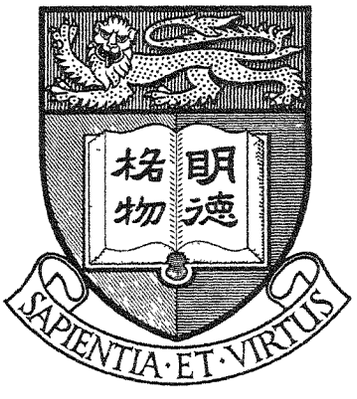
Bill of Rights Bulletin

1991-1992 Vol.1



BILL OF RIGHTS BULLETIN

Edited by

Andrew Byrnes

and

Johannes M.M. Chan

Faculty of Law

University of Hong Kong

TEL: 859 2951

FAX: 559 3543

Volume 1, No. 1 October 1991

THE BILL OF RIGHTS

The *Hong Kong Bill of Rights Ordinance* and an accompanying amendment to the *Letters* Patent entered into force on 8 June 1991, ushering in an important new stage of development in the Hong Kong legal system. The *Bill of Rights Bulletin* is intended to provide members of the legal profession with information about recent developments under the *Bill of Rights* and to refer them to relevant secondary materials.

THE EDITORS

Andrew Byrnes and **Johannes Chan** are members of the Department of Law of the University of Hong Kong. Both teach and write in the area of human rights law. **Johannes Chan** has written two books (in Chinese) on human rights in Hong Kong and published on international human rights topics as well as on the *Hong Kong Bill of Rights*. **Andrew Byrnes** has published articles on international human rights law and on human rights in Hong Kong and recently served as a consultant to the Attorney General's Chambers of the Hong Kong Government during the drafting of the *Bill of Rights*.

Both editors have produced reports on human rights for non-governmental organisations and represented those organisations before United Nations human rights bodies. They have been involved as advisers or consultants in a number of important *Bill of Rights* cases which have already been heard by the Hong Kong courts and are currently preparing a book on the *Hong Kong Bill of Rights*.

PUBLIC LAW RESEARCH GROUP OF THE FACULTY OF LAW UNIVERSITY OF HONG KONG

The production of the *Bulletin* is part of the program of the Public Law Research Group of the Faculty of Law at the University of Hong Kong and is supported by the Department of Law. If you would like to receive further issues of the *Bulletin*, please fill in the form on the back page of this issue and return it to one of the Editors. We are charging a rate of $200 for the 4 issues to cover the costs of production and distribution.

INFORMATION ON DEVELOPMENTS

We would particularly appreciate information about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We also welcome comments and suggestions on the format and content of the *Bulletin*. We would like to thank Phillip Ross, Gerry McCoy and Steve Bailey for providing us with information included in this issue of the *Bulletin*. This issue is based on (the necessarily incomplete) information available to the Editors as of 9 October 1991. We apologise for any errors or omissions.

CONTENTS

HONG KONG'S BILL OF RIGHTS:
AN EXPANDING JURISDICTION

The entry into force of the *Hong Kong Bill of Rights Ordinance* 1991 and the accompanying amendment to the *Hong Kong Letters Patent* has ushered in a major new chapter in the development of Hong Kong's legal system. From 8 June 1991 all pre-existing Hong Kong legislation -- with only a few exceptions -- is subject to review against the guarantees contained in the *Hong Kong Bill of Rights*, which comprises Part II of the *Ordinance*. The *BOR Ordinance* enacts as part of Hong Kong law the provisions of the *International Covenant on Civil and Political Rights* (*ICCPR*) as applied to Hong Kong. By virtue of article VII (3) of the *Letters Patent* all Hong Kong legislation enacted after 8 June 1991 will be subject to review against the standards of the *ICCPR* as applied to Hong Kong.

The *Bill of Rights* package thus represents a major expansion of the role of the Hong Kong courts. The courts have been entrusted with the tasks of determining whether pre-existing legislation has been repealed because it is inconsistent with the *Bill of Rights* and of deciding whether subsequent legislation is invalid because it is inconsistent with the *Letters Patent* (which now incorporate the standards of the *ICCPR* as a limit on the power of the Hong Kong Legislature).

The *ICCPR*, a major international human rights treaty to which almost 100 countries are parties, contains a catalogue of traditional civil and political rights, including the rights to life and to be free from torture, to be free from arbitrary or unlawful arrest, the right to fair and public trials in criminal and civil matters, the right to privacy, rights to freedom of expression, assembly, and association, and the right to equal protection of the law and equality before the law. The United Kingdom ratified the *ICCPR* in 1976 and extended it to Hong Kong at the same time.

The impact of the Bill of Rights

The *Bill of Rights* has already begun to have an impact. Within a month of its commencement, the District Court held that the provisions of the *District Court Ordinance* permitting the issue of prohibition orders against judgment debtors violated the guarantee of liberty of movement in article 8 of the *Bill of Rights* and had therefore been repealed. In August, another judge of the District Court held reverse onus provisions in the *Dangerous Drugs Ordinance* inconsistent with the presumption of innocence in article 11 (1) of the *Bill of Rights*. The Court of Appeal reached a similar conclusion in its first *Bill of Rights* judgment delivered on 30 September 1991 (*R v Sin Yau Ming*, noted at page 2 below), a decision which will have major repercussions in the area of criminal law. There are many other cases before the courts involving challenges to existing legislation in the criminal and civil fields.

The purpose of this *Bulletin* is to help judges, practitioners and others to keep up to date with the rapidly evolving case law under the *Bill of Rights*. We will also be including references to secondary literature on the *Bill of Rights* which may be of interest. Initially, we propose to publish 4 issues over the next few months. It is our hope that the *Bulletin* will be the precursor to a fully-fledged series of reports of human rights and public law cases in Hong Kong, which would also include relevant comparative materials and commentary on decided cases.

CASES DECIDED

COURT OF APPEAL

***R v Sin Yau Ming*, Reservation of a question of law under s. 81 of the *Criminal Procedure Ordinance* (cap. 221), HC No 289 of 1990, 30 September 1991 (Silke V-P, Kempster and Penlington JJA)**

This case arose out of the trial in the High Court of the defendant on charges of possession of dangerous drugs for the purpose of trafficking. In late August 1991 in the cases of *R v Ng Po-lam* and *R v Leung Ping-lam* Deputy District Judge Wong had ruled that presumptions contained in s. 46 (c) and (d) and s. 47 (1)(c) and (d) and (3) of the *Dangerous Drugs Ordinance* were inconsistent with the guarantee of the presumption of innocence contained in article 11 (1) of the *Bill of Rights*. After the arraignment of the defendant in the High Court in this case, the Crown applied to the trial judge, Ryan J, to reserve for the consideration of the Court of Appeal questions of law relating to the effect of the *Bill of Rights* on these provisions.

Held: 1. The Court of Appeal had jurisdiction under s. 81 of the *Criminal Procedure Ordinance* to consider a question of law reserved by a trial judge before the completion of the trial.

2. The *Bill of Rights Ordinance*, viewed in the light of the accompanying amendment to the *Letters Patent*, was a consitutional instrument and its *sui generis* nature should be recognised by interpreting it in a broad and generous manner.

3. In interpreting the *Bill of Rights Ordinance* considerable assistance could be gained from the decisions of common law jurisdictions with a constitutionally entrenched Bill of Rights (in particular Canada and the United States), from the general comments and decisions of the Human Rights Committee under the ICCPR and the Optional Protocol to the ICCPR, and from the jurisprudence under the European Convention on Human Rights. While none of these were binding, in so far as they reflect the interpretation of articles in the ICCPR and are directly related to Hong Kong legislation, these sources are of the greatest assistance and should be given considerable weight.

4. In determining whether a mandatory presumption such as those contained in ss. 46 and 47 of the *Dangerous Drugs Ordinance* was consistent with "the right to be presumed innocent until proved guilty according to law", it was not sufficient to show only that a reverse onus requirement was provided for by domestic legislation. The phrase "in accordance with law" had an autonomous meaning incorporating requirements of reasonableness and proportionality.

5. Where an evidentiary presumption left open the possibility that an accused could be convicted despite having raised a reasonable doubt as to the existence of a fact essential to a finding of guilt, there was a *prima facie* breach of the presumption of innocence.

6. For a mandatory presumption to be consistent with article 11 (1), the Crown would have to show by cogent and persuasive evidence that one could say with substantial assurance that the presumed fact would more likely than not flow from the proved fact.

The presumption must be for the purpose of achieving an important social objective and satisfy tests of rationality and proportionality.

> (*per* Kempster JA, Silke VP agreeing): A mandatory presumption of fact may be compatible with article 11 (1) of the *Bill of Rights* if it be shown by the Crown, due regard being paid to the enacted conclusion of the legislature, that the facts to be presumed rationally and realistically follow from that proved and also if the presumption is no more than proportionate to what is warranted by the nature of the evil against which society requires protection.

7. While no one doubted that drug trafficking in Hong Kong was a serous social problem in Hong Kong and its eradication an important social objective, the Crown had not demonstrated that the proved fact that a person possessed 0.5g of heroin meant that it was more likely than not that (s)he had it for the purpose of trafficking. Indeed, the evidence before the court, which showed that the average daily heroin consumption in Hong Kong was somewhere in the range 0.25 to 1 g of heroin, showed that this was not the case and that the presumption might mean that many persons innocent of trafficking might nonetheless be convicted of that offence. Section 46 (d)(v) was therefore inconsistent with article 11 (1) and had been repealed.

8. The Crown had not produced evidence which showed that the possession of six or more packets containing a dangerous drug more likely than not showed that the person who had those packets had them for the purpose of trafficking. Section 46 (c)(v) was therefore inconsistent with article 11 (1) and had been repealed.

9. There was no evidence before the court to demonstrate that either of the presumptions in s. 47 (1)(c) and (d) satisfied the rational connection test. Common experience did not support than conclusion, but rather the contrary one.

10. (*Per* Silke VP and Kempster JA): In so far as s. 47 (3) amounted to a presumption upon a presumption, it failed the rational connection test and had been repealed. However, there might be circumstances in which it might be reasonable to presume from the proved fact of possession of a dangerous drug that the possessor had knowledge of the nature of that drug.

> Penlington JA (dissenting): s. 47 (3) had not been repealed.

> *Counsel:* I.G. Cross QC, P.J. Dykes and S.R. Bailey, for the Crown; Daniel R. Fung QC, John Mullick and Johnny Mok (instructed by DLA), for the defendants.

Attorney General v Alick Au Shui-yuen, Civil App No. 149 of 1991 (appeal from the order of Saied J in High Court case No. 196 of 1991)

On 3 October 1991 the Court of Appeal dismissed an appeal against an order of Saied J to the effect that legal counsel be provided to the defendant for his trial, such counsel and solicitors to be paid for by the Hong Kong Government, and recommending that the Registrar of the Supreme Court assign counsel (see page 4 below). The appeal was dismissed on jurisdictional grounds, namely that the appeal involved a criminal cause or matter which the Court had no power to hear at this stage. The Court did not deal with the substantive *Bill of Rights* issues (which concerned the right to legal aid). As a result, the order of Saied J remained unaffected. Written reasons were delivered subsequently.

> *Counsel:* J. Findlay QC and P.J. Dykes for the Attorney General; G.J.X. McCoy (instructed by Alsop Wilkinson, assigned by the Registrar of the Supreme Court).

Note: A similar jurisdictional point has been raised in another case (*R v George Tan*) before a differently constituted division of the Court of Appeal.

HIGH COURT

***R v Alick Au Shui-yuen*, Saied J, ruling on 5 September 1991, order sealed on 13 September 1991**

The defendant, a solicitor, was on trial with a number of other persons on four counts of conspiracy. He applied to the Director of Legal Aid for legal aid for his trial, but his application was refused, since the Director concluded that he did not satisfy the means test laid down in the relevant legislation (a maximum of $2,200 monthly disposable income and a maximum of $15,000 disposable capital). The *Legal Aid in Criminal Cases Rules* (cap. 221) provide that, where the Director is not satisfied that an applicant for legal aid comes within the means test, his refusal of the application "shall be final and may not be disturbed".

The defendant sought to rely on article 11 (2)(d) of the *Bill of Rights* before the trial judge. Article 11 (2)(d) provides that in the determination of any criminal charge against him a person shall be entitled

> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The defendant argued that the case was a difficult and complex one which was likely to run for many months and claimed that he did not have the means to pay for legal assistance for a trial of this length.

Held: 1. The seriousness and complexity of the case were such that there was a real risk that the defendant would not get a fair trial if he were not assigned legal assistance to defend the charges against him.

2. Whether the defendant had "sufficient means" within the meaning of article 11 (2)(d) was a different question from whether he satisfied the means test applied pursuant to the legal aid rules. Deciding the issue for the purpose of article 11 (2)(d) was not impugning the decision of the Director, but was an independent inquiry under the *Bill of Rights*.

3. The burden was on the defendant to establish on the balance of probabilities that he lacked sufficient means for his legal assistance. The defendant had discharged the burden in this case. The proceedings should therefore be stayed until the funding for counsel for him was provided.

The judge subsequently ordered that the Registrar of the Supreme Court assign counsel to the defendant and that funding for legal aid be provided from central government funds. The Crown appealed against this order to the Court of Appeal, which dismissed the appeal on jurisdictional grounds without reaching the merits on the *Bill of Rights* issue.

Counsel: A. Huggins QC for the Crown; Desmond Keane QC and J. Hemmings, for the defendant; A. Macrae (*amicus curiae)*; and P. Moss, Director of Legal Aid, in person.

***In the Matter of South Kowloon Magistracy Court Criminal Case No. K-4535 of 1991 and In the Matter of an Application for Bail pending trial*, High Court, M.P. No. 1703 of 1991, Sears J, 11 July 1991**

The applicant was arrested on 20 May 1991 and charged on 22 May 1991 with various credit card offences. He was refused bail initially on 21 June 1991, but subsequently applied for bail again. It was likely that the committal proceedings would take place in August, but the trial was unlikely to commence before September 1992. The applicant argued that he was entitled to bail under article 5 (3) of the *Bill of Rights*, which had commenced operation on 8 June 1991. Article 5 (3) provides:

> 5. (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Held: 1. Article 5 (3) of the *Bill of Rights* embodied a presumption that bail should be granted and that any defendant is entitled to trial within a reasonable time.

2. The likely delay until the trial of the applicant (being the result only of a shortage of High Court judges) involved an undue delay and the defendant's right under article 5 (3) to trial within a reasonable time would be violated.

3. It was appropriate in this case to consider those factors normally considered by Hong Kong courts to determine whether bail was appropriate, namely, the nature of the offence charged, whether releasing the defendant may endanger the public, whether his release could affect the process of the trial, either by preventing the prosecution from presenting their evidence in a fair and uninfluenced manner, or by the defendant's failure to appear at the time of the trial. On the evidence before the court in this case bail should be refused.

Counsel: P.L Roberts, for the Crown; Jerome Matthews (instructed by Tang, Wong & Cheung), for the applicant.

Note: This decision is the subject of an appeal. For a comment on this judgment in the light of the international case law, see Byrnes (1991) *HKLJ* (October 1991), see page 15 below.

DISTRICT COURT

***In the matter of an ex parte application for six production orders pursuant to section 20 of the Drug Trafficking (Recovery of Proceeds) Ordinance (cap. 405) and in the Matter of an ex parte application for a search warrant pursuant to section 21 of the Drug Trafficking (Recovery of Proceeds) Ordinance (cap. 405) and in the Matter of the Shangri-La Hotel and Reiner Jacobi*, District Court, MP Nos 974 and 975 of 1991, Judge Cheung, date of decision 8 August 1991, date of judgment 27 August 1991**

This case involved an *ex parte* application by the Crown for production orders under s. 20 of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (cap. 405) and for a search warrant under s. 21 of the Ordinance. The production orders were sought to compel 5 banks to disclose relevant records relating to a person suspected of possession of dangerous drugs for the purpose of trafficking. The search warrant was for the purpose of searching two suitcases belonging to the suspect.

The Court considered whether ss. 20 and 21 of the Ordinance were inconsistent with article 14 of the *Bill of Rights*, which provides a guarantee of freedom from "unlawful or arbitrary interference" with one's privacy.

In considering the issue, the Court drew on authorities decided under the guarantee of freedom from "unreasonable search and seizure" under the *Canadian Charter of Rights and Freedoms* and applied the tests enunciated by the Supreme Court of Canada in *Hunter v Southam Inc.* (1984) 11 DLR (4th) 641 to determine whether there had been an unlawful or arbitrary interference with privacy. That case concluded that a search will be reasonable if the authorising statute contains:

> (a) a requirement of a search warrant or other authorisation, to be obtained in advance of the search;
>
> (b) a requirement that the warrant be issued by a person who must be capable of acting judicially, that is, who must not be involved in the investigation; and
>
> (c) a requirement that the warrant be issued only after it has been established upon oath that reasonable and probable grounds exist to believe that an offence has been committed and that evidence is to be found in the place to be searched.

Held: Sections 20 and 21 (4) of the Ordinance satisfied these requirements (and in some cases went beyond them) and therefore they were not inconsistent with the *Bill of Rights*.

Counsel: S.R. Bailey, for the Crown (*ex parte*).

***R v Ng Po-lam*, Case No. 101 of 1991, 21 August 1991; *R v Leung Ping-lam*, Case No 235 of 1991, 22 August 1991, District Court, Deputy Judge C.Y. Wong**

These two cases raised identical issues to those subsequently considered by the Court of Appeal in *R v Sin Yau Ming* (see page 2 above).

After an extensive review of the authorities, Deputy District Judge Ching Y. Wong held that the presumptions contained in s. 46 (c) and (d) and s. 47 (1)(c) and (d) and (3)

were inconsistent with the guarantee of the presumption of innocence contained in article 11 (1) of the *Bill of Rights*. The Court of Appeal in *Sin Yau Ming* came to the same conclusion, adopting a similar approach to that of Deputy Judge Wong in these cases.

Counsel: P.J. Dykes and P. Lee, for the Crown; Daniel R. Fung QC, Johnny Mok and Paul Wu (instructed by DLA), for the defendants.

***Tam Hing-yee v Wu Tai-wai*, District Court, Action No. 6250 of 1989, Judge Downey, 8 July 1991**

This case involved a challenge to the power of the District Court under s. 52E (1)(a) of the *District Court Ordinance* (cap. 336) to make prohibition orders preventing a debtor from leaving Hong Kong. The applicant, a judgment creditor, had obtained a prohibition order against the debtor in May 1991 and applied for an extension of the order after the commencement of the *Bill of Rights Ordinance* (8 June 1991). The Court raised the issue whether the power under s. 52E (1)(a) to grant prohibition orders was consistent with the guarantee of liberty of movement in article 8 of the *Bill of Rights*.

Article 8 of the *Bill of Rights* provides:

(1) Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave Hong Kong.

(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights.

The creditor argued that the *Bill of Rights Ordinance* had no application to proceedings involving two private individuals, since s. 7 of the Ordinance provides that the Ordinance "binds only" "(a) the Government and all public authorities"; and "(b) any person acting on behalf of the government or a public authority".

Section 3 of the *Bill of Rights Ordinance* provides:

3. (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.

(2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.

The creditor also argued that, even if the *Bill of Rights Ordinance* applied, the power to grant prohibition orders was a permissible restriction on liberty of movement, being necessary to protect the rights of others (creditors) or for the preservation of *ordre public* (respect for the authority of the courts).

Held: 1. Section 3 of the *Bill of Rights Ordinance* had an independent operation and s. 7 did not restrict review of legislation only to those cases in which the rights of the individual as against the State were affected by legislation. Thus, even though "inter-citizen rights" had been removed from the Ordinance, the effect of s. 3 was that legislation affecting private rights was subject to review under the *Bill of Rights*.

2. Although the restriction on freedom of movement permitted by s. 52E (1)(a) was provided "by law", it had not been demonstrated that such a restriction was "necessary" for the protection of the rights and freedoms of others or for the preservation of *ordre public*.

3. Accordingly, s. 52E (1)(a), being inconsistent with article 8 of the *Bill of Rights*, had been repealed by s. 3 (2) of the *Bill of Rights Ordinance*.

Counsel: G.J.X. McCoy (instructed by DLA) for the creditor.

Note: This case is the subject of an appeal to the Court of Appeal, Civil Appeal No 118 of 1991, to be heard from 19-21 November 1991. For a comment on this judgment, see Byrnes (1991) *HKLJ* (October 1991).

"Stop" orders under section 77 of the Inland Revenue Ordinance

Shortly after the passage of the *Bill of Rights Ordinance*, the District Court expressed doubt as to whether it could continue to grant stop orders under s. 77 of the *Inland Revenue Ordinance* in the light of article 8 of the *Bill of Rights*. The Commissioner for Inland Revenue withdrew the application before the court before there was any decision on the merits. We understand that the Commissioner is preparing a test case which is likely to be brought before the courts early in 1992.

MAGISTRATES COURTS

R v Ma Man Ho and others, SK No 5472 of 1991, 9 October 1991, Mr R. Day Esq, Magistrate[1]

In this case a number of provisions of the *Import and Export Ordinance* (cap. 60) were challenged on the ground that they contained provisions which violated the presumption of innocence in article 11 (1) of the *Bill of Rights*. The magistrate held that ss. 14 and 35A of the Ordinance were reasonable and therefore not in conflict with article 11 (1). He also held that, while s. 34 of the Ordinance and s. 94A of the *Criminal Procedure Ordinance* (cap. 221) (negative averments) were prima facie violations of the presumption of innocence, but pursued an important social objective and satisfied the rational connection and proportionality tests adopted in *R v Sin Yau Ming*. They were therefore not inconsistent with the *Bill of Rights*.

Counsel: S.R. Bailey, for the Crown; John Miller and Johnny Chan, for first to eighth defendants; Keith Oderberg, for ninth to twelfth defendants.

---

[1] We are grateful to Steve Bailey and Keith Oderberg for information about this case.

***R v Tsang Wai-chung and others*, Fanling Magistracy No 3896 of 1991, Mr R. Venning, Esq, Magistrate**[2]

This case involved prosecution of 33 persons for offences under the *Gambling Ordinance* (cap. 148). One person was charged with operating a gambling establishment, two with permitting a house to be used for unlawful gambling, and the remaining 30 with unlawful gambling.

The Magistrate ruled that, in the light of the decision of the Court of Appeal in *R v Sin Yau Ming*, a number of presumptions in ss. 18 and 19 of the Ordinance were inconsistent with the presumption of innocence in article 11 (1) of the *Bill of Rights* and had therefore been repealed in part or whole. They included ss. 18, 19 (2) and (4). As a result, 30 of the 33 defendants were acquitted; the remaining 3 (who had made cautioned statements admitting to gambling (Pai Kau)) were convicted of unlawful gambling. However, the Magistrate also found that the presumption in s. 19 (1)(c) (where the presence of gambling equipment on premises is proved, those premises are presumed to be a gambling establishment, unless the contrary is proved).

Counsel: Paul Tong for the Crown; D. Mackenzie Ross (instructed by K.C. Man & Co.) for the defendants.

R v Lam Chung-shu[3]

In this case the defendant to a charge of murder argued that the Bill of Rights gave him a right to apply for bail to that court, even though s. 102 of the *Magistrates Ordinance* forbade a magistrate from granting bail in cases of murder or treason. The defendant's argument appears to have been based on article 8 of the Bill of Rights (liberty of movement) rather than on article 5 (3). The magistrate rejected the contention that s. 102 had been repealed by the Bill of Rights, apparently accepting the Crown's contention that, since the defendant could apply to the High Court for bail, the right to apply for bail was guaranteed and that s. 102 was not repealed: *South China Morning Post*, 9 August 1991, p. 8.

Licensing Court

***Re Rich Sir Ltd*, EMP No. 387/1991, decision of 27 August 1991, Mr C. Morley Esq, Magistrate and two Assessors**

This case involved an application for the renewal of a moneylender's licence. Renewal of the licence was opposed by the Commissioner of Police. In considering the application, the Tribunal considered evidence which it had admitted pursuant to s. 10B (a) of the *Moneylenders Ordinance* (cap. 163). Section 10B (a) permits the Court to receive and consider written material, documents or oral evidence which would not otherwise be admissible.

The applicant argued that s. 10B (a), by permitting the consideration of hearsay evidence and other material which would not otherwise be admissible in civil or criminal proceedings violated the right to a "fair" hearing in the determination of the applicant's "civil rights and obligations" guaranteed by article 10 of the *Bill of Rights*. It was argued that s. 3 (2) of the *Bill of Rights Ordinance* had therefore repealed s. 10B (a).

---

[2] We are grateful to David Mackenzie Ross (counsel in this case) for providing us with information about it.

[3] We are grateful to Andrew Bruce for providing us with information about this case.

Held: The Licensing Court rejected the argument, concluding that "the object of Section 10 B (a) was to liberalise the procedural rules, a concept in no way incompatible with the Bill of Rights Ordinance; and we felt that the position of both sides could be safeguarded by the weight which was attached to any written evidence which was objectionable for technical reasons."

Counsel: G.J.X. McCoy (instructed by So & Company), for the applicant.

Note: This case is the subject of an appeal to the High Court.

CASES PENDING

COURT OF APPEAL

***de Kantzow v The Appeal Tribunal*, Civil Appeal No. 53 of 1991 (appeal from the judgment of 7 February 1991 of Bokhary J in High Court, MP No 3193 of 1990)**

This case arises out of a demolition order issued by the Building Authority under the *Building Ordinance* (cap. 123), by which the applicants were ordered to remove alterations to their house which had been made without the approval of the building authority. The applicants appealed against this order to the Appeal Tribunal established under s. 43 of the Ordinance. Where the Tribunal "after due consideration of any appeal" is of the view that "no good cause has been shown why an inquiry should be held", it may refuse to hold an inquiry. In this case the Tribunal convened in private, and on the basis of the papers before it considered that it was not appropriate in the applicants' case to conduct an inquiry (at which the applicants would have been permitted to appear). The Tribunal dismissed the appeal against the demolition order.

The applicants applied for judicial review of the decision of the Tribunal not to hold an inquiry into their case. They were successful before Bokhary J, who held that in the present case it was not possible to give the appeal due consideration on the papers alone and that an inquiry should have been held. He quashed the decision of the Tribunal and granted mandamus directing the Tribunal to hold such an inquiry.

The Crown appealed against this decision and, after the entry into force of the *Bill of Rights*, the applicants cross-appealed relying on article 10. Article 10 provides that "in the determination of his civil rights and obligations" a person is entitled to a "fair and public hearing" by "a competent, independent and impartial tribunal". The applicants seek an order that their appeal *not* be heard by the Tribunal, since that body is not an independent and impartial tribunal, one of its members being in effect by law the nominee of the Building Authority. The applicants also argue that the provisions of the Ordinance which permit the holding of meetings to decide appeals to be held in private are inconsistent with the guarantee of a "fair and *public* hearing". The applicants further claim that article 10 was violated by the "hearing" in that they did not have a fair opportunity to present their case before the Tribunal.

Counsel: A. Ismail (instructed by Kao, Lee & Yip), for the applicants; V. Hartstein, for the Appeal Tribunal.

Tam Hing-yee v Wu Tai-wai

Appeal from the judgment of Judge Downey delivered on 8 July 1991) (see page 7 above).

HIGH COURT

***Hong Kong Stationery Manufacturing Co. Ltd v Worldwide Stationery Manufacturing Co.*, Action No. 434 of 1990**

This case involves an action for breach of copyright. The issue has been raised whether s. 9 of the *Copyright Ordinance* (cap. 39) violates the *Bill of Rights*. Section 9 permits affidavits containing assertions as to the subsistence of copyright or the identity of the owner to be received in evidence and requires a court to presume that the facts contained in them are correct until the contrary is proved.

Counsel: Andrew Liao QC and Priscilla Wong, for the plaintiff; Anthony Rogers QC, Johnny Mok and Winnie Tam, for the defendants.

***In the Matter of an Application for Judicial Review by Deacon Chiu and others*, Kaplan J**

The applicant sought a stay of all proceedings against him on the ground, *inter alia*, of undue delay, loss of memory, prejudice, lack of fair trial and abuse of process. The magistrate found that there had been undue delay, but refused to stay the proceedings.

On the application for judicial review, the Crown argued that a magistrate hearing committal proceedings had no jurisdiction to grant a stay of proceedings. The applicant argued that, if there could not be a fair trial in accordance with article 10 of the *Bill of Rights*, then the proceedings could and should be terminated at this stage without committing the applicant for trial before a higher court. The magistrate had jurisdiction under the common law and the *Bill of Rights* to grant a stay in these circumstances.

Counsel: Denis Chang QC and Johnny Mok (instructed by Cheng, Yeung & Co.), for the applicant; Martin Lee QC, J. Pethes and Y.C. Wong, for the Crown.

***In the Matter of an Application for leave to Apply for Judicial Review by Lee Mo Loi*, MP No 2936 of 1991**

This is an application for leave to apply for judicial review of, *inter alia*, a decision of the Commissioner for Inland Revenue to issue a notice under s. 76 (1). One of the applicant's arguments is that s. 76 of the *Inland Revenue Ordinance* (cap. 112) is inconsistent with the *Bill of Rights*.

Counsel: G.J.X. McCoy and Michael Darwyne (instructed by John Pickavanta & Co), for the applicant; Lynda Shine, for the Crown.

***In the Matter of an Application for leave to Apply for Judicial Review by Jenny Chua Yee Yen*, MP No 2325 of 1991**

This case involves an application for leave to apply for judicial review of, *inter alia*, a decision of the Hong Kong Polytechnic requiring the applicant to withdraw from a diploma course in hotel and catering management. The applicant had sought unsuccessfully to be represented by both solicitor and counsel before the Academic Appeals Committee of the Polytechnic, whose rules permit an appellant to be represented by only one other person. The grounds relied on include the ground that this rule is contrary to the *Bill of Rights*, since it did not permit the applicant to be represented by a barrister, thus denying her a fair hearing.

Counsel: G.J.X. McCoy (instructed by K.F. Wong & Co.), for the applicant.

Re Rich Sir Ltd

Appeal from the decision of the Licensing Court, EMP No. 387/1991, 27 August 1991 (see page 9 above)

***Sun Ching-yee v Wong Shum*, Action No 5808 of 1986, Hooper J (in chambers)**

This case involves an application for a prohibition order under s. 21 of the *Supreme Court Ordinance* (cap. 4). The *Bill of Rights* issues it raises are the same as those considered by Judge Downey in *Tam Hing-yee v Wu Tai-wai* (presently before the Court of Appeal). The case before Hooper J has been adjourned pending the outcome of the appeal in *Tam Hing-yee v Wu Tai-wai*.

DISTRICT COURT

***R v Lau Ting-man*, Deputy Judge Eccleton**

The presumptions contained in s. 24 of the *Firearms and Ammunition Ordinance* (cap. 238) and the negative averment provision in s. 94A of the *Criminal Procedure Ordinance* (cap. 221) are being challenged on the ground they violate the presumption of innocence in article 11 (1) of the *Bill of Rights*. Judgment is scheduled for 18 October 1991.

Counsel: S.R. Bailey and Maria Ip, for the Crown; Rodney Griffiths, for the defendant.

***R v Chan Fuk-lee*, Judge Longley**

This case involves a challenge to s. 29 (6) of the *Theft Ordinance* (cap. 210) on the basis of inconsistency with article 11 (1) of the *Bill of Rights*. Section 29 (6)(a)(i) provides that, where a person obtains property, a pecuniary advantage or servies by means of a cheque or bill of exchange which is dishonoured, is presumed to have done so with the knowledge that the cheque or bill would be dishonoured, until the contrary is proved. Section 29 (6)(a)(ii) provides that, where a person evades liability to make a payment by

means of a cheque or bill which is dishonoured, he is presumed to have evaded the liability with knowledge that the cheque or bill would be dishonoured, until the contrary is proved.

Counsel: S.R. Bailey, for the Crown.

MAGISTRATES COURTS

The decisions of the District Court in *R v Ng Po-lam* and *R v Leung Ping-lam* and of the Court of Appeal in *R v Sin Yau Ming* have spawned a large number of challenges to presumptions contained in various Ordinances, mainly on the ground that such presumptions violate the guarantee of the presumption of innocence in article 11 (1) of the *Bill of Rights*. Cases in which provisions are being challenged on that ground include:

***R v Cheng Pui-kit*, SK No 5333 of 1991**

This case involves a challenge to s. 21 of the *Control of Indecent and Obscene Articles Ordinance* (cap. 390) on the ground that it violates the presumption of innocence in article 11 (1) of the *Bill of Rights*. That section provides that, subject to a number of defences, it is an offence for a person to publish, possess for the purpose of publication or import for the purpose of publication any obscene article whether or not (s)he knows it is an obscene article. Subsection 21 (2) provides a number of defences, all of which the defendant must establish on the balance of probabilities. Judgment is scheduled for 18 October 1991.

Counsel: S.R. Bailey, for the Crown; Nicholas Pirie, for the defendant.

***R v Tsui Shek-law and others*, SK No 5817 of 1991**

Challenge to s. 35A (2) of the *Import and Export Ordinance* (cap. 60) on the ground that it violates article 11 (1) of the *Bill of Rights*. Argument comnmenced on 9 October 1991.

Counsel: S.R. Bailey, for the Crown; Danny Marash, for the defence.

SK No 4835 of 1991

Challenge to s. 14A of the *Import and Export Ordinance* (cap. 60) on the ground that it violates article 11 (1) of the *Bill of Rights*. The case is listed for 12 November 1991.

Counsel: S.R. Bailey, for the Crown; Raymond Yu, for the defendant.

***R v Lee Hing-shum*, Fanling Magistracy No 4188 of 1991**

Challenge to regulations 3 (1) and (5) of the *Import and Export (Carriage of Articles) Regulations 1991* (Cap. 60) on the ground that they violate article 11 (1) of the *Bill of Rights*.

Counsel: S.R. Bailey, for the Crown; G. Watson, for the defendant.

***R v Lee Kwong Kut*, WM No 1990 of 1991, Mr J. Acton-Bond Esq., Magistrate**

This case involves a challenge to s. 30 of the *Summary Offences Ordinance* (cap. 228) on the ground that it violates the presumption of innocence in article 11 (1) of the *Bill of Rights*. Section 17 provides that, where a person is brought before a magistrate having possession of anything which may reasonably be suspected of having been stolen *and who does not give an account, to the satisf*action of the magistrate, how he came by it, he is liable to a fine of $1,000 or to 3 months' imprisonment.

Counsel: S.R. Bailey, for the Crown; Keith Oderberg, for the defendant.

***R v Lai Kwok-sin*, TM No 4687 of 1991**

This case involves a challenge to s. 30 of the *Summary Offences Ordinance* (cap. 228) on the same gound as in the case above. The case is listed for 15 October 1991.

***Summary Offences Ordinance* (cap. 228), s. 17**

Section 17 of the *Summary Offences Ordinance* provides that a person in possession of an offensive weapon who is unable to give a satisfactory explanation of his possession thereof is guilty of an offence. This provision is being challenged in a case involving possession of a paper cutter, on the ground that the provision is inconsistent with the guarantee of the presumption of innocence in article 11 (1) of the *Bill of Rights*.

COURTS OF OTHER JURISDICTIONS

***Osman v The Governor of Her Majesty's Prison at Brixton*, High Court of Justice, London, Queen's Bench Division**

The extradition of the applicant from the U.K. on various conspiracy and corruption charges was requested by the Government of Hong Kong in late 1985 and the applicant has been remanded in custody since that time. Earlier this year he was successful in challenging proceedings for the collection of evidence in the U.S.A. He has previously been partially successful in a similar challenge in Malaysia.

In this case, his sixth application for habeas corpus, the applicant invokes the guarantees of articles 10 and 11 of the *Hong Kong Bill of Rights*, claiming that his right to trial without undue delay under article 11 (2)(c) has already been violated. He is also claiming that, in view of the delay to date, the likely delays in the future and the fact that many documents in Malaysia are now not available to him, he cannot enjoy the right to a fair trial guaranteed by article 10. The application is to be heard in November 1991.

Counsel: A. Scrivener QC and Johnny Mok, for the applicant; Clive Nicols QC and Graham Grant, for the Hong Kong Government.

RECENT ARTICLES AND LITERATURE RELEVANT TO THE BILL OF RIGHTS

J. Allan, "A Bill of Rights for Hong Kong", [1991] *Public Law* 175-180

A. Byrnes, "The Bill of Rights and remand in custody pending trial: a warning shot?", (1991) *HKLJ* (October 1991)

A. Byrnes, "'Recalcitrant debtors' in a town 'pollinated by gold': Hong Kong's first Bill of Rights judgment", (1991) *HKLJ* (October 1991)

A. Byrnes, "Figuring out the Bill", *The New Gazette*, October 1991, pp. 28, 30-31

A. Byrnes, "Meeting the Bill", *The New Gazette*, August 1991, pp. 24-25

J. Chan, "Prohibition Orders and the Bill of Rights", (1991) 173 *Hong Kong Economic Journal Monthly* 32-38 (in Chinese)

J. Chan, "The Bill of Rights and Traditional Rights of the New territories Indigenous Population", (1991) 174 *Hong Kong Economic Journal Monthly* 58-60 (in Chinese)

D. Shannon, "Hong Kong: Satellite TV and the Bill of Rights", *IP Asia*, 19 September 1991, 2-8

S. Walker, "Freedom of Speech and Contempt of Court: the English and Australian Approaches Compared", (1991) 40 *ICLQ* 583-606

Other material of interest

R. Wacks (ed.), *Hong Kong's Bill of Rights* (Hong Kong: Faculty of Law, University of Hong Kong, 1990)

Developing Human Rights Jurisprudence (London: Commonwealth Secretariat, 1989), reviewed in (1990) 20 (3) *Hong Kong Law Journal* 411-415

Forthcoming

R. Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992)

INFORMATION ON BILL OF RIGHTS CASES AND OTHER MATERIAL

We would greatly appreciate information about cases in which you are or have been involved which raise *Bill of Rights* issues. If you could fax or mail us a copy of any decision, that would be particularly useful. If possible, please use the form on the next page. Thank you.

Andrew Byrnes

Johannes Chan

TO: ANDREW BYRNES/JOHANNES CHAN
FACULTY OF LAW
UNIVERSITY OF HONG KONG
HONG KONG

FAX: 559 3543

TEL: 859 2951

FROM:

FAX:

TEL:

NAME OF CASE:

COURT NO.:

COURT:

JUDGE:

STATUTE INVOLVED:

ARTICLES OF THE
BILL OF RIGHTS:

DATE OF DECISION
HEARING:

RESULT:

COUNSEL:

SOLICITORS:

COMMENTS

BILL OF RIGHTS BULLETIN

SUBSCRIPTION AND INFORMATION FORM

Name:

Firm:

Address:

Tel.:

Fax:

___ I wish to subscribe to the first four issues of the *Bill of Rights Bulletin* (vol. 1, nos. 1-4).

___ I do not wish to subscribe to the *Bill of Rights Bulletin* (please let us know your reasons)

It would help us in our planning if you could respond to the following:

___ I/my firm would be interested in subscribing to a series of reports dealing with *Bill of Rights*, constitutional law and administrative law cases with editorial comments and articles.

___ I/my firm would ***not*** be interested in subscribing to a series of reports dealing with *Bill of Rights*, constitutional law and administrative law cases (please let us know your reasons)

___ I/my firm has a subscription to the Hong Kong *Law Reports*

___ I/my firm does *not* have a subscription to the *Hong Kong Law Reports*

Subscription payments

Please make cheques for $200 payable to the "University of Hong Kong" and send to Andrew Byrnes, Editor, *Bill of Rights Bulletin*, Faculty of Law, University of Hong Kong, Pokfulam Road, Hong Kong.

BILL OF RIGHTS BULLETIN

Edited by

Andrew Byrnes

and

Johannes M.M. Chan

with the collaboration of Steve Bailey

Faculty of Law

University of Hong Kong

TEL: 859 2951

FAX: 559 3543

Volume 1, No. 2 December 1991

THE BILL OF RIGHTS

The *Hong Kong Bill of Rights Ordinance* and an accompanying amendment to the *Letters* Patent entered into force on 8 June 1991, ushering in an important new stage of development in the Hong Kong legal system. The *Bill of Rights Bulletin* is intended to provide members of the legal profession with information about recent developments under the *Bill of Rights* and to refer them to relevant secondary materials.

THE EDITORS

Andrew Byrnes and **Johannes Chan** are members of the Department of Law of the University of Hong Kong. Both teach and write in the area of human rights law. **Johannes Chan** has written two books (in Chinese) on human rights in Hong Kong and published on international human rights topics as well as on the *Hong Kong Bill of Rights*. **Andrew Byrnes** has published articles on international human rights law and on human rights in Hong Kong and recently served as a consultant to the Attorney General's Chambers of the Hong Kong Government during the drafting of the *Bill of Rights*. **Steve Bailey** is Senior Assistant Crown Prosecutor (Ag.) with the Attorney General's Chambers, Hong Kong. He has acted as the Government's principal advocate in criminal law cases in which *Bill of Rights* issues have been raised.

Editorial comments are the sole responsibility of the editors (Andrew Byrnes and Johannes Chan) and should not be taken to represent the views of the University, the Faculty of Law or any other person.

PUBLIC LAW RESEARCH GROUP OF THE FACULTY OF LAW UNIVERSITY OF HONG KONG

The production of the *Bulletin* is part of the program of the Public Law Research Group of the Faculty of Law at the University of Hong Kong and is supported by the Department of Law. If you would like to receive further issues of the *Bulletin*, please fill in the form on the back page of this issue and return it to the Editors. We are charging a rate of $100 for the remaining 2 issues of this volume to cover the costs of production and distribution.

INFORMATION ON DEVELOPMENTS

We would particularly appreciate information about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We also welcome comments and suggestions on the format and content of the *Bulletin*. We would like to thank Phil Dykes, Phil Ross, Gerry McCoy, Bernard Downey and Mike Blanchflower (as well as others) for providing us with information included in this issue of the *Bulletin*. With a couple of exceptions, this issue is based on (the necessarily incomplete) information available to the Editors as of 29 November 1991. We apologise for any errors or omissions.

CONTENTS

TABLE OF STATUTES CONSIDERED

UNITED KINGDOM ACTS AND STATUTORY INSTRUMENTS

HONG KONG LEGISLATION

Application of English Law Ordinance (cap. 88)

Bill of Rights Ordinance

Building Ordinance (cap. 123)

Control of Obscene and Indecent Articles Ordinance (cap. 390)

TABLE OF CASES

CORRECTIONS AND CLARIFICATIONS

***In the Matter of South Kowloon Magistracy Court Criminal Case No. K-4535 of 1991 and In the Matter of an Application for Bail pending trial*, High Court, M.P. No. 1703 of 1991, Sears J, 11 July 1991**

Note: Contrary to what appeared in *Bill of Rights Bulletin*, v. 1, n. 1, at p. 13, this decision was *not* the subject of an appeal.

***R v Tsang Wai-chung and others*, Fanling Magistracy No 3896 of 1991, Mr R. Venning, Esq, Magistrate (*Bill of Rights Bulletin*, v. 1, n. 1, p. 9)**

The final sentence of the note of this case (which dealt with presumptions under the *Gambling Ordinance*) should have read:

> However, the Magistrate also found that the presumption in s. 19 (1)(c) (where the presence of gambling equipment on premises is proved, those premises are presumed to be a gambling establishment, unless the contrary is proved) **was consistent with the *Bill of Rights*.**

R v Sin Yau Ming

In *R v Yiu Chi Fung* (District Court Case No. 397 of 1991, see p. 27 below), Judge Lugar-Mawson quoted the summary of the Court of Appeal's decision which appears in the first issue of this *Bulletin* (v. 1, n.1, pp. 2-3), but added (at p. 10 of his judgment):

> "One matter not summarized in the Bulletin but which I do consider of the utmost importance is Kempster J.A. and Silke V.P.'s findings in *Sin's* case that the rights given by the Hong Kong Bill of Rights Ordinance are not absolute but are subject to limitations analogous to those contained in Section 1 of the Canadian Charter of Rights and Freedoms contained in the Canadian Constitution Act 1982."

His Honour then went on to cite extensively from the passages in *R v Sin Yau Ming* in which this view was expressed by members of the Court of Appeal, who had in turn quoted from the judgment of Dickson CJC in *R v Oakes* (1986) 26 DLR (4th) 200 (Supreme Court of Canada). Judge Lugar-Mawson then applied those principles to the case before him (see below at p. 19).

Editors' note

The notion of implied or inherent limitations to the rights guaranteed by the *ICCPR* (and the *European Convention*) is a controversial one.[1] It may give rise to difficulties in light of article 5 of the *ICCPR*, which is incorporated in section 2 (4) of the *Bill of Rights Ordinance*. That sub-section provides:

---

[1] See, for example, P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention of Human Rights* (Deventer/Boston: Kluwer, 2nd ed. 1990), pp. 575-578.

> 2. (4) Nothing in this Ordinance may be interpreted as implying for the Government or any authority, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms guaranteed in the Bill of Rights or at their limitation to a greater extent than is provided for in the Bill.

In *R v Sin Yau Ming* the Court of Appeal held, in accordance with the international case law, that the right of a person to be presumed innocent could be limited if such limitations were "in accordance with law" as provided in article 11 (1) of the *Bill of Rights*. The Court also held that the concept of "law" in this phrase was not purely formal concept (so that any restriction embodied Hong Kong legislation would suffice), but that any legislation would have to satisfy the substantive requirements of "law", namely reasonableness and proportionality. In assessing whether those criteria are present, then the type of analysis suggested in *R v Sin Yau Ming* and *R v Oakes* seems entirely appropriate.

There are a number of provisions in the *Bill of Rights* which provide protection against "arbitrary" or "unlawful" interferences with particular rights (for example, articles 5 and 14). According to the international jurisprudence, an "arbitrary" interference is one which is unreasonable, unfair or disproportionate. To the extent that these provisions do not spell out in detail the permissible restrictions, it may be said that they embody "implied" restrictions. However, these are based on the text of the provisions; any broader doctrine of implied limitations, although accepted in some European cases, may be problematic.

EDITORIAL

In response to a number of suggestions (for which we are most grateful), we have restructured the way in which cases are presented, arranging them according to topic and relevant article of the *Bill of Rights Ordinance* rather than according to the court in which they were decided. Where a case deals with one or more issues, we have noted the relevant holdings of the case under the appropriate subject headings.

In this issue we have included (sometimes lengthy) extracts from the judgments. Since many of the decisions are difficult to obtain and are not likely to be reported for some time, we hope that this will make the *Bulletin* more useful for readers.

We have also included notes or editorial comments where we think that these might be of interest to readers. The Editors (Andrew Byrnes and Johannes Chan) are solely responsible for any views expressed in those comments.

A number of readers have asked where they can obtain *European Convention* case law. The best source is the *European Human Rights Reports* (held by the Legal Department Library, HKU Law Library and available on LEXIS) and for older decisions of the Court, the *International Law Reports* (held by both those libraries as well as the Supreme Court library).

RECENT DEVELOPMENTS

There has been an increasing number of cases in which *Bill of Rights* points are being taken. Influenced by the Court of Appeal decision in *R v Sin Yau Ming*, the great majority of these cases have involved challenges to statutory presumptions. There have also been a number of cases in which the defendants have sought to rely on the detailed protections in articles 5 (1) and 11(2). While *Bill of Rights* issues have also been taken in some civil cases, the number of such cases has been relatively few so far.

