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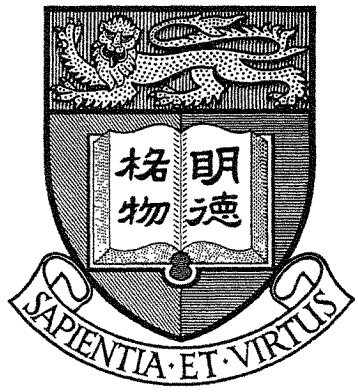

BILL OF RIGHTS

BULLETIN

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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.

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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

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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 Benjamin Chain, John Leung, Gerry McCoy, Phil Dykes, Ching Y Wong, 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 30 November 1992. We apologise for any errors or omissions.

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EDITORIAL

RECENT DEVELOPMENTS

The period since the last issue of the *Bulletin* has seen a smaller number of cases at all levels than in the previous period. The most significant decision during this period is the Court of Appeal's judgment in the trilogy of cases concerning provisions of the *Import and Export Ordinance* (Cap 60). In those cases, *R v Wong Hiu-chor*, *R v Yeung Chu-tim* and *R v Suen Shun* (see page 18 below), the Court of Appeal upheld a number of presumptions contained in that *Ordinance*. However, in so doing the Court accepted that not only do presumptions which impose a *legal* burden on a defendant but also those which impose an *evidential* burden constitute prima facie infringements of the presumption of innocence and must therefore be justified under the tests of rationality, proportionality and minimal impairment.

Other cases noted in this issue are the decision of Jones J dealing with challenges to provisions of section 145 of the *Companies Ordinance* (Cap 60): *Re Tse Chu-fai* (page 27). In a case which he heard last year as one of the first *Bill of Rights* cases, Sears J revisited the issue of the right to trial within a reasonable time or to release on bail and granted bail to the same defendant to whom he had refused bail in July 1991, holding this time that his rights under article 5 (3) of the *Bill of Rights* had not been violated (*In re an Application for bail pending trial (No 2)*, page 9 below). The first detailed judicial examination of the consistency of the strict liability offences with the *Bill of Rights* is also noted (*R v Hui Lan-chak*, Judge Lugar-Mawson, page 5).

Two cases in the High Court also explored the applicability of the *Bill of Rights* to extradition proceedings, coming to the conclusion that the right to cross-examine witnesses in article 11 (2)(g) of the *Bill of Rights* did not apply to extradition proceedings since they did not involve the determination of a criminal charge and (in one case) that article 22 of the *Bill of Rights* was not violated by treating fugitives differently from persons facing committal proceedings (*Re Ng Hung-yiu*, page 25 below; *Re Suthipong Smittacharatch*, page 26 below).

Two cases in the magistrates courts raised for the first time the important issue of the extent of the power of the courts to exclude evidence which has been obtained in violation of the *Bill of Rights*, with some consideration being given to the impact of the *Bill of Rights* on the general rule in *R v Sang* [1980] AC 402 (*R v Alagon*, page 31 below; *R v Kwok Wai-chun*, page 31 below).

INTERNATIONAL DEVELOPMENTS OF RELEVANCE TO HONG KONG

In view of the less voluminous amount of Hong Kong case material in the last few months we have taken the opportunity to include in this issue more international and comparative material, both in the text and in a number of appendices. There are a number of developments at the international level, both relating specifically to Hong Kong and more general developments, which are likely to be of interest to many in Hong Kong working in the field of human rights.

Human Rights Committee -- new general comments and decisions under the First Optional Protocol

The Human Rights Committee recently adopted two new *General comments* under article 40 of the International Covenant on Civil and Political Rights. These general comments, while not formally binding interpretations of the provisions of the ICCPR, are considered internationally as highly persuasive elaborations of the content of the Covenant. Their relevance for the interpretation of the Hong Kong *Bill of Rights* was recognised by the Court of Appeal in *R v Sin Yau-ming* [1992] 1 HKCLR 127 and they have been cited to and by the Hong Kong courts (including the Court of Appeal) in a number of *Bill of Rights* cases.

The two new general comments, *General comments 20 (44)* and *21 (44)* deal with articles 7 and 10 of the ICCPR (articles 3 and 6 of the *Bill of Rights*) and are reproduced at Appendix A.[1] Article 7 guarantees the right not to be subjected to cruel, inhuman or degrading treatment or punishment; while article 10 guarantees persons in detention the right to humane treatment. Among other matters *General comment 20 (44)* notes that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."

Reproduced at Appendix B are extracts from a United Nations press release summarising decisions of the Human Rights Committee at its July 1992 session in relation to complaints under the First Optional Protocol to the ICCPR. We have also included extracts from a number of decisions of the Human Rights Committee under the corresponding article of the *Bill of Rights*.

Reporting procedures under United Nations human rights treaties

One issue of importance to Hong Kong is that of reporting to international bodies on the implementation of human rights treaties in Hong Kong. The major United Nations treaties which apply to Hong Kong (or which may be applied to Hong Kong in the future) all oblige States parties to report regularly to a body of independent experts on the steps taken to realise the human rights guaranteed by the particular treaty. (A similar procedure applies in the case of the international labour conventions which apply to Hong Kong; reports are submitted regularly to the International Labour Organisation.) Hong Kong currently submits reports through the United Kingdom government under the two International Covenants and the Racial Discrimination Convention. The Hong Kong government will shortly be reporting (through the United Kingdom government) under the Convention Against Torture, and perhaps also under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.

The reporting procedure provides an important opportunity for a regular appraisal by the Hong Kong community as well as the international community of the progress made in the realisation of the human rights guaranteed by these treaties. The United Nations have encouraged States to involve their communities in the preparation of reports (an invitation not taken up by the Hong Kong government) and to give publicity to the reports and the consideration of them by the respective committees. Previously, only reports under the Civil and Political Rights Covenant have been made widely available to the public (or laid before the Legislative Council) and there does not appear to have been any reporting back by the government to the Hong Kong community of the conclusions of the supervisory committees (a task performed so far largely by NGOs, if at all).

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[1] They replace earlier general comments by the Committee on these articles, namely *General comments 7 (16)* and *9 (16)*.

In view of the important functions served by these reporting procedures (of particular relevance in the context of the debate over the extension to Hong Kong of the Women's Convention), we have included extracts from a *general comment* of the Committee on Economic, Social and Cultural Rights dealing with the functions of reporting which has general applicability (*General comment No 1*, reproduced at Appendix C). This Committee is the body of independent experts which considers reports submitted under the Economic and Social Covenant.

Report under the Racial Discrimination Convention

The United Kingdom government recently submitted to the United Nations its twelfth report in respect of Hong Kong under the International Convention on the Elimination of All Forms of Racial Discrimination (reproduced as Appendix D). This Convention was adopted by the United Nations General Assembly in 1965 and was ratified by the United Kingdom in 1969, when it also became applicable to Hong Kong. The Convention is one of the most widely ratified of the United Nations human rights treaties and requires States parties to take all appropriate measures to prohibit and eradicate discrimination based on race, colour and national or ethnic origin. The Convention also provides a procedure for considering complaints by individuals that their rights under the Convention have been violated; however, the United Kingdom has not submitted to this procedure.

States parties to the Convention are required to report regularly to the *Committee on the Elimination of Racial Discrimination* (CERD), a body of 18 independent experts elected by the States parties to the Convention. The Committee reviews those reports in the presence of representatives of the States parties in public hearings.

Reports on the implementation of the Convention in Hong Kong have been submitted regularly and considered by the Committee. However, it seems that there has been almost no awareness of this procedure in Hong Kong. The reporting procedure provides an opportunity to raise issues of racial discrimination at the international level and within Hong Kong. Members of the Committee welcome written submissions by non-governmental organisations which supplement or respond to government reports, since these provide information which they can draw on to question government representatives.

The twelfth report submitted by the United Kingdom (and Hong Kong) government contains a number of statements with which many people in Hong Kong might disagree. Its primary contention is that there is no racial discrimination in Hong Kong and that in any event the existing laws (including the *Bill of Rights*) provide adequate legal protection against the types of racial discrimination covered by the Convention. Both of these claims are, in our view, difficult to maintain as broadly stated.

It is important that the Committee be provided with independent information from Hong Kong which will enable it to assess the extent of racial discrimination in Hong Kong and the steps taken by the Hong Kong government to prohibit and eliminate it. (There was no information before the Committee when Hong Kong's last report was considered in April 1991 and there was no substantive discussion of any aspect of racial discrimination in Hong Kong.)

The report is likely to be considered by the Committee in late 1993 or early 1994. If you are interested in submitting material to the Committee and wish to know how to go about doing this, please contact the Editors.

Reports under the Economic, Social and Cultural Rights Covenant

Hong Kong also submits reports under the International Covenant on Economic, Social and Cultural Rights which are considered by another independent expert body, the Committee on Economic, Social and Cultural Rights. It is expected that Hong Kong's next report on articles 13-15 of the Economic Covenant (which is overdue) will be submitted shortly. Articles 13 to 15 deal with the right to education and the right to take part in cultural life, to enjoy the benefits of scientific progress and of one's own scientific, literary or artistic production. Anyone interested in submitting information to the Committee may contact the Editors. The report may be considered as early as April 1993.

OTHER INTERNATIONAL DEVELOPMENTS

Many readers will be aware that the Hong Kong government is examining whether the United Nations Convention on the Elimination of All Forms of Discrimination Against Women should be extended to Hong Kong. Adopted by the United Nations General Assembly in 1979, it was ratified by the Untied Kingdom in 1986 and extended to a number of dependent territories (not including Hong Kong) at that time. The Hong Kong government has had the question "under consideration" for over six years. China has been a party to the Convention since 1981.

States parties to the Convention are required to report regularly to the *Committee on the Elimination of Discrimination Against Women* (CEDAW), a body of 23 independent experts elected by the States parties to the Convention. The Committee reviews those reports in the presence of representatives of the States parties in public hearings.

The Committee has the power to adopt *general recommendations*, a power which it has recently begun to use to adopt recommendations similar to the general comments of the Human Rights Committee. In January 1992 CEDAW adopted an important general recommendation on *violence* against women, *General recommendation 19 (eleventh session, 1992)*. This general recommendation is reproduced as Appendix E. The general recommendation is of interest in the Hong Kong context, not just because of the possible extension of the Women's Convention to Hong Kong, but because the Committee stresses that violence against women in its various forms violates many of the rights guaranteed by the two International Covenants and other human rights treaties which apply to Hong Kong. Accordingly, States (and Hong Kong) are already under an obligation to take effective measures to prevent or punish violence against women whether or not the Women's Convention applies to them.

CASES

APPLICATION OF THE BILL OF RIGHTS ORDINANCE

"LEGISLATION THAT CAN BE AMENDED BY AN ORDINANCE" (SECTION 2 (3))

See Re Ng Hung-yiu and Government of the United States of America (1992) HCt, MP No 2007 of 1992, 30 July 1992, Sears J at page 25 below.

JURISDICTION OF COURTS AND POWER TO GRANT REMEDIES (SECTION 6)

See the discussion of the power of the courts under section 6 of the *Bill of Rights Ordinance* to exclude evidence obtained in violation of the *Bill of Rights* in *R v Alagon*, page 31 below and *R v Kwok Wai-chun*, page 31.

ARBITRARY DEPRIVATION OF LIBERTY (ARTICLE 5 (1), BOR; ARTICLE 9 (1), ICCPR)

***Immigration Ordinance* (Cap 115), sections 37C (1)(a), 37 (2)(b)**

***R v Hui Lan-chak and others* (1992) DCt, Case No 556 of 1992, 8 September 1992, Judge Lugar-Mawson**

The defendants in this were charged with being members of the crew of a ship which entered Hong Kong with unauthorised entrants on board contrary to section 37C (1)(a) of the *Immigration Ordinance* (Cap 115). The defence challenged these provisions on the ground that they were inconsistent with articles 5, 11 (1) and 11 (2)(g) of the *Bill of Rights*. Sections 37C (1)(a) and (2)(b) 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."

Held (rejecting the challenge):

1. The offence created by s 37C (1)(a) was an offence of strict liability. The commission of the offence was established upon proof by the Crown beyond reasonable doubt of three elements:

   (1) that the accused is a member of the crew of a ship;

   (2) that the ship has entered Hong Kong with the accused present on it as a member of the crew; and

   (3) that on that ship is an unauthorised entrant, or entrants.

   Gammon (Hong Kong) Ltd v Attorney General of Hong Kong [1985] AC 1, applied.

Substantive review of criminal provisions

2. Nothing in the *Ordinance* empowers the judiciary to determine generally whether a law is "fair", "reasonable" or "equitable". The substantive content of the criminal law is not subject to judicial review as to its expediency, in contrast, for example, to procedural review, as to how laws are enforced (for example article 11) and particular articles (for example article 4 prohibiting slavery) which impose specific restrictions on the content of the law.

Strict liability and the Bill of Rights generally

3. The *Hong Kong Bill of Rights Ordinance* does not prohibit the creation of offences of strict liability.

4. Strict liability offences do not violate article 11 (1) of the *Bill of Rights*. That article is concerned with the burden and standard of proof. It provides that the prosecution bears the burden of proving the defendant's guilt and the standard required is proof beyond reasonable doubt. Article 11 (1) is not concerned with the elements which go to make up an offence, only how such elements are to be proved. The selection of what conduct is to amount to a criminal offence, and the elements which to go make up such an offence, are matters for the legislature, subject to any specific restrictions in the *Bill of Rights Ordinance*.

5. Offences of strict liability are not, as a matter of principle, inconsistent with article 5 (1) of the *Bill of Rights*.

   R v Wholesale Travel Group Inc (1991) 84 DLR (4th) 161, considered.

6. In the absence of any article in the *Hong Kong Bill of Rights Ordinance* which prohibits offences of strict liability in general, or imposes particular requirements on the subject matter of s 37C (1)(a), there is no basis for holding s 37C (1)(a) or (2)(b), whether separately or in combination, to be inconsistent with the *Bill of Rights Ordinance*. If the legislature is free to create offences which include elements of strict liability, it follows that the legislature is free to provide, or not provide, statutory defences on whatever terms it may choose. Section 37C (1)(a)

standing alone is valid under the *Bill of Rights Ordinance*; the addition of a defence to be proved on the balance of probabilities cannot call such validity into question.

Presumption of innocence -- article 11 (1)

7. Section 37 C (1) and (2)(b) did not amount to a prima facie infringement of the presumption of innocence, since the Crown was obliged to prove all the elements of the offence and the defendant was not required to disprove any element of the offence but was provided with the opportunity of establishing a defence.

Attorney General v Lee Kwong-kut [1992] 2 HKCLR 76 , distinguished

8. If s 37C (1)(a) and (2)(b) did violate the presumption of innocence, the deletion of the words "he proves that" would render it consistent with article 11 (1); such a course of action was permitted by section 3 (2) of the *Bill of Rights Ordinance.*

Article 11 (2)(g)

9. Section 37C (2)(b) does not infringe a defendant's rights under article 11 (2)(g) of the *Bill of Rights*. That provision does not compel an accused to testify against himself, nor does it require him to confess his guilt. An accused may choose to seek to establish his due diligence defence, however nothing in s 37C (2)(b) requires him as a matter of law to enter the witness box. In practical terms an accused may feel that he has no choice, but there is no legal compulsion of the kind prohibited by article 11 (2)(g).

Editorial comment

This case is the first Hong Kong case in which there has been extended judicial consideration of the compatibility of strict liability offences with the provisions of the *Bill of Rights,* an area which is complex and in Canada has given rise to considerable divergence of opinion. In our view a number of conclusions reached by the judge are worthy of comment.

Strict liability offences are not as a matter of principle inconsistent with article 5 (1) of the *Bill of Rights*: Judge Lugar-Mawson holds that as a matter of general principle "strict liability" offences do not offend article 5 (1) of the *Bill of Rights*. In reaching this conclusion, he refers to the decision of the Supreme Court of *R v Wholesale Travel Group Inc* (1991) 84 DLR (4th) 161. However, the Canadian use of the term "strict liability offence" is somewhat different to the Hong Kong use. In Canada, the courts have read into strict liability offences which have no mens rea requirement a "due diligence" defence: *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161. It is strict liability offences (in the Hong Kong sense) *alleviated by a due diligence defence* which have been held by the Supreme Court to be consistent with section 7 of the Charter (at least in the regulatory context). Under Hong Kong law, once the court has concluded that an offence is one of "strict liability" according to the *Gammon* criteria, the defendant will be convicted if the constituent elements of the offence are proved, *unless the legislation itself provides for a due diligence defence* (or a general law defence is available).

A "strict liability offence" in the Hong Kong sense, when not alleviated by a due diligence defence, is more appropriately compared with the category of "absolute liability offences" under Canadian law. The Canadian courts have held that, as a matter of principle, where imprisonment may be imposed for an absolute liability offence, it will breach section 7 of the Charter. Thus, it would seem that the applicable Canadian authority would lead to the opposite conclusion to that reached by Judge Lugar-Mawson: if a Hong

Kong statute creates an offence of strict liability (in the *Gammon* sense) and the statute does not provide for a due diligence defence, then as a matter of principle the statute will be inconsistent with article 5 (1) of the *Bill of Rights* if imprisonment may be imposed as a punishment for the offence. For these reasons, the judge's statement that, if strict liability offences standing alone are consistent with the *Bill of Rights*, then the addition of a defence which alleviates their stringency "cannot call such validity into question" is based on an unsustainable premise.

However, the end result that he reaches appears sound in the light of the Canadian authorities, since the offence created by section 37C (1)(a) (if it can properly be considered a regulatory offence) is alleviated by a due diligence offence and could therefore be viewed as consistent with article 5 (1). This may be dependent on a finding that the allocation of matters to be proved by the defendant is reasonable.

No substantive review of criminal offences under the *Bill of Rights*: Judge Lugar-Mawson also states that there is nothing in the *Bill of Rights* which empowers the judiciary to determine generally whether a law is "fair", "reasonable" or "equitable". This conclusion, if it is to be understood as broadly as it is stated, does not appear justified by the jurisprudence of the ICCPR or by authorities from other jurisdictions. It seems clear, for example, that deprivation of liberty may be considered "arbitrary" under article 5 (1) of the *Bill of Rights* if it is manifestly unfair or unreasonable. A similar conclusion would follow from the substantive content of the term "law" in article 5 (1), which on the reasoning of the Court of Appeal in *R v Sin Yau-ming* [1992] 1 HKCLR 127 and *R v Wong Hiu-chor* (below, page 18), would also permit substantive review of criminal provisions which may lead to imprisonment. For example, a law which imprisoned a person where the person had done nothing wrong or provided for a penalty which was grossly disproportionate to the blameworthiness of the defendant could violate that article or the guarantee against cruel, inhuman or degrading treatment of punishment in article 3 of the *Bill of Rights*. See generally ***R v Goltz*** (1991) 67 CCC (3d) 481, 7 CRR (2d) 1 (Supreme Court of Canada).

Strict liability offences do not constitute a prima facie breach of article 11 (1): In his analysis of the presumption of innocence the judge seeks to distinguish the decision of the Court of Appeal in *Attorney General v Lee Kwong-kut*. In that case two members of the Court of Appeal explicitly approved a passage in from the judgment of Dickson CJC in *R v Whyte* (1988) 51 DLR (4th) 481 at 493, 42 CCC (3d) at 109.[2]

By so doing, the Court of Appeal was explicitly endorsing a "holistic" approach to analysing the impact of provisions on the final verdict (whether they be classified as defences, qualifications or essential elements). Judge Lugar-Mawson rejects the applicability of this analysis to strict liability offences by seeking to distinguish *Lee Kwong-kut* (on the ground it was not dealing with a strict liability offence) and by relying on a number of decisions of the Supreme Court of Canada which appear inconsistent with the Dickson view. Yet the Dickson view has been consistently endorsed by the Supreme Court in its recent cases on the presumption of innocence, including "strict liability" cases. In our view, the message of the Court of Appeal in *Lee Kwong-kut* is unmistakeable, namely that formalistic classifications are to be eschewed. (Judge Lugar-Mawson did not consider, in

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[2] "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."

the alternative, whether the provisions could be justified as rational and proportionate measures to achieve a legitimate objective.)

In the alternative, the judge notes that if there is an inconsistency between article 11 (1) and sections 37C (1)(a) and (2)(b), that can be remedied by the deletion of the words "he proves that" from section 37 (2)(b), thus imposing only an evidential burden on the defendant. While that may have been a course open to a court previously, the Court of Appeal's decision in *R v Wong Hiu-chor* would appear to undermine such a simple solution, since even statutes which impose evidential burdens on defendants appear to be subject to tests of rationality and proportionality.

Article 11 (1) as procedural only and not substantive: Judge Lugar-Mawson also held that article 11 (1) is a procedural protection only and does not bear on substantive content of an offence. That may be so, but it is worthwhile pointing out that the presumption of innocence has been interpreted in the international jurisprudence as having a substantive content. The guarantee has been relied on, for example, to provide protection against public authorities making statements or treating a person as if (s)he were guilty of an offence where there has been no trial or verdict.

RIGHT TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE ON BAIL (ARTICLE 5 (3), BOR; ARTICLE 9 (3), ICCPR)

***Re South Kowloon Magistracy Criminal Case No SK-4535 of 1991 (No 2)* (1992) HCt, MP No 1703 of 1991, 16 October 1992, Sears J**

This was an application for bail by a defendant who had been arrested on 20 May 1991 for various credit card offences. He was initially refused bail on 21 June 1991, but applied to Sears J for bail in early July 1991, relying on article 5 (3) of the *Bill of Rights*. At that time the applicant's trial was expected to take place no earlier than September 1992. Although Sears J refused the applicant bail on that occasion, he stated that fifteen months' delay between arrest and trial was unreasonable in the context of article 5 (3). He also expressed his view that the length of delays in criminal trials in the High Court due to the shortage of judges should be a matter of public anxiety, and that there was a danger that guarantees in the *Bill of Rights* would be rendered worthless by such delays (see *Bill of Rights Bulletin*, v 1, n 1, p 5).

The applicant applied for bail again in October 1992, at which time he had been in custody for almost seventeen months; his trial was now not expected to come on before February 1992. The defendant argued that he was entitled to bail based on article 5 (3) of the *Bill of Rights* and that there was a material change of circumstances since his last application (that is, further delay).

Held (granting the application for bail):

1. The period of seventeen months between the applicant's arrest and the present application was unreasonable within the meaning of article 5 (3) of the *Bill of Rights* and the applicant was prima facie entitled to be released on bail.

2. In determining whether he should be released, it was necessary to take into account other factors, including whether the applicant has contributed to the delay or whether "he is such a danger to the community that he should never be allowed out of custody."

3. The evidence before the court was the same as that placed before it fifteen months ago. The Crown relied on the likelihood that the applicant would interfere with witnesses and that he is likely to abscond.

4. There was no evidence that there had been any interference directly or indirectly with witnesses since July 1991.

5. An important factor to consider was the length of time a person has been kept in custody compared with the length of sentence that might be passed. Somewhat less serious cases in the District Court had involved sentences of four to five years' imprisonment. By February 1993 the applicant would have been in custody for two years, the equivalent of a three year sentence.

6. Although there was a risk that the defendant might abscond, this was a classic case where the principle of ensuring that the *Bill of Rights Ordinance* is upheld by the judiciary is far more important than the particular case before the court.

Counsel: M McMahon, for the Crown; J Matthews (instructed by Tang, Wong & Cheung), for the applicant.

RIGHT TO A FAIR HEARING BEFORE AND INDPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW -- CIVIL MATTERS (ARTICLE 10, BOR; ARTICLE 14 (1), ICCPR)

***Ever Sure Investments v Attorney General*, HCt, MP No 844 of 1992**

This case involved 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 case was settled before the hearing and was adjourned *sine die* on 19 October 1992.

***J.L. v Australia*, Human Rights Committee, Communication No. 491/1992, decision on admissibility of 28 July 1992 [(1992) 13 HRLJ 353]**

This case involved a complaint by an Australian solicitor who objected to the payment of increased premiums for professional indemnity insurance, which cover was arranged under a scheme organised by the Law Institute of Victoria. Under the *Legal Profession Practice Act 1958* (Vic) the rules determining a practising fee for solicitors have no effect unless approved by the Chief Justice, who may also approve the regulations governing the professional indemnity insurance scheme. As a result of his refusal to pay the increased insurance fee, the Law Institute refused to renew his practising certificate. When J.L. nonetheless continued to practise, the Law Institute obtained an injunction from the Supreme Court restraining him from acting as a solicitor. J.L. ignored this injunction and was committed by the Chief Justice for contempt of court. His appeal against the issuing of the injunction was successful but not his appeal against the contempt committal. In 1988 he refused to pay his practising certificate fees, as a result of which the Law Institute obtained another injunction against him, which, after an appeal, he once again ignored and was found in contempt. He was subsequently fined for his failure to obtain practising certifiactes in 1989 and 1990, fined for contempt of court and struck off the roll.

He complained to the Human Rights Committee that his right under article 14 (1) of the ICCPR, namely of access to an independent and impartial tribiunal had been violated.

One of the arguments he put forward was that, since the Supreme Court of Victoria was institutionally linked to the Law Institute because of the role of the Chief Justice in approving practising certificate fees, judges of the Supreme Court were not impartial.

Although the events occurred prior to the entry into force of the First Optional Protocol for Australia, the Committee held that the "effects of the decisions taken by the Supreme Court continue until the present time." Accordingly, complaints about violations of the author's rights allegedly ensuing from these decisions were "not in principle excluded *ratione temporis*." (para. 4.2)

Held (rejecting the author's complaint):

The Committee rejected J.L.'s claim, stating:

> "[T]he Committee notes that the regulation of the activities or professional bodies and the scrutiny of such regulations by the courts may raise issues in particular under article 14 of the Covenant. More particularly, the determination of any rights or obligations in a suit at law in relation thereto entitles an author to a fair and public hearing. It is in principle for States parties to regulate or approve the activities of professional bodies, which may encompass the provision for insurance schemes. In the instant case the fact that the practice of law is governed by the *Legal Profession Practice Act 1958* and that the rules providing for a practising fee and a professional indemnity insurance will have no effect unless approved by the Chief Justice does not lead in itself to the conclusion that the court, as an institution, is not an independent and impartial tribunal." (para. 4.3)

RIGHT TO A FAIR HEARING BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL IN THE DETERMINATION OF A CRIMINAL CHARGE

Right to a fair hearing -- Absence of notified witness -- Relationship between common law and *Bill of Rights*

***R v Ng Kam-fuk* (1992) DCt, Case No 104 of 1992, 13 October 1992, Judge Tyler**

In this case an application was made to the trial judge, Judge Tyler, after the commencement of a trial for a permanent stay of proceedings, when one of the Crown witnesses named on the back of the charge sheet failed to appear at the trial to give evidence.

The defendant was charged with robbery of the driver of a taxi and the missing witness was to give evidence identifying the defendant. The witness concerned had resigned from the police force and had emigrated, apparently without informing his superiors that he had this case outstanding. The police discovered his unavailability only a few days before the trial.

The application was based on the common law and also on the right to a fair hearing guaranteed by article 10 of the *Bill of Rights*. The defendant also argued that the failure of the witness to appear was a violation of his right to cross-examine witnesses against him guaranteed by article 11 (2)(e) of the *Bill of Rights*. The application for a stay was made only after one of the Crown's witnesses had already testified.

Held (granting a permanent stay of proceedings):

Bill of Rights

1. Article 11 (2)(e) had no application to the present circumstances, since that article gives a right to an accused to cross-examine witnesses who have given evidence against him.

2. Article 10 of the *Bill of Rights*, however, did apply to the missing witness situation. It is for the defendant to raise on the balance of probabilities a prima facie case of infringement of the article and, once that has been established, the prosecution has the task of satisfying the court, on the balance of probabilities, that notwithstanding the alleged infringement of article 10, the defendant has not been so prejudiced that a fair trial cannot be achieved.

R v Fung Shu-shing (*Bill of Rights Bulletin*, v 1, n 4, p 34), applied.

3. There was a prima facie infringement of article 10 and the prosecution had not demonstrated that a fair trial could now be achieved, for the following reasons:

-- the application for a stay was being made not at the commencement of the trial but well into the trial;

-- after evidence of identification had been given by another witness, identification had become a major factor in the case (since there were apparent inconsistencies between that evidence and the evidence to be given by the unavailable witness), and the defendant should have been given the opportunity to test the evidence of identification given against that of the missing witness

-- the defence had prepared for the trial on the basis of the missing officer being a witness and on his witness statement, the officer and the victim originally being the two principal witnesses for the prosecution.

Common law

4. The principle to be applied on an application for a stay due to the absence of a witness was that, provided the prosecution had taken all reasonable steps to secure the attendance of the witnesses named on the back of the indictment (or, in this case, the charge sheet), the court had a discretion to permit the trial to proceed if there was no injustice to the defendants.

R v Takeshi Machiya, Crim App No 332 of 1989, applied.

5. The prosecution had not taken all reasonable steps to secure the attendance of the missing police officer.

6. The taking of all reasonable steps to secure the witness' attendance was a condition precedent to the court's discretion to permit the trial to proceed. Accordingly, the common law application for a stay should also be granted.

7. Even prosecution had taken all reasonable steps, it would have been appropriate for the court to stay the prosecution, since the test of injustice was the same as the fair trial test under the *Bill of Rights* and a fair trial could not be achieved in the absence of the police witness.

Counsel: Mr Poon, for the Crown; J Midgley (solicitor, Haldane, Midgley & Booth), for the defendant.

***Wright v Jamaica*, Human Rights Committee, Communication No. 349/1989, views adopted on 27 July 1992 [(1992) 13 HRLJ 348]**

In this case the Human Rights Committee considered a communication lodged by Wright, who had been sentenced to death in Jamaica for murder. Wright complained that a number of his rights under the ICCPR had been violated. His grievances included a claim that his right to a fair trial under article 14 (1) of the ICCPR had been violated because the judge had not put to the jury evidence which suggested that he may have already been in custody at the time the victim was shot. The Committee found in his favour on this claim, concluding that the failure to put to the jury evidence which implied that the defendant was already in custody when the victim was shot resulted in a violation of the defendant's right to a fair hearing, even though it was not mentioned by counsel:

> "in all the circumstances and especially given that the trial of the author was for a capital offence, this omission must . . . be deemed a denial of justice and as such constitutes a violation of article 14, paragraph 1 of the Covenant. This remains so even if the placing of this evidence before the jury might not, in the event have changed their verdict and the outcome of the case." (para. 8.3)

However, the Committee rejected Wright's claim under article 14 ((3)(b) [article 11 (2)(b) of the *Bill of Rights*] that he had had inadequate time to prepare his case in view of the failure of the defence to request an adjournment (para. 8.4) and rejected his contention that the failure to call a witness requested by him was a violation of article 14 (3)(e)[article 11 (2)(e) of the *Bill of Rights*], since it was not apparent that the evidence of the witness would have buttressed the defence in respect of the charge of murder (as it merely concerned the nature of injuries suffered by the defendant in another incident).

***Criminal Procedure Ordinance* (Cap 221) s 24A (1)(b)**

***R v Wong Kwai-fun*, Crim App No 390 of 1991**

In this case a challenge is being made to section 24A (1)(b) of the *Criminal Procedure Ordinance* (Cap 221), which prescribes the cases in which indictments may be preferred. We are not aware of the basis of the challenge, but it is likely to be grounded in article 10, 11 or 22.

PRESUMPTION OF INNOCENCE (ARTICLE 11 (1), BOR, ARTICLE 14 (2), ICCPR)

***Control of Obscene and Indecent Articles Ordinance* (Cap 390), s 21 (1)(a)**

***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*, v 1, n 3, p 19. The case was originally scheduled for hearing by the Court of Appeal in November 1992, but has been adjourned to a date to be fixed. Issues arise under articles 5, 11 and 16 of the *Bill of Rights*.

Crimes Ordinance (Cap 200), section 137 (2)

There have been two cases in which rulings have been given on the consistency of section 137 (2) with article 11 (1) of the *Bill of Rights*. Both have upheld the "third limb" of the section, that is the presumption of living of the earnings of a prostitute if the person exercises control over a woman in certain circumstances. Section 137 provides:

> 137. (1) A man who knowingly lives wholly or in part on the earnings of prostitution shall be guilty of an offence and shall be liable on conviction to imprisonment for 5 years.
>
> (2) For the purposes of subsection (1), a man who lives with or is habitually in the company of a prostitute, or *who exercises control, direction or influence over a woman's movements in a way which shows he is aiding, abetting or compelling her prostitution with others*, shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary." (emphasis added)

R v Lam Wing-nin (1992) Mag, E 3768 of 1992, 14 November 1992, Mr A Wright

The defendant argued that section 137 (2) of the *Crimes Ordinance* (Cap 200) was inconsistent with article 11 (1) of the *Bill of Rights*. The Crown conceded that the reverse onus was a prima facie infringement of article 11 (1) that fell to be justified under the tests elaborated in *R v Sin yau-ming* [1992] 1 HKCLR 127. (No point was taken that the differential treatment of men and women by sections 137 and 138 of the *Crimes Ordinance* might violate the guarantee of non-discrimination in article 22 of the *Bill of Rights*.)

Held (rejecting the challenge):

1. The presumption under s 137 (2) could be triggered in three separate and distinct circumstances, namely where a person:

   (a) lives with a prostitute;

   (b) is habitually in the company of a prostitute; or

   (c) exercises control, direction or influence over another person's movements in a way which shows he or she is aiding, abetting or compelling the other person's prostitution.

2. Since the facts to be relied on in the present case related only to the third category of circumstances, it was appropriate (and permissible under the *Bill of Rights Ordinance*) to examine only that category for consistency with the *Bill of Rights*.

3. The presumed fact, that a person was living off the earnings of a prostitute, flowed rationally and realistically from the facts required to be proved before the presumption came into play.

4. Although the information before the court was scant and reports of a social nature such as those referred to in *R v Downey* (1992) 90 DLR (4th) 449, 72 CCC (3d) 1, 9 CRR (2d) 1 (SCC) would have been of more assistance, the offence was one of social concern, prevalence and regarded seriously by the courts.

5. In view of the fact that the evils of organised prostitution were notorious and obtaining evidence of the commission of the offence was difficult (as well as other factors), the presumption was a proportionate measure.

Per curiam (obiter): "The result could very well have been different had I had to consider either or both of the other two facets [of s 137 (2)]."

***R v Chan Suk-man* (1992) Mag, KT 3188 of 1992, 21 September 1992, Mr J L Saunders**

Written reasons are awaited in this case.

***Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405), s 4**

***R v Ko Chi-yuen*, HCt Case No 286 of 1991**

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.

The case is listed before Leonard J for hearing on 15 December 1992. A decision in a similar case, *R v Wong Ma-tai*, District Court Case No 129 of 1990, before Deputy Judge Ching Y. Wong (see *Bill of Rights Bulletin*, v 1 n 3, p 20), is still awaited.

***Immigration Ordinance* (Cap 115), ss 37C (1)(a), 37C (2)(b)**

***R v Hui Lan-chak and others* (1992) DCt, Case No 556 of 1992, 8 September 1992, Judge Lugar-Mawson**

This case (above page 5) also deals with the application of article 11 (1) to strict liability offences.

***Immigration Ordinance* (Cap 115), ss 37C (1)(a), 37C (2)(b), 37K (1), (2)**

***R v Lau Wan-chung* (1992) DCt, Case No 450 of 1992, 10 August 1992, Judge Kilgour**

The two defendants were charged with offences of being members of the crew of a ship which entered Hong Kong with unauthorized entrants on board contrary to s 37C (1)(a) of the *Immigration Ordinance* (Cap 115). The defendants contended that s 37C (1)(a) required proof of mens rea and that s 37C (1)(b), which provided for a due diligence defence, was a reverse onus provision and inconsistent with article 11 (1) of the *Bill of Rights*. They further argued that the presumptions contained in s 37K (1) and (2) were

inconsistent with article 11 (1) of the Bill of Rights and were repealed. Sections 37C (1)(a) and (2)(b) appear above at page 5. Sections 37K (1) and (2) provide:

> "37K. (1) A person who in any proceedings under this Part is alleged to be an unauthorised entrant shall be presumed to be such until the contrary is proved.
>
> (2) Where a person is charged with an offence under this Part as being the owner of a ship, or the agent of the owner, or as being a member of the crew of a ship, a certificate purporting to be signed by a police officer of the rank of superintendent or above and certifying that the person charged was, at the date on which the offence is alleged to ahve taken place, in the honest belief of that officer--
>
> . . .
>
> (c) the captain or other member of the ship's crew,
>
> shall be admitted in evidence on its production without further proof and until the contrary is proved it shall be presumed that --
>
> . . .
>
> (iii) the person charged was, at the date on which the offence is alleged to have taken place, the owner of the ship, the agent of the owner or, as the case may be, the captain or other member of the ship's crew."

Held (rejecting the challenge):

1. Section 37C (1)(a) created a strict liability offence which did not require the proof of mens rea. The offence was designed to enforce immigration policy and did not carry the usual hallmarks of viciousness or dishonesty of other types of offences in the criminal calendar. It concerned a matter of major social concern, and encouraging stricter viligance to prevent the entry of unauthorized entrants by the imposition of a strict liability was in the public interest.

   Gammon (Hong Kong) Ltd v Attorney General [1985] AC 1, applied.

2. Article 11 (1) was not concerned with the elements which went to make up an offence, but only how the elements of an offence were to be proved. Nor did the *Bill of Rights* prohibit the creation of "strict liability" offences. Therefore it was unnecessary to consider whether s 37C (1)(a) could be justified according to the criteria laid down in *Attorney General v Lee Kwong-kut*.

   Attorney General v Lee Kwong-kut [1992] 2 HKCLR 76, distinguished.

3. Although s 37C (1)(b) was a reverse onus provision, it was not in breach of the *Bill of Rights*.

4. By adopting the phrase "in the absence of evidence to the contrary" s 37K imposed only an evidential burden on the defendants. This formulation averted the danger that the defendants might be convicted despite the existence of a reasonable doubt. Accordingly, neither s 37K (1) nor (2) were prima facie in breach of the *Bill of Rights* and it was not necessary to consider whether they were reasonable and justified.

   Attorney General v Lee Kwong-kut [1992] 2 HKCLR 76, discussed.

Per Judge Kilgour (obiter):

> "I might add that were it necessary for me to go on to consider whether [s 37K (1) and (2)] were in fact [reasonable and justified] I felt that there were strong arguments in support of their continuing validity."

Editorial comment

The correctness of the reasoning of this decision is thrown into considerable doubt after the recent Court of Appeal decision in *R v Wong Hiu Chor* (see page p[0. In that case the Court of Appeal considered the compatibility with the *Bill of Rights* of presumptions which adopted the formula "in the absence of evidence to the contrary", and held that such presumptions are still subject to the tests of rationality, proportionality and minimal impairment. The fact that the statutory provision imposes an evidential burden on the defendant as opposed to legal burden will be taken into account in the balancing process. This is certainly a welcome analytical approach, for otherwise the danger is that one falls prey to the technical, formalistic and usually artificial distinction and categorization of different types of statutory provisions.

Judge Kilgour's judgment contains only a rather cursory discussion of why strict liability offences are outside the purview of *Lee Kwong-kut*. Although the Court of Appeal in *R v Wong Hiu-chor* did not touch upon the issue of strict liability directly, the wording of one part of the judgment of Fuad VP may be interpreted as suggesting that strict liability offences are subject to the same tests. In this respect we refer to our comment on *R v Hui Lan-chak* concerning strict liability offences (see page 5 above).

Immigration Ordinance (Cap 115), s 38A

R v Shun Shing Construction Co Ltd, ST 6544 of 1992

This case involves a challenge to section 38A of the *Immigration Ordinance* (Cap 115) on the ground that it violates the guarantee of the presumption of innocence (issues under article 22 may also arise). Section 38A provides:

> **"Site controller commits an offence if illegal immigrant on construction site**
>
> (2) Where it is proved that a person to whom section 38 (1) applies [illegal immigrants] was on a construction site, the construction site controller commits an offence and is liable to a fine of $250,000.
>
> (3) It is a defence in proceedings for an offence under this section for the person charged to prove that he took all practicable steps to prevent persons to whom section 38 (1) applies from being on the construction site."

Immigration Ordinance (Cap 115), ss 62 and 64

R v Lau Fai-ling (magistrates court)

In this case a challenge is based on article 11 (1) of the *Bill of Rights* to sections 62 and 64 of the *Immigration Ordinance* (Cap 115), which contain a number of presumptions and impose the burden of proving certain matters on the person asserting them.

Import and Export Ordinance (Cap 60), sections 18A (1), (2) and 35A (1), (2)

***R v Wong Hiu-chor* (1992) CA, Mag App No 227 of 1992; *R v Yeung Chu-tim* (1992) CA, Mag App No 484 of 1992; *R v Suen Shun* (1992) CA, Mag App No 718 of 1992, 4 December 1992, Fuad VP, Penlington JA and Mortimer J**

The various defendants in these cases had been charged with offences including offences contrary to sections 18A (1)(c), 35A (1)(a) and 35A (1)(c) the *Import and Export Ordinance* (Cap 60). They had challenged the consistency of those provisions (and the related presumptions in sections 18A (2) and 35A (2)) with the presumption of innocence in article 11 (1) of the *Bill of Rights*. That argument had been unsuccessful in *R v Wong Hiu-chor* and *R v Yeung Chu-tim* and the defendants appealed. The argument had succeeded in *R v Suen Shun* and the Crown appealed by way of case stated. The appeals were heard together since these raised identical or essentially the same issues.

Section 18A of the *Ordinance* provides:

"(1) Any person who knowingly--

(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,

with intent to export the cargo without a manifest or with intent to assist another person to export the cargo without a manifest is guilty of an offence and liable on conviction to a fine of $500,000 and to imprisonment for 2 years.

(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 without a manifest, the first mentioned person will be presumed to have such intent in the absence of evidence to the contrary."

Section 35A (2) provides:

"(1) Any person who knowingly --

(a) has possession of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

(c) assists with the carrying, removing, depositing, harbouring, keeping or concealing of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

with intent to evade the restriction or prohibition or to assist another person to evade the restriction or prohibition is guilty of an offence and liable on conviction to a fine of $500,000 and to imprisonment for 2 years.

(2) Any person who--

(a) has possession of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

(c) assists with the carrying, removing, depositing, harbouring, keeping or concealing of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

in circumstances that give rise to a reasonable suspicion that there is intent on the part of that person to evade a restriction or prohibition or to assist another person to evade a restriction or prohibition, the first mentioned person will be presumed to have such intent in the absence of evidence to the contrary."

Held (upholding the challenged provisions):

1. The mandatory presumptions contained in ss 18A (2) and 35A (2) were prima facie infringements of the presumption of innocence and fell to be justified against the standards of rationality, proportionality and minimal impairment.

