of China hosted by the Local Judges Association. Mr Justice Liu is the Chairman of the Local Judges Association. The translation was done by Johannes Chan.

[2] [Eds] The original is unclear and it is likely that this is a reference to the International Covenant on Civil and Political Rights or the International Bill of Rights.

the law of the United Kingdom or other Commonwealth countries, nor is it to be generally implemented by other means. However, it became law and was generally enforced in Hong Kong in just about a year. The then Deputy Minister of Justice of Canada, Mr Justice Strayer, was invited to come to Hong Kong to assist with the drafting of the Basic Law. Mr Justice Strayer had assisted the Canadian Government in introducing their Bill of Rights [the Canadian Charter of Fundamental Rights and Freedoms 1982]. During the three months he was in Hong Kong, Mr Justice Strayer had met with members of the Hong Kong judiciary. When I asked him whether the Bill of Rights would override the Basic Law, he did not give me a clear reply.

2. After the speedy enactment of the Bill of Rights in Hong Kong, it has been shown that the Bill of Rights has had great adverse impact on criminal and civil litigation; its adverse impact has particularly been felt in criminal law. The Bill of Rights has also exerted fundamental impact on judicial reasoning, judicial process and law enforcement agencies in such a way that it indirectly weakens the effectiveness of law enforcement agencies in the maintenance of public order. As to the implementation of the Bill of Rights, Professor David Bill [?] of the University of Toronto had commented that the Canadian Charter was both ambiguous and too flexible ("Talking Heads and the Supremes -- the Canadian Production of Constitutional Review" (1990), p

8). Those who are sceptical always said that the greatest beneficiary of a Bill of Rights is the lawyers and not the illegal immigrants or the criminals. Lord Goff of the Judicial Committee of the Privy Council in London, in his private discussion with Sir T L Yang on the Hong Kong Bill of Rights, also took the view that the Bill of Rights was inconsistent with the Basic Law.[3] Some academics also said that the Bill of Rights had made little contribution to members of society, but it created difficulties for the law enforcement agencies in carrying out their duties. The Bill of Rights also increased legal fees by creating unprecedented obstacles in legal proceedings. These are also the comments I frequently heard in private discussions with many judges in Hong Kong.

3. As to the future, the amendment or repeal of the Bill of Rights and the reinstatement of previous laws in Hong Kong by the Preliminary Working Committee/Preparatory Committee or the Hong Kong Special Administrative Region is not only a practical matter, but also a political question. Many people believe that human rights have been reasonably protected by the existing laws of Hong Kong, especially in view of the recently

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[3] [Eds] In reply to Mr Martin Lee who asked the judge to clarify this point, Lord Goff said that he had never expressed such view.

reinforced administrative law[4] and that Hong Kong was bound by international human rights treaties. The Basic Law has also implemented the international human rights treaty in Hong Kong law (Art 8 of the Basic Law: the British Government has already extended the ICCPR to Hong Kong).[5] The decision of the Preliminary Working Committee/Preparatory Committee or the Hong Kong Special Administrative Region will not bring any adverse effect to the laws of Hong Kong.

2 November 1995

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[4] [Eds] The original is unclear. It is likely be a reference to the amendment to the Commission for Administrative Complaints Ordinance.

[5] [Eds] The original refers to art 8 of the Basic Law, but it may be a mistake for art 39 which provides that the ICCPR as applied to Hong Kong shall remain in force.

APPENDIX E

THE HONG KONG BAR ASSOCIATION'S VIEWS ON THE STATUS AND EFFECT OF THE BILL OF RIGHTS ORDINANCE (CAP 383), LAWS OF HONG KONG

1. The Bill of Rights Ordinance (Cap 383) (the "BOR") embodies provisions of the *International Covenant on Civil and Political Rights* as applied to Hong Kong (ICCPR) which is an international treaty obligation dating from 1976 under which the United Kingdom undertook to ensure and guarantee basic political and civil rights for the inhabitants of Hong Kong.