THE COURT OF APPEAL'S DECISION IN TAM HING-YEE V WU TAI-WAI

The most significant development since the last issue of the *Bulletin* is the Court of Appeal's judgment of 28 November 1991 in *Tam Hing-yee v Wu Tai-wai* (see p. 8 below). In that decision the Court of Appeal reversed the decision of Judge Downey below and held that the *Bill of Rights Ordinance* did not permit a review under the *Bill of Rights* of section 52E (1)(a) of the *District Court Ordinance*, which permits a judgment creditor to obtain a stop order against a debtor, thus preventing the debtor from leaving Hong Kong.

Judge Downey had held that sections 3 and 7 of the *Bill of Rights Ordinance* operate independently of one another. In his view, legislation could be challenged for inconsistency with the *Bill of Rights* whether it affected the rights of the citizen against the State or the legal relations between two private individuals (the situation in *Tam Hing-yee*). By its decision the Court of Appeal appears to have ruled out the possibility of application of the *Bill of Rights* to legislation which regulates the legal rights of private individuals *inter se*. This conclusion is a controversial one and will no doubt be the subject of much discussion. With the greatest respect to the Court of Appeal, in our view the judgment is flawed in a number of critical respects, both substantive and methodological.[1]

---

[1] A summary of the decision and extracts from the judgment appear below at pp. 8 and 13.

Some aspects of the hearing in Tam Hing-yee

It is disappointing that the Court of Appeal disposed of this important point of principle without the benefit of full argument on the issue from the perspective of debtors (or indeed on the liberty of movement issue). The debtor did not appear either at first instance or on appeal and only the creditor was legally represented at both stages of the case. The Court of Appeal did have the benefit of arguments presented by an *amicus curiae*. However, the *amicus* argued that the case did not involve "inter-citizen" relations since it was public officials who ultimately enforced the prohibition order and he did not argue in the alternative that the *Bill of Rights Ordinance* applied to all legislation. On the liberty of movement issue, the *amicus* essentially supported the stance of the creditor. It seems rather curious that the Court did not request that arguments directly contrary to those put by the creditor be presented to it. There are certainly strong arguments to the contrary on both the questions at issue in the case and it is unfortunate that the Court rejected a position without having heard arguments directly in support of it.

It is also disappointing that the Attorney General did not intervene and assist the Court on the important questions of principle at issue in the case. The Court indicated its willingness to hear from the Attorney General if he wished to intervene. However, the Attorney General apparently considers it inappropriate for him to intervene in such cases unless there is a formal request from the Court. While there are obviously good reasons for the Attorney General to be cautious about intervening, there is plainly a need for the Attorney General and the Chief Justice to explore whether some satisfactory procedure for intervention in appropriate cases can be developed. The present case is a clear illustration of why it can be undesirable for the Attorney General to stand on the sidelines while important matters of principle are decided largely by default.

Since neither the debtor nor the Attorney General were involved in the case, it appears that no appeal is possible from the judgment of the Court of Appeal in this case. However, it seems inevitable that the issue will arise again in the near future either in the context of prohibition orders or in some other context. As matters stand now, however, the present ruling, if not reversed by the Privy Council in a subsequent case or by legislative amendment, will limit the impact of the *Bill of Rights* in important ways.

Legislation, "inter-citizen rights" and the *Bill of Rights*

An "unavoidable interpretation"?

The Court of Appeal characterised as "unavoidable" its conclusion that the operation of section 3 was qualified by section 7 and that legislation affecting the rights of private individuals *inter se* was not subject to the *Bill of Rights* (p. 7 of the judgment).

With respect, we would suggest that this conclusion was by no means unavoidable. Even without looking at the drafting history of the *Ordinance* (something the Court was unwilling to do in accordance with established rules, which may themselves be ripe for legislative reform), it would have been possible for the Court to hold that all legislation was subject to the *Bill of Rights* (as a result of section 3) and that section 7 subjected the Government and public authorities to the strictures of the *Bill of Rights* when they were acting pursuant to non-statutory powers derived from the common law (for example, prerogative powers). The phrase in section 7 (1) "This Ordinance *binds* only" "the Government and all public authorities" might well have been construed as meaning that *new* causes of action were created by the *Bill of Rights* only as against the State, but not as against private individuals. This would not necessarily have meant that existing legislation which provided a defence to existing causes of action would be immune from scrutiny (for example, it might not have been possible to invoke legislation permitting employers to discriminate against women as a defence to an action for wrongful dismissal). Had the

Court considered the drafting history of the *Bill of Rights*, the attraction of this interpretation might have been even stronger.

Interestingly, the Court of Appeal noted that the "inevitable result" of the interpretation it found "unavoidable" was that the *Ordinance* does not fully comply with the intention expressed in the preamble of the *Ordinance*, namely to incorporate as part of Hong Kong law the *International Covenant on Civil and Political Rights* as applied to Hong Kong, there being no similar restriction in the Covenant of the enjoyment of the rights guaranteed by it (p. 7). Yet had the Court adopted the Downey approach, its decision would have gone further towards fulfilling the intention expressed in the preamble to the *Ordinance* than did the interpretation the Court favoured. Such an interpretation would also have implemented better the Legislature's injunction in section 2 (3) that "[i]n interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and related matters."

The conclusion that the *Bill of Rights Ordinance* was clearly intended to have no operation in respect of inter-citizen litigation would not seem to sit well with article 10 of the *Bill of Rights*. That article provides procedural guarantees before the courts which a person is entitled to enjoy in "the determination . . . of his rights and obligations in a suit at law", a phrase which refers primarily (although not exclusively) to private law relations. It seems curious that the Legislature could be thought to have included such a right in the words of the *Bill of Rights* but at the same time ensured that the *Bill of Rights* could not be invoked in support of it.

Some consequences of the decision

The result of the Court's decision will be that the same piece of legislation may be invalid if Government or a public authority seeks to rely on it, but valid if a private individual seeks to rely on it. One foreseeable consequence of the decision will therefore be a considerable amount of litigation over what bodies are "public authorities" within the meaning of the *Ordinance*. While that issue would have been a live one had the Court decided the case the other way, its resolution now becomes especially important as a practical matter. The phrase is not defined in the *Bill of Rights Ordinance* or in the *Interpretation and General Clauses Ordinance* (which contains a definition only of "public body"). Defining and identifying "public" authorities and functions can be an extremely difficult task; however, it seems likely that the courts will look for assistance to case law in the area of judicial review in the process of identifying public authorities.

Approach towards permissible limitations

The approach adopted by the Court in deciding whether section 52E (1) was a permissible restriction under the *Bill of Rights* also gives rise to concern. The Court held that such a restriction was "necessary" for the "protection of the rights . . . of others" (namely judgment creditors) and was therefore a permissible limitation within article 8 (3) of the Bill of Rights.

Instead of drawing on the wealth of international and comparative jurisprudence on the meaning of the word "necessary" in article 8 (3) of the *Bill of Rights*, the Court of Appeal appeared to place little value on that accumulated experience (p. 10 of the judgment, see p. 13 below). It is not clear whether the Court was suggesting that such material was not of particular assistance generally or just in this particular case. In either event, the approach to international and comparative material adopted by the Court appears at variance with the spirit of the decision in *R v Sin Yau Ming*, which noted that such

jurisprudence could be "of the great assistance and should be given considerable weight" in interpreting our *Bill of Rights*.

Furthermore, the Court's standard for determining whether a restriction is "necessary" appears less exacting than the standard applied in many international and national decisions. Had the Court in this case considered the international material in greater depth, it may well have applied a more exacting standard or at any rate produced a judgment more persuasive in its argumentation. The relatively undemanding standard applied here could have important ramifications for the future impact of the *Bill of Rights*. While no doubt many in the business world will welcome the upholding of prohibition orders against debtors as valid, it may be that the present decision will have adverse consequences for them in other areas when they seek to resist regulation on the ground that it violates their freedom of expression, for example in the area of advertising.

One notable feature of the Court's analysis was the paucity of material before it on which it could base its conclusion that s. 52E (1) was a necessary measure. While the Court admitted that statistics were hard to come by, it did accept some figures from the Bar table, to the effect that an average of 20 applications a year were handled by the Director of Legal Aid. The Court's assessment seems to have turned largely on what it considered to be common experience (that everyone knows that absconding debtors are a serious problem in the peculiar circumstances of Hong Kong and that prohibition orders are a proportionate way of responding to that problem) and a consideration of the formal protections in the legislation. It may be that the Court is correct in its ultimate conclusion, but its mode of analysis is far from compelling. It would have been far preferable had the Court's conclusion been based on sociological evidence, comparative material and other relevant evidence.

It is to be hoped that in future cases the courts will follow international practice by requesting and availing themselves of comparative material and sociological evidence. While considering this type of material would bring a new, not unproblematic dimension to the judicial process in Hong Kong, it is an approach which needs to be developed if full effect is to be given to the rights guaranteed in the *Bill of Rights*.

If the fairly low level of scrutiny applied by the Court in this case is an indication of the standard to be applied in future, the result may be that it will be relatively easy for Government and the Legislature to justify serious encroachments on fundamental human rights. That would, in our view, be a most unfortunate result. In the early days of a Bill of Rights it may be unrealistic to expect judges to spring, Athena-like, fully armed into the fray. However, the approach adopted by a differently constituted Court of Appeal in *R v Sin Yau Ming* justifiably raised hopes that the Hong Kong courts would deal with the *Bill of Rights* in a manner which was sensitive to its goals and origin and that they would be receptive to the rich international and national jurisprudence under comparable Bills of Rights elsewhere. The decision of the Court in *Tam Hing-yee v Wu Tai-wai*, however, does little to reinforce that optimism.

APPLICATION OF THE BILL OF RIGHTS

COMMENCEMENT, "RETROSPECTIVE" OPERATION AND "EXTRA-TERRITORIAL" OPERATION OF THE BILL OF RIGHTS

Evidence Ordinance (cap. 8), section 77E

Attorney General v Lorrain Osman, (1991) HCt, MP 2793 of 1985, Jones J, 28 October 1991

This was an application to set aside an order of Master Betts dated 11 December 1985 for the issue of a letter of request to the High Court of Malaya for the purpose of obtaining evidence in Malaysia to be used in extradition proceedings against the applicant in London. The background to this application is summarized in *In the Matter of Lorrain Osman* (see p. 16 below). A preliminary issue as to locus standi was raised. It was argued that the *Bill of Rights Ordinance* gave a person under suspicion locus standi to challenge the making of an order under section 77E of the *Evidence Ordinance*, at least when criminal proceedings had already been commenced against that person. It was further argued that article 10 of the *Bill of Rights* included a right of access to a court during the early stages of the criminal process. As the applicant was denied his right to contest the subpoenas prior to the depositions and to participate and cross examine witnesses in their depositions, there was a violation of articles 10 and 11 of the *Bill of Rights*.

Jones J held that the Bill of Rights did not have retrospective or extraterritorial effect. In his view, since the applicant was not in Hong Kong, he could not invoke the rights in personam under the *Bill of Rights* (p. 12 of his judgment):

> "It is trite law that a statute does not operate retrospectively unless there is a provision to the contrary. As there is no provision to this effect in the Bill of Rights Ordinance, the Ordinance does not, in any event, apply. Further, until Osman returns to Hong Kong, he is not entitled to avail himself of any rights in personam under the Bill of Rights."

He also dismissed the application insofar as it relied on articles 10 and 11 of the *Bill of Rights* (see p. 17 below).

> *Counsel*: Martin Thomas QC and Johnny Mok (instructed by Boase & Cohen) for the applicant; Clive Nicholls QC and Graham Harris (instructed by Clifford Chance), for the Attorney General.

R v Li Kwok Wa, Crim App No. 350 of 1991, Court of Appeal

In this case the Court of Appeal has requested argument on the issue of whether the guarantee of the presumption of innocence in article 11 (1) of the *Bill of Rights* can be invoked in a prosecution for an offence which was committed before the entry into force of the *Bill of Rights Ordinance* on 8 June 1991.

> *Counsel*: Gerry Forlin, for the Crown; John Mullick, for the defence.

Editors' comment

While the statement of Jones J that the *Bill of Rights Ordinance* does not operate "retrospectively" reflects the general rule, it should also be noted that the presumption against retrospective operation of a statute does not apply to procedural rights.

The issue of retrospectivity was in fact argued before the Court of Appeal in *R v Sin Yau Ming*, in which the alleged offence had been committed before 8 June 1991. The defence argued that article 11 (1) of the *Bill of Rights* was, in relation to the reverse onus provisions in question, a procedural protection and could therefore be relied on although the alleged offence had taken place before the entry into force of the *Bill of Rights Ordinance*. The Crown supported this position. The Court of Appeal did not advert to the question in its otherwise comprehensive judgment, but since it went on to hold the provisions repealed, presumably it accepted the point. In a number of cases in the High Court, Duffy J has also ruled to the same effect.

It may be arguable that procedural disadvantages which arise after 8 June 1991 as a result of evidence gathering prior to that date could be scrutinised under the *Bill of Rights* prior to trial (perhaps as a propsective denial of the right to a "fair" hearing in article 10), and in any event at the trial. However, the matter is unclear.

However, it should be noted that, where the *Bill of Rights* is relied on to challenge substantive provisions of an Ordinance, actions taken before 8 June 1991 under an impugned Ordinance will in general not be subject to review against the guarantees of the *Bill of Rights*.

In relation to the judge's comment that the applicant could not avail himself of any rights under the *Bill of Rights* until he returned to Hong Kong, see the note on *Eng*'s case at p. 12 below.

INTERPRETATION OF THE BILL OF RIGHTS

R v Yiu Chi Fung, District Court, Case No. 397 of 1991, Judge Lugar-Mawson, 25 October 1991[2]

In this case, which involved a challenge to section 17 of the *Summary Offences Ordinance*, Judge Lugar-Mawson made a number of comments on the interpretation of the *Bill of Rights Ordinance*. He accepted (at pp. 13-14 of his judgment) the following submission by counsel for the Crown:

> "The Court of Appeal [in *R v Sin Yau Ming*], while affording considerable weight to international jurisprudence and particularly that of common law countries with a constitutionally entrenched Bill of Rights, did not suggest the wholesale importation of Canadian and American precedents. . . .
>
> This [comments made by Silke VP in *Sin Yau Ming*] indicates that the Hong Kong Courts will not necessarily follow the route taken by the Canadian and United States Courts when interpreting their constitutional documents which contain provisions analogous to the Hong Kong Bill of Rights."

---

[2] We are grateful to Philip Wong, who kindly supplied us with information about this case.

ADOPTION OF A CONSTRUCTION CONSISTENT WITH THE BILL OF RIGHTS ORDINANCE; REPEAL "TO THE EXTENT OF THE INCONSISTENCY": BILL OF RIGHTS ORDINANCE , SS. 3 (1) AND 3 (2)

In *R v Lau Shiu-wah* (see p. 21 below), Judge Whaley considered the meaning of section 3 of the *Bill of Rights Ordinance* in the context of section 29 (6)(a)(i) of the *Theft Ordinance*. He concluded that it was not possible for him to adopt a construction of that provision which was consistent with article 11 (1) of the *Bill of Rights* and held that it had been repealed.

In *R v Yiu Chi Fung* (see p. 27 below), Judge Lugar-Mawson made the following comments in relation to section 3 (at pp. 15-16 of his judgment):

> "It is clear from Section 3 (1) of the Hong Kong Bill of Rights Ordinance that if I find that Section 17 of the Summary Offences Ordinance admits of a construction consistent with that Ordinance, it shall be given that construction. It is only if I find that it does not admit of a construction consistent with the Bill of Rights that it is repealed -- and then only to the extent of the inconsistency. That is provided for in Section 3 (2) of the Ordinance. As I read that sub-section it means that I can apply a "red pencil" test and hold that certain words and phrases are inconsistent and that only those words and phrases have been repealed by the Ordinance, but that the remainder of the provision remains in full force. Provided always that the effect of the repeal does not render it wholly nugatory."

APPLICATION OF THE BILL OF RIGHTS ORDINANCE -- "PRE-EXISTING LEGISLATION", "LEGISLATION THAT CAN BE AMENDED BY AN ORDINANCE", EXTRADITION

***Extradition Act 1989* (UK); *United States of America (Extradition) Order 1976; Hong Kong (Legislative Powers) Order 1989*; *Application of English Law Ordinance* (cap. 88)**

***United States of America v Johnny Eng*, CMP No. 1237 of 1990, 9 September 1991, H.L. Brazier Esq**

The fugitive challenged the admission of affidavit evidence in extradition proceedings on the ground that the admission of such evidence without permitting witnesses to be called for cross-examination was a violation of article 10 (right to a fair trial) and article 11 (2)(g) (right to cross-examine witnesses) of the *Bill of Rights*. The Magistrate considered first whether the *Bill of Rights Ordinance* had any application to extradition proceedings in Hong Kong at all. (For his decision on the other matters, see below, p. 16).

Magistrate Brazier held that the *Bill of Rights Ordinance* did not apply to extradition proceedings in Hong Kong. Extradition requests made by the U.S.A. were dealt with in accordance with the *Extradition Act 1989* (UK), which had been extended to Hong Kong by section 16 of that Act and *United States of America (Extradition) Order 1976*. Section 3 of the *Bill of Rights Ordinance* applied only to "pre-existing legislation", "legislation" being defined in section 2 (1) of the *Ordinance* as meaning "legislation that can be amended by an Ordinance".

The Magistrate held that neither the 1989 Act nor the 1976 Order in Council could be amended by a Hong Kong Ordinance. Nor did he consider that the position in this case was affected by section 2 of the *Hong Kong (Legislative Powers) Order 1989*, which

provides that the Hong Kong Legislature "may, to the extent required in order to give effect to an international agreement which applies to Hong Kong and for related purposes . . . (a) repeal or amend any enactment so far as it is part of the law of Hong Kong . . .". He commented (at p. 14 of the judgment):

> "Whilst on the face of it this does give Hong Kong 'rights' with regard to international agreements, it falls well short of giving power to the Hong Kong Legislature to amend an existing Treaty or imperial enactment."[3]

The Magistrate also rejected an argument to the effect that the *Application of English Law Ordinance* (cap. 88) granted the Hong Kong Legislature power to amend or repeal extradition legislation. Nonetheless, he then went on to consider whether the legislation did conflict with any of the substantive guarantees of the *Bill of Rights* and concluded that they did not (see below at p. 16).

APPLICATION TO PROCEEDINGS BETWEEN PRIVATE INDIVIDUALS (SECTIONS 3 AND 7)

***Tam Hing-yee v Wu Tai-wai*, Court of Appeal, Civ App No. 118 of 1991, 28 November 1991 (Cons VP, Clough and MacDougall JJA)**

This was an appeal from the judgment of Judge Downey, who had held on 8 July 1991 that section 52E (1)(a) of the *District Court Ordinance* had been repealed by the *Bill of Rights Ordinance*. The case involved an application by a creditor for the extension or renewal of a prohibition order made against his debtor prior to the commencement of the *Bill of Rights Ordinance*. In his judgment Judge Downey had held that the *Bill of Rights Ordinance* applied to all legislation and that therefore legislation which affected legal relations between private individuals could be measured against the guarantees of the *Bill of Rights*. He also held that the restriction on the guarantee of freedom of movement was an infringement of article 8 (2) of the *Bill of Rights* and was not a permissible restriction within the meaning of article 8 (3). (See the summary in the *Bill of Rights Bulletin*, v. 1, n. 1, pp. 7-8).

The Court of Appeal **reversed** the judgment of Judge Downey on both grounds.

Held: 1. The *Bill of Rights Ordinance* binds only the Government and public authorities and therefore the guarantees of the *Bill of Rights* could not be invoked in litigation between two private parties to impugn legislation affecting the rights of those parties *inter se*.

2. Section 52E (1)(a) is a provision necessary for the protection of the rights of others within the meaning of article 8 (3) of the *Bill of Rights*, namely judgment creditors. (Further discussion of the Court's holdings on this ground appears at p. 13 below.)

On the question whether the *Bill of Rights Ordinance* applied to legislation which was being invoked or relied on by one private individual in litigation against another private individual, Judge Downey had held that a negative conclusion would defeat a major purpose of the Ordinance, namely judicial scrutiny of all legislation inconsistent with the Ordinance" and would produce "bizarre and irrational" results. The Court of Appeal

---

[3] **Editors:** It is not entirely clear whether this conclusion takes fully into account the fact that the *Bill of Rights Ordinance* itself is giving effect to a treaty and can therefore be viewed as having drawn on the power conferred by s. 2 of the *Hong Kong (Legislative Powers) Order 1989*.

(whose judgment was delivered by Cons VP) was not persuaded by Judge Downey's conclusions:

> "We accept that the Ordinance, being in the nature of a constitution, must be given a 'generous interpretation' (per Lord Wilberforce in *Ministry of Home Affairs v Fisher* [1980] AC 319 at 328) or 'a generous and purposive interpretation' (per Lord Diplock in *Attorney-General of the Gambia v Jobe* [1984] AC 689 at 700), but that does not entitle a court to override the clear intention of the legislature, which we take to be, from the words 'binds only the government, etc.' [section 7] that private individuals should not be adversely affected by the Ordinance, as the judgment creditor in the present instance would be if, assuming for the moment that s. 52E is in fact inconsistent with the Ordinance, the judge's construction be correct." (p. 6)
>
> . . .
>
> "Nor do we find any conceptual difficulty in the repeal of an ordinance with regard to one section of the community but not with regard to the rest. Many statutes are specifically enacted to apply disjunctively in that way. The judge appears to assume that it was an 'all or nothing' situation. With respect to him he overlooked that s. 3 repeals the offending legislation only 'to the extent of the inconsistency'.
>
> We accept that the inevitable result of the interpretation which we find unavoidable is that the Ordinance does not fully comply with the intention expressed in its preamble, namely:
>
> > 'to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights'
>
> for the convention itself has no similar restrictive provision, unless perhaps this aspect is covered by the qualification that follows the words quoted:
>
> > 'as applied to Hong Kong'
>
> But we foresee no bizarre or irrational results." (p. 7)

***Sun Ching-yee v Wong Shum*, Action No 5808 of 1986, Hooper J (in chambers)**

This case involves an application for a prohibition order under s. 21B of the *Supreme Court Ordinance* (cap. 4). The *Bill of Rights* issues it raises are the same as those considered by Judge Downey in *Tam Hing-yee v Wu Tai-wai* (presently before the Court of Appeal). The case before Hooper J was adjourned pending the outcome of the appeal in *Tam Hing-yee v Wu Tai-wai*.

***Theft Ordinance* (cap. 210), section 33**

***Duty Free Shoppers HK Ltd v. Wong Kwok Pong et al*, Civ App 169 of 1991, HCA No. A6091 of 1991**

This case involved interlocutory proceedings in an action by the plaintiff for sums allegedly misappropriated by the defendants. The first to fourth defendants were former employees of the plaintiff. It was alleged that during their employment with the plaintiff

they had drawn a total of 48 cheques on the plaintiff's account in favour of a fictitious company. These cheques were eventually paid into the bank account of the fifth defendant's company. The defendants were charged with five counts of theft. On 13 August 1991 the plaintiff obtained an ex parte Mareva injunction against the defendants. On 28 August 1991 an order of disclosure was made by Deputy Judge Wong against the first, second, third and fifth defendants, who had complied with the order with the exception of one paragraph, which required them to disclose the whereabouts of the proceeds of the cheques in question. The defendants refused to answer the question on the ground that such disclosure would incriminate them in the criminal proceedings and that the order violated article 11(2)(g) of the *Bill of Rights*.

Section 33 of the *Theft Ordinance* provides that no person shall refuse to answer any question put to him in proceedings for the recovery or administration of any property on the ground that to do so may incriminate a person or the person's spouse of an offence under the Ordinance. It further provides that such answers shall not be admissible in evidence against the person or the person's spouse in proceedings under that Ordinance.

On 10 October 1991 Jones J rejected the *Bill of Rights* argument, holding that "Article 11 is irrelevant for it is concerned with criminal proceedings." (p. 4 of the judgment) He further held, though without supporting reasoning or reference to *Tam Hing yee* or other materials, that the *Bill of Rights* did not apply to proceedings between private parties (pp. 4-5 of the judgment):

> "However, Mr Beach contended that the Bill of Rights does not apply to private proceedings having regard to s. 7 which reads . . .[text of s. 7]
>
> I accept this submission for it is clear that the Bill of Rights is not applicable to proceedings between private parties so that the defendants are not entitled to a stay . . .".

A further application for a stay pending appeal was dismissed by the judge on 24 October 1991. The defendants appealed against the order of Jones J and sought from the Court of Appeal a stay of the original order of disclosure pending appeal. It was argued that the *Bill of Rights* could apply to this particular case, relying on *Tam Hing-yee v Wu Tai-wai* and other materials, and that section 33 of the *Theft Ordinance* is inconsistent with, inter alia, article 5 of the Bill of Rights (liberty and security of person). On 11 November 1991 Fuad V-P dismissed the appeal on procedural grounds, holding that the defendants had appealed against the wrong order, and did not rule on the merits of the *Bill of Rights* issues.

> *Counsel*: John Bleach (instructed by Deacons) for the plaintiff; Anthony Neoh QC, Johannes Chan and Michael Ko (instructed by Raymond Tang & Co.), for the defendants.

Copyright Ordinance (cap. 39), section 9

Hong Kong Stationery Manufacturing Co. Ltd v Worldwide Stationery Manufacturing Co., High Court, Action No. 434 of 1990, Mayo J

This case involved an application for summary judgment under Order 14 in an action for breach of copyright. The defendant argued that s. 9 of the *Copyright Ordinance* (cap. 39) violates the right to a fair trial in article 10 of the *Bill of Rights*, as well as the presumption of innocence in article 11 (1). Section 9 permits affidavits containing assertions as to the subsistence of copyright or the identity of the owner to be received in evidence and requires a court to presume that the facts contained in them are correct until the contrary is proved.

The plaintiff argued that the *Bill of Rights* has no application to civil proceedings between private parties, that section 9 in any event did not violate either article 10 or 11 (1) in the context of criminal proceedings, and that if it did the section could be interpreted as applying only to civil proceedings. The plaintiff further argued that section 9 did not violate the defendant's right to a fair hearing in the determination of its rights and obligations in a suit at law.

Even though there were two and a half days of argument on the *Bill of Rights* issue, Mayo J eventually found that he could decide the application without deciding the *Bill of Rights* issues. He wrote (at p. 14 of his judgment):

> "The interpretation of the law relating to the Bill of Rights is still in a formative stage. This is particularly the case on the subject of its application between private individuals. I have been informed that the decision of Downey DJ [on] which Mr. Rogers placed particular reliance is shortly to be considered by the Court of Appeal.
>
> I am doubtful whether much useful purpose is likely to be served by any observations I may make having regard to the fact that they will be obiter dicta.
>
> It is also overwhelmingly the case that s. 9 will be called in aid of criminal proceedings and any comments I make in a civil context are not likely to be helpful.
>
> Accordingly, I have chosen not to express a view on this subject."

Counsel: Andrew Liao QC and Priscilla Wong (instructed by Wilkinson & Grist), for the plaintiff; Anthony Rogers QC, Peter Garland, Winnie Tam and Johnny Mok (instructed by Henry C.K. Tung & Co.), for the defendants.

GUARANTEE OF FREEDOM FROM TORTURE AND OTHER ILL TREATMENT (ARTICLE 3) AND HUMANE TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY (ARTICLE 6); REMEDIES

Extradition Act 1989 **(UK);** ***United States of America (Extradition) Order 1976; Hong Kong (Legislative) Powers Order 1989; Application of English Law Ordinance*** **(cap. 88)**

United States of America v Johnny Eng**, CMP No. 1274 of 1990, 27 September 1991, H.L. Brazier Esq**

In this case the fugitive argued that, because one of the crimes for which his extradition was sought carried a mandatory minimum sentence of life imprisonment, permitting his extradition to face the possibility of such a penalty would involve a violation of articles 3 and 6 of the *Bill of Rights*.

The Magistrate rejected this argument. He noted that there was no evidence before him that imprisonment in the U.S.A. was inhuman or degrading or infringed the inherent dignity of the human person, and that more severe penalties for similar offences could be imposed under the law of Hong Kong (although they were not mandatory).

However, he went further, concluding (at pp. 9-10 of his judgment):

> "On this point the Court found, as a matter of principle, that these Articles 3 and 6 have no application to the function of the Court. Further the Court is not concerned with the law of the requesting state (*Sinclair* and *Neilson*) or what may happen in a trial there (*Levy*); it is assumed justice will be administered in accordance with our own law (Arton 1986) and any action that could be taken in this regard should be by the Executive.
>
> . . .
>
> In short, the Court finds that whilst Articles 3 and 6 apply to protect this fugitive whilst he is in Hong Kong they cannot have any effect directly or indirectly outside the territory nor can they affect the conduct of the proceedings or any order made by this Court. It is accepted, however, that the nature of the offence and the statutory minimum sentence in the U.S. might be an appropriate matter for the Court to bring to the attention of the Governor, before the Governor considers the fugitives [sic] surrender (if such be the case)."

The Magistrate also stated, that even if a case under the *Bill of Rights* had been made out, he would have not been able to grant a specially tailored remedy, since the only powers conferred upon him were to commit or discharge the fugitive. He held that he had no jurisdiction to find a case to answer and yet refuse to commit, or to extradite and to order the U.S. not to prosecute on one of the offences or to waive the statutory minimum sentence (at p. 9).

Editors' comment

The suggestion that the *Bill of Rights* applies to a person only when the person is in Hong Kong (see also the comment of Jones J in *Osman*, p. 5 above) and that it can have no indirect effect in relation to actions which may occur outside Hong Kong appears to overlook well-established jurisprudence to the contrary under the *ICCPR* and the *European Convention*. There are a number of cases decided by the Human Rights Committee under the *ICCPR* in which individuals outside the territory of the State concerned have been able to claim that actions of the State have infringed guaranteed rights. For an example of the way in which human rights guarantees may prevent a fugitive from being returned to requesting state (in the context of extradition from the U.K. to the U.S.A.), see *Soering v U.K.*, European Court of Human Rights, Judgment of 7 July 1989, Series A, No. 161, 11 *EHRR* 439.

LIBERTY AND SECURITY OF THE PERSON: RIGHTS AGAINST SELF-INCRIMINATION (ARTICLE 5)

***Theft Ordinance* (cap. 210), section 33**

***Duty Free Shoppers HK Ltd v. Wong Kwok Pong et al*, Civ App 169 of 1991, HCA No. A6091 of 1991**

In this case (the facts of which appear at p. 9 above), the argument was made on an applications for a stay pending appeal from the decisions of Deputy Judge Wong and Jones J that the order to produce to the court in civil proceedings information which may

incriminate them was a violation of their right to liberty and security of the person in article 5 (1) of the *Bill of Rights*.

However, the application for leave to appeal was dismissed on other grounds and Fuad VP expressly stated that this issue was not considered on the merits.

LIBERTY OF MOVEMENT (ARTICLE 8) -- PROHIBITION ORDERS

***District Court Ordinance* (cap. 336), section 52E**

***Tam Hing-yee v Wu Tai-wai*, Court of Appeal, Civ App No. 118 of 1991, 28 November 1991 (Cons VP, Clough and MacDougall JJA)**

As noted above (p. 8), the Court of Appeal held that section 52E (1)(a) was not a violation of the *Bill of Rights*.

Article 8 of the *Bill of Rights* provides:

> (1) Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.
>
> (2) Everyone shall be free to leave Hong Kong.
>
> (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights.
>
> (4) No one who has right of abode in Hong Kong shall be arbitrarily deprived of the right to leave Hong Kong.

In dealing with the question whether the infringement on a debtor's freedom to leave Hong Kong came within article 8 (3), the Court wrote (at p. 10 of the judgment):

> "The judge approached the question of necessity as though it were a balancing exercise between the personal liberty and freedom of the judgment debtor on the one hand and the legitimate interest in the satisfaction of his debt by the judgment creditor on the other. We do not see it that way. Firstly it is not a question of general liberty or freedom. It is a question of the particular right of the individual to leave Hong Kong if he wishes. Secondly it is not for the courts to put a value on that right. Worth little or much, that right is confirmed to the individual by the Ordinance which provides that it shall only be taken away or restricted if that is necessary to achieve one of the stated objectives. In assessing whether or not that is so we do not, with the very greatest respect, feel that the court is assisted by substituting for necessity some phrase such as "pressing social need" (see *The Sunday Times v. The United Kingdom*, 1979 2 EHRR 245 at paras. 59 and 62) or considering whether the restriction in question is reasonable and demonstrably justified in a free and democratic society, as may be

> appropriate in the application of other articles of the Ordinance: c.f. *R. v. Sin Yau Ming*, HCA 289/90, 30th September 1991, as yet unreported. The court must instead direct its mind to factors such as what would be likely to happen if the restriction were removed or by what alternatives might the stated objectives be otherwise achieved. It may also be legitimate, we think, to consider how far the restriction impinges on the right to leave Hong Kong, for more than is necessary may not be taken."

The Court went on to hold that, in view of the ease with which debtors who wished to evade their responsibility could leave Hong Kong to a jurisdictions where a Hong Kong judgment could not be enforced and the safeguards contained in section 52E, the provision was a measure necessary for the protection of the rights of others (namely creditors).

Although the Court decided that it was not necessary to decide whether the provision was also necessary for the protection of public order, it noted (at pp. 11-12 of the judgment):

> "As to protection of public order, it is not uncommon to find in the criminal jurisdiction of the courts that those commonly known as 'loan sharks' do not hesitate to employ strong arm tactics to recover sums of money they allege to be due from their victims. If those with monies lawfully adjudged due to them were compelled to watch their debtors calmly pack their bags and leave, some might well succumb to the temptation to take the law into their own hands. But in view of the opinion we have just ventured to express, it is not necessary to come to a firm conclusion."

Editors' comment

It is well established in the international case law that it is permissible to restrict the enjoyment of rights guaranteed by the *ICCPR* if it is necessary to protect rights which are *not* protected by that instrument. However, in deciding whether a restriction is necessary, it does appear that special weight should be given to the rights which *are* included in the *ICCPR*. (Similar reasoning applies to the *Bill of Rights*.)

The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*,[4] a non-binding set of principles adopted by leading international lawyers, suggest that the follwoing is the correct approach to adopt:

> 35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.
>
> 36. Where a conflict exists between a right protected in the Covenant and one which is not, recognition should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.

---

[4] (1985) 7 *Human Rights Quarterly* 3-14.

***Sun Ching-yee v Wong Shum*, Action No 5808 of 1986, Hooper J (in chambers) (prohibition orders): see p. 9 above.**

RIGHT TO A FAIR TRIAL IN CIVIL PROCEEDINGS (ARTICLE 10)

Fair and public hearing before a competent, independent and impartial tribunal in the determination of one's rights and obligations in a suit at law

***de Kantzow v The Appeal Tribunal*, Civ App No. 53 of 1991 (appeal from the judgment of 7 February 1991 of Bokhary J in High Court, MP No 3193 of 1990),**

The background to this case is described in the *Bill of Rights Bulletin*, v. 1, n. 1, p. 10. On 8 October 1991 the Court of Appeal allowed the appeal against the decision of Bokhary J on the ground that the original appeal to the Building Tribunal against the decision of the Building Authority had been lodged out of time. The Court did not deal with the *Bill of Rights* issues. The only comment which touched on the *Bill of Rights* was made by of Kempster JA, who expressed the view (at p. 4 of the judgment) that, although he did not accept that there was any appealable error in the judge's conclusion that an oral hearing before the Tribunal had been necessary in the present case:

> This does not mean that the Tribunal, in appropriate circumstances and insofar as the legislation meets the requirements of the Bill of Rights Ordinance, may not refuse an oral hearing where is it apparent that an ostensible dispute as to matters of fact is without substance.

Counsel: A. Ismail (instructed by Kao, Lee & Yip), for the applicants; V. Hartstein, for the Appeal Tribunal.

***Moneylenders Ordinance* (cap. 163), section 10B (a); rules of evidence, fair trial**

***Re Rich Sir Ltd*, EMP No. 387/1991, decision of 27 August 1991, C. Morley Esq, Magistrate and two Assessors**

This case was noted in the *Bill of Rights* Bulletin, v.1, n.1, p. 10. The appeal from the decision of the Licensing Court has not yet been heard.

***In the Matter of an Application for leave to Apply for Judicial Review by Jenny Chua Yee Yen*, MP No 2325 of 1991**

This case involves an application for leave to apply for judicial review of, *inter alia*, a decision of the Hong Kong Polytechnic requiring the applicant to withdraw from a diploma course in hotel and catering management. (For further details see *Bill of Rights Bulletin*, v.1, n.1, p. 12). The matter has not yet been heard.

RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS (ARTICLES 10 AND 11)

Extradition Act 1989 **(UK);** ***United States of America (Extradition) Order 1976; Hong Kong (Legislative Powers) Order 1989; Application of English Law Ordinance*** **(cap. 88)**

United States of America v Johnny Eng**, CMP No. 1237 of 1990, 9 September 1991, Mr Brazier Esq**

The fugitive in this case argued that section 12 of Schedule 1 of the *Extradition Act 1989* (UK), which permitted the introduction of affidavit evidence in extradition proceedings, violated the right to a "fair trial" in the "determination of any criminal charge" (article 10) and to the right to examine, or have examined, the witnesses against him" (article 11 (2)(e)).

The Magistrate held that in this case article 10 essentially added little or nothing to the specific guarantees in article 11 (2)(e).[5] He expressed doubts as to whether extradition proceedings even concerned a "criminal charge" or "criminal offence" at all, but held that in any event such proceedings did not involve the *determination* of such a charge, because the purpose of extradition proceedings was not to determine the guilt or innocence of the fugitive.

Counsel: M. Hartmann and M.C. Blanchflower, for the Government of the USA; Gary Alderdice, for the fugitive.

The same Magistrate reiterated these conclusions in **CMP 1274 of 1990, 27 September 1991**.

Extradition proceedings in UK, relevance of rights under ***Hong Kong Bill of Rights Ordinance***

In the Matter of Lorrain Esme Osman and In the matter of an Application for A Writ of Habeas Corpus Ad Subjiciendum**, Queen's Bench Division, High Court of Justice (Divisional Court), London, Woolf LJ and Pill J, 14 November 1991**

This was the sixth application for habeas corpus made by the applicant, whose extradition from the U.K. on various conspiracy and corruption charges has been sought by the Government of Hong Kong since 1985. The applicant has been remanded in custody for the whole of that period. In this case the applicant relied on section 11 (3)(b) of the *Extradition Act 1989*, which enabled the Court to discharge an applicant on an application for habeas corpus if the return of the applicant would be unjust and oppressive by reason of the passage of time. The applicant argued that his right to trial without undue delay under article 11 (2)(c) of the *Bill of Rights* and his right to fair trial under article 10 of the *Bill of Rights* had been violated. He relied, inter alia, on the delay to date, the likely delays in the future caused by the delay in extraditing a co-accused from France, a US federal district court order suppressing all evidence collected in the United States, and the delay in

[5] It should be noted that this will not always be the case. It is generally accepted in relation to the corresponding provisions in the Covenant that article 10's guarantee of a fair hearing is not exhausted by the specific guarantees in article 11.

collecting evidence in Malaysia. The history of the application was considered by the Court, which eventually dismissed the application on the ground that it was an abuse of process.

It was held that the delay, though disturbing, was deliberately brought about by the applicant himself who had exploited the legal machinery to prevent his return to Hong Kong. In relation to the *Bill of Rights*, it was held that:

> (a) arguments in relation to the *Bill of Rights* could have been raised in earlier application for habeas corpus;
>
> (b) the passage of the *Bill of Rights*, which raised the standards of procedure and fairness with regard to trial in Hong Kong, could not make the return of the applicant for trial in Hong Kong unjust or oppressive;
>
> (c) the expert evidence before the Court did not suggest that there could be no question of the applicant being tried in Hong Kong. At best this evidence only showed that it was likely that the courts of Hong Kong would, in view of the *Bill of Rights*, decide that the applicant should not be subject to trial; and
>
> (d) in any event, the appropriate forum to decide on the *Bill of Rights* issues would be the Hong Kong court, who would have access to all the material matters which were not available to the London court.

Woolf LJ expressed the view that "it is deeply disturbing that after this period of time, after Mr. Osman has been in custody in prison in this country for far too long, it should still be uncertain whether he is to be returned to Hong Kong."(at p. 28) The court also dismissed a cross-application by the Government of Hong Kong to the effect that all future applications of the applicant should be subject to a special requirement of leave. Instead, it was held that all future applications should be directed to the same bench and would normally be heard within seven days.

> *Counsel*: Anthony Scrivener QC and Johnny Mok (instructed by Eversheds), for the applicant; Clive Nicholls QC and Graham Grant (instructed by Clifford Chance), for the Government of Hong Kong; J. Lewis, (instructed by the Crown Prosecution Service), for the Governor of Brixton Prison.

Evidence Ordinance (cap. 8), section 77E

Attorney General v Lorrain Osman, (1991) HCt, MP 2793 of 1985, Jones J, 28 October 1991

This was an application to set aside an order of Master Betts dated 11 December 1985 in relation to the issue of a letter of request to the High Court of Malaya for the purpose of obtaining evidence in Malaysia to be used in extradition proceedings against the applicant in London. The background to this application is summarized in *In the Matter of Lorrain Osman* (see p. 16 above). A preliminary issue as to locus standi was raised. It was argued that the *Bill of Rights Ordinance* gave a person under suspicion locus standi to challenge the making of an order under section 77E of the *Evidence Ordinance* when criminal proceedings have already been commenced against that person. It was further argued that article 10 of the *Bill of Rights* included a right of access to a court during the early stages of the criminal process. As the applicant was denied his right to contest the subpoenas prior to the depositions and to participate and cross examine witnesses in their depositions, there was a violation of articles 10 and 11 of the *Bill of Rights*.

The application was dismissed. It was held that articles 10 and 11 did not apply in these circumstances for they were only related to the trial procedure and not to the preliminary procedure of evidence gathering.

Jones J stated (at pp. 11-12 of his judgment):

> "Having regard to the authorities and upon a construction of the provisions of the Bill of Rights Ordinance, I am quite satisfied that Articles 10 and 11 cannot be invoked for the purposes of s. 77E of the Evidence Ordinance for they relate to the determination of a criminal trial. The issue of evidence gathering does not form part of the trial, but is part of the machinery that leads to the collection of evidence. At this stage the Bill of Rights Ordinance will not apply for the rights and liberty of a suspected person are not at stake or in jeopardy. Upon the execution of the letter of request, the rights of the suspected person may come under attack if, for instance, depositions are taken without affording him an opportunity to be present for cross-examination of the witnesses. Further, the suspected person will have an opportunity to challenge the evidence obtained and object to its admissibility at the trial under s. 77F of the Evidence Ordinance. In this case, Osman has not yet been charged for he cannot be charged until he comes to Hong Kong. As a result, I accept the submission of Mr. Nicholls that Articles 10 and 11 do not apply for they only relate to the trial procedure and not to the preliminary issue of evidence gathering."

Jones J further held that the *Bill of Rights* did not have retrospective or extraterritorial effect (see p. 5 above). In his view, since the applicant was not in Hong Kong, he could not invoke the rights in personam under the *Bill of Rights* (at p. 12 of his judgment).

> *Counsel*: Martin Thomas QC and Johnny Mok (instructed by Boase & Cohen) for the applicant; Clive Nicholls QC and Graham Harris (instructed by Clifford Chance), for the Attorney General.

PRESUMPTION OF INNOCENCE (ARTICLE 11 (1))

***Firearms and Ammunition Ordinance* (cap. 238), section 24**

***R v Lau Ting-man*, District Court, Deputy Judge Eccleton**

This case involved a challenge to presumptions contained in section 24 of the *Firearms and Ammunition Ordinance* (cap. 238), as well as to the negative averment provision contained in section 94A of the *Criminal Procedure Ordinance* (cap. 221) on the ground they violated the presumption of innocence in article 11 (1) of the *Bill of Rights*.

On 15 November 1991 the Court held that section 24 of the *Firearms and Ammunition Ordinance* was inconsistent with the *Bill of Rights* and had been repealed, but that section 94A was not inconsistent with the *Bill of Rights*. As of 29 November 1991, written reasons had not yet been made available.

> *Counsel*: S.R. Bailey and Maria Ip, for the Crown; Rodney Griffiths, for the defendant.

Summary Offences Ordinance (cap. 228), section 17

***R v Yiu Chi Fung*, District Court, Case No. 397 of 1991, Judge Lugar-Mawson, 25 October 1991**

In this case a challenge was made to s. 17 of the *Summary Offences Ordinance* (cap. 228) on the ground that it contravened the presumption of innocence in article 11 (1) of the *Bill of Rights*, to the extent that it required a person to give a satisfactory account of his possession of one of the types of object specified in the section. The defendant also argued that the provision infringed the right against self-incrimination guaranteed in article 11 (2)(g) of the *Bill of Rights*. The defendant was charged with possession of a diving knife and a saw blade.

Section 17 of the *Summary Offences Ordinance* provides:

> Any person who has in his possession any wrist restraint or other instrument or article manufactured for the purpose of physically restraining a person, any handcuffs or thumbcuffs, any offensive weapon, or any crowbar, picklock, skeleton or other instrument fit for unlawful purposes, with intent to use the same for any unlawful purpose, or being unable to give satisfactory account of his possession thereof, shall be liable to a fine of $5,000 or to imprisonment for 2 years.

Judge Lugar-Mawson held that the provision infringed neither article 11 (1) nor article 11 (2)(g) (for the latter, see p. 27 below). He held:

1. In a case involving possession of an object which could be used for a lawful as well as an unlawful purpose, section 17 required the prosecution, to prove that was possessed by the defendant with intent to use it for an unlawful purpose.

2. The requirement that a person who had been proved to be in possession of an article fit for unlawful purposes give a satisfactory account of his possession of the article was not a reverse onus clause of the type considered by the Court of Appeal in *R v Sin Yau Ming*. The absence of a satisfactory account of that possession was not an essential element of the offence; rather, the giving of a satisfactory account was a matter of defence. Thus, the defendant was not required to disprove an essential element of the offence.

3. Requiring a defendant to bear the burden of proof when making out a true defence was not a prima facie breach of article 11 (1) of the *Bill of Rights*.

4. If requiring a defendant to make out a true defence was a prima facie breach of the presumption of innocence, nonetheless it was a permissible limitation on the enjoyment of that right, as it satisfied the tests of rationality and proportionality which had been endorsed by the Court of Appeal in *R v Sin Yau Ming*. It was in no sense irrational to require a defendant who is proved to have been in possession of an article with intent to use it for an unlawful purpose to explain his possession of the article. The provision was pursuing the important social goal of combatting violent crime to the person and crimes against property and amounted to no more than minimal interference with the protected right.

Counsel: S.R. Bailey and Amy Chan, for the Crown; Philip Wong (instructed by DLA), for the defendant.

Note: This case was decided shortly before *R v Lee Kwong-yut* (see immediately following), although Judge Lugar-Mawson's written reasons were not available until the middle of November 1991. In that case, Magistrate Acton-Bond refused to draw a distinction in principle between a

provision requiring a defendant to disprove an "essential element" of an offence and one requiring that a defendant prove a "true defence". That decision is under appeal.