   R v Sin Yau-ming [1992] 1 HKCLR 127, followed; *R v Oakes* (1986) 26 DLR (4th) 200, considered.

2. The objective of dealing with the serious problem of smuggling was a sufficiently important one to justify a restriction of a right guaranteed by the *Bill of Rights*. It was not necessary to consider the statistics produced to the court to conclude that the problem of smuggling was a serious one, since that was universally known.

3. There was a rational connection between the proved facts and the presumed facts. To establish a rational connection between a proved fact and a presumed fact it was not necessary to show that the latter inexorably followed from the former.

4. The provisions satisfied the test of proportionality, since they represented a reasonable response to the very substantial problem of smuggling.

5. The Legislature could have enacted offences of strict liability by omitting any requirement as to intent. However, the Legislature required intent to be established, but recognised that often evidentiary problems arise in proving intent. The impairment of the right to be presumed innocent was minimal, since all the accused had to do was to point to some evidence which is capable of raising a reasonable doubt as to his intent.

Per curiam

It was proper to construe the word "law" as appearing in article 11 (1) as meaning not the domestic law of Hong Kong but a universal concept of

justice, thus importing the notion of reasonableness or the tests of rationality, proportionality and minimal impairment.

Per Penlington JA

The words "according to law" in article 11 (1) of the *Bill of Rights* bore the same meaning as the words "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" contained in s 1 of the Canadian Charter of Rights and Freedoms.

Per Mortimer J

In deciding whether a mandatory presumption admits of a construction consistent with article 11 (1) of the *Bill of Rights*, a court should consider the following:

(i) Does the provision under consideration allow of the possibility that an accused person may be convicted of an offence without each essential element of that offence being proved agianst him beyond reasonable doubt?

(ii) To what extent does the provision under consideration derogate from the right given in article 11 (1)? In other words, what is the likelihood of an accused being convicted in the absence of an ingredient of the offence being proved against him beyond reasonable doubt?

(iii) Does the fact to be presumed rationally and realistically follow from those required to be proved?

(iv) Having rgard to the foregoing, is the presumption proportionate? Is it no more than a reasonable provision giving due weight to the need of society to protect itself balanced with the interests of the individual accused?

Counsel: S R Bailey, for the Crown; G Watson (instructed by Wong Shum & Co); J McNamara (instructed by Tang, Wong & Cheung); and C Y Wong, S See, S Chiu and P Sit, for the various appellants/respondents.

Editorial comment

One significant aspect of the Court of Appeal's decision in these cases is its acceptance that there may be a prima facie infringement of the presumption of innocence even where there is only an *evidential* burden placed on a defendant. (In this regard the court reached the same conclusion as the magistrate in *R v Suen Shun*, see *Bill of Rights Bulletin*, v 1 n 4, p 23). Accordingly, it would appear that as a result of this case and the decision of the Court of Appeal in *Attorney General v Lee Kwong-kut* that *all* provisions which raise the possibility that the defendant may be convicted despite the existence of a reasonable doubt must be justified under the tests of rationality, proportionality and minimal impairment. This would include not just reverse onus clauses, but also provisions classified as "true defences", exceptions, provisoes, qualifications and so on. (Mortimer J in this case appears to adhere to the "essential element" approach, but that analysis appears not to be consistent with *Lee Kwong-kut*).

The court stated that it did not need to consider the statistics placed before it to determine that smuggling was a serious problem, since the nature and extent of the problem were notorious. While that may be a safe approach to adopt in this case, there is much to be said for the courts being cautious in making assumptions about the existence of

problems without considering the evidence for those assumptions. It may be particularly important to consider statistical or other material where the issue is the proportionality of a measure, since on occasion commonly held assumptions turn out not to be confirmed by empirical or other material.

It may also be noted that Fuad VP in passing appears to accept the argument of the Crown that "the legislature could have enacted offences of strict liability by omitting any requirement as to intent." It is not clear if the Vice-President considered that such provisions would give rise to no problems under article 5 (1) of the *Bill of Rights*. For the difficulties that might arise under article 5 (1), see the Editorial comment following the decision of Judge Lugar-Mawson in *R v Hui Lan-chak* (page 5 above).

Import and Export (Carriage of Articles) Regulations (Cap 60), rr 3 (3) and (5)

R v Wong Far (1992) Mag, KT No 2803 of 1992, 4 September 1992, Mr J L Saunders

The defendant had been charged with an offence of useing a vessel to carry a prohibited article without lawful excuse contrary to rr 3 (3) and 3 (5) of the *Import and Export (Carriage of Articles) Regulations*. These regulations provide

> "3. (3) A person shall not, without lawful excuse, use a vessel to carry or tow a prescribed article within the waters of Hong Kong."
>
> "3. (5) A person who contravenes subregulation (1), (2), or (3) is guilty of an offence and liable on conviction to a fine of $500,000 and to imprisonment for 2 years."

The defendant challenged the validity of the regulations on the grounds that they were ultra vires the enabling legislation generally and that the penalty provided for under the regulations exceeded that permitted by s 28 (e) of the *Interpretation and General Clauses Ordinance* (Cap 1). Both these arguments were rejected by the court. He also challenged the provisions under the *Bill of Rights*, on the ground that they violated both the presumption of innocence in article 11 (1) and the right not to testify against oneself or to confess guilt in article 11 (2)(g) of the *Bill of Rights*. In the course of argument counsel for the defendant accepted that the argument based on article 11 (2)(g) must fail, since the fact that there may be an onus on the defendant to establish a resaonable excuse did not *require* the defendant to testify, that was a tactical matter (see *R v Boss* (1988) 46 CCC (3d) 523).

Held (rejecting the challenge):

1. Regulation 3 (3) was a prima facie infringement of the presumption of innocence in article 11 (1) of the *Bill of Rights*; however, it could be saved if it satisfied the tests of rationality and proportionality enunciated in *R v Sin Yau-ming* [1992] 1 HKCLR 127, the onus being on the Crown to demonstrate that the provision satisfied those tests.

2. In order to satisfy those tests the provision must be:

   a. carefully designed to achieve the objective in question; it must not be arbitrary or based on irrational considerations;

   b. designed to impair as little as possible the right or freedom guaranteed by the *Bill of Rights*;

c. proportionate in its effects to the objective in question.

3. The problem of "smuggling out" in Hong Kong was a matter of serious and pressing concern; it was important in terms of Hong Kong's international reputation and relations with neighbouring countries (particularly China) that international trade through the territory be properly conducted.

4. In view of the importance of this issue to Hong Kong strict liability offences are an appropriate means by which the Legislature might approach the problem.

5. The assessment of whether a right had been impaired "as little as possible" must be made in light of the objective of the legislation and the matters required to be established by a defendant.

6. Many of the matters which constitute a lawful excuse are quite straight forward and so plain that their existnce will ensure that a person is not even charged if they apply. The defendant is likely to be the only person who can give direct evidence of why prescribed articles might be on board a vessel.

7. In view of the above considerations it was not unreasonable to place the burden of proving a lawful excuse on a defendant and the provisions were consistent with the *Bill of Rights Ordinance*.

Counsel: L Cross, for the Crown; Mr Toliday-Wright, for the defendant.

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*, iis still pending before the Court of Appeal. There are two other cases in which the same issue has been raised, both of which were referred to the Court of Appeal by Sears J on 24 November 1992: *R v Wong Tam-tai*, Mag App No 457 of 1992 and *R v Wong Shui-hay*, Mag App No 458 of 1992. The fate of all these proceedings will no doubt be affected by the decision of the Court of Appeal in the trilogy of cases above, page 18.

Trade Descriptions Ordinance (Cap 362), ss 7 (1)(b), 9 (2), 26 (3) and (4)

R v Joshi (1992) Mag, SK No 5420 of 1992, Mr E Lim

The defendant was charged with offences against ss 7 (1)(b) and s 9 (2) of the *Trade Descriptions Ordinance* (Cap 362). He challenged these provisions on the ground that they, in combination with the defences provided for in ss 26 (3) and (4) of the *Ordinance*, were contrary to the presumption of innocence guaranteed by article 11 (1) of the *Bill of Rights*. The court rejected the challenge.

Section 7 (1)(b) provides:

"Subject to the provisions of this Ordinance, any person who has in his possession for sale or for any purpose of trade or manufacture any goods to which a false trade description is applied, commits an offence."

Section 9 (2) provides:

"Subject to the provisions of this Ordinance, any person who sells or exposes or has in his possession for sale or for any purpose of trade or

manufacture, any goods to which any forged trade mark is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, commits an offence."

Section 26 (1) provides that:

"In any proceedings for an offence under this Ordinance it shall, subject to subsection (2), be a defence for the person charged to prove -

(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control."

Section 26 (3) provides that:

"In any proceedings for an offence under section 7(1)(a)(ii) or (b) it shall be a defence for the person charged to prove that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods."

Section 26 (4) provides that:

"In any proceedings for an offence under section 9(2) it shall be a defence for the person charged to prove that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that a forged trade mark had been applied to the goods or that a trade mark or mark so nearly resembling a trade mark as to be calculated to deceive had falsely been applied to the goods."

After referring to the decisions of the Court of Appeal in *R v Sin Yau-ming* [1992] 1 HKCLR 127 and *Attorney General v Lee Kwong-kut* [1992] 2 HKCLR 76 for their formulation of the general approach to interpreting the *Bill of Rights* and the scope of the presumption of innocence, the Magistrate then examined the provisions of the Ordinance in the light of the analysis of the Supreme Court of Canada in *R v Wholesale Travel Group Inc* (1991) 84 DLR (4th) 161. He endorsed the four criteria enunciated by Iacobucci J in that case (which drew in turn on *R v Oakes*):

(1) the objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom;

(2) the means chosen to achieve the objective must be rationally connected to the objective and not arbitrary, unfair, or based on irrational considerations;

(3) the means chosen must impair the right or freedom in question as little as possible to accomplish the objective; and

(4) the means chosen must be such that their effects on the limitation on rights and freedoms are proportional to the objective.

Held (rejecting the challenge):

1. The objective of placing the burden of proving due diligence on the defendant was to ensure that all those who are guilty of such regulatory offences which concern Hong Kong as a major trading city be convicted of the offences and to avoid the loss of convictions merely because of evidentiary problems which arise because the relevant facts are particularly in the knowledge of the accused.

2. Imposing on the accused the burden of establishing due diligence on a balance of probabilities rather than requiring the Crown to prove the lack of due diligence beyond a reasonable doubt was without a doubt a rational and logical method of pursuing this objective.

3. To require the Crown to prove lack of due diligence beyond reasonable doubt would in practice make it virtually impossible for the Crown to prove public welfare offences such as the one in question and would effectively prevent governments from seeking to implement public policy through prosecution. It would also not provide effective inducement for those engaged in regulated activity to compel strictly with the regulatory scheme, including adopting proper procedures and record keeping and might even have a contrary effect.

4. Those who chose to participate in regulated activities must be taken to have accepted the consequential responsibilities and their penal enforcement. One of these consequences is that they should be held responsible for the harm that may result from their lack of due diligence.

R v Wholesale Travel Group Inc (1991) 84 DLR (4th) 161, applied.

Counsel: L Cross, for the Crown; K Egan, for the defendant.

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*, v 1 n 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*, v 1 n 3, p 26. This matter is still pending before the courts.

RIGHT TO CALL AND EXAMINE WITNESSES (ARTICLE 11 (2)(E))

Extradition -- Entitlement to cross-examine witness -- Habeas corpus -- Rearrest of person after release on habeas corpus

***Re Ng Hung-yiu and Government of the United States of America* (1992) HCt, MP No 2007 of 1992, 30 July 1992, Sears J**

In October 1985 the applicant allegedly met with persons who were planning to transport heroin to the United States. At that meeting a vial of heroin was allegedly passed from one person to another. In November 1985 the applicant travelled to the USA and allegedly arranged delivery of heroin to a person who later gave him a large sum of money. Upon leaving the USA, the applicant was intercepted by customs officials who found US$287,000 on him. Customs seized the money, it being an offence under US federal law to export a large sum of money without government consent. However, the applicant was not arrested and left the country. Based on this and other evidence, a New York grand jury indicted the applicant and other individuals for conspiracy to traffick in narcotics, as well as trafficking in and possession of narcotics. The indictment was filed in September 1990 and was amended by a superseding indictment filed in February 1991. The statute of limitations for these offences expired after the filing of the first indictment but before the filing of the superseding indictment.

The USA requested the extradition of the applicant from Hong Kong. He was initially detained but then released following a successful application for habeas corpus on the ground that the relevant procedures had not been followed and that the warrant for his arrest in the USA had not been duly authenticated.

Three days before the decision of the judge, the USA made a further request for the extradition of the applicant on four charges. He was rearrested some weeks later and, following an extradition hearing before a magistrate, committed to await his surrender. The applicant thereupon applied to the High Court once again for a writ of habeas corpus.

Held (refusing the application for habeas corpus):

1. Mere presence at a meeting of persons engaged in an ongoing conspiracy is insufficient to establish a prima facie case of conspiracy in the absence of overt acts or evidence that the applicant was aware of the passing of heroin at the meeting. The magistrate was wrong to commit on this charge and the applicant could not be surrendered to the USA to stand trial on it. However, a prima facie case had been established on each of the other three charges.

2. On the evidence before the court the original indictment had been filed before the limitation period for prosecuting these crimes had expired and the filing of the superseding indictment which was in all relevant respects the same did not cause the original indictment to be postdated. Accordingly, extradition of the applicant was not barred on the ground that prosecution of the offences for which extradition was requested was time-barred under the law of the USA.

3. A magistrate did not have the power to order the attendance of an overseas witness to give evidence in extradition proceedings, notwithstanding the requirement that the conduct of extradition proceedings should be conducted as near as may be in accordance with procedures followed in committal proceedings.

4. A person who has been released following an extradition hearing may not be rearrested pursuant to a second extradition request for the same offences if at the earlier hearing there had been a consideration of the merits of the case and it had been found that no prima facie case had been made out. However, in the present case the earlier habeas corpus proceedings had been concerned with an alleged failure to follow the required procedures and not with the existence of a prima facie case. Accordingly, the rearrest of the applicant was not barred by s 5 of the *Habeas Corpus Act 1679* (UK) (which formed part of Hong Kong law).

5. An extradition hearing did not involve the determination of a criminal charge within the meaning of article 11 (2) of the *Bill of Rights* and therefore the right to call and cross-examine witnesses guaranteed by article 11 (2)(e) of the *Bill of Rights* did not apply in extradition proceedings.

6. Section 2 (3) of the *Bill of Rights Ordinance* provides that the *Ordinance* repeals only "legislation that can be amended by an Ordinance". Accordingly, even if they were inconsistent with the guarantees of the *Bill of Rights*, the *Bill of Rights Ordinance* cannot repeal Imperial enactments such as the *Extradition Act 1989* (UK) or the Order-in-Council extending the UK/USA treaty to Hong Kong.

***Re Suthipong Smittacharatch and United States* (1992) HCt, MP No 1119 of 1992, 12 October 1992, Penlington JA (sitting as an additional judge of the High Court)**

This case involved an application for judicial review of the decision of a magistrate in extradition proceedings. The USA had requested the extradition of the applicant for various drug offences. The evidence produced to the magistrate conducting the extradition hearing included affidavits sworn in the USA by a number of witnesses. In the course of the proceedings the applicant sought an order that the deponents be brought before the court to give oral evidence and to be cross-examined. In the alternative an order was sought that the proceedings be stayed pending an application that the witnesses be examined further upon commission, pursuant to s 77E of the *Evidence Ordinance* (Cap 8).

The magistrate refused these applications and the applicant applied for judicial review of the decision. The applicant argued that in appropriate cases the making of an order that deponents be brought before the court to be cross-examined as to their depositions. The deponents in this case were accomplices, it was argued, and therefore it was appropriate to exercise the power in this case.

The applicant argued that the entitlement to cross-examine deponents was conferred by Schdeule 1 to the *Extradition Act 1989* (UK), which provides that when a fugitive is brought before a magistrate, the magistrate:

> "shall hear the case in the same manner and have the same jurisdiction and powers as may be if the prisoner were brought before him charged with an indictable offence committed in England or Wales."

The applicant also relied on article 10 of the *Bill of Rights*, which provides that all persons shall be equal before the courts and tribunals. He argued that a person who is sought to be extradited should be treated in the same way as a person who is to be committed for trial. He also argued that the differential treatment of the two classes of person was discrimination based on "(an)other status" within the meaning of article 22 of the *Bill of Rights*. The applicant further relied on the right to cross-examine witnesses guaranteed by article 11 (2)(e) of the *Bill of Rights*, contending that the applicant was a person "charged with a criminal offence" and that the extradition proceedings were part of the "determination of a criminal charge".

Finally, the applicant argued that if any provision of the *Extradition Act 1989* was inconsistent with the *Bill of Rights* it was repealed to the extent of the inconsistency by virtue of the powers conferred on the Hong Kong Legislature by the *Hong Kong Act 1985* (UK) and the *Hong Kong (Legislative Powers) Order 1989*, which provides that the Legislature may, to the extent required to give effect to an international agreement which applies to Hong Kong and for any connected purpose, repeal or amend any enactment so far as it is part of the law of Hong Kong.

The Crown argued that the phrase "as near as may be" meant that extradition proceedigns were not to be regarded in the same light as committal proceedings and relied on a line of Canadian authorities which rejected a right to cross-examine in extradition proceedings. The Crown also argued that extradition proceedings did not involve the "determination of a criminal charge" and that article 22 had no application since any difference between the treatment of a fugitive and a person facing committal proceedings was not by reference to a "status".

Held (dismissing the application for judicial review):

1. As far as extradition proceedings were concerned, articles 10 and 11 of the *Bill of Rights* had not made any change to the existing law or conferred any additional rights in addition to those existing before its passage.

2. Extradition proceedings did not involve the "determination of any criminal charge" and therefore the guarantee of article 11 (2)(e) was not applicable.

3. Article 22 of the *Bill of Rights* did not assist the applicant. The words "as near as may be" in clause 6 (1) of the Schedule make it clear that extradition is not the same as committal; "a person whose extradition is sought does not have the same status as regards the right to cross-examine witnesses as one who is to be committed for trial except in respect of witnesses who are in Hong Kong and who give evidence at the hearing."

4. In view of the fact that no application had been made by the applicant pursuant to s 77E of the *Evidence Ordinance* for evidence to be taken on commission in the United States (despite ample opportunity for doing so), it was not appropriate to grant a stay pending the making of such an application.

Counsel: M Darwyne (instructed by Haldane, Midgley & Booth), for the applicant; A Bruce and M Ip, for the respondent.

RIGHT NOT TO INCRIMINATE ONESELF OR TO CONFESS GUILT (ARTICLE 11 (2)(G), BOR)

Companies Ordinance (Cap 32), s 145

***Re Tse Chu Fai Ronald and Re an Investigation under Section 143 (1)(c) of the Companies Ordinance* (1992) HCt, MP 3646 of 1992, 20 November 1992, Jones J; (1992) CA, Civ App No 189 of 1992, 26 November 1992, Cons VP, Kempster JA and Litton JA**

Pursuant to section 143 (1)(c) of the *Companies Ordinance*, the Financial Secretary appointed Nicholas Allen (the respondent) to investigate and to report upon the affairs of the Allied Group and three affiliate companies. By a letter dated 23 October 1992 the

respondent sought to examine the applicant, who was a director of the Allied Group and various subsidiaries in the group, on 12 November 1992. The date of examination was subsequently postponed to 7 December 1992. On 11 November 1992 the applicant applied for leave for judicial review. Leave was granted on the same day and the hearing was fixed for the following two days. At the hearing the applicant sought relief which included an order of prohibition prohibiting the respondent from further involving the applicant in any part of the investigation in connection with the Allied Group and other companies referred thereto, and a declaration that sections 145 (1), (2), (3) and (3A) of the *Companies Ordinance* were repealed by the *Hong Kong Bill of Rights Ordinance* since they were inconsistent with articles 11 (2)(g), 14, 15 and 16 of the *Bill of Rights*.

Under section 145 of the *Companies Ordinance*, all officers and agents of the company under investigation are under a duty to produce all books and documents relating to the company, to attend before the investigator for examination, and otherwise to give all assistance in connection with the investigation. If an officer or agent refuses to produce any books or documents required, or refuses to answer any question put to him by the investigator, the investigator may certify him for contempt before the High Court, and the Court, after hearing evidence, may punish him for contempt by imposing custodial sentence or fine. Section 145 (3A) further provides that the right against self-incrimination is not an excuse to refuse to answer the question of the investigator, but where the person under investigation claims his right against self-incrimination before answering, both the question and the answer shall not be admissible as evidence against him in criminal proceedings.

Before Jones J

Held (dismissing the application):

1. The mere possibility of exposure to the risk of a criminal conviction or the imposition of a penalty is not sufficient to trigger the protection of article 11 (2)(g), which is only applicable when a person is charged with a criminal offence. Article 11 (2)(g) is not applicable in the present case, as the investigation by the inspector respondent is for the purpose of gathering evidence and not concerned with the determination of a criminal charge.

2. Article 14 relates to an unlawful interference with the applicant's privacy in his personal and private affairs and does not extend to his affairs in his capacity as a director. Nor is there any evidence that the respondent will act capriciously in the exercise of his statutory duties. Accordingly, article 14 has no relevance to an investigation by an investigator, who cannot be described as acting arbitrarily if he acted in accordance with his terms of reference.

3. There is no basis for any objection under articles 15 or 16, as the investigator is required to obtain facts and is not concerned with the applicant's thought or opinion.

Counsel: D Fung QC and P Dykes (instructed by Ada Chan & Co) for the applicant; A Huggins QC and R Coleman (instructed by Herbert Smith), for the respondent.

Before the Court of Appeal

On appeal, the applicant sought leave to amend the notice of application for judicial review to raise article 5 of the *Bill of Rights*. The application was refused on the ground that its effect was to ask the Court of Appeal to exercise original jurisdiction to grant leave

for judicial review, which the Court of Appeal has no such jurisdiction. Litton JA observed that section 6 of the *Bill of Rights Ordinance* only enabled the court to grant such remedy or relief as it has power to grant; it did not confer any jurisdiction on the court additional to that it already possessed. The appeal was then withdrawn.

Counsel: N Sarony QC, L Remedios and J Chan (instructed by Ada Chan & Co), for the applicant; M Thomas QC and R Coleman (instructed by Herbert Smith), for the respondent.

Editorial comment

While justice delayed is justice denied, justice rendered too hastily may be no less a denial of justice. The speed with which this case proceeded is quite out of the ordinary: the hearing for judicial review took place on the very day after leave had been granted. While there was some urgency in the matter, to give counsel for the applicant less than a day to prepare for a case which raised complicated and novel issues of the *Bill of Rights* is troubling. It may be noted that in the leading Canadian case where similar issues under the Canadian Charter were argued the members of Supreme Court of Canada took more than 100 pages to explain their differing reasons for the court's divided decision (*Thomson Newspapers v Director of Investigation and Research* (1990) 67 DLR (4th) 161).

Article 11 (2)(b) of the *Bill of Rights* provides that in the determination of every criminal charge everyone shall be entitled to have adequate time and facilities for the preparation of his defence. The same principle applies in civil cases. The very notion of a fair trial under article 10 of the *Bill of Rights* demands that any party to a civil proceedings must be provided adequate time and facilities to prepare his or her case. See Human Rights Committee *General comment No 13 (21)*.

The pace at which the appeal was brought on also gives rise to concern. Judgment at first instance was given on 20 November 1992 (Friday), and appeal was fixed for the following Thursday (26 November 1992), notwithstanding the fact that neither the leading nor the junior counsel for the applicant was available on that day (neither was the leading counsel for the respondent). As a result, the applicant had to instruct a new team of counsel for his appeal at extremely short notice. An application for adjournment was made by the applicant on 23 November 1992 (the following Monday) on the ground that there was insufficient time for counsel to prepare properly for the case; this application was refused by the Court of Appeal. While the Court's desire to respond to the urgency of cases such as these is laudable, it appears that in this case this zeal may have redounded to the detriment of the litigants.

The decision of the Court of Appeal in rejecting the application of the applicant for leave to amend the notice of appeal to add a significant new groudn not canvassed before the judge on the leave application or the substantive hearing is no doubt technically correct. Litton JA's comments in this context once again underline the limited scope of section 6 of the *Bill of Rights Ordinance*, which, in his view, does not confer any additional jurisdiction on the court which it does not already possess. The appeal raised an important issue of the scope of the right against self-incrimination as applied in regulatory investigations and seems likely to be back before the Court of Appeal shortly. It may not been seen as desirable for the Court of Appeal to possess (or exercise) a power to permit amendments in a manner which undermines the rationale of requiring a judicial review applicant to seek leave of a judge before commencing judicial review proceedings. It may be noted, however, that the Court enjoys a wide-ranging power in other appeals to permit amendments (see O 59, r 7 and the White Book commentary). In any event, the comments of Litton JA underline the limited nature of section 6. We have previously advocated the conferral on all courts of a power to grant such remedies as are just and appropriate in the circumstances and would reiterate that proposal.

RIGHT TO COMPENSATION WHERE A PERSON HAS BEEN WRONGFULLY CONVICTED AND IMPRISONED (ARTICLE 11 (5), BOR; ARTICLE 14 (6), ICCPR)

***W.J.H. v Netherlands*, Human Rights Committee, Communication No. 408/1990, decision on admissibility of 22 July 1992**

In this case W.J.H. had been arrested on 8 December 1983 and kept in pre-trial detention until 8 February 1984. He was convicted of various offences on 24 December 1985. That conviction was quashed by the appeal court and he was subseqeuntly acquitted. W.J.H. then sought compensation for pre-trial detention and for the costs of his legal representation, a request rejected by the courts. W.J.H. complained that his right to be presumed innocent under article 14 (2) of the ICCPR and his right to compensation under article 14 (6) of the ICCPR had been violated.

The Human Rights Committee rejected the claim based on article 14 (2), noting delphically that this article "applies only to criminal proceedings and not to proceedings for compensation" (para 6.2). It also commented in relation to article 14 (6) (para 6.3):

> "6.3 With regard to the author's claim for compensation under article 14, paragraph 6, of the Covenant, the Committee observes that the conditions for the application of this article are:
>
> (a) A final conviction for a criminal offence;
>
> (b) Suffering of punishment as a consequence of such conviction; and
>
> (c) A subsequent reversal or pardon on the ground of a new or newly discovered fact showing conclusively that there has been a miscarriage of justice."

As the final decision in this case was an acquittal and no punishment was suffered as a result of W.J.H.'s earlier conviction (pre-trial detention was not "punishment"), the Committee held that the complaint was outside the scope of article 14 (6).

RIGHT TO PRIVACY (ARTICLE 14, BOR; ARTICLE 17, ICCPR)

***Companies Ordinance* (Cap 32), s 145**

***Re Tse Chu Fai Ronald* (1992) HCt, MP 3646 of 1992, 20 November 1992, Jones J; (1992) CA, Civ App No 189 of 1992, 26 November 1992, Cons VP, Kempster JA and Litton JA**

On the article 14 issue considered by Jones J, see page 27 above.

Prevention of Bribery Ordinance (Cap 201), ss 17A and 17B

Ngai Man v Commissioner of ICAC, Mag App No 737 of 1992

This case involved a challenge to sections 17A and 17B of the *Prevention of Bribery Ordinance* (Cap 201) on the ground that they violated articles 8 and 14 of the *Bill of Rights*.

On 8 October 1992 the case was referred by Gall J to the Court of Appeal. A hearing was scheduled for 10 November 1992. However, the *Bill of Rights* point was not pursued on appeal.

Counsel: Benjamin Chain (instructed by King & Co.), for the respondent; Patrick Li, for the Commissioner.

Securities and Futures Commission Ordinance (Cap 24), section 33

Re Lee Kwok-hung and Securities and Futures Commission, MP No 3039 of 1992

This case involves a challenge to various subsections of section 33 of the *Securities and Futures Commission Ordinance* (Cap 24), on the ground that they violate articles 14, 15 and 16 of the *Bill of Rights*.

The hearing is scheduled for 14 and 15 December 1992 before Jones J.

Violation of right to privacy -- Admission of evidence -- Discretion to exclude

R v Alagon (1992) Mag, TM No 3432 of 1992, 20 July 1992, Mr D I Thomas

In this case the court held that a search of the belongings of a foreign domestic helper by the person's employer which had been directed or authorised by the police was the act of a public authority. Since there was no evidence that the police had any suspicion to justify the search, the search was unlawful and arbitrary, and therefore violated article 14 of the *Bill of Rights* since it was an arbitrary search. The Magistrate excluded the evidence which resulted from the search (a ring belonging to the employer allegedly stolen by the helper), as a result of which there was no case to answer. The Magistrate noted the accepted position as laid down in *R v Sang* [1980] AC 402, but then said:

> "However, that case was decided before the enactment of the [*Bill of Rights Ordinance*]. The landmark decision of *SIN Yau-ming* [1992] 1 HKCLR 127 recognises that the BoRO should be given such generous interpretation as befits an enactment of a constitutional character. I held that, so far as the case of *Sang* (supra), the status of the decision, insofar as it conflicted with the BoRO had changed on and after 8th June 1991."

R v Kwok Wai-chun (1992) Mag, FL No 4305 of 1992

The defendant was charged with the offence of using an identity card relating to another person and remaining in Hong Kong without the authority of the Director of Immigration. The only witness called by the prosecution was a police officer who had entered the defendant's hut (without seeking her consent), then revealed his identity as a

police officer and requested her to produce proof of her identity. The defendant produced an identity card and nodded when the police officer asked if it was hers. Subsequently, she admitted that the identity card was not hers and also that she had come to Hong Kong illegally.

The defendant argued that the entry onto the premises had been unlawful (since it amounted to a trespass) and that the evidence of the production of the identity card and of the failure of the defendant to produce evidence of her own identity should be excluded, as it had been obtained as a result of the illegal entry. The defendant also argued that the police officer's entry was a violation of article 14 of the *Bill of Rights* and that the court had power under section 6 of the *Bill of Rights Ordinance* to exclude the evidence.

Held (rejecting the application to exclude the evidence):

1. The law as laid down in *R v Sang* [1980] AC 402 was that the court possessed no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means, save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence. Since the evidence in question had been obtained in the commission of the offences, it could not be excluded.

2. The power of the court under s 6 of the *Bill of Rights Ordinance* to exclude admissible evidence was no broader than the discretion to exclude such evidence under the general law as elaborated in *R v Sang*. Under *Sang* that discretion is limited to preventing the unfair use of evidence at trial and does not extend to preventing a prosecution being brought because the court disapproves of the way in which legally admissible evidence has been obtained.

3. The use of the evidence of what took place in the defendant's home after the police officer's unlawful entry was unfair in the sense that it converted her from one who was liable to deportation without prosecution to one who would be prosecuted for two offences each carrying heavy deterrent sentences.

4. However, the unfairness related to the decision to prosecute and the admission of the evidence did not endanger any of the principles of a fair trial. Therefore, an order excluding that evidence would be beyond the limits of the court's discretion, as defined in *Sang*, to exclude admissible evidence.

Editorial comment

This ruling does not appear to approach the construction of section 6 and article 14 with the "generous and purposive" approach to interpretation approved by the Court of Appeal in a number of cases and deriving ultimately from the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319. However, it also highlights the ambiguities and unsatisfactory nature of section 6.

The court in *Kwok Kwai-chun* accepts the argument that the power to grant relief under section 6 is no greater than the court's powers existing at the time of coming into force of the *Bill of Rights Ordinance* and that, since that power does not extend to the exclusion of evidence of the type concerned in this case, section 6 does not therefore confer power on a court to exclude it. There is no real argumentation adduced to support this conclusion which is a rather narrow reading of section 6 and highlights the fact that the remedial powers available under the *Bill of Rights Ordinance* depend very much on the level of generality at which one conceives of the present power of the courts. It might equally well have been argued that the courts have a discretion to exclude evidence if they

consider the public interest so permits (while accepting that prior to the *Bill of Rights* they have restricted this along the lines laid down in *Sang*).

If one took as one's starting point the injunction in section 2 (3) of the *Ordinance* that in interpreting the *Bill of Rights Ordinance* regard is to be had to the fact that its purpose is to incorporate provisions of the ICCPR as applied to Hong Kong, one might reach a very different conclusion. Article 2 (3) of the ICCPR provides that States parties undertake to ensure that any person whose rights are violated "shall have an effective remedy". Section 6 of the *Bill of Rights Ordinance* is plainly one way of carrying out this obligation and should therefore be construed generously (so far as its language permits) to ensure that there is a remedy provided for violations.

One might also point to the special constitutional nature of the *Bill of Rights* (recognised by the Court of Appeal in *Sin Yau-ming*), which might be relied on to grant greater protection against the use of evidence obtained by violations of its provisions than by evidence obtained improperly or in violation of non-constitutional legislation. In any event the upshot would be that *Sang* does not define the outer boundaries of the power of the court under section 6 of the *Bill of Rights Ordinance*. (This is the conclusion reached by the court in *R v Alagon*, but there is little elaboration of the reasoning underlying this conclusion.)

To accept that the courts have a discretion to exclude evidence obtained in violation of the *Bill of Rights* does not mean that such evidence will necessarily have to be excluded in all cases, but that where a violation has been intentional or egregious or would bring the administration of justice into disrepute (to use the Canadian Charter standard) it is appropriate to exclude it. In this context the experience of the New Zealand and Canadian courts is of relevance. The New Zealand Court of Appeal, for example, has recently held under the *New Zealand Bill of Rights Act 1990*:[3]

> "The New Zealand rights affirmed in general terms by the 1990 statute cannot be hard-and-fast in their operation. . . .[T]here may be circumstances in which, despite some degree of transgression of the rights, it is fair and right to admit a confession in evidence. For example there might be circumstances falling within or analogous to the circumstances analogous to the concept embodied in section 5 -- "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Or the breach of the Act might be trivial or inconsequential. The Bill of Rights Act has to be applied in our society in a realistic way. Prima facie, however, a violation of rights should result in the ruling out of evidence obtained thereby. The prosecution should bear the onus of satisfying the Court that there is good reason for admitting the evidence despite the violation."

It is also unclear whether the decision of the Privy Council in *Lam Chi-ming* [1991] 2 WLR 1083 broadens the scope of the discretion as laid down in *Sang*. See also what may be an expansion of the common law notion of unfairness in cases under the *Police and Criminal Evidence Act 1984* (UK), section 78 ([1992] Crim LR 732).[4]

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[3] *R v Accused* (1991) 7 CRNZ 407, 417 (CA), per Cooke P.

[4] We are grateful to Janice Brabyn for this suggestion and reference.

RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION (ARTICLE 15, BOR; ARTICLE 18, ICCPR)

***J.v.K. and C.M.G.v.K.-S. v Netherlands*, Human Rights Committee, Communication No. 483/1991, decision on admissibility of 23 July 1992**

In this case the Human Rights Committee rejected a claim that article 18 of the Covenant entitled conscientious objectors to nuclear weapons to refuse to pay that proportion of their assessed taxes as was used for military expenditures, including nuclear related activities. The Committee stated (at para. 4.2 of its views):

> "the Committee notes that the authors seek to apply the idea of conscientious objection to the disposition by the State of the taxes it collects from persons under its jurisdiction. The Committee has already had the opportunity to observe that, although article 18 of the Covenant certainly protects the right to manifest one's conscience by opposing military activities and expenditures, the refusal to pay taxes on the grounds of conscientious objection clearly falls outside the scope of the protection of this article." [Referring to *Prior v Canada*, Communication No. 446/191, 7 November 1991].

RIGHT TO FREEDOM OF ASSOCIATION (ARTICLE 18, BOR; ARTICLE 22, ICCPR)

***Hong Kong Union of Post Office Employees and others v United Kingdom (Hong Kong)*, Case No 1553, ILO Governing Body Committee on Freedom of Association, Reports of February/March 1991 and March 1992, ILO Doc GB.249/8/14 (1991) and ILO Doc GB.252/9/13 (1992)**

In a case brought before the Committee on Freedom of Association of the Governing Body of the International Labour Organisation (ILO) in late 1990, the Hong Kong government was found to have violated fundamental principles of freedom of association of workers (embodied in the ILO Constitution) and the provisions of the Convention on Freedom of Association and Protection of the Right to Organise 1948 (ILO No 87), which applies to Hong Kong. The ILO complaints procedures are one of the few international procedures available to people in Hong Kong who wish to complain about violations of their human rights.

The case is of relevance to the *Bill of Rights*, since the findings of the ILO supervisory bodies on the similarly worded provisions of the ILO Constitution and treaties are important sources of international human rights law, and particularly because the *Bill of Rights* (article 18 (3)) and the ICCPR (article 22 (3)) refer specifically to ILO No 87 and maintain it as a minimum threshold of protection.

The Convention guarantees the right of freedom of association of workers, in particular their right to establish their own organisations, to administer their affairs and to organise their own activities and programs. In particular, article 3 of the Convention provides:

> "1. Workers' and employers' organizations shall have the right to draw up their constitution and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

The case arose out of a proposed sit-in outside the General Post Office by postal workers, with a view to pressing a number of industrial demands. After an unsuccessful meeting between the unions and the Postmaster General, the latter wrote a letter in which he warned that the actions proposed "may invite imposition of sanctions provided for under Civil Service Regulations and Article XVI of the Letters Patent." Article XVI of the Letters Patent empowers the Governor to dismiss civil servants "upon sufficient cause to him appearing" or to take disciplinary action against them.

The Committee on Freedom of Association held that the warning violated the unions' freedom of association and article 3 of ILO 87. It stated:

> "461. . . .[T]he Committee considers that the contents of the Postmaster General's letter of 12 October 1990 represented a threat against the workers who had expresed their intention to hold a sit-in in order to bring pressure on the employer in their negotiations. Even though no administrative or disciplinary measures appear to have been taken under the Civil Service Regulations or Article XVI of the Letters Patent, the mere fact that such threat existed could be a powerful deterrent for the workers concerned, particularly in view of the broad and discretionary language of Aricle XVI which provides for severe penalties: 'The Governor may . . . *dismiss or suspend* from the exercise of his office *any person* holding *any public office* within the Colony or . . . may take *such other disciplinary action as may seem to him desirable*'(emphasis added). The Committee considers that the use made of the Letters Patent by the Government is contrary to the principles of freedom of association.
>
> 462. The Committee and the other ILO supervisory bodies have always recognised that the right to strike in its different forms (including the sit-in), as long as it is exercised peacefully, is one of the essential means through which workers and their organisations may promote and defend their economic and social interests [*Digest of decisions and principles of the Freedom of Association Committee*, 3rd edition 1985, paras. 362, 363 and 367]. It follows that restrictions or even prohibitions of the right to strike can only be justified in a limited number of situations: civil service -- civil servants being those who act as agents of the public authorities -- or services whose interruption would endanger the life, personal safety or health of the whole or part of the population [*Digest*, loc. cit. para. 387], provided however those workers have access to adequate procedures, such as conciliation and arbitration, where the parties concerned can participate at all stages and in which the awards are binding on both parties and are fully and promptly implemented, in order fully to safeguard the interests of the workers thus deprived of an essential means of defending their occupational interests.
>
> [The Committee rejected the government's argument that the postal service was an "essential service" in which strikes could be prohibited and concluded:]
>
> 454. The Committe therefore considers that by threatening retaliatory measures against workers who, at that time, had merely expressed their intention to hold a sit-in in pursuance of their legitimate economic and social interests, the employer interfered in the workers' basic right to organise their administration and activities and to formulate their programmes, contrary to Article 3 of Convention No. 87. The Committee calls on the

> Government, in the future, to refrain from making such threats against workers and their organisations entitled to strike."

The Committee also considered a claim that the govenrment was in breach of its obligations under another convention to ensure the availability of appropriate collective bargaining decisions, but concluded that it did not have all the necessary information on that aspect of the case.

In its report of March 1992 (ILO Doc GB.252/9/13, paras 44-48) the Committee reiterated its conclusions in the face of arguments by the government that the letter of 12 October 1990 was not a threat but a "sincere plea" to drop industrial action and that the postal services were an "essential service". However, the Committee consdiered that, since the dispute had been settled satisfactorily, no further action was called for.

RIGHT TO PARTICIPATE IN THE CONDUCT OF PUBLIC AFFAIRS (ARTICLE 21, BOR; ARTICLE 25, ICCPR)

***Pavlou v Chief Returning Officer, Mayor of Nicosia* (1987) 86 ILR 109 (Supreme Court of Cyprus)**

In this case a challenge was made to a statute which prohibited persons occupying paid posts as civil servants or employees of public corporations from taking up the elected office of municipal councillor if they continued to hold their paid public office or employment. Among the grounds on which the challenge was based was the claim that these provisions violated the right contained in article 25 (b) of the ICCPR:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors; . . . .

There was some disagreement among members of the court whether the ICCPR formed part of the domestic law of Cyprus and whether it was self-executing. However, all the members of the court held that the restrictions on the right to be elected were not "unreasonable" within the meaning of article 25 of the Covenant, nor did they violate the equality guarantees of the Constitution.

OTHER CASES RAISING ISSUES OF INTERNATIONAL HUMAN RIGHTS

STATELESSNESS

***Re Pan Ze Yang and Director of Immigration* (1992) HCt, MP Nos 816 and 817 of 1992, 11 September 1992**

These cases involved 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 applicants argued

that it was wrong for the Director of Immigration to require them to leave Hong Kong, since they were stateless person within the meaning of the Convention on the Status of Stateless Persons (360 UNTS 117), which has been extended to Hong Kong by the United Kingdom. Article 31 of the Convention provides:

> "1. The Contracting State shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a stateless person shall only be in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they deem necessary."

Mayo J rejected the application essentially on evidentiary grounds, holding that the applicants had a heavy burden to discharge if they were to establish they were stateless and that this [loss of PRC nationality] had to be proved in accordance with the law of the PRC. In his view, the evidence before the court failed to establish that the applicants were stateless persons within the meaning of the Convention.

Interestingly, the judge appears to be of the view that, had the applicants established that they were stateless, the Director of Immigration would have acted unreasonably in a *Wednesbury* sense if he had ordered them to leave Hong Kong in circumstances which would involve a breach of the obligations imposed by the treaty.

The decision of Mayo J is being appealed against.

NEW AND PENDING LEGISLATION

***Crimes (Amendment) (No 3) Bill 1992* (Legal Supplement No 3 to the Hong Kong Government Gazette, 30 October 1992, C1193)**

This Bill abolishes the death penalty in relation to those offences for which it may still be imposed.