2. The ICCPR binds the Hong Kong Government, as agent for the United Kingdom Government, to recognize and give effect to rights in domestic law in areas where, as a matter of international law, it is already so bound. The main difference between the ICCPR as applied to Hong Kong as a treaty obligation and the ICCPR as applied to Hong Kong in the BOR is that individuals under the BOR can go before Hong Kong courts to demand that those rights be recognized and protected by judges whereas a treaty, being an agreement between states, confers no right of access to the courts which are obliged to

implement domestic laws even though they may be recognized as being wholly inconsistent with treaty obligations.

3. It is clear as a result of cases heard under the BOR since its enactment that upon the ICCPR as applied to Hong Kong coming into force in 1976 the Hong Kong Government did nothing at the time to ensure that laws already in place were consistent with the new treaty obligations. It was not until the late 1980's after China had already agreed in the Joint Declaration to ensure that the ICCPR would continue to apply to Hong Kong after 1997 that the Hong Kong Government, for the first time, took its obligations under the ICCPR seriously. The end result was the enactment of the BOR in 1991 which repealed pre-existing legislation inconsistent with its provisions and the simultaneous amendment of the Letters Patent which now expressly prohibits the making of new legislation which is inconsistent with the ICCPR as applied to Hong Kong.

4. The BOR is a law made by the Governor, by and with the advice of the Legislative Council of Hong Kong, for the peace, order and good government of Hong Kong in accordance with *Article VII(1) of the Letters Patent.* It was enacted in June 1991 by legislators who considered the BOR to be in the best interests of the residents of Hong Kong. It was not a piece of legislation drafted and enacted in a hurry. The legislative history of the BOR shows that the best part of 2 years were taken up in

considering its form, content and likely effect on laws already in place and its status in 1997 as an ordinance which was previously in force within the meaning of *Article 8* of the Basic Law.

5. Many bodies and organizations with a direct interest in the form and content of the Bill were given an opportunity to make representations on the BOR before it became law. This included being given the opportunity to say why a bill of rights was not necessary or desirable. Many bodies and organizations responded to the invitation and changes were made to it the most significant being the removal of the provision which applied the Bill to everyone in Hong Kong with the result that the BOR is binding on the Government and public authorities only, and therefore anti-discrimination provisions which could have affected businesses were removed.

6. The BOR is not as a matter of constitutional law a "superior" law. It is however a very powerful law. It was intended that the BOR, by its general repeal provisions, would remove from the laws of Hong Kong all laws which were inconsistent with the ICCPR as applied to Hong Kong. Those provisions do not, however, make the BOR unconstitutional because it is within the competence of the legislature to enact wide ranging legislation with general repealing provisions to achieve a particular purpose just as it is also within the competence of the legislature to enact

detailed legislation repealing or amending existing laws to bring them into line with treaty obligations.

7. The purpose of the legislature in enacting the BOR was to incorporate into the law of Hong Kong provisions of the ICCPR as applied to Hong Kong. The ICCPR is a treaty obligation of the United Kingdom which it is required to implement through laws in Hong Kong under *Article 2(2)* of the covenant.

8. One method of implementation is through a Bill of Rights and so, without prejudice to existing or future methods of implementation, it was within the competence of the legislature in 1991 to enact the BOR for this purpose.

9. The continued implementation of the ICCPR as applied to Hong Kong after 1997 through laws is a treaty obligation of the PRC under the Sino-British Joint Declaration. That obligation has been recognized and repeated in *Article 39* of the Basic Law which requires the ICCPR to be implemented through the laws of the Hong Kong Special Administrative Region. Article 39 is in the following terms:

ARTICLE 39

> *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.*

10. Article 39 does not attempt to prescribe the way in which the provisions of the international treaty obligations are to be implemented. This is not surprising as states parties to treaties are given considerable latitude in choosing how to implement treaty obligations. When implementing a treaty dealing with basic human rights and freedoms one way of discharging the obligations under the treaty is through a justiciable Bill of Rights which repeals any pre-existing legislation which is inconsistent with the underlying treaty obligations.