The Court of Appeal may shortly be considering the compatibility of section 17 with the *Bill of Rights* in another case, *R v Lam Kau-yee*, Civ App No. 408 of 1991, listed for 5 and 6 March 1992.

Summary Offences Ordinance, section 30

R v Lee Kwong-yut, WM No. 990/91, Jonathan Acton-Bond Esq, 28 October 1991

This case involved a challenge to section 30 of the *Summary Offences Ordinance* on the ground that it violates the presumption of innocence in article 11(1) of the Bill of Rights. Section 30 provides that any person who has in his possession or conveys in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give a satisfactory account to the magistrate shall be liable to a fine of $1,000 and 3 months' imprisonment.

It was argued by the Crown that giving a satisfactory account was a matter of defence, so the burden on the accused was to establish a defence, and not to disprove an element of the prosecution. The Magistrate refused to draw a distinction between evidential presumptions and defences where the burden of proof was placed on the defence. In the latter case, the provision has to satisfy a modified test of proportionality and rationality (at p. 5 of his judgment):

> ". . . when a court is confronted with an onus reversing defence it may be compatible with BORO, if it is shown by the crown:
>
> (a) that the balance between those elements of the offence that the crown has to prove and those elements of defence that the defendant has to prove is fair having regard to both the purpose of the legislation and the requirements of article 11 (1) and the extent to which the burden of proof is shifted onto the defence is no more than proportionate to the evil against which society requires protection,
>
> (b) that it is rational and realistic for the defendant to be required to prove those elements of defence."

The Magistrate held that section 30 contained a reverse onus provision, which shifted the burden to the defence as soon as possession in transit and reasonable grounds for suspicion that the property has been stolen or unlawfully obtained had been proved (at p. 6):

> "Reasonable grounds for suspicion would not necessarily amount to a prima facie case that the property was stolen or unlawfully obtained. Unless compelling public interest reasons can be shown, that is far too early a stage for the burden to shift."

The Magistrate held that there was no evidence of such compelling public interest. The effect of section 30 was that, if a defendant declined to give evidence, he could be convicted on a mere suspicion. In his view section 30 could not be construed in a manner consistent with the *Bill of Rights* (for example, by construing it as imposing merely an evidential burden) without doing violence to the clear language of the statute. Accordingly, it had been repealed by the *Bill of Rights*.

Counsel: S.R. Bailey for the Crown; Keith Oderberg, for the defendant.

Note: This decision is the subject of an appeal by way of case stated.

Editors' comment

The defendant first appeared before the court on 13 April 1991, that is, before the commencement date of the *Hong Kong Bill of Rights Ordinance*. The trial was subsequently adjourned to 2 September 1991. It could be argued that the *Bill of Rights* does not apply to this case, since the *Bill of Rights* does not have retrospective effect insofar as it affects substantive offences. There was no argument on this point. The Magistrate ruled, without the benefit of argument from counsel, that "s. 30 is a hybrid provision in that it both defines the offence and the procedure under which the offence can be proved." (at p. 8) This analysis does not seem particularly persuasive and a better argument may be that the offence is not committed until the defendant fails to give a satisfactory account to the magistrate, that is, the relevant date is the time of the trial. At that stage the *Bill of Rights* is operative and applicable.

***R v Lai Kwok-sin*, TM No 4687 of 1991**

This case involves a challenge to section 30 of the *Summary Offences Ordinance* (cap. 228) on the same ground as in the case above. The case has been adjourned pending the outcome of the appeal in *R v Lee Kwong-yut*.

***Theft Ordinance* (cap. 210), section 29 (6)(a)(i)**

***R v Lau Shiu-wah*, District Court, Judge Whaley, 1 November 1991**

In this case Judge Whaley held that section 29 (6)(a)(i) of the *Theft Ordinance* (cap. 210) violated article 11 (1) of the *Bill of Rights* and had therefore been repealed. Section 29 (6)(a)(i) provides:

> 29. (6) In any proceedings for an offence under section 17, 18, 18A or 18B --
>
> (a) any person who --
>
> (i) obtains property, pecuniary advantage or services by means of a cheque or other bill of exchange which is dishonoured upon presentation or after becoming due shall, until the contrary is proved, be deemed to have obtained the property, pecuniary advantage or services with the knowledge that such cheque or other bill of exchange would not be honoured.

In this case the Crown conceded that the presumption did not pass the test of rationality and proportionality endorsed by the Court of Appeal in *R v Sin Yau Ming* (*Bill of Rights Bulletin*, vol. 1, no. 1, p. 2). However, the Crown argued that the provision could be construed consistently with the *Bill of Rights* and, pursuant to section 3 (1) of the *Bill of Rights Ordinance*, should be so construed. The Crown argued that it was possible to read section 29 (6)(a)(i) as imposing on the defendant only an *evidential* burden rather than a legal burden and that such a construction would be consistent with article 11 (1) of the *Bill of Rights* and should therefore be adopted.

Judge Whaley refused to construe the provision in this way and held that it had been repealed by section 3 (2) of the *Bill of Rights Ordinance*. He wrote (at pp. 30-31 of his judgment):

> "I agree that the provisions of section 3 (1) of the Hong Kong Bill of Rights Ordinance should be given their full weight, along with those of section 3 (2). They reflect a clear legislative intention that in interpreting pre-existing legislation the courts should in the first place, (adopting established principles of statutory construction, I would interpolate), determine whether the legislation admits of a construction consistent with the Bill of Rights Ordinance. It is only if the legislation does not, without doing violence to such established principles of statutory construction, admit of a construction consistent with the Bill of Rights Ordinance that it must be found to be, to the extent of such inconsistency, repealed under the provisions of section 3 (2).
>
> In the instant case the outcome of such an analysis is to my mind inevitable. To construe the words 'until the contrary is proved' as imposing no more than an evidential burden on an accused to adduce evidence fit to be left to a jury, would be to depart from the plain meaning of those words. 'Proof' involves more than simply adducing evidence. The difference is very well established in the statute law of Hong Kong and other common law jurisdictions. Thus expressions such as 'until the contrary is proved' are to be contrasted with expressions such as 'in the absence of evidence to the contrary'. To construe 'until the contrary is proved' as imposing no more than an evidential burden would be not to construe but to rewrite the legislation in my view, which remains the province of the executive and not the judiciary, notwithstanding the new situation and the new jurisprudence which has been brought in to being by the Hong Kong Bill of Rights Ordinance."

R v Chan Fuk-lee, Judge Longley (*Bill of Rights Bulletin*, v. 1, n. 1, p. 12)

This case raised the identical challenge to section 29 (6) of the *Theft Ordinance* as was argued in the preceding case, *R v Lau Shiu-wah*. Counsel for the prosecution had conceded that the defendant had no case to answer if the prosecution were not able to rely on the presumption. After the delivery of judgment by Judge Whaley in *R v Lau Shiu-wah*, the Crown did not choose to argue the *Bill of Rights* issue and Judge Longley ruled that there was no case to answer and acquitted the defendant.

Import and Export Ordinance, sections 18A, 34 and 35A

R v Ma Man Ho, SK No. 5472 of 1991, R. Day Esq., 9 October 1991

This case (*Bill of Rights Bulletin*, v. 1, n. 1, p. 8) involved a challenge to sections 18A, 35A and 34 of the *Import and Export Ordinance* (cap 60) on the basis that the presumptions therein violated the guarantee of presumption of innocence under article 11 (1) of the *Bill of Rights*. Section 18A (2) (and section 35A (s)) provides, inter alia, that any person who has possession of or deals with any cargo in circumstances that give rise to a reasonable suspicion that there is an intent to export the cargo without a manifest, the person will be presumed to have such intent in the absence of evidence to the contrary.

It was held that the expression "in the absence of evidence to the contrary" created an evidential burden only. The "presumption" could be rebutted by raising a reasonable doubt and hence sections 18A (2) and 35A could be interpreted in a way consistent with the

Bill of Rights. Section 34 (1) was a "reverse onus provision". The Magistrate accepted that the section was intended to pursue a legitimate objective, namely, the proper regulation of trade. The section dealt with matters which were generally peculiarly within the knowledge of the defendant and the requirements would generally be satisfied by the production of proper documents. Accordingly, it was held that section 34 (1) satisfied the test of rationality and proportionality and was consistent with the *Bill of Rights*.

The trial subsequently miscarried and there is to be a retrial before another Magistrate.

***R v Tsui Shek-law and others*, SK No. 5817 of 1991, Mr de Souza, Esq.**

This case involved a challenge to section 35A (2) of the *Import and Export Ordinance* (cap. 60) on the ground that it violated article 11 (1) of the *Bill of Rights*.

The Magistrate adopted a similar approach to that adopted by Mr Day in the case immediately above, *R v Ma Man Ho*. He also ruled against defence arguments that section 35A violated articles 5 (1) and 11 (2)(g) of the *Bill of Rights*.

A written ruling is awaited. The case is the subject of an appeal to the High Court.

Counsel: S.R. Bailey, for the Crown; Danny Marash, for the defence.

***Import and Export Ordinance* (cap. 60), section 14A**

***R v Wong Man-kwong*, SK No 4835 of 1991 (*Bill of Rights Bulletin*, v. 1, n.1, p. 13)**

This case, which involves a challenge to section 14A of the *Import and Export Ordinance* (cap. 60) on the ground that it violates article 11 (1) of the *Bill of Rights*, has been adjourned until 14 February 1992.

***R v Lee Hing-shum*, Fanling Magistracy No. 4188 of 1991 (*Bill of Rights Bulletin*, v. 1, n.1, p. 13)**

Challenge to regulations 3 (1) and (5) of the *Import and Export (Carriage of Articles) Regulations 1991* (cap. 60). ***The regulations were impugned on the ground that they were ultra vires the Governor, not on any Bill of Rights ground.***

***Control of Obscene and Indecent Articles Ordinance* (cap. 390), section 21 (1)(a)**

***R v Cheng Pui Kit*, SK No. 5333 of 1991, Ian Carlson Esq, 18 October 1991 (noted in *Bill of Rights Bulletin*, v. 1, n. 1, p. 13)**

The defendants were charged with publishing obscene articles contrary to section 21 (1)(a) of the *Control of Obscene and Indecent Articles Ordinance* (cap. 390). That section provides that, subject to a number of defences, it is an offence for a person to publish, possess for the purpose of publication or import for the purpose of publication any obscene article whether or not (s)he knows it is an obscene article. Section 21 (2) provides a number of defences, all of which the defendant must establish on the balance of probabilities. Under this section, a defendant can be convicted whether or not he knew

before publication that the article was obscene. It was argued that section 21 (1)(a) was inconsistent with articles 5 (1) and 11 (1) of the Bill of Rights.

Held:

1. Offences of absolute liability and strict liability are prima facie inconsistent with both the right to be presumed innocent in article 11 (1) of the *Bill of Rights* and the right to liberty and security of person embodied in article 5 (1) of the *Bill of Rights*; such offences can be upheld only if they satisfy the tests of rationality and proportionality as laid down in *R v Sin Yau Ming* and *R v Oakes*.

2. The offence created by section 21 (1)(a) was an offence of strict liability; since no mens rea was required, there was a prima facie violation of the presumption of innocence.

3. Protection of the young and frail of judgement from pornography was a legitimate social objective. It was reasonable to do away with the requirement of proving knowledge of obscenity in view of the availability of a cheap and efficient means of determining whether an article is obscene by submitting it to the Tribunal. In light of the inherent safeguards in the classification system and the available defences, albeit limited in scope, section 21(1)(a) of the Ordinance satisfied the tests of rationality and proportionality and was hence consistent with the *Bill of Rights*.

Counsel: S.R. Bailey for the Crown; Nicholas Pirie for the defendant.

***Massage Establishments Ordinance* (cap. 266), s. 4 (1); *Criminal Procedure Ordinance* (cap. 221), s. 94A; negative averments**

***R v Wan Yin-man*, S.J. Geiser, Esq, 18 November 1991**

This case involved a challenge to section 4 (1) of the *Massage Establishments Ordinance* (cap. 266) and section 94A of *Criminal Procedure Ordinance* (cap. 221) on the ground that, in so far as section 94A applied to section 4 (1), the defendant's right to be presumed innocent under article 11 (1) of the *Bill of Rights* had been violated.

Section 4 (1) provides:

> Any person who on any occasion operates, keeps, manages, assists in any capacity in the operation of, or assists in the management of, a massage establishment for the operation of which a licence is not in force commits an offence.

The defendant argued that, if section 94A applied, the requirement that he produce a licence was an impermissible reversal of the burden of proof which violated his right to be presumed innocent.

The Magistrate held that section 94A of cap. 221 did apply to section 4 (1) of cap. 266 and that therefore the defendant bore the burden of proving the existence of a licence as a matter of defence. He further held that requiring a defendant to produce a licence by way of defence to a charge did not fall within the category of reverse onus provisions held in *R v Sin Yau Ming* to be prina facie infringements of article 11 (1), and concluded that it was not inconsistent with article 11 (1) to require a defendant to prove that he possessed the requisite licence.

Counsel: S.R. Bailey, for the Crown; A. Sahkrani, for the defence.

***Gambling Ordinance* (cap. 148), section 19 (1)(c); *Criminal Procedure Ordinance* (cap. 221), section 94A; negative averments, gambling offences**

***R v Man Kit-man*, Mag App No. 991 of 1991, High Court, Bewley J**

This case involves a challenge to section 19 (1)(c) of the *Gambling Ordinance* (cap. 148), s. 19 (1)(c) and section 94A of the *Criminal Procedure Ordinance* (cap. 221) on the grounds that these provision violate article 11 (1) of the *Bill of Rights*. The matter is listed for hearing on 6 December 1991, but is likely to be adjourned.

Counsel: S.R. Bailey, for the Crown; Joseph Tse, for the defence.

***Gambling Ordinance* (cap. 148), sections 19 (1)(a), (c) and 19 (2)**

***R v To Tai-yau*, ST No. 545 of 1991, Mr L.D. D'Almada Remedios, Magistrate**

This case involves a challenge to a number of presumptions in the ***Gambling Ordinance*** (cap. 148) on the ground that they violate article 11 (1) of the *Bill of Rights*. The defendants are also engaged in concurrent civil proceedings in which they have brought actions for wrongful arrest and false imprisonment.

Counsel: S.R. Bailey, for the Crown; Keith Oderberg, for the defence.

***Gambling Ordinance* (cap. 148), section 26**

***R v Ng Chi-keung*, Mr Davies, Esq**

This case involves a challenge to section 26 of the *Gambling Ordinance* (cap. 148) on the ground that it violates the presumption of innocence. Section 26 provides:

> 26. If in any proceedings under this Ordinance or otherwise on application by or on behalf of the Commissioner of Police, a court is satisfied that any money, gambling equipment or other property, not being immovable properry, has been used in or for or in connexion with unlawful gambling or an unlawful lottery, the court shall order that it be forfeited to the Crown, whether or not any person has been convicted of an offence under this Ordinance.

Counsel: Patrick Lee, for the Crown.

***Drug Trafficking (Recovery of Proceeds) Ordinance* (cap. 405), section 4 (3)**

***R v Wong Ma-tai*, District Court Case No. 129 of 1990, Deputy Judge Ching Y. Wong**

This case involves a challenge to the "assumptions" contained in section 4 (3) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (cap. 405). Section 4 deals with the assessment of a person's proceeds of drug trafficking. Section 4 (2) provides that, in making the assessment, the relevant court "may make the following assumptions, except to

the extent that the defendant shows that any of the assumptions are incorrect in his case". The assumptions include the assumption:

> 4. (3)(a) that any property appearing to the court--
>
> (ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him,
>
> was received by him, at the earliest time at which he appears to the court to have held it, as payment or reward in connection with drug trafficking carried on by him or another.

Counsel: Tim Casewell, for the Crown; Kevin Egan for the defence.

***Public Order Ordinance* (cap. 245), section 33 (1); offensive weapon**

***R v Chan Cho-ming*, Magistrate Lim**

This case involves a challenge to section 33 (1) of the *Public Order Ordinance* (cap. 245) on the ground that it violates article 11 (1) of the *Bill of Rights*. Section 33 (1) provides:

> 33. (1) Any person who, without lawful authority or reasonable excuse, has with him in any public place any offensive weapon shall be guilty of an offence . . .".

There are a number of other cases in which the same issue has been raised.

RIGHT TO TRIAL WITHOUT UNDUE DELAY (ARTICLE 11 (2)(C))

Extradition proceedings in UK

***In the Matter of Lorrain Esme Osman and In the matter of an Application for A Writ of Habeas Corpus Ad Subjiciendum*, Queen's Bench Division, High Court of Justice (Divisional Court), London, Woolf LJ and Pill J, 14 November 1991**

See the discussion of this case at p. 16 above.

PRIVILEGE AGAINST SELF-INCRIMINATION (ARTICLE 11 (2)(G))

***Theft Ordinance* (cap. 210), section 33**

***Duty Free Shoppers HK Ltd v. Wong Kwok Pong et al*, Civ App 169 of 1991, HCA No. A6091 of 1991**

In this case (described in detail at p. 9 above), it was argued that section 33 of the *Theft Ordinance* violated article 11 (2)(g) of the *Bill of Rights*. Article 11 (2)(g) provides:

11. (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality --

(g) not to be compelled to testify against himself or to confess guilt.

Jones J held that the guarantee did not apply to the proceedings in question, since they were not criminal proceedings.

***R v Yiu Chi Fung*, District Court, Case No. 397 of 1991, Judge Lugar-Mawson, 25 October 1991**

In this case, section 17 of the *Summary Offences Ordinance* was challenged on various ground (see p. 27 above), including the ground that it violated article 11 (2)(g) of the *Bill of Rights*.

Judge Lugar-Mawson held that article 11 (2)(g) did not embody a general right to silence, but was limited to applied protection in criminal *proceedings*. He also held that the compulsion referred to in article 11 (2)(g) was a *legal* obligation to testify in such proceedings. While the defendant may feel a tactical need to testify in proceedings under section 17, nothing in that section legally compelled the defendant to enter the witness box. There was therefore no violation of article 11 (2)(g).

DOUBLE PUNISHMENT (ARTICLE 11 (6))

***Road Traffic (Driving Offence) Points Ordinance* (cap. 375), section 8**

***R v Wan Kit-man*, Mr I. Tanzer, Esq., 28 November 1991**

This case involved a challenge to section 8 of the *Road Traffic (Driving Offence) Points Ordinance* (cap. 375) on the ground that it violated the protection in article 11 (6) of the *Bill of Rights* against double punishment for the same offence.

Article 11 (6) of the *Bill of Rights* provides:

> 11. (6) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong.

The defendant had been disqualified under section 8 of the *Road Traffic (Driving Offence) Points Ordinance* from holding or obtaining a driving licence on the basis that he had accumulated 15 points within 2 years. He argued that this disqualification amounted to double punishment, since he had already paid fixed penalty tickets (FPT) in respect of the incidents. Although payment of a FPT was not a "conviction", he argued that a person who paid a penalty should not be in any worse position than a defendant who was convicted by a court for a similar offence. Accordingly, he argued that the payment of a FPT discharged his liability for punishment and that cap. 375 was inconsistent with article 11 (6).

The Magistrate rejected the defendant's arguemnts, stating that he accepted the submissions made by the Crown. These were that:

1. A disqualification under section 8 of cap. 375 is not "punishment" within the meaning of article 11 (6). Rather it was a civil consequence of accumulating 15 points for driving offences. Article 11 (6) was directed only at criminal sanctions, not at all punitive consequences of a conviction.

2. The payment of a FPT absolves a person from liability to prosecution for an offence (section 3 (8) of cap. 240) and therefore article 11 (6) had no application.

3. Nothing in article 11 (6) prohibits multiple consequences flowing from a single act.

4. There is no "final" disposition of a traffic offence until expiry of the relevant two year period.

Counsel: S.R. Bailey, for the Crown; Paul Li, of K.M. Lai & Co, solicitors, for the defence.

Note: For a discussion by the European Court of Human Rights of whether regulatory traffic offences punishable by fines are "criminal" within the meaning of article 6 of the *European Convention of Human Rights*, see *Öztürk v Federal Republic of Germany*, Judgment of 21 February 1984, Series A, No. 73, 6 *EHRR* 409, 73 *ILR* 511.

RIGHT TO PRIVACY (ARTICLE 14)

***R v Eddie Soh Chee-kong*, High Court, Saied J**

In this case, Warwick Reid, a potential witness for the Crown in the custody of the Independent Commission Against Corruption, sought to prevent the prosecution from disclosing to the defence copies of personal letters written by him to his wife. According to the *South China Morning Post* (2 December 1991, p. 1), Reid argued that the decision to intercept, photocopy and retain his letters in their entirety was a violation of his right to privacy under article 14 of the *Bill of Rights* and that disclosure of the correspondence would compound that violation. He asked the judge to order that the copies be delivered to him or destroyed. Article 14 of the *Bill of Rights* provides:

> 14. (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of hte law against such interference or attacks.

A ruling by Saied J is scheduled for 6 December 1991.

[**Note**: The censorship of prisoners' correspondence has given rise to a number of (successful) cases against the United Kingdom under article 8 of the the *European Convention* (right to respect for private life and correspondence). See, for example, *Silver v United Kingdom*, European Court of Human Rights, Judgment of 25 March 1989, Series A, No. 61, 72 *ILR* 334, 5 *EHRR* 347.]

FREEDOM OF EXPRESSION (ARTICLE 16)

***Attorney General v South China Morning Post*, High Court, Jones and Mayo JJ**

This case involved contempt proceedings brought by the Attorney General against the defendant arising out of publications by the defendants of material which it was alleged may have prejudiced the trial of Mr George Tan. Among the grounds relied on by the newspaper was article 16 of the *Bill of Rights* (freedom of expression). The action was dismissed on 2 December 1991 as the result of an agreement between the parties; on 3 December 1991 the Court awarded the defendant costs.

> **Note**: For a recent decision of the European Court of Human Rights, in which the Court found that certain (though not all) injunctions issued in the *Spycatcher* litigation in the United Kingdom were in violation of article 10 of the *European Convention*, see *The Observer and The Guardian v United Kingdom* and *The Sunday Times v United Kingdom (No 2)*, Judgment of 26 November 1991, *The Times*, 27 November 1991.

FREEDOM OF ASSOCIATION (ARTICLE 18)

***In the Matter of the Stock Exchange of Hong Kong Limited and In the Matter of Section 50 of the Securities and Futures Ordinance*, High Court, MP No. 3297 of 1991, Jones J**

This was an application for leave to apply for judicial review against two notices issued by the Securities and Futures Commission to the Stock Exchange of Hong Kong which required the Stock Exchange to amend its articles of association and rules in a number of respects. One of the grounds on which the application was based was that the notices involved a violation of article 18 of the *Bill of Rights*, which guarantees the right to freedom of association.

Leave was granted by Jones J on 31 October 1991, but the case progressed no further as the result of agreements reached between the Exchange and the Commission.

EQUALITY AND NON-DISCRIMINATION (ARTICLE 26)

***Criminal Procedure Ordinance* (cap. 221), section 84A**

***R v Lo Shut-fo*, District Court Judge Moylan**

This case involves a challenge to section 84A of the *Criminal Procedure Ordinance* (cap. 221), on the ground that it violates the guarantee of equality in article 22 of the *Bill of Rights*.

Article 22 of the *Bill of Rights* provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> *Counsel*: Tim Casewell, for the Crown; L. Lok, Andrew Kan and Timothy Cheung, for the defence.

Separation and Maintenance Ordinance (cap. 16)

In a case before the District Court provisions of this Ordinance which provide for different grounds for applications by husbands and wives for orders made under the Ordinance are being attacked on the ground that such distinctions amount to discrimination on the ground of sex contrary to article 22 of the *Bill of Rights*.

> **Note**: For a discussion of the guarantees of equality under the *ICCPR* and the *Bill of Rights* in the light of international and comparative jurisprudence, see Byrnes, "Equality and Non-Discrimination" in R. Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, forthcoming 1992).

PENDING LEGISLATION

In this section we note a number of recent Bills which may give rise to *Bill of Rights* issues or, more accurately, issues under article VII (3) of the *Letters Patent*, since if enacted, they will commence after 8 June 1991. We merely note the concerns that have been raised. The inclusion of the Bills in this section should not be taken to reflect a view on the part of the Editors that provisions of these Bills would be held to violate the *Letters Patent*. In a number of instances the Government has rejected suggestions that provisions of the Bills are inconsistent with the rights guaranteed by the *ICCPR* as applied to Hong Kong.

White Bill on Organized Crime

This Bill proposes a number of new offences to curb organized crime, confers a wide power on the courts to order the confiscation of "proceeds of crime", as well as broad investigative powers on law enforcement agencies. The consultation period ended on 22 November 1991 and a number of submissions have been made to the effect that various clauses in the Bill are likely to be found to be inconsistent with the guarantees of the *International Covenant on Civil and Political Rights* (as incoporated in article VII (3) of the *Letters Patent*), notably the protection of presumption of innocence under article 14 (2). (Article 14 (2) of the ICCPR is in identical terms to article 11 (1) of the *Bill of Rights*.)

Professional Accountants (Amendment) Bill 1991

This Bill proposes the establishment of a practice review scheme. Under the Bill, the Council of the Hong Kong Society of Accountancy would be empowered to appoint a reviewer to review the practice of practising accountants to ensure that their auditing practice complies with professional standards. Subject to a duty of confidentiality, the reviewer has a right of access to any file or document which he reasonably believes is or

may be relevant to the practice review, and may make copies or take any abstract thereof. The Bill was opposed by some accountants on a number of grounds, including that it violated the right to privacy under article 14 of the *Bill of Rights* and the right against self-incrimination under article 11(2)(g) of the *Bill of Rights*, as the duty of confidentiality did not extend to disciplinary or criminal proceedings.

RECENT ARTICLES AND LITERATURE RELEVANT TO THE BILL OF RIGHTS

A. Byrnes, "The Bill of Rights and remand in custody pending trial: a warning shot?", (1991) 21 (3) *HKLJ* 362-373

A. Byrnes, "'Recalcitrant debtors' in a town 'pollinated by gold': Hong Kong's first Bill of Rights judgment", (1991) 21 (3) *HKLJ* 377-398

J. Chan, "Unprepared for the Challenges", *The New Gazette*, November 1991, p. 3

J. Chan, "Not to be Presumptuous: A Case Note on R v. Sin Yau Ming (Part I)", *The New Gazette*, December 1991, pp. 31-32 (Part II to appear in the January issue)

J. Chan, "Undue Delay and the Bill of Rights", (1992) 22 (1) *HKLJ* (forthcoming)

N. Jayawickrama, "Hong Kong: The Gathering Storm", (1991) 22 (3) *Bulletin of Peace Proposals* 157-174

L. Ma, "Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bill of Rights",(1991) 21 (3) *HKLJ* 289-332

We would be grateful for details and copies of articles dealing with the *Bill of Rights* or related issues.

INFORMATION ON BILL OF RIGHTS CASES AND OTHER MATERIAL

We would greatly appreciate information about cases in which you are or have been involved which raise *Bill of Rights* issues. If you could fax or mail us a copy of any decision, that would be particularly useful. If possible, please use the form on the next page. Thank you.

Andrew Byrnes

Johannes Chan

TO: ANDREW BYRNES/JOHANNES CHAN
FACULTY OF LAW
UNIVERSITY OF HONG KONG
HONG KONG

FAX: 559 3543

TEL: 859 2951

FROM:

FAX:

TEL:

NAME OF CASE:

COURT NO.:

COURT:

JUDGE:

STATUTE INVOLVED:

ARTICLES OF THE
BILL OF RIGHTS:

DATE OF DECISION
HEARING:

RESULT:

COUNSEL:

SOLICITORS:

COMMENTS

BILL OF RIGHTS BULLETIN

SUBSCRIPTION AND INFORMATION FORM

Name:

Firm:

Address:

Tel.:

Fax:

___ I wish to subscribe to the next two four issues of the *Bill of Rights Bulletin* (vol. 1, nos. 3-4).

___ I do not wish to subscribe to the *Bill of Rights Bulletin* (please let us know your reasons)

It would help us in our planning if you could respond to the following:

___ I/my firm would be interested in subscribing to a series of reports dealing with *Bill of Rights*, constitutional law and administrative law cases with editorial comments and articles.

___ I/my firm would ***not*** be interested in subscribing to a series of reports dealing with *Bill of Rights*, constitutional law and administrative law cases (please let us know your reasons)

___ I/my firm has a subscription to the Hong Kong *Law Reports*

___ I/my firm does *not* have a subscription to the *Hong Kong Law Reports*

Subscription payments

Please make cheques for $100 payable to the "University of Hong Kong" and send to Andrew Byrnes, Editor, *Bill of Rights Bulletin*, Faculty of Law, University of Hong Kong, Pokfulam Road, Hong Kong.

BILL OF RIGHTS

BULLETIN

Edited by

Andrew Byrnes

and

Johannes M.M. Chan

with the collaboration of Steve Bailey

Faculty of Law

University of Hong Kong

TEL: 859 2951

FAX: 559 3543

Volume 1, No. 3 April 1992

THE BILL OF RIGHTS

The *Hong Kong Bill of Rights Ordinance* and an accompanying amendment to the *Letters* Patent entered into force on 8 June 1991, ushering in an important new stage of development in the Hong Kong legal system. The *Bill of Rights Bulletin* is intended to provide members of the legal profession with information about recent developments under the *Bill of Rights* and to refer them to relevant secondary materials.

THE EDITORS

Andrew Byrnes and **Johannes Chan** are members of the Department of Law of the University of Hong Kong. Both teach and write in the area of human rights law. **Johannes Chan** has written two books (in Chinese) on human rights in Hong Kong and published on international human rights topics as well as on the *Hong Kong Bill of Rights*. **Andrew Byrnes** has published articles on international human rights law and on human rights in Hong Kong and served as a consultant to the Attorney General's Chambers of the Hong Kong Government during the drafting of the *Bill of Rights*. **Steve Bailey** is Senior Assistant Crown Prosecutor with the Attorney General's Chambers, Hong Kong. He has acted as the Government's principal advocate in criminal law cases in which *Bill of Rights* issues have been raised.

Editorial comments are the sole responsibility of the editors (Andrew Byrnes and Johannes Chan) and should not be taken to represent the views of the University, the Faculty of Law or any other person.

PUBLIC LAW RESEARCH GROUP OF THE FACULTY OF LAW UNIVERSITY OF HONG KONG

The production of the *Bulletin* is part of the program of the Public Law Research Group of the Faculty of Law at the University of Hong Kong and is supported by the Department of Law. If you would like to receive further issues of the *Bulletin*, please fill in the form on the back page of this issue and return it to the Editors. We are charging a rate of $100 for the remaining issue of this volume to cover the costs of production and distribution.

INFORMATION ON DEVELOPMENTS

We would particularly appreciate information about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We also welcome comments and suggestions on the format and content of the *Bulletin*. We would like to thank Gerry McCoy, Phil Dykes, Phil Ross, Jerome Matthews, Gus Andrée Wiltens, Bill Eccleton, John Mullick, Jim Chandler, Andrew Rankin, Keith Oderberg, Tim Casewell, Michael Ko, John Haynes, David Shannon, Jeremy Summer and Yash Ghai (as well as others) for providing us with information included in this issue of the *Bulletin*. This issue is based on (the necessarily incomplete) information available to the Editors as of 6 April 1992. We apologise for any errors or omissions.

CONTENTS

TABLE OF STATUTES AND OTHER INSTRUMENTS CONSIDERED

HONG KONG LEGISLATION

Bill of Rights Ordinance (cap. 383)

Control of Obscene and Indecent Articles Ordinance (cap. 390)

Criminal Procedure Ordinance (cap. 221)

Dangerous Drugs Ordinance (cap. 134)

District Court Ordinance (cap. 336)

TABLE OF CASES

HONG KONG CASES

EUROPEAN COURT CASES

PRIVY COUNCIL CASES

CANADIAN CASES

NEW ZEALAND CASES

EDITORIAL

RECENT DEVELOPMENTS

Since the last issue of the *Bulletin*, there have been many cases in which *Bill of Rights* issues have arisen. The overwhelming majority of those cases have been criminal cases and there have been few civil cases in which the *Bill of Rights* has played any important role to date.

In the area of criminal law and procedure, although counsel have begun to raise a variety of issues, the cases have been dominated by two categories: presumption of innocence cases and cases arguing that the defendant has been denied his right to be tried within a reasonable time or to be released (article 5 (3) of the *Bill of Rights*) or his right to be tried without undue delay (article 11 (2)(c)).

In addition, there have been a number of cases in the Court of Appeal and the High Court which have addressed the temporal operation of the *Bill of Rights Ordinance*. In brief, the courts have held that the *Ordinance* has no application to the substantive or procedural law applied in proceedings completed before the commencement of the *Ordinance*, but that its procedural guarantees will apply to proceedings on foot as of that date or commenced after it and arising out of events prior to that date. These cases have largely settled the general position so far as any retrospective operation of the *Bill of Rights Ordinance* is concerned.

Retrospective operation and transitional effect of the *Bill of Rights*

The position in relation to the retrospective operation of the *Bill of Rights Ordinance* now appears to be the following:

1. **None of the guarantees of the *Bill of Rights Ordinance* can be invoked to challenge the conduct of proceedings which were concluded before 8 June 1991 or to attack the validity of the substantive law applied in those proceedings.**

However, it should be noted that, where the *Bill of Rights* actually confers rights in relation to appellate proceedings and those proceedings are on foot after 8 June 1991, then presumably the *Bill of Rights* will apply. For example, the right to legal aid in article 11 (2)(d) may be applicable to appeal proceedings, even where the defendant was convicted before 8 June 1991, and the general right to a fair hearing in article 10 applies to appeal proceedings. Furthermore, time which has elapsed before 8 June 1991 may "count" in determining whether there has been a violation of the right to trial within a reasonable time under article 5 (3) or the right to trial without undue delay under article 11 (2)(c).

2. **Where proceedings are underway as of 8 June 1991 or are commenced after that date, then the procedural guarantees contained in the *Bill of Rights* will in general apply to those proceedings, in relation to acts or events which occurred prior to 8 June 1991.** However, the substantive law which gives rise to liability or confers rights at the time of the relevant events or which prescribes penalties for offences is in general not affected by the *Bill of Rights* (though one should note the effect of article 12 (1) of the *Bill of Rights).*

UNDUE DELAY

The area of undue delay has been the most important area of case law development since the last issue of the *Bulletin* and it seems likely that this will continue to be so in view of the delays in obtaining court dates. Although no undue delay cases have reached the Court of Appeal, there have been a number of judgments in the District Court and High Court in which the applicable principles are analysed in some detail. In this issue we provide detailed summaries and extended quotations from some of those cases.

There is abundant case law before international and national courts to the effect that a lack of institutional resources is in general not a sufficient justification for a failure to provide a person charged with a criminal offence with a trial without undue delay. The judiciary has recently succeeded in persuading the Legislative Council to approve funds for the appointment of additional High Court judges and is studying the merits of a recorder system. While the appointment of additional judges is no doubt a move in the right direction, the Finance Committee of the Legislative Council has queried whether an increase in the number of judges is in itself a sufficient solution. It seems likely that the present delays are due in part to the methods of case management used by the courts and the manner in which hearings are conducted. Among the suggestions made for improving the situation are a greater use of tape recording of proceedings and more frequent utilisation of pre-trial conferences. If the appointment of additional judges will address only some of the causes of the delays, it may be that the time has now come for an independent review of the methods of operation of the courts in order to identify other causes and to address those as well.

PRACTICAL DIFFICULTIES IN THE OPERATION OF THE BILL OF RIGHTS

Reporting

Many practitioners have noted that it can be particularly difficult to obtain information about and copies of recent *Bill of Rights* judgments. To date only two cases involving *Bill of Rights* issues appear to have been reported: *Attorney General v Osman* [1992] 1 HKCLR 35 and *The Appeal Tribunal v de Kantzow* [1992] 1 HKLR 55.

Adjournments

Some concern has been expressed by practitioners that adjournments in many *Bill of Rights* cases are being too readily granted on the application of the Crown. Two main grounds for seeking such adjournments have been mentioned. The first is that, where a *Bill of Rights* point is raised by the defence, counsel prosecuting on fiat are under instructions to seek an adjournment in order to have Crown counsel who are part of the Crown's specialist *Bill of Rights* team come to argue the case. Similar applications have also been made where Crown counsel are prosecuting.

The other category of adjournments has been in those cases where a challenge is made to a statutory provision and a similar challenge (or appeal from a challenge) is pending before a higher court. The most prominent instance of this has been prosecutions under section 30 of the *Summary Offences Ordinance*, since there is an appeal pending against the decision of Mr Jonathan Acton-Bond, who held on 28 October 1991 that the provision had been repealed by the *Bill of Rights* (*R v Lee kwon-kut*, see page 25 below). Dozens of cases are believed to have been adjourned pending the outcome of this appeal, which now seems unlikely to be heard before August 1992.

While there are no doubt good reasons for the Crown's wishing to have *Bill of Rights* issues (particularly those of first impression) argued fully, there is a danger that

delays which result from such adjournments may lead to a court finding that the defendant's rights to a trial within a reasonable time or to release on bail (article 5 (3)) and to trial without undue delay (article 11 (2)(c)) have been violated. In one case (*R v William Hung*), an adjournment to have Crown counsel argue the undue delay issue resulted in a further delay of 3 months. Another case involving a 17-year old boy (*Leong Chi Hung v Crawford McKee Esq*) has been adjourned since June 1991 on some eight occasions -- the latest adjournment for 5 months until August 1992 -- pending the outcome of the *Lee kwong-kut* appeal. It may be that some procedure needs to be devised to enable a test case to be brought quickly before the High Court or the Court of Appeal; where a case raises an issue of major public importance and the outcome will affect a large number of cases presently pending, the need for its early resolution is obvious and pressing.

THE PROBLEMS OF REMEDIES AND JURISDICTION

The decision of Mayo J in *Tung Chi Hung* (page 11 below) and that of the Court of Appeal in *R v Sin Hoi* (page 8 below) have highlighted the inadequacies in section 6 of the *Bill of Rights Ordinance* and the general powers of the courts so far as the provision of effective and timely remedies for *Bill of Rights* violations is concerned. Whatever the merits of those decisions, it is becoming increasingly apparent that the provisions governing the jurisdiction and powers of the courts to provide remedies for *Bill of Rights* violations are in need of review.

Section 6 of the *Bill of Rights Ordinance* has not been interpreted as conferring any new substantive or remedial jurisdiction on the courts (with the exception of Mayo J in *Tung Chi Hung*, who did not in any event exercise that assumed power) and was probably not intended to do so. The upshot of decisions such as that of Mayo J in *Tung Chi Hung* -- holding that the High Court has no jurisdiction to prevent a District Court from proceeding with a trial where there is a violation of the right to trial without undue delay -- is that there may be cases in which there is a violation of the *Bill of Rights* for which the courts can provide no timely and adequate remedy. Such a situation constitutes a clear violation of the obligations accepted by the UK and Hong Kong governments under the *ICCPR*.

If the governments concerned take their international obligations seriously in this respect, then immediate steps should be taken to amend the *Bill of Rights Ordinance* to confer on the High Court and other courts the power they need to provide timely and effective relief for actual or threatened violations of the *Bill of Rights*. Such an amendment could take the form of conferring on the High Court a general jurisdiction to grant remedies for actual or threatened violations of the *Bill of Rights*, a course recommended by a number of commentators during the drafting of the *Bill of Rights Ordinance* but not followed by the Government.

The opportunity should also be taken to remedy the situation resulting from the decision of the Court of Appeal in *Tam Hing-yee v Wu Tai-wai*, so that it is made clear that the *Bill of Rights Ordinance* is intended (and has always been intended) to permit review of all legislation, whether it affects legal relationships between private individuals or only between private individuals and the State. This, too, is necessary to bring Hong Kong's law and practice into conformity with the obligations under the *ICCPR*.

THE USE OF INTERNATIONAL MATERIAL

The use of Canadian authorities has been widespread in *Bill of Rights* cases so far. Also important has been the use of case law under the *European Convention* on Human Rights, many provisions of which are similar to those of the *International Covenant on Civil and Political Rights* and the *Bill of Rights*. By contrast, there has been less extensive reference to the many useful decisions from other Commonwealth countries with

constitutional Bills of Rights. Most of these cases are reported in the *Law Reports of the Commonwealth (Constitutional)* [*LRC (Con)*].

Also of relevance (but unfortunately less voluminous and often less helpful than the above sources) is the jurisprudence of the Human Rights Committee. The Human Rights Committee is the body established by the ICCPR to monitor the implementation of the Covenant by States Parties to it. In addition to reviewing reports submitted by States on a regular basis (its major function), it also adopts *General comments* and considers complaints by individuals that the rights guaranteed to them by the Covenant have been violated. This complaint procedure is available only where the State concerned has accepted the jurisdiction of the Committee to receive complaints; the United Kingdom has not done so.

The Committee has to date adopted 19 *General comments*. These seek to summarise its understanding of the meaning of various articles of the Covenant. While not legally binding interpretations of the Covenant, they are considered highly authoritative and persuasive interpretations of the Covenant. In some cases they may be able to throw a helpful light on the meaning of a provision of the *Bill of Rights* in a particular case (as noted by the Court of Appeal in *Sin Yau Ming*), although it must be admitted they are often of little assistance for that purpose.

The *General comments* of the Committee have been referred to increasingly in argument in a number of cases and have begun to be referred to by the courts in their judgments. For this reason we have included two *General comments* of the Human Rights Committee in this issue of the *Bulletin* (Appendix A). They are *General comment 8 (16)*, which deals with the right to liberty and security of the person (article 9 of the *ICCPR*; article 10 of the *Bill of Rights*) and *General comment 13 (21)*, which deals with the right to a fair trial (article 14 of the *ICCPR*; articles 10 and 11 of the *Bill of Rights*).

CASES

APPLICATION OF THE BILL OF RIGHTS

COMMENCEMENT AND "RETROSPECTIVE" OPERATION OF THE BILL OF RIGHTS ORDINANCE

Violation of procedural rights under the Bill of Rights where trial takes place after 8 June 1991 but alleged offence occurred before 8 June 1991

***R v Li Kwok Wa and Chiu Chi Kwong* (1992) CA, Crim App No 350 of 1991, 31 January 1992 (Kempster and Clough JJA and Hooper J)**

The appellants were convicted of possessing dangerous drugs for the purpose of unlawful trafficking. The offences were alleged to have been committed on 16 November 1990 and 2 January 1991 respectively. The respective trials commenced on 14 June 1991 and 29 July 1991 and concluded on 2 July 1991 and 30 July 1991. The trial judge relied upon (or directed the jury on) the presumptions enacted in sections 46 (d)(v) and 47 of the Dangerous Drugs Ordinance. After appellants' convictions these presumptions had been declared to be inconsistent with article 11 (1) of the *Bill of Rights* in *R v Sin Yau Ming*, which had held that they were repealed as from 8 June 1991, the commencement date of the *Bill of Rights Ordinance*.

Held (allowing the appeals and quashing the convictions):

The effect of the repeal of the presumptions was that a trial judge could no longer rely on these presumptions after 8 June 1991 even in relation to an offence committed before the entry into force of the *Bill of Rights Ordinance*. Since there was no evidence that the judge and the jury would inevitably have convicted the appellants on the basis of a different burden and standard of proof, the convictions were unsafe and unsatisfactory. The conviction were therefore quashed and the sentences set aside.

Counsel: John Mullick (instructed by DLA), for the applicant Li Kwok Wa; Jerome Matthews (instructed by DLA), for the applicant Chiu Chi Kwong; G. Forlin (Crown Counsel), for the Crown.

***R v Lam Chau On*, (1991) HCt. Mag App No 925 of 1991, 29 November 1991, Duffy J**

This case involved an appeal from a conviction for possession of dangerous drugs for the purpose of unlawful trafficking. The offence was alleged to have been committed on 25 April 1991; the trial began on 25 June 1991 and concluded on 16 July 1991. The defendant was convicted on the basis of the presumption contained in section 46 (d) of the *Dangerous Drugs Ordinance*. The sole ground of appeal was that, in light of the decision of the Court of Appeal in *R v Sin Yau Ming*, the presumption upon which the magistrate had relied had been repealed on 8 June 1991 by the *Bill of Rights Ordinance*. (In *Sin Yau Ming* the alleged offence had also been committed before the entry into force of the *Bill of Rights Ordinance*.)

Held (allowing the appeal and substituting a conviction for simple possession):

1. The repeal by the *Bill of Rights Ordinance* of the presumption provisions in the *Dangerous Drugs Ordinance* (which were procedural provisions) applied to proceedings after 8 June 1991.

2. Since the presumptions had been repealed by the time of the trial, the Magistrate could not have relied on them to convict the appellants.

Per Duffy J (pages 2-3 of his judgment):

> "The presumptive provisions in the Dangerous Drugs Ordinance are properly described as procedural provisions because they have regard to the determination of guilt or to the weight to be attached to or significance to be given to evidence which has been established as proved in trials for offences under the Dangerous Drugs Ordinance. A change made by the legislature (the same effect in this case as the repeal by the Court of Appeal of the presumptive provisions in the Dangerous Drugs Ordinance) to procedural provisions would operate to the general advantage of all litigants. In other words, all litigation will be affected by the procedural change from the moment that that change is made and therefore it will apply to all legislation, both present and future."

After referring to the decision of the House of Lords in *Blyth v Blyth* [1966] AC 643, he concluded (at page 4):

> "This [*Blyth*] was a clear statement of the principle that when there are changes in legislation which are purely procedural they must be given effect immediately upon their introduction, whether they amount to an amendment of the legislation or to its repeal. In the instant case therefore the magistrate could not rely on the presumptions in the Dangerous Drugs Ordinance because they had already been repealed. That being the case, it follows that the conviction for possession of drugs for the purposes of trafficking had to be quashed. I substituted therefor a conviction for simple possession of the drug."

Counsel: P.J. Dykes, for the Crown; John Mullick (K.Y. Woo & Co), for the appellant.

Application of the Bill of Rights Ordinance in an appeal from proceedings concerning events prior to 8 June 1991 and completed before that date

R v Lam Wan-kow, (1992), CA, Crim App No 201 of 1992; *R v Yuen Chun-kong*, Crim App No 266 of 1991, 25 March 1992, (Yang CJ, Silke VP and MacDougall JA

This case involved appeals from convictions following trials which concluded prior to the commencement of the *Bill of Rights Ordinance*. Lam was convicted on 24 April 1991 after trial on a charge of possession of a dangerous drug for the purpose of unlawful trafficking, the offences having been committed on 17 August 1990. Yuen was convicted on 27 May 1991, after trial on a charge of possession of a dangerous drug for purpose of unlawful trafficking. The offence occurred on 23 December 1990.

Lam admitted possession and was convicted on the basis of the presumption in section 46 of the *Dangerous Drugs Ordinance*. Yuen was also convicted on the basis of the presumption.