***Inland Revenue (Amendment) (No 5) Bill*, s 30 (Legal Supplement No 3 to the Hong Kong Government Gazette, 13 November 1992, C1311)**

This Bill proposes the replacement of the existing s 77 of the *Inland Revenue Ordinance* (Cap 112) with a new section. The existing section 77 provides that the

The main provision of the proposed new section is subclause (1):

> **"77. Recovery of tax from persons leaving Hong Kong**
>
> (1) Where --

(a) a person has not paid all tax assessed upon him; and
(b) the Commissioner believes on reasonable grounds that it is in the public interest to do so for the purpose of ensuring that that person does not depart from Hong Kong without first --

(i) paying the tax; or
(ii) furnishing security to the satisfaction of the Commissioner for payment of the tax,

the Commissioner may issue a direction ('departure prevention direction') to the Director of Immigration and the Commissioner of Police directing them to prevent the person from leaving Hong Kong and such a direction comes into force immediately and continues in force whether or not a copy of it is served in accordance with subsection (3)."

Subclause (2) provides that the order remains in force until it is revoked by the Commissioner or set aside by the High Court on appeal. Subclause (3) requires the Commissioner to serve a copy of the order on the person affected as soon as practicable after making it. Subclause (4) empowers immigration officers and police officers to take appropriate measures (including the use of force) to prevent a person whom the officer believes on resaonable grounds is the subject of an existing order and who is about to leave Hong Kong from doing so. Subclause (5) makes it an offence for a person who has been served with an order preventing his or her departure; subclause (6) provides that the offence bears a maximum penalty of $20,000 and 6 months' imprisonment.

Subclause (7) requires the Commissioner to revoke an order on the application of the person affected if all tax assessed has been paid or security satisfactory to the Commissioner provided and empowers the Commissioner to do so of his own initiative in such circumnstances. Subclause (8) gives the Commissioner a power to revoke the order in certain circumstances. Subclauses (9) and (10) deal with the procedure for responding to objections agianst departure orders.

Subclause (11) provides that a person aggrieved by an order of the Commissioner or by his refusal to revoke an order may appeal to the High Court, which is given powers to grant interim relief and to revoke or vary the order. Subclauses (12) to (14) provide for procedural, transitional and definitional matters.

Editorial comment

The proposed new section represents a disturbing development, not only in itself but also to the extent that it represents the attitude of the government to the need to adapt policy-making and legislative proposals to the letter and spirit of the *Bill of Rights*.

The existing section 77 has been the subject of criticism. Although it requires the District Court to make an order preventing departure from Hong Kong, critics feel that the District Court is given little power to consider the merits of the application, but acts rather as a "rubber stamp". It may be noted that, since the commencement of the *Bill of Rights*, the Commissioner has not been granted new orders by the Court and has entered into settlements with persons subject to existing orders in a number of cases in which those persons intimated an intention to challenge the order as a violation of their right to liberty of movement guaranteed by article 8 of the *Bill of Rights* and article 12 of the ICCPR (the latter being the relevant standard for testing the new legislation). In our view, although the proposed restriction is probably "provided by law" within the meaning of the ICCPR and pursues a legitimate goal, it fails to satisfy the standard of proportionality and to provide adequate protection against abuse.

Preventing a person from leaving Hong Kong represents a serious infringement of personal liberty guaranteed by the *Bill of Rights*. Both the substantive grounds on which such a step may be taken and the procedure for doing so under the new Bill give rise to serious concern. Substantively, there is no requirement that there are grounds for believing that the person concerned is departing Hong Kong permanently or in an attempt to evade tax (as opposed to leaving on a business trip or holiday). If the taxpayer happens to have a bona fide dispute with the revenue authorities which has dragged on over time (a frequent occurrence in Hong Kong in view of the inadequate resources which appear to be provided to the Department), (s)he would still fall within the scope of the power.

Procedurally, we consider that such a serious infringement of personal liberty should be permitted only where there is prior judicial scrutiny. The transfer of the power from the judiciary to an officer of the executive is, in our view, a regressive development from the perspective of the *Bill of Rights*. The possibility of appeal to the High Court (rather than the District Court, which previously had jurisdiction in these matters) is not an adequate safeguard against abuse of the power, given the legal costs likely to be incurred and the fact that the person affected in unlikely to be eligible for legal aid. The proposed power is also likely to result in considerable delays and hardship for the persons affected, especially when the prohibition order takes effect immediately it is made and remains in force until it is revoked. The Department has worked with the existing section 77 for many years; requiring the Commissioner to go before a court, even if he has to demonstrate a stronger case than previously, seems unlikely to add significantly to the administrative burden of the Commissioner. If it does, then that is a price which is arguably mandated by the *Bill of Rights*.

It is well-established as a matter of international law that the rights conferred by the ICCPR are to be construed generously and the permissible restrictions narrowly -- not the other way around. In our view, the appropriate course for the government to take, if it feels it needs this power, is to provide for prior judicial scrutiny of any order preventing a person from leaving Hong Kong and to reformulate the factual conditions precedent to ensure closer scrutiny of the justifiability for any such decision. In *Tam Hing-yee v Wu Tqi-wai* [1992] 1 HKLR 185 the Court of Appeal, when upholding the power to issue stop orders against judgment debtors, placed considerable emphasis on the safeguards incorporated in the relevant legislation, including prior judicial approval and a limited period of validity of the order (three months, subject to extension by the court).

SELECTED INTERNATIONAL CASES AND CASES FROM OTHER JURISDICTIONS

EUROPEAN COURT OF HUMAN RIGHTS

Right to a fair hearing within a reasonable time -- Civil rights and obligations -- Action brought by HIV sufferer

***X v France*, European Court of Human Rights, Judgment of 23 March 1992, Series A, No 234-C, (1992) 14 EHRR 483, 13 HRLJ 269**

This case involved an action commenced in May 1990 by a haemophiliac, who was diagnosed HIV positive, against the Minister for Health, alleging that the Minister had negligently delayed the implementation of rules about the supply of blood products. (The applicant had lodged a claim in 1989 with the Minister, but that claim had been rejected in March 1990.) The applicant developed AIDS in the course of 1990. His claim was rejected

by the administrative court in December 1991 and he appealed in January 1992. The applicant died in February 1992.

The court held that the claim for compensation involved a dispute over civil rights and obligations within the meaning of article 6 (1) of the Convention and that the applicant had a right to have that claim determined within a reasonable time. The Court held that the applicant's right to a determination of his claim within a reasonable time had been violated (the period to be taken into account commenced in 1989), in view of the fact that what was at stake in the proceedings was of crucial importance for the applicant in view of his disease. In such a case, the court held, exceptional diligence was called for by the authorities.

Civil rights and obligations -- Taxation dispute -- Right to hearing within a reasonable time

***Editions Périscope v France*, European Court of Human Rights, Judgment of 26 March 1992, Series A, No 234-B, (1992) 14 EHRR 597**

In this case the court upheld a complaint by a company that its right to a trial within a reasonable time of a claim against the government for damages for the government's wrongful refusal to grant it certain tax exemptions and preferential postal rates. The court held that the dispute fell within the scope of article 6 (1) of the Convention (being a dispute over "civil rights and obligations" and "pecuniary" in nature), even though rights and obligations with respect to taxation were normally considered to be "administrative" rather than "civil" in nature under French law. The court held that the right to trial within a reasonable time had been violated.

Recognition as a person before the law - Transsexuals -- Right to respect for private life

***B v France*, European Court of Human Rights, Judgment of 25 March 1992, Series A, No 232-C, (1992) 13 HRLJ 358**

In this case the applicant, a person, who was born and registered at birth as a male, underwent a sex change operation after having lived as a female from an early age. In 1978 the applicant sought a declaration from the French courts that she was female and requested the rectification of her birth certificate to reflect this. The French courts refused to make such a declaration.

The court held that the failure to recognise the new sexual identity of the applicant after her sex change operation was a violation of the applicant's right to respect for her private life. In so doing, it distinguished (or, in the view of some, overruled) its earlier decisions going the other way in relation to the position under English law (*Rees v United Kingdom* (1986) 9 EHRR 56 and *Cossey v United Kingdom* (1990) 13 EHRR 622).

Freedom of expression -- Right to provide information about abortion services abroad even though abortion unlawful in country -- Whether restrictions on provision of information justifiable

***Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v Ireland*, European Court of Human Rights, Judgment of 29 October 1992, Series A, No 246, (1992) 13 HRLJ 378**

This case involved a challenge by the applicants to injunctions granted against the applicants by the Irish courts which prevented them from, among other things, providing women with information concerning abortion facilities abroad (for the Irish proceedings, see [1988] 593; 618; [1989] IR 734; 753). The applicants claimed that the restrictions on the right to make available information of this sort as part of their non-directive counselling activities infringed the guarantee of freedom of expression in article 10 of the European Convention and did not fall within one of the categories of permissible restrictions.

The court held that the injunctions interfered with the rights of the applicants to impart information (and also of two applicants, women of childbearing age to receive information), that the restriction was "provided by law" and pursued a legitimate aim, namely the protection of morals. (The court did not decide whether the unborn could be classified as "others" within the meaning of the phrase "protection of the rights of others", which is another of the permitted objectives that may be relied on under article 10 to justify restrictions on freedom of expression.)

The court held that the restriction was not a proportionate measure due the absolute and sweeping nature of the restriction, the non-directive nature of the counselling given to women by the two agencies, the availability of information from other sources in Ireland or by persons with contacts in Great Britain, the fact that the effect of the injunction was that the information was available in a manner less protective of women's health than would have been the case were the information available through counselling services. The court did not address the challenges based on the right to respect for private life (article 8) and the right to enjoy the rights guaranteed in the Convention without discrimination based on sex (article 14).

PRIVY COUNCIL

Mauritius -- Deprivation of property -- Whether right to vote a compnay share was "property" within the meaning of the constitutional guarantee

***Government of Mauritius v Union Flacq Estates Co Ltd* [1992] 1 WLR 903**

In this case the Privy Council considered whether legislation intended to prevent the holders of a minority interest in a company from exercising the power to control the management of the company deprived minority shareholders of "property". The Judicial Committee held that the "expression 'property' cannot be extended to the powers of some shareholders to exercise a disproportionate influence over the management and control of the company." ([1992] 1 WLR at 911)

AUSTRALIA

Freedom of expression -- Restrictions on political broadcasting during election period -- Right to freedom of expression implicit in the notion of representative and responsible government

***Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 66 ALJR 695 (High Court of Australia)**

In this case a majority of the High Court of Australia declared invalid provisions of a federal statute which limited severely political advertising in the media, particularly during election periods. The court found that the legislation violated an implied right to freedom of communication as to public and political discussion derived from the system of representative democracy embodied in the Australian Constitution.

While the court discussed the issue as an implied aspect of the system of representative democracy (there being no express guarantee of freedom of expression in the Australian Constitution), its discussion is relevant not only to the interperetation of article 21 of the *Bill of Rights* (article 25 of the ICCPR) but also to the right to freedom of expression in article 16 of the *Bill of Rights* (article 19 of the ICCPR).

***Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658 (High Court of Australia)**

In this case the court held that a statute which made it an offence to "by writing or speech use words calculated . . . to bring a member of the [Australian Industrial] Commission or the Commission into disrepute" was invalid as it was not a reasonable and proportionate way of achieving the legitimate goal of protecting the Commission. (The protection afforded the Commission went beyond that granted to the established courts of law and protected the Commission against justified as well as unjustified criticism.) Although the court examined the issue in the context of whether the legislation was within the incidental power of Parliament to legislate with respect to conciliation and arbitration of industrial disputes, its discussion of the concept of proportionality is of relevance to the similar inquiry under the *Bill of Rights* in determining whether limitations imposed on freedom of expression under article 16 (3) of the *Bill of Rights* are justifiable.

Discrimination -- Differential sentences served in different States by persons convicted under Commonwealth laws -- Whether a violation of Constitution

***Leeth v Commonwealth* (1992) 66 ALJR 695, 107 ALR 672 (High Court of Australia)**

In this case the court rejected a constitutional challenge to federal legislation which had the effect that prisoners convicted of federal offences and serving their terms of imprisonment in different States would be eligible for release on parole at different times. The court rejected the argument that the Constitution required that federal laws have an uniform application throughout the Commonwealth. In their joint judgment Deane and Toohey JJ, who considered that there was an implied constitutionsal right to equality under the law and before the courts (a view apparently not shared by other members of the court), wrote (107 ALR at 696):

> "The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as

providing a rational and relevant basis for the discriminatory treatment. In one sense, almost all laws discriminate against some people since almost all laws operate to punish, penalise or advantage some, but not all, persons by reference to whether their commands are breached or observed. While such laws discriminate against those whom they punish or penalise or do not advantage, they do not infringe the doctrine of the equality of all persons under the law and before the courts. To the contrary, they assume that underlying equality in that they discriminate by reference to relevant differences. Again, laws which distinguish between the different needs or responsibilities of different people or different localities may necessarily be directed to some, but not all, of the people of the Commonwealth. Provided that the differentiation of and between those to whom they are addressed does not involve discrimination of a kind that infringes their inherent equality as people of the Commonwealth, such laws will not infringe the doctrine of equality under the law and before the courts." (footnote omitted)

BAHAMAS

Drug trafficking -- Money laundering -- Assumptions that property was acquired by drug trafficking -- Retroactive effect of legislation -- Ex post facto laws

***Commissioner of Police v Woods* [1990] LRC (Const) 1 (Court of Appeal of the Bahamas)**

In this case a challenge was made to the provisions of the *Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986* (Bahamas), the relevant parts of which provided:

"20 (2) It shall be an offence for a person to (a) be in possession of property . . . derived from his participation in drug trafficking.

. . .

(6) In proceedings against a person for an offence under subsection (2), evidence establishing (a) that a person has acquired substantial amounts of money, land, property [or securities] and (b) that in relation to [their value] the person had no apparent legitimate source of income to account for the acquisition of his wealth, as the case may be, is, in the absence of evidence to the contrary prima facie proof that the money, property, security . . . or wealth was knowingly derived from that person's participation in drug trafficking."

The defendant contended that insofar as the provision purported to apply to the acquisition of property before the entry into force of the legislation, it amounted to a retrospective criminal law, since it made criminal acts which at the time they were done were not criminal, and thus contravened the ban on ex post facto criminal laws contained in article 20 (4) of the Constitution. A majority of the court held that section 20 (2) and (6) did not violate the prohibition against retrospective criminal laws.

BOTSWANA

Discrimination -- Nationality laws -- Transmission of nationality to children -- Discrimination against female citizens

***Attorney General v Dow*, July 1992, Court of Appeal, No 4 of 1991, on appeal from the decision of the High Court reproduced at (1991) 13 *Human Rights Quarterly* 614**

The court held that differential treatment of male and female citizens in Botswana's nationality laws in ability to transmit citizenship to their children was a violation of constitutional guarantee of equality.

CANADA

Corporations -- Whether entitled to enjoy guarantee of right to trial within a reasonable time -- Whether presumption of prejudice to corporate defendant arises from a long delay

***R v CIP Inc* (1992) 71 CCC (3d) 129, 9 CRR (2d) 62 (Supreme Court of Canada)**

The Court held in this case that the phrase "any person charged with an offence" included a corporation and thus a corporation was entitled to trial within a reasonable time under section 11 (b) of the Charter. However, the Court held that the presumption of prejudice which arises in the case of very long delays cannot be invoked by corporate defendants, since the inference of prejudice was linked to the liberty and security interests of a person and to the interest in a fair trial. A corporate accused had to show that its ability to make full answer and defence had been irremediably prejudiced by the delay.

Cruel and unusual treatment or punishment -- Mandatory minimum penalty -- Driving while prohibited

***R v Goltz* (1991) 67 CCC (3d) 481, 7 CRR (2d) 1 (Supreme Court of Canada)**

In this case a majority of the court rejected a challenge to a statute which imposed a mandatory minimum penalty of $300 and seven days' imprisonment where a person drove a vehicle after being prohibited to do so by the Superintendent of Motor Vehicles. The defendant argued that the mandatory minimum sentence was a violation of the right not to be subjected to cruel and unusual punishment contained in section 12 of the Charter.

The court held that a mandatory minimum sentence will infringe the guarantee in section 12 where (a) it is grossly or excessively disproportionate to the wrongdoing. It is necessary to examine the particular circumstances of the offence and the personal characteristics of the offender; or (b) if the particular facts of the case did not warrant a finding of disproportionality, the court could examine the issue in relation to reasonable hypothetical circumstances. On either approach the penalty was not disproportionate to the offence which was a serious one.

Cruel and unusual treatment or punishment -- Immigration -- Deportation of permanent resident convicted of serious offence -- Violation of principles of fundamental justice -- Discrimination

Re Chiarelli and Minister of Employment and Immigration **(1992) 90 DLR (4th) 289, 72 CCC (3d) 215 (Supreme Court of Canada)**

This case involved a challenge to the provisions of the Canadian *Immigration Act* which permitted the deportation of a (non-citizen) permanent resident who has been convicted of an offence under a federal Act for which a term of imprisonment of five or more years may be imposed. The challenge was based on a number of grounds, including that the deportation of such a person amounted to cruel and unusual treatment or punishment within section 12 of the Charter.

The court rejected this argument, holding that such a deportation would not outrage standards of decency. The court also rejected arguments based on a denial of equality rights, mobility rights and the right not to be deprived of liberty or security of person other than in accordance with the principles of fundamental justice.

Fair trial -- Independent and impartial tribunal -- Jury selection -- Challenges -- Prosecution's right to stand potential jurors aside

R v Bain **(1992) 87 DLR (4th) 449 (Supreme Court of Canada)**

The court (by a majority of 4-3) held unconstitutional provisions of the Criminal Code which permitted the Crown, in addition to the right to challenge 4 jurors peremptorily, to direct that up to 48 jurors be stood aside. An accused had the right to challenge 12 jurors, but no right to direct jurors to be stood aside. The court considered that a reasonable person might apprehend bias in the selection of the jury in view of the extensive rights the Crown enjoyed and that there was therefore a violation of the right to an independent and impartial tribunal that could not be justified under section 1. The court suspended its declaration of invalidity for six months in order to give Parliament an opportunity to remedy the situation if it considered it appropriate to do so.

Fair trial -- Military tribunal -- Court martial -- Whether an independent tribunal

R v Généreux **(1992) 88 DLR (4th) 110, 70 CCC (3d) 1 (Supreme Court of Canada)**

The Supreme Court (by a majority of 6-1) declared unconstitutional the legislation relating to the establishment of a General Court Martial to try serious offences by members of the military on the ground that such a tribunal was not independent within the meaning of section 11 (d) of the *Charter*. The court further held that the infringement of section 11 (d) could not be justified under section 1.

In reaching its conclusion, the court applied the test of whether an informed and reasonable person would perceive the tribunal as independent. In line with earlier authority it considered three factors: security of tenure of members of the tribunal; their financial security; and the tribunal's institutional independence from the executive with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function.

Presumption of innocence -- Regulatory offences -- Due diligence offences

***R v Ellis-Don Ltd* (1992) 71 CCC (3d) 63**

Presumption of innocence -- Bribery offences -- Gifts -- Government officials -- Onus of proof of consent

***R v Fisher* [1992] 24 CRD 530-02 (Ontario Provincial Court, 26 May 1992)**

In this case the court held that section 121 (1)(c) of the Canadian Criminal Code was contrary to the presumption of innocence and not saved under section 1 of the Charter. Section 121 (1)(c) provides:

> "121. Every one commits an offence who--
>
> (c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him; . . . .

The court held that the placing of a legal burden on the accused was a prima facie infringement of the presumption of innocence which fell to be justified under section 1 of the Charter. The preservation of the integrity of the public service was held to be a laudable social objective. Although there was a rational link between the objective and the reversal of the onus of proof, the provision was held to fail the proportionality test, in view of the fact that there were other ways of achieving the objective without limiting the accused's right to be presumed innocent. (The court also declared the provision void for vagueness.)

Right to privacy -- Unreasonable search -- Placement of electronic tracking device on suspect's car

***R v Wise* (1992) 70 CCC (3d) 193, 8 CRR (2d) 53 (Supreme Court of Canada)**

In this case the accused, who had been charged with mischief to property, sought to have excluded evidence of his movement which had been obtained by the use of an electronic tracking device installed by police in his car. The device had been installed without authorisation. The court held that the installation of the device amounted to an "unreasonable search" within the meaning of section 8 of the Charter, but held by a 4-3 majority that the evidence should nonetheless be admitted, since its admission would not bring the administration of jsutice into disrepute.

False news provision -- Freedom of expression -- Whether a permissible limitation on freedom of speech.

***R v Zundel* [1992] 24 CRD 525.100-03 (Supreme Court of Canada, 27 August 1992)**

In this case a majority of the Supreme Court held that the "false news" provision of the Canadian Criminal Code (section 181) was a violation of the right to freedom of expression under section 2 (b) of the Charter and could not be justified as a reasonable limit under section 1. The defendant had been convicted of publishing a pamphlet which in effect stated that the genocide perpetrated against Jews by the Nazi regime did not occur.

Section 181 provided:

> "Every one who wilfully publishes a statement, tale or news that he knows is false or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

Freedom of the press -- Search and seizure -- Seizure pursuant to warrant of videotapes of allegedly criminal conduct

***Canadian Broadcasting Corp v Lessard* (1991) 67 CCC (3d) 517, 7 CRR (2d) 244 (Supreme Court of Canada)**

This case involved a challenge to the validity of a search warrant issued by a justice of the peace permitting police to enter the premises of the CBC to search for and seize videotapes made by CBC reporters of a group of people occupying and damaging a post office building in Quebec. Portions of the tape had been broadcast before the warrant was sought. The CBC argued that the guarantee of freedom of the press in section 2 (b) of the Charter permitted searches of the offices of a media organisation to be carried out only when the information was available from no other source and that, as there had been no material before the justice of the peace bearing on this issue, the warrant had been unlawfully issued.

A majority of the court (McLachlin J dissenting) held that the issue of the warrant in this case did not violate section 2 (b). The court placed particular emphasis on the fact that the information sought in this case had already been broadcast by the CBC. Four justices held that, although not a consitutional requirement, affidavits in support of applications for warrants should ordinarily disclose whether the information is available form another source and, if so, whether reasonable steps have been taken to obtain the information from that other source.

The court came to a similar conclusion in another case raising the same issues: *Société Radio Canada v New Brusnwick (Attorney General)* (1991) 7 CRR (2d) 271.

Freedom of expression -- Obscene material -- Whether restrictions on publication of obscene material a permissible restriction on freedom of expression

***R v Butler* (1992) 89 DLR (4th) 449, 70 CCC (3d) 129, 8 CRR (2d) 1 (Supreme Court of Canada)**

In this case the court considered a challenge to section 163 of the Canadian Criminal Code, which makes it an offence to make, print, publish, distribute, circulate or have in one's possession for one of those purposes any obscene written matter, picture model, record or thing. Section 163 (8) provides that for the purposes of the section:

> "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."

The court held that the provision infringed the guarantee of freedom of expression, but as interpreted by the courts was a reasonable and justified limit on the right. [A similar issue is likely to be considered in *R v Cheng Pui-kit* when it is argued before the Court of Appeal next year: see page 13 above).

Right to vote -- Prisoners -- Whether limitations on right of prisoners to vote a permissible restriction

***Belczowski v Canada* (1992) 9 CRR (2d) 134 (FCA)**
***Sauvé v Canada* (1992) 7 OR (2d) 481 (Ont CA)**

In these two cases challenges were made to section 51 (e) of the Canada *Elections Act* on the ground that it infringed the right of prisoners to vote under section 3 of the Charter and was not justified under section 1 of the Charter. Section 51 (e) of the Act provided that a number of categories of person were not qualified to vote at an election, including "(e) every person undergoing punishment as an inmate in any penal institution for the commission of any offence". In each case the appellate court found that the provision violated the Charter (in *Belczowski* upholding the lower court's decision, in *Sauvé* reversing the lower court). Section 3 of the Charter provides:

> "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

The appellate courts held that restrictions on the right of prisoners to vote infringed the right to vote guaranteed in section 3 of the Charter and could not be justified under section 1 of the Charter. The Government advanced a number of objectives which it claimed the voting rights limitations pursued in a proportionate manner. They included: (a) the affirmation and maintenance of the sanctity of the franchise; (b) the preservation of the integrity of the voting process; and (c) to punish offenders. However, the Court refused to accept that the proffered objectives in fact motivated the legislation or that the ban on prisoners' voting was a rational and proportionate way of pursuing those goals.

Citations to Canadian cases cited in earlier Bulletins

R v Morin (1992) 71 CCC (3d) 1, 8 CRR (2d) 193 (Supreme Court of Canada)

R v Downey (1992) 90 DLR (4th) 449, 72 CCC (3d) 1, 9 CRR (2d) 1 (Supreme Court of Canada)

IRELAND

Abortion -- Right to seek an abortion abroad -- Ireland

***Attorney General v X* (1992) 13 HRLJ 210; [1992] 2 CMLR 277 (Supreme Court of Ireland)**

In this case the court, despite limits on abortion contained in the Irish Constitution, upheld the right of a minor to obtain an abortion abroad where suicide was a real possibility if she was refused leave to do so.

See also the judgment of the European Court of Human Rights in *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v Ireland* (1992) 13 HRLJ 378 (above, page 41).

NAMIBIA

Evidence -- Sexual assault cases -- Special cautionary rule -- Discrimination against women -- Guarantee of equality

***S v D*, 1992 (1) SA 513 (High Court of Namibia)**

The court held that the special cautionary rule relating to sexual assault cases as opposed to other types of cases had no rational foundation and had the effect of discriminating against women and therefore violated article 10 of the Namibian Constitution which guarantees equality of all persons before the law.

TANZANIA

Customary law -- Discrimination against women -- Land rights -- Equality guarantees

***Ephraim v Pastory* (1990) 87 ILR 106 (High Court of Tanzania)**

The court held that sex discrimination in customary law relating to land rights was a violation of constitutional and international standards of equality and non-discrimination.

ZIMBABWE

Mandatory minimum sentences -- Whether inhuman or degrading treatment -- Dealing in precious stones

***Arab v The State* [1990] LRC (Crim) 40 (Supreme Court of Zimbabwe)**

In this case the court considered an argument to the effect that a mandatory minimum sentence of three years' imprisonment for the offence of dealing or being in possession of precious stones was a violation of the constitutional guarantee against inhuman or degrading treatment since the sentence was grossly disproportionate to the offence.

The court accepted that a sentence which was grossly disproportionate to the offence committed would amount to inhuman or degrading treatment, citing its earlier decision in *R v Ncube* [1988] LRC (Const) 442 and the decision of the Supreme Court of Canada in *R v Smith* (1987) 40 DLR (4th) 435. However, it held that the statute under consideration did not impose grossly disproportionate penalties, since the offence was a serious one and it was open to the defendant to show the court that there were "special reasons" why the sentence should not be imposed. The court also took the view that the question of proportionality of a penalty should be resolved not on a case by case basis taking into account the characteristics of each individual defendant but more generally.

Right to trial within a reasonable time -- Factors to be taken into account -- Burden of proof

***In re Mlambo* 1992 (4) SA 144 (Supreme Court of Zimbabwe)**

In this case a five judge bench of the Supreme Court of Zimbabwe considered the ambit of the right to "a fair hearing within a reasonable time by an independent and impartial tribunal established by to law" in the trial of a criminal charge. The court adopted a similar approach to that taken by the Hong Kong courts, citing *Bell v DPP of Jamaica* [1985] AC 937, *Barker v Wingo*, 407 US 514, *R v Askov* (1990) 74 DLR (4th) 355, and a number of other decisions (including decisions of the European Court of Human Rights). In particular the court noted that:

> -- the point at which time begins to run is not necessarily the time at which a charge was formally laid; rather the period commences "with the start of the impairment of the individual's interests in the liberty and security of his person. The concept of 'security' is not restricted to physical integrity, but includes stigmatisation, loss of privacy, anxiety, disruption of family, social life and work." (1992 (4) SA at 149, per Gubbay CJ)
>
> -- the person alleging that the right has been violated bears the onus of showing that the delay is *prima facie* unreasonable (or "presumptively prejudicial"). "It is that which triggers the enquiry into the other factors that go into the balance. It is the threshold at which the court may look to the State for an explanation." (at 154) The court also held that "a very long delay such as this [4 years and 7 months] inherently gives rise to a strong presumption of prejudice. Where the State can demonstrate that there was no prejudice flowing from the delay, then such proof may serve to excuse it." (at 155)

See also *Corbett v State* [1990] LRC (Crim) 30, in which the same court discussed the right to trial without undue delay in the context of delays in hearing appeals.

RECENT PUBLICATIONS

Hong Kong

A Byrnes, "The Impact of the Hong Kong Bill of Rights on Litigation", in J Sihombing (ed), *Law Lectures for Practitioners 1992* (Hong Kong: Hong Kong Law Journal, 1992) 152-

J Chan, "The right to speedy trial", University of Hong Kong, Law Working Paper Series, Paper No 7, November 1992

J Chan, "The Applicability of the Bill of Rights to A Body Corporate", (1992) 22 (3) *Hong Kong Law Journal* 269-292

J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Perspective* (Singapore: Butterworths, 1993)

Chow Kwok-keung and Ng Sek-hong, "Trade Unions, Collective Bargaining and Associated Rights: The Case of Hong Kong", (1992) 22 (3) *Hong Kong Law Journal* 292-318

P J Dykes, "For the Term of His Natural Life", University of Hong Kong, Law Working Paper Series, Paper No 4, June 1992 (a review, among other matters, of the law relating to discretionary life sentences and its consistency with international standards and the *Bill of Rights*)

K D Ewing, "A Bill of Rights: Lessons from the Privy Council", in W. Finnie et al (eds), *Edinburgh Essays in Public Law* (1991), 231-249 (a critical review of the Privy Council's record in dealing with human rights appeals from Commonwealth jurisdictions)

Law Reform Commission (Hong Kong), *Report on Arrest [Topic 25]*, August 1992

A Liu, "Parent and Child Bill 1992: Reforming the Law on Illegitimacy", (1992) 22 (3) *Hong Kong Law Journal* 336-351

Of general interest

H Bourguignon, "Human Rights decisions by the United States Supreme Court -- October term 1991", (1992) 13 HRLJ 325

A W Bradley, "Freedom of Expression and Acts of Racial Hatred", [1992] *Public Law* 357-359

N Browne-Wilkinson, "The Infiltration of a Bill of Rights", [1992] *Public Law* 397-410

R Cook, "Women's International Human Rights: A Bibliography", (1992) 24 *New York Unbiversity Journal of International Law and Politics* 857-888

(part of a special Winter 1992 issue of the *Journal* on "Women's Rights and International Law")

J Cottrell, "Wrestling with the Death Penalty in India", (1991) 7 (2) *South African Journal on Human Rights* 185

C Forsyth, "Intepreting a Bill of Rights: The Future Task of Reformed Judiciary?", (1991) 7 (1) *South African Journal on Human Rights* 1

S K Hom, "Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)other Vision", (1992) 23 *Columbia Human Rights Law Review* 249

Law Reform Commission (Ireland), *Report on the Civil Law of Defamation* (Dublin: Law Reform Commission, 1991), Appendix B, pp 125-138 ("The European Convention on Human Rights")

A. Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinaivan University Press, 1992)

G Quinn, "Civil Commitment and the Right to Treatment Under the European Convention on Human Rights", (1992) 5 *Harvard Human Rights Journal* 1

A Tomkins and B Bix, "The Sounds of Silence: A Duty to Incriminate Oneself?", [1992] *Public Law* 363-371

United Nations, *Draft Declaration on Violence Against Women*, UN Doc. E/CN.6/WG.2/1992/L.3 (adopted by an inter-sessional working group of the UN Commission on the Status of Women in September 1992)

United Nations, "The realization of economic, social and cultural rights", Final report submitted by Mr Danilo Türk, Special Rapportuer of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/1992/16

United Nations Centre for Human Rights, *Bulletin of Human Rights*, 91/2, *The Rights of the Child* (New York: United Nations, 1992) (special issue on the Convention on the Rights of the Child)

Victoria University of Wellington Law Review, *Essays and Documents on Human Rights in the Pacific*, (1992) 22 (3) *Victoria University of Wellington Law Review* 1-184 (special issue)

APPENDIX A

GENERAL COMMENTS OF THE HUMAN RIGHTS COMMITTEE DEALING WITH ARTICLES 7 AND 10 OF THE ICCPR (ARTICLES 3 AND 6 OF THE BILL OF RIGHTS)

GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[1]

A. General comment No. 20 (44) (article 7)[2]

1. This general comment replaces general comment No. 7 (16) reflecting and further developing it.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.

6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only

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[1] UN Doc CCPR/C/21/Rev 1/Add. 3 (7 April 1992).

[2] Adopted by the Human Rights Committee at its 1138th meeting (forty-fourth session), on 3 April 1992.

be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime, States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.

10. The Committee should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.

11. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and places of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

13. States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or

punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

14. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedures that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

b. General comment No. 21 (44) (article 10)[3]

1. This general comment replaces general comment No. 9 (16) reflecting and further developing it.

2. Article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals -- particularly psychiatric hospitals -- detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.

3. Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied 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.

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[3] Adopted by the Human Rights Committee at its 1141st meeting (forty-fourth session), on 6 April 1992.

5. States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

6. The Committee recalls that reports should provide detailed information on national legislative and administrative provisions that have a bearing on the right provided for in article 10, paragraph 1. The Committee also considers that it is necessary for reports to specify what concrete measures have been taken by the competent authorities to monitor the effective application of the rules regarding the treatment of persons deprived of their liberty. States parties should include in their reports information concerning the system for supervising penitentiary establishments, the specific measures to prevent torture and cruel, inhuman or degrading treatment, and how impartial supervision is ensured.

7. Furthermore, the Committee recalls that reports should indicate whether the various applicable provisions form an integral part of the instruction and training of the personnel who have authority over persons deprived of their liberty and whether they are strictly adhered to by such personnel in the discharge of their duties. It would also be appropriate to specify whether arrested or detained persons have access to such information and have effective legal means enabling them to ensure that those rules are respected, to complain if the rules are ignored and to obtain adequate compensation in the event of a viblation.

8. The Committee recalls that the principle set forth in article 10, paragraph 1, constitutes the basis for the more specific obligations of States parties in respect of criminal justice, which are set forth in article 10, paragraphs 2 and 3.

9. Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted person.

10. As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.

11. In a number of cases, the information furnished by the State party contains no specific reference either to legislative or administrative provisions or to practical measures to ensure the re-education of convicted persons. The Committee requests specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside.

12. In order to determine whether the principle set forth in article 10, paragraph 3, is being fully respected, the Committee also requests information on the specific measures applied during detention, e.g., how convicted persons are dealt with individually and how they are categorized, the disciplinary system, solitary confinement and high-security detention and the conditions under which contracts are ensured with the outside world (family, lawyer, social and medical services, non-governmental organizations).

13. Moreover, the Committee notes that in the reports of some States parties no information has been provided concerning the treatment accorded to accused juvenile persons and juvenile offenders. Article 10, paragraph 2 (b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant. The text also provides that cases involving juveniles must be considered as speedily as possible. Reports should specify the measures taken by States parties to give effect to that provision. Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation. Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. In that regard, States parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987).

APPENDIX B

HUMAN RIGHTS COMMITTEE DECISIONS UNDER THE OPTIONAL PROTOCOL

The following consists of edited extracts from United Nations Press Release HR/3197 (12 October 1992):

"HUMAN RIGHTS COMMITTEE CONCLUDES CONSIDERATION ON 19 CASES ALLEGING VIOLATION OF HUMAN RIGHTS

The Human Rights Committee has recently concluded examination of communications from 20 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, subjection to torture or other inhuman treatment by the authorities, denial of the right to a fair trial, arbitrary arrest and detention, arbitrary or unlawful interference with privacy and family life, and violation of the right to freedom of conscience. The Committee adopted views on four of these cases and declared the other 15 cases inadmissible. It examined these confidential communications in closed meetings at its forty-fifth session, held at Geneva from 13 to 31 July [1992].

. . .

Views Adopted on Four Cases

The Committee adopted views on three cases involving Jamaican citizens sentenced to death. The authors alleged various irregularities in the course of the judicial proceedings against them such as being convicted of murder on the basis of "common design", that the judges failed to give adequate instruction to the jury or displayed a hostile and unfair attitude towards the defendant and his representatives, that jurors and other persons involved had been intimidated, evidence was deliberately overlooked and adequate time for the preparation of the defence denied.

The fourth case involved a Hungarian citizen who contended that his arrest and detention by the police were arbitrary, since no adequate evidence could be produced to support the charges and that the conditions of his pre-trial detention were deplorable.

In the case of *Trevor Ellis v. Jamaica* (No. 276/1988), who claimed that the trial judge had misdirected the jury on the issue of identification, the Committee was of the view that the facts before it did not disclose a violation of articles 7 and 14 of the International Covenant. These articles declare, among other things, that no one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment; and that all persons shall be equal before the courts and tribunals, and that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Horace Hibbert (No. 293/1988) contended that his trial was moved from Saint Thomas to Kingston, Jamaica, after threats against and intimidation of his representatives, which had considerably delayed and complicated the adjudication of his case. Furthermore, the judge had pressured the prosecution witnesses and initiated both the jurors and his lawyers. The Committee was of the view that the facts before it did not disclose violations of any provisions of the Covenant.

In the case of *Clifton Wright v. Jamaica* (No. 349/1989), the author was convicted and sentenced to death for murder on 29 March 1983. The Committee had to determine whether the court's failure to consider the evidence tendered by the forensic expert who had performed the post-mortem on the deceased made the author's trial unfair within the meaning of article 14.

The Committee noted that the expert had concluded that the death had occurred after the author was already in police custody. This information was available to the court and, given the seriousness of its implications, the court should have brought it to the attention of the jury. In all the circumstances, and especially given that the trial of the author was for a capital offence, the Committee had to deem this omission a denial of justice. It was of the view that Mr. Wright was entitled, therefore, to an effective remedy, in this case entailing his release, as so many years had elapsed since his conviction.

Concerning the case of *Csaba Párkány v. Hungary* (No. 410/1990),[1] part of the communication related to pre-trial detention which occurred before the entry into force of the Optional Protocol for Hungary. The Committee noted, in this regard, that the State party had not objected to the competence of the committee to consider this claim. It was of the view that the facts before it disclosed a violation of article 10 of the Covenant, which states among other things that all persons deprived of their liberty shall be treated with humanity and with respect for their inherent dignity. Therefore, the State party should offer Mr. Párkány an appropriate remedy. Furthermore, while it welcomed the general improvements in prison conditions afforded under recent amendments, it observed that legal provision should be made for adequate time both for hygiene and exercise.

Inadmissible Cases

Communication No. 335/1988 from *M.F.* concerned a Jamaican citizen under sentence of death. The author claimed to be innocent and contended that during his re-trial, his legal aid counsel refused to have him cross-examined and failed to call witnesses for the defence.

The author of communication No. 340/1988, *R.W.*, also a Jamaican citizen sentenced to death, claimed that his human rights had been violated by the Jamaican Court of Appeal because it did not allow him to put forward new evidence and denied him the opportunity to submit grounds for appeal.

With regard to both of these cases, the Committee decided that the communications were inadmissible under article 5, paragraph 2(b) of the Optional Protocol, which requires that an individual has exhausted all available domestic remedies before the Committee shall consider the communication. It requested the State party not to carry out the death sentence against the authors before they had had a reasonable time, after completing the effective domestic remedies available to them, to request the Committee to review the present decision.

L.E.S.K., in communication No. 381/1989, claimed that the Netherlands had denied her due protection of the law, which had led to various violations of her human rights. Specifically, the judicial authorities had discriminated against her "by ignoring her ethical points of view and attitudes during the proceedings" and her contention was not duly heard that she had never left the conjugal residence as such, but that the divorce proceedings were initiated by her husband in order to force her to sell their house. The Committee noted that the author's claim concerning the sale of the conjugal residence related primarily to an alleged violation of her right to property, a right which is not protected by the International Covenant. Accordingly, the author's allegations in respect of

[1] Reported at (1992) 13 HRLJ 345 [Eds]

this issue were inadmissible. With regard to the other violations, the Committee noted that the author had failed to substantiate her allegations. Therefore, the communication was inadmissible.

In communication No. 382/1989, *C.F.*, a Jamaican citizen currently awaiting execution, claimed to be a victim of violations of his human rights by Jamaica. He considered that he did not receive a fair trial, that he had been discriminated against and was the victim of inhuman and degrading treatment. The Committee concluded that domestic remedies had not been exhausted and decided, therefore, that the communication was inadmissible.

The author of communication No. 383/1989, *H.C.*, a Jamaican citizen serving a 20-year prison sentence, claimed that his lawyer did not properly represent him at his trial, the trial was unfair and the conviction unjust. In this regard, the Committee indicated that it had no evidence that the courts' decisions in his case were manifestly arbitrary. Furthermore, the author's lawyer was privately retained and his alleged failure properly to represent the author could not be attributed to the State party. Concerning the participation of the trial judge at the appeal proceedings, the Committee found that the allegations were incorrect and thus unsubstantiated. The communication, therefore, was inadmissible.

Communication No. 393/1990 from *A.C.* claimed that France had denied him the right to a fair trial because he was convicted on the basis of false evidence. In addition, the proceedings before the Court of Cassation were unfair, notably because he did not have adequate time and opportunity to prepare his defence and because he was not able to defend himself in person. He was also denied access to what he termed a particularly important element of his file. The Committee noted that the complaint pertained to the evaluation of evidence and alleged bias of the judges in the case. It considered that, while the author had sought to substantiate his allegation, the material before it did not reveal that the conduct of either trial or appeal suffered from such defects. Thus, the communication was inadmissible.

C.B.D., author of communication No. 394/1990, stated that he was prosecuted by the Netherlands for his refusal to perform alternative military service. He alleged that the refusal of the Court of Appeal to hear an important defence witness had violated his right to a fair trial and that the Netherlands defence policy violated the Covenant. Therefore the requirement to perform (alternative) military service was illegal. The Committee noted that the author had not substantiated his claim to the effect that the Court of Appeal's refusal to hear the witness was arbitrary and could constitute a violation of the Covenant. In addition, the Covenant did not preclude the institution of compulsory military service by States parties. By mere reference to the requirement to do military, or alternative service, the author could not claim to be a victim of a violation of his human rights. The Committee found the communication inadmissible.

Communication No. 396/1990 from *M.S.* claimed that the Netherlands had denied him a fair trial because the Court had relied on the allegedly biased evidence gathered by the police. He further claimed that the prosecutor's failure to prosecute his assailants violated the principle of equality of arms. The Committee observed that the Covenant did not provide for the right to see another person criminally prosecuted. It was not in principle for the Committee, but for the courts of States parties to evaluate facts and evidence in a particular case, unless it was apparent that the court's decisions were arbitrary and amounted to a denial of justice. In the circumstances, the Committee concluded that the communication was inadmissible.