11. Article 39 states that the rights and freedoms of Hong Kong residents can only be restricted by law and such restrictions must be consistent with restrictions which are permitted under the ICCPR. That means that the courts of the HKSAR are bound to give effect to the ICCPR if there is ever a question whether a Hong Kong law restricts rights and freedoms in a manner which is inconsistent with the ICCPR as applied to Hong Kong. Judges will be required to judicially review legislation to see if it comes up to the standards required by the Basic Law, i.e. consistency with the ICCPR as applied to Hong Kong.

12. Some people have said that the BOR is wholly novel because it requires unelected judges to judicially review laws made by the legislature and that is not right because it gives them too much power.
13. That is not right. The judicial review of legislation is nothing new. It is an integral feature of a system where laws are made by a legislature but are interpreted and applied by an independent judiciary who are required to interpret and apply law so as to give effect to the intention of the law-makers.
14. If a judge or a magistrate is required to construe the validity of any subsidiary legislation made by a body to which the legislature has delegated law-making powers the judge is engaged in judicial review of legislation when he is called upon to decide whether the subsidiary legislation is *ultra vires*. If so, this subordinate legislation will be declared null and void.
15. Where there is a constitutional hierarchy of law such as exists in Hong Kong today where some United Kingdom laws apply to Hong Kong the same principle applies. The Hong Kong legislature cannot, except in special circumstances provided for under the *Hong Kong Act 1985*, enact a law which is inconsistent with a United Kingdom law. If a question of inconsistency arises before a judge or magistrate he is bound to resolve it by declaring the local law either good or bad in the

light of the United Kingdom law. This is also the judicial review of legislation.

16. Judges are also involved in the judicial review of legislation whenever they are required to interpret one piece of legislation in the light of another and the later piece of legislation deals with the same subject matter. They apply an established legal principle which accords with common sense which is that the more recent law embodies the current intention of the legislature on the subject. If the two laws cannot be reconciled then it is the duty of a judge or magistrate to say so and declare that the later law embodies the will of the legislature and that the earlier law is repealed, in whole or in part, by the later one.

17. The intention of the legislature when it enacted section 3(1) of the BOR was that judges and magistrates should interpret existing legislation consistently with the BOR if they could. If they could not, then the will of the Legislative Council, expressed in section 3(2), was that inconsistent laws stood repealed from the date of the enactment of the BOR. This means that the repeal comes about through a legislative, and not a judicial, act.

18. If a law was enacted after June 1991 and its consistency with the ICCPR was called into question under the amended Letters Patent, then a judge or magistrate would have to perform the same task.

19. In reviewing legislation for consistency with established legislative or constitutional standards judges and magistrates in Hong Kong are called upon to do no more than what they have been trained, and are, by virtue of their office, required to do and have done in practice. Where there are conflicting decisions at first instance on BOR issues in the District Court and in magistrates' courts the existing rights of appeal and the mechanism of judicial review ensure that BOR issues can be brought up into the Court of Appeal and High Court expeditiously and those conflicts can be resolved there. In the circumstances, there is no question of the judges usurping the functions of the legislature or the system not being able to cope with issues arising under the BOR.

20. If it is the case that judges and magistrates have found it difficult to interpret the BOR because of the breadth of its provisions and the general terms used to identify rights and freedoms then they will certainly have the same difficulties after 1997 when called upon to construe legislation for consistency with the Basic Law which guarantees fundamental rights which are very similar to those found in the BOR.

21. By way of example, *Article 87* of the Basic Law guarantees the right to be *presumed innocent until convicted by the judicial organs*. This is essentially the same right which is guaranteed by *Article 11(1) of the BOR (right to be presumed innocent until*

proved guilty according to law) and which is the article which has given rise to most of the challenges under the BOR against statutory provisions which reverse the burden of proof. No one has seriously suggested that the right under *Article 11(1)* of the BOR and *Article 87* of the Basic Law are different in substance. That being the case there is no reason to suppose that the task of a judge or magistrate after 1997 called upon to review legislation under the Basic Law will be different from the task of a judge or magistrate under the BOR. Therefore, any impact the BOR has had on our legal system is only a preview of what the Basic Law would bring to our system after 1997.