Two issues were raised: (1) whether the *Bill of Rights Ordinance* had retrospective effect so that its provisions should be applied to determine appeals from convictions entered before 8 June 1991 and (2) whether the guarantee contained in article 11 (4) of the *Bill of Rights* -- which provides that a person convicted of a crime has the right to a review of the conviction and sentence by a higher tribunal "according to law" -- meant the law as it stood at the time of the trial or at the time of the appeal should be applied by the Court of Appeal.

Held:

1. There was nothing in the *Bill of Rights Ordinance* to displace the normal presumption against the retrospective operation of legislation.

2. Accordingly, the provisions of article 11 (1) of the *Bill of Rights* did not apply to proceedings resulting in a conviction before 8 June 1991 of an offence of possession of dangerous drugs for the purpose of unlawful trafficking.

3. Article 11 (4) of the Bill of Rights did not require the law as at the time of an appeal to be applied in disposing of the appeal (see below under article 11 (4)).

Per Yang CJ (at pages 8-9 of the judgment):

"The next question is whether or not s. 2 (3) of the Bill of Rights Ordinance is to be given retrospective effect. There is nothing in the Ordinance which indicates that it should be retrospective. That there is a presumption against retrospective operation of laws is a long established principle. And it is unlikely that the legislature in Hong Kong, having refrained from domesticating the provisions of the ICCPR in May 1976, decided in June 1991, and without clear and express provision, to do exactly this by means of retrospective legislation . . .

Further, the legislature expressly isolated six ordinances from the effect of the repealing provision of s. 3 of the Ordinance for a period of 12 months from the date of the Ordinance coming into force: see s. 14 and the Schedule. [9] There would therefore appear to be little point in saving ordinances from present repeal or a revised construction or from claims for relief (s. 6) if s. 2 (3) permitted these courts to reach back in time and apply the Ordinance to conviction come to in the past under the authority of those laws. The relevant law, as Mr. Cross puts it, is the law, be it procedural or substantive, which prevailed at the trial. There cannot properly be separate bodies of law applicable at trial and at appeal.

The two applicants' convictions were perfectly lawful at the relevant date. In our judgment, s. 2 (3) of the Bill of Rights Ordinance does not have retrospective application to rights and obligations which existed before it came into force."

Counsel: I.G.Cross QC and W.S. Cheung, for the Crown; P.J.Dykes, *amicus curiae*. Applicants in person.

JURISDICTION OF COURTS AND REMEDIES (SECTION 6)

R v Sin Hoi, (1992) CA, Civ App No 34 of 1992, 5 March 1992, (Fuad VP, Nazareth JA and Bewley J) (on appeal from MP No. 270 of 1992)

The appellant was charged with two offences of robbery and an offence under the *Firearms and Ammunition Ordinance* alleged to have been committed on 4 and 28 October 1991. He was arrested on 13 November 1991. On 21 November 1991 he was released on bail by a magistrate. After being identified by witnesses on 2 December 1991, on 12 December the same magistrate revoked his bail. On 29 January 1992, Deputy Judge Jones in the High Court ordered that the application of the applicant for bail pending trial be refused. On 14 February 1992, a notice of appeal was filed against the judge's order.

Section 12A of the *Criminal Procedure Ordinance* gives unfettered power to a judge of the High Court to admit a person to bail at any time. There is no right under section 12A of the *Criminal Procedure Ordinance* to appeal from a refusal by a High Court judge to grant bail. Section 12B restricts multiple applications. However, section 24 of the *Supreme Court Ordinance* (cap. 4) provides that an appeal lies to the Court of Appeal from any decision of the High Court on a criminal or civil application for habeas corpus.

The applicant argued that the Court of Appeal had jurisdiction to entertain the appeal by virtue of article 5 (4) of the Bill of Rights and section 6 (2) of the *Bill of Rights Ordinance*. Counsel for the applicant argued that article 5 (4) of the Bill of Rights was "a statutory provision for habeas corpus in a constitutional instrument which entitles, inter alia, a person in custody awaiting trial on a criminal matter to have the lawfulness of his detention ruled upon". Accordingly, he submitted that the Court should read section 24 of the *Supreme Court Ordinance* as permitting it to hear such an appeal.

Section 12A provides (so far as directly relevant):

> 12A. The court or a judge may at any time, on the application of any accused person, whether he has been committed for trial or not, to be admitted to bail . . ..

Section 12B provides:

> 12B. If an accused person is refused or denied bail by the court or a judge, he shall not thereafter be entitled to make a fresh application for bail--
>
> (a) before the commencement of his trial, except to the court or a judge and only if he satisfies the court or a judge that since the refusal of denial there has been a material change in the relevant circumstances; or
>
> (b) during his trial, except to the court conducting his trial.

Section 24 of the *Supreme Court Ordinance* provides:

> An appeal lies as of right to the Court of Appeal from any decision of the High Court on a criminal or civil application for habeas corpus, whether the High Court orders the release of the person restrained or refuses to make such an order.

Held (dismissing the appeal as incompetent):

1. A right of appeal is a creature of statute. The appellate jurisdiction of the Court of Appeal is prescribed by section 13 of the *Supreme Court Ordinance*. Refusal of bail

is neither a "civil cause or matter" nor a "criminal cause or matter" within the meaning of section 13 of that *Ordinance*.

2. No matter how generous and purposive a construction is put upon section 6 (2) of the *Bill of Rights Ordinance*, this section does not confer appellate jurisdiction on any court which does not otherwise possess it. The ordinary law relating to appeals is not overridden.

Per Fuad VP (at pages 5-8 of the judgment):

"Provisions on the lines of s. 6 of the Hong Kong Bill of Rights are somewhat unusual both in independent and dependent Commonwealth jurisdictions. More typical are provisions (found generally in constitutional instruments) which allow any person who alleges that any fundamental right protected in the Constitution has been, is being, or is likely to be, contravened in relation to him, without prejudice to any other action with respect to the same matter which is lawfully available, to apply to the High (or Supreme) Court for redress. Coupled with such provisions, one often sees a provision which states that if a question regarding the contravention of any of the protective provisions arises in a subordinate court, that court may (and must if a party so requests) refer it to the High (or Supreme) Court. It is usual, too, to give the High (or Supreme) Court a discretion not to exercise its powers to grant relief if it is satisfied that adequate means of redress are available to the applicant under any other law.. . .

[After referring to examples from Guyana, Belize, Jamaica, Bermuda, Gibraltar and notes that in a number of these jurisdictions there is a right of appeal expressly conferred, he continued]

In many of the jurisdictions with provisions of this kind, a right of appeal to the Court of Appeal is expressly given from final decisions of the High (or Supreme) Court in cases concerning the enforcement of fundamental rights and freedoms . . .

[After noting that the application before Deputy Judge Jones was not a "civil cause or matter" within section 13 of the *Supreme Court Ordinance* (citing *Alick Au*), he continued (at page 7):]

Mr Mathews has suggested that if we do not accept jurisdiction in this case, it will gravely affect the efficacy of the rights accorded under the Hong Kong Bill of Rights. I feel bound to observe here that the rule of law, upon which the protection of fundamental rights and freedoms ultimately depends, would have no meaning if a court were to assume jurisdiction not conferred upon it by the legislature. . . .

I find it quite impossible to hold that the application refused by the judge was an "an application for habeas corpus" within the meaning of those words in s.24 of the Supreme Court Ordinance, without doing unacceptable violence to the language used by the legislature. Recourse to a court for a remedy or relief under s.6 of the Hong Kong Bill of Rights Ordinance, relying on article 5 of the Bill of Rights, and an application for habeas corpus will, no doubt, have some common features, but the right of appeal given by s.24 is limited to orders made by the High Court in applications for the latter relief."

This is not the occasion to consider the full scope and true effect of all that is enacted by s. 6 of the Hong Kong Bill of Rights Ordinance, but in relation to subsection 2 of that section particularly relied upon by Mr Mathews [sic],

> I think it can safely be said that however generous and purposive a construction is put upon the language of that subsection, it does not confer appellate [8] jurisdiction on any court which it does not otherwise possess. The ordinary law relating to appeals is not thereby overridden.
>
> Before I take leave of this case, I permit myself to wonder how someone who was remanded in custody on serious charges on 12 December 1991 can , in the real world, pray in aid article 5 (3) as early as 7 weeks later."

Nazareth JA agreed and noted that (at page 8) "article 5 (3) and (4) can be fully taken into account in the bail procedures and jurisdiction that is prescribed." Bewley J agreed with both judgments.

> *Counsel*: Jerome Matthews and Merinda Chow (instructed by Tang, Wong & Cheung), for the appellant; Clive Grossman and Patrick Li (Crown Counsel), for the Crown.

Editors' comments

Fuad VP was of the view that, no matter how generous an interpretation was put on section 6 of the *Bill of Rights*, the Court of Appeal had no jurisdiction to hear such an appeal. However, it may have been possible to construe section 24 of the *Supreme Court Ordinance* in such a way as to permit an appeal to be brought where an application is based on article 5 (4), which has been described as the international guarantee of habeas corpus. Such a construction would be consistent with the obligation under article 2 of the *ICCPR* to provide an effective remedy for violations of the rights guaranteed and would arguably not do violence to the language of the section but would involve interpreting it in a manner consistent with the *Bill of Rights* (s. 3 (1)).

It is interesting to note that the New Zealand Court of Appeal, when it found itself in a somewhat analogous situation, adopted a different approach. In *Flickinger v Superintendent of Mount Eden Prison* [1991] 1 NZLR 439, the Court faced the question of whether a person who had been committed for extradition to Hong Kong was entitled to appeal from a denial of habeas corpus by a lower court. The provision which might have been interpreted in this way had been interpreted in many cases prior to the enactment of the *Bill of Rights* as not applying to criminal cases.

Section 6 of the *New Zealand Bill of Rights Act* provides:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Section 23 (1)(c) of the *New Zealand Bill of Rights Act* provides:

> Everyone who is arrested or who is detained under any enactment --
>
> (c) shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

The Court saw "force in the argument that to give full measure to the rights specified in s. 23 (1)(c), s. 66 of the Judicature Act should now receive a wider interpretation than has prevailed hitherto. . . .". Without deciding the jurisdictional issue, the Court then went on to consider the substantive question "in the spirit of the Bill of Rights and habeas corpus law, both of which protect the liberty of persons unless lawfully

restrained." The Court held that in the event there was no ground for overturning the judgment of the lower court.

It would appear that the appropriate step to take when relying on article 5 (3) or 5 (4) in order to seek the release of a defendant in custody pending trial is to lodge an application for habeas corpus together with any bail application. If this is done, then the applicant will have an appeal as of right to the Court of Appeal from a denial of the habeas corpus application and will be able to argue the article 5 (3) issues on that appeal. For a recent discussion of the law of habeas corpus in Hong Kong, see D. Clark, "Liberty and Security of the Person: Habeas Corpus", in R. Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), 301.

High Court -- Jurisdiction in judicial review proceedings -- Power to review decisions of the District Court -- Bill of Rights Ordinance, section 6

***Re Tung Chi Hung and Judge Lugar-Mawson*, (1991) DCt, DCC No. 857 of 1991, 2 April 1992, Mayo J**

This was an application for judicial review of the decision of a District Court judge refusing a stay in criminal proceedings.

In July 1989 the defendants had been arrested and charged with obtaining property by deception. The trial came on before a Magistrate, but before the defendants entered a plea, the Crown offered no evidence on the charges. Subsequently, in January 1990, the defendants were rearrested and charged with conspiracy to obtain property by deception. This second charge arose out of the same events which gave rise to the first charge. The trial came on in the District Court in October 1991.

The defendants argued before the District Court that they were entitled to be acquitted on the grounds of autrefois acquit under the general law and article 11 (6) of the *Bill of Rights*, of abuse of process, and on the ground of undue delay under both the general law and article 11 (2)(c) of the *Bill of Rights*.

Held (by the District Court):

1. Since a Magistrate's Court could not acquit a defendant until after a plea had been entered, the defendants here had never been in jeopardy and could not be said to have been "finally acquittted in accordance with the law of Hong Kong".

2. Although the investigation had been inefficient and haphazard, the delay had not been so long or any resulting prejudice so extreme that the defendants' right to trial without undue delay had no been violated.

For further details of the holdings on articles 11 (2)(c) and 11 (6), see below (pages 35 and 39).

Before Mayo J, in addition to the substantive grounds, the applicants argued that the High Court had jurisdiction to review the decision of the District Court as part of its power to hear judicial review applications or, alternatively, by virtue of section 6 of the *Bill of Rights*, which provides:

(1) A court or tribunal-

(a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and

(b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant,

may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.

(2) No proceedings shall be held to be outside the jurisdiction of any court or tribunal on the ground that they relate to the Bill of Rights.

Held (by Mayo J on the application for judicial review):[1]

1. Under its judicial review jurisdiction the High Court had no power to issue an order prohibiting the District Court from proceeding with the trial.

2. While section 6 of the *Bill of Rights Ordinance* may confer additional jurisdiction on the Court to grant relief for *Bill of Rights* violations, that would only be so if there were no other form of relief available under existing law.

3. In this case the appropriate avenue for seeking relief was to place before the District Court any arguments relating to the issue.

Written reasons are yet to be delivered.

Editors' comments

Mayo J reached the conclusion that the High Court did not have the jurisdiction to review the decision of the District Court despite the conclusion to the contrary of a Full Bench in 1954 (*R v District Judge, ex parte Attorney General* (1955) 39 HKLR 8) and accepted practice to the contrary (in the last year some nine applications of this sort have been entertained by the High Court). He appears to have relied at least partly on a dictum of Kempster JA (*R v Harris* [1991] HKLR 389, 404) which is inconsistent with that earlier authority and accepted practice. In view of the state of the authorities, Mayo J's decision seems a curious one and particularly unfortunate since it cannot be appealed against.

Mayo J's conclusion that section 6 of the *Bill of Rights Ordinance* may provide an independent basis of jurisdiction is welcome in its conclusion, but may be difficult to justify in the light of the language and apparent intention of the section. (We have suggested above that section 6 needs a major overhaul to ensure that the courts do have such an independent power.) However, his refusal to grant a remedy in the exercise of the power he concluded he possessed under section 6 was because he considered that raising the matter before the District Court was a sufficient remedy. This was so, even though the application for a stay on this ground had already been made before that court and rejected by the judge.

It appears that Mayo J conisdered that an appeal from a conviction by the District Court could be described as an adequate remedy. However, the essence of the violation alleged in this case was that the defendants' right to a trial without undue delay had been violated. To put the defendants through a full trial would in substance deprive them of the remedy to which they might be entitled (namely, a stay), even if one assumed that the point could be taken on appeal and any conviction quashed on that basis.

---

[1] Based on the report in the *South China Morning Post*, 3 April 1992, p. 8 and discussions with Mr G.J.X. McCoy, counsel for the applicant.

The outcome of the case also seems unsatisfactory from the view of the obligations assumed by the United Kingdom and Hong Kong governments under the *ICCPR*. Under article 2 of the Covenant a State Party is obliged to provide an effective remedy for violations of rights guaranteed in the Covenant. Both the *Bill of Rights Ordinance* and existing law should be interpreted so as to give effect to this obligation if possible. Even if there existed some doubt about the extent of the High Court's jurisdiction to review the District Court (a conclusion which discounts the authorities considerably), that doubt should have been resolved in favour of an approach which ensured that a person whose rights may have been infringed could have a remedy (cp. *R v Home Secretary, ex parte Brind* [1991] 1 AC 696; *Derbyshire County Council v Times Newspapers Ltd*, English Court of Appeal, 19 February 1992, noted at page 43 below).

THE SCOPE OF OPERATION OF THE BILL OF RIGHTS -- "PUBLIC AUTHORITY" (SECTION 7)

***Re Jenny Chua Yee Yen and the Hong Kong Polytechnic*, (1992) HCt, MP No 2325 of 1991, 26 March 1992, Mayo J**

In this case one of the issues argued before Mayo J was whether the Hong Polytechnic was a "public authority" within the meaning of section 7 of the *Bill of Rights Ordinance*.

THE "FREEZE" (SECTION 14 AND THE SCHEDULE)

***Immigration Ordinance* (cap. 115), sections 37C (1)(a), 37K (1), 37K (2)(b) and 37K(2)(c)**

***R v Lam Shun and Lam Chi Chun* (1992) CA, Crim App No. 410 of 1991, 21 February 1992 (Silke VP, Power and Penlington JJA)**

The defendants were charged with offences under the *Immigration Ordinance* (cap. 115) relating to being crew members of a ship entering Hong Kong with unauthorised entrants. On the application for leave to appeal one of the grounds raised was that the presumptions contained in the applicable sections of the *Immigration Ordinance* violated article 11 (1) of the *Bill of Rights*. He also sought legal aid under article 11 (2)(d) of the *Bill of Rights*.

Held (dismissing the application for leave to appeal):

1. The effect of section 14 of the *Bill of Rights Ordinance* and the Schedule was that the provisions of the *Immigration Ordinance* may not as yet be challenged in relation to the provisions of the *Bill of Rights Ordinance*, its articles or sections.

2. The matter was not of such complexity that the applicant was entitled to legal aid.

FREEDOM FROM TORTURE AND OTHER FORMS OF CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTICLE 3)

Note the passage through the Legislative Council of the *Crimes (Torture) Bill* (see below page 42.

BAIL, RIGHT TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE ON BAIL (ARTICLE 5 (3))

***R v Chan Wai-ming*, (1992) HCt, MP No. 1640 of 1991, 24 September 1991, Gall J**

The applicant applied for release on bail on the ground that his detention, which had lasted for 15 months from the time of his arrest, had continued for an unreasonable period of time and thus article 5 (3) of the *Bill of Rights* entitled him to release on bail.

Held:

1. There was no violation of article 5 (3). A delay of 15 months is on the borderline of being an unreasonable period of time but is arguably not such a period as to infringe article 5 (3).

2. Even if there were an unreasonable delay within the meaning of article 5(3), the court would still have a residual discretion to decide whether bail should or should not be granted.

   In re an application for bail pending trial, (1991) HCt, MP No. 1703 of 1991, 11 July 1991, Sears J (*Bill of Rights Bulletin*, vol. 1, no. 1, p. 5), followed.

3. On the facts of this case, there is a real prospect that the defendant may not present himself for trial if bail was granted. The application for bail should therefore be refused.

   Counsel: G.D. Goodman (Senior Crown Counsel), for the Crown; James Chandler and Raymond Yu (instructed by K.C. Man & Co), for the applicant.

Editors' comment

In the case decided by Sears J and relied on by Gall J in this case, the applicant for bail had been in custody for only about two months since his arrest. Sears J expressed the view that by the time when his trial was likely to come on he would have been in custody for 15 months, a period the judge considered to be "unreasonable". However, he then proceeded to consider whether, as of July 1991, the applicant should be granted bail. It is not clear whether Sears J directly considered the question of whether there was residual discretion once a reasonable period had elapsed and such a conclusion is, at best, obiter.

In the present case, however, although it is not clear from the judgment, the applicant had in fact already been in custody for 15 months at the time when his application for bail was heard before Gall J.

It is consistent with the international case law to maintain that a court should enjoy a residual discretion to grant bail even after the lapse of an unreasonable period. However, the international case law suggests that a court should not apply the same criteria and standards to determine whether bail should be denied as it did in the early stages of detention, but that far greater weight should be placed on the interest in personal liberty as time progresses. Gall J did conclude that there was "a real prospect that he may not present himself for trial when called upon to do so", but the factual basis which led him to this conclusion is not detailed in the judgment.

R v Lau Ting-fan, (1992) HCt, MP No. 3793 of 1991, 14 January 1992, Deputy Judge Sharwood

The applicant was arrested on 8 October 1991 and charged with possession of a large quantity of dangerous drugs for the purpose of unlawful trafficking. It was likely that he would not be tried until sometime between August 1992 and January 1992. He applied to the High Court for release on bail. There was some dispute as to whether he had jumped bail 11 years ago when charged with another drug offence. The Crown adduced unsworn evidence, including records from the Police Criminal Record Bureau and a District Court file, to prove that the applicant had jumped bail. The judge held that, in hearing a bail application, the court was not bound by strict rules of evidence when its concern was to decide whether there were substantial grounds for believing that a defendant would abscond. Taking into account the fact that the defendant was caught red-handed, that he faced a possible sentence of 20 years' imprisonment if convicted, and his previous record of absconding, the judge held that there were good reasons for refusing bail.

The applicant also argued that, since he would have been in custody for 10 to 14 months before he was tried, he was entitled to be released on bail under the first sentence of article 5 (3) of the Bill of Rights, which reads:

> "5 (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

Held (refusing the application for bail):

1. The second sentence of article 5 (3) of the *Bill of Rights* means that persons awaiting trial should generally be granted bail, subject to guarantees to appear for trial. Any departure from this general rule would require the Crown to show good cause.

2. The corresponding provision of the *European Convention on Human Rights* (also article 5 (3)) refers to "release pending trial". It was not clear that article 5 (3) of the *Bill of Rights* bears the same meaning as article 5(3) of the *European Convention*. The omission of the words "pending trial" in the first sentence of article 5 (3) of the *Bill of Rights* could mean that the provision confers a right to a trial within a reasonable time or to release in the sense of discharge, and not to release pending trial.

3. If the *European Convention* provision did mean the same as article 5 (3) of the *Bill of Rights* provision, in the light of the case law of the European Commission of Human Rights, the continued detention of the applicant and the circumstances of this case would not violate article 5 (3) of the *Bill of Rights*. If the two provisions do not bear the same meaning and article 5 (3) of the *Bill of Rights* refers to release in the sense of discharge, then the application has to be made otherwise than in a bail application.

Per Deputy Judge Sharwood (at pages 15-16 of the judgment):

> "I am satisfied that his continued detention would not therefore violate Article 5(3) of the Convention or Article 5(3) of the Hong Kong Bill of Rights Ordinance, if they mean the same thing.

If they do not mean the same thing, and the Hong Kong legislation means that there is an entitlement to trial within a reasonable time, or release in the sense of discharge, then an application will have to be made after a reasonable time has elapsed, and it will be an application of a different type, and not a bail application.

I find some support for my reservations as to the meaning of Article 5(3) in a passage from a book [edited by Louis Henkin.] "The International Bill of Rights" (New York: Columbia University Press, 1981), which is a commentary on the Covenant on Civil and Political Rights, upon which the Hong Kong legislation is based. The following passage appears at page 142, in an article by Haji N.A. Noor Muhammad:

"The only basis for continuing detention, as for the original arrest, is the reasonable belief that the person has committed a crime and will be brought to trial. Article 9(3) implies that if he cannot be brought to trial within a reasonable time, he must be released; in fact, failure to bring the person to trial within a reasonable time precludes trial thereafter, and he must be released."

The Article 9(3) referred to is in identical terms to Hong Kong's Article 5(3). It may therefore be the case that the first sentence of Article 5(3) has nothing whatsoever to do with bail, and that only the second sentence deals with bail. If so, then the Crown has shown good cause why bail should be refused and the "general rule" departed from."

Counsel: Patrick Li (Crown Counsel) for the Crown: A.J.J. Sanguinetti and John Chan (instructed by Tang, Wong & Cheung), for the applicant.

Editors' Comment

The judge's reservations that article 5 (3) of the *Bill of Rights* may not bear the same meaning as article 5 (3) of the *European Convention* since the former does not include the words "pending trial" may perhaps be allayed by the drafting history of the *ICCPR*.[2] The *travaux préparatoires* (preparatory works) of the treaty show that the drafters were not contemplating absolute discharge if a detention exceeded a reasonable time, but accepted that any release could be made subject to the giving of financial or other undertakings sufficient to ensure the defendant's appearance at trial.[3] Thus, it is probably the case that a right to bail is implicit in the first sentence of article 5 (3): see Human Rights Committee, *General comment 8 (16)*, in which the Committee noted that "pre-trial detention should be an exception an as short as possible."

Although the two "undue delay" guarantees contained in articles 5 (3) and 11 (2)(c) of the *Bill of Rights* overlap to some extent, there are important differences between them. The former provides that, even where detention may be initially justified, it may not last beyond a reasonable time; once that point is reached it appears that release subject to conditions may be required. The period of time taken into account commences at the time of arrest and continues until the decision of the first instance court. The right does not provide the basis for the stay of an action, but rather is directed to the permissible length of remand in custody.

---

[2] It should also be noted that the *European Convention* does not include the phrase "It shall not be the general rule that persons awaiting trial shall be detained in custody . . .".

[3] See M. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987), 207-210.

Article 11 (2)(c), however, concerns not the reasonableness of the length of detention as such, but the length of the proceedings overall. The period taken into account commences with the notification of the charge (broadly defined) and comes to an end once proceedings (including appellate proceedings) are completed. It is quite possible for there to be a violation of article 5 (3) where detention is unduly prolonged, without there having been a violation of the right to trial without undue delay under article 11 (2)(c). One remedy for a violation of this right would be to stay the prosecution and, as Deputy Judge Sharwood suggests, an application of this sort should be brought otherwise than by way of a bail application.

The judge refers to a number of decisions of the European Commission of Human Rights in his judgment. In addition to these decisions of the Commission, the European Court of Human Rights has delivered a number of important judgments dealing with the issue. One of the most recent decisions of the Court is referred to below (page 45).

R v Lam Tak-ming and Lam Ho-ming **(1992) DCt, DCC No. 271 of 1991, 6 November 1991, Judge Lugar-Mawson**

See page 29 below.

ARTICLE 5 (4)

R v Sin Hoi, **(1992) CA, Civ App No. 34 of 1992, 5 March 1992 (Fuad VP, Nazareth JA and Bewley J)**

The Court of Appeal held in this case that it had no jurisdiction to entertain an appeal from an adverse decision on an application under article 5 (3) or 5 (4) of the *Bill of Rights* (see above page 8 for a summary).

LIBERTY OF MOVEMENT (ARTICLE 8)

Inland Revenue Ordinance **(cap. 112), section 77**

Ho Hin Wah v Commissioner for Inland Revenue, **DCt, MP No. 144 of 1986**

This case involves an application to set aside a stop order made under section 77 of the *Inland Revenue Ordinance* (cap. 112) on various grounds, including the ground that it is an unjustifiable restriction on the guarantee of liberty of movement contained in article 8 of the *Bill of Rights*.

RIGHT TO A FAIR TRIAL IN CIVIL PROCEEDINGS (ARTICLE 10)

Fair and public hearing before a competent, independent and impartial tribunal in the determination of one's rights and obligations in a suit at law

***Hong Kong Polytechnic Ordinance* (cap. 1075)**

***Re Jenny Chua Yee Yen and the Hong Kong Polytechnic*, (1992) HCt, MP No 2325 of 1991, 26 March 1992, Mayo J**

This case involved an application for judicial review of, *inter alia*, a decision of the Hong Kong Polytechnic requiring the applicant to withdraw from a diploma course in hotel and catering management. (For further details see *Bill of Rights Bulletin*, v.1, n 1, p. 12)

Mayo J dismissed the application for judicial review on 26 March 1992. Written reasons will follow.

Counsel: G.J.X. McCoy, for the plaintiff; Richard Mills-Owen QC and A. Barma, for the respondent.

RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS (ARTICLES 10 AND 11)

FAIR TRIAL (ARTICLE 10)

***Criminal Procedure Ordinance* (cap. 221), section 83XX**

***R v Man Wai Keung*, Crim App No 403 of 1990**

This case involves a challenge to section 83 XX of the *Criminal Procedure Ordinance* (cap. 221) on the grounds that it violates articles 10 and 11 of the *Bill of Rights*. Section 83XX confers on the Court of Appeal a discretion to order the payment out of the public revenue of the costs of a successful appellant in defined categories of cases. However, section 83XX (3) provides that no order may be made under the section where a defendant who has successfully appealed against a conviction is ordered to be retried.

The case is scheduled to be heard on 29 May 1992.

***Control of Obscene and Indecent Publications Ordinance* (cap. 390), section 33 (2)**

***R v Mak Siu-shing*, Mag App No 724 of 1991**

This case involves a challenge to section 33 (2) of the *Control of Obscene and Indecent Publications Ordinance* on the ground that it violates the guarantees of articles 10 and 11 of the *Bill of Rights*. Section 33 (2) provides that a determination by the Obscene

Articles Tribunal that an article is obscene is conclusive in criminal proceedings, even where the defendant has had no notice of the proceedings before the Tribunal.

The matter was adjourned on 8 January 1992 pending the making of enquiries and is now listed before Yang CJ on 14 April 1992.

Counsel: S.R. Bailey, for the Crown; G.J.X. McCoy, for the defendant/appellant.

PRESUMPTION OF INNOCENCE (ARTICLE 11 (1))

***Criminal Procedure Ordinance* (cap. 221), section 94A**

***R v Lau Po Tung*, Crim App No. 375 of 1991**

The case also involves a challenge to section 94A of the *Criminal Procedure Ordinance* on the ground that it violates the presumption of innocence in article 11 (1) of the *Bill of Rights*. On 7 February 1992 the case was adjourned to a date to be fixed.

Counsel: Vernon Eaton, for the appellant; S.R. Bailey, for the Crown.

***Import and Export Regulations* (cap. 6)**

***R v Li Tat*, Mag App No 1065 of 1991**

This case also involves a challenge to section 94A of the *Criminal Procedure Ordinance* on the ground that it violates the presumption of innocence in article 11 (1) of the *Bill of Rights*, as well as to regulation 4 of the *Import and Export Regulations* (cap. 6) on the ground that it violates the presumption of innocence. The case has been adjourned pending the outcome of *Lau Po Tung*.

Counsel: G.J.X. McCoy, for the appellant.

***Control of Obscene and Indecent Articles Ordinance* (cap. 390), section 21 (1)(a)**

***R v Cheng Pui-kit*, HCt, Mag App No. 165 of 1992 (on appeal from SK No. 5333 of 1991, Mr Ian Carlson Esq, 18 October 1991 (noted in *Bill of Rights Bulletin*, v. 1, n. 1, p. 13)**

This is an appeal from a conviction before a Magistrate. The defendants were charged with publishing obscene articles contrary to section 21 (1)(a) of the *Control of Obscene and Indecent Articles Ordinance* (cap. 390). That section provides that, subject to a number of defences, it is an offence for a person to publish, possess for the purpose of publication or import for the purpose of publication any obscene article whether or not (s)he knows it is an obscene article. Section 21 (2) provides a number of defences, all of which the defendant must establish on the balance of probabilities. Under this section, a defendant can be convicted whether or not he knew before publication that the article was obscene.

It was argued that section 21 (1)(a) was inconsistent with articles 5 (1) and 11 (1) of the Bill of Rights. The Magistrate rejected this argument, He held that, while the offence

was a prima facie violation of the right to be presumed innocent, the provision was a rational, resonable and proportionate method of pursusing an important social objective, namely the protection of the young and frail of judgement from pornography. It was reasonable to do away with the requirement of proving knowledge of obscenity in view of the availability of a cheap and efficient means of determining whether an article is obscene by submitting it to the Tribunal. In light of the inherent safeguards in the classification system and the available defences, albeit limited in scope, section 21(1)(a) of the Ordinance satisfied the tests of rationality and proportionality and was hence consistent with the *Bill of Rights*.

Counsel: S.R. Bailey for the Crown; G.J.X. McCoy , for the defendant.

Control of Obscene and Indecent Publications Ordinance (cap. 390), section 33 (2)

See ***R v Mak Siu-shing*, Mag App No 724 of 1991** (page 18 above).

Drug Trafficking (Recovery of Proceeds) Ordinance (cap. 405), section 4 (3)

R v Wong Ma-tai, District Court Case No. 129 of 1990, Deputy Judge Ching Y. Wong

This case involves a challenge to the "assumptions" contained in section 4 (3) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (cap. 405). Section 4 deals with the assessment of a person's proceeds of drug trafficking. Section 4 (2) provides that, in making the assessment, the relevant court "may make the following assumptions, except to the extent that the defendant shows that any of the assumptions are incorrect in his case". The assumptions include the assumption:

> 4. (3)(a) that any property appearing to the court--
>
> (ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him,
>
> was received by him, at the earliest time at which he appears to the court to have held it, as payment or reward in connection with drug trafficking carried on by him or another.

Counsel: Tim Casewell, for the Crown; Kevin Egan for the defence.

Firearms and Ammunition Ordinance (cap. 238), section 24

R v Lau Ting-man, District Court, DCC No 222 of 1991, 15 November 1991, Deputy Judge Eccleton

This case was briefly noted in an earlier issue (*Bill of Rights Bulletin*, vol. 1, no. 2, p. 18), but at that time the written reasons for the judgment were not yet available. The case involved a challenge to presumptions contained in section 24 of the *Firearms and Ammunition Ordinance* (cap. 238), as well as to the negative averment provision contained in section 94A of the *Criminal Procedure Ordinance* (cap. 221) on the ground they violated the presumption of innocence in article 11 (1) of the *Bill of Rights*.

Section 24 provides:

24. (1) Any person who is proved--

(a) to have had in his possession--

(i) anything whatsoever containing any arms or ammunition;

(ii) the keys of anything whatsoever containing any arms or ammunition;

(iii) the keys of any place, premises, or vehicle or part of any place, premises or vehicle in which any arms or ammunition are found;

(b) to have had in his possession or under his charge or control any place, premises, vessel, vehicle or aircraft or part of any place, premises, vessel, vehicle or aircraft in which any arms or ammunition are found; shall until the contrary is proved, be presumed to have had such arms or ammunition in his possession for the purposes of sections 13 and 15.

Section 13 of the Ordinance provides:

13. (1) No person shall have in his possession any arms or ammunition unless--

(a) he holds a licence for possession of such arms or ammunition or a dealer's licence therefor; . . ..

On 15 November 1991 the Court held that section 24 of the *Firearms and Ammunition Ordinance* was inconsistent with the *Bill of Rights* and had been repealed, but that section 94A was not inconsistent with the *Bill of Rights*.

On the section 24 issue Deputy Judge Eccleton ruled (page 4 of his judgment):

"Having considered the recent Court of Appeal decision of R. v. SIN YAU MING H.C. 289 of 1990 I have no difficulty in ruling that S.24 of the Firearms and Ammunition Ordinance is clearly inconsistent with Article 11 of the Hong Kong Bill of Rights. It is clearly a presumption that is no more rational than Section 47(1)(c) and (d) of the Dangerous Drugs Ordinance which the Court of Appeal in Hong Kong has ruled as being inconsistent with the Hong Kong *Bill of Rights* and therefore repealed."

He then went on to consider whether section 94A of the *Criminal Procedure Ordinance* in its operation in relation to section 13 (1). After referring to a number of Canadian authorities, he wrote:[4]

"I have considered the relevant legislation relating to all 3 of the Canadian licensing cases and in my view it differs quite materially from S.13(1) of the Firearms Ordinance in Hong Kong.

In the main body of each of the statutory provisions relating to those cases it was necessary for the Crown to prove not only the act done but also that it had been done without a registration certificate, permit or licence. The Crown then obtained the benefit of either a specific reverse onus provision as in *R v Schwartz* or general reverse onus provision. It would, however, have been for the Crown to prove the lack of certificate, licence or permit if it had not been for the reverse onus provision and it would have been

---

[4] With some editing by the editors.

necessary for the Crown to have proved that as an essential ingredient of the offence.

My interpretation of S.13(1) of the Firearms Ordinance is that it does not create a presumption and that it is not an essential ingredient of the offence that the Crown prove that the Defendant did not have a licence. In my view the subparagraph (a) unless "he holds a licence for possession of such arms or ammunition" creates an exception to the offence which is a defence that a Defendant can avail himself of if he wishes. In my view although it might be a reverse onus provision it when read in conjunction with S.94A of the Criminal Procedure Ordinance does not create a presumption in respect of any essential element that the Crown must prove.

I do not consider that S.94A when applied to S.13(1) of the Firearms Ordinance infringes Article 11 of the Hong Kong Bill of Rights."

Counsel: S.R. Bailey and Maria Ip, for the Crown; Rodney Griffiths, for the defendant.

***Firearms and Ammunition Ordinance*, sections 13 (1) and 24 (1)(b)**

***R v So Sai Fong and Cahn Wai Lam* (1992) HCt, HC No. 115 of 1991, 18 March 1992, Deputy Judge Hoo QC**

The defendants were charged with possession of firearms contrary to section 13 of the *Firearms and Ammunition Ordinance*. The defendant argued that the presumption of possession contained in section 24 (1)(b) of the *Ordinance* was inconsistent the presumption of innocence contained in article 11 (1) of the *Bill of Rights*. He also argued that the requirement in section 13 that a defendant prove on the balance of probabilities as a matter of defence that he had a licence was also inconsistent with article 11 (1) of the *Bill of Rights*.

Held:

1. The presumption of possession of firearms under section 24 (1)(b) of the *Firearms and Ammunition Ordinance*, being almost identical to section 47 (1)(c) of the *Dangerous Drugs Ordinance*, was inconsistent with article 11 (1) of the Bill of Rights. The Crown did not attempt to justify the presumptions that they have satisfied the tests of rationality and proportionality.

2. The absence of a requisite licence is not an essential ingredient of an offence under section 13 of the *Firearms and Ammunition Ordinance*. It is clear that the legislative intention of section 13 is to prohibit the possession of firearms or ammunition and that, unless the accused avails himself of the statutory defences in section 11, a criminal offence has been committed by the mere fact of possession.

Counsel: S. Westbrook (on fiat), for the Crown; Michael Ko, for the defendant.

***Gambling Ordinance* (cap. 148), section 19 (1)(c), 19 (2); *Criminal Procedure Ordinance* (cap. 221), section 94A; negative averments, gambling offences**

There have been a number of cases in which the presumptions contained in section 19 of the *Gambling Ordinance* have been challenged on the ground that they violate the presumption of innocence in article 11 (1). The courts have consistently upheld the

presumptions contained in sections 19 (1)(a) and (c) of the *Ordinance*, but there is at least one decision in which the presumption in section 19 (2) has been held to be inconsistent with the *Bill of Rights*. Section 19 (2) has been held to be valid in (among other cases) *R v Tsang Hing-man*, NK No. 11915 of 1991 (24 December 1991, Mr I. Tanzer Esq.) and *R v Chan Wing-pu*, SK No. 133 of 1992 (Mr E. Lim Esq.). It was held to be invalid in *R v Lau Ming-fai*, SK No 7367 of 1991 (22 January 1992, Mr G. Talllentire, Esq.) (following).

***R v Lau Ming-fai and others* (1992) Mag, SK No. 7367 of 1991, 23 January 1992, G. Tallentire Esq.**

This case involved a challenge to the presumptions contained in sections 19 (1)(c) and 19 (2) of the *Gambling Ordinance* on the ground that they are inconsistent with the guarantee of the right to be presumed innocent in article 11 (1) of the *Bill of Rights*.

The relevant sections provide:

19. (1) Where in any proceedings under this Ordinance it proved that --

(a) the entry of a police officer to any premises or place under section 23 (2)(a) was prevented, obstructed or delayed;

(b) any premises or place entered under section 23 (2)(a) were or was provided with any means for concealing removing or destroying gambling equipment;

(c) gambling equipment was found in any premises or place enterted under section 23 (2)(a) or on any peron found in any such premises or place,

it shall be presumed until the contrary is proved that the premises or place are oris a gambling establishment.

(2) Where in any proceedings under section 6 it is proved that a person was found in a gambling establishment or that a person escaped from a gambling establishment on the occasion of its being entered under section 23 (2)(a), such person shall until the contrary is proved be presumed to ahve been gambling thereon.

Held:

1. The presumptions in sections 19 (1)(c) and 19 (2) are prima facie breaches of article 11 (1) of the *Bill of Rights*; the burden of justifying these presumptions accordingly lies on the Crown.

2. The presumptions relate to concerns which are substantial and pressing. There is a demonstrable connection between illegal gambling and other more serious crimes of loan sharking and corruption.

3. As to the presumption under section 19 (1)(c), entry into any premises under section 23 (2)(a) of the *Gambling Ordinance* has to be authorised by an office of the rank of Superintendent or above, who has to exercise his discretion upon reasonable suspicion. If gambling equipment is either found in the premises or on a person found on the premises, it is more likely than not that the premises are a gambling establishment. Therefore section 19 (1)(c) is not inconsistent with article 11 (1) of the *Bill of Rights*.

4. As to the presumption under section 19 (in so far as it applies to persons found in a gambling establishment, not in relation to persons escaping from it): Apart from gamblers, there could be many other innocent persons, such as waiters, workers or idle spectators, in the gambling establishment. Therefore, the presumed fact that all persons in a gambling establishment are gamblers would not rationally follow from the proved fact, and hence the presumption under section 19 (2) is inconsistent with article 11 (1) of the *Bill of Rights*.

R v Man Kit-man (1991) HCt, Mag App No. 991 of 1991, High Court, 6 December 1991, Sir Derek Cons VP (sitting as an additional judge of the High Court)

This case involved a challenge to section 19 (1)(c) of the *Gambling Ordinance* (cap. 148) alone and in conjunction with and section 94A of the *Criminal Procedure Ordinance* (cap. 221), on the ground that these provisions violate article 11 (1) of the *Bill of Rights*. The defendant had been convicted of operating a gambling establishment contrary to section 5 (a) of the *Ordinance*. The Crown conceded on the appeal that there was not sufficient evidence to found a conviction for operating a gambling establishment and the appeal was allowed on that basis. The Court did not consider it necessary to deal with the *Bill of Rights* issue.

Counsel: S.R. Bailey, for the Crown; Joseph Tse (instructed by David K.W. Tang & Co), for the defence.

***Public Order Ordinance* (cap. 245), section 33 (1); offensive weapon**

R v Yu Chi-lun, KT No 5373 of 1991, 19 December 1991, Mr J. Saunders Esq.

This case involved a challenge to section 33 (1) of the *Public Order Ordinance* (cap. 245) on the ground that it violates article 11 (1) of the *Bill of Rights*. Section 33 (1) provides:

> 33. (1) Any person who, without lawful authority or reasonable excuse, has with him in any public place any offensive weapon shall be guilty of an offence . . .".

The Magistrate held that section 33 (1) was not inconsistent with articles 11 (1) or 11 (2)(g) of the *Bill of Rights*. The Magistrate has been requested to provide written reasons for his ruling.

Counsel: Patrick Li, for the Crown; Mr Crawford, solicitor (Crawford & Co.), for the defendant.

***Summary Offences Ordinance*, section 17**

R v Lam Yau-kee, Crim App No 408 of 1991, Court of Appeal

This case, which involved a challenge to section 17 of the Summary Offences Ordinance (possession of an offensive weapon without a satisfactory explanation), originally involved a *Bill of Rights* challenge to that section. The *Bill of Rights* issue was not considered since the Crown did not support the conviction on the facts.

Summary Offences Ordinance, section 30

***R v Lee Kwong-kut*, Mag App No 90 of 1992, appeal by way of case stated from the decision of Mr J. Acton-Bond, Western Mag No 990 of 1991 (noted *Bill of Rights Bulletin*, v.1, n.1, p.20)**

This case involves a challenge to section 30 of the *Summary Offences Ordinance* on the ground that it violates the presumption of innocence in article 11(1) of the Bill of Rights. Section 30 provides that any person who has in his possession or conveys in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give a satisfactory account to the magistrate shall be liable to a fine of $1,000 and 3 months' imprisonment.

The Magistrate held that section 30 was inconsistent with article 11 (1) of the *Bill of Rights*. The Crown appealed by way of case stated. The matter has been referred to the Court of Appeal and now seems unlikely to be heard before August 1992.

***Trade Descriptions Ordinance* (cap. 362), section 12 (1)**

***R v Lee Ping-yau*, FL No 3280 of 1992, Mr R Venning Esq.**

This case involved a challenge to section 12 (1) of the *Trade Descriptions Ordinance* (cap. 362) (importing goods with forged trade mark) on the ground that it violated article 11 (1) of the *Bill of Rights*. The section creates a strict liability offence with a "due diligence" defence. The Magistrate ruled that there was a case to answer, but did not give detailed reasons. The defendant gave evidence and, having failed to establish the defence, was convicted.

Counsel: S.R. Bailey, for the Crown; Malcolm Nunns, for the defendant.

FAIR TRIAL (ARTICLE 10)

ARTICLE 11 (2)(B)

***R v Lai Kai-wing*, Mag App No 1041 of 1991**

In this case counsel for the defence has indicated that he wishes to argue that article 11 (2)(b) of the *Bill of Rights* obliges the Crown to provide the defence with copies of all witness statements before trial. Article 11 (2)(c) provides:

> 11 (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

On 14 February 1992 Sears J referred the case to the Court of Appeal.

Counsel: Jerome Matthews, for the defendant.

Re Chow Po Bor and Deputy District Judge Timothy Lee, HCt, MP No. 108 of 1992

This case involves an application for judicial review of the decision of a District Court judge to order a trial de novo. The defendants had sought an adjournment of the case when the prosecution provided them with more than 6,500 pages of unused prosecution material and 135 hours of videotapes, all of which were in Chinese. The defence argued that the prosecution was obliged to supply certified translations of the unused material The judge refused to grant the adjournment and ordered a trail de novo.

The application for judicial review of the judge's decision is based on a number of grounds. One of the claims made by the applicant is that the prosecution were obliged to provide the translations by virute of the right to a fair hearing contained in article 10 of the *Bill of Rights* and the right to adequate time and facilities for the preparation of one's defence in article 11 (2)(b) of the *Bill of Rights*.

Leave to apply for judicial review has been granted; the matter has been set down for September 1992.

Counsel: Michael Thomas QC, Cheng Huan QC and G.J.X. McCoy, for the defendant.

RIGHT TO TRIAL WITHOUT UNDUE DELAY (ARTICLE 11 (2)(C))

R v Wong Chiu-yuen (1992) DCt, STDC No. 44 of 1990, 8 January 1992, Judge Caird

The defendant was first arrested in August 1989 for a number of offences allegedly committed between 8 December 1988 and 15 January 1989. In May 1990 he was charged with nine offences, including theft, uttering forged documents and handling stolen goods. The trial was scheduled for November 1990. The Crown was not ready to proceed then and the matter was adjourned to July 1991. The hearing was again adjourned because of unavailability of the trial judge. At the date of the third trial (7 January 1992), two prosecution witnesses were not available. Certified translations of all the documents were only made available to the defence on the first day of the third trial. The defendant took a preliminary point that his right to speedy trial under articles 5 (3) and 11 (2)(c) of the *Bill of Rights* had been violated and requested a permanent stay of proceedings.

Held (granting the stay):

1. In determining whether there is undue delay, the whole period including all events which transpired before the 8 June 1991 when the Bill of Rights entered into force must be taken into account.

2. This case was not a complex theft case; it involved no more than 23 documents and no expert evidence. A straightforward case of little complexity has to be treated in a different manner to a complex commercial case.

3. The defendant had not contributed in any material way to the delay of some two years and five months before trial. Having regard to the lack of complexity of the case, the prejudice to the defendant, the unavailability of prosecution witnesses at the beginning of this trial and the failure to provide certified translation of documents, the proceedings should be stayed permanently.

Counsel: Lily Yew (on fiat), for the Crown; James Chandler (instructed by DLA), for the defendant.

Per Judge Caird (at p. 3):

"In any future case in which excessive delay is alleged the prosecution should place before the Court an affidavit which sets out the history of the case with reasons (if any) for the relevant period of delay."