In case No. 398/1990. *P.S. et al. v. Denmark,* the Committee had to consider whether the author, the divorced father of an eight-year-old boy whose custody had been given to the mother, had standing to present a claim not only on his own behalf, but also on behalf of the son. While declaring the communication inadmissible on the ground of non-exhaustion of domestic remedies, the Committee nevertheless observed that it was

clear that the son could not himself submit a complaint to the Committee and that the relationship between father and son had to be deemed sufficient to justify representation of the latter before the Committee by the father.

In communication No. 398/1990, *A.M.* claimed that a Finnish commercial bank which had financed a real estate deal had allegedly appropriated the securities that had been handed over to it by the author and his wife to the debtor after the conclusion of the deal. The Committee concluded that the facts submitted did not raise potential issues under articles of the Covenant. It therefore found that the communication was incompatible with the Covenant within the meaning of article 3 of the Optional Protocol.

M.R., serving a 20-year prison term in Jamaica, in case No. 405/1990 contended that he was "framed" by the police, who had abducted him from his home with the intention of killing him. As the author had not exhausted domestic remedies, the Committee found the communication inadmissible.

In *W.J.H. v. the Netherlands*, case No. 408/1990, the author was convicted of fraud and forgery, his conviction was quashed on appeal and he was finally acquitted. His subsequent request for compensation was rejected. The Committee noted that the conditions for compensation were a final conviction for a criminal offence; suffering of punishing as a consequence of such conviction; and a subsequent reversal or pardon on the ground of new evidence showing conclusively that there had been a miscarriage of justice. Since the final decision in the case had acquitted the author and since he did not suffer any punishment as a result of his earlier conviction, the claim was outside the scope of article 14.

In communication No. 483/1991, *J.v.K. and C.M.G.v.K.-s.* claimed that the obligation by the Government of the Netherlands to pay taxes for military expenditures that include nuclear weapons violated their freedom of conscience. The Committee observed that, although article 18 of the Covenant certainly protected the right to manifest one's conscience by opposing military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly fell outside the scope of protection of that article. The claim submitted was thus incompatible with the Covenant and inadmissible under the Optional Protocol.

The author of communication No. 486/1992, *K.C.*, currently detained at a penitentiary in Montreal, Canada, and facing extradition to the United States, claimed that extraditing him would violate his right to life. He alleged that the way death penalties were pronounced in the United States generally discriminated against black people. The Committee concluded that the author had not exhausted all available domestic remedies and therefore the communication was inadmissible.

In communication No. 491/1992. *J.L. v. Australia*, the author complained that his obligation to contribute practising fees and mandatory professional indemnity insurance premiums to the Law Institute of the State of Victoria violated his rights, as the applicable regulations had been subject to the approval of the Chief Justice of the Supreme Court of Victoria. He thus challenged the impartiality of the court. In declaring the complaint inadmissible, the Committee noted that the regulation of professional bodies and the scrutiny of such regulations by the courts may raise issues in particular under article 14 of the Covenant, which states that all persons shall be equal before the courts and tribunals. The fact that the rules providing for a practising fee and a professional indemnity insurance would have no effect unless approved by the Chief Justice did not lead in itself to the conclusion that the court was not independent and impartial."

APPENDIX C

GENERAL COMMENT OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

GENERAL COMMENT NO. 1 (1989)

REPORTING BY STATES PARTIES

1. The reporting obligations which are contained in part IV of the Covenant are designed principally to assist each State party in fulfilling its obligations under the Covenant and, in addition, to provide a basis on which the Council, assisted by the Committee, can discharge its responsibilities for monitoring States parties' compliance with their obligations and for facilitating the realization of economic, social and cultural rights in accordance with the provisions of the Covenant. The Committee considers that it would be incorrect to assume that reporting is essentially only a procedural matter designed solely to satisfy each State party's formal obligation to report to the appropriate international monitoring body. On the contrary, in accordance with the letter and spirit of the Covenant, the processes of preparation and submission of reports by States can, and indeed should, serve to achieve a variety of objectives.

2. A *first objective*, which is of particular relevance to the initial report required to be submitted within two years of the Covenant's entry into force for the State party concerned, is to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant. Such a review might, for example, be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy-making and implementation in the different fields covered by the Covenant.

3. A *second objective* is to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. From the Committee's experience to date, it is clear that the fulfilment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged. Thus, the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation. The Committee is aware that this process of monitoring and gathering information is a potentially time-consuming and costly one and that international assistance and co-operation, as provided for in article 2, paragraph 1 and articles 22 and 23 of the Covenant, may well be required in order to enable some States parties to fulfil the relevant obligations. If that is the case, and the State party concludes that it does not have the capacity to undertake the monitoring process which is an integral part of any process designed to promote accepted goals of public policy and is indispensable to the effective implementation of the Covenant, it may note this fact in its report to the Committee and indicate the nature and extent of any international assistance that it may need.

4. While monitoring is designed to give a detailed overview of the existing situation, the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant. Therefore, a *third objective* of the reporting process is to enable the Government to demonstrate that such principled policy-making has in fact been undertaken. While the Covenant makes this obligation explicit only in article 14 in cases where "compulsory primary education, free of charge" has not yet been secured

for all, a comparable obligation "to work out and adopt a detailed plan of action for the progressive implementation" of each of the rights contained in the Covenant is clearly implied by the obligation in article 2, paragraph 1 "to take steps . . . by all appropriate means . . .".

5. A *fourth objective* of the reporting process is to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies. In examining reports submitted to it to date, the Committee has welcomed the fact that a number of States parties, reflecting different political and economic systems, have encouraged inputs by such non-governmental groups into the preparation of their reports under the Covenant. Other States have ensured the widespread dissemination of their reports with a view to enabling comments to be made by the public at large. In these ways, the preparation of the report, and its consideration at the national level can come to be of at least as much value as the constructive dialogue conducted at the international level between the Committee and representatives of the reporting State.

6. A *fifth objective* is to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific bench-marks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health care provider, etc. In many of these areas, global bench-marks are of limited use, whereas national or other more specific bench-marks can provide an extremely valuable indication of progress.

7. In this regard, the Committee wishes to note that the Covenant attaches particular importance to the concept of "progressive realization" of the relevant rights and, for that reason, the Committee urges States parties to include in their periodic reports information which shows the progress over time, with respect to the effective realization of the relevant rights. By the same token, it is clear that qualitative, as well as quantitative, data are required in order for an adequate assessment of the situation to be made.

8. A *sixth objective* is to enable the State party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of economic, social and cultural rights. For this reason, it is essential that States parties report in detail on the "factors and difficulties" inhibiting such realization. This process of identification and recognition of the relevant difficulties then provides the framework within which more appropriate policies can be devised.

9. A *seventh objective* is to enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the Covenant. This part of the process also enables the Committee to identify the most appropriate means by which the international community might assist States, in accordance with articles 22 and 23 of the Covenant. In order to underline the importance which the Committee attaches to this objective, a separate general comment on those articles will be discussed by the Committee at its fourth session.

APPENDIX D

TWELFTH PERIODIC REPORT OF HONG KONG UNDER INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1992)

A. Policy on elimination of racial discrimination

1. *Legislative arrangements* The Government, satisfied that racial discrimination is not a problem in Hong Kong, has not considered it necessary to introduce any law aimed at eradicating racially discriminatory behaviour and practices. In enacting legislation, however, the Governor is by virtue of the Royal Instructions of 1917 and 1986 prohibited from giving his assent to any bill whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable, unless he has had prior permission from Her Majesty's Government to do so.

2. Since April 1989, all new principal legislation and most new subsidiary legislation has been drafted in English and Chinese. Pre-existing legislation drafted in English is also being rendered into Chinese. At the time of the report, some 32 pre-existing ordinances have been so rendered and are awaiting the approval of the Executive and Legislative Councils. It is expected that the whole process of rendition will be completed in 1995. The English and Chinese texts of legislation are equally authentic for legal purposes.

3. The Hong Kong Bill of Rights Ordinance, incorporating into Hong Kong law the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, was enacted in June 1991. To complement the protection afforded by the Bill of Rights, the Letters Patent, Hong Kong's primary constitutional document, have been amended so as to ensure that no law can be made in Hong Kong that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with the ICCPR as applied to Hong Kong. The amendment came into operation at the same time as the Bill of Rights Ordinance. The equal enjoyment of rights and equal protection of the law regardless of one's race, colour or national or ethnic origin, as guaranteed in the Covenant, have thus been strengthened.

4. *Judicial arrangements* In Hong Kong, all persons regardless of their race, colour or national or ethnic origin are equal before the law and have equal access to the courts. Subject to certain objective criteria, legal aid is available to all. Both English and Chinese being the official languages are used in the lower courts. Although proceedings in the higher courts are conducted in English, ample interpretation facilities are provided for non-English speakers. The government is considering how a greater use of the Chinese language may be introduced in the higher courts. It is the Government's stated objective that more judicial posts be filled by local candidates.

5. *Administrative arrangements* No administrative or other measures in Hong Kong are contrary to the provisions of the Convention.

B. General legal framework in which racial discrimination is defined

6. "Racial discrimination" is not, as such, defined in the laws of Hong Kong.

C. Recognition on equal footing of human rights and fundamental freedoms

7. A system of direct election to the Legislative Council based on geographical constituencies was introduced in September 1991. Concurrently the system of indirect elections through functional constituencies continues. Members elected through these systems account for 65% of the total membership of the Legislative Council.

8. Electoral franchise for direct elections to the Legislative Council, municipal councils and district boards is based on residency, irrespective of sex and race. With minor exceptions, every person of the age of 21 years or above and who has been registered as an elector, and having been ordinarily resident in Hong Kong for ten years or more, can be nominated for these direct elections if supported by ten electors in the relevant constituency.

D. Invocation of provisions of the Convention

9. The Convention does not, of itself, form part of Hong Kong law. Short of an Act of the Parliament of the United Kingdom or any order by the United Kingdom, the Convention could not become part of Hong Kong law unless the Legislative Council in Hong Kong implements it through legislation. The Government is satisfied that racial discrimination is not a problem in Hong Kong. The Royal Instructions, in conjunction with the Bill of Rights Ordinance and the amended Letters Patent (see paragraph 3 above), will provide a sufficient guarantee that there is no discrimination in law. The Government does not, therefore, consider it necessary to implement the Convention in the form of law.

E. Demographic composition of the population

10. According to the most recent estimate, the population of Hong Kong in mid-1991 was 5,754,800.

11. There is no up-to-date information on the racial characteristics of the population of Hong Kong. Information on place of birth, which is not the same as race, was elicited in the 1991 By-Census. According to the 1991 Population Census, 5,522,300 residents were enumerated, of whom 3,299,600 (59.8%) were born in Hong Kong, 1,967,500 (35.6%) in China, including Macau and Taiwan, and the remaining 255,200 (4.6%) in various other countries.

Details are shown below.

1991 HONG KONG POPULATION CENSUS: NUMBER OF ENUMERATED RESIDENTS BY PLACE OF BIRTH

	Number	Per Cent
Hong Kong	3,299,600	59.8
China (including Macau and Taiwan)	1,967,500	35.6
Philippines	66,100	1.2
Indonesia	40,700	0.7

United Kingdom	23,700	0.4
India, Pakistan, Bangladesh and Sri Lanka	14,300	0.3
Thailand	14,100	0.3
Malaysia	12,800	0.2
Japan	11,200	0.2
USA	11,200	0.2
Vietnam	10,300	0.2
Elsewhere	50,800	0.9
TOTAL	5,522,300	100.0

F. Special measures taken in accordance with Article 2, Paragraph 2

12. *Recreational and sporting activities* No distinction is made by the Government on racial or religious grounds in providing recreational and sporting facilities and financial support. Regardless of race, Hong Kong people have equal opportunities to participate in all sporting and recreational activities. It is the policy of the Government to promote sports, both in terms of excellence and at the grass-roots level, for the community as a whole. Major sports, open championships, international events and territory-wide, regional and district events, are open to all.

13. *Economic activities* For all intents and purposes, Hong Kong has financial and economic autonomy. It formulates and follows its own economic policies and draws up its own budgets of internal revenue and expenditure, without reference to the United Kingdom.

14. Hong Kong being a free port and a free economy, and with minimum interference from Government, offers equal opportunities to everyone, irrespective of race, in trade and investment. Foreign investments have been made in Hong Kong because of the favourable economic climate and not because of discrimination in any form. People of Chinese and other ethnic groups (European, Indian, Japanese) play important roles in the economic life of Hong Kong.

15. *Employment* The recruitment policy of the Hong Kong Government has been for many years to appoint suitable and qualified local candidates to positions in the public service, but no discrimination is made on the basis of race. The recruitment of overseas candidates is undertaken only when local candidates are not available or are available in insufficient numbers. The main reasons for the difficulties in recruiting local candidates are:

a) the qualifications required for appointment cannot be obtained in Hong Kong, and

b) in certain professions, the private sector offers higher financial rewards with which Government salaries and fringe benefits cannot compete.

16. There were 190,975 officers in the public service as at 1 October 1991, comprising 188,677 local officers (98.7%) and 2,308 (1.2%) overseas officers.

17. There are now over 84,000 foreign domestic helpers working in Hong Kong, the majority of whom are from the Philippines. These workers are employed under contract, which gives them employment protection similar to that enjoyed by local workers under the employment legislation.

18. To sustain economic growth and to relieve local labour shortage, special labour importation schemes to permit the import of workers from outside Hong Kong have been in operation since 1989. This has been resisted by labour groups who wish to protect their earnings and working conditions. Workers from outside Hong Kong regardless of their countries of origin can be imported under the schemes. They are entitled to the same protection as local workers under the labour laws. The majority of these imported workers come from China.

G. Education

19. Instruction continues to be given in schools and colleges to bring about greater appreciation of the achievements of different cultures. With more emphasis on civic education, a greater degree of understanding or interaction and interdependence within the community will continue to be fostered.

APPENDIX E

GENERAL RECOMMENDATION OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

GENERAL RECOMMENDATION NO. 19 (ELEVENTH SESSION, 1992)

VIOLENCE AGAINST WOMEN

BACKGROUND

1. Gender based violence is a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

2. At its eighth session 1989, CEDAW recommended that States should include in their reports information about violence and about measures introduced to deal with it (General Recommendation 12, eighth session).

3. At the tenth session in 1991, it was decided to allocate part of the eleventh session to a discussion and study on article 6 and other articles relating to violence towards women and the sexual harassment and exploitation of women. This subject was chosen in anticipation of the 1993 World Conference on Human Rights.

4. The Committee has concluded that the reports of States parties do not all adequately reflect the close connection between discrimination against women, gender based violence, and violations of human rights and fundamental freedoms. The full implementation of the Convention requires States to take positive measures to eliminate all forms of violence against women.

I. VIOLENCE AGAINST WOMEN IS A FORM OF DISCRIMINATION

5. *The Committee recommends* to States parties that in reviewing their laws and policies, and in reporting under the Convention, they should have regard to the following comments of the Committee concerning gender based violence.

GENERAL COMMENTS

Gender based violence is discrimination

6. The Convention in article 1 defines discrimination against women as meaning:

> "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." (article 1)

7. This definition of discrimination includes gender based violence -- that is violence which is directed against a woman because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based

violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

Gender based violence violates human rights

8. Gender based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include, *inter alia*:

-- the right to life,

-- the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment,

-- the right to the equal protection of humanitarian norms in time of international or internal armed conflict,

-- the right to liberty and security of person,

-- the right to the equal protection of the law,

-- the right to equality in the family,

-- the right to the highest standard attainable of physical and mental health, and

-- the right to just and favourable conditions of work.

The Convention covers public and private acts

9. The Convention applies to violence perpetrated by public authorities. Such acts of violence may also breach that State's obligations under general international human rights law, and under other conventions, in addition to being a breach of this Convention.

10. It should be emphasized, however, that discrimination under the Convention is not restricted to actions by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States to take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation.

11. States parties should take appropriate and effective measures to overcome all forms of gender based violence, whether by public or private act.

COMMENTS ON SPECIFIC PROVISIONS OF THE CONVENTION

Articles 2 and 3

12. Under articles 2 and 3 States are to take all appropriate measures to overcome discrimination in all fields. The kind of measures to be taken are not restricted to the matters covered by specific articles of the Convention. Articles 2 and 3 establish a

comprehensive obligation to eliminate discrimination in *all* its forms in addition to the specific obligations under articles 5-16.

13. States should ensure that laws against family violence and abuse, rape, sexual assault and other gender based violence give adequate protection to all women, respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.

14. States should encourage the compilation of statistics and research about the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence.

Traditional attitudes, customs and practices (Articles 2 (f), 5 and 10 (c))

15. Traditional attitudes under which women are regarded as subordinate or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks, female circumcision. Such prejudices and practices may justify gender based violence as a form of protection or control of women. The effect of such violence to the physical and mental integrity of women deprives them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying (structural) consequences of these forms of gender based violence help to maintain women in subordinate roles, contribute to their low level of political participation, and to their lower level of education skills and work opportunities. The full implementation of the Convention requires that effective measures be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices which hinder women's equality (Recommendation No.3, 1987).

16. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender based violence. Effective measurers should be taken to ensure that the media respects and promotes respect for women.

17. States reports should identify the nature and extent of attitudes, custom and practices which perpetuate violence against women, and on the kind of violence which results. They should report the measures which they have undertaken to overcome violence and the effect of these measures.

Exploitation of prostitution and trafficking in women (Article 6)

18. Article 6 requires States parties to take measures "to suppress all forms of traffic in women and exploitation of prostitution of women."

19. Poverty and unemployment increase the opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruiting of domestic labour from developing countries to work in the developed world, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse. Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation.

20. Poverty and unemployment also forces many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence, because their status,

which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.

21. Wars, armed conflicts, occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women which require specific protective and punitive measures.

22. State reports should describe the extend of all these problems and the measures, including penal provisions, preventive and rehabilitation measures, which have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described.

Violence and equality in employment (Article 11)

23. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace.

24. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.

25. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.

Violence and health (Article 12)

26. Article 12 requires States to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk. States should establish or support services for victims of family violence, rape, sexual assault and other forms of gender based violence, including refuges, specially trained health workers, rehabilitation and counselling.

27. In some States there are traditional practices perpetuated by culture and tradition which are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation. States should take measures to overcome such practices and should take account of the Committee's recommendations on female circumcision (Recommendation No. 14) in reporting on health issues.

28. Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringe the rights of "women to choose the number and spacing of their children" (16.1 (e)). States should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.

29. State reports should report on the extent of these problems and should indicate the measures which have been taken and their effect.

Rural women (Article 14)

30. Rural women are at risk of gender based violence because of the persistence of traditional attitudes regarding the subordinate role of women which persist in many rural communities. States should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns. Measures to protect them from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers.

31. States should report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and on the effectiveness of measures to overcome violence.

Family violence (Article 16)

32. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence described under article 5 which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality. Measures which are necessary to overcome family violence include:

- criminal penalties where necessary and civil remedies in case of domestic violence,

- legislation to remove the defence of honour in regard to the assault or murder of a female family member,

- services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes,

- rehabilitation programmes for perpetrators of domestic violence,

- support services for families where incest or sexual abuse has occurred.

33. States should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures which have been taken.

II. MEASURES NECESSARY TO OVERCOME VIOLENCE

In light of these comments, *the Committee recommends*:

1. That States take all legal and other measures which are necessary to provide effective protection of women against gender based violence, including, inter alia:

(a) effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;

(b) preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;

(c) protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.

2. That States report on all forms of gender based violence, and that such reports include all available data about the incidence of each form of violence, and about the effects of such violence on the women who are victims.

3. That States reports include information about the legal, preventive and protective measures which have been taken to overcome violence against women, and on the effectiveness of such measures.

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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, usherıng 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

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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

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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 Benjamin Chain, Alfred Chan, John Leung, Gerry McCoy, Phil Dykes, John McNamara, Phil Ross, Thomas Tsang, Ray Wacks, Ching Y Wong, Steven Wong, Sidney Jones, Jennifer Van Dale, Nancy Choi, 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 30 April 1993. We apologise for any errors or omissions. The *Bulletin* is printed on recycled paper.

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EDITORIAL

RECENT CASE LAW DEVELOPMENTS

In the period since the publication of the last issue of the *Bulletin* there have been a number of significant developments in case law under the *Bill of Rights*. The publication of this issue of the *Bulletin* is appearing somewhat later than originally planned and we apologise for the delay.

The period has seen the first cases in which the Privy Council has been exposed to Hong Kong's Bill of Rights. Although the Privy Council did not need to address *Bill of Rights* issues in the first case that raised these issues before it (*Attorney General v Charles Cheung Wai-bun*, page 33 below), it could not avoid pronouncing on the Bill in the next two cases which came before it. In *Attorney General v Lee Kwong-kut* (page 30 below), the Board, affirming the decision of the Court of Appeal ([1992] 2 HKCLR 76), held that section 30 of the *Summary Offences Ordinance* (Cap 228) was inconsistent with article 11(1) of the *Bill of Rights*. As of the end of April written reasons were still awaited. The Privy Council considered at the same time the appeal in *Attorney General v Lo Chak-man*, an appeal from the decision of Gall J, who had declared ss 25(1) and (4) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* inconsistent with article 11(1) and therefore repealed. As of the end of April neither the result nor the judgment in this case was available. The judgments in these two cases should clarify the scope of the right to be presumed innocent in article 11(1) of the *Bill of Rights*. A large number of cases have been adjourned pending the judgment of the Privy Council in these cases.

Judge Downey in the District Court held that a deeming provision in the *Landlord and Tenant (Consolidation) Ordinance* (Cap 7) (s 53(7F)(b)) violated the presumption of innocence and could not be justified (*R v Lau Kung-shing*, page 29 below). The "assumptions" contained in s 4 of the *Drug Trafficking (Recovery of Proceeds) Ordinance* also came under attack on the ground of inconsistency with the presumption of innocence, with conflicting decisions. The assumptions were upheld by Leonard J in the High Court (*R v Ko Chi-yuen*, page 25 below), but were held to be inconsistent with article 11(1) by Deputy Judge C Y Wong in the District Court (*R v Wong Ma-tai*, page 24). Both these decisions, as well as the judgment of Jones J in *Lee Kwok-hung*, consider the meaning of the term "criminal charge" and "charged with a criminal offence" in article 11 of the *Bill of Rights*.

The period also saw important decisions on the consistency with the *Bill of Rights* of the investigative powers of regulatory agencies, in particular the Securities and Futures Commission. Both Jones J and the Court of Appeal rejected challenges to the investigative powers of the SFC which invoked a number of articles of the *Bill of Rights* and strongly affirmed the necessity and reasonableness of these powers (*R v Securities and Futures Commission, ex parte Lee Kwok-hung*, page 37 below).

In *R v Lai Kai-ming* (page 36 below) the Court of Appeal applied article 12(1) of the *Bill of Rights* for the first time, holding that a defendant was entitled to benefit from a lesser penalty where the provision under which he had been convicted was replaced by a similar provision with a lesser maximum penalty. The first judicial discussion in Hong Kong of the scope of the "right to a court" under article 10 of the *Bill of Rights* appears in the judgment of Judge Cheung in *Commissioner of Inland Revenue v Lee Lai-ping* (page 11 below), who held that s 77 of the *Inland Revenue Ordinance* (Cap 112), which empowered the Commissioner of Inland Revenue to obtain a stop order restraining a taxpayer from leaving Hong Kong, was inconsistent with article 10 of the *Bill of Rights*. Other decisions explored the right to a fair hearing guaranteed by article 10 of the *Bill of Rights*, and its

relationship to common law abuse of process, as well as the relevance of the *Bill of Rights* to cases involving missing witnesses (*R v Chan Chak-fan*, page 15 below). The duty of the prosecution under the *Bill of Rights* to disclose unused material to the defendant was also considered (*R v District Judge Timothy Lee, ex parte Chow Po-bor*, page 31 below).

PRACTICE DIRECTION ON THE REPORTING OF CHAMBERS PROCEEDINGS

In July 1992 the Chief Justice issued a Practice Direction which prohibited the reporting of any proceedings, including the judgment, held in chambers without the authority of the master or the judge before whom the proceedings were conducted. In an earlier issue of the *Bulletin* (v 1, no 4, at p 44-46), we commented critically on this Practice Direction, arguing that it was incompatible with article 10 of the Bill of Rights, which expressly requires that "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." The Bar Association, the Law Society, the *Hong Kong Law Journal* and the *New Gazette* have also expressed reservations about the Practice Direction.

As a result, the Practice Direction is being reviewed, the review being coordinated by Mr Justice Godfrey, the chairperson of the committee which originally recommended its adoption. It appears that the Practice Direction may be amended so that all judgments given in chambers will be publishable 14 days after their delivery, unless the parties concerned object to its publication, in which case the judge concerned will decide whether or not to release the judgment for publication. This would appear to be consistent with article 10 of the *Bill of Rights*. However, if this procedure is adopted, it is to be hoped that members of the judiciary will withhold the publication of a judgment only when the parties concerned are able to put forward a strong and cogent case for prohibition. It appears that in some cases recently judges have been prepared to accede to a request made by one party to the proceedings not to release a judgment for publication without requiring the party to demonstrate why it should not be made public, even though the judgment may raise a novel point of law and its non-publication does not appear to fall within the exceptions in article 10. It is difficult to know how widespread a practice this is.

While the likely amendments to the Practice Direction address the issue of publicity of *judgments*, the more difficult and contentious issue, namely the extensive use of chambers proceedings in Hong Kong -- a practice which appears in some respects to be in breach of article 10 of the *Bill of Rights* -- is still being considered.

CONSULTATIVE DOCUMENT ON THE LAW RELATING TO INFORMATION PRIVACY

This document represents the results of almost two years' deliberation by the Privacy Sub-committee of the Law Reform Commission. It recommends that internationally agreed data protection principles, in particular the OECD Guidelines, be given statutory force in both the public and private sectors. The OECD Guidelines cover many different aspects of personal information, including limitations on the collection, use and disclosure of personal data; specification of the purposes for which personal data may be collected; ensuring the accuracy of any records of personal data; protection against the loss or unauthorised access or disclosure of personal data; publication of any practices and policies with respect to personal data; and protecting an individual's rights to have access to, right to challenge and to correct, any of his or her personal data.

The report also proposes the setting up of a Privacy Commission, which will be given wide powers of access to personal data, including the power of search and seizure and the power to obtain Anton Piller orders, as well as the power to lay down detailed

sectoral guidelines for the implementation of the Information Privacy legislation to be enacted.

Despite the sweeping scope of the Sub-committee's title, the report does not consider the entire area of privacy. Its proposals cover only personal information, which is defined as "any information relating to an identifiable individual, regardless of how apparently trivial it may be." The Sub-committee has not yet examined issues such as intrusions into private premises, by electronic or other means, or the interception of communications, whether oral or recorded. Nor has the issue of the right of access to government information been considered; the only right to be legislatively guaranteed under these proposals will be the right of access to one's own personal records.

Most of the proposals contained in the report, which would apply to both the public and the private sectors, are desirable and will have far-reaching consequences. It is not possible here to make detailed comments on the report, save to point out that the wide powers given to the Privacy Commissioner and the wide range of exemptions afforded to the law enforcement agencies are areas for concern. Another comment which could be offered at this stage is that the report, which runs almost to 200 pages, is written in such a style that may not be particular accessible to the average member of the public, although there is a summary of the Sub-committee's recommendations available in Chinese.

It is unfortunate that so little progress has been made in relation to other important aspects of privacy and the associated right of access to information. That interception of telephonic and other electronic communications continues to take place in Hong Kong under a legal regime that seems to be in clear violation of article 14 of the *Bill of Rights* is unacceptable and particularly ironic in view of the fact that there is so much rhetoric from the administration about the importance of the "rule of law" to Hong Kong's future Similarly, despite the administration's protestations to the contrary and some attempts to deal with the issue administratively, there is a pressing need for freedom of information legislation in Hong Kong. We would therefore recommend that the Law Reform Commission be given a reference to inquire into the need for of legislation guaranteeing access to government information.

INTERNATIONAL DEVELOPMENTS

HUMAN RIGHTS COMMITTEE -- DECISIONS UNDER THE FIRST OPTIONAL PROTOCOL TO THE ICCPR

Reproduced at Appendix A are extracts from a United Nations press release summarising decisions of the Human Rights Committee at its October/November 1992 session in relation to complaints under the First Optional Protocol to the ICCPR. We have also included extracts from a number of decisions of the Human Rights Committee under the corresponding article of the *Bill of Rights*.

HONG KONG AND THE INTERNATIONAL LABOUR ORGANISATION

The strike earlier this year by Cathay Pacific flight attendants gave rise to considerable public discussion about the extent to which the legitimate rights of employees to strike were protected under Hong Kong law, whether those laws were consistent with the applicable international standards, and whether reforms to Hong Kong law were necessary or desirable.

The subject of workers' rights has for a long time been a concern of the International Labour Organisation (ILO), in the activities of which Hong Kong participates

as a non-metropolitan territory of the United Kingdom (and will continue to participate on an "analogous basis" after 1997). More than forty ILO Conventions apply to Hong Kong, including the two conventions central to the protection of workers' rights to organise and bargain collectively, ILO Convention No 87 on the Right to Freedom of Association and Protection of the Right to Organise and ILO Convention No 98 on the Right to Organise and Bargain Collectively.

Hong Kong reports to the ILO regularly under these conventions and the reports are subject to the scrutiny of the Committee of Independent Experts on the Application of Conventions and Recommendations. Complaints of violations of these and other conventions may also be brought before the ILO. (In the last issue of the *Bulletin* we noted a case brought against Hong Kong under ILO Convention No 87 arising out of the threat by the Postmaster-General to invoke powers of dismissal under the Letters Patent: *Bill of Rights Bulletin*, v 2, n 1, p 34).

We have included in this issue a copy of the standard reporting form issued by the ILO for reports under ILO Conventions 87 and 98 and a copy of the most recent reports submitted in respect of Hong Kong under those conventions (Appendices B and C).

HUMAN RIGHTS TREATY ACTION IN RELATION TO HONG KONG

Extension of the United Nations Convention Against Torture to Hong Kong

The United Kingdom has extended the 1984 UN Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment[1] to Hong Kong, with effect from 8 December 1992. The Convention places an obligation on the Hong Kong authorities to prevent and punish torture in Hong Kong, as well as barring the return of persons to a country where they would face a real risk of torture. The Convention also imposes an obligation on States Parties to take appropriate steps to prevent "other acts of cruel, inhuman or degrading treatment or punishment". The Convention also requires States parties to report to the Committee Against Torture, a committee of ten independent experts established under the Convention which meets twice a year at the United Nations in Geneva. Reports are to be submitted one year after the entry into force of the Convention for a State and regularly thereafter. Thus, the first report in respect of Hong Kong should be submitted by the United Kingdom government in December 1993. If it is submitted on time, it will be considered by the Committee Against Torture in 1994.

The Convention largely reiterates and gives detailed content to the similar obligations in the International Covenant on Civil and Political Rights (ICCPR) and the Hong Kong Bill of Rights. There is, however, one important difference: there is no reservation to the Torture Convention which restricts its application to immigration laws, as there is in the case of the ICCPR and *Bill of Rights*. While the Convention is not directly enforceable as part of Hong Kong law and the courts have shown some reluctance to require decision-makers to take into account the provisions of treaties, it seems likely that the Torture Convention will be raised before the courts in challenges to decisions to remove persons from Hong Kong, on the basis that its provisions are a relevant consideration that should be taken into account by the Director of Immigration in reaching decisions to order the removal of persons from Hong Kong. Cases in which children are to be separated from one or both their parents and returned to China, for example, may raise issues of cruel, inhuman or degrading treatment.

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[1] The text of the Convention may be found in A Byrnes and J Chan (eds), *Hong Kong Constitutional and Human Rights Documents: A Sourcebook* (Butterworths, forthcoming 1993).

As part of the process of implementing some of the obligations imposed by the Torture Convention, the Legislature has enacted the *Crimes (Torture) Ordinance*. Originally passed by the Legislative Council in 1992, the Ordinance commenced operation on 21 January 1993. It creates a specific offence of "torture" (defined as in the Convention) which can be committed only by certain categories of public officials. It also makes provision for the exercise of extraterritorial jurisdiction in respect of persons who may have committed torture in other jurisdictions.

Reports under the Economic, Social and Cultural Rights Covenant

The United Kingdom will shortly submit its overdue reports relating to the implementation of articles 10-12 and 13-15 of the International Covenant on Economic, Social and Cultural Rights in Hong Kong. Articles 10 to 12 deal with the protection of the family, mothers and children; the right to adequate food, clothing and housing; and the right to health. Articles 13 to 15 deal with the right to education, and the rights to take part in cultural life and to enjoy the benefits of scientific progress and of one's own scientific, literary or artistic production. The text of these reports will be included in a future issue of the *Bulletin*. The reports will be considered by the Committee on Economic, Social and Cultural Rights at the earliest in November 1993, but more likely in 1994.

United Nations Convention on the Rights of the Child 1989

Both China and the United Kingdom have now ratified this Convention. The Convention entered into force for the United Kingdom on 15 January 1992 and for China on 1 April 1992. Both parties entered reservations when they ratified the convention. The United Kingdom has not yet extended the Convention to Hong Kong, although that is under consideration.

TREATY INACTION: THE HONG KONG GOVERNMENT AND THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

In our last issue we noted that the government continued to examine the question of extending the Women's Convention to Hong Kong. On 16 December 1992 the Legislative Council voted in favour of a resolution calling on the Hong Kong administration to "support the extension to Hong Kong of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and to request the British Government to take the necessary action to so extend the Convention forthwith." The motion gained the support of all those who voted, the only abstentions being those of the three members of the administration who belong to the Council. The vote in favour of extension represents a significant achievement for the many women's groups who have been campaigning for extension of the Convention as well as other issues of particular concern of women.

Although the government has been happy to take the Legislative Council's views to represent the views of Hong Kong people on some issues (ones on which the Legislative Council's views happen to coincide with the administration's own policies), it has essentially chosen to ignore the clearly expressed views of the Council on this issue. The government has proposed further consultation on the issue in order to establish the public's views of the matter. This will be carried out by means of a Green Paper, to be completed sometime in the coming year. Unfortunately, if the administration's previous track record on this issue is any indication, it would be easy to see this as yet another tactic to further delay extension of the Convention to Hong Kong. No such public consultation was considered necessary when the Racial Discrimination Convention, the two International Covenants or the Torture Convention were extended to Hong Kong.

The most energetic step the government has taken since the adoption of the Convention 13 years ago is the establishment in March 1992 of an inter-departmental working party to examine the question of discrimination in employment. However, not only was that inquiry limited to employment discrimination, but the indications are that from the outset the group was inclined to doubt the existence and extent of the problem, to turn its face against clear evidence of discrimination, and to recommend the most mild measures available to address any problems the existence of which it could not deny.

This Working Party released its findings on the eve of the Council debate. The group found that there was no significant discrimination against women in employment (despite the copious evidence of such discrimination supplied to the Group); that, if it was a problem, legislation of itself would not be a panacea (no one has suggested that it would), and that extension of the Convention would not necessarily bring about the elimination of discrimination against women.

Interestingly, the group did not release details of the materials on which its conclusions were based, despite the government's standard criticism of women's groups and others for not coming up with "compelling evidence" to support their claims that discrimination is widespread in Hong Kong. It appears that the government has no plans to publish the full record, so that members of the public will be in a position to judge whether or not the working group's findings are indeed based on solid material. In view of the large amount of evidence of discrimination submitted to the party by women's groups and the convenient timing of the release of those findings (shortly before the Legislative Council debate), the credibility of the working party's findings can hardly be described as overpowering.

The findings of the Working Party bear a striking similarity to the positions advanced by the government over the years. Firstly, the government denies that there is any significant problem of sex discrimination in Hong Kong. This is a position that can only engender disbelief in anyone who listens to what many women in Hong Kong say or who has any exposure to Hong Kong's media, even accepting the government's extremely limited notion of "discrimination", which seems confined to one on one discrimination and seems unable to comprehend that the disadvantages to women that are the result of structures and practices in Hong Kong society. The reports of studies of the extent of sexual harassment at some tertiary institutions and in employment, sex-specific job advertisements in which lower status and lower paid jobs are "reserved" for women, the many degrading and denigrating portrayals of women in the media are some of the most obvious examples of sex discrimination and there are doubtless many more. It is difficult to believe that the Hong Kong government can seriously think that Hong Kong society is different from every other society and free of discrimination against women; ignorance is the most generous explanation; wilful refusal to look women's realities in the face a slightly less generous one; or most likely, these problems are not regarded as serious or pressing by the predominantly male leadership in the administration.

When confronted with evidence of discrimination put to it by women's groups and researchers, the government's next tactic is to attempt to marginalise or discredit the data as "anecdotal" (that is, it is merely women telling of what they have experienced and that doesn't count) or not statistically significant. The groups seeking to persuade the government to act rarely have the resources to conduct the sort of research the government claims would convince it (although at times one wonders whether anything would convince it, since it often appears simply unwilling to see what seems self-evident). Since the government is unwilling to undertake or fund wide-ranging research or to establish a women's or human rights commission to do so, this approach is a particularly effective tactic for controlling what counts as accepted "truth" for the purposes of public policy-making.

A further argument put forward by the government is that in any event Hong Kong women are as well, if not better, off than women in other Asian countries, a statement

never backed up by specific data detailing the basis of the comparison. If such an argument were used when considering whether the Torture Convention should be applied to Hong Kong, whether Hong Kong needs a new airport, or whether Hong Kong should continue to improve its public housing programs, it would carry little weight. The suggestion that, because women in Hong Kong may be less subordinated than women elsewhere in Asia, then there is no real need to do anything about it is a disturbingly cynical approach.

OTHER INTERNATIONAL DEVELOPMENTS

The World Conference on Human Rights, the first of its kind since the late 1960s, has been organised by the United Nations to carry out a review and appraisal of the progress that has been made in the advancement of human rights since the adoption of the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948). It will be held in Vienna from 14-25 June 1993 and will be preceded by a forum organised by non-governmental organisations. A number of regional preparatory conferences have been held as part of the lead-up to the conference.

At the recent Asian Regional Preparatory Conference for the United Nations World Conference on Human Rights Asian governments adopted the Bangkok Declaration on Human Rights (see Appendix D). A group of Asian non-governmental organisations also adopted a Declaration on human rights.

JUST PUBLISHED: THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH

The secondary literature on human rights in Hong Kong continues to burgeon. The latest contribution to the literature is J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths Asia, 1993), which has just appeared. The book consists of revised papers from the major international conference held in Hong Kong in June 1991 on Hong Kong's Bill of Rights. The collection contains essays which review the background to the Bill of Rights, the resources and techniques available for its interpretation, litigation strategies, as well as discussing parallel and related developments in Canada, India, Australia, the Philippines and elsewhere. Contributors include overseas judges, practitioners and academics from abroad as well as Hong Kong. Further material and an order form appears as an insert in this issue *Bulletin*. Also included is an order form for a collection of papers on police powers delivered at a recent seminar held by the Faculty of Law in early April 1993: R Wacks (ed), *Police Powers in Hong Kong: Problems & Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1993). See also J Chan (ed), "United Kingdom -- British Dependent Territories: Hong Kong", Booklet 3, in A P Blaustein (ed) *Constitutions of Dependencies and Special Sovereignties* (Dobbs Ferry, NY: Oceana, 1993). This part contains, among other documents the text of Governor Patten's address to the Legislative Council on 7 October 1992, the diplomatic correspondence between the British and Chinese governments concering political development of Hong Kong in early 1990, and the text of the United States-Hong Kong Policy Act of 1992.

Also in press are two further publications in the area of human rights and Hong Kong. The first, edited by the Editors of this *Bulletin* and also to be published by Butterworths by the middle of 1993, is a collection of Hong Kong constitutional, public law and human rights documents (together with international human rights materials). The second is the *Hong Kong Public Law Reports*, edited by the Editors in conjunction with G Edwards and to be published by Hong Kong University Press. The first volume (1991 cases) is likely to be available by the middle of this year. The first issue of volume 3 (a quarterly), reporting 1993 cases, will appear in summer 1993; volume 2, reporting 1992 cases, will appear later in the year.

CASES

RIGHT NOT TO BE ARBITRARILY DEPRIVED OF ONE'S LIBERTY (ARTICLE 5(1), BOR; ARTICLE 9(1), ICCPR)

Securities and Futures Commission Ordinance (Cap 24), section 33

See *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) HCt and CA, at page 37 below; and *R v Hung Wai-shing and others* (1993) Mag, at page 28 below.

Common law conspiracy to defraud and *Trade Descriptions Ordinance* (Cap 362) -- Possibility of imprisonment for strict liability offences

***R v Lau Kwok-hing and others* (1993) DCt, DC Case No 1225 of 1991, 12 March 1993, Judge Beeson[2]**

The defendants were charged with a number of substantive offences under the *Trade Descriptions Ordinance* (Cap 362) and with two counts of conspiring to contravene ss 7(1)(a)(i) and 9(1)(b) of the Ordinance. On the day of the trial the Crown elected to proceed on the conspiracy charges alone.

The defendants applied for an order to stay the proceedings permanently. They argued that it was an abuse of process for the Crown to proceed on the conspiracy charges alone, as this would deprive the defendants of the benefit of the due diligence defence which would have been available had they been charged with the substantive offences under the Ordinance. They also argued that there was a violation of article 5(1) as the defendants could be imprisoned without the issue of "fault" being canvassed at all.

The relevant parts of ss 7(1)(a)(i) and 9(1)(b) of the Ordinance provide:

"7.(1) Subject to the provisions of this Ordinance, any person who--

(a) in the course of any trade or business--

(i) applies a false trade description to any goods;

. . .

commits an offence.

. . .

9.(1) Subject to the provisions of this Ordinance, any person who--

(b) falsely applies to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive;

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[2] We are particularly grateful to Phil Dykes for his detailed note on this case, which we have largely reproduced in the following text.

. . .

commits an offence unless he proves that he acted without intent to defraud.

Section 26 (1) provides:

"In any proceedings for an offence under this Ordinance it shall, subject to subsection (2), be a defence for the person charged to prove -

(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control."

Held (rejecting the application for a permanent stay of proceedings):

1. As the common law offence of conspiracy is quite separate and distinct from the statutory offences under the *Trade Descriptions Ordinance*, the statutory defences and statutory presumptions were not available to either the prosecution or the defence in relation to a common law conspiracy charge.

2. The substantive offence under s 9(1)(b) presumes an intention to defraud, which is therefore an element of the substantive offence. In a prosecution for conspiracy to commit the statutory offence, the Crown has the burden of proving an intention to defraud.

3. A conspiracy to commit an offence contrary to s 7(1)(a)(i) requires proof of an intention to enter into an agreement to do acts which were unlawful. It is not required to establish knowledge on the part of the alleged conspirators that the prohibited acts were unlawful.