22. In any event, experience has shown that the majority of challenges under the BOR to existing laws fail. In the period June 1991 to April 1995 there have been approximately 230 challenges to legislation under the BOR and the success rate in the High Court and Court of Appeal was only about 30% and most of the successful challenges related to reverse onus provisions which were inconsistent with *Article 11(1)* BOR. There is no evidence that the preservation of law and order has been jeopardized by law enforcement bodies being required to give up some of their powers which have been found by the courts to be unlawful.

23. Where challenges have succeeded there has been shown to be non-compliance with minimum standards of human rights protection. This is a serious matter.

24. Some people have suggested that it is a pity that some powers enjoyed by the executive arm of government have been curtailed by the BOR because such powers were useful and made the jobs of government officials easier, particularly in the law enforcement area.

25. Such commentators have failed to grasp a basic point. In a society which is governed by the rule of law all sources of executive power must themselves comply with the law. This includes international obligations embedded in an ordinance, in the Letters Patent or, after 1997, in the Basic Law. It may be expedient for the executive arm of government not to be bound by such obligations but it is not lawful.

26. Whatever arrangements may exist in other countries for the protection of civil and political rights the fact is that the legislature chose the BOR as the means by which minimum standards would be maintained in Hong Kong before 1997 knowing that it was consistent with *Article 8* of the Basic Law and so could survive the transition. It has proved a popular and effective choice and it is clearly contrary to the interests of the people of Hong Kong that the modest protection which it offers to individuals be diluted.

27. In comparing Hong Kong's BOR with similar legislation in other countries it must be remembered that any arrangements for the protection of basic human rights in Hong Kong must be consistent with existing constitutional arrangements made for Hong Kong by the United Kingdom and future constitutional arrangements made by the PRC. The Hong Kong legislature does not have a completely free hand in the matter.
28. It must also be remembered that in countries like the United Kingdom which do not have a modern justiciable bill of rights, human rights treaty obligations often give individuals with a grievance the right of access to a human rights court, such as the European Court of Human Rights or a similar body, such as the United Nations Human Rights Committee. The existing relevant treaty obligations of the United Kingdom do not afford people in Hong Kong the right of access to such a body and it seems unlikely that the PRC will assume treaty obligations which grant such a right. In the circumstances Hong Kong people must look to the courts in Hong Kong for protection of human rights even if that is perceived by some to be unsatisfactory.
29. It is inconceivable that laws which have been repealed or amended because of the BOR should be re-enacted as some people have suggested. The BOR has had the effect of bringing

about changes in the law because long overdue changes were needed to ensure full compliance with the ICCPR.

30. It would be an exercise in legislative futility to seek to re-enact a law known to be inconsistent with the ICCPR because, with or without the BOR, such a law would also be inconsistent with *Article 39* of the Basic Law and/or those provisions of the Basic Law which guarantee specific rights such as the right to be presumed innocent already mentioned and would be unconstitutional and liable to be declared so by judges exercising powers of final adjudication under *Article 19* of the Basic Law.

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SUMMARY OF POINTS: BAR ASSOCIATION STATEMENT

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1. The BOR is an ordinance with no special status under Hong Kong's existing constitutional arrangements.
2. The BOR is an ordinance which is consistent with the provisions of the Basic Law.
3. In applying and interpreting the BOR judges and magistrates are bound to give effect to the wishes of the legislature. It is the BOR which repeals earlier inconsistent laws and not judges and magistrates who simply declare the fact of a repeal.

4. The judicial review of legislation is a feature of Hong Kong's legal system and will continue to be so under the Basic Law.
5. Many of the rights and freedoms guaranteed by the BOR have their exact counterparts under the Basic Law. Judges and magistrates will be faced with similar issues under the Basic Law when required to review constitutionally subordinate laws for consistency with the Basic Law.
6. People in Hong Kong do not have rights of access to an international human rights tribunal to complain of human rights abuses. They have to look to the domestic courts for effective protection of the rights guaranteed under the ICCPR.
7. The re-introduction of laws which have been repealed because they were inconsistent with the BOR would constitute a violation of the Basic Law which guarantees basic rights and freedoms which are substantially the same as those contained in the BOR and which, under Article 39, prohibit any laws which abridge the rights and freedoms of residents of Hong Kong in a manner which is inconsistent with the ICCPR.

Dated 1 December 1995