***R v Kwan Kwok-wah and others* (1992) Dist Ct, DC Case No. 26 of 1991, 19 February 1992, Judge Britton**

[Note: This decision is the subject of an application for judicial review: HCt, MP No. 901 of 1992]

The defendants were charged with conspiracy to defraud the Inland Revenue of profits tax derived from speculating in property transactions. The alleged offences took place over a three year period from early 1987 to late 1989. Various preliminary applications were made to stay the proceedings as an abuse of process, as involving unjustifiable delay giving rise to a presumption of prejudice or actual prejudice, bad faith on the part of the investigating officers of the ICAC amounting to manipulation of the court process and/or causing undue delay, and the impossibility of having a fair trial because of the absence of a key defence witness.

Held (refusing the applications for a stay):

1. The court has a general discretionary power to stay proceedings on the ground of abuse of process.

2. The length of time which must elapse before delay can be described as unjustifiable depends on the circumstances of each case. A delay of some considerable length in a complex fraud case may be perfectly reasonable whereas the same delay in a simple shoplifting case would not be.

3. The case involved 66 prosecution witnesses and several hundred documents. The prosecution took twenty and a half months to investigate and prepare their case to the stage where the defendants made their first appearance in court. Given the complexity of the investigation, this was a reasonable time in this particular case. The trial date was fixed for six months later in July 1991. Shortly before the trial, the defendant requested and was granted an adjournment because of the unavailability of leading counsel. Another six months delay resulted. Less weight should be attached to this extra delay of six months as it was incurred, quite legitimately, by the defendant. The overall delay of two years and three months did not amount to an unjustifiable delay which gave rise to a presumption of prejudice.

4. Even assuming manipulation and bad faith on the part of the investigating authority which led to the delay, the prejudice, arising from the missing defence witness, suffered by the defendant could not be attributed to the delay.

5. If there has been no overall undue delay, a period of undue delay at one particular stage of the investigation could not amount to a violation of article 11 (2)(c) of the *Bill of Rights*. Even if undue delay at any individual stage of the investigation could amount to a breach of Article 11(2)(c), the breach would not amount to sufficient grounds to stay the trial.

6. On the facts of the case there was no bad faith on the part of the investigating officer, although it was not necessary to come to any conclusion on this point.

7. While genuine efforts have been made by the defendants to locate the missing witness, these efforts were barely adequate. In any event, there was insufficient evidence to show that the missing witness would be able to give sufficiently material evidence that injustice would result if the trial was to proceed in his absence.

Per Judge Britton:

"32. However, Mr. Hoo has made a further submission which he states breaks new ground on the existing law. He submits that the position as set out in ex p. Brooks is the law as it applies in England. The law is different in Hong Kong, he submits, because there is no Bill of Rights in the United Kingdom. The Bill of Rights in Hong Kong has brought about new statutory and constitutional rights which require the Court to go beyond the English common law position.

33. He relies on Article 11(2)(c) of the Bill of Rights . . .

34. The significance of this, he contends, is that unlike the English position as set out in ex p. Brooks that undue delay which causes prejudice may be an abuse (and which I have dealt with above) in Hong Kong undue delay alone which does not necessarily cause prejudice is a breach of the Bill of Rights and would on its own amount to an abuse.. . .

36. It is an attractive and ingenious argument but it is one which, in my respectful view, is wrong.

37. It seems to me that what the Court is required to do is look at the overall period of time involved and that if that amounts to undue delay then there is a breach of the Bill of Rights. Article 11(2)(c) does not say that a person is entitled to be tried without <u>any</u> undue delay (my emphasis). The underlying and fundamental aim is to secure a fair trial for an accused person. It would be a surprising result of the Bill of Rights if the Crown were to be denied its right to have a case tried where there had been no overall undue delay and where it was possible for the defendant to have a fair trial simply because at some stage of the investigation there had been a period of undue delay. An example will illustrate the point.

38. Suppose a person was arrested on a suspected shoplifting offence. Normally that person could expect to be before the Magistrate in Hong Kong next day and receive a trial within about two months. Suppose, however, the police officer dealing with the case carelessly misplaced the file and one month elapsed before the defendant was brought before the Court. He or she would still get a trial within an overall time span of three months which could hardly be described as undue delay overall. Should the Court say that as there had been undue delay for a month because of the carelessness of the police officer that no trial should take place because there had been a breach of the Bill of Rights ? That would seem to me to be an absurdity.

39. Looking at the overall time span involved in this particular case I do not find that there has been undue delay. The overall time involved is well within the normal parameters for a conspiracy case of this type. There has, therefore, in my view been no breach of Article 11(2)(c) of the Bill of Rights. However, if I am wrong about that, and if there was any undue delay at any individual stage of the investigation which would amount to a breach of that Article, then I find that as it is still possible for the defendants

> to receive a fair trial, notwithstanding any such breach, that the breach would not amount to sufficient grounds to stay the trial."

Editors' Comment:

In its *General comment* on article 14 (3)(c) of the *ICCPR* (the equivalent of article 11 (2)(c) of the *Bill of Rights*), the Human Rights Committee stated that:

> "this guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."
>
> (*General Comment 13 (21)*, para. 10)

There is also abundant authority from the European Court of Human Rights to the effect that not only the entire trial process must proceed without undue delay, but that each individual stage of the trial must also be conducted without undue delay. (See, for example, *Baggetta v Italy*, (1988) 10 *EHRR* 325; *Milasi v Italy*, (1988) 10 *EHRR* 333).

This jurisprudence suggests that undue delay at one particular stage of the process could amount to a violation of article 11(2)(c) of the *Bill of Rights*. However, it is by no means clear that undue delay in one part of the procedure requires that a prosecution be stayed, if the overall period of the proceedings is not unduly long. In such a case the appropriate remedy might be to order expedition of the remaining stages of the proceedings in order to ensure that the overall period of time is not unreasonably prolonged.

The power to stay a proceeding at common law is discretionary, and this seems not to have been affected by section 6 (1) of the *Bill of Rights Ordinance*. However, not only will courts frequently be reluctant to stay a prosecution permanently, but in some circumstances, a stay of proceedings will be peculiarly inappropriate. For example, where an appeal from a conviction has been outstanding for an unresaonable length of time, a stay of the appeal proceedings would hardly be an appropriate remedy. The appropriate remedy may be to order the hearing to be expedited or to award some form of compensation. However, there may be jurisdictional problems here due to the limited range of remedies available under existing law and the failure of the *Bill of Rights Ordinance* to confer a general power on the courts to award such relief as is just and appropriate, without being constrained by the existing limitations on their power to grant remedies. The availability of a remedy less drastic than a stay of proceedings might encourage courts to hold prosecuting authorities to a more stringent standard of diligence in the conduct of prosecutions.

***R v Lam Tak-ming and Lam Ho-ming* (1992) DCt, DC No. 271 of 1991, 6 November 1991, Judge Lugar-Mawson**

The accused were arrested on 5 July 1988. Both were charged with on 28 March 1991, and their trial began on 28 October 1991. It was argued, as a preliminary point, that the delay amount to an abuse of process under common law and also constituted a violation of articles 5 (2), 10 and 11 (2)(c) of the *Bill of Rights*.

> **Held** (refusing the application for a stay): There was no violation of articles 5 (2), 10 or 11 (2)(c) of the *Bill of Rights*.

Retrospectivity

1. The *Bill of Rights Ordinance* applies to proceedings taking place after the coming into force of the Ordinance notwithstanding that the criminal activities complained of took place before the coming into force of the *Ordinance*.

Interpretation

2. In interpreting the *Bill of Rights*, Canadian and United States authorities are only persuasive authorities; the Hong Kong courts will not necessarily follow these cases when interpreting the *Bill of Rights Ordinance*.

Article 5 (3)

3. Article 5 (3) of the Bill of Rights refers to detained persons only. A person who has been provisionally released does not fall within this provision. The accused were remanded in custody for two days only and have since then been granted bail. Therefore article 5 (3) does not apply to this case.

Article 10

4. Article 10 of the *Bill of Rights* is mainly concerned with the trial procedure and not the investigation of criminal offences. It has no, or only limited, application to this case.

Article 11 (2)(c)

5. For the purpose of article 11 (2)(c) of the *Bill of Rights*, the words "charge" or "charges" should be given the widest possible meaning of "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence." The word "charge" is not restricted to the formal laying of an accusation against a man before a court. Delay before the formal laying of a charge against the defendant is a relevant consideration.

   R v. Kalanj and Pion (1989) 48 CCC (3d) 459, partly followed and partly distinguished.

6. In determining whether there is undue delay, the court should take into account (1) the length of the delay; (2) the reasons given by the prosecution to justify the delay; delays occasioned by inadequate resources such as inadequate number of courts or judges must weigh against the Crown; (3) the responsibility of the accused for asserting his rights, or waiver by the defendant; waiver must be informed, unequivocal and freely given, and the burden of showing a waiver is on the Crown; (4) prejudice to the accused; the right to speedy trial is designed to protect three kinds of interests: to prevent oppressive pre-trial incarceration, to minimize the anxiety and concern of the accused, and to limit the possibility that the defence will be impaired. Of these, the most serious is the last.

Abuse of process

7. By virtue of section 75 (1) of the *District Court Ordinance*, the District Court has a statutory jurisdiction to prevent an abuse of the process of the court and to stop a prosecution.

Relationship between abuse of process and article 11 (2)(c)

8. The principles or factors to be applied in deciding whether there is undue delay under Article 11 (2)(c) and whether there is an abuse of process under common law

as the result of delay are and should be the same. The key question is whether the delay is such that a fair trial according to law is no longer possible of achievement.

9. The power to stop a prosecution as an abuse of process is a discretionary power under common law. This discretionary power is preserved by section 6 (1) of the *Bill of Rights Ordinance*.

Reasonableness of the delay in the present case

10. There was a delay of two years and nine months between the date of arrest (the official notification to both accused of an allegation that they had committed a criminal offence) and the laying of formal charges, and a further delay of 7 months from the date of charge to the commencement of trial. While the initial arrest of the accused was both premature and unnecessary, the Crown has discharged its burden on a balance of probabilities that there was no deliberate or negligent delay. The investigation was complex, involving the consideration of a large number of documents and enquiries in six European countries. Delay in fraud cases may be more readily excusable.

11. Something more than passive acquiescence in the time the investigation and prosecution process is taking is required to constitute waiver. There is no evidence of waiver by the accused. At the same time, the accused had not made any common sense layman's enquiries or complaint about the length of time the enquiry was taking.

12. The prejudice allegedly suffered by the accused is neither unusual nor particularly onerous; much of the hardship is self-induced as a result of their own inaction. Further, the case did not involve a test of witnesses' memories of observed events, but relied heavily on documents to which witnesses would refer in order to refresh their memories.

13. Taking all these factors into account, the court is satisfied, on a balance of probabilities, that, notwithstanding the delay in bringing this matter to trial, the accused have not been so prejudiced in the preparation, or conduct of their defence that a fair trial according to law is impossible of achievement. The delay complained of in the circumstances of this case was not an undue delay.

Counsel: Cheng Huan QC and Sterling Tsu, for both accused; A.R. Suffiad (on fiat), for the Crown.

Per Judge Lugar-Mawson (at pages 5-17):

"The effect of these Canadian cases may, I think, fairly be summarised as follows:--

1. It is delay after the laying of the charges that is the subject matter of the protection in s.11(b) of the Canadian Charter and not the delay before the laying of the charges. However, in considering what amount of delay after the laying of the charges is reasonable or unreasonable in the circumstances of a particular case, it is proper to consider all the relevant events which go to the reasonableness, or unreasonableness, of that post charge delay; including what has occurred and what time has passed in the period between the Commission of the offence and the laying of the charges. See the judgment of McIntyre J. of the Canadian Supreme Court in R. v. Kalanj & Pion.

2. In testing whether there has been an infringement of s.11(b) of the Canadian Charter the court must weigh and balance the following factors:

(1) The length of the delay: very lengthy delays must be such that they cannot be justified for any reason.

(2) The Crown's explanation for the delay --

(a) Delays attributable to the Crown: Such delays will weigh in favour of the accused. Complex cases which require longer time for preparation, a greater expenditure of resources by the Crown and a longer use of institutional facilities will justify delays longer than those acceptable in simple cases.

(b) Systematic or institutional delays (for example, an inadequate number of courts or judges). Delays occasioned by inadequate resources must weigh against the Crown Institutional delays should be considered in comparative terms as between similarly situated communities. The burden of justifying inadequate resources resulting in systematic delays will always fall on the Crown.

(c) Delays attributable to the defendant: Certain actions of the defendant will justify delay. There may be occasions where it can be clearly demonstrated by the Crown that the actions of the defendant were undertaken for the purpose of delaying trial. The defendant should not be able to claim any benefit from these.

(3) What the Canadians call "waiver": For a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. It is not the s.11(b) Charter right which is waived, but merely the inclusion of specific time periods in the overall assessment of the duration and the reasonableness of the delay.

(4) Prejudice to the accused: There is a general and in the case of very long delays a virtually irrebuttable, presumption of prejudice to the defendant resulting from the passage of time. When the Crown can demonstrate that there is no prejudice to the accused flowing from the delay then such proof may serve to excuse the delay. It is open to the accused to call evidence, including his own testimony, to show the actual prejudice suffered by him.

In general I consider that the above principles should be and are relevant in Hong Kong when considering Article 11(2)(c) of the Bill of Rights, though I do consider that the delay before the formal laying of a charge against the defendant is a relevant consideration.

[The judge then quoted in extenso the dissenting judgment of Lamer J in *R v. Kalanj and Pion*, at pp.473-4, 475, and he continued:]

I consider that for the purpose of Article 11(2)(c) of the Hong Kong Bill of Rights, the words "Charge" or "Charges" should be given the widest possible meaning of "...the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence..." - the definition given in the Eckle case. The word "Charge" is given six different meaning in Stroud's Judicial Dictionary (5th ed, Vol 1, at p.379). There is no comprehensive and generally applicable statutory, or

case law, definition of what it means. Both McIntyre J. and Lamer J. said in R. v. Kalanj and Pion that the word has many meanings in Canadian law. I see no warrant for restricting it to the formal laying of an accusation against a man before a court.. . .

I comment also that one of the reasons why the majority of the Canadian Supreme Court in R. v. Kalanj and Pion held that only post charge delay was relevant in a consideration of s.11(b) of the Canadian Charter was that they considered pre-charge delays were guarded against by other provisions contained not only in the Charter itself, but also in the Canadian Criminal Code. We in Hong Kong do not have the same protection. Indeed it may be that the only protection we have is the doctrine of abuse of process and for that reason I consider it desirable to take a broad definition of "Charge".

[The judge then discussed the Privy Council's decision in *Bell v DPP of Jamaica* [1985] 2 All ER 585, and quoted extensively from the opinion of Lord Templeman at pp.590-591, referring to four relevant factors in accessing whether there was an undue delay, namely, the length of delay, the reasons given by the prosecution to justify the delay, the responsibility of the accused for asserting his rights and prejudice to the accused. The judge then turned to discuss the principles of abuse of court's process under common law. He continued:]

The Relationship between Article 11(2)(c) and Abuse of Process

Given that I am of the view that Article 11(2)(c) of the Bill of Rights applies from the moment that the defendant is officially notified by a competent authority that it is alleged that he has committed a criminal offence, I am of the view that the principles or factors to be applied in deciding both the Article 11(2)(c) issue and the abuse of process through delay issue are and should be the same. Mr. Cheng Huan also urges this conclusion on me. I am of the view also that the overriding principle, the touchstone as it were, is the question: "Is the delay such that a fair trial according to law is no longer possible of achievement ?"

The Discretion and the Factors to be Applied

Once grounds for consideration of the issue are established, the burden of proof is cast upon the Crown and the standard of proof is a balance of probabilities, as stated by Sir Roger Ormrod in R. v. Derby Justices. Sir Roger Ormrod also makes it clear in that case that at common law the power to stop a prosecution as an abuse of process is a discretionary power to be exercised by the trial judge in accordance with legal principle.

I find it difficult to say what effect the Bill of Rights Ordinance has upon that discretion. Given the words of s.6(1) of the Ordinance, which reads: [the section is quoted] it appears that it is open to me to decline to make an order or grant any relief, even though I may find an Article of the Bill of Rights violated, provided that I am of the view that the making of no order, or the granting of no relief, is appropriate and just in the circumstances of the case. My discretion may thus be preserved by this provision.

There are four factors to be taken into account. They are:-

(1) The length of the delay.

(2) The reasons given by the prosecution to justify the delay.

(3) The responsibility of the accused for asserting his rights - the Canadian waiver issue.

(4) The prejudice to the accused."

Editors' comments

Judge Lugar-Mawson's judgment contains a very useful analysis of relevant case law from Canada, the United States, the United Kingdom and European Court of Human Rights. The approach adopted by the judge, and the meticulous analysis of each stage of the process, are to be welcomed.

While the judge notes that "something more than passive acquiescence" is required in order to constitute waiver (paragraph 11 of the holdings), he nonetheless seems to place some weight on the failure by the accused to complain to the investigatory authorities about the length of time the investigation is taking. One might perhaps ask whether it is reasonable to expect an ordinary accused to protest the length of the investigation before trial. An accused may understandably try to avoid the investigating authorities as much as possible at this stage. The accused may, rightly or wrongly, be under the impression that any complaint will only worsen his or her position. Even if (s)he wishes to complain, the only avenue available might be the investigating authority itself. The lack of complaint by the accused should not in itself be a factor which counts against the accused.

It may be noted that the judge did not attach much weight to the delay of seven months between the date of charge and the trial, as this period, though "far from ideal", was the normal listing period in the District Court and "is considerably shorter than that period in the High Court." While the conclusion is no doubt correct in the circumstances of this case, institutional delay, if sufficiently lengthy, can itself constitute undue delay, as the Canadian and European authorities have made clear. Thus, the fact that a case is subject to "normal" delays in coming on does not mean that an undue delay argument might not succeed if the "normal" period is considered to be unreasonable.

In dealing with the applicability of article 10 of the *Bill of Rights* in the present case, Judge Lugar-Mawson noted that the provision had "no or only a limited application", a conclusion which appears correct on the facts in the case. It should perhaps be noted that the guarantees contained in article 11 of the *Bill of Rights* are specific manifestations of the right to a fair hearing contained in article 10 and do not exhaust that guarantee of a fair hearing. The Human Rights Committee has stated that article 14 (2)-(7) of the *ICCPR* (the equivalent of article 11 of the *Bill of Rights*) is an elaboration of various specific aspects of the right to a fair trial under article 14 (1) of the *ICCPR* (article 10 of the *Bill of Rights*). In a case such as the present, the international bodies too would not examine the issue of undue delay under the general guarantee of a fair hearing; the standard international formulation would be that any issue arising under article 10 in this case is subsumed under article 11(2)(c) and therefore no separate consideration of article 10 is necessary.

Finally, the judge commented adversely on the practice of the ICAC in arresting the accused at an early stage of the investigation, where the arrest is both unnecessary and premature. It would have been sufficient to inform the accused that they were under suspicion and investigation. He remarked (at p. 28):

> "There are other ways of informing a man that he is under investigation than arresting him. For example, he may be asked to assist the police or the ICAC in their enquiries. It is seldom in fraud cases necessary to physically restrain a person and deprive him, however temporarily, of his liberty with all the other indignities to the person and psyche that arrest connotates. The

> powers of investigation given to the ICAC in the Prevention of Bribery Ordinance can be invoked against a person under investigation, it is not a necessary precondition to their exercise that the suspect be arrested. I hope that the ICAC will bear this in mind in the future. Heavy handed investigation does not aid their cause."

Arrest in Hong Kong frequently seems to be routine rather than an exception, irrespective of whether it is really necessary to arrest the suspect and the judge's warning would apply with equal force to other law enforcement agencies which may on occasion carry out arrests which are not necessary to achieve what are admittedly legitimate purposes.

R v Tung Chi Hung (1991) DCt, DCC No. 857 of 1991, 10 December 1991, Judge Lugar-Mawson

The facts of this case are noted above (see 11. The defendants had been arrested and charged in early July 1989 on the original charge (which had been withdrawn before the Magistrate in August 1989. Tung was rearrested in January 1990. One of the arguments made by the defendants before the District Court was that the delay of well over two years from the time of the charge was a violation of their rights under article 11 (2)(c).

Judge Lugar-Mawson referred briefly to the general principles discussed at greater length in his judgments in *Lam Tak-ming* (see page 29 above). He then noted that the investigation had been conducted in "a somewhat haphazard way with little real direction" and that the matter had been "inefficiently investigated". He noted in relation to both the abuse or process and article 11 (2)(c)) arguments:

> There is also no evidence before me that either Accused has suffered any prejudice and most importantly will be deprived of a fair trial as a result of the delay in bringing this matter to trial. As I have said the 1st accused declined to give evidence in support of the application so I know nothing of his circumsstances. The 2nd accused, OSMAN, spoke in his evidence of no prejudice and was not questioned on this. I accept that any man facing a criminal charge suffers some prejudice in the sense of loss of self-esteem, worry and perhaps a loss ofsocial relationships but there is no evidence here to suggest that those prejudices are extreme."

The judge concluded that there was no breach of the defendants' right to trial without undue delay.

Editors' comments

This decision appears be be an unduly narrow interpretation of the guarantee in article 11 (2)(c) (insofar as it seems to lay down a requirement of "extreme" prejudice), and a less than generous application of the general principles to the circumstances in this case. If Judge Lugar-Mawson is suggesting that there is a requirement that "extreme" prejudice must be shown, then this would not appear to be supported by the international case law or comparable national case law. (It may be, however, that this requirement of extreme prejudice applies only to the specific types of prejudice he refers to. However, even the requirement of a positive showing of prejudice after the passage of a lengthy period is a matter of some contention.)

***R v William Hung*, (1992) HCt, HCt Case No. 32 of 1991, Duffy J**

This case involves an application to stay a trial permanently on the ground that a delay of 15 months from the date of arrest violates the defendant's right to trial without undue delay. The case was argued on 23-26 March 1992, with extensive reference to common law and international authorities and academic writing. Judgment is scheduled for 14 April 1992.

Counsel: James Chandler (instructed by DLA), for the defendant; Tim Casewell, for the Crown.

***Re Leong Chi-hung and Crawford McKee Esq, Principal Magistrate*, MP No 832 of 1992**

This case is one of a number of cases in which adjournments have been granted on the application of the Crown pending the outcome of the appeal in *R v Lee Kwong-kut* (see page 25 above). The case involves a charge against a 17-year old boy under section 30 of the *Summary Offences Ordinance* (possession of a watch reasonably believed to be stolen). The relevant events occurred in June 1991. On 3 March 1992 the case was adjourned for the eighth time -- for mention on 4 August 1992 -- pending the outcome of the *Lee Kwon-kut* appeal.

The defendant has sought judicial review of the decision of the magistrate to adjourn the case on the ground that his right to trial without undue delay under article 11 (2)(c) of the *Bill of Rights* has been violated.

RIGHT TO LEGAL AID (ARTICLE 11 (2)(D))

Right to legal aid on appeal -- Power of Court of Appeal to order the provision of legal aid

***R v Mirchandani*, HCt Case No. 226 of 1988**

The appellant has applied to the Court of Appeal for the provision of legal aid on his appeal pursuant to article 11 (2)(d) of the *Bill of Rights*. The matter has been adjourned.

RIGHT TO HAVE ONE'S APPEAL DETERMINED "ACCORDING TO LAW" (ARTICLE 11 (4))

***R v Lam Wan-kow*, Crim App No 201 of 1992; *R v Yuen Chun-kong*, Crim App No 266 of 1991, 25 March 1992, Court of Appeal (Yang CJ, Silke VP and MacDougall JA**

The facts of this case are summarised above (see page 6). One of the issues was whether article 11 (4) of the *Bill of Rights* required the law as it stood at the time of the appeal to be applied rather than the law as it stood at the time of the trial.

The Court considered *General comment 13 (21)* of the Human Rights Committee, as well as decisions of the Human Rights Committee, the European Court of Human Rights and the Canadian courts elucidating the notions of "law" and "according to law".

The Court accepted the analysis put forward by the amicus (Mr P.J. Dykes) of the notion of "law", a formulation largely derived from the Canadian jurisprudence on the phrase "prescribed by law" under the *Charter* (citations omitted here):

> (i) That a limit on a right or freedom is prescribed by law it if is expressly provided for by statute or regulation or results by necessary implication from the terms of a statute or regulation.
>
> (ii) That the common law (including equity) is a source of law which can limit Charter rights and freedoms.
>
> (iii) That a statute authorising an adminstrative body to exercise a discretion may be a source of law capable of limiting Charter rights. Legislation which confers an imprecise discretion on a decision maker should be interpreted so as not to allow Charter rights to be infringed.
>
> (iv) That laws which restrict guaranteed rights and freedomns must be accessible and intelligible and should not grant plenary discretions to authorities enabling them to do whatever seems appropraite in a wide set of circumstances. Government policies and directives are not law.

The Court continued (at page 7):

> "From the way supra-national and national tribunuals monitor the implementation of human rights treaty obligations amd municipal courts interpret a constitutional instrument, there appears a degree of similarity in all their approaches, by the insistence on certain basic standards of legality and fairness."

The Court accepted the argument put by the amicus and the Crown that the words "according to law" meant (at page 8 of the judgment):

> "As regards the present appeal, the relevant 'law' is contained in Part IV of the Criminal Procedure Ordinance, cap. 221, the Criminal Appeal Rules made under section 9 of the principal ordinance and Practice Directions and, arguably, case law. When all of these are taken together they enable a superior court of law (this Court) to review both convictions and sentences from the High Court and District Court within a coherent legal framework where the basic rule of law is observed. This almost certainly suffices as regards the international obligation and the scheme would probably pass the tests applied in the Canadian cases to determine what is 'law'."
>
> . . .
>
> "'According to law' therefore does not relate to the specific offence laws applicable at the time of conviction at the time of the appeal but means, as is indicated above, the laws which exist and existed to enable the court of appeal to exercise its appellate function."

DOUBLE PUNISHMENT/DOUBLE JEOPARDY (ARTICLE 11 (6))

Road Traffic (Driving Offence Points) Ordinance (cap. 375)

R v Wan Kit Man (1992) HCt, Mag App No. 1190 of 1991, 18 February 1992, Hooper J (appeal from the decision of Mr I Tanzer noted in *Bill of Rights Bulletin*, vol. 1, no. 2, December 1992, p. 27)

The appellant had accumulated 15 driving-offences points for repeated traffic offences over a period of two years and was hence disqualified pursuant to the *Road Traffic (Driving Offence Points) Ordinance* (cap. 375) from holding or obtaining a driving licence of a period of six months. The defendant argued that section 8 of the *Ordinance* was inconsistent with articles 10 and 11 (6) of the *Bill of Rights Ordinance* and had therefore been repealed. The magistrate rejected these arguments (see *Bill of Rights Bulletin*, vol. 1, no. 2, December 1991, p. 27) and the defendant appealed.

Article 11 (6) provides:

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong."

Held (dismissing the appeal):

1. Disqualification from holding a driving licence is not a punishment but a civil consequence of an offence.

2. A person who has committed a scheduled offence may be punished either by prosecution and conviction and subsequent sentence, or by proceedings under the *Fixed Penalty (Criminal Proceedings) Ordinance*, where he pays the fixed penalty. In either case, disqualification may follow and the disqualification could not be described as punishing *again*.

3. In any event, the appellant had not been finally convicted or acquitted in accordance with the law and penal procedural of Hong Kong. Even if a disqualification could be regarded as a punishment, it is only one of the multiple penal sanctions. A single act may have more than one consequence. Where the law permits a variety of sanctions to be imposed in conjunction with other forms of punishment, a person is not finally punished until all possible penal consequences for the offence are exhausted. Accordingly, there is no violation of article 11 (6) of the *Bill of Rights*.

4. Since the appellant's sole ground of appeal did not refer to article 10 of the *Bill of Rights*, it was not necessary to comment on this aspect. However, the choice offered to a person when proceedings under the *Ordinance* are commenced enables him to be heard.

Counsel: Yasmin Mahomed (Crown Counsel), for the Crown; Geoffrey Watson (instructed by K.M. Lai & Li), for the appellant.

Editors' comment

Of interest in the context of road traffic offences may be the recent decision in *R v Hedayat* (1992) 22 *Canadian Rights Decisions* 725.10-04 (Alberta Prov. Ct). In that case

the defendant had been clocked as speeding by a radar machine, but the first notification of the offence which he received was the offence notice served 25 days later. The defendant argued that, since the alleged speeding happened some time ago, he could hardly be expected to recall exactly at what speed he had been travelling where and when. He was thus faced with the choice of entering a guilty plea as a matter of convenience or with putting the Crown to strict proof by entering a not guilty plea in order to be in a position to appreciate the circumstances of the case and his own guilt or innocence. The Court held that conducting a prosecution in this way amounted to an abuse of process, one which could be avoided by timely service of a notice.

Similar arguments may be available in Hong Kong. There will often be a delay of some weeks in Hong Kong between the time of an alleged offence and the time when the defendant first receives notice of it. It seems that the first step is to request the owner to identify the driver at the time of the incident and only after this is done is an infringement notices sent to the alleged offender pursuant to section 3 (3) of the *Fixed Penalty (Criminal Proceedings) Ordinance* (cap. 240). Since the police do not always stop cars once they have been clocked as driving over the speed limit, a driver or owner is faced with the choice of admitting guilt by paying the fixed penalty as a matter of convenience or entering a not guilty plea in order to get full disclosure from the Crown of the circumstances of the alleged offence (which (s)he might not otherwise be in a position to know or recall). The problem with the latter course of action is that, having once received this information, if the defendant then decides that the offence must indeed have occurred, (s)he is penalised with an additional penalty equivalent to the fixed penalty plus costs. Such a procedure appears to give rise to concerns under article 10 of the *Bill of Rights*, which guarantees the right to a *fair* hearing.

R v Tung Chi Hung (1991) DCt, DCC No. 857 of 1991, 8 December 1991, Judge Lugar-Mawson

In December 1991 the applicants had applied to the trial judge, Judge Lugar-Mawson, for a stay of prosecutions against them on the ground that they had already been acquitted on the same offence by a magistrate in August 1989. They argued that article 11 (6) of the *Bill of Rights* applied and also relied on abuse of process.

Before the Magistrate, no plea had been taken. Judge Lugar Mawson held that the applicants had not been acquitted of the offence by the Magistrate, since the Magistrate could only proceed to deal with the charge on the merits once the defendant had entered a plea. He held therefore that the plea of autrefois acquit was not available under section 31 of the *Criminal Procedure Ordinance* and that article 11 (6) of the *Bill of Rights* did not apply since the defendants had not been "finally acquitted in accordance with the law of Hong Kong".

An application was made for judicial review of this decision, but Mayo J concluded that the High Court had no jurisdiction to review the actions of the District Court as part of its judicial review jurisdiction; accordingly, he did not rule on this issue (on which both sides agreed with Judge Lugar-Mawson).

RIGHT TO PRIVACY (ARTICLE 14)

R v Eddie Soh Chee-kong, High Court, 6 December 1991, Saied J

In this case, Warwick Reid, a potential witness for the Crown in the custody of the Independent Commission Against Corruption, sought to prevent the prosecution from disclosing to the defence copies of personal letters written by him to his wife. Reid argued that the decision to intercept, photocopy and retain his letters in their entirety was a violation of his right to privacy under article 14 of the *Bill of Rights* and that disclosure of the correspondence would compound that violation. He asked the judge to order that the copies be delivered to him or destroyed. Article 14 of the *Bill of Rights* provides:

> 14. (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks.

On 6 December 1991 Saied J permitted the letters to be disclosed to the defence with a number of sections omitted. In reaching this conclusion, he referred not only to Reid's right under article 14 of the *Bill of Rights*, but also to the rights of the defendants under articles 10 and 11.

Saied J noted in relation to the conduct of the ICAC in monitoring and copying Reid's letters (transcript at pages 2172-73):

> [The ICAC] were not only Reid's custodians but also his investigators. Their investigations had continued and progressed through the period of Reid's incarceration at the ICAC headquarters before and after 6th July 1990. Reid recognises the fact that any prison authority would be entitled to open up the inmates' mail, and even censor it. . . . What is objected to, obviously, is that action of the ICAC in photocopying those letters and retaining them and, in the end, handing them over to the prosecuting team.
>
> . . .
>
> . . . in the situation where Reid was sending out letters, I think the ICAC were fully justified in monitoring this correspondence with a very keen and sharp eye. Keeping photocopies of the letters was, in these circumstances, not only part of their investigation process but also, I think in the circumstances, to enable the prosecution to make such use of those letters as counsel thought fit in the conduct of the case. It is plain, however, that rule 47 of the Prison Rules [Cap. 234], which contains the general provisions as to letters and which applied also to Reid while he was serving his sentence, does not extend the censorship to the copying of the letters. While it was an attempt obviously, to obtain evidence through unlawful means -- whether that was against Reid himself, inter alia, to discover the whereabouts of the money, or against any of the defendants -- such evidence, would, in my opinion, be admissible as a matter of law, subject, of course, to the ultimate discretion of the court.
>
> . . .

> . . . Where the interests of justice arise in a criminal case touching and concerning liberty, the weigh to be attached to the interests of justice must ultimately outweigh considerations such as the right of the prospective witness presently serving his sentence to the protection of his correspondence against arbitrary and unlawful interference. To let the latter predominate [over] everything else will surely result in the defendants being denied a fair trial, which, in turn, will defeat the interests of justice."

Editors' comments

It is by no means clear that the Prison Rules do as a matter of law apply to a person held in custody otherwise than in a designated prison. In any event, it is worth noting that the Prison Rules and Prison Orders made under them which regulate the censorship of prisoners' correspondence are based closely on the English legislation and orders which were held to be inconsistent with the guarantee of the right to respect for private life in article 8 of the *European Convention* on Human Rights. See, for example, *Silver v United Kingdom*, European Court of Human Rights, Judgment of 25 March 1989, Series A, No. 61, 72 *ILR* 334, 5 *EHRR* 347. It has recently been reported that amendments to the Prison Rules and Orders will shortly be introduced into the Legislative Council as part of efforts to bring them into conformity with the *Bill of Rights*: *South China Morning Post*, 7 April 1992, p. 6.

UNIVERSAL AND EQUAL SUFFRAGE (ARTICLE 25)

It has been reported that the Association for People's Livelihood and Democracy is planning to challenge the laws governing elections to the Legislative Council on the ground that they violate the guarantee of unviersal and equal suffrage in article 21 of the *Bill of Rights* (*South China Morning Post*, 6 April 1992, p. 7). Article 21 of the *Bill of Rights* provides:

> Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1 (1) and without unreasonable restrictions--
>
> (b) to vote and to be elected at genuine periodic elections which shall be by unversal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Section 13 of the *Bill of Rights Ordinance* provides that "Article 21 does not guarantee the establishment of an elected Executive or Legislative Council in Hong Kong." This replicates the reservation entered by the United Kingdom to the corresponding provision of the *ICCPR* (article 25) when it ratified the Covenant in 1976.

EQUALITY AND NON-DISCRIMINATION (ARTICLE 22)

Criminal Procedure Ordinance (cap. 221), section 84A

***R v Lo Shut-fo*, District Court Judge Moylan**

The *Bill of Rights* challenge in this case, that section 84A of the *Criminal Procedure Ordinance* (cap. 221) violates the guarantee of equality in article 22 of the *Bill of Rights*, was abandoned.

Counsel: Tim Casewell, for the Crown; L. Lok, Andrew Kan and Timothy Cheung, for the defence.

LEGISLATION

Crimes (Torture) Bill

This piece of legislation has been passed by the Legislative Council but has yet to be signed by the Governor. The legislation is intended to permit the extension to Hong Kong of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment 1984. The United Kingdom ratified the Convention in 1988 but did not extend it to Hong Kong at that time. The PRC is also a party to the Convention. The Convention will be extended to Hong Kong later this year (this was originally promised for February 1990) and the *Crimes (Torture) Ordinance* will commence operation at the same time.

The Bill creates an offence of torture, defined as in the Convention, and provides for extradition in respect of torture and related offences.

Although the Convention provides for a procedure under which individual complaints alleging violations of the Convention may be taken to the UN Committee Against Torture, the United Kingdom has not submitted to that procedure. However, the procedure under article 20 of the Convention will be applicable to Hong Kong. That procedure permits the Committee to conduct an enquiry on its own initiative where "it receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party".

Amendments to legislation governing the powers of the Independent Commission Against Corruption

The Legislature has before it Bills to amend or repeal a number of provisions of the *Independent Commission Against Corruption Ordinance* (cap. 204) and the *Prevention of Bribery Ordinance* (cap. 201), both of which have been exempted from the operation of the *Bill of Rights* until 8 June 1992. These Bills would amend or repeal provisions which have been identified as almost certainly inconsistent with the *Bill of Rights*.

The changes include the removal of the powers of ICAC officers to detain any person found on premises being searched as part of an investigation, of the power of a magistrate to issues a warrant for the arrest and admission to bail (or to prison if bail is not granted) of a person under investigation who is about to leave Hong Kong, amendment of the provision which makes it an offence to disclose the identity of a person under

investigation after his arrest (it will still be an offence to do so before arrest), and the repeal of the power of the ICAC Commissioner to require any person to provide him with any information which he considers necessary.

However, the Bills do not amend or repeal other provisions which have been claimed by some commentators to be inconsistent with the *Bill of Rights*. Furthermore, there has not yet been any public statement made by the ICAC or the Government of the steps that will be taken to regulate the use of electronic and telephonic interception as part of criminal investigations. The existing legislation (such as it is) seems clearly inconsistent with the *Bill of Rights*.

Dangerous Drugs (Amendment) (No. 2) Bill 1992

The Legislative Council has been considering legislation which has been drafted in response to the decision of the Court of Appeal in *Sin Yau Ming*. This Bill repeals sections 45, 46 and 47 of the *Dangerous Drugs Ordinance* and substitutes a new section 45 (presumption of the knowledge of the nature of a drug if person proved to have been manufacturing it) and section 47 (presumption of possession arising from the proof of various matters). The new section 47 contains a series of more narrowly drawn presumptions than did its predecessor.

OTHER CASES RAISING SIGNIFICANT ISSUES OF INTERNATIONAL HUMAN RIGHTS

TREATY OBLIGATIONS AND THEIR RELEVANCE TO DOMESTIC LAW

STATELESSNESS

Pan Ze Yang v Director of Immigration, **HCt, MP Nos 816 and 817 of 1992**

This is one of the cases which have arisen as the result of the cancellation of a number of Lesotho passports issued through the former Lesotho Consul-General in Hong Kong. It involves an application for judicial review of the decision of the Director of Immigration to order the removal of a former national of the PRC who renounced his nationality when he acquired a Lesothan passport and who may now be stateless as a result of the revocation of the passport by the Lesothan authorities. Among other matters, the case raises issues of the relevance to the exercise of the Director's discretion of the *Convention on the Reduction of Statelessness 1961* and the *Convention Relating to the Status of Stateless Persons 1954*, both of which have been ratified by the United Kingdom and extended to Hong Kong.

Derbyshire County Council v Times Newspapers Ltd, **English Court of Appeal, 19 February 1992 (Balcombe, Ralph Gibson and Butler-Sloss LJJ)**

This case involved the issue of whether a local authority could sue for libel. A number of the judgments discuss the extent to which treaty obligations may be taken into account in deciding the appropriate rule to be applied in a case where the common law rule is uncertain. In this case, the Court of Appeal considered that the common law position was uncertain and that this uncertainty permitted it to consider relevant treaty obligations. The Court discusses in some detail the provisions of and case law under article 10 of the

European Convention on Human Rights (freedom of expression), noting that it is in substance the same guarantee as article 19 of the *ICCPR* (the equivalent of article 16 of the *Bill of Rights*).

The case is important as an example of how unincorporated treaty obligations may be relied on in the interpretation or development of domestic law. Since a number of important human rights treaties applicable to Hong Kong have not been directly incorporated into Hong Kong law, the approach taken in this case may be of practical use in Hong Kong (see, for example, *Pan Ze Yang* above).

Balcombe LJ, in commenting on the relevance of article 10 of the *European Convention* to the issue, stated (at pages 19-21 of his judgment):

> "Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law -- per Lord Ackner in *Reg. v home Secretary, ex parte Brind* [1991] 1 A.C. 696, 761. Thus:-
>
> (1) Article 10 may be used for the purpose of the resolution of an ambiguity in Engish primary or subordinate legislation. *Ex parte Brind* (supra) per Lord Bridge of Harwich at pp. 747-8; per Lord Roskill at pp. 749-50; per Lord Ackner at p. 760.
>
> (2) Article 10 may be used when considering the principles upon which the Court should act in exercising a discretion, e.g., whether or not to grant an interlocutory injunction - per Lords Templeman and Ackner in *Attorney-General v. Guardian* [1987] 1 W.L R. 1248, ta pp. 1296, 1307; *In re W (A Minor)* [1992] 1 W.L.R. 100, 103, C.A.
>
> (3) Article 10 may be used when the common law (by which I include the doctrines of equity) is uncertain. In *A-G v. Guardian Newspapers (No. 2)* (supra) [[1990] 1 A.C. 109] the courts at all levels had regard to the provisions of Article 10 in considering the extent of the **duty** of confidence. They did not limit the application of Article 10 to the discretion of the court to grant or withhold an injunction to restrain a breach of confidence.
>
> Even if the common law is certain, the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10 [referring to *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudury* [1991] 1 QB 429, 449]. . . .
>
> In my judgment, therefore, where the law is uncertain, it must be right for the court to apporach the issue before it with a predilection to ensure that our law should not involve a breach of Article 10."

Butler-Sloss LJ commented (at page 5 of her judgment):

> "[T]he principles governing the duty of the Englsih court to take account of Article 10 appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to Article 10 is unnecessary and inappropriate. Consequently the law of libel in respect of individuals does not require the court to consider the Convention. But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of Article 10."

INTERNATIONAL AND NATIONAL DEVELOPMENTS

In this section we briefly note a number of cases decided by international bodies or by the courts of other jurisdictions which may be of interest to readers. The selection is no more than that and is not intended to be a comprehensive survey of jurisprudence elsewhere.

RECENT INTERNATIONAL DEVELOPMENTS

European Convention on Human Rights

Freedom of expression -- Permissible restrictions -- Spycatcher cases -- Article 10

***The Observer and The Guardian v United Kingdom*; *The Sunday Times v United Kingdom (No 2)*, European Court of Human Rights, Judgment of 26 November 1991, Series A, No. 217, summarised in *The Times*, 27 November 1991**

The Court in this case considered the consistency of the various injunctions which had been granted in the English *Spycatcher* litigation and held that the injunctions continued after the publication of *Spycatcher* in the U.S.A. had been inconsistent with the guarantee of freedom of expression in article 10 of the Convention. The case contains a good overview and summary of the Court's jurisprudence on article 10.

Right to an independent and impartial tribunal in the determination of a criminal charge -- charge of contempt of Parliament -- whether legislature an independent and impartial tribunal -- Article 6 (1)

***Demicoli v Malta*, European Court of Human Rights, Judgement of 27 August 1991, Series A, No. 210, 12 *HRLJ* 306**

The Court held that the Maltese Parliament had not acted as an independent and impartial tribunal in the circumstances of the case, in which the two members of the Parliament who had been attacked by the article concerned raised the question of breach of privilege and took part in the hearing of the charge (including the final decision as to guilt and the deliberations about sentencing).

Right to trial within a reasonable time or to release on bail -- Article 5 (3)

***Letellier v France*, European Court of Human Rights, Judgment of 26 June 1991, Series A, No. 207, 12 HRLJ 302**

This is a recent decision of the Court in which it reviews and summarises its previous jurisprudence on the scope of the guarantee in article 5 (3) of the *European Convention* (the equivalent of article 5 (3) of the *Bill of Rights*). The Court concluded in that case the detention of a defendant exceeded what was a reasonable period of time in the circumstances and that there had therefore been a violation of article 5 (3).

Discrimination -- Illegitimacy --Right to private life -- Article 8 -- Article 14

***Vermeire v Belgium*, European Court of Human Rights, Judgment of 29 November 1991, Series A, No 214-C**

This case involved a challenge to Belgian succession law on the ground that it discriminated between legitimate and illegitimate children. The challenged law conferred no succession rights on illegitimate children in the event of intestacy. The Court held that this was a violation of article 14 of the Convention (non-discrimination) in conjunction with article 8 (right to respect for private life).

Discrimination -- Right to peaveful enjoyment of possessions -- Planning and development permisions -- Article 14 -- Protocol 1, Article 1

***Pine Valley Developments Ltd v Ireland*, European Court of Human Rights, Judgment of 29 November 191, Series A, No. 222**

This case involved a successful challenge on the ground of discrimination to a refusal by the Irish authorities to validate a grant of planning permission obtained by the applicants which was subsequently declared invalid, where other holders of such permissions in a similar position to the applicant had their permissions validated.

NATIONAL COURTS

Privy Council

Bissoon Mungroo v R [1991] 1 WLR 1351 (PC) (Mauritius; undue delay)

Phillip v Director of Public Prosecutions [1992] 1 WLR 211 (Trinidad and Tobago; validity of pre-trial pardon)

Ali v R [1992] 2 WLR 357 (Mauritius; Director of Public Prosecution's power to select the court in which a drugs offence could be tried and thus was in a position in substance to select the penalty to be imposed was a violation of the principle of separation of powers)

Canadian Charter

R v Wholesale Travel Group Inc (1991) 84 DLR (4th) 161 (SCC) (a strict liability regulatory offence of false or misleading advertising did not as such violate section 7 of the *Charter*; however, since in this case a defendant could only rely on the due diligence defence if it showed that a prompt correction or retraction had been made the offence one of absolute liability, which did contravene section 7. The Court also held (by a majority) that a due diligence offence, which was required to be proved on the balance of probabibilities, was a prima facie violation of the presumption of innocence, but justifiable under section 1 of the *Charter*)

R v Seaboyer (1991) 83 DLR (4th) 193 (SCC) (holding that certain evidentiary rules limiting the admission of evidence in a rape trial of a victim's prior sexual conduct violated the guarantee in section 7 of the *Charter* that a person shall not be deprived of life, liberty or security of the person other than in accordance with principles of fundamental justice)

Committee for the Commonwealth of Canada v Canada (1991) 77 DLR (4th) 385 (SCC) (prohibition imposed by airport authority on the distribution of pamphlets and display of placards in the public terminal concourse of an airport was an interference with the guarantee of freedom of expression in section 2 (d) of the *Charter*, could not be justified as a reasonable restriction under section 1 and was therefore invalid)

R v Lippé (1991) (SCC) (6 June 1991) (system under which lawyers in practice could serve as part-time judges did not, in view of the legislative safeguards, violate the guarantee in section 11 (d) of the *Charter* of a right of a person charged with an offence to a fair hearing before an independent and impartial tribunal)

Osborne v Canada (1991) 82 DLR (4th) 321 (SCC)(prohibition on federal public servants from "engaging in work" for or against a candidate or political party - other than by attending a political meeting or contributing money to a candidate or party -- was an unreasonable restriction on the guarantee of freedom of expression contained in section 2 (d) of the *Charter*)

R v Broyles [1992] 1 WWR 289 (SCC)

The Court considered the admission of evidence obtained from a person accused of murder by a friend of the accused wearing a body pack who visited the accused in custody at the request of the police in order to talk about the alleged murder. It was held that the State had been instrumental in eliciting the evidence and that there had been a violation of the accused's right to silence implicit in section 7 of the *Charter* (which provides a guarantee of protection against the deprivation of life, liberty or security of person except in accordance with principles of fundamental justice).