4. Although the defendants could not rely on the due diligence defence under s 26 of the Ordinance, which would have been available to them had they been charged with a substantive offence under s 7(1)((a)(i), it was not an abuse of process for the Crown to proceed by way of charging conspiracy to contravene s 7(1)(a)(i).

5. However, the Crown, by proceeding with a conspiracy charge, infringed the defendants' right to security and liberty as guaranteed under article 5(1) of the *Bill of Rights*. They may be deprived of their liberty without the issue of "fault" being canvassed at all, whether by way of the prosecution establishing it as part of its case or by way of raising the statutory defence of due diligence.

   R v Wholesale Travel Group Inc (1991) 84 DLR (4th) 161, applied.

6. The appropriate remedy was not to stay the proceedings but to exercise a judicial discretion not to impose any sentence of imprisonment in the event of a conviction on the charge of conspiracy to contravene s 7. It was not necessary to exercise the judicial discretion in the same manner in relation to the conspiracy to contravene the s 9 offence where an intention to defraud had to be proved.

Counsel: M McMahon and A Papadopolous, for the Crown; P Emerson (of Ho & Chan), and P Dykes (instructed by Ho & Chan)(for the *Bill of Rights* argument), for the first defendant; M Musdeen (instructed by the Director of Legal Aid), for the second defendant.

LIBERTY OF MOVEMENT (ARTICLE 8, BOR; ARTICLE 12, ICCPR)

Commissioner of Inland Revenue v Lee Lai-ping, the Administratrix of the Estate of Lui Kim-kei, deceased, formerly trading as Leung Lee Seafood Wholesale **(1993) DCt, DC Action No 1541 of 1992, 25 March 1993, Judge Cheung**

This case is summarised at page 11 below under article 10 ot the *Bill of Rights*. The plaintiff argued, *inter alia*, that a stop order made pursuant to s 77 of the *Inland Revenue Ordinance* (Cap 112) which prohibited her from leaving the territory, was inconsistent with article 8 of the *Bill of Rights*. The court did not decide the article 8 issue, but held that s 77 was inconsistent with article 10 of the *Bill of Rights*. This was because the stop order involved the plaintiff's "rights and obligations in a suit at law" and there was available to her no independent and impartial tribunal which could review all issues of fact and law relevant to the matter in dispute.

International Covenant on Civil and Political Rights, article 12(2)

***González del Río v Peru*, Human Rights Committee, Communication No 263/1987, Views adopted on 28 October 1992, UN Doc CCPR/C/46/D/263/1987**

In this case (see below, page 21 below) the author of the communication had had criminal proceedings pending against him for some 7 years, during which time an arrest warrant preventing him from leaving Peru was outstanding. The author complained to the Human Rights Committee that this constituted a violation of his right to leave his country, guaranteed by article 12(2) of the ICCPR. The Committee upheld this aspect of the complaint, holding:

> "5.3 Article 12, paragraph 2, protects an individual's right to leave any country, including his own. The author claims that because of the arrest warrant still pending, he is prevented from leaving Peruvian territory. Pursuant to paragraph 3 of article 12, the right to leave any country may be restricted, primarily, on grounds of national security and public order (ordre public). The Committee considers that pending judicial proceedings may justify restrictions on an individual's right to leave his country. But where the judicial proceedings are unduly delayed, a constraint upon the right to leave the country is thus not justified. In this case, the restriction on Mr. Gonzalez' freedom to leave Peru has been in force for seven years, and the date of its termination remains uncertain. The Committee considers that this situation violates the author's rights under article 12, paragraph 2; in this context, it observes that the violation of the author's rights under article 12 may be linked to the violation of his right, under article 14, to a fair trial."

RIGHT TO A FAIR HEARING BEFORE A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL IN THE DETERMINATION OF RIGHTS AND OBLIGATIONS IN A SUIT AT LAW (ARTICLE 10, BOR; ARTICLE 14(1), ICCPR)

Substantive content of equality guarantee in article 10

See *R v Hung Wai-shing and others* (1993) Mag, at page 28 below.

Inland Revenue Ordinance (Cap 112), ss 75 (3), (5), 77

Commissioner of Inland Revenue v Lee Lai-ping, the Administratrix of the Estate of Lui Kim-kei, deceased, formerly trading as Leung Lee Seafood Wholesale (1993) DCt, DC Action No 1541 of 1992, 25 March 1993, Judge Cheung

The plaintiff claimed against the defendant for profits tax due and payable, such tax being recoverable in the District Court as a civil debt. Section 75(3) of the *Inland Revenue Ordinance* (Cap 112) provides that in such proceedings a certificate signed by the Commissioner stating the particulars of the tax due by the taxpayer, shall be sufficient evidence of the amount so due and shall be sufficient authority for a District Court to give judgment for that amount. Section 75(4) further provides that the Court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal in such proceedings. The defendant argued that ss 75(3) and (4) were inconsistent with article 10 of the *Bill of Rights*. She further claimed that a "stop order" issued pursuant to s 77 of the *Inland Revenue Ordinance*, which prevented her from leaving Hong Kong, was inconsistent with articles 8, 10 and 22 of the *Bill of Rights*.

Held:

"Rights and obligations in a suit at law"

1. The expression "rights and obligations in a suit at law" in article 10 of the *Bill of Rights* bears the same meaning as the expression "civil rights and obligations" in article 6(1) of the European Convention on Human Rights.

Liability to taxation and article 10

2. Assessment of the taxpayer's liability to profits tax is an administrative act and not a determination of the private rights of the taxpayer, even though the fiscal measure had repercussions on her property rights.

3. Article 10 of the *Bill of Rights* requires an administrative act to be subject to control by an independent and impartial body that has full jurisdiction to deal with the merits of the matter. The assessment of profits tax is subject to a review on the merits by the Board of Review established under the appeals procedure laid down in the *Inland Revenue Ordinance*, which clearly satisfies the requirements of article 10. Article 10 therefore has no application to the present case and ss 75(3) and (4) of the *Inland Revenue Ordinance* are not inconsistent with the *Bill of Rights*.

Equality and non-discrimination

4. There was no violation of the guarantee of equality and non-discrimination contained in article 22 of the *Bill of Rights*, since there was no suggestion that ss 75(3) and (4) had been applied differently to different taxpayers.

Restrictions on liberty of movement and article 10

5. When a District Judge issues a stop order to prevent a taxpayer from leaving Hong Kong, (s)he is acting in a judicial capacity and not as a public officer performing an administrative act.

6. Article 10 is applicable where restrictions on the liberty of an individual are involved. A person whose liberty is restricted has the right to have the lawfulness and reasonableness of that restriction determined in a fair and public hearing by a competent, independent and impartial tribunal established by law. That tribunal must have power to consider all relevant issues of fact and law.

7. In considering applications for a stop order under s 77, the court is provided with scanty information and has no discretion in the matter. Such applications are not made in a public hearing, and the taxpayer is not given any opportunity to present her case. Accordingly, the guarantee of a fair and public hearing in article 10 is not observed.

8. Article 10 requires a right of appeal against the original decision on disputed issues of fact and on the merits, not merely a right to review its legality. The availability of an application for judicial review of the decision of a District Judge is not a sufficient remedy for the purpose of article 10, as the scope of judicial review is too restrictive and does not permit an examination of the merits of the decision. Nor does the existence of an appeal to the Court of Appeal satisfy the requirement of article 10, as the wording of s 77(1) precludes the Court of Appeal from going into the merits of the matter. Accordingly, s 77 is inconsistent with article 10 and repealed.

Counsel: S H Kwok, Senior Crown Counsel, for the plaintiff; Sze Kin (instructed by Haldane, Midgley & Booth), for the defendant.

Editorial comment

This is the first case in which a Hong Kong court has pronounced on the scope of the expression "rights and obligations in a suit at law" in article 10 of the *Bill of Rights* and the scope of the so-called "right to a court" under the same article. The court accepted that the expression "rights and obligations in a suit at law" bears the same meaning as the expression "civil rights and obligations" in article 6(1) of the European Convention on Human Rights. While this is supported by the drafting history of article 14(1) of the ICCPR, which is identical to article 10 of the *Bill of Rights*, the difficulty of this approach is that it brings into our system the well developed concept of public/private law inherent in the civil law system, a distinction which has a different history in the common law system.

To appreciate the scope of the concept of "civil rights and obligations" it is necessary to note that under the civil law system there is a relatively clear distinction between civil law and administrative law and that there exists a sophisticated procedure and even special forum for the determination of administrative dispute. Thus, one of the difficult problems faced by the European Commission and Court of Human Rights in their early days in defining the scope of "civil rights and obligations" was how far the guarantee of a right to fair hearing should be extended to administrative disputes. The early case law suggests a rather circumscribed and cautious approach, partly because the European organs were still in the process of establishing their credibility with the member States, some of which were (and still are) very critical of any attempt by the Strasbourg organs to enlarge their own jurisdiction.

However, in the 1980s (by which time the authority and reputation of the European Commission and Court were firmly established), the two bodies have tended to adopt a more liberal approach towards the interpretation of the concept of civil rights and obligations. On a number of occasions the European Court has held that the mere fact that the subject-matter of a decision is governed by administrative/public law does not prevent it from falling within the scope of "civil rights and obligations". (See *Feldbrugge v Netherlands* (1986) 8 EHRR 425; *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR

309). Thus, some of the pronouncements in the earlier decisions of the European Commission, which are cited by Judge Cheung, may need to be treated with some caution.

While the European Commission has consistently excluded taxation matters from article 6(1) of the European Convention, some of its decisions in this context may now be less persuasive in light of the recent case of *Editions Périscope v France* (1992) 14 EHRR 597, a judgment not referred to by the District Court in the present case. In the *Editions Périscope* case the European Court held that a claim for compensation for a wrongful refusal to grant a tax concession for certain publications was a civil right. The Court drew a distinction between a tax concession and a claim for compensation for infringement of rights which were pecuniary in nature, an exercise which highlights the difficulties (and sometimes the artificiality) of drawing distinctions of this nature.

In considering the issue of the "right to a court" (that is, the extent of independent review to which one is entitled under article 10), Judge Cheung follows the European jurisprudence and holds that article 10 requires that administrative acts to be subject to review by a body that has full jurisdiction to deal with the merits of the matter and in conformity with the article. This right to a court appears to apply only to those cases in which there is a dispute in relation to a "civil right or obligation", but an argument might be made that in the common law context this right is more general.

The judge concludes that it is clear that article 10 is complied with in relation to decisions assessing tax liabilities, since the procedure for appeals to the Board of Review and subsequent appeal to the Court of Appeal satisfies the requirement of a hearing by a competent, independent and impartial tribunal. While the Board of Review is very likely an independent and impartial tribunal, hearings before the Board of Review are not "public". While there seems little doubt that the restrictions on public access to hearings before the Board of Review would be held to fall within the permissible restrictions on the right to a public hearing, the permissibility of that restriction cannot be taken for granted and must be demonstrated. In any event, having decided that article 10 had no application to a taxation dispute of this kind, it was strictly not necessary to decide whether the procedures for appeal from a decision by the Commissioner satisfied article 10.

In considering whether the procedure for issuing stop orders under s 77 of the Ordinance violates article 10 of the *Bill of Rights*, the judge rightly concludes that this procedure, which deprives the court of any discretion in granting a stop order, falls short of the requirements of article 10. In this connection he held that the availability of judicial review of the District Judge's decision does not satisfy the requirement of article 10, since it is confined to review on grounds of illegality, irrationality and procedural impropriety, and does not allow the court to review the merits of the decision. This conclusion is based on a solid body of case law from the European Court, including cases in which judicial review in the English context has been the direct subject of examination.

This decision, if followed, may have far-reaching consequences for our administrative review system, reform of which is no doubt long overdue. For example, many administrative decisions are reviewable on the merits only within the administration, culminating in many cases in a appeal to the Governor in Council. This path of review would plainly not satisfy article 10. Recent legislation and proposed legislation, designed to relieve the Governor in Council of the burden of considering many of these appeals apparently recognises the *Bill of Rights* problems and provides for review by an independent body.

One of the many issues to which article 10 gives rise is whether all the rights guaranteed by the *Bill of Rights* are "rights and obligations in a suit at law" for the purposes of article 10. While it seems that for a legal entitlement to be so classified it must be created or recognised by national law, it is not the case that every legal entitlement created by national law is *ipso facto* a "right and obligation in a suit at law". See also the recent judgment of the European Court of Human Rights in *de Geouffre de la Pradelle v*

France, Judgment of 16 December 1992, Series A, No 253-B, in which the Court considered the consistency of restrictions on the development of land in the context of the right to a court in article 6 of the European Convention.

RIGHT TO A FAIR HEARING BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10, BOR; ARTICLE 14(1), ICCPR

"Criminal charge"; "criminal proceedings"

See *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) HCt and CA, at page 37 below; *R v Wong Ma-tai* (1992) DCt, at page 24 below; and *R v Ko Chi-yuen* (1992) HCt, at page 25 below.

Equality of arms -- Access to unused material in possession of prosecution

See *R v Deputy District Judge Timothy Lee, ex parte Chow Po-bor* (1993) HCt, at page 31 below.

Entrapment -- Whether available as a defence under Hong Kong law -- Whether a violation of the *Bill of Rights*

***R v Wright, ex parte Lau Wing-wo* (1993) HCt, MP No 3051 of 1992, 18 February 1993, Mayo J**

This case involved the prosecution of the defendant for allegedly having offered an advantage to a public servant contrary to the *Prevention of Bribery Ordinance*. It arose out of the circumstances which gave rise to *Chow Po-bor* (see page 31 below). The defendant sought a stay of proceedings on the ground of abuse of process, relying on three matters: (a) the applicant had been entrapped by the undercover agent of the ICAC; (b) there had been non-disclosure of unused material relevant to the entrapment (the same ground relied on in *Chow Po-bor)*; and (c) there had been delay. The stay was refused and the defendant applied for judicial review of the magistrate's order.

In view of the judgment of Mayo J in *Chow Po-bor* the applicant reserved his position on the issue of non-disclosure and chose not to pursue the issue of delay on the judicial review application. The Crown argued that in any event it was inappropriate to apply for judicial review of an interlocutory ruling in criminal proceedings such as the present and that the proper approach was to raise such issues on appeal if the defendant were convicted.

Held (dismissing the application for judicial review):

Appropriateness of intervention by way of judicial review

1. Although the High Court did have jurisdiction to review the decision of the magistrate refusing a stay, it was only in wholly exceptional cases that it would be appropriate to intervene by granting an application for judicial review.

2. There was nothing in the present case which made it exceptional; there was no reason why, had the applicant been convicted, the complaint of entrapment could not be included as a ground of appeal. To intervene at this stage would mean very substantially delaying the criminal proceedings. Furthermore, since there was no agreement on the facts upon which the allegation of entrapment was based, it would be necessary to have a full hearing on the merits on the judicial review application, which would be a wasteful duplication of time an effort.

Entrapment

3. In view of the decision of the House of Lords in *R v Sang* [1980] AC 407 the defence of entrapment was not available under the law of Hong Kong. Nor, in the light of the analysis in that case, could the argument that entrapment amounted to abuse of process be accepted. The position was no different if one considered the matter as an aspect of the right to a fair trial under article 10 of the *Bill of Rights*. The fact that some Commonwealth courts have chosen to deal with the problem of entrapment in a different way to the approach adopted by the House of Laws is not a significant matter and is not a compelling reason for adopting those developments in Hong Kong.

R v Mack (1989) 44 CCC (3d) 513, not followed.

Counsel: D Keane QC, G McCoy and S Chui (instructed by Francis Yim & Co), for the applicant; M McMahon, for the second respondent.

Right to a fair hearing -- Absence of notified witnesses whose evidence is adverse to accused -- Relationship between common law and *Bill of Rights*

***R v Chan Chak-fan and Chan Yiu-cheung* (1993) DCt, DC Case No 674 of 1992, 8 February 1993, Judge Britton**

In this case the defendants were charged with an offence of being crew members of a ship which entered Hong Kong with unauthorized entrants on board, contrary to s 37C(1)(a) of the *Immigration Ordinance*. Two of the unauthorized entrants found on board each gave a statement to the police, which were material evidence damaging and unhelpful to the defendants. They were repatriated to China prior to the trial, and neither of these two witnesses nor their statements were made available to the defendants before the repatriation.

The defendants applied for a permanent stay of proceedings on the grounds of abuse of process and violations of articles 10 and 11(2)(b) and (e) of the *Bill of Rights*.

Held (refusing the application):

Duty to make witnesses available -- the common law position

1. Where the prosecution have a statement from a witness who can give material evidence, but decide not to call him, they are under a duty to make that person available as a defence witness and to supply his particulars. The prosecution are under no duty to supply a copy of the statement, although it is the better practice to do so, unless that witness can speak as to the defendant's innocence, in which case

the prosecution are required to either call the witness themselves or provide the statement. Since the witnesses' statements in this case went to the defendants' guilt and not their innocence, the prosecution had no duty to supply them to the defence.

2. Notwithstanding the detrimental contents of the statements, the prosecution were under a duty to make the witnesses available to the defence.

3. Making a witness available means notifying the defence of the existence and particulars of a material witness in circumstances where the defence may not know of the existence of or the particulars of such witness. As the defendants were fully aware of the identity of the witnesses, their whereabouts and the fact that they were material witnesses, these witnesses had always been available to the defendants.

4. While the Crown could apply to a magistrate for an order under s 32(4) of the *Immigration Ordinance* to detain witnesses so as to make them readily available to the defence, such application should be used as sparingly as possible. It was wrong to detain unlawful visitors for months on a remote chance that they might be required in a future trial by the defence.

5. The Crown had not taken reasonable steps to secure the attendance of the witnesses in court. However, a failure to secure the attendance of witnesses in court is one of the factors, and not a pre-condition, to the exercise of judicial discretion to allow a trial to proceed in the absence of material witnesses. The principles governing stay of proceedings in a missing witness case and an abuse of process on other grounds are the same.

R v Ng Kam-fuk (1992) DCt, DC Case No 104 of 1992 (noted *Bill of Rights Bulletin*, v 2, n 1, p 11), not followed.

Articles 10 and 11 of the *Bill of Rights*

6. Articles 10 and 11 of the *Bill of Rights* should be construed together and not in isolation. The goal of a fair trial is the overriding principle. The court must look not only at any specific violations of article 11 but also at the general conditions for a fair trial in the absence of such violations.

7. The guarantee of adequate facilities to the defence under article 11(2)(b) of the *Bill of Rights* is confined to those facilities which assist or may assist the defendant in the preparation of his defence. There was no indication that the statement of the missing witnesses or their evidence would be of any assistance to the defence. Nor had the decision of the prosecution not to make an application under s 32(4) led to any disadvantage to the defendants. Accordingly, there was no violation of article 11(2)(b).

8. Article 11(2)(e) guarantees a right to obtain the attendance and examine witnesses on behalf of the accused. It does not guarantee a right to secure the attendance of witnesses who will give evidence adverse to the accused. As the missing witnesses were adverse to the defendants, a failure to secure their attendance by the Crown did not amount to a violation of article 11(2)(e).

9. It is not enough for an accused person who alleges a breach of article 10 to prove that he was unable to question a certain witness; he must also demonstrate that the hearing of the witness was necessary for ascertaining the truth and that failure to hear the witness would prejudice the rights of the defence. As there is no realistic prospect of any prejudice to the defendants arising from the missing witnesses, there is no violation of article 10.

Per curiam (obiter):

> "If a fair trial cannot be achieved then it would be a violation of the Hong Kong Bill of Rights and, under section 6 thereof, the Court may grant such relief as it considers appropriate and just in the circumstances. That, of course, includes the right to stay the prosecution and is not, in my view, shackled by the common law doctrine that the granting of a stay must be the exception rather than the rule. The clear wording of section 6 takes precedence over case law."

Counsel: P Li, for the Crown; Mr Kwok for the defendants.

***R v Kevin Egan* (1993) HCt, Case No 280(3) of 1991, 12 January 1993, Deputy Judge Jones**

The defendant was charged with a number of criminal offences. He made a preliminary application for a stay of proceedings on the grounds that the trial would be an abuse of the process of the court and would infringe his right to a fair hearing under article 10 of the *Bill of Rights*.

Held (refusing the application):

1. The power to grant a stay of proceedings should be used only in the most exceptional circumstances. It should not be exercised except where a prosecution would be vexatious or oppressive if allowed to continue.

2. The right to a fair and public hearing guaranteed by article 10 of the *Bill of Rights* is declaratory of the common law position. It does not enhance or enlarge those common law rights, nor the remedies available for their abuse.

3. The defendant had not made out a case of an abuse of process or a violation of article 10 of the *Bill of Rights*, as all the matters he complained of could be redressed in the course of the trial and the drastic remedy of a stay of proceedings is not warranted.

Per curiam:

> "[T]he jurisprudence engendered by the *Bill of Rights* is in its infancy. There may in the course of time develop a jurisprudence from the wording of article 10 and from other articles going beyond the protection afforded to the individual by the common law."

Counsel: A Huggins QC and A Chan (instructed by Herbert Smith), for the Crown; J McNamara (instructed by John Massie & Co), for the defendant.

Editorial comment

This case provides an interesting contrast to *R v Chan Chak-fan* on the relationship between common law abuse of process and the *Bill of Rights*. In *Chan Chak-fan* Judge Britton seems to suggest that the court would be more ready to grant a stay of proceedings under the *Bill of Rights* if a fair trial cannot be achieved, whereas under common law the granting of a stay must be the exception rather than the rule: "The clear wording of section 6 takes precedence over case law." In contrast, Deputy Judge Jones states that article 10 is merely declaratory of the common law position: "It does not enhance or enlarge those common law rights, nor the remedies for their abuse." However, the judge did accept that

this may be changed as time passes, as the "jurisprudence engendered by the Bill of Rights is still in its infancy."

While it is unclear whether a stay of proceedings should be more readily granted under the *Bill of Rights* than under the common law, it is useful to keep separate considerations under the *Bill of Rights* and the common law, as too close an adherence to the common law principle may overlook, and very possibly obstruct, the proper development of the *Bill of Rights* which is called for by its *sui generis* nature as a (quasi-)constitutional document of international origin. It may also be noted that the Privy Council in *Attorney General v Charles Cheung Wai-bun* (see page 33 below) explicitly left open the issue (in the context of article 11 (2)(c) and common law abuse on the ground of delay) whether there is a difference of approach at common law and under the *Bill of Rights*.

Split trial of charges in different courts -- Same witness and evidence in subsequent trial after defendant acquitted in earlier trial -- Whether a fair trial possible -- Whether abuse of process

***R v Lo Wai-keung* (1992) DCt, Crim Case No 312 of 1992, 17 December 1992, Judge Jackson**

The defendant was initially charged with four offences arising out of a traffic accident. Subsequently, he was charged with one count of wounding and one count of common assault to be tried in the Magistrates Court, and with one count of attempting to pervert the course of justice to be tried in the District Court. The trial before the Magistrates Court came on first, and the defendant was acquitted of both charges, after the court accepted a submission of no case to answer. During the trial in the Magistrates Court, the Crown called a witness who addressed the allegations which gave rise to the charge of attempting to pervert the course of justice. The Crown intended to call the same witness in the proceedings at the District Court.

The defendant applied for a permanent stay of proceedings. He defendant contended that the trial before the District Court was an abuse of the court's process and was oppressive, since the transfer of the charge of attempting to pervert to the District Court was contrary to the Indictment Rules, gave the Crown a second bite at the cherry, and deprived the defendant of any opportunity to apply for a joinder of the charges. The defendant also argued that there was a violation of article 10 of the *Bill of Rights*, as the defendant could not receive a fair trial in these circumstances.

Held (granting a permanent stay of proceedings):

1. The right to a fair trial under article 10 comprehends the whole process leading up to and including the trial.

2. Under the *Bill of Rights* it is for the defendant to prove, on the 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 burden is on the Crown to show, on the balance of probabilities, that the defendant has not been so prejudiced that a fair trial cannot be achieved.

   R v Fung Shu-shing (1992) DCt, Case No 777 of 1991, Judge Tyler (noted *Bill of Rights Bulletin*, v 1 n 4, p 34), followed.

3. In order to succeed in a claim of a common law abuse of process by reason of the exercise of the Attorney General's discretion (which effectively severed from other

charges the charge of `attempting to pervert'), the defendant must show, on a balance of probabilities, that the a decision amounted to an abuse of process and that what followed from that abuse amounts to oppression. Once the defendant succeeds in that, it is for the Crown to show, on the balance of probabilities, that there was no abuse in what it did or that the defendant was not prejudiced or oppressed as a consequence.

4. The court has a discretion to stay proceedings if to proceed after conviction or acquittal on a lesser charge would be prejudicial or oppressive.

5. In the present case there was a violation of article 10 of the *Bill of Rights* and an abuse of process because the Crown, in deciding to sever the charges and transfer the charge of attempting to pervert to the District Court, has effectively deprived the defendant of that he otherwise would have had of requesting that all the charges be tried together. The defendant cannot have a fair hearing on the charge of attempting to pervert when he has previously been acquitted by a different court of other charges which gave rise to the charge of attempting to pervert. To permit the charge to proceed would be oppressive.

Counsel: Mr Mackay for the Crown; J Chandler, for the defendant.

International Covenant on Civil and Political Rights, article 14(1)

Karttunen v Finland, Human Rights Committee, Communication No 387/1989, Views adopted on 23 October 1992, UN Doc CCCPR/C/46/D/387/1989

The author of the communication, Karttunen, had been tried and convicted on a charge of fraudulent bankruptcy. The trial court comprised one career judge and a number of law judges. One of the lay judges was the uncle of a partner in one of the firms that was a complainant in the proceedings and allegedly made the comment "She is lying" during the testimony of the author's wife. Another of the lay judges was the sister of a man who was on the board of a bank of which the author had been a client and which also appeared as a complainant. He had resigned from the Board two years before the proceedings.

The author appealed against his conviction on the ground of bias and requested a public hearing before the appellate court. The appeal was dismissed on the merits and a public hearing was not granted. The author then lodged a communication with the Human Rights Committee, claiming that his right to a fair and *public* hearing by an *independent and impartial* tribunal had been violated.

The Committee held that there had been a violation of article 14(1), stating:

"7.1 The Committee is called upon to determine whether the disqualification of lay judge V.S. and his alleged disruption of the testimony of the author's wife influenced the evaluation of evidence by, and the verdict of, the Raakkyla District Court, in a way contrary to article 14, and whether the author was denied a fair trial on account of the Court of Appeal's refusal to grant the author's request for an oral hearing. As the two questions are closely related, the Committee will address them jointly. The Committee expresses its appreciation for the State party's frank cooperation in the consideration of the author's case.

7.2 The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. 'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act

in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.

7.3 It is possible for appellate instances to correct the irregularities of proceedings before lower court instances. In the present case, the Court of Appeal considered, on the basis of the written evidence, that the District Court's verdict had not been influenced by the presence of lay judge V.S., while admitting that V.S. manifestly should have been disqualified. The Committee considers that the author was entitled to oral proceedings before the Court of Appeal. As the state party itself concedes, only this procedure would have enabled the Court to proceed with the reevaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw had indeed affected the verdict of the District Court. In the light of the above, the Committee concludes that there has been a violation of article 14, paragraph 1."

In a separate opinion one member of the Committee, Mr Bertil Wennergren addressed the issue of whether public oral hearings were necessary under article 14(1) in appellate proceedings. He wrote (at p 9):

"Mine is not a dissenting opinion; I merely want to clarify my view on the Committee's reasoning in this case. Mr. Karttunen's case concerns procedural requirements before an appellate court in criminal proceedings. The relevant provisions of the Covenant are laid out in article 14, firstly the general requirements for fair proceedings in paragraph 1, secondly the special guarantees in paragraph 3. Paragraph 1 applies to all stages of the judicial proceedings, be they before the court of first instance, the court of appeal, the Supreme Court, a general court of law or a special court. Paragraph 3 applies only to criminal proceedings and primarily to proceedings at first instance. The Committee's jurisprudence, however, has found the requirements of paragraph 3 to be also applicable to review and appellate procedures in criminal cases, i.e. the rights to have adequate time and facilities for the preparation of the defence and to communicate with counsel of one's own choosing (article 14, paragraph 3(b)), to be tried without undue delay (article 14, paragraph 3(c)), to have legal assistance assigned in any case where the interests of justice so require and without payment by the accused if he does not have sufficient means to pay for it (article 14; paragraph 3(d)), to have free assistance of an interpreter if the accused cannot understand or speak the language used in court (article 14, paragraph 3(f)), and finally the right not to be compelled to testify against himself or to confess guilt (article 14, paragraph 3(g)). That all these provisions should, *mutatis mutandis*, also apply to review procedures is only normal, as they are emanations of a fair trial, which in general terms is required under article 14, paragraph 1.

Under article 14, paragraph 1, everyone is entitled not only to a fair but also to a public hearing; moreover, according to article 14, paragraph 3(d), the accused is entitled to be tried in his presence. According to the *travaux préparatoires* to the Covenant, the concept of a 'public hearing' must be read against the background that in the legal system of many countries, trials take place on the basis of written documentation, which is deemed not to place at risk the parties' procedural guarantees, as the content of all these documents can be made public. In my opinion, the requirement, in

paragraph 1 of article 14, for a 'public hearing' must be applied in a flexible way and cannot *prima facie* be understood as requiring a public oral hearing. I further consider that this explains why, at a later stage of the *travaux préparatoires* on article 14, paragraph 3(d), the right to be tried in one's own presence before the court of first instance was inserted.

In accordance with the Committee's case law, there can be no *a priori* assumption in favour of public oral hearings in review procedures. It should be noted that the right to be tried in one's own presence has not explicitly been spelled out in the corresponding provision of the European Convention on Human Rights (article 6, paragraph 3(c)). This in my opinion explains why the European Court of Human Rights, unlike the Committee, has found itself bound to interpret the concept of 'public hearing' as a general requirement of 'oral'. The formulations of article 14, paragraphs 1 and 3(d), of the Covenant leave room for a case by case determination of when an oral hearing must be deemed necessary in review procedures, from the point of view of the concept of 'fair trial'. With regard to Mr. Karttunen's case, an oral hearing was in my view undoubtedly required from the point of view of 'fair trial' (within the meaning of article 14, paragraph 3(d)), as Mr. Karttunen had explicitly asked for an oral hearing that could not *a priori* be considered meaningless."

***González del Río v Peru*, Human Rights Committee, Communication No 263/1987, Views adopted on 28 October 1992, UN Doc CCPR/C/46/D/263/1987**

In this case the author of the communication had been charged with a number of corruption offences arising out of his tenure as director-general of the Peruvian prisons system. The author had challenged both his dismissal from his position in the civil service and had litigated the criminal charges against him through the Peruvian court system. He claimed that there was one criminal proceeding against him which had been pending since 1985. When he inquired of the court before which the matter was pending (the Supreme Court) as to the status of the case, he was told by the President of the Court that the proceedings would "be delayed to the maximum possible extent" since the matter was a political one and he (the President) would not like the press to question the final decision, which would obviously be adopted in the author's favour. The author complained to the Human Rights Committee, *inter alia*, that his right to a trial by an independent and impartial tribunal had been violated.

The Committee upheld the complaint, concluding:

"5.2 The Committee has noted the author's claim that he was not treated equally before the Peruvian courts, and that the State party has not refuted his specific allegation that some of the judges involved in the case had referred to its political implications (see paragraph 2.7 above) and justified the courts' inaction or the delays in the judicial proceedings on this ground. The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. It considers that the Supreme Court's position in the author's case was, and remains, incompatible with this requirement. The Committee is further of the view that the delays in the workings of the judicial system in respect of the author since 1985 violate his right, under article 14, paragraph 1, to a fair trial. In this connection, the Committee observes that no decision at first instance in this case had been reached by the autumn of 1992."

PRESUMPTION OF INNOCENCE (ARTICLE 11 (1), BOR, ARTICLE 14 (2), ICCPR)

Control of Obscene and Indecent Articles Ordinance (Cap 390), s 21 (1)(a)

***R v Cheng Pui-kit*, Mag App No 165 of 1992**

For details of this case, see *Bill of Rights Bulletin*, v 1, n 3, p 19. The case was adjourned in late May by the Court of Appeal pending the judgment of the Privy Council in *Attorney General v Lee Kwong-kut* and *Attorney General v Lo Chak-man.*

Copyright Ordinance (Cap 39), *ss 5, 9*

***R v Wong Leung-fung* (1993) Mag, WSC No 51235 of 1992, 10 February 1993, Mrs B Kwan**

In this case a challenge was made to ss 5(1) and 9 of the *Copyright Ordinance* (Cap 39) on the ground that they were inconsistent with the presumption of innocence in article 11(1) of the *Bill of Rights*. Section 5(1) provides:

> "5 (1) Without prejudice to section 21 of the [UK Copyright] Act, any person who for the purposes of trade or business has in his possession any infringing copy of a work or other subject matter in which copyright susbsists under the Act or this Ordinance shall, unless he proves to the satisfaction of the court that he did not know and that he had no reason to beleive that it was an infringing copy of such work or other subject matter, be guilty of an offence and shall be liable on conviction to a fine of $1,000 in respect of such infringing copy and to imprisonment for 12 months."

Section 9 of the Ordinance provides for statements in affidavits as to the subsistence, ownership and accuracy of copies of works to be admitted as proof of the truth of those statements until the contrary is proved. The provision applies in both civil and criminal proceedings.

Held (dismissing the challenge):

> While both provisions constituted prima facie violations of the presumption of innocence, they were justifiable. The legislative goal (the eradication of copyright infringements) was an important one. When one considered the rights of copyright owners, the fact that many of the copyrights likely to be in issue would be owned by foreigners, and the fact that an accused could relatively easily discharge the burden placed upon him meant that the provisions were not unreasonable.

The compatibility of s 9 of the *Copyright Ordinance* with the *Bill of Rights* was the subject of argument before Mayo J in *Hong Kong Stationery Manufacturing Co Ltd v Worldwide Stationery Manufacturing Co Ltd* (noted *Bill of Rights Bulletin*, v 1 n 2, p 10), but the judge considered that it was not necessary to resolve that issue for the purposes of that case.

Crimes Ordinance (Cap 200), section 137 (2)

R v Choi Bik-wan (1992) Mag, NK Case No 50439 of 1992, February 1993, Mr B Chau

The magistrate in this case considered a challenge to the "third limb" of s 137(2) of the *Crimes Ordinance* (Cap 200) on the ground of incompatibility with article 11(1) of the *Bill of Rights*. Section 137 provides:

> 137. (1) A man who knowingly lives wholly or in part on the earnings of prostitution shall be guilty of an offence and shall be liable on conviction to imprisonment for 5 years.
>
> (2) For the purposes of subsection (1), a man who lives with or is habitually in the company of a prostitute, or *who exercises control, direction or influence over a woman's movements in a way which shows he is aiding, abetting or compelling her prostitution with others*, shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary." (emphasis added)

Although the court held that there was a prima facie violation of article 11(1), the provision was a justified limitation on the enjoyment of that right, since it satisfied tests of rationality and proportionality in the pursuit of a legitimate social purpose:

> "The logical connection between the presumed fact and the basic fact is obvious. One can say with substantial assurance that the presumed fact 'knowingly living on the earnings of prostitution' would *more likely than not* flow from the proved fact that an accused had not only exercised control etc over the prostitute's movement but had done so in a manner which showed that he is aiding, abetting or compelling the other person's prostitution."
>
> ". . . [T]here is no room for doubt that the control of prostitution and the commercial exploitation of woman (or man) for sex is a matter of 'pressing and substantial' concern in Hong Kong. There is grave and public concern as to the extent of triad and organised crime involvement in the area of prostitution. I think Courts could and should take judicial notice of this problem. Moreover, I am sure that all judges in Hong Kong will agree that prostitutes rarely testify against pimps. The Legislature, in enacting the section, has recognised that evidence of this type was difficult if not impossible to obtain without the cooperation of prostitutes. Although the section requires an accused to rebut the presumption on the balance of probabilities instead of merely raising a reasonable doubt, I am satisfied that a less intrusive means would defeat the object of the legislation."

This decision reaches the same conclusion as have a number of other magistrates in challenges to s 137(2): see *Bill of Rights Bulletin*, v 2 n 1, pp 14-15.

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), s 25(1) and (4)

Attorney General v Lo Chak-man (1993) PC (appeal from the decision of Gall J, noted *Bill of Rights Bulletin*, v 1 n 4, p 18)

The Judicial Committee of the Privy Council heard argument in this case from 22-25 March 1993. Judgment was reserved and, as of the end of April, neither the result nor the reasons had been announced in the case.

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), s 4

R v Wong Ma-tai (1992) DCt, Case No STCC 129 of 1990, 16 December 1992, Deputy Judge C Y Wong

This case involved a challenge to the "assumptions" contained in s 4(3) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405), which form part of the procedure for the confiscation of proceeds of drug trafficking. The procedure is triggered once the defendant is convicted of one of the drug-related offence set out in a schedule to the Ordinance. Section 4 of the Ordinance deals with the assessment of a defendant'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." Those assumptions are (s 4(3)):

> "(a) that any property appearing to the court -
>
> (i) to have been held by him at any time since his conviction; or
>
> (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;
>
> (b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him or another; and
>
> (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a payment or reward, he received the property free of any other interests in it."

Held:

1. Confiscation proceedings under s 3 of the *Drug Trafficking (Recovery of Proceeds) Ordinance* do not form part of the sentencing procedure in relation to the convictions. They are, however, criminal and adversarial in nature; the Crown bears the burden of proof and the standard of proof is beyond a reasonable doubt.

2. The expression "criminal charge" in articles 10 and 11 of the *Bill of Rights* includes proceedings which are criminal in character and in which a decision of the court may lead to a defendant being penalised, or proceedings in which the court is

required to decide whether a defendant is guilty or innocent of an offence which has not been charged.

3. The scope of confiscation orders covers any payments or rewards which are not directly related to the offences for which the defendant was convicted. As the benefits and proceeds to be confiscated must be related to drug trafficking activities, the court, in making a confiscation order, has to make a finding tantamount to finding that the defendant is guilty of past drug trafficking offences and that the property which he held or has held was the proceeds of those offences, even though the defendant is not facing any criminal charges and that there is no evidence supporting such findings. The effect of s 4(2) and (3) is to presume the defendant guilty of past trafficking offences without trial; they are therefore inconsistent with articles 10 and 11(1) of the *Bill of Rights*.

Counsel: S Bailey, Senior Assistant Crown Prosecutor, and G Rhead, Senior Crown Counsel, for the Crown; Mr Marray for the defendant.

***R v Ko Chi-yuen* (1992) HCt, Case No 286 of 1991, 22 December 1992, Leonard J**

This case raised the same issues as *R v Wong Ma-tai*, above. The defendant, having been convicted of two drug trafficking offences for the purpose of the *Drug Trafficking (Recovery of Proceeds) Ordinance*, challenged in the confiscation proceedings the assumptions contained in s 4(2) and (3) of the Ordinance relating to the assessment of the defendant's benefits of drug trafficking, on the ground that they were inconsistent with article 11(1) of the *Bill of Rights*. The Crown argued, inter alia, that confiscation proceedings were not criminal proceedings; that the defendant, having been convicted, was no longer "charged with an criminal offence"; and that therefore article 11(1) was not applicable. The Crown further argued that the assumptions set out in s 4(3) were permissive rather than mandatory.

Held:

1. In view of the draconian nature of confiscation proceedings under s 3 of the *Drug Trafficking (Recovery of Proceeds) Ordinance*, the burden of proof is on the Crown and the standard of proof is that beyond reasonable doubt.

2. The trial of a criminal charge ends upon conviction. Confiscation proceedings do not form part of the sentencing procedure imposed on the defendant for the offences of which he has been convicted. They cannot result in a conviction of the defendant for a criminal offence.

3. Even if the confiscation proceedings were to be classified as criminal proceedings, they would be post-conviction criminal proceedings. The defendant cannot be considered at that stage to be "charged with a criminal offence" and therefore article 11(1) is not applicable.

Counsel: S Bailey, Senior Assistant Crown Prosecutor, and G Rhead, Senior Crown Counsel, for the Crown; J Dunn (instructed by John Massie & Co), for the defendant.

Editorial comment

R v Wong Ma-tai and *R v Ko Chi-yuen* provide an interesting contrast of approach. Both judges held the burden of proof in confiscation proceedings under the *Drug Trafficking (Recovery of Proceeds) Ordinance* is on the Crown and that the standard of proof is that of proof beyond reasonable doubt. Both judges also agreed that confiscation

proceedings did not form part of the sentencing proceedings in relation to the offences for which the defendant was convicted. Deputy Judge Wong regarded confiscation proceedings as criminal in nature; Leonard J is ambiguous on this point. Without deciding this issue, he suggested that, even if they were criminal in nature, they are post-conviction criminal proceedings.

At this point the two judges parted company. Deputy Judge Wong adopted a wide definition of "criminal charge" for the purpose of articles 10 and 11, and concluded that the term covers any proceedings in which a decision of the court may lead to a defendant being penalised, or proceedings in which the court is required to decide whether a defendant is guilty or innocent of an offence with which (s)he has not been charged. Leonard J disagreed, and held that the mere fact that the proceedings are criminal in nature does not necessarily mean that the defendant is charged with a criminal offence.

The broader view is, from an international standpoint, to be preferred. It is well-established as a matter of international law that many terms in the ICCPR must be given an "autonomous" meaning and are not restricted to the meaning that they may bear under Hong Kong law or any other national law. The same applies in the case of the *Bill of Rights*, as has been accepted by the Court of Appeal, at least in relation to the meaning of the word "law" in article 11(1) of the *Bill of Rights*. Accordingly, in our view to conclude that a proceeding does not involve the "determination of a criminal charge" merely because it does not manifest all the indicia of a normal criminal trial or because as a technical matter there is no formal "charge" of the type normally found in criminal cases may be misguided. As well as Leonard J in this case, both Jones J and the Court of Appeal in *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (see page 37 below) appear to have adopted an approach that may not have given due weight to the autonomous meaning of the term "criminal charge".

In coming to his conclusion, Leonard J relied almost exclusively on Canadian authorities. It is surprising that no European Court decisions are referred to in the judgment, although the meaning of the expression "charged with a criminal offence" has been extensively considered by the Strasbourg court. The European jurisprudence suggests a wide notion of "criminal charge", and given the heavy penalty for failure to comply with a confiscation order and the draconian nature of the proceedings, the court may well have come to a different conclusion had this body of case law been considered. The case may serve as a useful reminder of the danger of over-reliance on Canadian materials.

It may also be mentioned that Deputy Judge Wong refused to look at Hansard, whereas Leonard J found it unnecessary to refer to it. After the recent House of Lords decision in *Pepper v Hart* [1993] 1 All ER 42 (see page 50 below), the courts should feel more comfortable in referring to this kind of material.