The Court noted (at WWR 305, per Iacobucci J) that "[i]n general, the admission of self-incriminating evidence obtained as a breach of the *Charter*, unlike the admission of real evidence which would have existed regardless of the breach, will make the trial unfair: *R v Collins*" ([1987] 1 SCR 265, (1987) 33 CCC (3d) 1) and (at 306) that the "existence of other admissible evidence also tending to incriminate the accused will not make the trial fair." The Court excluded the evidence under section 24 (2) of the *Charter*, which requires exclusion where a court is of the view that its admission "would bring the administration of justice into disrepute."

RECENT ARTICLES AND LITERATURE RELEVANT TO THE BILL OF RIGHTS

Just out!

R. Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992) (see the last page of this issue for details and an order form)

Hong Kong

A. Byrnes, "Limited Rights", *The New Gazette*, February 1992, 28-30

A. Byrnes, "Limited Rights -- Part II", *The New Gazette*, March 1992, 26, 28-29

A. Byrnes, "Limited Rights -- Part III", *The New Gazette*, April 1992 (forthcoming)

J.M.M. Chan, "Undue delay and the Bill of Rights", (1992) 22 (1) *HKLJ* 2-19

A. Helton, "Judicial Review of the Refugee Status Determination Procedure for Vietnamese Asylum-Seekers in Hong Kong: The Case of Do Giau", (1991) 17 *Brooklyn Journal of International Law* 263-291

J.D. Murphy, "At Issue", *The New Gazette*, February 1992, 42-43 (discussion of the impact of the *Canadian Charter of Rights and Freedoms*)

Other jurisdictions

Commonwealth Human Rights Initiative, *Put Our World to Rights* (Commonwealth Secretariat, 1991)

J.C. Luik, *Freedom of Expression: The Case Against Tobacco Advertising Bans -- A Landmark Decision* (Ontario: Gray Matters Press, 1991)

B. Robertson, "Confessions and the Bill of Rights", [1991] *New Zealand Law Journal* 398

A. Shaw, "The New Zealand Bill of Rights Comes Alive (I)", [1991] *New Zealand Law Journal* 400

We would be grateful for details and copies of articles dealing with the *Bill of Rights* or related issues.

APPENDIX A

GENERAL COMMENTS 8 (16) AND 13 (21) OF THE HUMAN RIGHTS COMMITTEE ON ARTICLES 9 AND 14 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

GENERAL COMMENT 8 [16] (ARTICLE 9)[1]

1. Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect.

3. Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement "to trial within a reasonable time or to release" under paragraph 3. Pre-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention.

4. Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.

---

[1] UN Doc. CCPR/C/21/Rev. 1 (1989), p. 7.

GENERAL COMMENT 13 [21] (ARTICLE 14)[2]

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

---

[2] UN Doc. CCPR/C/21/Rev. 1 (1989), p. 12.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (subparagraph (a). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arisen when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph (3) (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3(b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3(c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay:. To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3(d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements

are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

12. Subparagraph 3(e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie.") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

BILL OF RIGHTS

BULLETIN

Edited by

Andrew Byrnes

and

Johannes M.M. Chan

with the collaboration of Steve Bailey

Faculty of Law

University of Hong Kong

TEL: 859 2951

FAX: 559 3543

Volume 1, No. 4

August 1992

2nd printing (with corrections)

THE BILL OF RIGHTS

The *Hong Kong Bill of Rights Ordinance* and an accompanying amendment to the *Letters* Patent entered into force on 8 June 1991, ushering in an important new stage of development in the Hong Kong legal system. The *Bill of Rights Bulletin* is intended to provide members of the legal profession with information about recent developments under the *Bill of Rights* and to refer them to relevant secondary materials.

THE EDITORS

Andrew Byrnes and **Johannes Chan** are members of the Department of Law of the University of Hong Kong. Both teach and write in the area of human rights law. **Johannes Chan** has written two books (in Chinese) on human rights in Hong Kong and published on international human rights topics as well as on the *Hong Kong Bill of Rights*. **Andrew Byrnes** has published articles on international human rights law and on human rights in Hong Kong and served as a consultant to the Attorney General's Chambers of the Hong Kong Government during the drafting of the *Bill of Rights*. **Steve Bailey** is Senior Assistant Crown Prosecutor with the Attorney General's Chambers, Hong Kong. He has acted as the Government's principal advocate in criminal law cases in which *Bill of Rights* issues have been raised.

Editorial comments are the sole responsibility of the editors (Andrew Byrnes and Johannes Chan) and should not be taken to represent the views of the University, the Faculty of Law or any other person.

SUBSCRIPTIONS

The production of the Bulletin is part of the program of the Public Law Research Group of the Faculty of Law at the University of Hong Kong and is supported by the Department of Law. If you would like to receive further issues of the Bulletin, please fill in the form on the back page of this issue and return it to the Editors. This is the last issue of Volume 1 of the Bulletin. Volume 2 will consist of four issues, published approximately every three months. The subscription for Volume 2 will be HK$400. All four issues of Volume 1 are available for a cost of HK$100. Discounts are available for multiple copies.

INFORMATION ON DEVELOPMENTS

We would particularly appreciate information about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We also welcome comments and suggestions on the format and content of the *Bulletin*. We would like to thank Gerry McCoy, Phil Dykes, Anthony Ismail, Jim Chandler, Osmond Lam, Keith Oderberg, Daniel Fung, Gus Andrée Wiltens, John McLanahan, the Registrar and Deputy Registrar of the Supreme Court, the Chief Magistrate (as well as others) for providing us with information included in this issue of the *Bulletin*. This issue is based on (the necessarily incomplete) information available to the Editors as of 25 August 1992. We apologise for any errors or omissions.

*

CONTENTS

TABLE OF STATUTES AND OTHER SOURCES CONSIDERED

TREATIES

International Covenant on Civil and Political Rights

HONG KONG CONSTITUTIONAL DOCUMENTS AND LEGISLATION[1]

Hong Kong Letters Patent 1917-1991

Bill of Rights Ordinance[2]

Control of Obscene and Indecent Articles Ordinance (Cap 390)

---

[1] Including Bills

[2] See also references under the corresponding articles of the *International Covenant on Civil and Political Rights*.

TABLE OF CASES

HONG KONG CASES

HUMAN RIGHTS COMMITTEE CASES

EUROPEAN COURT CASES

PRIVY COUNCIL CASES

CANADIAN CASES

EDITORIAL

RECENT DEVELOPMENTS

The period since the publication of the last issue of this *Bulletin* has seen a large number of cases, particularly in the higher courts. The overwhelming majority of cases continues to be in the area of criminal law and procedure; most of those have concerned the guarantee of the presumption of innocence and "reverse onus" clauses of one kind or another. There have also been a number of important cases in which the scope of the right to trial without undue delay under article 11 (2)(c) has been explored in depth.

Of particular significance are a number of cases decided by the Court of Appeal. In *Attorney General v Lee Kong-kut* (page 10 below), the Court found that section 30 of the Summary Offences Ordinance was inconsistent with article 11 (1) of the *Bill of Rights* and was repealed. In *R v Man Wai-keung* (page 7 below), the Court considered for the first time the guarantees of equality in the *Bill of Rights* and held that section 83XX (3)(a) of the *Criminal Procedure Ordinance* -- which denies the Court a discretion to award costs to an appellant sent back for a retrial -- was inconsistent with article 10, which guarantees equality before the courts. In two other cases, *R v Fu Yan* (page 36 below) and *R v Mirchandani* (page 38 below), the Court considered the relevance of the right to legal representation in appeal proceedings and the compatibility of the new legal aid scheme with that right (article 11 (2)(d) of the *Bill of Rights*; article 14 (3)(d) of the ICCPR).

The presumption of innocence continues to give rise to a constant stream of cases. The question of the appropriate analysis to be applied to reverse onus clauses which do not require the defendant to disprove a matter on the balance of probabilities is still at large. There continues to be disagreement as to whether provisions imposing merely an evidential burden or offences which are subject to statutory defences are to be measured against the tests of rationality and proportionality laid down in *Sin Yau-ming* or do not give rise to even a prima facie infringement of the guarantee.

The amendments to the *Dangerous Drugs Ordinance* enacted in response to the Court of Appeal's decision in *R v Sin Yau-ming* came before the courts within days of their commencement. While some of the new presumptive provisions have been held to be inconsistent with the presumption of innocence, the majority have survived attack. However, the amendments also threw up issues of the transitional operation of the provisions, in particular whether they apply to proceedings concerning events prior to the commencement date of the amendments (26 June 1992) (see page 13 below).

LEGISLATIVE AMENDMENTS

The expiry of the one year "freeze" in respect of six important Ordinances led to a flurry of legislative activity designed to amend provisions of the Ordinances which were inconsistent with the *Bill of Rights* (or, at least, some of them). This resulted in amendments to the *ICAC Ordinance*, the *Prevention of Bribery Ordinance*, the *Societies Ordinance*, the *Crimes Ordinance*, and the *Immigration Ordinance*. (For further details see page 51 below.)

While the Government has maintained that the amendments repeal or amend provisions in those Ordinances which are almost certainly inconsistent with the *Bill of Rights*, critics have pointed out that in a number of instances provisions which appear at odds with the *Bill of Rights* have still not been amended or repealed; they have also pointed

to likely inconsistencies between the ICCPR and some of the new or replacement provisions. Furthermore, there has beeen no legislation announced or introduced in areas in which there are clear violations of the *Bill of Rights*, for example, in relation to the interception of telephonic communications.[1] Rather than adopting a "generous and purposive" approach to the intepretation of the *Bill of Rights* (as the executive and not just the courts are obliged to do under international law), the Government has taken the view that these matters can be left to the courts to decide.

Problems of access

Leaving matters to be decided by the courts, whatever its merit as a principled and broad approach to the implementation of human rights, can only be relied on if persons alleging that their rights have been violated have access to the courts. The Government has gone to considerable lengths to expand eligibility for legal aid, and the new means test and discretion given to the Director of Legal Aid are significant steps and to be welcomed.

While defendants in criminal cases may have access to court, potential plaintiffs in civil cases may not. Although the Attorney General has on a number of occasions stressed that persons can enforce their rights under the *Bill of Rights* through the courts, neither he nor his Government have taken any steps to ensure that this assurance is realized in practice for those who may wish to raise important matters of public interest by way of civil action. While it is true that there have been some civil cases in which *Bill of Rights* points have been taken, these have been cases in which well-resourced businesses have been able to litigate (and the *Bill of Rights* issues have been incidental). There have been a number of civil cases raising strongly arguable *Bill of Rights* points which have been unable even to get to court because of the cost of legal proceedings. The fact that, if a plaintiff loses, the Government will be entitled to its costs, acts as a significant deterrent. This restriction on access to court has the practical effect of excluding from the courts matters which should be litigated in the public interest.

The Attorney General was asked during the debate on the *Bill of Rights* to consider waiving the genreal rule as to costs in *Bill of Rights* cases which were arguable and which raised issues of public importance. He refused. Nor has the Government, by its refusal to establish a Human Rights Commission and its apparent rejection of a court challenge fund, done anything significant to ensure that people in Hong Kong do not just have human rights in theory but can enforce them in practice when it is necessary to do so. Article 10 of the *Bill of Rights* guarantees access to court in practice; perhaps the time has come for the courts to take a lead and modify the traditional rules as to costs in appropriate cases.

THE ROLE OF THE PRIVY COUNCIL

The coming few months will see the first cases under the Hong Kong *Bill of Rights* being heard by the Privy Council. The Privy Council has long exercised appellate jurisdiction in cases concerning constitutional guarantees of human rights in appeals from dependent territories or independent countries of the Commwonwealth.

A number of Caribbean countries which still have appeals to the Privy Council have also ratified the Optional Protocol to the ICCPR, thus permitting unsuccessful appellants to lodge complaints with the United Nations Human Rights Committee that the rights

---

[1] Nor has there been any legislation introduced to "undo" the effect of the Court of Appeal's decision in *Tam Hing-yee v Wu Tai-wai* [1992] 1 HKLR 185, the effect of which is that the *Bill of Rights Ordinance* does not give effect to the intention expressed in its Preambie. The Government is apparently unconcerned that it may be violating its international obligations in a number of areas as a result of that decision.

guaranteed to them by the Covenant have been violated and that no redress have been provided by the national legal system.

In a number of important cases (mostly involving capital punishment cases), decisions of the Privy Council interpeting the provisions of constitutional guarantees have been held by the Human Rights Committee to result in violations of provisions of the Covenant. For example, in *Robinson v Jamaica*[2] the Human Rights Committee concluded that the trial of the defendant in which he had been found guilty of murder and sentenced to death in a trial at which he was unrepresented constituted a failure to observe the guarantee of the right to a fair trial in article 14 (1) of the ICCPR and the right to legal assistance in cases where the interests of justice require it. A majority of the Privy Council had held that the trial had not violated the guarantee under the Jamaican Constitution that "a person shall be permitted to defend himself in person or by a legal representative of his own choice" (*Robinson v Jamaica* [1985] 2 All ER 594).

Although the Privy Council was not interpreting the words of the ICCPR in that case, if the Privy Council were to reach a decision on the construction of the *Hong Kong Bill of Rights* which is inconsistent with the international jurisprudence, it would not be possible for a person in Hong Kong to take the matter to the Human Rights Committee, since the United Kingdom (presumably with the concurrence of the Hong Kong government) has refused to ratify the Optional Protocol or to extend the European Convention's individual complaints procedure to Hong Kong.

MATERIALS

An increasing number of cases now concern the validity of legislation enacted on or after 8 June 1991, the date on which the *Hong Kong Bill of Rights Ordinance* commenced operation. The controlling standard for the interpretation and validity of such legislation with the Hong Kong Bill of Rights "regime" is the *International Covenant on Civil and Political Rights* as applied to Hong Kong rather than the provisions of the *Bill of Rights Ordinance*. Section 4 of the *Bill of Rights Ordinance* provides that legislation enacted on or after 8 June 1992 "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." If it cannot be interpreted consistently with the ICCPR, then by virtue of article VII (3) of the *Hong Kong Letters Patent 1917-1991*, the legislation will, to the extent of the inconsistency, be *ultra vires* the Hong Kong Legislature and void.

In order to make more accessible the jurisprudence of the Human Rights Committee, the international body responsible for monitoring the implementation of the ICCPR by States Parties to it, we have reproduced the text of another of the Committee's *General comments*. *General comment 18 (37)* (reproduced as Appendix A) deals with equality and non-discrimination under the ICCPR and was recently referred to by the Court of Appeal in the case of *R v'Man Wai-keung* (see page 7 below). Appendix B consists of extracts from a recent United Nations press release summarising the latest decisions adopted by the Human Rights Committee under the Optional Protocol to the ICCPR.

HUMAN RIGHTS REPORTS

The *New Zealand Bill of Rights Act 1990* entered into force on 25 September 1990. The *New Zealand Bill of Rights* is modelled closely on the *Canadian Charter* and decisions of the New Zealand courts may provide a useful resource for cases under Hong Kong's *Bill of Rights*. Some of the cases decided so far are reported in the regular series of New Zealand reports. However, a new series of reports, the *New Zealand Bill of Rights Reports*,

---

[2] Communication No 223/1987, UN Doc A/44/40, Annex X.H, p 241 (1989).

is shortly to be published by Oxford University Press in New Zealand. A bound volume of the cases decided to the middle of 1992 will be supplemented by a loose-leaf service. At the end of this issue of the *Bulletin* we include a copy of a brochure from the publisher which contains further details.

Unfortunately, the reporting of Hong Kong *Bill of Rights* decision in the *Hong Kong Law Reports* continues to take time, due no doubt to the volume of decisions in this area as well as in other areas. Only a handful of cases have been reported so far (see below). The Editors of the *Bulletin* are presently compiling a volume of decisions decided under Hong Kong's *Bill of Rights* in the first year or so of its operation. A bound volume of these decisions will, we hope, be available before the end of the year.

SPECIAL THANKS

We would like to thank Bobo Cheung, of the Faculty of Law, University of Hong Kong, for her contribution to the *Bulletin*. She has handled the adminstrative side of the *Bulletin* with dedication and an enviable thoroughness. She will shortly be leaving the University to study abroad and we wish her every success in her studies.

RENEWAL OF SUBSCRIPTIONS

This is the last issue of volume 1 of the *Bill of Rights Bulletin*. If you wish to continue receiving the *Bulletin*, please renew your subscription by filling in the subscription form which appears at the back of this issue and sending it to us. Discounts are available for multiple copies.

CUMULATIVE TABLE OF HONG KONG BILL OF RIGHTS CASES REPORTED TO DATE

The Appeal Tribunal v de Kantzow [1992] 1 HKLR 55 (CA)
Attorney General v Osman [1992] 1 HKCLR 35 (HCt)
R v Lau Shiu-wah [1992] HKDCR 11 (DCt)
R v Sin Yau Ming [1992] 1 HKCLR 127 (CA)
R v Wan Kit-man [1992] 1 HKCLR 224 (HCt)
R v Wong Cheung-bun [1992] 1 HKCLR 240 (HCt)
Tam Hing-yee v Wu Tai-wai [1992] 1 HKLR 185 (CA)

CASES PENDING BEFORE THE PRIVY COUNCIL OR IN WHICH SPECIAL LEAVE TO APPEAL HAS BEEN OR IS TO BE SOUGHT

Attorney General v Lee Kwong-kut (CA) (page 10)
R v Lo Chak-man (HCt) (page 18)
R v Charles Cheung Wai-bun (HCt) (page 31) (special leave has been granted)

HONG KONG CASES

RIGHT TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE (ARTICLE 5)

R v Ng Yiu-fai (1992) HCt, MP No 1057 of 1992, 1 July 1992, Deputy Judge Jones

The applicant applied to Deputy Judge Jones for bail on 25 June 1992, having made a previous unsuccessful application to another judge of the High Court on 16 April 1992. At the time of his earlier application for bail, the date for his trial had not been fixed. Section 12B of the *Criminal Procedure Ordinance* (Cap 221) provides:

> "If an accused person is refused or denied bail by the court or a judge, he shall not thereafter be entitled to make a fresh application for bail --
>
> (a) before the commencement of his trial, except to the court or a judge and only if he satisfies the court or judge that since the refusal or denial, there has been a material change in relevant circumstances;
>
> (b) during the trial, except to the court conducting his trial."

The Crown opposed the application for bail on the ground that it was barred by section 12B. The applicant argued that the setting of a trial date some 7 months after the applicant's first arrest was a "material change of circumstances" within the meaning of section 12B and that in any event section 12B was inconsistent with article 5 (3) of the *Bill of Rights*.

Held (rejecting the application):

1. A change in the court timetable after the refusal of an application for bail will amount to a material change of relevant circumstances within the meaning of section 12B of the *Criminal Procedure Ordinance* only when the change results in an excessive delay to trial or, if the delay is not excessive, it gives rise to a waiting period which is beyond the likely contemplation of the judge refusing bail.

2. Section 12B serves an important public interest, namely, to prevent an abuse of court's process by making repetitious and even frivolous bail applications where the issues of bail had been fully and fairly canvassed before. It is consistent with article 5 (3) of the *Bill of Rights*.

In rejecting the argument that the change in timetable was a material change in relevant circumstances Deputy Judge Jones held (at pp 6-7 of his judgment):

> "Allocation of a trial date after a bail refusal will materially change the circumstances only if the delay to trial is excessive in itself or, if not excessive, then beyond the likely contemplation of the judge refusing bail. In the present case the date allocated is an early date for trial in all the circumstances and its allocation cannot be adduced as a material change."

The judge also rejected the argument that section 12B was inconsistent with article 5 (3) of the *Bill of Rights*.

> "Inter alia, this [article 5 (3)] provides that detention pending trial shall not be the general rule, although release may be subject to guarantees for appearance. This is hardly a novel concept in our law and I venture to say

that the provision in itself is merely declaratory of pre-existing common law principles. When harnessed to the repeal provisions, it could however have more serious effects if Mr. Chandler's present argument were to succeed.

The evident purpose of S.12B is not to deprive an accused of his right to seek liberty pending trial. It is directed against a proliferation of bail applications after an initial refusal of bail. Without such a provision bail applications could and probably would be made to successive judges on grounds both speculative and even frivolous. The applicant without a material change in his circumstances would hope eventually to appear before a judge who may view his case more sympathetically than a predecessor. The absence of such a section would invite abuse of the court's process by repetitious applications where the issue of bail had been fully and fairly canvassed already. There is a clearly perceived public interest in preventing such abuse in the manner provided by S.12B.

Mr. Chandler has further argued that an applicant with good grounds for bail should not be debarred from further application merely by the terms of S.12B, Cap.221. This argument is of course ignoring the central issue that this applicant's grounds for bail have already been judicially tested and found wanting. S.12B does not prevent his raising those grounds, it merely prevents his raising the same grounds twice. Leong J. has evidently considered the bail application with great care, to which his eight pages of detailed notes bear testimony. He has reached his decision after full argument and with representation for the applicant. In the absence of a material change in circumstances, which I have found to be the case, there can be no injustice in disallowing a fresh application.

I find that S.12B is a sensible and necessary adjunct to a coherent legal system, which would otherwise be prey to a proliferation of speculative bail applications on issues already decided. Moreover the section expressly provides for the rights of the individual in allowing further application on showing a material change in relevant circumstances. It is entirely just and appropriate that there be a judicial evaluation in that area before a fresh application is allowed.

I therefore find no inconsistency between the provisions of S.12B, Cap. 221 and the terms of the *Bill of Rights*. The submission that the section is repealed therefore fails."

Counsel: S R Bailey, for the Crown; J Chandler (instructed by David K W Tsang & Co), for the applicant.

Editorial note

The conclusion reached by the court in this case seems to be correct. The international case law interpreting the equivalent of article 5 (3) lays down a number of criteria on which pre-trial detention is permissible. However, that case law clearly establishes that, if one of the conditions which originally justified detention no longer holds good (for example, the danger of interference with witnesses or the course of an investigation may diminish over time), then the detention may become impermissible. Provided that changes such as these were considered to be "material changes" in relevant circumstances under the current interpretation of section 12B (or "reinterpreted in the light of section 3 (1) of the *Bill of Rights Ordinance*), then there would appear to be no inconsistency between article 5 (3) and section 12B.

***R v Charles Cheung Wai-bun*, (1992) HCt, Case No 160 of 1990, 1 July 1992, Duffy J**

The Judge held that pre-trial detention of 526 days was in the circumstances of the case unresaonable and a violation of article 5 (3). For details of this and related holdings, see page 31 below.

LIBERTY OF MOVEMENT (ARTICLE 8)

***Inland Revenue Ordinance* (Cap 112), section 77**

***Ho Hin Wah v Commissioner for Inland Revenue*, DCt, MP No 144 of 1986**

This case, which involved an application to set aside a stop order made under section 77 of the *Inland Revenue Ordinance* on a number of grounds, including inconsistency with article 12 of the *Bill of Rights*, has been settled.

We understand that settlements have been reached in a number of cases in which persons affected by a stop order have sought to challenge the order on the basis of inconsistency with the *Bill of Rights*. The Commissioner for Inland Revenue has, however, publicly stated that he does not consider that the provision is inconsistent with the *Bill of Rights*.

RIGHT OF ACCESS TO COURT IN THE DETERMINATION OF RIGHTS AND OBLIGATIONS IN A SUIT AT LAW (ARTICLE 10)

***Ever Sure Investments v Attorney General*, HCt, MP No 844 of 1992**

This case involves a challenge to various provisions of the *Town Planning Ordinance* on (among other grounds) the ground that they violate article 10 of the *Bill of Rights*. After the applicant had acquired a piece of land and shortly before the approval of its development plans by the Building Authority, the plot ratio and the maximum site coverage were drastically reduced. The hearing of the application for judicial review is scheduled for two weeks beginning 14 October 1992.

EQUALITY BEFORE THE COURTS (ARTICLE 10)

Equality before the courts -- Power of Court of Appeal to award costs to successful appellants -- Lack of power to award costs to appellant successful on appeal but sent back for retrial -- *Criminal Procedure Ordinance* (Cap 221), s 83XX (3)

***R v Man Wai-keung* (1992) CA, Crim App No 403 of 1990, 7 July 1992 (Silke VP, Nazareth JA and Bokhary J)**

The defendant was convicted of murder and appealed against his conviction, The Court of Appeal allowed his appeal and ordered a retrial ([1992] 1 HKCLR 89). Before his retrial took place, the defendant made an application for costs. Section 83XX (3)(a) of the

Criminal Procedure Ordinance provides that the Court of Appeal may not award costs to a person who successfully appeals against a conviction if a retrial is ordered.

The defendant argued that s 83XX (3)(a), by drawing a distinction between those appellants who were ordered to be retried and those who were not in respect of their right to seek for costs was discriminatory and inconsistent with articles 10, 11 (1), 11 (4) and 22 of the Bill Rights, either taken alone or in conjunction with article 1 of the *Bill of Rights*.

The Crown did not seek to argue that the provisions could be justified under as a reasonable and proportionate restriction on a guaranteed right. The Crown's main argument was that the distinction drawn between successful applellants who were no longer in jeopardy and those who were was not a distinction which fell withinthe ambit of the guarantee in the *Bill of Rights* to equality and non-discrimination. Arguing that the position under the *Bill of Rights* was the same as the position under section 15 of the *Canadian Charter*, the Crown maintained that the Bill's guarantees of non-discrimination applied only to the distinctions specifically mentioned in articles 1 and 22 of the *Bill of Rights* and to distinctions analogous to them.

Held:

Per curiam

1. Section 83XX draws a distinction between two classes of appellant, those who are entirely successful in the sense that they are not placed in further jeopardy, and those who are successful but are placed in further jeopardy by being ordered to be retried.

2. The guarantee of equality before the courts contained in article 10 of the *Bill of Rights* is not confined to the matters set out in articles 1 and 22 of the *Bill of Rights* as illustrative of forms of discrimination. Under article 10 the notion of discrimination had a broader concept within the equality which is declared to exist between all persons who have recourse to the court's process and relates to the fairness of that process.

3. To be consistent with the guarantee of equality before the courts in article 10, a distinction between classes of litigants must be rational, reasonable and proportionate to the achievement of a legitimate purpose.

4. Section 83XX distinguished between two classes of litigants for no apparent good reason. The court's power to award costs is discretionary in nature; there is no need nor justification for taking away this discretionary power in a case where retrial has been ordered. Since s 83XX (3)(a) could not be defended as a rational, reasonable and proportionate measure, it was inconsistent with article 10 of the *Bill of Rights* and repealed.

Per Silke VP

5. Section 83XX (3)(a) did not violate the presumption of innocence guaranteed by article 11 (1) of the *Bill of Rights*. Once an appellant has been successful in overturning his conviction, for whatever reason, the presumption of innocence which died with that conviction is revived. The provision could not be characterised as a legislative finding that a person once convicted is to be treated as guilty until the final termination of all proceedings against him; the concern of the Legislature was rather that of lack of finality in a case where a retrial had been ordered.

6. Although the possibility that a retrial might be ordered (and an application for costs thereby rendered unavailable) might inhibit a person from appealing, this did not constitute a violation of the right guaranteed by article 11 (4) of the *Bill of Rights* to have one's conviction and sentence reviewed by a higher tribunal according to law.

Per Bokhary J

7. Article 10 did not require literal equality in the sense of unrelentingly identical treatment always. Such rigidity would subvert rather than promote true even-handedness. 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. 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.

Counsel: G J X McCoy, (instructed by So & Co), for the applicant; A A Bruce, for the Crown/respondent.

Editorial comment

The court was unanimous in its view that the guarantee of equality in article 10 of the *Bill of Rights* was not restricted to the examination of distinctions based only on the specific grounds mentioned in articles 1 and 22 or other "analogous" grounds, but was a provision which permitted the rationality and proportionality of any distinction drawn between different classes of litigants to be tested.

However, the court did not decide whether articles 1 and 22 were so limited, so that only unreasonable distinctions based on enumerated grounds or analogous ones could amount to "discrimination" under those articles. The notion of enumerated grounds or ones analogous to them is a Canadian doctrine (see *Law Society of British Columbia v Andrews* [1989] 1 SCR 143, 56 DLR (4th) 1)), developed within the particular political and social context of Canadian Charter litigation. It is doubtful indeed whether the jurisprudence under section 15 of the *Charter* limiting the distinctions which may constitute discrimination to enumerated or analogous grounds can be directly applied to articles 1 and 22 of the *Bill of Rights*.

There is a considerable body of case law of the Human Rights Committee on the non-discrimination guarantees in the ICCPR, as well as an even larger body of jurisprudence under the similarly worded guarantees in the European Convention on Human Rights.[3] While it is encouraging to see that one member of the court referred to the *General comment* of the Human Rights Committee on equality and non-discrimination (reproduced below at Appendix A), no reference was made in the judgments to the relevant international cases, which were cited to the Court and which make it clear that the Crown's argument that the position under the ICCPR and *Bill of Rights* is the same as that under the *Canadian Charter* is incorrect. In view of the fact that the *Bill of Rights* was enacted to give effect to the ICCPR as applied to Hong Kong, it would be unfortunate if the jurisprudence under Hong Kong's *Bill of Rights* were to be developed under the almost total domination of Canadian Charter case law (despite its obvious value), without adequate consideration of the relevant international materials and case law from other countries.

---

[3] See A Bayefsky, "The Principle of Equality or Non-Discrimination in International Law", (1990) 11 *Human Rights Law Journal* 1, 5-8; A Byrnes, "Equality and Non-Discrimination", in R Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), 225 at 236-238.

The failure of the court to refer to any of the academic material placed before is less surprising and consistent with the general practice of the Hong Kong courts (though there have been exceptions). In our view, the practice of the Hong Kong courts contrasts unfavourably with the practice of appellate courts in other comparable Commonwealth jurisdictions.

PRESUMPTION OF INNOCENCE (ARTICLE 11 (1), BOR,; ARTICLE 14 (2), ICCPR)

Summary Offences Ordinance **(Cap 228), section 30**

Attorney General v Lee Kwong-kut **(1992) CA, Mag App No 90 of 1992, 18 June 1992 (Cons ACJ, Kempster JA and Bokhary J)**

The respondent had been arrested and charged on 16 February 1991 with having in his possession $1.76m which was reasonably suspected of having been stolen or unlawfully obtained contrary to section 30 of the *Summary Offences Ordinance*. Section 30 provides:

> "Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of $1,000 or to imprisonment for 3 months."

When the respondent appeared before a magistrate on 2 September 1991 to answer the charge, a preliminary issue was raised before plea as to whether section 30 admitted of a construction consistent with the *Bill of Rights*. The magistrate concluded that s 30 was inconsistent with the presumption of innocence contained in article 11 (1) of the *Bill of Rights* and had therefore been repealed by s 3 (2) of the *Hong Kong Bill of Rights Ordinance* (Cap 383). He therefore dismissed the charge.

The Attorney General appealed by way of case stated against the decision of the magistrate and the appeal was reserved to the Court of Appeal by Gall J. The magistrate stated the following questions for consideration by the court:

> 1. Whether I was correct in holding that section 30 of the Summary Offences Ordinance (Cap 228) does not admit of a construction which is consistent with section 8, Article 11(1) of the Hong Kong Bill of Rights Ordinance 1991; and
>
> 2. Whether I was correct in holding that the said section 30 had been repealed in its entirety by virtue of s 3(2) of the said Bill of Rights Ordinance.

On the appeal the respondent argued that section 30 was inconsistent with articles 5, 10, and 11 (1) of the *Bill of Rights*. The Attorney General argued that the provision was consistent with those provisions and, in particular, that section 30 was a strict liability offence ameliorated by a statutory defence and that such provisions were not inconsistent with the *Bill of Rights*.

Held (answering both questions in the affirmative and dismissing the appeal):

Per curiam

1. Section 30 of the *Summary Offences Ordinance* (Cap 228) was inconsistent with the presumption of innocence guaranteed by article 11 (1) of the *Bill of Rights*.

2. The requirement that an accused furnish an explanation satisfactory to a magistrate once the prosecution had established possession by the accused in the course of a journey of a thing reasonably suspected of having been stolen or unlawfully obtained was a matter of procedure. Any changes to section 30 in this regard by the *Bill of Rights* were therefore procedural and the general principle that such amendments take effect from the commencement of the amending statute applied to the present case. Section 30 had therefore been repealed on 8 June 1991.

3. In view of the conclusion on article 11 (1) of the *Bill of Rights*, it was not necessary to decide whether section 30 violated other articles of the *Bill of Rights* or to decide whether strict liability offences were consistent with the *Bill of Rights*.

Per Kempster JA

Section 30 prima facie infringed the presumption of innocence, since implicit in the section are presumptions that the thing in question has been unlawfully come by to the knowledge of the person charged. The Attorney General had not suggested that this prima facie infringement could be justified under the *Oakes* tests of rationality and proportionality as approved in *R v Sin Yau Ming* [1992] 1 HKCLR 127.

It would not accord with normal principles of construction to interpret section 30 as requiring the acquittal of an accused if he merely raised a reasonable doubt as to whether he came by the article in question honestly rather than proving on the balance of probabilities that he had done so. Section 30 accordingly did not admit of a construction consistent with the *Bill of Rights* and had therefore been repealed by virtue of section 3 (2) of the *Bill of Rights Ordinance*.

Observations on the retrospective operation of statutory provisions.

Per Cons ACJ

Section 30 contained an implicit mental element, namely a requirement that the accused violated in one way or another the proprietorial rights in the thing in question. Whether that mental element was an implicit presumption, a condition precedent to conviction or its absence was a matter of defence to be established by the accused is immaterial. The real concern was whether a person might be convicted while a reasonable doubt exists.

> *R v Whyte* [1988] 2 SCR 3, 51 DLR (4th) 481, 42 CCC (3d) 97, approved.

Per Bokhary J

In determining whether a provision infringes the presumption of innocence it is necessary to examine the substance and reality of the matter and it was not appropriate to adopt an approach under which a fundamental human right may in any given case be lost or diminished through a rigid division of an offence into its ingredients and the particular defences to it.

Section 30 was inconsistent with the presumption of innocence since it required an accused, once reasonable suspicion that he was dishonest had been shown, to prove that he was honest on the balance of probabilities. Reasonable suspicion thus converts a presumption of innocence into one of guilt.

> *R v Whyte* [1988] 2 SCR 3, 51 DLR (4th) 481, 42 CCC (3d) 97, approved.

Counsel: S R Bailey, for the Attorney General; G J X McCoy, K Oderberg and M Chow (instructed by So & Co), for the respondent.

Note: The Crown has announced its intention to petition the Privy Council for special leave to appeal against this decision. See also *Lo Chak-man* (page 18 below, against which the Crown also intends to appeal to the Privy Council.

Control of Obscene and Indecent Publications Ordinance (Cap 390)

R v Mak Siu-shing, Mag App No 724 of 1991

This case involved a challenge to section 33 (2) of the *Control of Obscene and Indecent Publications Ordinance*, which provides that a determination by the Obscene Articles Tribunal that an article is obscene is conclusive in criminal proceedings even where the defendant has had no notice of the proceedings before the Tribunal. The *Bill of Rights* point was not taken further.

R v Cheng Pui-kit, Mag App No 165 of 1992

Referred to the Court of Appeal on 10 July 1992 by Duffy J. For details of the case, see *Bill of Rights Bulletin*, vol 1 no 3, p 19.

Crimes Ordinance (Cap 200), section 137 (2)

There a a number of cases pending in which section 137 (2) of the *Crimes Ordinance* is likely to be challenged on the basis that it violates article 11 (1) of the *Bill of Rights*.

Note: The Supreme Court of Canada recently upheld a similar provision in the *Canadian Criminal Code*: see *R v Downey*, noted at page 48 below.

The validity of the new presumptions in the *Dangerous Drugs Ordinance* (Cap 134), sections 47 (1) and (2)

In response to the decision of the Court of Appeal in *R v Sin Yau Ming* [1992] 1 HKCLR 127 the Legislature passed a number of amendments to the provisions of the *Dangerous Drugs Ordinance*. These were contained in the *Dangerous Drugs (Amendment) (No 2) Ordinance*, which came into effect on 26 June 1992. The amending legislation repealed a number of provisions of the Ordinance and inserted a new section 47. This new section contains a number of presumptions more narrowly drawn than those which appeared in the earlier version of section 47.

The new section 47 reads as follows:

"47. **Presumption of possession and knowledge of dangerous drug**

(1) Any person who is proved to have had in his physical possession--

(a) anything containing or supporting a dangerous drug;

(b) the keys of any baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar container containing a dangerous drug;

(c) the keys of any motor vehicle containing a dangerous drug,

shall, until the contrary is proved, be presumed to have had such drug in his possession.

(2) Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.

(3) The presumption provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the dangerous drug."

In late July and early August there were three cases in which the High Court considered the validity of the new amendments, as well as the question of whether the amendments applied in proceedings relating to acts alleged to have occurred after 8 June 1991 but before the commencement of the new section.

In *R v Lum Wai-ming*, Deputy Judge Burrell held that the new section 47 (1)(c) was inconsistent with the presumption of innocence contained in article 14 (2) of the *ICCPR*, but that the rest of the section was consistent with it. In *R v Chan Wai-ming* Ryan J held that the new sections 47 (1)(b) and 47 (2) were consistent with the *ICCPR*. In *R v Tran Viet Van* Deputy Judge Jones held that the new section 47 (2) did not apply in proceedings relating to offences alleged to have been committed after the repeal of the old section 47 (3) (8 June 1991) but before the amendments came into operation (26 June 1992).

R v Lum Wai-ming (1992) HCt, Case No 75 of 1991, 27 July 1992, Deputy Judge Burrell

The defendant was charged with three counts of possession of dangerous drugs for the purpose of trafficking under s 7 of the *Dangerous Drugs Ordinance* (Cap 134).[4] The events giving rise to the charge were alleged to have occurred on 20 October 1990. The defendant had been driving a motor vehicle, which was searched by police after the defendant stopped. The police found about 100 g of heroin on the floor behind the driver's seat and a smaller quantity of dangerous drugs in a red "laisee" packet on or near the front door on the driver's side. The car key was in the ignition of the vehicle. After the voir dire and before empanelling the jury, the defendant challenged the constitutionality of sections 47 (1) and (2) of the *Dangerous Drugs Ordinance* (Cap 134) (as amended), on the ground that they were inconsistent with the presumption of innocence contained in article 14 (2) of the ICCPR and therefore *ultra vires* the Hong Kong Letters Patent and void.

---

[4] This section was repealed by the *Dangerous Drugs (Amendment) (No 2) Ordinance 1992*, which came into effect on 26 June 1992. The trial judge had earlier ruled that, in accordance with section 27 of the *Interpretation and General Clauses Ordinance* (Cap 1), the repeal did not have retrospective effect and that the defendant was properly charged.

Held:

1. Under section 4 of the *Bill of Rights Ordinance* and article VII (3) of the Letters Patent, all legislation enacted on or after 8 June 1991 is to be construed, insofar as the language of the statute permits, in a manner consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong. Provisions of such legislation which cannot be so construed are, to the extent of inconsistency with the Covenant, *ultra vires* the Letters Patent and void.

2. Mandatory presumptions are inherently dangerous in that an individual may be convicted notwithstanding the existence of a reasonable doubt. Such presumptions are prima facie inconsistent with article 14 (2) of the ICCPR unless they satisfy the threefold tests of rationality, proportionality and minimal impairment as laid down by the Court of Appeal in *R v Sin Yau-ming*. A further requirement of realism is added by Bokhary J in *R v Lee Kwong-kut*. The onus of justification lies on the Crown, which must discharge the burden on a balance of probabilities by the presentation of cogent and persuasive evidence.

3. The presumptions in section 47 pursue a legitimate objective, namely, the urgent need to curb dangerous drug trade in Hong Kong.

4. A narrow definition of the term "physical" in section 47 (1) should be adopted. Physical possession, as opposed to constructive possession, refers to immediate custody and control, with the intention to exercise that control.

   R v Hon Sai King (1950) 34 HKLR 319, referred to.

Section 47 (1)(a)

5. The term "anything" in section 47 (1)(a) goes beyond those items particularised in section 47 (1)(b). Insofar as the defendant is in physical possession of the car which is used as a container of goods found therein, section 47 (1)(a) becomes relevant. As physical possession is confined to immediate control and custody, the presumption of possession arising from physical possession under section 47 (1)(a) is rational and reasonable.

Section 47 (1)(b)

6. Section 47 (1)(b) refers to keys to certain items commonly used for storage (as opposed to motor vehicles referred to in s 47 (1)(c) which were primarily used for transportation). Although it was not necessary on the facts of this case to determine the legality of s 47 (1)(b), the provision, being triggered by proof of physical possession, satisfied the tests of rationality and proportionality.

Section 47 (1)(c)

7. Section 47 (1)(c) was subject to the same criticisms as had been levelled against the old section 47 (1)(d). Many people may have physical possession of keys to the same car and the Crown had not shown that the presumption that a person possesed drugs found in a car rationally and realistically followed from possession of keys to the car. Section 47 (1)(c) failed the tests of rationality and proportionality and is inconsistent with article VII (3) of the Letters Patent.

Section 47 (2)

8. Section 47 (2) is a presumption upon presumption; it is in identical terms to the old section 47 (3) which was declared repealed in *R v Sin Yau-ming*. *Sin Yau-ming* held that a presumption upon presumption is inconsistent with the presumption of innocence only if it is dependent upon an "unsustainable" presumption. As section 47 (2) is dependent on new presumptions which are different from those in the old section 47 (1), its legality depends on the legality of these new presumptions.

10. Any new legislation which is inconsistent with the ICCPR as applied to Hong Kong is void only to the extent of inconsistency. Therefore, section 47 (2) is consistent with the ICCPR as applied to Hong Kong except insofar as it is dependent on section 47 (1)(c).

Counsel: S R Bailey and T Yu (on fiat), for the Crown; D Fung QC, J M M Chan and S Ma (instructed by C M Li, Ho and Chow), for the defendant.

***R v Chan Wai-ming (No 2)* (1992) HCt, Case No 240 of 1991, 6 August 1992, Ryan J**

The defendant had been charged with two counts of being in possession of dangerous drugs for the purpose of unlawful trafficking. It was alleged that in May 1991 he had been found in physical possession of keys to a locked drawer in his home in which dangerous drugs were found. Under the new section 47 of the *Dangerous Drugs Ordinance* (Cap 134), the defendant's physical possession of the keys gave rise to a presumption of possession of the drugs.

The defendant challenged the new sections 47 (1)(b) and 47 (2) of the Ordinance on the ground that they were inconsistent with the guarantee of the presumption of innocence contained in article 14 (2) of the ICCPR and, pursuant to article VII (3) of the *Hong Kong Letters Patent*, were therefore *ultra vires* the Legislature and void.

Held:

1. The appropriate test for deciding whether a mandatory preumption of fact was consistent with the presumption of innocence contained in article 14 (2) of the ICCPR was the three-fold test of rationality, proportionality and minimal impairment laid down in *R v Sin Yau-ming*.

Section 47 (1)(b)

2. The amendments to the *Dangerous Drugs Ordinance* which required physical possession of keys to a container to be shown before a presumption of possession of drugs found in that container could arise considerably narrowed the field of persons likely to be caught by the presumption in section 47 (1)(b). Since the containers referred to in section 47 (1)(b) were usually small and goods were stored in them with a view to keeping them secret and safe, it was more likely than not that a person in physical possession of keys to such a container in which dangerous drugs were stored would not have given a duplicate key to another person or would not have put drugs into the container knowing that other persons held keys to that container.

3. Section 47 (1)(b) struck a reasonable balance between the right of the individual to the presumption of innocence against the needs of society to be protected from drug trafficking and was therefore not inconsistent with article 14 (2) of the ICCPR.

Section 47 (2)

4. Section 47 (2), while identical in wording to the former section 47 (3) was a new provision. As a presumption upon a presumption, its validity depended on the validity of the underlying presumptions. To the extent that it depended for its validity on the presumption in section 47 (1)(b), s 47 (2) was consistent with article 14 (2) of the ICCPR.

R v Lum Wai-ming (page 13 above), followed; *R v Sin Yau-ming* [1992] 1 HKCLR 127, distinguished.

Note: In view of the ruling of Deputy Judge Jones in *R v Tran Viet Van* (following), the Crown did not rely on the presumptions in this case (the issue of retrospectivity was not argued). The defendant was eventually convict.

Counsel: S R Bailey, for the Crown; O Lam, for the defendant.

***R v Tran Viet Van* (1992) HCt, Case No 12 of 1992, 10 August 1992, Deputy Judge Jones**

The defendant was charged with one count of trafficking in a dangerous drug. The prosecution informed the defence that it intended to rely on the presumption in the new section 47 (2) of the *Dangerous Drugs Ordinance* (Cap 134), which had been inserted in the Ordinance by the *Dangerous Drugs (Amendment)(No 2) Ordinance 1992*. The acts which gave rise to the charge were alleged to have occurred after 8 June 1991 (the effective date of repeal of the old section 47 (3) but before 26 June 1992 (the date of commencement of the new section 47 (2).

The defendant wished to argue that section 47 (2) was inconsistent with the right to be presumed innocent until proven guilty according to law contained in the *Bill of Rights*.[5] However, the court first requested argument on the issue of whether the amendments were intended to apply to a case such as the present in which the events at issue in the proceedings had occurred prior to the commencement of the amendments to section 47 even though the proceedings were on foot after the commencement of those amendments.

The Crown argued that, while there was a presumption against the retrospective operation of legislation that affected substantive law, the general rule was that procedural changes took effect from the time of enactment in relation to proceedings on foot at that time. Since the amendments to section 47 were procedural, that general rule applied and the time when the offence was committed was not relevant. The defendant argued that to apply the new presumption to the defendant would be unfair since they imposed a disadvantage on him at trial compared to the evidentiary provisions in force at the time of the alleged offence.

Held:

1. The general rule that procedural changes to the law take effect from enactment was based on an assumption that such changes would be to the benefit of all litigants. In the present case, the amendments penalised the defendant by imposing on him a considerable disadvantage which he did not face at the time the acts may have been committed.

---

[5] Since the legislation concerned was enacted after 8 June 1991, the controlling standard would have been the identical right contained in article 14 (2) of the *International Covenant on Civil and Political Rights*: see *Hong Kong Letters Patent 1917-1991*, article VII (3).

2. The distinction between procedural and substantive legislation is no longer conclusive as to the materiality or otherwise of retrospectivity. If an enactment seeks to impose a detriment on the individual in its operation on pre-existing facts then, whether or not that enactment is procedural, the Legislature should say so expressly. If the Legislature does not say so, it is open to the court to limit the effect of the enactment so that it does not comprehend proceedings pending when it came into force.

3. There was no distinction in principle between the imposition of a retrospective penalty and the introduction of evidential provisions imposing a new and onerous burden of disproof as to pre-existing facts.

4. The detriment caused to the individual by section 47 (2) was such that, procedural or otherwise, the provision should be interpreted as relating only to pre-existing events if the Legislature said so expressly. In the absence of such express provision, the presumption in the subsection must be taken to relate only to events charged as having occurred after its enactment.

Counsel: S R Bailey (Senior Assistant Crown Prosecutor) and A Wong (Crown Counsel), for the Crown; J McLanahan (instructed by Crawford Miller & Co), for the defendant.

Editorial comment

The decision in *Tran Viet Van* may give rise to some surprise in view of the well-established distinction between procedural and substantive amendments. If followed in other cases involving procedural amendments, the decision is of general significance. It underlines the importance of including clear transitional provisions in legislation so that the Legislature makes express its intention as to whether procedural amendments to laws take effect immediately in relation to all cases or apply only to cases commenced after or concerning events occurring after the entry into force of the amendments.

One issue raised by *Tran Viet Van* but not decided by it is whether an express provision in the 1992 amendment Ordinance that section 47 was intended to apply to all proceedings underway at or commenced after its enactment would be consistent with the *International Covenant on Civil and Political Rights*. Deputy Judge Jones did not need to address the scope of the guarantee of a "fair" hearing under article 14 (1) of the ICCPR. However, the reasoning he uses to support his conclusion that even procedural changes which operate to disadvantage a defendant in proceedings relating to events prior to the commencement of those changes could perhaps be used to support an argument that such a trial was "unfair".

The decision gives rise to uncertainty in another respect. The case holds that the amendments in the new section 47 do not apply to the trial of an offence alleged to have occurred between 8 June 1991 and 26 June 1992. The rationale underlying this result is that the new presumptive provisions disdavantage the defendant when compared with the situation after 8 June 1991 (when there was no corresponding presumption).

However, it is unclear whether the holding applies to the trial of offences alleged to have been committed **before** 8 June 1991. Since at that time the presumptions in force were even more stringent than the new presumptions introduced in the 1992 amendments, the rationale of relative disadvantage would not appear to apply. On that view, the presumptions introduced by the 1992 amendments would apply to the trial of these offences.

A different argument is that the intention to be imputed to the Legislature is that the amendments were intended to operate prospectively because of the potential unfairness to

defendants charged with post-8 June 1991 but pre-26 June 1992 offences, and that defendants charged with pre-8 June 1991 offences are the indirect beneficiaries of that intepretation of the amendment. On this argument the amendments would not apply to proceedings relating to **any** events alleged to have occurred before the commencement date of the amendments.

If the view that the amendments were to operate prospectively in **all** cases is not adopted, further difficulties might arise. It may be difficult to know whether a procedural or evidentiary amendment will operate (un)favourably to a given defendant or class of defendants except in the context of a particular case. Where a trial involves more than one defendant, the same provision may operate favourably to one defendant while unfavourably to another, for example, a procedural amendment permitting the introduction of affidavit evidence may advantage the Crown as against one defendant but another defendant against the Crown depending on the nature of the evidence introduced by this route. Of course, it may be argued that an amendment which does not always operate to the detriment of a defendant or class of defendants (as do the 1992 amendments) is in effect a "neutral" procedural amendment which applies to all proceedings from the date of its enactment. The judge's focus on fairness as between the Crown and defendant may mean that the question of fairness as between different defendants may not have been adequately considered. In any event, the rationale underlying the decision of Deputy Judge Jones may well give rise to further complications in the future.

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), section 25

R v Lo Chak-man (1992) HCt, Case No 108 of 1990, 4 August 1992, Gall J

The defendant was charged on indictment with one count under section 25 (1) of the *Drug Trafficking (Recovery of Proceeds) Ordinance*. The relevant parts of section 25 provide:

> (1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby-
>
> (a) the retention or control by or on behalf of another ('the relevant person) of the relevant person's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise);
>
> (b) . . .
>
> knowing or having reasonable grounds to believe that the relevant person is a person who carries on or who has carried on drug trafficking or has benefited from drug trafficking, commits an offence.
>
> (2) . . .
>
> (3) . . .
>
> (4) In proceedings against a person for an offence under this section, it is a defence to prove--
>
> (a) that he did not know or suspect that the arrangements related to any person's proceeds of drug trafficking; or
>
> (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of the relevant person of any property was

facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1) . . .".

The defendant challenged sections 25 (1) and (4) on the ground that they were inconsistent with the guarantee of innocence contained in article 11 (1) of the *Bill of Rights*.

Held:

1. Section 25 (1) contained a presumption of fact, namely that a person who knew that another person was carrying on or had carried on drug trafficking could be presumed to know that a particular arrangement involved the proceeds of drug trafficking and would facilitate the retention or control of the proceeds of drug trafficking by that other person.

2. The effect of sections 25 (1) and 25 (4) was that there as a possibility that a person could be convicted despite the existence of a reasonable doubt as to whether he knew or suspected that the proceeds of drug trafficking were involved in a given transaction. There was therefore a prima facie violation of article 11 (1).

3. A presumption of fact which involved a prima facie violation of the *Bill of Rights* would nonetheless be consistent with it if the presumed fact rationally and realistically followed from the fact proved and if the presumption was not more than is proportionate to what was warranted by the nature of the evil against which society requires protection.

4. A presumed fact "rationally and realistically" followed from a proven fact if it was the only reasonable inference from that fact; it was not necessary that the presumed fact inevitably followed from a proven fact.

5. In view of the volume of commerce in Hong Kong it was not a rational and realistic inference from knowledge or suspicion that a person was a drug trafficker that a given transaction involved the proceeds of drug trafficking.

6. The legislation addressed an important social objective and was a rational way of pursuing the goal of the elimination of the laundering of the proceeds of drug trafficking.

7. It was doubtful whether the provision satisfied the test of minimal impairment of the right to be presumed innocent.

8. Although the legislation addressed a problem requiring drastic measures, it too was also a drastic measure. Judicial notice could be taken of the extent of the problem of drug trafficking, but in the absence of evidence as to whether the means adopted by the legislation was proportionate to the end it served, it was not possible to conclude that the proper proportion of interests had been achieved by the legislation.

9. It was not possible to sever section 25 (4) from section 25 (1), since that would run counter to the intention of the Legislature and would put a defendant charged under section 25 (1) in a worse off position; the two provisions must stand or fall together. Sections 25 (1) and (4)(a) and (b) had therefore been repealed with effect from 8 June 1991.

Counsel: M Lunn (on fiat), for the Crown; A Hoo QC, P J Dykes (instructed by Chan and Tang), for the defendant.

Note: The Crown has announced that it will petition the Privy Council for special leave to appeal against this decision. The decision in this case has important ramifications for the fate of the *Organised and Serious Crimes Bill*, which contains similar provisions.

Dutiable Commodities Ordinance (Cap 109), section 40 (a)

R v Au Shun-sang **(1992) Mag, KT 327 of 1992, 7 May 1992, Mr T S Jenkins**

The validity of section 40 (a) of the *Dutiable Commodities Ordinance* (Cap 109) was raised in this case. Section 40 (a) provides:

> "40. In all proceedings under this Ordinance and in all proceedings for the recovery of any duties imposed by or under this Ordinance, it shall be presumed until the contrary is proved--
>
> (a) that any goods to which this Ordinance applies are dutiable goods . . .".

Under section 3 (1) the Ordinance is expressed to apply to alcoholic liquors, tobacco and various other products. The Crown conceded that the presumption did not satisfy the test of rationality laid down in *Sin Yau-ming*, since the presumption applied to a person in possession of a single packet of cigarettes. The court therefore found the section had been repealed.

Counsel: S R Bailey, for the Crown; defendant unrepresented.

Factories and Industrial Undertakings Ordinance (Cap 59), section 18

R v Ho Pong 280 Management Ltd**, Mag App No 369 of 1992**

This case was referred to the Court of Appeal by Leonard J on 14 August 1992. It involves a challenge to section 18 of the *Factories and Industrial Undertakings Ordinance* (Cap 59) on the ground that it violates the presumption of innocence in article 11 (1) of the *Bill of Rights*. Section 18 provides:

> "18 (1) In a proceeding for an offence under a provision in this Ordinance consisting of a failure to comply with a duty or requirement to do something so far as is necessary, where practicable, so far as is reasonably practicable or to take all reasonable steps, all practicable steps, adequate steps or all reasonably practicable steps to something, the onus is on the accused to prove that it was not necessary, not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that he has taken all reasonable steps to satisfy the duty or requirement."

Gambling Ordinance (Cap 148), sections 19 (1) and (2)

In the case of *R v Lau Sai-miu* (1992) Mag, ST No 78 of 1992 (19 March 1992), both sections 19 (1) and (2) of the *Gambling Ordinance* were held to be consistent with article 11 (1) of the *Bill of Rights*. In *R v Choi Kai-on* (1992) Mag, NK 216756 of 1991 (10 March 1992) section 19 (2) was held to be consistent with article 11 (1).

At this stage there appears to be no case before the High Court or Court of Appeal dealing with the presumptions in sections 19 (1) and (2). To date section 19 (1)(a) and (c)

have been consistently upheld, but there have been decisions going both ways on section 19 (2) (see *Bill of Rights Bulletin*, vol 1, no 3, pp 22-23).

***Immigration Ordinance* (Cap 115), sections 37C (1)(a), 37 (2)(b), 37K (1), 37K (2)**

***R v Tsui Tsz-fat* (1992) DCt, Case No 402 of 1992, 3 July 1992, Judge B Chan**

This case involved a challenge to sections 37C (1)(a) and (2)(b) of the *Immigration Ordinance* (Cap 115). These sections provide:

> "37C. (1) Subject to subsection (2), if a ship enters Hong Kong with an unauthorized entrant on board--
>
> (a) each member of the crew;
> (b) the owner of the ship and his agent; and
> (c) any person who participated in making arrangements to enable the voyage on which the unauthorized entrant boarded the ship or was brought to Hong Kong to take place,
>
> commits an offence and is liable--
>
> (i) on conviction on indictment to a fine of $5,000,000 and to imprisonment for life; and
>
> (ii) on summary conviction to a fine of $1,000,000 and to imprisonment for 3 years.
>
> (2) . . .
>
> (b) A person who is a member of the crew of a ship other than the captain shall not be convicted of an offence under subsection (1) if he proves that prior to the commencement of the voyage on which the unauthorized entrant was brought to Hong Kong, he did not know and had no reason to suspect that any unauthorized entrant would be carried on the ship."

The defendant argued that sections 37C (1)(a) and (2)(c), when read together, created an offence involving a mens rea of knowledge or negligence, a presumption of knowledge or negligence being implicit in section 37C (1)(a). Accordingly, the provision was a reverse onus clause and had to satisfy the tests laid down in *R v Sin Yau-ming*. The Crown argued that section 37C (1)(a) was an offence of strict liability, to which a defence of lack of knowledge was available under section 37C (2) and that therefore the analysis in *R v Sin Yau-ming* did not apply. In the alternative, the Crown submitted that the provision satisfied the test of rationality and proportionality laid down in *Sin Yau-ming*.

Held (declaring the provisions consistent with the *Bill of Rights*):

1. The offence created by section 37C (1)(a) and (2)(b) was an offence of strict liability. The elements of the offence were those stated in 37C (1) and the Crown was required to prove each of these elements beyond reasonable doubt. The phrase "subject to" in section 37C (1) did not render subsection (2)(b) a condition precedent to the offence in section 37C (1). Accordingly, the provisions did not have to be measured against the test laid down in *R v Sin Yau-ming*.

2. It was not necessary to consider whether an offence of strict liability was inconsistent with the *Bill of Rights*, since defence counsel had not made submissions to that effect.

3. In any event, the provisions satisfied the two tests of rationality and proportionality laid down in *R v Sin Yau-ming*.

Counsel: S R Bailey, for the Crown; Mr Wong, for the defendant.

Editorial comment

The judge's analysis of the test to be applied to a strict liability provision offence which is alleviated by a defence of lack of knowledge or negligence depends on separating the offence and defence in a formalistic way. This approach has been adopted in a number of Hong Kong cases: see, for example, *R v Yiu Chi-fung* (*Bill of Rights Bulletin*, vol 1, no 2, p 19). However, it would appear that the decision of the Court of Appeal in *Attorney General v Lee Kwong-kut* (page 10 above) has disapproved this approach. In *Lee Kwong-kut* two members of the Court of Appeal referred with approval to words of Dickson CJC, delivering the judgment of the Supreme Court of Canada in *R v Whyte* (1988) 51 DLR (4th) 481 at 493, 42 CCC (3d) at 109:

> "The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
>
> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

This approach eschews a formalistic classification of the elements of an offence and defences to it. (An example of the non-formalistic approach is *R v Suen Shun*, page 23 below.) Applying the language of *Whyte* to the present case, a defendant is required to prove some fact on the balance of probabilities and therefore there is a prima facie violation of the presumption of innocence which requires justification. While the first paragraph of the extract above was referred to in this case, the second paragraph was not. The analysis Judge Chan adopts seems to be inconsistent with the approach set out in the passage in *Whyte* endorsed by the Court of Appeal. Nevertheless, her alternative conclusion would uphold the offence even under a *Sin Yau-ming* analysis.

***R v Lau Wan-chung* (1992) DCt, Case No 450 of 1992, 12 August 1992, Judge Kilgour**

In addition to sections 37C, sections 37K (1) and (2) were also attacked as being inconsistent with the *Bill of Rights*. Following the approach adopted by Judge Chan in *R v Tsui Tsz-fat* (above), the judge held that sections 37K (1) and (2) were also consistent with the *Bill of Rights*.

***Import and Export Ordinance* (Cap 60), sections 14A (2) and 35A (2)**

***R v Wong Man-kwong* (1992) Mag, SK 4835 of 1991, 7 July 1992, Mr G Tallentire**

This case involved a challenge to section 16A (1) of *Import and Export Ordinance* (Cap 60) on the ground of inconsistency with article 11 (1) of the *Bill of Rights*. The relevant parts of that section provide:

> "14A. (6) In subsections (1), (2), (3), (4) and (5) where--
>
> (a) The Commissioner . . . reasonably suspects that a vessel has been used or is intended to be used for the purpose of smuggling; and
>
> (b) it is a vessel that has--
>
> . . .
>
> (iv) a facility to mount more than 2 outboard engines where the total power of the engines could exceed 448 kilowatts;
>
> (v) fuel tanks or other on board fuel capacity exceeding 817 litres, such tanks or other capacity holding or suitable for holding fuel for outboard motors . .
>
> the vesseel, or vessel under construction, shall be presumed to have been under construction, constructed or used for the purpose of smuggling, in the absence of evidence to the contrary."

Held:

1. The provisions were consistent with article 11 (1) of the *Bill of Rights*, since the section imposed only an evidential and not a legal burden on the defendant. and the Crown must discharge a heavy burden of proof despite the presumption which does no more than provide the Crown with an essential element in it prosecution of the offence and a defendant could not be convicted in the face of a reasonable doubt.

2. In any event the provision was justifiable, since the fact presumed rationally and realistically followed from the facts proved and was no more than was proportionate as part of the battle against smuggling.as a ational

***Import and Export Ordinance* (Cap 60), sections 18A (2) and 35A (2)**

***R v Suen Shun* (1992) Mag, KT 8817 of 1991, 4 May 1992, Mr Z E Li**

The defendants were charged with various offences under the *Import and Export Ordinance* (Cap 60). These offences included knowingly dealing with cargo with intent to assist another person to export such cargo without a manifest, contrary to section 18A (1) of the Ordinance, and being knowingly in possession of prohibited articles with intent to assist another person to evade statutory restrictions, contrary to section 35A (1).

Section 18A (2) provides:

> "18A (2) Any person who--

(a) has possession of any cargo;
(b) assists with the carrying, removing, depositing, harbouring, keeping or concealing of any cargo; or
(c) otherwise deals with any cargo,

in circumstances that give rise to a reasonable suspicion that there is intent on the part of that person to export the cargo without a manifest or to assist another person to export the cargo wihtout a manifest, the first mentioned person will be presumed to have such intent in the absence of evidence to the contrary."

Section 35A (2) makes similar provision in relation to offences under section 35A (1), which deals with various offences involving the evasion of restrictions or prohibitions provided for by the Ordinance or other laws.

The defendants challenged both these provisions on the ground that they were inconsistent with article 11 (1) of the *Bill of Rights*. The Crown argued that, since the provisions required the defendant to raise only a reasonable doubt and did not require the defendant to disprove presumed facts on the balance of probabilities, the provisions did not amount to a prima facie breach of article 11 (1) which had to be defended on grounds of rationality, proportionality and minimal impairment.

Held:

1. In determining whether a statutory presumption was inconsistent with article 11 (1) of the *Bill of Rights*, it was not appropriate to adopt a "Bifocal" approach of determining first whether a provision constituted a prima facie breach of the provision and, only if it did, then considering whether it satisfied tests of rationality, proportionality and minimal impairment. Thus, the fact that a presumption could be displaced by the defendant's merely raising a reasonable doubt as to the existence of the presumed fact was not determinative of the issue of whether the provision violated article 11 (1).

2. The appropriate test was the "double-barrelled" test articulated in *R v Sin Yau-ming*, which involved testing presumptions against tests of rationality and proportionality.

3. The presumptions in sections 18A (2) and 35A (2) failed the test of rationality.

4. In relation to proportionality, the Crown had not discharged its burden of showing that there were no other appropriate means by which the prosecution can bring smugglers to justice, since there were various alternatives to the enactment of provisions such as sections 18A (2) and 35A (2).

Both sections were declared to have been repealed by the *Bill of Rights Ordinance*.

Counsel: T Chu (on fiat), for the Crown; C Y Wong and S See, for the defendants.

Note: The Crown is appealing against this decision by way of case stated. However, there are two other appeals from the decisions of magistrates (both of whom held section 35A (1) was consistent with the *Bill of Rights*) which have been referred to the Court of Appeal:

R v Wong Hiu-chor, Mag App No 227 of 1992, referred to the Court of Appeal by the Chief Justice on 23 July 1992

R v Yeung Chu-tim, Mag App No 484 of 1992, referred to the Court of Appeal by Wong J on 7 August 1992.

The case of *R v Fong Chi-chung*, NK 500/347/92, also challenging section 35A (2), was adjourned on 25 August 1992 until December pending the outcome of the above appeals. In *R v Chan Kiu-tung* (1992) Mag, FL 1039 of 1992, the court held that section 18A (2) was consistent with the *Bill of Rights*.

Import and Export (Carriage of Articles) Regulations, reg 3

R v Lai Tai-tai, Mag App No 474 of 1992

This case, which involves a challenge to regulation 3 of the *Import and Export (Carriage of Articles) Regulations*, was referred to the Court of Appeal by Bokhary, J on 17 July 1992.

Prevention of Bribery Ordinance (Cap 201), section 24

R v Alfred Li Kwok-lun ("Stock Exchange Trial"), 19 June 1992, Mortimer J

In this trial, in which all defendants were eventually acquitted of various charges under the *Prevention of Bribery Ordinance*, the trial judge, Mortimer J, had not completed his summing up to the jury when the Court of Appeal delivered its decision in *Attorney General v Lee Kwong-kut* (see page 10 above). The judge then amended his directions to the jury. The following are relevant extracts from the transcript:

> " [IN THE ABSENCE OF THE JURY]
>
> COURT: When we came into this trial, the Bill of Rights Ordinance came into force so far as the Prevention of Bribery Ordinance was concerned, that was on the 8th June last and shortly after that date I heard submissions from counsel as to the effect of the Bill of Rights upon the Prevention of Bribery Ordinance, particularly in respect of the reverse onus provision in regard to lawful authority and reasonable excuse and also as to the proper statutory interpretation of the provision relating to permission. I gave a ruling that those provisions were saved and were no[t] struck down by the Bill of Rights. Yesterday, when I had been summing up to this jury for several days, the Court of Appeal made a decision in Lee Kwong Kut and although that was a vastly different case from the case before me, some of the reasoning that I had given in my ruling is seriously undermined by that Court of Appeal decision. It would be necessary therefore, if I am to review that ruling, for me to reconsider the whole question.
>
> Now it is not appropriate nor just that I should indulge at this moment in the trial in lengthy legal argument which would be necessary for me if I am to properly reconsider my ruling in the light of the Court of Appeal case yesterday, by which I am of course bound. It is clear from that decision that reverse onus provisions are prima facie repealed but that they may be saved on certain grounds and those grounds have to be advanced by the Crown and have been advanced before me. So it would not be just to send the jury away until I determine the matter properly.
>
> How am I to approach it? My inclination, as I have indicated in the course of the arguments, my inclination is that these provisions are preserved, are not in fact struck down by the Bill of Rights Ordinance. But my concern, as I hope has been throughout the trial, to try to achieve justice

and what am I to do in these circumstances knowing that at any rate it is possible that these provisions have been changed by the Bill of Rights?

I am going to deal with the matter, I hope fairly, and in a practical way. I am simply going to do this. I am going to direct the jury that the burden of disproving the presence of permission and reasonable excuse rests upon the Crown upon the whole of the evidence, and I am quite satisfied that there is evidence here for the jury to consider and I will ask to jury to return.

[THE JURY RETURNED]

Members of the jury, I apologise for having kept you waiting. You will appreciate in a moment why. An unusual thing has happened and I should explain it just in broad detail. The Court of Appeal made a decision yesterday and the reasoning of that decision has caused me to reconsider one direction of law which I gave you earlier in the case. It will in fact, the direction I'm about to give you, it will in fact I believe ease your task as it makes the matter less complicated for you to approach and it is of advantage to the accused and of disadvantage to the prosecution in the case.

You will remember, members of the jury, that I told you that the standard of proof which has to be achieved is that before you convict, you must be sure of the accused's guilt and I told you that the burden of proving that guilt rests throughout upon the prosecution and I told you that that was the general and fundamental rule. Now I come to the point, members of the jury, that I am going to vary. I am going to withdraw what I said about any burden resting upon the accused. You will remember that I said that if you are otherwise sure of guilt you should then go on to consider whether the accused in the appropriate circumstances had proved permission, lawful authority or reasonable excuse when they raised it on the basis that it was more likely than not, and it you came to the conclusion that it was more likely than not, that permission, lawful authority or reasonable excuse had been established by the accused then you should acquit.

Now, members of the jury, the matter is now much more simple. Please disregard what I said about any of the accused being under any burden to prove anything. The result is this. That where the accused have raised permission, lawful authority or reasonable excuse, it is for the prosecution to prove so that you are sure that the accused did not have any permission, lawful authority or reasonable excuse. The prosecution in other words has to disprove those matters. The prosecution does that upon a consideration of the whole of the evidence in the case and particularly upon the proof of the facts of the individual transactions and the accused's knowledge of them. . . .".

[Mortimer J then went on to consider the individual cases.]

Editorial comment

It is extremely unfortunate that the decision of the Court of Appeal in *Attorney General v Lee Kwong-kut* (page 10 above) was delivered shortly before the judge was due to complete his summing up to the jury. The judge was faced with an unenviable choice between hearing full arguments on the validity of the relevant reverse onus provisions in the *Prevention of Bribery Ordinance* (which may have taken days) and dealing with the matter as he did (which gave the defendants the benefit of the legal doubt). The solution

adopted was a practical resolution which effectively amounted to a declaration that the relevant provisions were repealed, at least for the purposes of the present trial.

With the great advantage of hindsight, in view of the great public interest of the case and the significance of the provisions in question, the more cumbersome procedure of hearing full argument may have been preferable. (For another aspect of the case, see page 44 below). The Attorney General had indicated his intention to refer the issue to the Court of Appeal and it is obviously in the public interest that this be done.

Public Order Ordinance (Cap 245), section 33

R v Lau Po-tung, Crim App No 375 of 1991 (see *Bill of Rights Bulletin*, vol 1, no 3, p 19)

The appeal in this case was abandoned on the release of the defendant from prison.

Road Traffic Ordinance (Cap 374), sections 42 (3) and (4)

R v Leung Yung-yau (1992) Mag, TM 1259 of 1992, 23 April 1992, Miss B Kwan

This case involved a challenge to sections 42 (3) and (4) of the *Road Traffic Ordinance* (Cap 374) on the ground that they violated the presumption of innocence in article 11 (1) of the *Bill of Rights*. These section provide:

> "42. (3) Except as otherwise provided by this Ordinance, no person shall suffer or permit a motor vehicle to be driven by a person who is not the holder of a driving licence of the class to which such vehicle belongs:
>
> Provided that in any proceedings under this subsection it shall not be necessary to allege or to prove that the person charged knew that the driver was not the holder of a driving licence and it shall be no defence to prove that the person did not know that the driver was not the holder of a driving licence."

Section 42 (4) provides for a penalty upon first conviction of $5,000 and imprisonment for 3 months and for a second or subsequent offence for a fine of $10,000 and imprisionment for 6 months.

Held:

> The provisions were consistent with article 11 (1) of the *Bill of Rights*, since the Crown had to prove all the elements of the offence as defined and no reverse onus was imposed on the defendant.
>
> *Counsel:* P Tse (on fiat), for the Crown; G Holland, solicitor (Tang, Wong & Chen), for the defendant.

Editorial note: This case appears to have been argued in terms of article 11 (1) only. In view of the fact that it appears to constitute a strict liability offence without a due dilligence defence, it may give rise to issues under article 5 (1) of the *Bill of Rights*.

Summary Offences Ordinance (Cap 228), section 17

***R v Lau Chi-yung* (1992) Mag, E 10895 of 1992, 10 July 1992, Mr M D Hill**

The defendant was charged under section 17 of the *Summary Offences Ordinance* (Cap 228) with having in his possesion an offensive weapon (a thread cutter) and being unable to give a sastisfactory account of his possession of the item.

The defendant argued that section 17 of the Ordinance was inconsistent with the presumption of innocence guaranteed by article 11 (1) of the *Bill of Rights*. He relied on the decision of the Court of Appeal in *Attorney General v Lee Kwong-kut* (page 10 above), in which section 30 of the *Summary Offences Ordinance* was held to be inconsistent with article 11 (1).

The Magistrate distinguished the present case from *Attorney General v Lee Kong-kut*, holding that, while section 30 applied to an article reasonably suspected of being stolen, section 17 applied to something proved to be an offensive weapon. He followed the decision of Judge Lugar-Mawson on section 17 in *R v Yiu Chi-fung* (see *Bill of Rights Bulletin*, vol 1, no 2, at page 19) and held section 17 to be consistent with article 11 (1).

Counsel: S R Bailey. for the Crown; M Chew (instructed by Duty Lawyer Scheme), for the defendant.

RIGHT TO BE INFORMED PROMPTLY AND IN A LANGUAGE ONE UNDERSTANDS OF THE NATURE AND CAUSE OF THE CHARGE AGAINST ONE (ARTICLE 11 (2)(A))

Fixed Penalty (Traffic Contraventions) Ordinance (Cap 237), sections 15 and 16

***R v Lam Chi-chiu* (1992) Mag, E 300311 of 1992, 6 March 1992, Mr P C White**

The Magistrate raised a number of issues in relation to a notice and summons issued under the *Fixed Penalty (Traffic Contraventions) Ordinance* (Cap 237), including whether sufficient particulars of the alleged offence had been given and whether the fact that the notice and the summons gave details of the time and place of the alleged offence were only in English was consistent with article 11 (2)(a) of the *Bill of Rights*.

> "11. (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language he understands of the nature and cause of the charge against him."

Held:

The guarantees under article 11 of the *Bill of Rights* apply only in the determination of a *criminal charge*. A fixed penalty offence is civil in nature rather than criminal, since the proceedings proceed by way of complaint rather than by way of information, the remedies under sections 22 and 23 of the Ordinance are exclusively civil in nature, contraventions are not "criminal convictions" and any amounts ordered to be paid are "civil debts" within the meaning of section 2 (g) of the *Magistrates Ordinance* (Cap 228).

Counsel: S R Bailey, for the Crown; defendant in person.

Editorial note: The right to a fair and public hearing in article 10 of the *Bill of Rights* applies both to criminal proceedings and to the determination of "rights and obligations in a suit at law". The Human Rights Committee has recognised that in civil proceedings some of the specific guarantees mentioned in article 11 may form part of the concept of a fair hearing, although they may need to be appropriately adapted to the civil context. If a fixed penalty offence involves the determination of a rights and obligation in a suit at law, then an argument under article 10 may be available.

RIGHT TO ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF ONE'S DEFENCE (ARTICLE 11 (2)(B))

R v Lai Kai-wing, Mag App No 1041 of 1991

See *Bill of Rights Bulletin*, vol 1 no 3, p 25. This matter is still pending before the Court of Appeal.

Re Chow To Bor and Deputy Judge Timothy Lee, HCt, MP No 108 of 1992

See *Bill of Rights Bulletin*, vol 1 no 3, p 26. This matter is still pending before the courts.

RIGHT TO TRIAL WITHOUT UNDUE DELAY (ARTICLE 11 (2)(C))

The right to trial without undue delay continues to be an important area of evolving case law under the *Bill of Rights*. Since the last issue of the *Bulletin*, there have been two major cases in the High Court and one in the District Court (all resulting in extremely lengthy judgments). In one of those cases, (*R v Charles Cheung Wai-bun*) the prosecution was stayed. Although the parameters of the right seem now to have been defined by those cases, the Crown's decision to take *R v Charles Cheung Wai-bun* to the Privy Council means that the position will be uncertain until that case is decided. In *Tan v Cameron* [1992] 3 WLR 249 the Privy Council (on appeal from Hong Kong) endorsed a fairly strict approach to the common law doctrine of abuse of process so far as it concerns staying criminal proceedings.

R v William Hung (1992) HCt, Case No 32 of 1991, Duffy J

The defendant was arrested on 26 September 1990 and charged with serious drug offences. He was committed for trial on 23 January 1991. The trial was set down for 5 December 1991. On that date the Crown applied for and was granted an adjournment for six weeks in order to instruct counsel from the Attorney General's special *Bill of Rights* unit to deal with the *Bill of Rights* submissions raised by the defendant's counsel. The defendant had been remanded in custody and had made a number of unsuccessful applications for bail. He was subsequently granted bail by Duffy J on 13 March 1992, by which time he had been in custody for 526 days. The defendant invoked articles 5 (3) and 11 (2)(c) of the *Bill of Rights* and applied for a permanent stay of the proceedings.

Held (application refused, notwithstanding a violation of article 5 (3)):

1. In interpreting those articles of the *Bill of Rights* which bear upon the questions of "reasonableness", or the meaning of expressions such as "undue delay" in relation

to criminal proceedings, due regard should be taken of local cultural, social and economic factors.

2. In determining whether there is undue delay in criminal proceedings, Hong Kong should not be compared with Jamaica or Mauritius, where long delays may be readily excusable. The administration in Hong Kong has at its disposal the means to provide adequate resources to ensure the proper, efficient and timely disposal of its criminal proceedings.

3. Article 5 (3) of the *Bill of Rights* deals with pre-trial detention and does not afford a remedy of a permanent stay of the proceedings. The reasonableness of the length of pre-trial detention must be assessed in the light of the fact that the defendant is presumed innocent until convicted and in the context of a relatively short and uncomplicated matter which could be disposed of in a few days. The risk of absconding was easily outweighed by the length of pre-trial detention in this case. Accordingly, there was a violation of article 5 (3).

4. Article 5 (3) also provides for a right to speedy trial. This right exists even when the accused is released on bail. Article 5 (3) does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release pending trial. While an unreasonable length of pre-trial detention is not conclusive of an infringement of article 11 (2)(c), it is a factor in favour of the defendant.

5. It was not necessary to decide whether s 12B of the *Criminal Procedure Ordinance*, which restricts multiple bail applications in the absence of material change of circumstances, is consistent with article 5(3).[6]

6. The court had jurisdiction to grant a stay of proceedings upon a violation of article 11 (2)(c) by virtue of section 6 of the *Bill of Rights Ordinance*.

7. In determining the scope and nature of the right to trial without undue delay, the factors to be taken into account are the same as those considered under common law abuse of process by way of delay. These factors include the length of the delay, the reasons for the delay, the attitude of the parties, prejudice to the defendant, and public interest. This list is not exhaustive.

8. Delay occasioned by a lack of institutional facilities is to be counted against the Crown. While a temporary backlog of cases may be tolerated, judicial intervention to stay criminal proceedings becomes more likely if the temporary state of affairs becomes structural.

9. Delay caused by the Crown's application for an adjournment to allow a member of the Attorney General's special *Bill of Rights* unit to deal with the *Bill of Rights* application made by the defendant cannot be justified. The court has a right to expect the prosecution will be ready to answer any defence application at once or within one or two days.

10. The defendant was not responsible for the delay. His failure to apply to a High Court judge for an early trial did not amount to acquiescence in the delay.

11. The right to trial without undue delay in article 11 (2)(c) is a corollary right of the right to a fair hearing under article 10. Thus, for there to be a violation of article 11 (2)(c) it is necessary to show that the defendant has suffered prejudice in the sense

---

[6] See *R v Ng Yiu-fai*, page 5 above on this issue.

that the delay has rendered or might render any subsequent trial unfair. Prejudice can be presumed from very lengthy period of delay.

12. There is a community interest in bringing offenders to trial and in having criminal proceedings conducted in an efficient and fair manner. Yet the weight to be given to this factor must diminish the longer the delay and the less justification the Crown can give for it.

13. A delay of 526 days is prima facie excessive. It was partly caused by a lack of institutional facilities and partly by the fault of the Crown. Part of the delay took place before the *Bill of Rights* came into effect, and new judicial posts have been created to ease the problem of delay since then. Some allowance should be given for the administration's tardiness in responding to the requirements of the *Bill of Rights* at the early days of its operation. While the normal life of the defendant has been seriously disrupted by the lengthy period of detention, the inordinate delay has not impaired his ability to defend himself or rendered the continuation of the proceedings oppressive. The charges are serious and there is a community interest in having the defendant's guilt or innocence determined by the trial. After balancing all these factors, there was no violation of article 11 (2)(c).

Counsel: T H Casewell, Senior Crown Counsel, for the Crown; J Chandler (instructed by John Massie & Co), for the defendant.

Note: The defendant was convicted after trial and his sentence was reduced by the period of time he spent in detention before trial.

***R v Charles Cheung Wai-hun* (1992) HCt, Case No 169 of 1989, 15 June 1992 (date of ruling), 1 July 1992 (date of handing down of judgment), Duffy J**

The defendant faced one charge of conspiracy to defraud and two charges of false accounting, all of which were related to events which took place between 1979 and March 1982. Investigation by the ICAC began in November 1986. The defendant was arrested in August 1988, and charged, together with four other defendants, with conspiracy to defraud in September 1988. On 30 May 1989 the Attorney General issued a certificate of committal pursuant to the *Complex Commercial Crimes Ordinance* (Cap 394). The defendant was arraigned on 29 October 1989. On 5 September 1990 the court ordered a separate trial of the defendant. The trial of the other defendants (the first trial) took place on 24 September 1990 and concluded on 6 December 1990. The new trial date for the defendant was fixed for 28 April 1992, and was adjourned to 4 May 1992 because of an intervening appeal by the defendants in the first trial. The defendant applied for an order of permanent stay of proceedings on the grounds of undue delay, unfairness and oppression under common law and articles 10 and 11 (2)(c) of the *Bill of Rights*.

Held (allowing the application):

1. The *Bill of Rights* should be construed from a proper constitutional perspective. While real assistance can be derived from the experience of other jurisdictions in interpreting similar enactments, local cultural, social and economic factors shall be taken into account in interpreting the *Bill of Rights*.

2. The court has a discretionary power to stay proceedings for an abuse of process under common law and for an infringement of the *Bill of Rights* by virtue of section 6 of the *Bill of Rights Ordinance*.

Relevant factors

3. The factors to be taken into account in determining whether there is common law abuse and an infringement of the right to speedy trial under the *Bill of Rights* are the same. They include the length of the delay, the reasons for the delay, the conduct of the parties, prejudice to the defendant, and public interests In determining whether a stay of proceedings should be ordered, the court should conduct a balancing exercise of all these factors and all other relevant circumstances.

Charge and pre-charge delay: the relevant period

4. The word "charge" in article 11 (2)(c) of the *Bill of Rights* should be liberally construed to mean the time at which an individual is officially advised by a competent authority that he is suspected of having committed a criminal offence, for it is from that time that a suspect begins to be affected by the pressure and strain inherent in all criminal trials. The relevant period began in August 1988.

5. While pre-charge delay may not be relevant to the determination of the length of undue delay in relation to article 11 (2)(c) of the *Bill of Rights*, it is relevant to an assessment of the fairness of the proceedings under article 10 and common law abuse of process. Therefore the application should be considered in the context of a period of 3 years and 9 months pre-trial delay in relation to a trial regarding events which had taken place some ten years earlier.

Reasons for the delay

6. The Crown was responsible for the delay after September 1990 because of a belated amendment to the Prosecution's Case Statement which resulted in an order of a separate trial for the defendant. The amendment was related to matters which could have been foreseen by the prosecutor at the time of the original prosecution statement was served, and the effect of the amendment was to render it impossible for the defendant to cross-examine certain Crown witnesses; hence a separate trial of the defendant became obligatory.

Conduct of the parties

7. The defendant did not contribute to any part of the delay. While the defendant had made a number of unsuccessful applications which might have delayed the trial, all these applications were well made and had substantial merits. The fact that these applications were unsuccessful does not suggest any frivolity on the part of the defendant.

Length of the delay

8. The delay of three years between commencement of investigation and trial is only barely within the bounds of acceptability and reasonableness. The total post-charge waiting period of three years and nine months, including an unjustifiable delay of two years and eight months caused by the prosecution for a trial whose issues are themselves ten years old, is unacceptable and unreasonable.

9. So many and various are the factors that determine the institution and course of a criminal investigation that courts should be very reluctant to pass judgment on the authorities for not having taken action at an earlier date. This is particularly so

when the case involves highly sensitive issues such as the stability of the banking industry and involves assessment of the public interest which courts are notoriously ill-placed to assess reliably. Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law.

Stay of proceedings

10. Under both the common law and the *Bill of Rights*, a stay of proceedings on account of an abuse of process due to delay will not be granted unless it is established that any subsequent proceedings would be unfair or oppressive.

Prejudice

11. There is no distinction between the common law position and the *Bill of Rights* in relation to the factor of prejudice to the defendant. Ultimately, what has to be determined is whether the proceedings can be fair, and it is for the defendant, if he is to succeed, to establish on the balance of probabilities that they cannot be fair.

12. A presumption of prejudice will arise should the delay become excessive; it is then for the Crown to rebut this presumption. The fairness of proceedings can be jeopardised either because the personal circumstances of the defendant are so affected by the delay that to continue with the proceedings would be oppressive, or because the defendant's ability to conduct his defence has been significantly impaired.

13. The length of delay in this case, namely, ten years between the events and trial, five and a half years between the beginning of the investigation and trial, and three years and nine months between arrest and trial, gives rise to a presumption of prejudice.

14. The defendant has suffered actual prejudice in that he has genuinely experienced symptons of stress such as sleeping problems, concentration and memory problems, depression and anxiety, and a general feeling of malaise. His general health has also been affected by the very lengthy waiting period for trial.

15. While there is a large volume of documentation upon which the Crown builds its case, the factual circumstances of this case suggest that the defendant's memories still play a significant role in his defence. Ten year-old memories are manifestly unreliable and to such extent the fairness of the proceedings must be called into question.

16. In any event, the Crown has not rebutted the presumption of prejudice arising from a lengthy delay.

Public interest

17. The weight to be attached to the factor of public interest in bringing offenders to trial and in having criminal proceedings conducted in an efficient and fair manner must diminish with the passage of time and other changing circumstances, including changing banking practice in Hong Kong in the last ten years.

Conclusion

18. Upon a balance of all these factors, and bearing in mind that judicial intervention to stay criminal proceedings should only occur in exceptional cases, there is an abuse of process under common law and a violation of the defendant's rights under articles 10 and 11 (2)(c) of the *Bill of Rights*. An order to stay the proceedings permanently is granted.

Counsel: C Nicholls QC and R G Turnbull (Crown Counsel), for the Crown; W G Haldane (instructed by Haldane, Midgley & Booth), for the defendant.

Note: The Crown has obtained special leave from the Privy Council to appeal against this decision.

***R v Fung Shu-shing* (1992) DCt, Case No 777 of 1991, Judge Tyler**

The facts of this case are related to those of *R v Lam Tak-ming* (*Bill of Rights Bulletin*, vol 1, no 2, p 19). At a trial which concluded on 26 Janaury 1992 the fourth defendant, Lam Ka-lai, had been convicted of seven charges of conspiracy in connection with a suspected textile quota fraud, investigation of which had been commenced in 1987. He was charged with conspiracy to pervert the course of justice, the offence which formed the subject of the present trial (the second trial). The charge in the second trial arose out of the same investigation as the first trial, but the material facts in support of this charge only became known to the investigators in 1990. Lam alleged that there had been undue delay in the prosecution and that the bringing of the additional charge (the subject matter of which could have been included in the first trial) was oppressive, vexatious and an abuse of process. He applied for a stay of proceedings on the basis of articles 10 and 11 (2)(c) of the *Bill of Rights* and abuse of process under common law.

Held (dismissing the application):

1. The right to a fair trial in article 10 comprehends the whole process leading up to and including the trial and through to the final appeal.

2. The defendant has the burden of proving, on a balance of probabilities, a prima facie case of an infringement of article 10 and any actual prejudice which he alleges to have suffered. Once a prima facie case is proved, the prosecution has the burden of satisfying the court, on a balance of probabilities that, notwithstanding the alleged infringement, the defendant has not been so prejudiced that a fair trial cannot be achieved.

3. The factors relevant to an application for a stay of proceedings for abuse of process on account of delay and for a violation of article 11 (2)(c) are the same. They include the length of the delay, the justifications for the delay, waiver by the defendant, prejudice to the defendant, public interest in bringing offenders to trial and in having efficient and fair criminal trials. Pre-*Bill of Rights* delay can be taken into account, and some allowance should be given for the administration's tardiness in responding to the requirements of the *Bill of Rights* in the early days of its operation. Not all factors have to be present at the same time.

   R v Lam Tak Ming and *R v William Hung*, followed.

4. The court may consider that there is no general prejudice in the sense that a fair trial is still possible despite the presence of actual prejudice. Conversely, there could be general prejudice in the absence of any evidence of actual prejudice. It is

not necessary for the defendant to prove actual prejudice in an application under article 11 (2)(c). The overriding test is whether a fair trial can still be achieved.

5. For the purpose of article 11 (2)(c), time begins to run when the defendant is first notified of official interest in him. (*R v Lam Tak-ming*, followed) The notification need not be of the specific charges ultimately laid. So long as the ultimate charge falls broadly within the nature of the offence for which the defendant is arrested time begins to run from that arrest. The defendant was arrested in respect of charges in the first trial on 5 July 1988, and in respect of charges in the second trial on 27 May 1991. These charges were of broadly the same nature. Therefore, time began to run as from 5 July 1988.

6. Under article 11 (2)(c), the defendant bears the burden of showing, on a balance of probabilities, that there is a prima facie case of excessive delay. The burden then shifts to the prosecution, who has to show, on a balance of probabilities, that the delay is justifiable, that the defendant has waived his right, and that public interest should prevail over the private right of the defendant. The defendant has the burden to satisfy the court of any prejudice he suffers, although prejudice can be readily presumed from a lengthy period of delay. Finally, the prosecution has the overall burden of showing, on a balance of probabilities, that notwithstanding the delay, the defendant can still have a fair trial. The burden of proof under articles 10 and 11 (2)(c) is different from that under common law abuse of process.

7. For abuse of process under common law, the defendant has the burden of showing, on a balance of probabilities, that (a) there has been an unjustifiable delay; (b) the delay has caused him prejudice and unfairness; and (c) the unfairness and prejudice is of such a nature that it is likely that it will adversely affect his right to a fair trial, subject to a proviso that the court will readily infer that prejudice has occurred if the delay is substantial.

> *R v Norwich Crown Court, ex parte Belsham* [1992] 1 WLR 54, followed.

8. Even when the delay is unjustifiable, a stay of proceedings will only be granted in an exceptional case. No stay will be granted unless the defendant can show, on a balance of probabilities, that he will suffer serious prejudice to the extent that no fair trial can be held as a result of the delay.

9. The delay of three years and nine months from arrest to trial in this case was prima facie excessive. The delay could be justified by the complexity of the investigation. Although time began to run in May 1987, the material facts leading to the second trial were not revealed until April 1990. There had been no deliberate or negligent delay on the part of both the investigation and the prosecution. The defendant had not waived his right and failure to take steps to expedite the process could not be held against him. There was no evidence of actual or general prejudice. Accordingly, there was no violation of article 11 (2)(c).

10. There was no violation of article 10 and no abuse of process under common law. The length of the investigation was not unreasonable in the particular circumstances of the case. The defendant's right to a fair trial was not impaired by the delay. The delay in preferring the charge in the second trial should be seen in the light of the larger complex investigation. There was no suggestion of bad faith or negligence on the part of the Crown or its servants. While the charge in the second trial could in theory be included in the first trial, this was not possible in practice and there were good reasons to have separate trials. The defendant had not been prejudiced.

Counsel: J McLanachan (on fiat), for the Crown; J Chandler, for the fourth defendant.

***R v Tang Shui-kwan* (1992) Mag, KT No 7979/91, Mr C R Mackintosh**

In this case the Magistrate refused to stay a prosecution on the ground of undue delay, although he found there were delays of between 1 and 4 years on various charges (and thus unjustifiable or undue delay within article 11 (2)(c)), he considered that there was no presumption of prejudice in the circumstances of the case and no evidence of actual prejudice to the defendant.

***R v Chan Lui-tat* (1992) Mag, E 11582/92, 27 March 1992, Mr W L Yung**

In this case the court held that a delay of 7-8 months between the legal advice to prosecute and the laying of a charge was unjsutified, but that there was in all the circumstances no "undue" delay within the meaning of article 11 (2)(c), since the defendant had suffered no prejudice as a result of the delay and there was nothing to suggest that he could not receive a fair trial.

Counsel: P Leung, Senior Crown Counsel, for the Crown; L Yew (instructed by Duty Lawyer Scheme), for the defendant.

***Campbell v Jamaica*, Human Rights Committee, Communication No 248/1987, decision of 30 March 1992, UN Doc CCPR/C/44/D/248/1987**

In this case the Human Rights Committee concluded that a delay of 10 months between convicton and the dismissal of an appeal in a capital case did not constitute undue delay within the meaning of article 14 (3)(c) of the ICCPR.

RIGHT TO LEGAL AID (ARTICLE 11 (2)(D))

ENTITLEMENT TO LEGAL APPEAL FOR APPEALS IN CRIMINAL CASES

***R v Fu Yan* (1992) CA, Crim App No 490 of 1991, 23 June 1992 (Silke VP, Macdougall JA and Bewley J**

This was an application to the Court of Appeal pursuant to article 11 of the *Bill of Rights* for legal aid for the hearing of the applicant's appeal against conviction for a number of forgery offences. The applicant had applied to the Director of Legal Aid for legal aid for his appeal, but this application had been refused on the ground that the appeal lacked sufficient merit. The Director, in refusing the legal aid application, concluded that the applicant's disposable resources fell within the legal aid limits.

Two issues were considered by the Court. The first was whether the entitlement to legal assistance provided for by article 11 (2)(d) of the *Bill of Rights* applied to appellate proceedings in criminal matters; the second was, if it did, whether the interests of justice required that the applicant be granted legal aid in the present case.