Immigration Ordinance (Cap 115), s 37D(1) and (2)

R v Lee Kin-fai and Shum Wai-sun (1992) DCt, Crim Case No 315 of 1992, 10 November 1992, Deputy Judge de Souza

The defendants were jointly charged with an offence of assisting the passage within Hong Kong of unauthorised entrants, contrary to s 37D(1)(a) of the *Immigration Ordinance*. As a preliminary issue the defendants argued that s 37D(1) and (2) of the Ordinance violated the guarantee of presumption of innocence under article 11(1) of the *Bill of Rights*. The material part of s 37D of the *Immigration Ordinance* provides:

> "(1) Subject to subsection (2), any person who, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong -

(a) arranges or assists the passage to, or within, Hong Kong;
(b) offers to arrange or assist the passage to, or within, Hong Kong; or
(c) does or offers to do an act preparatory to or for the purpose of arranging or assisting the passage to, or within, Hong Kong,

of a person who is, or of a conveyance which carries, an unauthorised entrant, commits an offence ...

(2) No person shall be convicted of an offence under subsection (1) if he proves that he did not know, had no reason to suspect and could not with reasonable diligence have discovered -

(a) that the person whose carriage on a conveyance or whose passage is the subject of the charge, was an unauthorised entrant; or

(b) that the conveyance in relation to which he is charged was carrying, or would carry, any unauthorised entrant,

as the case may be."

Held:

1. Section 37D(1)(a) creates an offence of strict liability.

   Gammon (Hong Kong) Ltd v Attorney General [1985] AC 1; [1984] 2 All ER 503, applied.

2. The presumption of innocence touches upon the standard and incidence of the burden of proof; it plays no part in limiting the elements which go to make up an offence. The due diligence defence in s 37D(2) does not amount to a reverse onus clause. It merely provides the defendant with a defence despite his commission of the offence. Sections 37D(1)(a) and (2), when construed separately or in combination, are not incompatible with article 11(1) of the *Bill of Rights*.

   Attorney General v Lee Kwong-kut [1992] 2 HKCLR 75 (CA), distinguished.

   R v Hui Lan-chak (1992) DCt, DCC No 556 of 1992 (noted *Bill of Rights Bulletin*, v 2 n 1, p 5) followed.

3. Even if s 37D(2) amounts to a prima facie breach of article 11(1) of the *Bill of Rights*, it satisfies the tests of rationality and proportionality and can be justified.

Counsel: I G Cross QC, for the Crown; Mr Mok, for the first defendant; Mr Wong, for the second defendant.

Editorial comment

This case raises the same issues as were considered by Judge Lugar-Mawson in *R v Hui Lan-chak* (*Bill of Rights Bulletin*, v 2, no. 1, at pp 7-9). Deputy Judge de Souza adopted the same analysis and reasoning as Judge Lugar-Mawson in the earlier case. We have argued that that reasoning was flawed in important respects, although the result in the case may nonetheless be correct. The same criticisms would apply to the present decision. It may be noted that article 5 of the *Bill of Rights*, which provides a guarantee against arbitrary deprivation of liberty was not relied on in this case, although its corresponding

provision in the Canadian Charter has been invoked in challenging strict liability offences in a number of Canadian cases.

Import and Export Ordinance (Cap 60), s 18(1)(b)

R v Hung Wai-shing and others **(1993) Mag, FL No 4217 of 1992, 8 February 1993, Mr T Tsang**

This case involved a challenge to s 18(1)(b) of the *Import and Export Ordinance* (Cap 60) on the ground that it violated articles 5, 10 and 11(1) of the *Bill of Rights*. Sections 18(1)(b) and 18(2) of Cap 60 provide:

> "18.(1)(b) Any person who exports any unmanifested cargo shall be guilty of an offence and shall be liable on conviction to a fine of $500,000 and to imprisonment for 2 years."
>
> "18.(2) It shall be a defence to a charge under this section against the owner of a vessel, aircraft or vehicle, if the owner proves that he did not know and could not with reasonable diligence have known that the cargo was unmanifested."

Held:

1. Section 18(1)(b) created a strict liability offence which contained no requirement of mens rea. All the Crown needs to prove is that:

   (a) the accused exported the cargo; and
   (b) the cargo was unmanifested.

Article 5(1) of the *Bill of Rights*

2. Article 5(1) of the *Bill of Rights* affords not only a procedural protection against the arbitrary deprivation of liberty, but also guarantees that the substantive content of law which permits deprivation of liberty be in accordance with a universal concept of justice. Section 18(1)(b) is a prima facie breach of article 5(1) and falls to be justified under tests of rationality, proportionality and minimal impairment.

Article 10 of the *Bill of Rights*

3. Article 10 of the *Bill of Rights* is not only a guarantee of fair procedures in the hearing of a criminal charge, but also a guarantee for the substantive law in the hearing to accord with a universal concept of justice based on the concept of reasonableness.

Article 11(1) of the *Bill of Rights*

3. Article 11(1) of the *Bill of Rights* was not merely a procedural protection which is concerned with burden and standard of proof, but it is also concerned with the elements which go to make up an offence.

4. Section 18(1)(b) prima facie infringed article 11(1) and fell to be justified under the tests of rationality, proportionality and minimal impairment.

Counsel: S R Bailey, for the Crown; C Y Wong and R Yu, for the defendants.

This case has been adjourned on a number of occasions for the hearing on justification, most recently until 24 May 1993. A case raising a similar issue, *R v Lui Tak-hoi*, Mag App No 1 of 1993, was referred to the Court of Appeal on 30 March 1993.

***Landlord and Tenant (Consolidation) Ordinance* (Cap 7), ss 53(7)(a)(ii), 53(7B), 53(7F)(b)**

***R v Lau Kung-shing and Tan Jui-chih* (1993) DCt, Crim Case No 477 of 1992, 12 February 1993, Judge Downey**

The defendants applied in February 1990 to the Lands Tribunal for possession of a premises situated at Chungking Mansions of which they were the registered owners, on the ground that they reasonably required the premises as a residence for themselves. As the tenant delivered up vacant possession in or about March or April 1990 pursuant to an agreement with the defendants, they did not proceed with their application and no order for possession was ever made by the Lands Tribunal. In June 1990 the defendants assigned the premises to the family of one Koo. As a result of this transfer the defendants were charged with an offence of assigning the premises without the authority of the Lands Tribunal within 24 months of the making of a possession order, contrary to s 53(7)(a)(ii) and 53(7B) of the *Landlord and Tenant (Consolidation) Ordinance* (Cap 7). The Crown relied upon the deeming provision in s 53(7F)(b) which provides:

> "Where, in an application for possession of premises under subsection (2), the applicant alleges a ground mentioned in paragraph (b) or (c) of subsection (2) and --
>
> . . .
>
> (b) the application does not proceed and the tenant or sub-tenant consents to deliver up vacant possession of the premises. The applicant shall be deemed, for the purposes of subsections (7), (7G) and (8), to have obtained an order for possession under paragraph (b) or (c) of subsection (2); and, in a case mentioned in paragraph (b) of this subsection and for the purposes of fixing the commencement of the period mentioned in subsection (7), the date of the order shall be deemed to be the date upon which the application for possession is issued from the Tribunal."

Held (dismissing the charge):

1. The premises were used primarily for domestic purposes and Part II of the *Landlord and Tenant (Consolidation) Ordinance* therefore applied.

2. Section 53(7F)(b) was introduced, not to enlarge the scope of the offence, but to overcome problems of proof. It is evidential in nature and has to be justified under the *Bill of Rights*.

3. The net effect of subsection (7F) is to relieve the prosecution of the burden of proving an essential element of the offence, without anything to moderate the irrebuttable nature of the provision. The presumed fact of obtaining an order for possession under s 53(2)(b) does not follow rationally or realistically from the proved facts of the tenant's consent after an application has been filed in the Lands

Tribunal. Section 53(7F)(b) does not satisfy the tests of rationality and proportionality and the provision is inconsistent with article 11(1) of the *Bill of Rights* and hence repealed.

Counsel: M Nunns (on fiat), for the Crown; M Lee QC, W Chan and J Chan (instructed by Kevin L W Kwong & Co), for the defendants.

Editorial comment

This case highlights the blurred distinction between presumptions of fact and presumptions of law. One way of construing s 53(7F)(b) is that it is a definition section giving an expanded meaning to the term "order for possession", that is, mere application for possession on the ground of self-use, coupled with the voluntarily delivery up of vacant possession by a tenant without any court order for possession, is deemed to be an order for possession for certain purposes. While the judge seems to accept that article 11(1) does not apply to the definition of an offence (that is, the selection by the legislature of the constituent elements of the offence), he takes the view that the court has the power to examine the effect and nature of a deeming provision in considering whether article 11(1) has been infringed. Accordingly, while s 53(7F)(b) is on the face of it a definition section, this is not conclusive of its nature. After examining its drafting history and its relationship with other provisions in the Ordinance, the judge concluded that s 53(7F) was introduced to overcome problems of proof; it is evidential in nature and hence has to be justified under the *Bill of Rights*.

The upshot of the case is that deeming provisions, which may appear to be no more than definition sections, may be subject to challenge under article 11(1). However, it seems that the offence could be preserved quite simply, namely by making it an explicit offence to assign a property after having commenced proceedings for an order for possession on particular grounds; this would appear to avoid the problems identified in this case.

Also noteworthy is Judge Downey's statement that, while article 11(1) does not permit the court to examine the content of substantive criminal offences, even though a provision creating an offence may be arbitrary or unreasonable, if it does not impinge upon the presumption of innocence, a court may review the substantive criminal law under other articles of the *Bill of Rights*, in particular as articles 3, 4 or 5. Despite some suggestions to the contrary, this is plainly correct. (It may also be mentioned that the international decisions have held that the presumption of innocence may in certain circumstances have a substantive content and is not necessarily limited to scrutiny of the standard and allocation of the burden of proof.)

Summary Offences Ordinance (Cap 228), s 30

Attorney General v Lee Kwong-kut (1993) PC, 23 March 1993

On 23 March 1993 the Judicial Committee of the Privy Council rejected the appeal of the Attorney General against the decision of the Court of Appeal ([1992] 2 HKCLR 76), without calling on counsel for the respondent. As of the end of April the reasons of the Board had not yet been handed down.

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*, v 1 n 3, p 25. The appeal in this matter was abandoned last year.

"Facilities"

See *R v Chan Chak-fan and Chan Yiu-cheung* (1993) DCt at page 15 above.

Prosecution's duty of disclosure -- Attorney General's Guidelines -- Whether extended to making translations and transcripts of tapes

***R v Deputy District Judge Timothy Lee, ex parte Chow Po-bor* (1993) HCt, MP No 108 of 1992, 8 January 1993, Mayo J**

The applicants were charged with various offences under the *Prevention of Bribery Ordinance* (Cap 201). These charges arose out of an investigation of the Television and Entertainment Licensing Authority (TELA) undertaken by the ICAC which led to a number of people being charged with bribery offences.

The trial started on 21 August 1991. As a result of questions put to one of the prosecution witnesses who had acted as an undercover agent in the investigation, it emerged that a number of tape recordings had been made of conversations he had had with different people both in connection with the applicants' case and the cases involving the other 13 people who had been charged as a result of the investigation. Between 12 and 16 September 1991, 40 video tapes, 97 audio tapes, 6,660 pages of transcripts of the tapes and copy statements amounting to 197 pages were delivered by ICAC to the applicants' solicitors. The 6,660 pages of transcripts, which were in Chinese with certified English translations only transcribed approximately 30% of the audio tapes. There was no transcript of the remaining 70% of the tapes.

The applicants submitted to the District Court that there should be a stay of the proceedings mainly on the ground that the prosecution had failed to comply with the *Attorney General's Guidelines* for disclosure of information to the defence, arguing that the defendants faced considerable difficulties in preparing a defence which would take into account the material that had been belatedly made available by the prosecution. In all the circumstances of the case it was impossible that there could be a fair trial.

The prosecution conceded that the tapes could potentially be of assistance to the applicants, but resisted the application for a stay. The prosecution proposed that the applicants be tried before another judge, a suggestion opposed by the applicants on the ground that, if they were subsequently acquitted, they would not be able to recover the costs of the defence to date.

The District Judge acceded to the prosecution's request and ordered a trial before another judge. The applicants applied for judicial review of the judge's decision. The applicants sought a declaration that there should be a permanent stay of proceedings and, in the alternative, that mandamus be granted ordering the judge to continue with the trial. Among other grounds the applicant argued that the prosecution's failure to make adequate disclosure of unused material to the defendant not only amounted to common law abuse,

but also violated the right to equality of arms guaranteed by article 10 of the *Bill of Rights* and the right to have "adequate facilities" for the preparation of the defence guaranteed by article 11(2)(b) of the *Bill of Rights*. In particular, they argued that as a matter of law or, alternatively, as a matter of fairness, the prosecution was obliged to supply certified translations of all the material.

Held (dismissing the application for judicial review):

1. Subject to the discretion to withhold information on the ground of privilege, there is a general duty on the part of the Crown to disclose all material it proposes to use at trial on a charge of an indictable offence and, especially, all evidence which may assist the accused even if the Crown does not propose to adduce it. Information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege.

   Stinchcombe v R (1991) 68 CCC (3d) 1 (SCC), approved; *Attorney General's Guidelines* [1982] 1 All ER 734, (1982) 74 Cr App R 302, referred to.

2. The guarantees of "equality of arms" in article 10 and the right to adequate "facilities" in article 11(2)(b) of the *Bill of Rights* ensured the defendant access to relevant material in the possession of the prosecution. These rights accorded with the requirements laid down by the *Attorney General's Guidelines*.

   Jespers v Belgium, European Commission of Human Rights, Application No 8403/78, Report of 14 December 1981, 27 *D & R* 61, pp 87-88, paras 56-58, approved.

3. However, neither the duty of disclosure under the common law/*Attorney General Guidelines* nor articles 10 and 11(2)(b) of the *Bill of Rights* required the prosecution to transcribe tape recordings which had been made, regardless of whether they would be used in the prosecution case. There was evidence that there was no material on the tapes which would either implicate the undercover agent or exonerate either of the applicants. The prosecution had complied with its obligations by making all the material available; if they were required to transcribe all the tapes in these circumstances, it would be tantamount to requiring the prosecution to prepare the applicants' case for them.

4. The decision of the District Judge to order a trial before another judge was not reviewable. However, if the decision was reviewable, even though the District Judge had not been justified in making the order he did for the reasons he gave, that did not mean that it was appropriate to interfere with the ruling.

5. If the applicants were acquitted at a trial before a different judge, it would be open to the judge under s 73 of the Criminal Procedure Ordinance (Cap 221) to award the applicants the costs of the trial before the first judge, the first respondent.

6. Since the trial before the first respondent had been in its early stages and it was clear that the applicants would need time to examine the material provided to them, the hearing of the trial before another District Judge would not prejudice the applicants.

Counsel: Michael Thomas QC, Cheng Huan QC and G McCoy (instructed by Francis Yim & Co), for the applicants; P Dykes and S Lee (instructed by the Attorney General's Chambers), for the second respondent.

Editorial comment

See also *R v Wong Siu-tat* (1993) CA, Crim App No 531 of 1993, 18 February 1993, another case arising out of the same events as *Chow po-bor*. In that case the Court of Appeal, referring to the English *Attorney General's Guidelines* wrote (at p 8): "Mr. Chain has referred us to the guidelines . . . which, while they have no official standing in Hong Kong -- there being no similar type of guidelines here -- are certainly matters which any court in this territory would bear in mind."

Whatever the status of the *Attorney General's Guidelines* under the general law (whether as rules of law or rules of practice), it would appear that as a result of the passage of the *Bill of Rights*, they may now be binding as a matter of law, in relation to criminal proceedings before all courts in Hong Kong. This conclusion derives support from the recent decision of the European Court of Human Rights in *Edwards v United Kingdom*, European Court of Human Rights, Judgment of 16 December 1992, Series A, No 247-B.

The European Court noted, in considering article 6 (1) of the European Convention (the rough equivalent of article 10 of the *Bill of Rights*), that:

> "The Court considers that it is a requirement of fairness under paragraph 1 of Article 6, indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings."

The English law to which the Court was referring was the Attorney General's Guidelines and the duty to inform the defence of any earlier written or oral statement of a prosecution witness at the trial (citing *R v Clarke* (1930) 22 Cr App R 58).

RIGHT TO TRIAL WITHOUT UNDUE DELAY (ARTICLE 11(2)(C), BOR; ARTICLE 14(3)(C), ICCPR)

***Attorney General v Charles Cheung Wai-bun* (1993) PC, PC App No 56 of 1992, 29 March 1993, Judicial Committee of the Privy Council (Lords Griffiths, Bridge, Lowry, Slynn and Woolf; reasons delivered by Lord Woolf)**

This case was an appeal from the decision of Duffy J, permanently staying criminal proceedings against the respondent on common law grounds (abuse of process due to delay) and under article 11(2)(c) of the *Bill of Rights*. The background to the case and the holdings of Duffy J are summarised at *Bill of Rights Bulletin*, v 1, n 4, p 31.

The Judicial Committee dismissed the appeal by the Attorney General, concluding that under the common law rules relating to abuse of process, the judge had not erred in granting a stay. The Judicial Committee noted, as Duffy J had, that this was "very much a case on its own facts, the decision on which should not be taken as a precedent in other cases" (p 6 of the judgment). At the same time, the Board left open the issue whether there was a distinction between the burden of proof on an application based on common law abuse of process and under article 11(2)(c) of the *Bill of Rights*.

Held (dismissing the appeal):

1. The general test for determining whether a stay should be granted for delay under the common law doctrine of abuse of process was that no stay should be granted

unless the defendant shows on the balance of probabilities that owing to the delay he will suffer prejudice to the extent that no fair trial can be held.

Tan v Cameron [1992] 3 WLR 249 (PC), followed; *Attorney General's Reference No 1 of 1990* [1992] 3 WLR 9 at 19 (CA), considered.

2. It was not appropriate to resort to the introduction of shifting burdens of proof in determining whether the defendant could still obtain a fair trial despite a lengthy delay.

The following passage in the judgment of Lord Mustill in *Tan v Cameron* [1992] 3 WLR 249 at 264 (PC) was approved:

"Naturally, the longer the delay, the more likely it will be that the prosecution will be at fault and that the delay will have caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round and nothing is gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not unfair."

3. Although delay due to the complexity of the case or contributed to by the actions of the defendant should not be the foundation for a stay, the actions of the defendant in question were collateral acts or conduct which would not be the subject of the charge and disputed by the defendant at trial, for example jumping bail. In the present case any delay resulting from the alleged cover up and concealment by the defendant and others of the offences charged, being matters in dispute at trial, could be relied on by the defendant.

Lord Woolf, delivering the reasons of the Board, wrote (at pp 6-7):

"While there was no prospect of this appeal succeeding, the fact that their Lordships are of the opinion that the appeal ought to be dismissed should not be regarded as an indication that in the ordinary way, in the absence of exceptional circumstances, the time scales of the order of those under consideration will result in prosecutions of fraud being stayed."

Although submissions were made on the *Bill of Rights* and the possibility that there was a difference in burden of proof under the *Bill of Rights* and under the common law, the Privy Council chose not to decide this issue, commenting (at p 7):

"There remains the question as to whether Duffy J. was correct in saying that there is no material distinction between the onus on a defendant who seeks to have a prosecution staked as being an abuse of process at common law and the onus which faces a defendant who wishes to establish that he is entitled to have the proceedings stayed under the Bill of Rights. Mr. Nicholls having accepted that, if there was any distinction between the approach at common law and under the Bill, this distinction could not avail him on this appeal their Lordships had to decide whether to determine the issue. In the circumstances their Lordships decided no to do so and did not call on Mr. Robertson Q.C. to address the Board as they had already decided that his help was not need as to the outcome of the appeal. Their

> Lordships recognise that it is possible to argue that there is a difference of approach at common law and under the Bill. However, as any difference in the approach to be adopted is only likely to be of significance in a very small minority of applications for stay, their Lordships have decided that it is preferable not to determine the extent of the difference in this case, where it would be merely an academic exercise, but to leave it to be determined in a case where the existence of the difference would materially affect the outcome of the appeal. The issue is one which can be more satisfactorily examined in the context of a case where a difference in approach could have practical consequences."

RIGHT TO DEFEND ONESELF THROUGH LEGAL ASSISTANCE OF ONE'S OWN CHOOSING (ARTICLE 11 (2)(D), BOR; ARTICLE 14(3)(D), ICCPR)

***R v Chiu Te-kan* (1992) HCt, Criminal Case No 122 of 1992, 16 September 1992, Yang CJ (in chambers)**[3]

This case involved an application by the Crown for an expedited trial. The indictment against the defendant was filed on 15 April 1992. The trial date was initially set for 8 February 1993 and subsequently postponed, on the application of the defendant, until 17 January 1994. The Crown sought on this application to have the original dates restored or expedited dates fixed.

The defendant wished to retain a particular (English) counsel, who the defendant claimed would not be available to act for him earlier than October 1993 (for the pre-trial review) and January 1994 (for the trial). He also argued that additional time was needed for adequate preparation for his trial.

The Chief Justice ordered that the trial should be set down for April 1993, with a pre-trial review in January 1993. He commented (at p 3 of his judgment):

> "Clearly, the right of the defendant to have counsel of his choice is not an absolute one, and public interest in pursuing an expeditious trial must also be taken into account. Where a particular counsel is in great demand and his diaries are filled to such a degree that to accede to a defendant's desire to be represented by that counsel, inordinate delay would occur, then the defendant's desire should not be acceded to at the expense of the need for an expeditious trial."

RIGHT TO CALL AND EXAMINE WITNESSES (ARTICLE 11 (2)(E))

See *R v Chan Chak-fan and Chan Yiu-cheung* (1993) DCt at page 15 above.

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[3] Reported with the approval of the Deputy Registrar

RIGHT NOT TO TESTIFY AGAINST ONESELF OR TO CONFESS GUILT (ARTICLE 11 (2)(G), BOR; ARTICLE 14(3)(G))

Securities and Futures Commission Ordinance (Cap 24), section 33

See *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) HCt and CA, at page 37 below.

RIGHT TO THE BENEFIT OF A LESSER PENALTY WHERE STATUTE AMENDED BETWEEN COMMISSION OF OFFENCE AND SENTENCING (ARTICLE 12(1), BOR; ARTICLE 15(1), ICCPR)

Crimes Ordinance (Cap 200), s 75(2), 76(2); *Crimes (Amendment) Ordinance 1992* (No 49 of 1992)

***R v Lai Kai-ming* (1993) CA, Crim App No 296 of 1992, 12 January 1993, Cons VP, Kempster and Litton JJA**

The appellant in this case had been charged with the offence of being in possession of forged dies (8 forged credit cards) knowing them to have been forged, contrary to s 76(2) of the *Crimes Ordinance* (Cap 200). He entered a plea of guilty on 24 June 1992 in the District Court and was convicted. He appeared before the judge again for sentencing on 8 July 1992.

Section 76(2) of the *Crimes Ordinance* was repealed by Ordinance No 49 of 1992, with effect from 26 June 1992. The provision was in effect replaced by the new s 75 of the Crimes Ordinance. Under the old provision (s 76(2)), the maximum penalty was seven years' imprisonment. Under the new provision (s 75), the maximum penalty was three years' imprisonment.

The appellant was sentenced to imprisonment for one year and nine months. The judge calculated the appropriate period of imprisonment on the basis of a maximum period of imprisonment of seven years, unaware that the legislation had been amended. The defendant appealed on the ground that under article 12(1) of the *Bill of Rights*, he was entitled to be sentenced according to the new maximum of three years' imprisonment.

Article 12(1) of the *Bill of Rights* provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Held (allowing the appeal and ordering the release of the appellant):

1. Article 12(1) was not restricted in its operation only to those cases where the legislature has retained the definition of an offence in its entirety and simply lessened the penalty by amendment; it applies also in a case where the later offence has in effect replaced the earlier offence.

1. Since it was accepted that the new provision had effectively replaced the old s 76(2), article 12(1) of the *Bill of Rights* applied to the present case. Accordingly, the appellant was entitled to benefit from the reduction in penalty which took effect prior to his sentencing and he should have been sentenced on the basis of a maximum period of imprisonment of three years.

Editorial comment

Section 92 of the *Interpretation and General Clauses Ordinance* (Cap 1) provides:

"92. Where an act or omission constitutes an offence and the penalty for such offence is varied between the time of the commission of such offence and the conviction therefor, the offender shall be liable to the penalty prescribed at the time of the commission of the offence."

Although s 92 as such may not apply to a case such as the present where not merely the penalty is varied but a new offence enacted, to the extent that s 92 requires a higher penalty be imposed because that was the penalty in force at the time the offence was committed, it is inconsistent with article 12(1).

RIGHT TO PRIVACY (ARTICLE 14, BOR; ARTICLE 17, ICCPR)

Securities and Futures Commission Ordinance (Cap 24), section 33

***R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) HCt, MP No 3039 of 1992, 8 January 1993, Jones J; (1993) CA, Civ App No 7 of 1993, 19 February 1993 (Cons VP, Litton JA and Wong J)**

This case involved a challenge by the applicant to a number of provisions of the *Securities and Futures Commission Ordinance* (Cap 24) which confer investigative powers on the Securities and Futures Commission and related provisions. The applicant had been served with a notice under s 33 of the *SFC Ordinance* requiring him to attend at the offices of the Commission, to answer questions put to him by an officer of the Commission and to provide all assistance which he was reasonably able to give in relation to an investigation being undertaken by the Commission. The applicant was an employee of Truly International Holdings Ltd. The investigation related to dealing in the shares of Truly and had been initiated pursuant to s 33(1) of the *SFC Ordinance* because the Commission had reason to believe that:

"(a) offences contrary to Section 135 of the Securities Ordinance may have been committed in respect of dealings in the shares of Truly International Holdings Limited; and/or

(b) the manner in which persons have engaged in dealing in the shares of Truly International Holdings Limited may not be in the interest of the investing public, or the public interest;

during the period 29 July 1991 to 30 October 1991 and 20 January 1992 to 23 March 1992."

The applicant sought judicial review of the decision of the Commission to issue the notice. He claimed that the powers of the Commission violated articles 5, 11(2)(g), 14, 15 and 16 of the *Bill of Rights* and that the notice was therefore *ultra vires* the Commission.

In particular, he claimed that the requirements in s 33(4) and (6) to answer questions which might eventually be used derivatively in a criminal prosecution was inconsistent with article 11(2)(g). The applicant also argued that proceedings under Part III of the *Securities (Insider Dealing) Ordinance* (Cap 395) were "criminal" proceedings within the meaning of article 11 of the *Bill of Rights*, since they could lead to an order under s 23 of that Ordinance, ordering the disqualification of a person from holding specified positions, the payment of the profit gained or loss avoided to the government, or the imposition of a penalty of up to three times the amount of profit from insider dealing; accordingly, the use of answers given under compulsion in such proceedings violated article 11(2)(g).

The applicant further argued that the power to compel a person to answer questions and to order the production of documents was an infringement of the applicant's privacy guaranteed by **article 14** and that there must be a system of prior authorisation by an impartial and neutral arbiter such as a magistrate before such powers can be exercised.

The applicant further submitted that the failure to provide a person served with a notice with derivative use immunity in respect of his answers, but only with use immunity, was a violation of **article 5** of the *Bill of Rights*, relying on Canadian case law under s 7 of the *Canadian Charter of Rights and Freedoms*.

The applicant also submitted that s 33(8) was inconsistent with the right to freedom of thought guaranteed under **article 15** of the *Bill of Rights*, since it provided the Commission with the power to require a person under investigation to make a statutory declaration under threat of a penalty. He contended that no one should be compelled to affirm to the truth of facts unless there is an independent determination of the relevance of the issue in respect of which such affirmation is sought.

In relation to **article 16** the applicant contended that s 33(8) was inconsistent with the right to freedom of opinion and expression, as the powers of the Commission to compel a person under investigation to make a statutory declaration under threat of a penalty amounted to an interference with the right of that person to hold opinions as guaranteed under article 16(1) or, alternatively, the right not to impart information which is implicit in the right to freedom of expression guaranteed under article 16(2).

Sections 33 (4), (6) and (8) of the *SFC Ordinance* provide as follows:

> "33. (4) The person under investigation or any person who is reasonably believed or suspected by the investigator to have in his possession or under his control any record or other document which contains, or which is likely to contain, information relevant to an investigation under this section, or who is so believed or suspected of otherwise having such information in his possession or under his control, shall-
>
> (a) produce to the investigator, within such time and at such place as he may reasonably require, any record or other document specified by the investigator which is, or may be, relevant to the investigation, and which is in his possession or under his control;
>
> (b) if so required by the investigator, give to him such explanation or further particulars in respect of a record or other document produced in compliance with a requirement under paragraph (a) as the investigator shall specify;
>
> (c) attend before the investigator at such time and place as he may require in writing, and answer truthfully and to the best of his ability such questions relating to the matters under investigation as the investigator may put to him; and

(d) give to the investigator all assistance in connection with the investigation which he is reasonably able to give.

(6) A person shall be obliged to answer questions put to him under this section by the investigator, but if the answers might tend to incriminate him, and he so claims before answering the question, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings other than proceedings for an offence under subsection (12) or section 36 of the Crimes Ordinance (Cap.200), or for perjury, in respect of the answer but shall be admissible for all the purposes of the Securities (Insider Dealing) Ordinance (Cap.395); the investigator shall, before asking any question under this section, inform the person concerned of the limitation imposed by this subsection in respect of the admissibility in evidence of the question and any answer given.

(8) Where any explanation, particulars, answer or statement is or are made or given under subsection (4) to the investigator, he may further require, in writing, the person making or giving the same--

(a) to verify the explanation, particulars, answer or statement by statutory declaration (which may be taken and received by the investigator); or

(b) in case such explanation, particulars, answer or statement is or are not made or given in accordance with a requirement under subsection (4) to verify by a statutory declaration (which may be so taken and received) that he was unable to comply or, as the case may be, fully to comply, with that requirement because the matter which he failed to furnish was not within his knowledge or was neither in his possession nor under his control,

and where a requirement under this subsection is made, the person to whom it is made shall comply with the requirement within such reasonable period as is specified in the requirement."

Subsection 33(12) provides that any person who without reasonable excuse fails to comply with requests made under s 33(4) or (8) commits an offence. Subsection 33(13) provides that if any person, without reasonable excuse, fails to do anything which he is required to do under subsection (4), the investigator may certify the failure to the High Court and the High Court may thereupon inquire into the case and order the person to comply with the requirement or, if the High Court is satisfied that such person has failed without reasonable excuse to comply with such requirement, punish him in the same manner as if he had been guilty of contempt of court. Subsection 33(14) protects a person from being punished under subsections (12) and (13) in respect of the same failure.

Section 36 empowers a magistrate to issue a warrant upon the application of the Commission for a police officer or an authorised person to enter premises to search for and seize any records or documents required in connection with the investigation.

Section 61 provides that if any person commits an offence under s 33(6) of the *SFC Ordinance*, he will be liable on conviction upon indictment to a fine of $1,000,000 and to imprisonment for 2 years and upon summary conviction to a fine of $100,000 and imprisonment for 6 months.

Held (dismissing the application):

Article 5 -- the right to liberty and security of the person

1. Article 5 without doubt is concerned with the physical arrest and detention of a person in connection with criminal proceedings. Section 7 of the Charter on the other hand makes no reference to physical arrest and detention. In Hong Kong there is no provision for derivative use immunity either at common law or by statute and the introduction of the *Bill of Rights* has not changed the position.

Article 11(2)(g) -- Right not to be compelled to testify against oneself or to confess guilt

2. The words in article 11(2)(g) are unequivocal and are restricted to the rights of a person charged with or convicted of a criminal offence. There was no material difference between the powers exercised by a companies inspector under s 145 of the *Companies Ordinance*, powers which had been held to be consistent with article 11(2)(g) in *R v Allen, ex parte Tse Chu-fai* (*Bill of Rights Bulletin*, v 2, n 1, p 27).

3. Proceedings under the Securities (Insider Dealing) Ordinance, which could result in the imposition of a treble penalty on a person or in a person's being rendered ineligible for certain offices are not "criminal" proceedings within the meaning of article 11 of the *Bill of Rights*. The history of the legislation in Hong Kong made clear the legislature's intention was not to criminalise insider dealing. While the classification of the proceedings under Hong Kong law was not conclusive, that factor in combination with other factors supported the conclusion that the proceedings are disciplinary in nature and form part of the regulatory system of the financial markets. Other relevant factors were: no charge is preferred against anyone who appears before the Tribunal; the penalties imposed are quite clearly disciplinary in nature and do not reflect criminal sanctions and relate exclusively to the pecuniary benefit derived or losses avoided by the insider dealing together with a disqualification from various offices. The orders made by the Tribunal are not criminal convictions and so do not constitute a criminal record.

4. The offences created by ss 20, 30 and 34 of the *Insider Dealing Ordinance* underpinned the role of the Insider Dealing Tribunal and were not concerned with insider dealing.

Article 14 -- Right to protection against arbitrary or unlawful interference with privacy or correspondence

5. Article 14 makes no reference to a person's business premises so that it is restricted to the applicant's privacy in his personal and private affairs and does not extend to the realm of business transactions.

6. Even if the right to privacy does extend to an individual's business affairs, that expectation of privacy is minimal. However, the holding of shares in the circumstances where regulatory controls apply does not come within the ambit of article 14 when a criminal offence is suspected to have been committed.

7. The suggestion on behalf of the applicant that the investigator can summon a person before him upon a whim as he is not accountable to any independent body for the exercise of the power is unreal for before an investigation can be launched, the Commission must have a reasonable belief or suspicion that an offence has been committed. Further, an investigator cannot act unlawfully as the investigation must

be carried out in accordance with the provisions set out in the *SFC Ordinance*. If the Commission exceeds its jurisdiction, proceedings can be taken for judicial review.

Article 15 -- Freedom of thought, conscience and belief

8. The appointment by the Commission of an investigator, like the inspector in *Tse*, is not concerned with the applicant's thought processes but with obtaining factual evidence. Thus, the argument presented in respect of article 15 was devoid of merit.

Article 16 -- freedom of opinion and expression

9. Article 16 is concerned with the entrenched right of freedom of opinion and expression, not with providing an immunity from disclosing information. Accordingly, it had no application in the present circumstances.

10. The applicant was not entitled to demand further details of the information on which the Commission based its belief that an offence may have occurred or that dealing had taken place not in the public interest. Although the applicant complained that he did not have sufficient information or evidence when he was required to attend for interview, this is quite clearly wrong because he was aware that the investigation related to dealings in the shares in Truly in respect of two specified periods and that the suspected offences were violations of s 135 of the *Securities Ordinance* (Cap 333). He had also been informed of the names of four major traders. It would be inappropriate to provide further information, since this would be clearly prejudicial to the investigation.

Per Jones J: "I find that s.33(4) is in no way inconsistent with any of the articles of the BOR Ordinance that were invoked, whilst I reject the alternative argument based upon s.33(8). As a result the second stage of the bifocal or proportionality test was not reached. However, if I had found that there had been any contravention of the BOR Ordinance, I would have held that the interests of the state and the community far outweighed those of the individual for it is a matter of public interest that suspected offences of fraud should be investigated."

"The use of criminal sanctions in the SFC Ordinance is appropriate in order to enforce compliance with the law. Due to the complexity of transactions and the difficulties encountered when there are nominees and off-shore companies, it is imperative that these sanctions are available. These sanctions merely underpin the Ordinance in order to give it proper effect."

Before the Court of Appeal: (1993) CA, Civ App No 7 of 1993, 19 February 1993 (Cons VP, Litton JA and Wong J)

The applicant appealed against the judgment of Jones J to the Court of Appeal. On the appeal the applicant relied only on articles 5 and 14 of the *Bill of Rights*. He argued that the powers of the investigator under s 33(4) to require the attendance of a person in order to provide information were inconsistent with the right to liberty: and freedom from arbitrary detention conferred by article 5(1). He also argued that the powers represented an arbitrary and unlawful interference with the privacy of the person affected.

Held:

Article 5(1)

1. The words "arrest" and "detention" are invariably used in a criminal context and the compulsion exercised by an investigator over an interviewee could not be characterised as an "arrest" or detention". Article 5 is intended to cover only physical interference with the liberty or person of the citizen, although not necessarily confined to situations that are strictly criminal. It has no application to situations such as the present one. The provisions of article 5(1) are not engaged when an investigator exercises the powers conferred on him by s 33(4) of the *SFC Ordinance*.

2. In any event the requirement to attend an interview under s 33(4) could not be described as "arbitrary" detention, since there is nothing arbitrary about the exercise of powers under s 33(4). The power could only be lawfully exercised if the Commission has reason to believe the matters specified in s 33(1) and initiated an investigation; the investigator had also to be satisfied that the interviewee is in possession of relevant information; and in the event of an abuse of power, judicial review is available.

Article 14

3. (Cons VP semble not agreeing) It was by no means clear that a distinction between personal and business affairs was valid in the context of the protection against unlawful interference with one's privacy guaranteed by article 14 of the *Bill of Rights*. The emphasis under that article should be not whether personal or business affairs were affected, but whether any interference was arbitrary or unlawful.

4. Any interference with a person's privacy resulting from the lawful exercise by an investigator of powers under s 33(4) could not be described as arbitrary.

5. The question to ask in determining whether a provision was "unlawful" was who in the general run of things might be subjected to the compulsory powers of the investigators under s 33(4), not who might conceivably be caught in the extremities of the net. Those likely to be able to provide relevant information would be persons directly involved in the securities industry, whose expectation of privacy would be minimal.

6. (Cons VP not deciding) The phrase "for the purposes of the Securities (Insider Dealing) Ordinance" in s 33(6) of the *SFC Ordinance* did not include prosecutions for failure to comply with an order made under s 23(1) of the former Ordinance.

7. If this conclusion was wrong, the interference in a person's privacy resulting from the exercise of powers under s 33(4) was in any event not contrary to "universal concepts of justice" and was therefore not "unlawful" within the meaning of article 14 of the *Bill of Rights*: such privacy interests as the applicant and persons in a similar position might have cannot stand against society's requirements of a proper investigation under s 33(4).

Per Litton JA

8. (Cons VP not agreeing) The notion of "law" encompassed by the terms "unlawful" and "the protection of the law" in article 14 bore an autonomous meaning and was

not restricted to its meaning under the domestic law of Hong Kong, but embodied in addition a "universal concept of justice".

Per Cons VP

9. A person who trades in shares publicly listed on the official market must know that he is entering an area of commerce that is strictly regulated for the benefit of the community and market participants. Accordingly, vis-a-vis the authorities responsible for that regulation (but possibly not otherwise) he cannot maintain that his trading is a private matter.

10. It was not clear from the wording of article 14 that the term "unlawful' should be given a meaning broader than it should be given under the common and statute law of Hong Kong; the better view appeared to be that the term "law" in articles 14 and 15 refers only to that law which is found in relevant statutes or in the common law .

11. In any event, the provisions challenged were a reasonable and proportionate measure and would therefore satisfied the extended concept of "lawfulness".

Editorial comment

This case raises and decides a number of important issues relating to the consistency of the investigative powers of regulatory agencies with the *Bill of Rights*. To the extent that it upholds the powers of the SFC to demand information, documents and assistance, it reaches the same result as the Canadian cases dealing with securities legislation and other regulatory frameworks.

None of the judges apparently had any hesitation in concluding that a finding under the *Securities (Insider Dealing) Ordinance* that a person has engaged in insider dealing and a consequent disqualification order and/or order to pay a penalty of three times the amount gained or loss avoided as a result of the insider dealing did not involve the "determination of a criminal charge". While this conclusion may well be correct in the present case, it should be noted that this term has an "autonomous" meaning under the *Bill of Rights* and is not confined to proceedings which are "criminal" under the accepted Hong Kong meaning of that term. While Jones J does mention this, both he and the Court of Appeal seem to lay considerable stress on both the intention of the legislature and the fact that such a determination does not have the indicia of a normal criminal charge (charge, entry in criminal record and so on).

It may be that this does not give adequate weight to the severity of the penalty, a factor which may in another context be crucial: see, for example, *Société Stenuit v France* (14 EHRR 509), in which the European Commission of Human Rights held that the imposition by the relevant Ministry of a fine of FF50,000 for infractions of French competition law did involve the determination of a criminal charge against the company concerned.

The issue of whether proceedings which are not characterised as "criminal" under the law of Hong Kong are nonetheless "criminal" for the purpose of the *Bill of Rights* has also been considered in the context of whether confiscation proceedings under the *Drug Trafficking (Recovery of Proceeds) Ordinance* involved the "determination of a criminal charge" (see page 24).

On the question of whether the guarantee against unlawful interference with one's privacy and correspondence in article 14 of the *Bill of Rights* has any application to one's "business" affairs as opposed to one's personal affairs, the view of Litton JA (that it applies to both) is the better view on the basis of international and Canadian authorities.

Cons VP seems to disagree with this view and held that trading in publicly listed shares is not a "private" matter, at least so far as the regulatory authorities are concerned. Unfortunately, Wong J agreed with both Litton JA and Cons VP, despite their conflicting views, so his concurrence does little to help elucidate matters. In any event, both Jones J and Cons VP appear to be in agreement with the qualification mentioned by Litton JA, that the expectation of privacy in relation to business affairs will generally be less than in relation to personal affairs, a position well supported by the authorities.

The question whether the terms "unlawful" in article 14(1) and "law" in article 14(2) bear the extended meaning of embodying "a universal concept of justice" (or less, grandly, requirements of substantive reasonableness and proportionality) was answered differently by Litton JA (who held it did) and Cons VP (who held it did not). Again it was unfortunate that the concurrence of Wong J in both judgments does little to clarify matters. In the event, both Litton JA and Cons VP agreed that the provisions challenged satisfied this extended test of law.

The analysis by Cons VP of the terms "arbitrary", unlawful" and "protection by law" in article 14(1) and (2) highlights some of the difficulties that arise from the wording of article 14. Article 17 of the ICCPR (of which article 14 is a copy) is not as happily drafted as it might be, and its structure and wording differ from that of the corresponding provision of the European Convention (article 8). Although it may not have helped to resolve the issue definitively, reference by the Court to the drafting history of the ICCPR may have been useful, since it would have revealed the divergent reasons for the inclusion of the various terms in article 17. Even so, it must be admitted that the final formulation of article 17 reflected in a number of respects a failure to agree on the exact meaning of the terms "arbitrary" and "unlawful" and the need to include them both.

The view of Cons VP -- that the term "unlawful" refers only to domestic law -- derives support from the decision of the Human Rights Committee in *Aumeeruddy-Cziffra v Mauritius*, Communication No 35/1978, *Selected Decisions of the Human Rights Committee* (1985) vol 1, p 67 at p 70. In that case the Committee expressed the view that, if an interference with family is permissible under national law, it is not "unlawful" within the meaning of article 17(1) (para 9.2.(b)(i)4).