Referrring to authorities decided under the European Convention on Human Rights anad the Canadian Charter, the Court concluded that the right to legal aid did apply to appellate proceedings in criminal cases, although article 11 (2)(d) did not confer an

absolute right to legal aid either at trial or on appeal. Silke VP, who delivered the judgment of the Court, stated (at pp 14-15 of the judgment):

> "We find, bearing in mind that which has been said in other jurisdictions and on full consideration of Article 11 of the Bill, that there is no absolute right to legal aid in criminal trials or, a fortiori, in appellate proceedings. Nor is there an absolute right to be provided with a full transcript at public expense. Neither public funds nor judicial resources are limitless - (cf *R v Munroe* [1990] 59 CCC (3d) 44). What must be viewed is the interests of justice overall, with a bias towards the interests of the individual appellant. As Mr. Macrae has put it in his submissions, the case must be looked at as a whole and the most significant factor in any assessment of the interests of justice must be whether or not there are merits in the appeal.
>
> We would emphasise that, as we stated at the beginning of this judgment, we are here not concerned with the issue of means. That gives rise to far more complex issues.
>
> Mr. Bailey, for the Crown, has agreed with a great deal of the helpful submissions of Mr. Macrae. He adds that the Bill, by its very nature, cannot cut down the application of the already existing provisions of the Rules to which we have made reference. In our judgment what the Bill does is to broaden the construction to be placed on "the interests of justice" which this court considers when determining whether it should or should not grant legal aid on the merits after a refusal by the Director. The Director himself is enjoined to consider the interests of justice. Rule 10 say that the Director shall not grant legal aid unless he is satisfied that it is desirable in the interests of justice. Bearing in mind the preamble to the covenant, we would make use of a more purposive construction and say that legal aid shall be granted where the interests of justice so require."

The Court concluded that in the present case the interests of justice did not require that the applicant be provided with legal aid for his appeal. Referring with apparent approval to the so-called "Widgery criteria" for the granting of legal aid embodied in section 22 of the Legal Aid Act 1988 (UK),[7] the Court noted (at pp 16-17 of the judgment):

---

[7] Section 22 (2) provides:

"The factors to be taken into account by a competent authority in determining whether it is in the interests of justice that representation be granted for the purposes of proceedings to which this section applies to an accused shall include the following--

(a) the offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of his livelihood or serious damage to his reputation;

(b) the determination of the case may involve consideration of a substantial question of law;

(c) the accused may be unable to understand the proceedings or to state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability;

(d) the nature of the defence is such as to involve the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution;

(e) it is in the interests of someone other than the accused that the accused be represented."

"These criteria are not intended to be exhaustive nor, as Mr. Macrae has submitted, is the list closed. There should, however, on an appeal be some substantial matter of law or fact capable of being argued, not merely as is so often the case, a suggestion that, because the trial judge or the jury believed the prosecution evidence rather than the defence, the conviction is unsafe.

In essence we find that, while Article 11 does apply to appellate proceedings, it confers no absolute right on an appellant for the grant of legal aid by this court, subsequent to a refusal by the Director. While both the Director and this court must consider the interests of justice this court will take a more liberal view of when those interests require the grant of legal assistance. In so doing it will consider the merits and whether there appears to be "reasonable grounds". Every application has to be decided on its own merits.

We see no reason whatsoever here to order a full transcript. The nature of the evidence is plainly apparent from the summing up as it stands and from the various statements of Fu Yan of which there are copies in the appeal bundle. We would therefore refuse that application."

The Court also stated the practice that it will follow in hearing such applications for legal aid (at p 17 of the judgment):

"[W]e would indicate that in future applications for legal aid under the Bill will be heard immediately prior to the hearing of the application for leave to appeal itself. If the application is refused, then the applicant will be expected to immediately proceed with the hearing of the appeal and without an adjournment. It is to be hoped that this will avoid the delay inherent in the making of two separate applications which leads to two separate court hearings."

Counsel: S R Bailey, for the Crown; A Macrae, *amicus curiae*; applicant, in person.

***R v Mirchandani* (1992) CA, Crim App No 350 of 1990, 28 July 1992 (Fuad VP, Macdougall JA and Sears J)**

The applicant had been convicted in April 1990 on a number of counts of uttering forged documents and false accounting and was sentenced in June 1990 to 8 1/2 years of imprisonment and to fines with a default sentence in respect of each fine.

The applicant had originally been granted legal aid for his trial on 17 May 1988. Legal aid was withdrawn on 24 June 1988 and subsequent applications for legal aid were refused on the ground that the Director of Legal Aid was not satisfied that the applicant's disposable resources did not exceed the amount stipulated in the applicable law.

On 10 October 1990 the applicant was adjudged bankrupt. On 7 December 1990 the Director of Legal Aid refused the applicant legal aid for his application for leave to appeal against his convictions and sentences. The applicant applied to the Court of Appeal for legal aid, relying on article 11 (2)((d) of the *Bill of Rights*.

On 1 July 1992 the legislation governing legal aid was amended in a number of respects, changing the basis on which an applicant's financial resources were determined and setting a new upper limit for eligibility for a grant of legal aid. The legislation also conferred on the Director of Legal Aid a new discretion to grant legal aid for a criminal trial or appeal even though the applicant's resources exceed the new limit.

The applicant applied for legal aid under the new scheme but was again refused legal aid.

Held:

1. Article 11 (2)(d) of the *Bill of Rights* did not contain an absolute right to the granting of legal aid without payment. Two conditions must be satisfied for such a grant: "the interests of justice" must require that legal aid be provided and the defendant must "not have sufficient means to pay for it."

2. Although the present case was one in which the interests of justice would be served by the provision of legal aid for the appeal, that was not the only consideration.

3. Since the funds available for providing legal aid were limited, the decision as to what proportion of available funds should be allocated for that purpose was a political decision and not a matter for the courts.

4. There was nothing objectionable in principle to a regime under which persons who claim the right to free legal assistance are subject to a means test to determine whether they have sufficient means and requiring such applicants to demonstrate their eligibility.

5. There was no suggestion that the level of financial resources for the purpose of eligibility for legal aid has been set so low as to deny, in practical terms, the right accorded by article 11 (2)(d).

6. Accordingly, there was nothing in the law in force relating to legal aid in criminal cases which violates article 11 (2)(d) of the *Bill of Rights*.

Per Fuad VP (Sears J agreeing):

It was not necessary to decide whether the new discretion granted to the Director of Legal Aid to grant legal aid even though the financial resources of the applicant exceeded the prescribed limit may only be exercised if the Director has been given sufficient information so that he can be satisfied as to the actual extent of the applicant's financial resources.

Per Macdougall JA:

Irrespective of the basis on which they were made, applications to the Court of Appeal for legal aid for the hearing of an application for leave to appeal should be dealt with as invitations to the Court to exercise its powers under rule 12 (3) of the *Legal Aid in Criminal Cases Rules* (Cap 221) to grant legal aid.

Counsel: P J Dykes (instructed by the Crown Solicitor), for the Crown/respondent; A Macrae, amicus curiae; appellant/applicant in person.

Right to legal aid at trial -- Lawful refusal by Director of Legal Aid but interests of justice requiring legal representation -- Remedies available to the court -- Stay of proceedings

***R v Wong Cheung-bun* [1992] 1 HKCLR 240 (HCt)**

In this case the defendant had applied for legal aid for his trial on a charge of robbery, but had been refused it since according to the legal aid rules in force he had disposable income greater than the maximum permitted under the rules for a grant of legal aid. The defendant owned in common with his brother a village house, but the house could not be easily sold and attempts to raise a mortgagee on the house had been unsuccessful.

Held:

1. The court had power under its inherent jurisdiction to stay a prosecution for abuse of process; article 11 (2)(d) of the *Bill of Rights* declared in statutory form a particular situation under which an infringement of rights may provoke an appropriate response from the court. That appropriate response was detailed in section 6 of the *Bill of Rights Ordinance.*

2. The inquiry as to the interests if justice and means of the defendant under article 11 (2)(d) was a different inquiry from that of the Director of Legal Aid under the legal aid legislation.

3. It was in the interests of justice that the defendant be legally represented at his trial, since he would be unable to enjoy a fair trial if he was unrepresented.

4. Since it was not a practical possibility to sell the property the defendant co-owned and in view of the fact that reasonable but unsuccessful attempts had been made to mortgage the property, the defendant could not realistically be said to be able to pay for his own representation.

5. Since the defendant could not have a fair trial without legal representation and he had insufficient means to pay for that representation, the prosecution should be stayed.

RIGHT TO EXAMINE WITNESSES AGAINST ONESELF (ARTICLE 11 (2)(E))

***Evidence Ordinance* (Cap 8), section 20 (4)**

***R v Purkayastha* (1992) DCt, Case No 50 of 1991, 8 May 1992, Deputy Judge Longley**

This case concerned the consistency of section 20 (4) of the *Evidence Ordinance* (Cap 8) with article 11 (2)(e) of the *Bill of Rights*. Section 20 (4) provides for evidence in relation to a bank's records to be given by affidavit. The defendant argued that the section was inconsistent with a defendant's right to examine witnesses against him as guaranteed in article 11(2)(e).

Article 11 (2)(e) provides:

"11. (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:

. . .

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his own behalf under the same conditions as witnesses against him."

Section 20 (4) of the *Evidence Ordinance* provides:

"In any proceedings, the matters referred to in subsection (l)(a) and (b) and subsection (3)(a), (b) and (c) in relation to a banker's record may be proved, orally or by affidavit, by any officer of the bank, and any such affidavit shall, on its production without further proof, be admitted in evidence and may include an explanation of the contents of the copy of any entry or matter recorded in such banker's record which is tendered in evidence or any abbreviations, symbols or other marrkings appearing in such copy that may be relevant in the proceedings, and a description of the banker's record, its nature and use, and the procedures followed in keeping it; and for the purposes of this subsection it shall be sufficient for a matter referred to in subsection (l)(a)(i) or 3(c) to be stated in an affidavit to the best of the knowledge and belief of the person making the affidavit."

Held:

1. Section 20 (4) was not on its face inconsistent with article 11 (2)(e) of the *Bill of Rights*.

2. Section 20 (4) provided only that a banker's affidavit was admissible in evidence and not "prima facie" or "conclusive" evidence of its contents.

3. The evidence given in affidavit form by the maker of a banker's affidavit was the evidence of a "witness" against a defendant within the meaning of article 11 (2)(e).

4. There is no absolute and unrestricted right to cross-examine witnesses called by the Crown. The exercise of this right must be governed by the court's appreciation whether or not such cross-examination is likely to assist in, and thus be necessary for, ascertaining the truth.

5. Section 20 as a whole did not prevent the calling of the maker of an affidavit; indeed, section 20 (2)(b) provided a mechanism whereby either party can apply to the court for an order that the maker of the affidavit appear before the court. For the court to exercise this power the defendant would have to satisfy the judge that his cross-examination was not as to matters that were frivolous or irrelevant but rather was as to matters that are "likely to assist in, and thus necessary for ascertaining the truth".

6. If the defendant did not make an application to the court to order the attendance of the affiant for cross-examination, the court was entitled to assume that (s)he did not wish to cross-examine the witness.

7. If the court ordered the bank officer to appear and (s)he did so, then there would be no violation of article 11 (2)(e).

8. If the court made an order that the bank officer appear and the officer did not do so, this would amount to a prima facie violation of article 11 (2)(e), which could not be demonstrated to be a reasonable and justified restriction on the enjoyment of

that right. In such a case, the court would have to consider that fact, along with the matters about which the defendant had said he wished to cross examine, in deciding whether any weight whatsoever could be attached to the affidavit.

The court ordered the attendance of the bankers concerned for cross-examination by the defendant.

Counsel: S R Bailey, Senior Assistant Crown Prosecutor, and S Opai. SCC, for the Crown; defendant in person.

United States v Ng Hung-yiu (1992) HCt, Sears J

In this case Sears J held that the right under article 11 (2)(e) of the *Bill of Rights* applied only to a trial and not to extradition proceedings. Written reasons are to be made available shortly.

RIGHT NOT TO TESTIFY AGAINST ONESELF OR TO CONFESS GUILT (ARTICLE 11 (2)(G))

Road Traffic Ordinance (Cap 374), sections 63 (1) and (6)

R v Lee Tak-cheung (1992) Mag, NK No 1178 of 1992, 24 March 1992, K E Ball Esq

The defendant, the owner of a motor vehicle, was requested pursuant to section 63 (1) of the *Road Traffic Ordinance* (Cap 374) to provide the name and licence number of the driver of the vehicle at the time when a driving offence was allegedly committed on 20 July 1991. When the defendant failed to do so, he was charged with an offence under section 63 (6) of the Ordinance, which provides that it is an offence to fail to provide such information when it has been requested.

The defendant raised as a preliminary point the consistency of sections 63 (1) and (6) of the Ordinance with the *Bill of Rights*. He argued that requiring the owner to identify the driver would, in a case in which the owner was the driver, violate the guarantee of the right not to be compelled to testify against oneself in article 11 (2)(g) of the *Bill of Rights*, since prosecution would inevitably follow. Since sections 63 (1) and (6) were inconsistent with the *Bill of Rights*, they had been repealed and the prosecution could not continue.

Held (dismissing the defendant's preliminary objection):

1. In interpreting the *Bill of Rights Ordinance* the jurisprudence developed under the corresponding section of the *Canadian Charter of Rights and Freedoms* could be a useful guide.

2. The right not to be compelled to be a witness against oneself guaranteed by section 11 (c) of the *Canadian Charter* applies only where a person has been charged with a criminal offence. It provides protection only against a legal compulsion to testify and does not apply at the investigatory stage.

3. The legal compulsion in sections 63 (1) and (6) of the *Road Traffic Ordinance* is part of the investigatory stage and is not within the scope of the guarantee in article 11 (2)(g) of the *Bill of Rights*.

4. Section 2 (5) of the *Bill of Rights Ordinance* does no more than declare that the *Bill of Rights* and the specific rights enshrined in it do not in any way detract from or limit pre-existing rights.

5. The common law right against self-incrimination is applicable during the investigatory stage of the criminal process and this right is preserved by section 2 (5) of the *Bill of Rights Ordinance*. However, that privilege may be and has been modified by sections 63 (1) and (6) of the *Road Traffic Ordinance*. Since article 11 (2)(g) did not apply to this stage of criminal proceedings, the removal of that privilege was not inconsistent with the *Bill of Rights*.

Editorial comment

While it is arguable that article 11 (2)(g) does apply to the investigatory stage (see *Jijón v Ecuador*, page 59 below), the right to remain silent and not to incriminate oneself may also be derived from the presumption of innocence. However, article 11 (1) was not argued in this case.

FREEDOM OF EXPRESSION (ARTICLE 16)

Restrictions on the reporting of court proceedings

***Extramoney Ltd v Chan, Lai, Pang & Co (a firm)* (1992) HCt, Action No 8437 of 1987, 18 May 1992, Deputy Judge D R Fung QC**

The Attorney General intervened in a civil action seeking an order postponing the reporting of parts of the proceedings which might be considered directly or indirectly prejudicial to two criminal trials pending against Mr George Tan or, alternatively, a blanket ban on any reporting of the proceedigns until after the conclusion of those two trials.

The civil proceedings involved a number of actions brought by the plaintiffs, one of which was Carrian Holdings, against a firm of accountants, for damages for breach of contract, negligence and/or breach of statutory duty. The plaintiffs alleged that the defendant had overstated Extramoney's profits when the defendant passed its profit and loss account for 1980, as a consequence of which Extramoney incurred additional tax liability of $17 million. A second claim related to the acquisition from Extramoney of shares in Carrian Investments, in breach of their fiduciary duty to the plaintiffs.

Mr George Tan was alleged to have been the person who submitted the books and documents and made representations to the defendant on which the defendants relied in the preparation of their audit of the 1980 accounts. He was also alleged to have been the person with whom the partners of the defendant dealt in their personal capacity in the acquisition of Carrian Investment shares.

Held (refusing the application):

1. The court's power to postpone publication of its proceedings was to be treated in like manner to the court's power to sit in camera as an aspect of its general power to prevent publicity only in exceptional circumstances. The power should not be lightly exercised since it is a fundamental principle of the common law system that

trials should take place in public subject to the scrutiny not only of members of the public but of members of the press.

2. The burden of establishing such exceptional circumstances lies upon those seeking an order restricting the fundamental principle of open justice.

3. Reporting restrictions may amount to justifiable limits on the freedom of expression guaranteed by article 16 of the *Bill of Rights* if they were provided by law and were necessary for respect of the rights of others.

4. The Attorney General had failed to discharge his burden that the present circumstances were exceptional and that the evils which would flow from unrestricted publicity being given to the present trial would outweigh the evils which would flow from the imposition of reporting restrictions.

Counsel: W R Marshall QC and S Lee, for the Attorney General; J Griffiths QC and C Smith (instructed by Simmons & Simmons), for the plaintiffs; C Ching QC and R Faulkner (instructed by Chan & Cheng), for the defendants; R Andrews and S Sit (Attorney General's Chambers), for the third defendant (Commissioner for Inland Revenue).

Editorial comment -- some aspects of open justice in Hong Kong

The important interest in the public nature of court proceedings is recognised not merely by the common law principle of open justice (see *R v Shamsudin* [1987] HKLR 254), but also by article 10 of the *Bill of Rights* (Article 14 (1) of the ICCPR).

Article 10 of the *Bill of Rights* provides that:

"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)

Concern has been expressed previously that the practice in Hong Kong in relation to chambers proceedings may in some circumstances not be consistent with these principles of open justice, without sufficient justification for departure from them. While there are instances in which hearings in chambers are justified, chambers hearings should not merely be a matter of convenience or be resorted to too readily.

In recent months, for example, there have been a number of cases which give rise to concern. For example, it was reported in the press that, following the acquittal of the defendants in the recent "Stock Exchange trial", at least one of the first hearings on costs was heard in chambers, apparently by agreement between the parties. The application does not seem to have received close scrutiny from the court (Mortimer J), despite the clear public interest involved in this matter and in open justice generally. While there may conceivably have been reasons to justify a hearing in chambers, a hearing on costs is

considered part of the trial[8] and it seems a little odd that proceedings involving the possible disbursement of millions of dollars of taxpayers' money could be viewed as a "private proceedings".

In these and other cases it may also be that any legitimate interests could be appropriately protected by measures less drastic than transferring a case into chambers. For example, partial or total reporting restrictions would still permit public access to the proceedings while protecting legitimate privacy or other interests. Less restrictive alternatives which would achieve the legitimate objective while still respecting so far as possible the principle of open hearings would seem to further the spirit of the guarantee contained in article 10 of the *Bill of Rights*.

The use of chambers proceedings has been under review by a working party established by the Chief Justice. While the Committee did not discuss in any detail the impact that the *Bill of Rights* might have on the Hong Kong law and practice in this area in its first report, it did comment that the use made of interlocutory proceedings in civil matters in Hong Kong, "put at risk" "the principle of open justice", and made a number of proposals for regulating the use of hearings in chambers.

The Chief Justice recently issued a Practice Direction concerning Reports on Chambers Proceedings (10 July 1992), which provided:

> " No report shall be made of any proceedings (including the judgment) held in Chambers (which are private proceedings) without the authority of the master or the judge before whom the proceedings were conducted. If the master or the judge considers that the report should be released for publication he should afford the parties any opportunity to make representations to him on the matter before so declaring.
>
> 2. Nothing in this Practice Direction is intended to affect the powers of a judge to adjourn proceedings from Chambers into Court (whether for judgment or otherwise) and vice versa as the judge thinks fit."

The approach of this Practice Direction may be inconsistent with article 10 of the *Bill of Rights*. Article 10 appears to require the judgment to be made public even in a case from which the press and public have been excluded as a matter of course, unless one of the permissible grounds for not doing so is made out. However, the Practice Direction requires the permission of the judicial officer concerned before it is made public, reversing the presumption in article 10. While there are circumstances in which the non-publication of a judgment (even in edited form) may be legitimate, such circumstances must be rare and exceptional. While the Practice Direction envisages a judicial balancing of the competing interests that may be affected by publication of a judgment given in chambers, its starting point that there is to be no disclosure unless permission is given appears incompatible with article 10.

It would appear to be more consistent with the *Bill of Rights* if a general rule were adopted to the effect that all judgments given in chambers be made publicly available at the latest four weeks (or some other period) after their delivery, unless the parties object, in which case there would be a hearing before the judge or master concerned. In many cases

---

[8] In *R v Wong Hing-yuk* [1989] 1 HKLR 251 at 253 Mortimer J, delivering the judgment of the Court of Appeal in a case considering whether an order for costs made at the conclusion of a criminal trial was an order made in a "civil cause or matter", commented:

". . . the judge's order refusing the applicant's costs was so inextricably connected with the trial that it is plainly an intergral [sic] part of the criminal proceedings. It was an order in a criminal cause or matter . . .."

the legitimate interests of both the public and the parties can be protected by reports of a judgment which omit all identifying details of the parties. While the issue is no doubt a complicated one, we consider it important that procedures regulating the conduct of business in chambers be formulated and kept under review in the light of the letter and spirit of article 10 of the *Bill of Rights*.

See generally J Cremona, "The public character of trial and judgment in the jurisprudence of the European Court of Human Rights", in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension* (Cologne: Carl Heymann, 1988), 107-113; and C Baylis, "Justice done and justice seen to be done -- the public administration of justice", (1991) 21 *Victoria University of Wellington Law Review* 177-211.

EQUALITY AND NON-DISCRIMINATION (ARTICLE 22, BOR; ARTICLE 26, ICCPR)

Recent decisions of the Human Rights Committee on article 26 of the ICCPR

The Human Rights Committee has recently adopted two decisions under the Optional Protocol to the ICCPR relating to article 26 of the ICCPR, which is in identical terms to article 22 of the *Bill of Rights*.

***Pauger v Austria*, Human Rights Committee, Communication No 415/1990, decision of 26 March 1992, UN Doc CCPR/C/44/D/415/1990**

In this case the issue was whether the provisions of the Austrian Pension Act involved discrimination on the basis of sex in violation of article 26 of the ICCPR. The Act provided for full pension benefits for widowers only if they have no other source of income; the income requirement did not apply to widows. The differential treatment of widows and widowers was to end as of 1 January 1995.

The Human Rights Comittee held that the distinction between widows and widowers had no reasonable and objective justification and therefore constituted a violation of article 26.

***Sprenger v Netherlands*, Human Rights Committee, Communication No 396/1990, decision of 31 March 1992, UN Doc CCPR/C/44/D/395/1990**

In this case the issue was whether Netherlands health insurance legislation which provided benefits to spouses of an insured persons but which did not provide benefits for persons cohabiting with insured persons as "common law spouses".

The Human Rights Committee held that, in light of the fact that there had been no general abolition of the distinction between spouses and cohabitants and the reasona advanced by the Government to justify that distinction, the differential treatment did not amount to a violation of article 26.

In a separate concurring opinion, three members of the Committee commented:

> "We note firstly, that the determination whether prohibited discrimination within the meaning of article 26 has occurred depenbds on complex considerations, particularly in the field of economic, social and cultural

rights. Social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. While the aims of social justice vary from country to country, they must be compatible with the Covenant. Moreover, whatever distinctions are made must be based on reasonable and objective criteria. For instance, a system of progressive taxation, under which person with higher incomes fall into a higher tax bracket and pay a greater percentage of their income for taxes, does not entail a violation of article 26, since the distinction between higher and lower incomes is objective and the purpose of a more equitable distribution of wealth is reasonable and compatible with the aims of the Covenant.

Surely, it is also necessary to take into account the reality that the socio-economic and cultural needs of society are constantly evolving, so that legislaton -- in particular in the field of social security -- may well, and often does, lag behind developments. Accordingly, article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in the field at all times; instead, it should be seen as a general undertaking on the part of States parties to regularly review their legislation in order to ensure that it corresponds to the changing needs of society. In the field of civil and political rights, a State party is required to respect Covenant rights such as the right to a fair trial, to freedom of expression and freedom of religion, immediately from the date of entry into force of the Covenant, and to do so without discrimination. On the other hand, with regard to rights enshrined in the International Covenant on Economic, Social and Cultural Rights, it is generally understood that State parties may need time for the progressive implementation of these rights and to adapt relevant legislation in stages; moreover, constant efforts are need to ensure that distinctions that were reasonable at the time of enactment of a social security provision are not rendered unreasonable and discrimination by the socio-economic evolution of society. Finally, we recognize that legislative review is a complex process entailing consideration of many factors, including limited financial resources, and the potential effects of amendments on other existing legislation."

The counterpart of the Human Rights Committee under the Economic and Social Covenant, the United Nations Committee on Economic, Social and Cultural Rights, recently noted:[9]

"[W]hile the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these . . . is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination . . .'."

---

[9] *General comment No 3 (1990)*, UN Doc E/1991/23, para 1.

OTHER CASES RAISING ISSUES OF INTERNATIONAL HUMAN RIGHTS

STATELESSNESS

***Pan Ze Yang v Director of Immigration*, HCt, MP Nos 816 and 817 of 1992**

These cases involve challenges to removal orders made against persons who had renounced Chinese citizenship, acquired Lesotho citizenship, and who had their Lesotho passports revoked (see *Bill of Rights Bulletin*, vol 1, no 3, p 43). The hearing of the applications for judicial review is scheduled for 10 and 11 September 1992.

INTERNATIONAL AND NATIONAL CASE LAW DEVELOPMENTS

CANADIAN DECISIONS

Right to trial within a reasonable time

***R v Morin* (1992) 23 CRD 725.310-05 (26 March 1992, Supreme Court of Canada)**

In this case the Supreme Court reviewed its jurisprudence on the the right to trial within a reasonable time.

Presumption of innocence -- Evidential burden -- Living off the avails of prostitution

***R v Downey* (1992) 23 CRD 775.20-02 (21 May 1992, Supreme Court of Canada)**

In this case the Supreme Court, by a majority, rejected a challenge to the validity of section 195 (2) of the *Canadian Criminal Code* on the ground that the provision violated the presumption of innocence in section 11 (d) of the *Charter* and could not be saved under section 1. The provision provides that "[e]vidence that a person lives with or is habitually in the company of prostitutes . . . is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution."

While similar in some respects to section 137 (2) of the *Crimes Ordinance* (Cap 200), the Canadian provision imposes only an evidential burden on the defendant, while section 137 (2) imposes a legal burden.

"Law" -- Vagueness -- Doctrine of void for vagueness

***R v Nova Scotia Pharmaceutical Society* (1992) 23 CRD 530-14 (9 July 1992, Supreme Court of Canada)**

In this case the Court considered the limits of the doctrine of "void for vagueness" and stated that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate . . . The doctrine of 'vagueness' is founded

on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion." In the event, the Court held that the relevant sections of the *Combines Investigation Act* (which created offences of conspiracy to prevent or lessen competition) were not unconstitutionally vague.

Discrimination -- Remedies -- Whether statute conferring benefit in discriminatory manner should be declared invalid or whether benefit should be extended to those discriminated against

***Schachter v Attorney General* [1992] CRD 475-04 (9 July 1992, Supreme Court of Canada)**

This case involved a challenge to provisions of the *Unemployment Insurance Act* which provided certain child care benefits to adoptive parents but denied those benefits to natural parents on the ground that the distinction involved discrimination in violation of section 15 of the *Charter*.

The legislation was held to be discriminatory and only the issue of the appropriate remedy came before the Supreme Court. The Court noted that it had "flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny. It may (1) strike down the law that is inconsistent with the Charter, but 'only to the extent of the inconsistency' (the Charter, s. 52), or (2) It may grant an 'appropriate and just remedy . . .' (the Charter, s. 24)."

The Court held that it would be inappropriate to extend the benefit to the group excluded from and that the appropriate remedy would have been to declare the legislation void and to suspend the operation of that declaration in order to permit Parliament to amend the legislation to bring it into line with the *Charter*. In this case, however, that was unnecessary, since the legislation had been amended.

The Court also discussed the issue of severance and reading statutes consistently with the provisions of the *Charter* if that is possible.

While the provisions of the Canadian Constitution and *Charter* are somewhat different to those of the Hong Kong *Bill of Rights* and *Letters Patent*, the approach taken by the Canadian courts may be of relevance to Hong Kong, particularly as time passes and the courts are faced with declaring legislation repealed with effect from 8 June 1991 many years after that date.

EUROPEAN COURT OF HUMAN RIGHTS

Right to respect for family life -- Taking of child into public care -- Prohibition on removal of child from foster home -- Article 8

***Rieme v Sweden*, Judgment of 22 April 1992, Series A, No 226-B**

This case involved a challenge by the father of a child who had been taken into public care and subsequently placed in a foster home. It was held to be a justified interference with the father's right to respect for family life since it was in accordance with law and a proportionate measure for protecting the health and rights of the child.

Interference with prisoner's correspondence -- Right to privacy -- Communications with legal advisers and European Commission -- Article 8

***Campbell v United Kingdom*, Judgment of 25 March 1992, Series A, No 233**

The case involved a challenge to UK prison rules which permitted letters to legal advisers to be opened and inspected. The Court held that the extent of the power was excessive and that it constituted a violation of the prisoner's right to privacy.

Deportation -- Right to respect for family life -- Alien with longstanding connections with France -- Article 8

***Beldjoudi v France*, Judgment of 26 March 1992, Series A, No 234-A**

In this case the Court held that the deportation of an Algerian who had been born in France in 1950 of parents who were then French, was married to a French citizen, had spent his whole life in France and apparently knew no Arabic would be a disproportionate measure and therefore inconsistent with the right to respect for family life in article 8 of the Convention.

Mental health -- Detention in psychiatric hospital -- Failure to appoint lawyer for proceedings reviewing detention -- Article 5

***Meygeri v Germany*, Judgment of 12 May 1992, Series A, No 237-A**

In this case the Court held that the failure to appoint a lawyer to represent a person confined in a psychiatric institution was a violation of the right in article 5 (4) to take proceedings to have the lawfulness of one's detention determined.

Telephone interception -- Agent provocatuer/undercover agent -- Right to respect for private life -- Right to confront witness at trial -- Article 8 -- Article 6

***Lüdi v Switzerland*, Judgment of 15 June 1992, Series A, No 238**

In this case the Court held that there was no violation of the applicant's right to respect for private life by interception of the applicant's telephone conversations since this was in accordance with law and for a legitimate purpose, nor did the use of an undercover agent leading to the applicant's arrest for being involved in a cocaine deal violate that right.

Freedom of expression -- Articles about police brutality -- Criminal defamation proceedings against author -- Article 10

***Thorgeir Thorgeirson v Iceland*, Judgment of 25 June 1992, Series A, No 239**

In this case the Court held that the conviction of the applicant for articles he had written alleging widespread police brutality and calling for action to be taken was an unjustifable restriction on the right to freedom of expression.

LEGISLATION -- NEW AND PENDING

A number of legislative amendments have been introduced since the last issue of the *Bulletin*, some of them being prompted by the expiry of the freeze period (section 14), others necessitated by the repeal of certain statutory provisions which have been declared inconsistent with the *Bill of Rights* by the courts.

Dangerous Drugs (Amendment)(No 2) Ordinance 1992 (No 52 of 1992)

These amendments replaced those presumptions which had been struck down by the Court of Appeal in *R v Sin Yau Ming*. They repealed the former offence of possession of dangerous drugs for the purpose of trafficking (section 3, repealing former section 7), expanded the meaning of trafficking in section 2 to cover possession of dangerous drug for the purpose of trafficking, raised the maximum penalty of simple possession to 7 years' imprisonment, and created new statutory presumptions of possession and knowledge of dangerous drug under the new sections 47 (1) and (2). The amendment came into effect on 26 June 1992. On 27 July 1992, the new section 47 (1)(c), which created a presumption based upon physical possession of keys to vehicles, was declared ultra vires the legislature for being inconsistent with article 11 (2) of the ICCPR: see *R v Lum Wai-ming* (page 13 above). The presumptions in sections 47(1)(a) and (b) and 47(2) have been upheld: *R v Chan Wai-ming (No 2)* (page 15 above).

Crimes (Amendment)(No 2) Ordinance 1992 (No 74 of 1992)

The amendment repealed the offence of loitering in section 160 (1) of the *Crimes Ordinance* and replaced it with a new offence of loitering with intent to commit an arrestable offence. It came into effect on 17 July 1992.

Societies (Amendment) Ordinance 1992 (No 75 of 1992)

This ordinance made substantial amendments to the *Societies Ordinance*. It replaces the former registration system (under which any unregistered society is deemed to be an unlawful society) by a notification system (under which the office bearers who fail to notify the Societies Officer of the formation or change of particulars of the society will still commit an offence, but the society itself will not be unlawful as a result of failure to notify). The amendment also empowers the Secretary for Security, upon the recommendation of the Societies Officer, to prohibit the operation of any society whose operation may be prejudicial to the security of Hong Kong. The power of the Societies Officer to demand information from any society is restricted to those information as are reasonably required for the performance of his functions under the Ordinance (whereas there is no restriction under the former provisions). A requirement of reasonable belief is imposed in the exercise of his power of entry to any place or premises which are kept as place of meeting of the society.

The maximum penalty for being an office bearer and member of an unlawful society is substantially increased. A number of presumptions relating to membership and existence of triad society are repealed or re-written. Finally, the schedule of exempted bodies is enlarged to cover certain unincorporated trust (those of a public character established solely for charitable purpose and those established solely for the purpose of engaging in an approved retirement scheme under the Inland Revenue Ordinance). The amendment came into force on 17 July 1992. The amended Ordinance still gives rise to a number of human rights concerns, not just in its system of notification (which some have argued still constitutes an impermissible limitation on freedom of association), but also

some of its individual provisions (see, for example, section 31 (1), which confers on the Societies Officer an extremely broad power of entry of premises other than dwellings).

Prevention of Bribery (Amendment) Ordinance 1992 (No 44 of 1992)

This amendment removed the power to detain any person found in any premises or place which an investigating officer is empowered to search under ss 16 and 17 of the Ordinance. It also repealed the provision which enabled a magistrate to issue a warrant for the apprehension and admission to bail of a person who is the subject of an investigation and is about to leave Hong Kong. Disclosure of the details of an investigation or the identity of the person investigated after that person is arrested is no longer an offence. The amendment came into effect on 28 May 1992.

Independent Commission Against Corruption (Amendment) Ordinance 1992 (No 45 of 1992)

This amendment removed the power to detain any person found in the premises or place which the Commissioner is empowered to search under section 10C (1)(d) and (1A). It also repealed the power of the Commissioner under section 13 (1)(c) to require any person to provide him with any information which he considers necessary. It came into force on 28 May 1992.

Immigration (Amendment) Ordinance 1992 (No 48 of 1992)

The amendment repealed the power of the Director of Immigration to detain Vietnamese refugees under certain circumstances. It further imposed a maximum period of detention of a person for inquiry as to deportation. The expression "until the contrary is proved" was changed to "in the absence of evidence to the contrary" in a number of reverse onus provisions. The amendment came into effect on 4 June 1992.

Police Force (Amendment) Bill (Gazette No 3, 22 May 1992, C699)

The Bill proposes an amendment to sections 50 and 54 of the *Police Force Ordinance* by imposing greater restrictions on the exercise of the general power of arrest, detention, search and seizure. The power of arrest under section 50 is to be exercised only when a person is reasonably suspected of being guilty of an offence which carries a custodial sentence or when service of summons appears impracticable. The power under section 50 (6) to search and seize things reasonably suspected of throwing light on the character or activities of the person arrested is repealed. The sweeping power to stop and search, and if necessary, to arrest and detain any person under section 54 is replaced by a new section 54, which empowers a police officer to stop a person in a public place and who acts in a suspicious manners for inspection of his identity card, detain him for a reasonable period for enquiry, and if necessary, to search him for anything that may present a danger to the officer. The archaic section 56, which empowers a police officer to stop and detain any person removing furniture from premises at night, is repealed.

The amendments are not intended to be a comprehensive review of police powers, which is the subject of a pending report from the Law Reform Commission. The Bill will have to be considered in the 1992-93 Legislative Council session.

Organized Crime Bill

The Bill proposes the introduction of a series of new offences of committing one or more of the scheduled offences while being a member of an organized crime group. Some of the proposals contained in the Bill are quite controversial and have been subject to adverse criticism from a human rights perspective. The Bill contains two provisions which may be inconsistent with the ICCPR. One provision is essentially identical in wording to sections 25 (1) and 25 (4)(a) of the *Drug Trafficking (Recovery of Proceeds) Ordinance*, the provisions declared repealed in *R v Lo Chak-man*. Section 9 of the Bill is virtually the same as sections 4 (2) and (3) of the *Drug Trafficking (Recovery of Proceeds) Ordinance*, which is the subject of a pending challenge in the District Court.

RECENT PUBLICATIONS

Hong Kong

J Chan, "The Applicability of the Bill of Rights to A Body Corporate", (1992) 22 (3) *Hong Kong Law Journal* (forthcoming)

R Cullen,"The Bill of Rights: Some New Perspectives -- Report of a Student Study", City Polytechnic of Hong Kong, 1992 (for an extract, see *The New Gazette*, May 1992, p 16)

M Darwyne, "Giving Lawyers Access to Detention Centres", *The New Gazette*, June 1992, pp 21-23

International Commmission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong* (1991)

C Jones, "What to do about court delay?", *The New Gazette*, April 1992, pp 44-46

P Keller, "Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests", (1992) *Texas International Law Journal* 371-417

Lawyers Committee for Human Rights, *Critique: Review of the U.S. Department of State's Country Reports on Human Rights Practices for 1991* (New York: Lawyers Committee, 1992) 419-427 (section on Hong Kong)

G McCoy, "Tinkering with the Common Law", *The New Gazette*, April 1992, p 3

H Samuels, "The Detention of Vietnamese Asylum Seekers in Hong Kong: *Re Pham Van Ngo and 110 Others*" (1992) 41 *International and Comparative Law Quarterly* 422-432

L Siddall, "Paying the price for human rights", *The New Gazette*, September 1991, pp 40-42

Of general interest

P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992)

J Buted and M Mercado, "The Right to Non-Discriminatory Enforcement of Penal Laws: Expanding the Mantle of Equal Protection", (1988) 63 *Philippine Law Journal* 161-185

F Hampson, "Restrictions on Rights of Action and the European Convention on Human Rights: The case of *Powell and Rayner*", (1990) 61 *British Yearbook of International Law* 279-310

V Mendoza, "The Constitution According to the Supreme Court: A Review of Cases in 1989-1990", (1989) 64 *Philippine Law Journal* 34-80

M Tsamenyi, "The Enforcement of Prisoners' Rights in Papua New Guinea", (1988-89) *Lawasia* 103-111

M Wachenfeld, "The Human Rights of the Mentally Ill in Europe under the European Convention on Human Rights", (1991) 60 *Nordic Journal of International Law* 109-292

APPENDIX A

GENERAL COMMENT OF THE HUMAN RIGHTS COMMITTEE ON EQUALITY AND NON-DISCRIMINATION

GENERAL COMMENT 18 (37) (NON-DISCRIMINATION)

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1. of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race. colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogation from certain obligations under the Covenant in time of public emergency. the same article requires, *inter alia*, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character. the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles on non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin,

property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2(1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of

constitutions and laws not all the grounds on which discrimination is prohibited as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant. article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

APPENDIX B

HUMAN RIGHTS COMMITTEE DECISIONS UNDER THE OPTIONAL PROTOCOL

The following consists of edited extracts from United Nations Press Release HR/3099 (10 June 1992):

"The Human Rights Committee has recently concluded examination of communications from 11 individuals alleging that their basic human rights had been violated and that they had exhausted all domestic remedies. The complaints involved violation of the right to life, mistreatment under detention and denial of the right to a fair trial, and discrimination in the enjoyment of social security benefits. It examined these confidential communications in closed meetings at its forty-fourth session, held at New York from 23 March to 10 April.

The rights in question are guaranteed under the International Covenant on Civil and Political Rights. The Committee monitors implementation of the Covenant and acts on such communications under the Optional Protocol to the Covenant. No communication can be received by the Committee if it concerns a State party to the Covenant which is not also party to the Protocol.

The 53-article Covenant, which entered into force in 1976, proclaims such rights as the right to self-determination, to life, liberty and security of the person, to freedom of thought, conscience and religion and to equality before the law. It prohibits arbitrary deprivation of life; torture, cruel or degrading treatment or punishment; slavery and forced labour; war propaganda, and advocacy of racial or religious hatred.

Thus far, 65 of the 105 States which have acceded to or ratified the Covenant have accepted the competence of the Committee to deal with individual complaints.[10] . . .

Capital Punishment Cases

The Committee adopted views on five communications concerning Jamaican citizens sentenced to death or whose death sentence had been commuted to life imprisonment. The authors alleged various irregularities in the course of the judicial proceedings against them such as inadequate legal representation, unavailability of witnesses, or undue prolongation of the judicial proceedings. Moreover, one person alleged that he was forced to sign incriminating papers and two others claimed to have been subjected to ill-treatment in police detention or on death row.

In the case of *Glenford Campbell* (No. 248/1987), the Committee found violations of the Covenant in that the author had not, upon his arrest, been promptly informed of the charges against him and because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power. In addition, the author's legal aid representative had failed to raise objections to the prosecution's case, despite specific instructions from the author to this effect, and he was unable to instruct his representative for the appeal. The Committee also found a violation of Mr. Campbell's right to life, since the final sentence of death had been imposed in violation of his right to a fair trial. It recommended his release.

Delroy Prince (No. 269/1987) complained that witnesses on his behalf had been subjected to intimidation and therefore had failed to testify; however, he had not raised this

---

[10] The United Kingdom is not among them. [Eds]

matter during the trial. In the absence of further evidence, no violation of the relevant Covenant article, which entitles an accused to have witnesses examined on his behalf, was found. The Committee also found that Mr. Prince's claim that he was severely beaten upon his arrest was not substantiated. This allegation had been raised during the trial and rejected by the jury. The Committee found no violation of the Covenant in Mr. Prince's case.

In the cases of *Messrs. Randolph Barrett and Clyde Sutcliffe* (Nos. 270 and 271/1988), the Committee had to determine whether prolonged judicial proceedings and concomitant prolonged periods of detention on death row may in themselves amount to cruel, inhuman and degrading treatment within the meaning of the Covenant. The Committee held that prolonged judicial proceedings did not per se constitute that kind of treatment, even if they might be a source of mental strain and tension for detained persons. This also applied to appeal and review proceedings in cases involving capital punishment, although an assessment of the particular circumstances of each case would be called for. Even prolonged periods of detention under a severe custodial regime on death row could not generally be considered to constitute cruel, inhuman of degrading treatment if the convicted person was merely availing himself of appellate remedies. One member of the Committee appended an individual opinion on this point reflecting a different view.

However, the Committee found that the beatings and injuries inflicted on Mr. Sutcliffe on death row violated his rights under the Covenant and recommended that he be awarded an appropriate remedy, including adequate compensation. No finding of violations of the Covenant was made in respect of Mr. Barrett.

Alrick Thomas (No. 272/1988), who had been sentenced to death by the Court of first instance, was informed about the date of the appeal hearing only after it had taken place. He was therefore unable to communicate with his legal representative, who withdrew the original ground of appeal without consulting his client. The Committee, taking into account the combined effect of these circumstances, found that the appeal proceedings in this case did not meet the requirements of a fair trial under the Covenant. It requested Jamaica to offer Mr. Thomas an appropriate remedy.

Detention and Fairness of Judicial Proceedings

Juan Terán Jijón (No. 277/1988), an Ecuadorian citizen who had been arrested in March 1986 in connection with an armed robbery, claimed to have been kept incommunicado after his arrest, ill-treated and forced to sign blank sheets of paper. He further alleged that he was not promptly brought before a judge and that, after his release in March 1987, he was rearrested and reindicted for the same offence.

The Committee considered that the evidence before it was sufficiently compelling to find a violation of the articles relating to torture and inhuman and degrading treatment and of the right to be treated, in detention, with respect for the inherent dignity of the human person. In respect of the rearrest and reindictment, as well as the incommunicado detention, the Committee found violations of the Covenant and recommended that the author be given an appropriate remedy, including compensation, and called upon Ecuador to investigate the use to which the papers signed by Mr. Jijón under duress had been put, and to see to it that these documents were either returned to the author or destroyed. A Committee member appended an individual opinion on that point, finding also a violation of the article which provides that no one may be compelled to testify against himself or to confess guilt.

Dieter Wolf (No.289/1988), a German citizen who had been detained and convicted on charges of cheque fraud in Panama, claimed that he was not heard personally in any of the judicial proceedings against him; that he was never served a properly motivated indictment and was not brought promptly before a judge; that the proceedings against him

were unreasonably prolonged; that he was at all times denied access to legal counsel; and that he was forced to perform hard labour in an island penitentiary.

In this case, the Committee found violations of the articles relating to: the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power; the right to be treated, in detention, with respect for the inherent dignity of the human person and the right of unconvicted prisoners to be segregated from convicted prisoners; the right to a fair trial by an independent and impartial tribunal; and the right to adequate time and facilities for the preparation of the defence and right to legal representation. The Committee recommended that Mr. Wolf be provided with a remedy.

Non-discrimination

Article 26 of the Covenant guarantees equality before the law and equal protection of the law without any discrimination. In its jurisprudence, the Committee has consisently expressed the view that this article does not make all differences in treatment discriminatory; a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of that article. The issue of discrimination with regard to social security legislation was raised in two cases.

In the case of *Ms. Sprenger v. the Netherlands* (No. 395/1990), the Committee found that the distinction in the enjoyment of benefits under the Health Insurance Act between married and unmarried couples was reasonable in the light of the objective differences between the two categories still existing in the Dutch legal system. It noted the explanation of the State party that there had been no general abolition of the distinction between married persons and cohabitants, and the reasons given for the continuation of this distinction. The Committee found this differential treatment to be based on reasonable and objective grounds. In a concurring individual opinion, three Committee members stated that article 26 should be seen as a general undertaking on the part of States parties to review regularly their legislation in order to ensure that it corresponded to the changing needs of society.

In the case of *Mr. Pauger v. Austria* (No. 395/1990), the Committee found that the distinction merely on the basis of sex under the Pension Act between widows and widowers, whose social circumstances were similar, amounted to discrimination in violation of the relevant article of the Covenant. It recommended that Austria should offer Mr. Pauger an appropriate remedy.

Inadmissible Cases

Communication No. 351/1989 (*N.A.J. v. Jamaica*) concerned a Jamaican citizen under sentence of death. The author claimed that his trial was unfair and that a number of irregularities had occurred in its conduct. The Committee decided that the communication was inadmissible under article 3 of the Optional Protocol. It found that the allegations did not come within the scope of the Covenant under the right to a fair trial, as they related primarily to the judge's instructions to the jury and the evaluation of evidence, which are beyond the Committee's competence unless there is manifest partiality or arbitrariness on the part of the judge.

Case No. 363/1989 (*R.L.M. v. France*) concerned a French citizen of Breton origin who claimed that the French educational authorities had consistently discriminated against him by denying him the possibility to teach the Breton language on a full-time basis in high schools in Brittany. The Committee dismissed the author's claim of a violation of the right to freedom of expression as unsubstantiated. It noted that the author had not seized the French judicial authorities of his grievances and added that any doubts on the author's part about the effectiveness of local remedies did not absolve him from exhausting them."