While this view may make sense in relation to the first clause of article 14(1), it may not make as much sense in the second clause of article 14(1), which provides protection only against "unlawful attacks" on one's reputation. The narrower meaning of the term "unlawful" would mean that one would simply look to the provisions of national law regulating attacks on a person's character and not to their substance. Thus, provided that particular types of attack were not unlawful under national law, that would be the end of the inquiry under article 14(1), however unreasonable those laws were. Nor, it seems, would the person affected be able to claim that the State had failed to carry out its positive obligations under article 14(2), if there were legal provisions in place which provided some measure of protection, even though that may fall far short of what might be considered a reasonable level of protection of reputation.

It can be seen that the narrow and broader views of the scope of the term "law" in article 14 give rise to difficulties. As it happened in this case, it was not decisive to the outcome of the case to resolve them one way or the other.

RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION (ARTICLE 15, BOR; ARTICLE 18, ICCPR)

See *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) HCt and CA, at page 37 above.

RIGHT TO FREEDOM OF EXPRESSION (ARTICLE 16, BOR; ARTICLE 19, ICCPR)

See *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) HCt and CA, at page 37 above.

RIGHT TO EQUALITY AND NON-DISCRIMINATION (ARTICLE 22, BOR; ARTICLE 26, ICCPR)

Inland Revenue Ordinance (Cap 112), ss 75 (3), (5), 77

See *Commissioner of Inland Revenue v Lee Lai-ping* (1993) DCt, at page 11 above.

Crimes Ordinance (Cap 200), s 118J

R v C and H (1993) Mag

A challenge was made to the provisions of s 118J of the *Crimes Ordinance* (Cap 200) on the ground that the offence violated the guarantee against non-discrimination on the ground of sex in article 22. It was not necessary for the outcome of the case to determine this point. Section 118J provides:

> "118J. (1) A man who commits an act of gross indecency with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.
>
> (2) An act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done--
>
> (a) when more than 2 persons take part or are present; or
>
> (b) in a lavatory or bathhouse to which the public have or are permitted to have access, whether on payment or otherwise.
>
> (3) In this section, 'bathhouse' means any premises or part of any premises maintained for the use of persons requiring a sauna, shower-bath, Turkish bath or other type of bath."

International Covenant on Civil and Political Rights, article 26

Oulajin and Kaiss v Netherlands, Human Rights Committee, Communication Nos 406/1990 and 426/1990, Views adopted on 23 October 1992, UN Doc CCPR/C/46/D/406/1990 and 426/1990

The two applicants were Moroccan citizens living in the Netherlands. Oulajin had assumed financial responsibility for his nephews in Morocco after his brother's death. Kaiss had assumed financial responsibility for his two young siblings after his father's death. The authors applied for benefits under the Child Benefit Act claiming their dependants as "foster children" under that legislation. Their applications were rejected, on the ground that the children concerned could not be counted as foster children since they

were living in Morocco, where the authors could not influence their upbringing (as was required under the Act).

The authors argued that the refusal constituted discrimination contrary to article 26 of the Covenant. The Netherlands government noted that two issues of discrimination were raised: (a) whether the distinction between an applicant's children and foster children constituted discrimination; and (b) whether the regulations relating to foster children, as applied in the Netherlands, resulted in an unjustifiable disadvantage for non-Dutch nationals residing in the Netherlands. The government argued that the distinction between natural and foster children was an objective and reasonable one; that there was no data to show that foreign nationals in the Netherlands were disproportionately denied benefits under the Act; and, in any event, this would not amount to discrimination under article 26, since the scope of article 26 did not extend to differences of results in the application of common rules in the allocation of benefits.

The Human Rights Committee rejected the author's communication, stating:

> "7.3 In its constant jurisprudence, the Committee has held that although a State party is not required by the Covenant on Civil and Political Rights to adopt social security legislation, if it does, such legislation and the application thereof must comply with article 26 of the Covenant. The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.
>
> 7.4 With respect to the Child Benefit Act, the State party submits that there are objective differences between one's own children and foster children, which justify different treatment under the Act. The Committee recognizes that the distinction is objective and need only focus on the reasonableness criterion. Bearing in mind that certain limitations in the granting of benefits may be inevitable, the Committee has considered whether the distinction between one's own children and foster children under the Child Benefit Act, in particular the requirement that a foster parent be involved in the upbringing of the foster children, as a precondition to the granting of benefits, is unreasonable. In the light of the explanations given by the State party, the Committee finds that the distinctions made in the Child Benefit Act are not incompatible with article 26 of the Covenant.
>
> 7.5 The distinction made in the Child Benefit Act between own children and foster children precludes the granting of benefits for foster children who are not living with the applicant foster parent. In this connection, the authors allege that the application of this requirement is, in practice, discriminatory, since it affects migrant workers more than Dutch nationals. The Committee notes that the authors have failed to submit substantiation for this claim and observes, moreover, that the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers. The Committee considers that the scope of article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits."

Four members of the Committee (Messrs Herndl, Mullerson, N'Diaye and Sadi) appended a separate opinion, in which they wrote:

> "We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. While referring to the individual

opinion attached to the decision concerning Sprenger v. The Netherlands[4] (communication No. 395/1990), we consider it proper to briefly expand on the Committee's rationale, as it appears in these Views and in the Committee's Views, on Communications Nos. 172/1984, Broeks v. The Netherlands and 182/1984, Zwaan-de-Vries v. The Netherlands.[5]

It is obvious that while article 26 of the Covenant postulates an autonomous right to non-discrimination, the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.

Furthermore it would seem to us that it is essential to keep one's sense of proportion. With respect to the present cases, we note that the authors are asking for child benefits not only for their own children -- to which they are entitled under the legislation of the Netherlands -- but also for siblings nephews and nieces, for whom they claim to have accepted responsibility and hence consider as dependents. On the basis of the information before the Committee, such demands appear to run counter to a general sense of proportion, and their denial by the government concerned cannot be considered unreasonable in view of the budget limitations which exist in every social security system. While States parties to the Covenant may wish to extend benefits to such wide-ranging categories of dependents, article 26 of the Covenant does not require them to do so."

OTHER CASES RAISING ISSUES OF INTERNATIONAL HUMAN RIGHTS

STATELESSNESS

***R v Director of Immigration, ex parte Pan Ze-yang* (1993) (see *Bill of Rights Bulletin*, v 2, n 1, p 36)**

This case was been argued before the Court of Appeal in late April 1993 and judgment is awaited.

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[4] Views adopted on 31 March 1992 (44th session) [noted *Bill of Rights Bulletin* v 1 n 4, p 46].

[5] Views adopted on 9 April 1987 (29th session).

NEW LEGISLATION AND PENDING BILLS

ORDINANCES

Crimes (Amendment) (No 3) Ordinance 1993

This Ordinance abolishes the death penalty and substitutes mandatory life imprisonment for persons convicted of murder, and discretionary life sentences for persons convicted of treason or piracy with violence.

Television (Amendment) Ordinance 1993

This Ordinance provides the legislative framework for the licensing and control of subscription television, relaxes certain legislative restrictions on shareholding by licensees, and amends existing provisions in the *Television Ordinance* which may be inconsistent with the *Bill of Rights*. The major amendments include the repeal of s 26 on the duplicate sources of programme standards, s 29 on the power of the Governor in Council to issue directions on programme standards, s 36 which enables the Broadcasting Authority to prohibit broadcasting of material rendered by certain individuals, and regulation 5 on the control of the source of news service. Of particular interest is the amendment to ss 33 and 35 of the Ordinance, which repeals the power of Broadcasting Authority to censor a programme before it is broadcast.

BILLS

***Boundary and Electoral Commission Bill 1993* (Government Gazette, 29 January 1993, Legal Supplement No 3, C86)**

This Bill will establish an independent body to oversee electoral matters including the delineation of the geographical constituencies and the conduct of elections. One interesting feature of the Bill is that it would permit quite substantial variations in the relative sizes of constituencies will be permissible, provided that the population in each constituency is not greater or less than the population quota (the average population per constituency) by more than 25%. For example, if the average size of Hong Kong geographical constituencies were, say, 200,00, the Bill would permit electorates to be demarcated with populations of, say, 150,000 and 250,000, each electing a single member to the Legislative Council. What is of concern about this margin is that it is well beyond the tolerances that one would have thought achievable in Hong Kong and which are in fact insisted on in countries such as Australia (in federal elections). Of more concern is the administration's assertion in its Legislative Council Brief that the Bill had no *Bill of Rights* implications; discrepancies of this order in the size of constituencies clearly raise issues under articles 25 and 26 of the ICCPR (articles 21 and 22 of the *Bill of Rights*).

***Electoral Provisions (Miscellaneous Amendments) Bill 1993* (Government Gazette, 12 March 1993, Legal Supplement No 3, C237)**

This Bill embodies the so-called "Patten proposals", proposing changes to the existing electoral system for the 1995 Legislative Council elections. The Bill proposes a number of changes to existing law, including the lowering of the voting age from 21 to 18, the introduction of single-member geographical constituencies, the creation of a number of new functional constituencies (a move which will considerably increase the number of

persons entitled to vote in a functional constituency), and the abolition of corporate votes in the functional constituencies.

While the Bill considerably expands the franchise beyond the existing franchise and seeks to remedy some of the difficulties with the functional constituency system, it has nonetheless been criticised by some on the ground that, to the extent that it proceeds upon a system of functional constituencies which give preferential political representation to the privileged and powerful, it is inconsistent with the spirit of article 25 of the ICCPR (article 21 of the *Bill of Rights*). Problems also exist in relation to gross disparities in the relative sizes of the functional constituencies. The administration's claim that the Bill would extend a vote in the functional constituencies to "the working class" of Hong Kong has also been criticised for its failure to include in that class persons, overwhelmingly women, who may be working in the home but who may not be part of the paid labour force.

The stated purpose of the Bill was to reform the existing system in a manner which would dovetail with the Basic Law. A number of critics, including officials of the Chinese government, have strongly criticised the proposals and the Bill on various grounds, including that they are inconsistent with the Basic Law. The whole issue is the subject of talks between the United Kingdom and China which began in late April 1993.

INTERNATIONAL CASES AND CASES FROM OTHER JURISDICTIONS

EUROPEAN COURT OF HUMAN RIGHTS

Cruel, inhuman or degrading treatment or punishment-- Whether corporal punishment of schoolboy "degrading punishment" -- Whether State under an obligation to prevent private individuals from inflicting degrading punishment on others

***Costello-Roberts v United Kingdom*, European Court of Human Rights, Judgment of 25 March 1993, *The Times*, 26 March 1993**

In this case a Chamber of the European Court of Human Rights held (5-4) that corporal punishment inflicted on the applicant did not amount to degrading treatment under article 3 of the European Convention on Human Rights, since it had failed to reach the minimum threshold of severity that was necessary for it to be characterised in this way. The applicant had been hit across the buttocks, through his shorts, three times with a rubber-soled gym shoe by the headmaster of the independent school which the applicant attended.

The Court held that the responsibility of the State was engaged if a violation of the rights guaranteed by the Convention were the result of a failure by the State to "ensure" the enjoyment of those rights by everyone subject to its jurisdiction. In this case the State conceded that it did have an obligation as regards pupils in independent schools, but that this obligation was adequately discharged by prohibiting the use of any corporal punishment that was not reasonable or moderate. The Court held that in the present case the act was such as might engage the responsibility of the United Kingdom, if it were shown to violate articles 3 or 8 of the Convention. The Court rejected claims based on both these articles.

UNITED KINGDOM

***Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011 (HL)**

For an earlier discussion of this case in the Court of Appeal, see *Bill of Rights Bulletin*, v 1, n 3, p 43.

***Pepper v Hart* [1993] 1 All ER 42 (HL)**

In this case the House of Lords has finally followed developments in other Commonwealth jurisdictions and relaxed the previous English rule about the use of Hansard to assist in the interpretation of legislation.

The House of Lords held by a majority (Lord Mackay LC dissenting) that the rule prohibiting courts from having reference to Parliamentary materials as an aid to the construction of statutes should be relaxed so as to permit reference to such material where (i) the legislation is ambiguous or obscure or the literal meaning of the provision leads to an absurdity; (ii) the material consulted consists of statements of the relevant Minister or promoter of the Bill and other material necessary to understand those statements; and (iii) the material relied on is clear.

The decision will, we hope, be followed in Hong Kong. In the case of the *Bill of Rights* this may throw some light on the legislature's intentions relating to a number of difficult issues in the interpretation of the *Bill of Rights*, such as the extent to which it intended to exclude so-called "inter-citizen rights" from the scope of the *Bill of Rights*, or the existence of a pressing social need and the proportionality of certain measures which are prima facie inconsistent with the *Bill of Rights*.

AUSTRALIA

Marital rape -- Whether rule that husband could not rape wife part of the common law

***The Queen v L* (1991) 174 CLR 379 (HCA)**

In this case the High Court of Australia considered, in the context of a constitutional challenge to State legislation on the ground of its inconsistency with federal legislation, the status of the common law rule that a husband could not rape his wife. The Court held that, if it had ever been the common law that by marriage a wife gave irrevocable consent to sexual intercourse, it was no longer the common law. Judgment in the case was handed down after the decision of the House of Lords to similar effect in *Reg v R* [1992] 1 AC 612.

Contempt of court -- Punishment -- Fines -- Prisoner serving life sentence -- Whether fine an "excessive fine" -- Bill of Rights 1688 (UK)

***R v Smith* (1991) 25 NSWLR 1 (NSW CA)**

In this case a prisoner serving a sentence of life imprisonment refused to give evidence in a murder trial, with the result that the trial was aborted. He was subsequently convicted of contempt of court and fined AUS$60,000. He appealed against the conviction and the penalty.

A majority of the Court of Appeal upheld the conviction and penalty. The case is of particular interest in view of the survey by Kirby P (dissenting) of the development of the right not to be subjected to "excessive fines" from the Bill of Rights 1688 to modern national and international standards. Kirby P notes (25 NSWLR at 15) that the guarantee against cruel, inhuman or degrading treatment in article 7 of the ICCPR (article 3 of the Hong Kong *Bill of Rights*) reflects this right, "though without express provision in respect of excessive fines."

CANADA

Citations to Canadian cases cited in earlier Bulletins

R v Morin (1992) 71 CCC (3d) 1, 8 CRR (2d) 193 (Supreme Court of Canada)
R v Downey (1992) 90 DLR (4th) 449, 72 CCC (3d) 1, 9 CRR (2d) 1 (Supreme Court of Canada)
R v Zundel (1992) 95 DLR (4th) 202 (Supreme Court of Canada)

IRELAND

Right to respect for family life -- Citizen children and alien parents -- Whether entitled to stay in Ireland

***Fajujonu v Minister for Justice* [1990] 2 IR 151 (HCt and SCt)**

This case involved challenges by members of a family to a decision made by the Minister for Justice refusing the parents leave to stay in Ireland. The parents were aliens, but their children were born in Ireland and were therefore Irish citizens. The plaintiffs argued that the refusal to permit them to stay was a violation of article 41 of the Constitution which provided that the family is the natural and fundamental unit group of society, which the State guaranteed to protect.

Both the High Court and the Supreme Court on appeal rejected the plaintiffs' challenge, upholding the power of the Minister to order the deportation of aliens in such circumstances. However, the Court held that the Minister should reconsider the application of the parents to remain in Ireland. Finlay CJ wrote ([1990] 2 IR at 162):

> "I have come to the conclusion that where, as occurs in this case an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that *prima facie* and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State.
>
> I am also satisfied that whereas the parents who are not citizens and who are aliens cannot, by reason of their family children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland, they are entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children."

SOUTH AFRICA

Ciskei

Interpretation of Bill of Rights -- Permissible restrictions -- Liberty and security of person -- Arbitrary detention -- Freedom of assembly and association

***African National Congress (Border Branch) v Chairman, Council of State of the Republic of Ciskei*, 1992 (4) SA 434 (Ciskei, General Division)**

In this case a challenge was mounted, *inter alia*, to two provisions of the National Security Act of Ciskei on the grounds that they were contrary to the guarantees of the right to liberty and security of the person and the right to freedom of association and assembly guaranteed by the Ciskei Constitution. The provisions of the Act challenged were those which permitted indefinite detention by the police (to be terminated at the discretion of various officials) and those which prohibited gatherings of more than 20 people unless the gathering had been authorised by a magistrate in writing

The Court held that the provisions of the Act were inconsistent with the guarantees in the Constitution. Particularly interesting is the discussion against an international law background in the judgment of the issue of permissible restrictions on the enjoyment of fundamental human rights, particularly the discussion at pages 447-449 on the guidelines that should inform an interpretation of a Bill of Rights.

***Nyamakazi v President of Bophuthatswana*, 1992 (4) SA 540 (Bophuthatswana, General Division)**

This case involved a challenge to provisions of the Internal Security Act (B) which prohibited "non-citizens" of Bophuthatswana from participating at gatherings in speeches, addresses, discussions, debates or campaigns on matters relating to the internal politics of Bophuthatswana. The challenge was based on the guarantees of freedom of expression, freedom of association and non-discrimination in the Constitution of Bophuthatswana.

The court held that the provisions were unconstitutional as they were discriminatory against "aliens". The judgment of Friedman J contains a helpful review of the principles of constitutional interpretation adopted in various jurisdictions, as well as the judge's own formulation of appropriate guidelines for interpreting a written constitution with a Bill of Rights. He also reviews some United States jurisprudence relating to discrimination against aliens.

RECENT PUBLICATIONS

Hong Kong

Article 19 and the Hong Kong Journalists' Association, *Urgent Business: Hong Kong, Freedom of Expression and 1997* (1993)

A Byrnes, "The Impact of the Hong Kong Bill of Rights on Litigation", in J Sihombing (ed), *Law Lectures for Practitioners 1992* (Hong Kong: Hong Kong Law Journal, 1992) 152-235

J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Perspective* (Singapore: Butterworths, 1993)

J Chan (ed), "United Kingdom -- British Dependent Territories: Hong Kong", Booklet 3, in A P Blaustein (ed), *Constitutions of Dependencies and Special Sovereignties* (Dobbs Ferry, NY: Oceana, 1993)

Faculty of Law, University of Hong Kong, *Hong Kong's Transition: Problems & Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1993)

Kempster, Mr Justice M, *Report of the Commission of Inquiry into Witness Protection, Part I* (Hong Kong, April 1993

S Nossal, "Chambers proceedings under a shroud of secrecy: Practice Direction No 27", (1992) 22(3) *Hong Kong Law Journal* 251

D R Shannon, *Commercial Free Speech and the Law in Hong Kong* (Hong Kong: Baker & McKenzie, 1993)

Hong Kong Human Rights Commission, *Hong Kong Human Rights Report 1991-92: The First Year Review of the Hong Kong Bill of Rights Ordinance* (Hong Kong: Hong Kong Human Rights Commission, 1992)

R Wacks (ed), *Police Powers in Hong Kong: Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1993)

Law Reform Commission of Hong Kong, *Reform of the Law Relating to Information Privacy: A Consultative Document* (Hong Kong: Law Reform Commission, 1993)

White Paper on the Annual Report on Hong Kong 1992 to Parliament (Hong Kong: Government Printer, March 1993)

Of general interest

Centre on Housing Rights and Evictions, *Bibliography on Housing Rights and Evictions*, COHRE Booklet Series No 2 (1993)

H Corder et al, *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (Cape Town: University of Cape Town and University of the Western Cape, 1992)

S G Coughlan, "Trial within a reasonable time: Does the right still exist?" (1992) 12 CR (4th) 34

S. Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Dordrecht/Boston/London: Martinus Nijhoff, 1992)

Electoral and Administrative Review Commission of Queensland, *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Issues Paper No 20, June 1992

International Labour Office, *Combatting Sexual Harassment at Work* (Geneva: ILO 1992), *Conditions of work digest*, vol 11, no 1 (1992)

K. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht/Boston/London: Martinus Nijhoff, 1993)

S Millns, "Transsexuality and the European Convention on Human Rights" [1992] *Public Law* 559

S Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (Dordrecht/Boston/London: Martinus Nijhoff, 1993)

APPENDIX A

HUMAN RIGHTS COMMITTEE DECISIONS UNDER THE OPTIONAL PROTOCOL

The following consists of edited extracts from United Nations Press Release Press Release HR/3270 (16 December 1992):

HUMAN RIGHTS COMMITTEE CONCLUDES CONSIDERATION ON 13 CASES ALLEGING VIOLATION OF HUMAN RIGHTS

The Human Rights Committee has recently concluded examination of communications from 13 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, denial of the right to a fair trial hearing, arbitrary arrest and detention, discrimination in the awarding of child benefits, denial of equal opportunity because of religion, subjection to cruel, inhuman or degrading treatment, arbitrary or unlawful interference with privacy and family life, and violation of the right to liberty and security of the person.

The communications involved citizens or residents of Jamaica, Peru, Finland, the Netherlands, Canada and Austria. The Committee adopted views on eight of these cases and declared the other five inadmissible. It examined these confidential communications in closed meetings at its forty-sixth session, held at Geneva from 19 October to 6 November [1992].

Views Adopted on Eight Cases

The Committee adopted views on four cases involving Jamaican citizens sentenced to death or to life imprisonment who claimed that they had been denied the right to a fair trial. The authors alleged various irregularities such as that the members of the jury were biased against the defendant; the judge abused his discretion in ruling a statement inadmissible or misdirected the jury; being assigned an inexperienced or ineffective lawyer; or that the trial judge had failed to exclude questionable evidence. The other four cases concerned citizens of Peru, Finland and Morocco.

In *Denroy Gordon v. Jamaica* (Communication No. 237/1987), the author claimed to be innocent of the verdict of murder and alleged that, as the jurors were sympathetic to the deceased and his relatives, they did not base their decision on the facts of the case. The Committee could not conclude that the author's two lawyers had been unable to prepare properly the case for the defence; the Covenant did not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel; and that it would have been incumbent upon the author's counsel to raise on appeal the question of whether a verdict of manslaughter should have been left open to the jury. Therefore, the facts before it disclosed no violation of any of the articles of the Covenant.

In the case of *Carlton Linton v. Jamaica* (No. 255/1987), the author contended that he did not receive a fair trial as the judge had improperly summarized the legal requirements of common design in relation to murder and manslaughter. The Committee noted with regret the absence of cooperation from the State party in not making any submissions concerning the substance of the matter under consideration. In respect of the claim of unfair trial, the Committee concluded that there had been no violation of article 14 as the matter before it did not reveal that the instructions to the jury had been clearly

arbitrary or amounted to a denial of justice or that the judge had violated his obligation of independence and impartiality.

However, in the absence of refutation by the State party, the physical abuse inflicted on the author while on death row, the mock execution set up by the prison warders and the denial of adequate medical care after an aborted escape attempt constituted cruel and inhuman treatment under articles 7 and 10 of the Covenant. The Committee urged the State party to take effective steps to investigate the treatment to which Mr. Linton was subjected, to prosecute any persons responsible for his ill-treatment, and to grant him compensation.

In the case of *Delroy Quelch v. Jamaica* (No. 292/1988), the Committee noted with concern that the State party in its submission had confined itself to issues of admissibility. Its failure to investigate in good faith all the allegations made against it had rendered the Committee's examination of the communication unduly difficult. With regard to the author's claim that he was not represented during the appeal proceedings, the written judgement of the Court of Appeal showed that his Counsel was present during the hearing. The Committee was of the view that the facts before it did not disclose a violation of article 14 of the Covenant.

In the case of *Leroy Simmonds v. Jamaica* (No. 338/1988), the author claimed that he was not informed about either date or outcome of his appeal until two days after it had been dismissed. The Committee found a violation of article 14 in that the delay in notification of the date of the hearing jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer. It considered that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant had not been respected, if no further appeal against the sentence was available, a violation of article 6 concerning the right to life. The Committee was of the view that Mr. Simmonds was entitled to a remedy entailing his release and requested the State party to provide information, within 90 days, on any relevant measures taken in respect of the Committee's wishes.

In the case of *Miguel Gonzalez del Rio v. Peru* (No. 263/1987), the author complained that he ha not been reinstated as a public official, although he had been cleared of the charges of fraud and embezzlement of public funds; that his freedom of movement was restricted by a pending arrest warrant; and that his treatment constituted discrimination based on his foreign origin and on his political opinions.

The Committee noted with concern the lack of any cooperation on the part of the State party, both in respect of the admissibility and the substance of the author's allegations. Because of the arrest warrant still pending, the restriction on Mr. Gonzalez' freedom to leave Peru had been in force for seven years. The Committee held that this situation violated the author's right to freedom of movement and might be linked to the violation of his right to a fair trial. It concluded that Mr. Gonzalez was entitled to an effective remedy, including implementation of the decision delivered in his favour by the Constitutional Court. The State party was under an obligation to ensure that similar violations did not occur in the future.

Concerning the case of *Arvo O. Karttunen v. Finland* (No. 387/1989), who was convicted on a charge of fraudulent bankruptcy, the author claimed he was denied the right to a fair trial because the court proceedings were not impartial and because the Court of Appeal refused to examine the appeal in a public hearing. The Committee concluded that the facts before it revealed a violation of article 14 and that the State party was under an obligation to provide the author with an effective remedy for the violation suffered.

In the case of *Lahcen B.M. Oulajin and Mohamed Kaiss v. the Netherlands* (Nos. 406/1990 and 426/1990), the authors contended that the authorities had made an inadmissible distinction in their case between "own children" and "foster children", all of

whom belonged to the same family in Morocco, in denying them a family allowance for certain of their dependents. The Committee found that the distinctions made in the Child Benefit Act were not incompatible with the Covenant and that the facts before it did not disclose a violation of any of its provisions.

Inadmissible Cases

Communication No. 337/1988 from E.E., concerned a Jamaican citizen, currently awaiting execution in Jamaica, who claimed to have been denied the right to a fair trial. The Committee considered that the author's allegations had not been substantiated for purposes of admissibility.

G.H., the author of communication No. 370/1989, also a Jamaican citizen awaiting execution in Jamaica, complained that he did not have a fair trial because the judge on the issue of circumstantial evidence. The Committee concluded that the author's allegations did not show that the judge's instructions or conduct of the trial were arbitrary or amounted to a denial of justice. Accordingly, the communication was inadmissible.

In communication No. 420/1990, G.T., a Canadian citizen, claimed that he did not enjoy equal opportunity with respect to the Roman Catholic teachers in the Catholic school where he was teaching. The Committee observed that the author had not sought judicial review of the decision by the Court of Appeal, that he appeared to have made no effort to apply for legal aid, and had not availed himself of procedures under the Ontario Human Rights Code. In the light of the above, he had not exhausted domestic remedies and therefore the communication was inadmissible.

H.H. in communication No. 427/1990, claimed to be the victim of violations of his rights by Austria, as administrative powers had been used to frustrate his efforts since 1986 to build a house. He claimed that the "permanent harassment and psychological terror" exercised by the mayor concerned had had a profoundly detrimental effect on his and his family's health, security and well-being. The Committee noted that the author's allegations concerned decisions taken by the mayor which had subsequently been quashed by higher authorities or the courts, and that the author had not initiated civil proceedings against the persons responsible. As the author had failed to exhaust domestic remedies, the communication was inadmissible.

Communication No. 432/1990 by W.B.E. of the Netherlands alleged that his pre-trial detention was unlawful and unreasonably long and that he had a right to compensation since he was acquitted of the charges against him. The Committee considered that the author had not substantiated his claim that there was no lawful reason to extend his detention. As he had also not substantiated his claim that the detention was unlawful, the fact that he was subsequently acquitted did not in and of itself render the pre-trial detention unlawful. Therefore, the communication was inadmissible.

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APPENDIX B

INTERNATIONAL LABOUR OFFICE

REPORT FORM

FOR THE

FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (No. 87)

The present report form is for the use of countries which have ratified the Convention. It has been approved by the Governing Body of the International Labour Office, in accordance with article 22 of the ILO Constitution, which reads as follows: "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such a form and shall contain such particulars as the Governing Body may request."

PRACTICAL GUIDANCE FOR DRAWING UP REPORTS

First reports

If this is your Government's first report following the entry into force of the Convention in your country, full information should be given on each of the provisions of the Convention and on each of the questions set out in the report form.

Subsequent reports

In subsequent reports, information need normally be given only on the following points:

(a) any new legislative or other measures affecting the application of the Convention;

(b) replies to the questions in the report form on the practical application of the Convention (for example, statistics, results of inspections, judicial or administrative decisions) and on the communication of copies of the report to the representative organisations of employers and workers and on any observations received from these organisations;

(c) **replies to comments by supervisory bodies:** the report must contain replies to any comments regarding the application of the Convention in your country which may have been addressed to your Government by the Committee of Experts or by the Conference Committee on the Application of Conventions and Recommendations.

GENEVA
1990

Article 22 of the Constitution of the ILO

Report for the period ..... to .....

made by the Government of .....

on the

FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948

ratification of which was registered on .....

I. Please indicate whether effect is given to the Articles of the Convention—
(a) by customary law or practice, or
(b) by legislation.

In the first alternative, please indicate how effect is given to the Articles of the Convention.

In the second alternative, please give a list of the constitutional and legislative provisions or administrative or other regulations which give effect to the Articles of the Convention. Where this has not already been done please forward copies of these various provisions, etc., to the International Labour Office with this report.

Please give any available information concerning the extent to which these laws and regulations have been enacted or modified to permit of, or as a result of, ratification.

II. Please supply available information concerning the customary law, practice, legislative provisions and regulations and any other measures the effect of which is to ensure the application of each of the following Articles of the Convention. In addition, please provide any indication specifically requested below under individual Articles.

If, in your country, ratification of the Convention gives the force of national law to its provisions please indicate, in addition to the constitutional texts from which this effect is derived, any measures which may have been taken to give effect to those provisions of the Convention which may require the intervention of the national authorities to ensure their application.

If the Committee of Experts or the Conference Committee on the Application of Conventions and Recommendations has requested additional information or has made an observation on the measures adopted to apply the Convention, please supply the information asked for or indicate the action taken by your Government to settle the points in question.

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the organisation concerned, to join organisations of their own choosing without previous authorisation.

Please state what substantive or formal conditions, if any, must be fulfilled by workers' and employers' organisations when they are being established.

Please specify whether there exist any special legal provisions regarding the establishment of organisations by certain categories of workers (other than members of the armed forces and the police) and, in particular, by public officials and employees of publicly owned undertakings.

If so, please indicate under each of the Articles of the Convention what are the special legal provisions which apply as regards the establishment, functioning and dissolution of such organisations.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Please state the conditions, if any, governing the constitutions of such organisations or the objects which they may legally pursue.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Please state the legal provisions, if any, which relate to the suspension or dissolution of workers' and employers' organisations.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Please indicate any legal provisions relating to the affiliation of workers' and employers' organisations with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Please state whether any guarantees prescribed by national legislation which give effect to this Convention and which relate to the establishment, functioning or dissolution of workers' and employers' organisations apply equally to federations and confederations, or whether there exist special provisions with regard to the latter. In the second alternative, please indicate such provisions.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Please indicate any conditions to which the acquisition of legal personality may be made subject.

Please state, in particular, whether the acquisition of legal personality is optional or compulsory for workers' and employers' organisations.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Please give a general indication of the measures of a general character which may apply to workers' and employers' organisations, as, for example, general legislation concerning associations and meetings, laws concerning the safety of the State or a state of siege, penal codes, etc.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Please indicate to what extent the guarantees prescribed by the Convention apply to members of the armed forces or the police.

Article 10

In this Convention the term " organisation " means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

III. Article 11 of the Convention is as follows:

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise

Please indicate the legislative or other measures taken to ensure the free exercise of the right to organise.

IV. Please state whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. If so, please supply the text of these decisions.

V. Please supply any general observations which may be considered useful with regard to the manner in which the Convention is applied.

VI. Please indicate the representative organisations of employers and workers to which copies of the present report have been communicated in accordance with article 23, paragraph 2, of the Constitution of the International Labour Organisation.[1] If copies of the report have not been communicated to representative organisations of employers and/or workers, or if they have been communicated to bodies other than such organisations, please supply information on any particular circumstances existing in your country which explain the procedure followed.

Please indicate whether you have received from the organisations of employers or workers concerned any observations, either of a general kind or in connection with the present or the previous report, regarding the practical application of the provisions of the Convention or the application of the legislation or other measures implementing the Convention. If so, please communicate the observations received, together with any comments that you consider useful.

[1] Article 23, paragraph 2, of the Constitution reads as follows. "Each Member shall communicate to the representative organisations recognised for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22 "

REPORT FOR THE PERIOD 1 JULY 1990 TO 30 JUNE 1992 ON THE APPLICATION IN HONG KONG OF THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (NO. 87) WHICH WAS RATIFIED BY THE UNITED KINGDOM ON 27 JUNE 1949

This convention has been applied to Hong Kong with modification by an improved declaration in respect of Articles 3, 5 and 6 registered by the International Labour Organisation (ILO) on 4 June 1979. The previous modification was registered on 15 October 1963. Details of the current modifications are set out in the answers to Articles 3, 5 and 6.

This is a full report by the Government of Hong Kong. It supersedes all previous reports on the application of this convention. The requests made by the Committee of Experts in its Observation addressed to the Governments in 1992 on this convention have been fully dealt with in this report.

QUESTION I

Subject to the modifications registered with the ILO in respect of Articles 3, 5 and 6, the provisions of this convention are applied by:

(a) the Hong Kong Bill of Rights Ordinance, Chapter 383

(b) the Trade Unions Ordinance, Chapter 332, and the Trade Union Registration Regulations made thereunder;

(c) the Societies Ordinance, Chapter 151, and the Societies Rules made thereunder; and

(d) the Labour Relations Ordinance, Chapter 55.

A copy of (a) is attached to the report on Convention No. 105 for the period ending 30 June 1991. Three copies of (b) were attached to the report on Convention No. 141 for the period ending 30 June 1985. Subsequent amendments were attached to the report on this convention for the period ending 30 June 1988. Three copies of (c) and (d) were attached to the report on Convention No. 105 for the period ending 30 June 1985. Subsequent amendments of (c) are attached to the report on this convention for the period ending 30 June 1990 and the latest amendments are attached herewith.

QUESTION II

Article 2

Section 8, Article 18 of the Hong Kong Bill of Rights Ordinance stipulates that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." This provides a guiding principle governing the right of a person to freedom of association with others in Hong Kong.

Under the Trade Unions Ordinance, any combination of workers or of employers which has the principal objects of regulating of relations between employees and

employers, or between employees and employees or between employers and employers is required to be registered. This ordinance and the Trade Union Registration Regulations made thereunder cover matters relating to the registration of trade unions and the regulation of their internal administration.

The formal condition for the establishment and registration of trade unions are contained in Part III of the Trade Unions Ordinance. A group of people may form a trade union and apply for registration as a trade union in accordance with the procedures laid down in sections 5-9 of the ordinance. Under section 5(3), every such application shall be made by not less than seven voting members of the trade union, any of whom may be officers thereof.

The Registrar of Trade Unions may refuse to register a trade union on any of the grounds set out in section 7 of the ordinance. However when he does so, the applicants have a right under section 8 to appeal within 28 days to the Supreme Court.

The conditions under which a person may become a member or an officer of a trade union are governed by section 17 of the Trade Unions Ordinance. This section provides, inter alia, that no person shall be refused membership of a trade union solely on the ground that he is casually or seasonally engaged or employed in the trade, industry or occupation with which the trade union is directly concerned.

There are no requirements in respect of sex and nationality for eligibility for holding trade union office. However, the Trade Unions Ordinance provides that a person under the age of twenty-one years shall not be a member of the executive of a registered trade union. It also stipulates that no person shall, without the consent in writing of the Registrar, be an officer if he has never been engaged or employed in a trade, industry or occupation with which the trade union is directly concerned. So far, the Registrar has approved all such applications.

Existing legislation in Hong Kong imposes restriction only on those persons who have convicted of certain specific crimes from holding trade union office. Under section 17(3) of the Trade Unions Ordinance, a person who has been convicted of any of the specific offences involving fraud, dishonesty, extortion and membership of a triad society, shall, except with the consent of the public authority, be disqualified for holding office for a period of five years counting from the date of his conviction or discharge from prison.

There are no regular armed forces in Hong Kong other than those under the direct administration of the United Kingdom. Members of these forces, including locally enlisted personnel, are not permitted to join a trade union by virtue of the regulations governing their own series.

Members of the Royal Hong Kong Police Force are prohibited by section 3 of the Police Force Ordinance, Chapter 232, from trade union participation. However, the Commissioner of Police may establish, as he may think fit, and recognise associations composed only of police officers. He may also seek the advice of any such association in any matter relating to the welfare and conditions of service of all or any police officers.

Other than members of the armed forces and the police, traffic wardens are also prohibited under section 59(6) of the Road Traffic Ordinance, Chapter 374, from becoming members of a trade union, save with the consent of the Commissioner of Police. Traffic wardens, who are subject to the orders and direction of the Commissioner of Police, have all the duties and almost all the powers of a police officer in the discharge of their functions connected with road traffic. There are no other specific groups of persons who are not permitted to form or join trade unions.

Apart from these provisions, there are no special legal provisions regarding the establishment of organisations by particular categories of workers, public officials and employees of publicly owned undertakings.

Article 3

Part IV, V and VIII of the Trade Unions Ordinance regulate conditions relating to the constitution and administration of trade unions but do not restrict the growth of the local trade union movement. However, because of the provisions in sections 17, 17A, 24 to 31, 33, 33A, 33B, 34, 37 and 52 of the ordinance, this article has been applied with the following modifications:

> "All officers of a trade union are required to be or have been engaged or employed in the trade, industry or occupation with which the trade union is directly concerned but this requirement may be modified at the discretion of the public authority.
>
> The funds of a trade union may be expended only for objects specified in national laws or approved by the public authority.
>
> Amalgamation of registered trade unions is subject to the consent of the public authority where either of the trade unions is a member of an organisation established outside the territory.
>
> The public authority may in certain circumstances intervene for the purpose of supervising the accounts of trade unions and ensuring the application of their rules."

Section 37 and 38 of the Trade Unions Ordinance empower the Registrar of Trade Unions to inspect all accounts of a trade union at any time at its premises and to call upon the trade union to render an account of the funds. The Registrar exercises these powers with the utmost care and only in line with the policy of ensuring the application of trade union rules and regulations for the protection of the interests of union members. It is only when the Registrar has reason to believe that the annual accounts rendered by a trade union are inaccurate or incomplete, or when there is a complaint alleging malpractice or misapplication of union funds that the Registrar would exercise the powers under these two sections.

Article 4

Cancellation of registration of a trade union is governed by section 10-12 of the Trade Unions Ordinance and voluntary dissolution by section 32. There are no other provisions for the suspension or dissolution of a trade union.

Section 11 states that before cancellation of the registration of a trade union, the public authority shall give no less than two months' notice in writing to the trade union concerned specifying the justification for the cancellation. Under section 12, appeals may be lodged by any voting member with the Supreme Court within 28 days of receipt of the public authority's notice of intended cancellation. Any voting member may also appeal to the Supreme Court within 14 days after the cancellation of registration of the trade union on the following grounds:

> (a) notice had not been given by the public authority in accordance with section 11;
>
> (b) the trade union had not requested cancellation of its registration; and

(c) the trade union had not ceased to exist.

The right to appeal to the Full Court against the decision of the Supreme Court is provided by section 64(2) of the Trade Unions Ordinance.

Article 5

Workers' unions and employers' associations in Hong Kong may establish trade union federations under section 54 of Part IX of the Trade Unions Ordinance. However, because of the provisions under sections 45, 55 and 56, this article has been applied with the following modifications:

> "The consent of the public authority is required for affiliation of trade unions with international organisations.
>
> Federations of trade unions may be established only by registered trade unions engaged in the same trade, occupation or industry, and membership of a federation of trade unions is restricted to registered trade unions engaged in the same trade, occupation or industry as the component trade unions comprising such trade union federation."

The modification is necessary to promote the formation of federations with members sharing common or identical interests rather than those with members of diversified interests if they come from different trades, industries or occupations.

Federations or confederations of organisations of workers or employers which by virtue of sections 45, 55 and 56 are not entitled to registration under the Trade Unions Ordinance, can be registered under the Societies Ordinance, Chapter 151.

Section 45 of the Trade Unions Ordinance relates to trade union affiliation outside Hong Kong and such affiliation is subject to the consent of the Governor. In the case of societies registered under the Societies Ordinance, affiliation with international organisations is governed by section 6 of the ordinance.

Article 6

Federations and confederations which are registered under provisions of sections 53-57 of the Trade Unions Ordinance have the same standing in law as other registered trade unions and the same rights and liabilities. The modifications made in the declaration to the ILO on Article 3 relating to primary trade unions apply also to federations of trade unions, except that no person who is not or has not been engaged in a trade, industry or occupation with which the primary union is directly concerned may be an officer of a trade union federation. Section 57 also provides that no person shall be an officer of a registered trade union federation unless he is an officer or a voting member of one of the component trade unions comprising such federation.

Article 7

Under section 13 of the Trade Unions Ordinance, the registration of a trade union renders it a body corporate. Sections 40-44 of the ordinance give a registered trade union certain rights and privileges which include immunity from civil suit in certain cases and prohibition of actions in tort for actions done in contemplation or furtherance of a trade dispute.

Article 8

Article 18(3) of the Hong Kong Bill of Rights stipulates that "nothing in this article authorizes legislative measures to be taken which would prejudice, or the law to be applied in such a manner as to prejudice, the guarantees provided for in the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize as it applies to Hong Kong."

Like organisations and societies registered under the Societies Ordinance, trade unions have a general right to hold meetings of their members provided these are properly conducted.

The Labour Relations Service of the Labour Department operates voluntary conciliation service to help settle labour disputes, including collective labour disputes in the private sector.

Under the Labour Relations Ordinance, the Commissioner for labour may authorise a conciliation officer to conciliate in a trade dispute in order to promote settlement. Where a dispute is not settled by ordinary conciliation, the Commissioner for Labour may appoint a special conciliation officer to continue conciliation with a view to bringing the dispute to an early conclusion. If an attempt to settle a dispute fails, the Governor in Council may refer the dispute to arbitration with the consent of the parties, or refer the dispute to a Board of Inquiry, or take such other action as warranted by the circumstances of the dispute. So far, it has not been necessary for the Governor in Council to refer any labour dispute to arbitration or a Board of Inquiry under the ordinance. Special conciliation was undertaken in one case only.

When a labour dispute involving claims of right cannot be settled after conciliation, the parties to the dispute may seek to have their claims adjudicated at the Labour Tribunal. The Tribunal is an informal court established under the Labour Tribunal Ordinance with exclusive jurisdiction over claims arising from breaches of Employment Ordinance and contracts of employment.

In order to safeguard the public interest against large scale trade disputes, Part V of the Labour Relations Ordinance empowers the Governor to make an order for a cooling-off period in exceptional circumstances.

The Labour Relations Ordinance which was enacted in 1975 had repealed the Illegal Strikes and Lockout Ordinance which provided powers to control strikes in certain circumstances in public services. The Labour Relations Ordinance does not prohibit strikes or lockout. If workers are not satisfied with the results of conciliation, with the report of the Board of Inquiry or with the measures taken by the Governor in Council under section 11(c) of the ordinance, they are free to decide on any further course of action they wish to take and are not precluded from taking strike action after the cooling-off period.

Article 9

Members of the regular armed forces and of the police force are not permitted to join a trade union. Members of the armed forces are governed by the regulations appropriate to their particular service, as are those of the police force, who are prohibited from trade union membership by virtue of section 8 of the Police Force Ordinance, Chapter 232. The Royal Hong Kong Police Force has introduced joint consultative councils at both the officer and rank and file levels to discuss matters which affect the welfare and conditions of service of the police force.

As stipulated in its paragraph (2), Article(18) on freedom of association of the Bill of Rights shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Article 10

In Hong Kong, workers' and employers' organisations are generally registered as trade unions, which are defined under section 2 of the Trade Unions Ordinance as combinations the principal objects of which are under their constitutions the regulating of relations between employees and employers, or between employees and employees, or between employers and employers.

QUESTION III

The Trade Unions Ordinance generally ensures the free exercise of the right to organise. The modifications registered with the ILO on 4 June 1979 in respect of Articles 3, 5 and 6 are considered necessary in the local circumstances. The public authority and officers of the Labour Department exercise vigilance to ensure that workers and employers may freely enjoy the rights of organisation set out in the legislation.

QUESTION IV

No decisions involving question of principle relating to the application of this convention in Hong Kong have been made by courts of law or other courts.

QUESTION V

Registered trade unions in Hong Kong are represented on the Labour Advisory Board, to which legislative proposals concerning labour matters are referred for advice. The Board comprises six employers' representatives and an equal number of employees' representatives.

The responsibility of administering the Trade Unions Ordinance and the regulations made thereunder is entrusted to the Registrar of Trade Unions. In addition, the Labour Relations Service of the Labour Department offers advice and assistance to trade unions on such matters as joint consultation, collective bargaining and the general principles of organisation.

Compulsory registration of trade unions does not restrict the establishment of workers' and employers' organisations. The number of registered trade unions increased from 427 in 1982 to 515 as at 30 June 1992.

QUESTION VI

Copies of this report have been sent to the Labour Advisory Board on which employers' organisations and trade unions are represented and, through the United Kingdom Department of Employment, to the Confederation of British Industry and the Trade Union Congress of Great Britain. No observations regarding the application of this convention in Hong Kong have been received to date from any organisations of employers or workers during the period under review.

KATHERINE FOK
COMMISSIONER FOR LABOUR

HONG KONG
September 1992

APPENDIX C

INTERNATIONAL LABOUR OFFICE

REPORT FORM

FOR THE

RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION, 1949 (No. 98)

The present report form is for the use of countries which have ratified the Convention. It has been approved by the Governing Body of the International Labour Office, in accordance with article 22 of the ILO Constitution, which reads as follows: "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

PRACTICAL GUIDANCE FOR DRAWING UP REPORTS

First reports

If this is your Government's first report following the entry into force of the Convention in your country, full information should be given on each of the provisions of the Convention and on each of the questions set out in the report form.

Subsequent reports

In subsequent reports, information need normally be given only on the following points:

(a) any new legislative or other measures affecting the application of the Convention;

(b) replies to the questions in the report form on the practical application of the Convention (for example, statistics, results of inspections, judicial or administrative decisions) and on the communication of copies of the report to the representative organisations of employers and workers and on any observations received from these organisations;

(c) **replies to comments by supervisory bodies.** The report must contain replies to any comments regarding the application of the Convention in your country which may have been addressed to your Government by the Committee of Experts or by the Conference Committee on the Application of Conventions and Recommendations.

GENEVA
1988

Article 22 of the Constitution of the ILO

Report for the period ..... to .....
made by the Government of .....

on the

RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION, 1949 (No. 98)

(ratification registered on .....)

I. Please indicate whether effect is given to the Articles of the Convention—

(a) by customary law or practice, or
(b) by legislation.

In the first alternative, please indicate how effect is given to the Articles of the Convention.

In the second alternative, please give a list of the constitutional and legislative provisions or administrative or other regulations which give effect to the Articles of the Convention. Where this has not already been done please forward copies of these various provisions, etc., to the International Labour Office with this report.

Please give any available information concerning the extent to which these laws and regulations have been enacted or modified to permit, or as a result of, ratification.

II. Please supply available information concerning the customary law, practice, legislative provisions and regulations and any other measures the effect of which is to ensure the application of each of the following Articles of the Convention. In addition, please provide any indication specifically requested below under individual Articles.

If, in your country, ratification of the Convention gives the force of national law to its provisions, please indicate, in addition to the constitutional texts from which this effect is derived, any measures which may have been taken to give effect to those provisions of the Convention which may require the intervention of the national authorities to ensure their application.

If the Committee of Experts or the Conference Committee on the Application of Conventions and Recommendations has requested additional information or has made an observation on the measures adopted to apply the Convention, please supply the information asked for or indicate the action taken by your Government to settle the points in question.

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to—

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Please indicate how adequate protection against acts of anti-union discrimination in respect of their employment is ensured to workers.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Please indicate how adequate protection is ensured to workers' and employers' organisations against any acts of interference by each other.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Please indicate any action taken to give effect to Articles 3 and 4.

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Please indicate to what extent the guarantees provided in the Convention apply to members of the armed forces and the police.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

III. Please state whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. If so, please supply the text of these decisions.

IV. Please supply any general observations which may be considered useful with regard to the manner in which the Convention is applied.

V. Please indicate the representative organisations of employers and workers to which copies of the present report have been communicated in accordance with article 23, paragraph 2, of the Constitution of the International Labour Organisation.[1] If copies of the report have not been communicated to representative organisations of employers and/or workers, or if they have been communicated to bodies other than such organisations, please supply information on any particular circumstances existing in your country which explain the procedure followed.

Please indicate whether you have received from the organisations of employers or workers concerned any observations, either of a general kind or in connection with the present or the previous report, regarding the practical application of the provisions of the Convention or the application of the legislation or other measures implementing the Convention. If so, please communicate the observations received, together with any comments that you consider useful.

[1] Article 23, paragraph 2, of the Constitution reads as follows: "Each Member shall communicate to the representative organisations recognised for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22."

REPORT FOR THE PERIOD 1 JULY 1988 TO 30 JUNE 1990 ON THE APPLICATION IN HONG KONG OF THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION, 1949 (NO. 98) WHICH WAS RATIFIED BY THE UNITED KINGDOM ON 30 JUNE 1950

This convention has been applied without modification by an improved declaration registered by the International Labour Organisation (ILO) on 9 June 1975.

This is a full report by the Government of Hong Kong. If supersedes all previous reports on the application of this convention.

QUESTION I

The provisions of this convention are applied by:

(a) the Employment Ordinance, Chapter 57;

(b) the Trade Unions Ordinance, Chapter 332, and

(c) the Labour Relations Ordinance, Chapter 55.

Three copies of (a) were attached to the report on Convention No. 105 for the period ending 30 June 1989. Subsequent amendments of (a) are attached to the current report on Convention No. 101. Three copies of (b) were attached to the report on Convention No. 141 for the period ending 30 June 1985. Three copies of (c) were attached to the report on Convention No. 105 for the period ending 30 June 1985.

QUESTION II

Article 1

With regard to the direct request made by the Committee of Experts in connection with legislative provisions to protect workers against acts of anti-union discrimination, the Hong Kong Government would like to report that protection of workers against anti-union discrimination in respect of their employment is afforded by sections 21B and 21C of the Employment Ordinance. Under section 21C, any person, acting on his own or another person's behalf, shall not include in the offer of employment a condition or requirement that the person to whom the offer is made shall undertake:

(a) if he is a member or officer of a trade union, that he will relinquish his membership thereof or office therein;

(b) not to become a member or officer of a trade union; or

(c) not to associate with other person for the purpose of forming or applying for the registration of a trade union in accordance with the provisions of the Trade Unions Ordinance.

Contravention of this section is an offence and is liable on conviction to a fine of HK$20,000. This section applies, by virtue of section 21A, to every person to whom an offer of employment is made or is about to be made or who otherwise is a prospective employee.

Section 21B(1) further provides for the following rights of an employee:

(a) the right to be or to become a member or an officer of a trade union registered under the Trade Unions Ordinance;

(b) where he is a member or an officer of any such trade union, the right, at any appropriate time, to take part in the activities of the trade union;

(c) the right to associate with other persons for the purpose of forming or applying for the registration of a trade union in accordance with the provisions of the Trade Unions Ordinance.

Section 21B(2) stipulates that any employer or any person acting on behalf of an employer who:

(a) prevents or deters, or does any act calculated to prevent or deter, an employee for exercising any of the rights conferred on him by sub-section (1); or

(b) terminates the contract of employment or penalises, or otherwise discriminates against, an employee by reason of his exercising any such right,

shall be guilty of an offence and shall be liable on conviction to a fine of HK$20,000.

"Appropriate time" is defined in section 21B(3), in relation to an employee taking part in any activities of a trade union, as the time either:

(a) outside his working hours; or

(b) within his working hours at which, in accordance with arrangements agreed with or consent given by or on behalf of his employer, it is permissible for him to take part in those activities.

Article 2

With regard to the direct request made by the Committee of Experts in connection with legislative provisions to protect workers' organisations against acts of interference by employers or their organisations, the Hong Kong Government would like to report that this article is implemented by administrative measures by the Registrar of Trade Unions and the Commissioner for Labour. Officers of both the Registry of Trade Unions and the Labour Department exercise vigilance to ensure that employees and employers may freely enjoy the rights of organisation as well as adequate protection against any acts of interference by each other or each other's agents or members in the establishment, functioning or administration of their respective organisations.

Under section 36 of the Trade Unions Ordinance, every registered trade union is required to furnish annually to the Registry of the Trade Unions a statement of account of all receipts and expenditures for the financial year, and of the assets and liabilities of the trade union. Contributions from employers or employers' organisations, if any, must appear in these accounts. Section 37 of the same ordinance further provides that the account books of a registered trade union shall be open to inspection not only by the officers and members of the union, but also by the Registrar of Trade Unions whose officers make regular visits to trade unions. No cases are known of financial support to

employees' organisations by employers or employers' organisations with a view to exercising control or domination over those organisations.

Officers of the Promotion Unit in the Labour Relations Service of the Labour Department visit trade unions to offer advice on and assistance in such matters as joint consultation, collective bargaining and the general principles of organisation. Such visits also help to detect any acts of interference against employees' and employers' organisations by each other or each other's agents or members in their establishment, functioning or administration. However, no such cases have been detected.

As at 31 December 1989, there were 13 mixed organisations of employers and employees on the register of the Registrar of Trade Unions. The total declared membership of all registered trade unions. The largest mixed organisation is the Hong Kong Grzicrs Unions, with a declared membership of 13 551 as at 31 December 1989. Mixed unions were formed with the general objectives of promoting business, providing social benefits to members and promoting their welfare, regulating relations between members and settling disputes, promoting co-operation and mutual respect among members, and providing legal advice and assistance to them.

Neither the Registry of Trade Unions nor the Labour Department has reason to believe that the formation of these mixed unions was the domination of employers or employers' organisations. There is no evidence of acts of interference against employees' and employers' organisation by each other or each other's agents or members in their establishment, functioning or administration. Specific legislative provisions to ensure adequate protection to employees' organisations against such act of interference are therefore not considered necessary.

Article 3

While the administration of the Employment Ordinance is generally the responsibility of the Commissioner for Labour, any alleged breaches of the provisions of Part IVA of this ordinance concerning protection against anti-union discrimination come within the purview of the Attorney General. Complaints made to the Commissioner for Labour would be investigated in the first instance by the Labour Relations Division, which operates from 13 offices with the establishment of one Chief Labour Officer, five Senior Labour Officers, 24 Labour Officers and 29 Assistant Labour Officers. After investigation, the complaint, together with such evidence as was available, would be referred to the Attorney General who would decide whether there were sufficient grounds for prosecution.

Implementation of the provisions of Article 3 is administered jointly by the Commissioner for Labour and the Registrar of Trade Unions. The latter is the head of the Registry of Trade Unions and is assisted by two Deputy Registrars and six Assistant Registrars, all of whom hold statutory posts under the Trade Unions Ordinance and exercise powers delegated to the by the Registrar.

Article 4

The Labour Relations Division of the Labour Department encourages workers and employers in dispute to negotiate with a view to resolving their differences. If existing machinery for negotiation has been utilised and has failed, the division will provide conciliation service to the parties concerned. Where machinery for voluntary negotiation has been set up, the Labour Relations Division gives every encouragement to its use, and where such machinery has not been set up, the Division is prepared at all times to offer advice and assistance to have it brought into being.

With regard to the observation made by the Committee of Experts in connection with the low level of union membership and bargaining coverage, the Hong Kong Government would like to report that the union participation rate in Hong Kong has remained at a fairly steady level ranging from 15.7 per cent to 17.8 per cent during the past 10 years. A number of factors may have affected the level of trade union membership. These factors include the multiplicity of small businesses in Hong Kong, the high mobility of the work force, the politicised trade union movement, the sustained economic growth resulting in rapid increases in wages and the steady improvement in statutory protection for workers under labour laws. All these factors may have reduced the desire and need of workers to join a trade union.

Collective bargaining tends to work efficiently only in an environment where a small number of businesses employ large numbers of people, where the majority of them are represented by trade unions and where both sides consider it mutually advantageous to avoid the trouble and expense of negotiating at the level of individual enterprises. Such an environment for efficient collective bargaining to operate does not generally exist in Hong Kong. The large public utilities companies employ large numbers of people. The environment within these companies tends to facilitate collective bargaining. However, for Hong Kong as a whole, the existence of small businesses is predominant: about 92 per cent of the establishments employ less than 20 workers. There are ample opportunities for a direct dialogue between employers and workers at the shopfloor level. Furthermore, voluntary negotiation at individual enterprise level, underpinned by the Labour Department's conciliation service, has served Hong Kong well. Hong Kong enjoys a relatively peaceful industrial relations situation and the number of work stoppages and working days lost during the past years has been very low. In 1989, the number of working days lost due to work stoppages was only 1.35 per 1000 employees. On average, 1.22 days per 1000 employees per annum were lost for the last five years.

With regard to the direct request made by the Committee of Experts for more detailed information on the efforts of the Hong Kong Government to promote collective bargaining, the Hong Kong Government would like to report that measures appropriate to local conditions have been taken to encourage and promote voluntary negotiation between employers and employees or their respective organisations. For example, the Labour Department of Hong Kong has taken measures to encourage voluntary conciliation of industrial disputes and to promote the establishment of joint consultative machinery at the enterprise level. In the process of conciliation, the parties are encouraged to conclude a written collective agreement on the terms of settlement. Efforts have also bee made to promote tripartite dialogue at the industry level. For example, tripartite conference have been established for the catering and construction industries comprising labour officials, employers' and employees' representatives. Other promotion activities are regularly organised by the Labour Department to provide a forum for all parties concerned to exchange views on labour matters, including joint negotiations and collective bargaining. Such activities include conferences, seminars and courses. In 1989, there were 102 conference/seminars/courses with 6,700 participants. The Labour Department also publishes newsletters, pamphlets and leaflets aimed at promoting a greater awareness of the importance of affective communication and co-operation between labour and management.

The Hong Kong Government will continue to encourage voluntary negotiation and the development of tripartite conferences involving representatives of employers or employers' associations, trade unions and other labour groups, as well as representatives of the Labour Department to discuss how to improve labour-management relations, employees' benefits and compliance with labour legislation.

All these activities have the long term objective of raising the level of maturity of labour relations which in turn will be conducive to the further development of collective bargaining.

During the period under review, there were a number of cases in which workers negotiated with their employers for a collective pay increases. At the same time, many employers, on their own initiative, increased workers' wages because of a shortage of labour arising from rapid economic development, in order to retain their workforce and to attract new workers.

At the end of June 1990, there were in aggregate 89 collective agreements known to the Labour Relations Decision of the Labour Department, covering about 120,000 workers. These agreements, including these concluded for indefinite periods, have been instrumental in preserving employment standards and providing the basis upon which further improvements are introduced.

Since the Labour Relations Ordinance came into operation on 1 August 1975, trade disputes have been dealt with under the conciliation procedures as laid down in the ordinance. The disputing parties normally seek advice and assistance from the Labour Relation Division. In addition, officers of the Promotion Unit of the division promote harmonious labour relations by fostering the growth of joint consultative machinery at the enterprise level and other desirable labour relations practices.

Article 5

There are no regular armed forces in Hong Kong other than those under the direct administration of the United Kingdom. Members of these forces, including locally enlisted personnel, are not permitted to join unions by virtue of the regulations pertinent to their respective services. The Royal Hong Kong Regiment is a part-time volunteer force and its members are not prohibited from being members of unions in connection with their full-time employment. Members of the Royal Hong Kong Police Force are prohibited by section 8 of the Police Force Ordinance, Chapter 232, from union participation. However, according to section 6(3) of the ordinance, the Commissioner of Police may establish such associations as he may think fit, or recognise any association composed only of police officers. According to section 8(4), he may seek the advice of any such associations on any matter relating to the welfare and conditions of service of all or any police officers.

Article 6

Apart from members of the police force, traffic wardens, who come under the administration of the Royal Hong Kong Force, are required by section 7(C)(6) of the Road Traffic Ordinance, Chapter 220, to obtain the consent of the Commissioner of Police before they may join any registered trade union. All other government servants are free to join trade unions of their own choice. As at 30 June 1990, there were 172 registered trade union whose rules restrict membership to government employees. There were also 24 unions which are open to both government and non-government employees.

QUESTION III

No decisions involving questions of principle relating to the application of this convention in Hong Kong have been given by any courts of law or other courts.

QUESTION IV

In Hong Kong, there has never been any difficulty in securing the rights of employers and workers to associate for all lawful purposes. It is the policy of the Hong Kong Government to encourage the development and growth of democratic trade unions

whose primary object is to improve the industrial, social and economic conditions of their members.

QUESTION VI

Copies of this report have been sent to the Labour Advisory Board on which employers' organisations and trade unions are represented and, through the United Kingdom Department of Employment, to the Confederation of British Industry and the Trades Union Congress of Great Britain.

The Hong Kong Government received in June 1989 through the Foreign and Commonwealth Office of the United Kingdom a copy of the submission to the ILO by the Federation of Civil Service Unions on the application of the Right to Organise and Collective Bargaining Convention in Hong Kong. The Hong Kong Government has forwarded its comments to the United Kingdom Government for onward transmission to the ILO.

Y.N. YIU
COMMISSIONER FOR LABOUR (ACTING)

HONG KONG
August 1990

APPENDIX D

BANGKOK DECLARATION

The Ministers and representatives of Asian States, meeting at Bangkok from 29 March to 2 April 1993, pursuant to General Assembly resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human Rights,

Adopt this Declaration, to be known as "The Bangkok Declaration", which contains the aspirations and commitments of the Asian region:

"Bangkok Declaration

Emphasising the significance of the World Conference on Human Rights, which provides an invaluable opportunity to review all aspects of human rights and ensure a just and balanced approach thereto,

Recognizing the contribution that can be made to the World Conference by Asian countries with their diverse and rich cultures and traditions,

Welcoming the increased attention being paid to human rights in the international community,

Reaffirming their commitment to principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights,*Recalling* that in the Charter of the United Nations the question of universal observance and promotion of human rights and fundamental freedoms has been rightly placed within the context of international cooperation,

Noting the progress made in the codification of human rights instruments, and in the establishment of international human rights mechanisms, while *expressing concern* that these mechanisms relate mainly to one category of rights,

Emphasizing that ratification of international human rights instruments, particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, by all States should be further encouraged,

Reaffirming the principles of respect for national sovereignty, territorial integrity and non-interference in the international affairs of States,

Stressing the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization,

Recognizing that the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values.*Reiterating* the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the inherent interrelationship between development, democracy, universal enjoyment of all human rights, and social justice which must be addressed in an integrated and balanced manner,

Recalling that the Declaration on the Right to Development has recognized the right to development as a universal and inalienable right and an integral part of fundamental human rights,

Emphasizing that endeavours to move towards the creation of uniform international human rights norms must go hand in hand with endeavour to work towards a just and fair world economic order,

Convinced that economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights,

Stressing the importance of education and training in human rights at the national, regional and international levels and the need for international cooperation aimed at overcoming the lack of public awareness of human rights:

1. *Reaffirm* their commitment to the principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights as well as the full realization of all human rights throughout the world;

2. *Underline* the essential need to create favourable conditions for effective enjoyment of human rights at both the national and international levels;

3. *Stress* the urgent need to democratize the United Nations system, eliminate selectivity and improve procedures and mechanisms in order to strengthen international cooperation, based on principles of equality and mutual respect, and ensure a positive, balanced and non-confrontational approach in addressing and realizing all aspects of human rights;

4. *Discourage* any attempt to use human rights as a conditionality for extending development assistance;

5. *Emphasize* the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure;

6. *Reiterate* that all countries, large and small, have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development;

7. *Stress* the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization, and that no violation of human rights can be justified;

8. *Recognize* that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds;

9. *Recognize further* that States have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms, and also recognize that remedies must be sought and provided primarily through such mechanisms and procedures;

10. *Reaffirm* the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights;

11. *Emphasize* the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons;

12. *Reiterate* that self-determination is a principle of international law and a universal right recognized by the United Nations for peoples under alien or colonial domination or foreign occupation, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development, and that its denial constitutes a grave violation of human rights;

13. *Stress* that the right to self-determination is applicable to peoples under alien or colonial domination or foreign occupation, and should not be used to undermine the territorial integrity, national sovereignty and political independence of States;

14. *Express concern* over all forms of violation of human rights, including manifestations of racial discrimination, racism, apartheid, colonialism, foreign aggression and occupation, and the establishment of illegal settlements in occupied territories, as well as the recent resurgence of neonazism, xenophobia and ethnic cleansing;

15. *Underline* the need for taking effective international measures in order to guarantee and monitor the implementation of human rights standards and effective and legal protection of people under foreign occupation;

16. *Strongly affirm* their support for the legitimate struggle of the Palestinian people to restore their national and inalienable rights to self-determination and independence, and demand an immediate end to the grave violations of human rights in the Palestinian, Syrian Golan and other occupied Arab territories including Jerusalem;

17. *Reaffirm* the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights, which must be realized through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realization of such right;

18. *Recognize* that the main obstacles to the realization of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor;

19. *Affirm* that poverty is one of the major obstacles hindering the full enjoyment of human rights;

20. *Affirm also* the need to develop the right of humankind regarding a clean, safe and healthy environment;

21. *Note* that terrorism, in all its forms and manifestations, as distinguished from the legitimate struggle of people under colonial or alien domination or foreign occupation, has emerged as one of the most dangerous threats to the enjoyment of human rights and democracy, threatening the territorial integrity and security of States and destabilizing legitimately constituted governments, and that it must be unequivocally condemned by the international community;

22. *Reaffirm* their strong commitment to the promotion and protection of the right of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women;

23. *Recognize* the rights of the child to enjoy special protection and to be afforded the opportunities and facilities to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity;

24. *Welcome* the important role played by national institutions in the genuine and constructive promotion of human rights, and believe that the conceptualization and eventual establishment of such institutions are best left for the States to decide;

25. *Acknowledge* the importance of cooperation and dialogue between governments and non-governmental organizations on the basis of shared values as well as mutual respect and understanding in the promotion of human rights, and encourage the non-governmental organizations in consultative status with the Economic and Social Council to contribute positively to this process in accordance with Council resolution 1296 (XLIV);

26. *Reiterate* the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia;

27. *Reiterate* further the need to explore ways to generate international cooperation and financial support for education and training in the field of human rights at the national level and for the establishment of national infrastructures to promote and protect human rights if requested by States;

28. *Emphasize* the necessity to rationalize the United Nations human rights mechanism in order to enhance its effectiveness and efficiency and the need to ensure avoidance of the duplication of work that exists between the treaty bodies, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights, as well as the need to avoid the multiplicity of parallel mechanisms;

29. *Stress* the importance of strengthening the United Nations Centre for Human Rights with the necessary resources to enable it to provide a wide range of advisory services and technical assistance programmes in the promotion of human rights to requesting States in a timely and effective manner, as well as to enable it to finance adequately other activities in the field of human rights authorized by competent bodies;

30. *Call for* increased representation of the developing countries in the Centre for Human Rights.

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A COMPARATIVE APPROACH

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A Comparative Approach

*Edited by **Johannes Chan**, LLB, PCLL, LLM, Barrister of the Supreme Court of Hong Kong, Senior Lecturer in Law, University of Hong Kong; and **Yash Ghai**, CBE, DCL (Oxon), Barrister of the Middle Temple, Sir Y K Pao Professor of Public Law, University of Hong Kong*

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BILL OF RIGHTS

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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.

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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, John McNamara, Phil Ross, David Tolliday-Wright, Keith Jefferies, Andrew Mak, P C White, Ching Y Wong, and Sasha Haldane (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 10 September 1993. We apologise for any errors or omissions.

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R v Lum Wai-ming [1992] 2 HKCLR 221
R v Ma Man-ho (1991) 1 HKPLR 314
R v Man Wai-keung (No 2) [1992] 2 HKCLR 207
R v Mirchandani [1992] 2 HKCLR 174
R v Ng Kam-fuk [1993] HKDCLR 29
R v Ng Po-lam (1991) 1 HKPLR 25
R v Ng Yiu-fai [1992] 2 HKCLR 122
R v Securities and Futures Commission, ex parte Lee Kwok-hung (1993) 3 HKPLR 1 (HCt)
R v Securities and Futures Commission, ex parte Lee Kwok-hung (1993) 3 HKPLR (CA)
R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127 (CA)
R v Eddie Soh Chee-hong (1991) 1 HKPLR 83
R v Tran Viet Van [1992] 2 HKCLR 184
R v Tung Chi-hung (1991) 1 HKPLR 282
R v Yiu Chi-fung (1991) 1 HKPLR 167
R v Wan Kit-man [1992] 1 HKCLR 224 (HCt)
R v Wan Yin-man (1991) 1 HKPLR 360
R v Wong Cheung-bun [1992] 1 HKCLR 240 (HCt)
R v Wong Hiu-chor [1993] 1 HKCLR 107
R v Wright, ex parte Lau Wing-wo (1993) 3 HKPLR
Re Reid (1991) 1 HKPLR 275
Re Rich Sir Ltd (1991) 1 HKPLR 296
Re Sin Hoi [1992] 1 HKLR 408 (CA)

CASES DECIDED BY OR PENDING BEFORE THE PRIVY COUNCIL, OR IN WHICH SPECIAL LEAVE TO APPEAL HAS BEEN OR IS TO BE SOUGHT

EDITORIAL

RECENT CASE LAW DEVELOPMENTS

First decisions of the Privy Council on the Bill of Rights

The period since the publication of the last issue of this *Bulletin* has seen a number of significant decisions. The most important decision is that of the Privy Council in the consolidated appeals brought by the Attorney General concerning the validity of s 30 of the *Summary Offences Ordinance* and s 25 of the *Drug Trafficking (Recovery of Proceeds) Ordinance*: *Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man* [1993] 3 WLR 329 (to be reported in (1993) 3 HKPLR). In the first appeal the Privy Council upheld the decision of the Court of Appeal declaring s 30 of the *Summary Offences Ordinance* inconsistent with the presumption of innocence contained in article 11(1) of the *Bill of Rights* and in the second case it reversed the decision of Gall J who had declared s 25(4) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* repealed on the ground of inconsistency with the same article. The Privy Council also addressed a number of general issues relating to the approach that should be adopted in interpreting article 11 and the *Bill of Rights* generally. The result in relation to the two statutory provisions is a reasonable one, and the decision resolves a number of issues. However, the Board fails to resolve other important issues, and in some respects muddies what were previously clear waters. The explicit and implicit message sent by the overall approach of the judgment is, in our view, a very conservative and parochial one; the Board pays little more than lip-service to the notion of interpreting human rights guarantees in a generous and purposive manner. Furthermore, the Board, rather than accepting that the adoption of a Bill of Rights requires careful scrutiny of established practices in the light of old and new values now constitutionalised, appears to endorse the view that re-examination of accepted and long-standing law and practice is something that the *Bill of Rights* requires only exceptionally, the exceptional cases being identified by some intuitive test.

The Privy Council now having confirmed the repeal of s 30 of the *Summary Offences Ordinance* effective from 8 June 1991, a pressing practical question is what should be done about those cases in which persons were convicted of an offence under the section after 8 June 1991. It appears that there may be as many as 386 such cases: some 40 persons were convicted on guilty pleas under this section *after the Court of Appeal had rendered its judgment declaring the section repealed* (indeed, two persons were charged with the offence after the Privy Council had dismissed the appeal against the decision of the Court of Appeal but before the Order in Council dismissing the appeal had been signed). Among those convicted were a number of children, illegal immigrants and persons with no previous convictions; various items of property have also been forfeited to the Crown as a result of these convictions.

The Attorney General has not indicated that any steps will be taken by him to ensure that these convictions will be expunged or that any other administrative steps will taken to give effect to the repeal of s 30 in this regard. Apparently the view is being taken that it is up to each individual to apply for leave to appeal against conviction out of time, a position which is in stark contrast to the cases in which prosecutions under s 37C of the *Immigration Ordinance* have been found to be defective because of a failure to obtain the Governor's consent (see page 26 below). While in the latter case persons may still be in prison, there seems to be little reason why the government should not take steps in relation to the s 30 cases, particularly those where the government itself persisted in prosecutions after the Court of Appeal had declared the section repealed. There may arguably be reasons for requiring persons convicted under laws assumed to be valid at the time of the

conviction and in respect of which the point was not taken, these reasons can hardly be compelling in a case where the law in question had been declared repealed by the Court of Appeal. The blame for continuing with such prosecutions must be shared by the prosecution, defence counsel and the courts concerned, but one wonders why it was the prosecution continued with such prosecutions after the Court of Appeal decision. In the present case one might ask whether the reluctance of the administration to respond to the Privy Council's judgment by taking practical measures is consistent with a good faith interpretation of its undertaking under article 2 of the ICCPR to "respect and ensure" the rights guaranteed by the Covenant and to ensure that a person whose rights are violated has an "effective" remedy, not just in formal terms, but as a practical matter. That the Attorney General should be prepared to take such remedial action only after more public money is spent on mounting, defending and hearing the inevitable challenge is a matter of considerable concern.

The practical problems to which the repeal with effect from 8 June 1991 of legislation inconsistent with the *Bill of Rights* gives rise have been highlighted by the *Lee Kwong-kut* case and were adverted to by a number of commentators early in the life of the *Bill of Rights*. The problem will become more acute as time passes and perhaps it is now time for the Hong Kong courts or legislature to consider seriously whether prospective repeal is desirable and how one might go about achieving that.

Other cases

The second major development has been a series of cases decided by the Court of Appeal in which the scope of article 12(1) of the *Bill of Rights* has been explored. That article provides that a person convicted of a criminal offence is entitled to benefit in cases where a lighter penalty is provide for by law than was applicable at the time of the commission of the offence. The amendments to the *Crimes Ordinance* (Cap 200), effected by the *Crimes Amendment Ordinance 1992* (No 49 of 1992) with effect from 26 June 1992, have been the subject of these decisions. In the cases in question the earlier offence has been reformulated, being replaced by a more serious offence (generally involving something more than mere possession and carrying a significantly higher penalty) and a less serious offence (generally relating to possession of particular items and carrying a lesser maximum penalty).

The first decision in the series, *R v Lai Kai-ming* (to be reported in (1993) 3 HKPLR, noted *Bill of Rights Bulletin*, v 2, n 2, p 36), endorsed the adoption of a broad approach to the construction of article 12(1), holding that its application was not restricted to those cases where the offence was retained intact and the penalty was merely varied. In subsequent decisions two competing approaches have emerged. The first approach (the *formal* approach[1]) is that adopted in *R v Mohammad Faisal*, in which one looks to the elements of the offence under the old law and compares them with the new offences. If, for example, there is no explicit requirement of intention to use a forged credit card of which one has possession in the old provision and the new section creates an offence with a requirement of intention and one without, then it is the less serious offence which corresponds to the repealed offence, and the maximum term of imprisonment under the less serious section should be the basis for deciding whether article 12(1) applies.

The second approach (the *substantive* approach), adopted in *Wan Siu-kei* and *Chan Chi-hung*, looks to the actual conduct of the defendant as revealed by the facts admitted or found at trial. If the facts show that the defendant would likely have been charged under the more serious of the later offences, then it is the maximum penalty for that offence

[1] The terminology is ours. The Court of Appeal has, misleadingly in our view, described the *Faisal* approach as "restrictive" and the *Wan Siu-kei* and *Chan Chi-hung* approach as "broad": see page 52 below.

which has to be considered for the purposes of article 12(1). If the facts show a lesser degree of criminality which would fall within the less serious of the new offences, then it is that offence which is the basis on which the applicability of article 12(1) is considered.

The effect of the *Faisal* approach appears to be that more defendants would benefit from lighter penalties than would be the case under the *Wan Siu-kei* approach.

A number of different divisions of the Court of Appeal have considered the issue and it does not appear that the issue is yet resolved. In *Wan Siu-kei* and *Chan Chi-hung* Macdougall VP, while agreeing that the substantive approach was the correct approach, considered that the earlier decision of the Court of Appeal in *Faisal* was binding. Litton JA took the view that *Faisal* had failed to follow *Lai Kai-ming* and therefore the Court was free to choose what it thought was the correct decision. Bokhary JA did not consider that the matter had been decided by binding authority, but thought the Court was in any event free to choose which approach was correct.

The upshot, then, appears to be that, unless one of the cases is taken further, the outcome of one's appeal will turn on the particular division of the Court of Appeal by which it is heard.

Another case of some significance is the decision of Jones J in *R v Director of Immigration, ex parte Wong King-lung and others* (page 8 below). In that case the court considered the effect of s 11 of the *Bill of Rights Ordinance*, which limits the application of the *Bill of Rights* in relation to various immigration decisions. Jones J held that s 11 did not permit challenges to be made to decisions relating to a person's remaining in Hong Kong under the immigration legislation, whether the challenge was launched by the person liable to be removed from Hong Kong or a family member of that person with right of abode in Hong Kong.

Other cases of interest are *R v Li Tat* (page 29 below) in which the Court of Appeal held that reg 4 of the *Import and Export (General) Regulations* was consistent with the presumption of innocence; *R v Deacon Chiu* (page 33), dealing with the right to trial without undue delay under article 11(2)(c) of the *Bill of Rights*; *R v Wong Ma-tai* (page 23), in which Deputy Judge C Y Wong found that the assumptions contained in s 4 of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405) were a justified restriction on the right to be presumed innocent; *R v Tse Kim-ho* (page 31), in which a magistrate held that summons addressed to Chinese defendants who could not read English violated article 11(2)(a) of the *Bill of Rights*; and *R v Chan Chau-sum* (page 57 below), in which a magistrate rejected a *Bill of Rights* attack on various provisions of the *Public Order Ordinance* (Cap 245).

Also of interest is the series of cases concerning Vietnamese witnesses sought to be detained as witnesses for the defence under s 32(4)(b) of the *Immigration Ordinance* (Cap 115): see *Re Pham Si Dung*, at page 36 below.

GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN

The Hong Kong government has just released its consultative paper on equal opportunities for women and men: Hong Kong Government, *Green Paper on Equal Opportunities for Women and Men* (Hong Kong: August 1993). While the paper goes to some trouble to document some aspects of the position of women in Hong Kong, in overall terms it is a (not unexpected) disappointment, and it has been roundly criticised by many women's groups for its failure to describe fully the extent of the discrimination against women. Among the issues which are not addressed by the report are the issue of sexual harassment against women, violence against women, and the reasons for structural inequalities in areas such as education and employment despite the existence of formal equality. The report also engages in extremely selective and potentially misleading use of

statistics and appears to reflect a basic misunderstanding of the nature of the structural discrimination that women in Hong Kong (as in many other countries) face. The report continues the government's practice of ignoring or discounting the evidence produced by women that sex discrimination exists in various areas, either by simply not referring to that evidence or by portraying discrimination as a less likely cause than other factors, the evidence for which is no stronger and in some cases weaker than the evidence suggesting that discrimination exists.

While the *Green Paper* claims that Hong Kong would have no great difficulty in ratifying the Women's Convention as it is now basically in compliance with the Convention's provisions, it does not propose that this be done -- a strange omission in view of the fact that the Legislative Council has supported this move and the *Green Paper* was intended to explore the implications of such a move. The *Green Paper* contains few proposals of substance, the suggestion that there be a Women's Charter being one of them. There is little detailed discussion of the need for and (dis)advantages of anti-discrimination legislation, or of an independent Women's Commission or a Human Rights Commission with responsibility for such issues. There is little in the *Green Paper* which suggests that the government has changed its basic stance of unwillingness to really listen, or to move quickly to establish a Human Rights Commission or a Women's Commission (despite Legislative Council support for the former as recently as July this year), to extend the Women's Convention to Hong Kong, or to enact anti-discrimination legislation. What seems more likely is further delay and a continuing reluctance to accept the existence of serious issues that need to be addressed.

A striking comparison between the Hong Kong government's commitment as shown by the *Green Paper* and the commitment of governments elsewhere is shown by the consultative document released recently by the Australian Law Reform Commission, *Equality before the Law* (Sydney: ALRC, 1993), which addresses in detail many of the issues missing from the Hong Kong *Green Paper*.

INTERNATIONAL DEVELOPMENTS

HUMAN RIGHTS COMMITTEE -- DECISIONS UNDER THE FIRST OPTIONAL PROTOCOL TO THE ICCPR

Reproduced at Appendix A are extracts from a United Nations press release summarising decisions of the Human Rights Committee at its March/April 1993 session in relation to complaints under the First Optional Protocol to the ICCPR. We have also included extracts from a number of decisions of the Human Rights Committee under the corresponding article of the *Bill of Rights*.

COMMITTEE ON FREEDOM OF ASSOCIATION OF THE INTERNATIONAL LABOUR ORGANISATION -- COMPLAINT AGAINST CHINA

Included at Appendix B is the text of the report of the Committee on Freedom of Association of the Governing Body of the International Labour Organisation in relation to a complaint filed last year against China, claiming among other things that Chinese trade union laws were inconsistent with internationally accepted standards on freedom of association, a claim upheld by the Committee. Complaints have been filed against China, including other which arose out of the events of 1989. Britain and Hong Kong have also been subject of complaints, the most recent in relation to Hong Kong being the complaint brought in relation to the threat by the Postmaster General to invoke the powers of dismissal in the Letters Patent against employees who engaged in a proposed sit-in (see *Bill of Rights Bulletin*, v 2, n 1, p 34).

HUMAN RIGHTS TREATY ACTION IN RELATION TO HONG KONG

Reports under the Economic, Social and Cultural Rights Covenant

The United Kingdom will shortly submit its overdue reports relating to the implementation of articles 10-12 and 13-15 of the International Covenant on Economic, Social and Cultural Rights in Hong Kong. Articles 10 to 12 deal with the protection of the family, mothers and children; the right to adequate food, clothing and housing; and the right to health. Articles 13 to 15 deal with the right to education, and the rights to take part in cultural life and to enjoy the benefits of scientific progress and of one's own scientific, literary or artistic production. The text of these reports will be included in a future issue of the *Bulletin*. The reports will be considered by the Committee on Economic, Social and Cultural Rights at the earliest in November 1993, but more likely in 1994.

Treaty inaction: the Hong Kong government and the Convention on the Elimination of All Forms of Discrimination Against Women

Reference has been made above to the Hong Kong government's *Green Paper* on equal opportunities for women and men, which touches on the question of the extension of the Convention on the Elimination of All Forms of Discrimination Against Women to Hong Kong. At the session of the Committee on the Elimination of Discrimination (CEDAW) held in January 1993, the question of the extension of the Women's Convention to Hong Kong was raised by the New Zealand expert during the consideration of the United Kingdom's report under the Convention (UN Doc CEDAW/C/SR.223):

> "68. *Ms Cartwright* welcomed the partial withdrawal to articles 11 and 13 of the Convention, but noted that the United Kingdom had entered significantly more, and indeed more substantial reservations, than any other State party which had reported to the Committee at its twelfth session. Had the United Kingdom, which had ratified the other four major Human Rights Conventions, entered the same number of substantial reservations to them? Furthermore, since both China and the United Kingdom had ratified the Convention, was there any reason why the protection afforded by the Convention should [not] be extended to Hong Kong?
>
> 69. *Ms Lin Shangzhen*[2] said that in accordance with the Basic Law for the Hong Kong Special Administrative Region, the rights and interests of Hong Kong's residents, including its women, would be fully protected following Hong Kong's return to Chinese administration. If the British side wished to extend application of a given Convention during the transitional period, or wished its implementation to continue after 1997, then the matter should be discussed through the correct channels."

The representative of the United Kingdom government undertook to provide to the Committee answers in writing to the Committee in relation to Hong Kong. As of July 1993, that material had not yet been provided. The United Kingdom is unlikely to appear before the Committee before 1 July 1997, unless the Convention is extended to Hong Kong before that date.

The comments made by the Chinese expert reflect a view which is apparently shared by the United Kingdom and Hong Kong governments, namely, that as a formal

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[2] Expert from China. It is arguably not consistent with the purportedly independent status of the expert members of the Committee to act as a conduit for official views, although it does occur on occasion.

matter the extension of the Women's Convention to Hong Kong before 1997 involves the assumption of treaty obligations which would continue beyond 1997. However, any extension of the Convention to Hong Kong by the United Kingdom would have effect only until 30 June 1997. From that time it seems that, since China is a party to the Convention, that the Convention will become applicable to Hong Kong after 1997 of its own force, there being no provision made for the Convention to apply only to parts of a State (see article 29 of the Vienna Convention on the Law of Treaties).

If what is contemplated is that China will, in respect of Hong Kong, seek to declare that the Convention does not apply to Hong Kong automatically -- in essence amending the treaty by obtaining the agreement or acquiescence of the other States parties to this "federal clause" -- it would be most unfortunate, not just form the point of view of Hong Kong, but also because such a move would tend to dilute the integrity of an international treaty regimes and may even encourage other States in different contexts to attempt to exclude parts of their territory from the scope of a treaty. One would hope that the United Kingdom would not be a party to such an arrangement and that, as a State party to the Convention itself, it should strenuously oppose any attempt to exclude the application of the Convention to Hong Kong after 1997.

Of more immediate concern is the government's statement that, should the government decide to go ahead with the extension of the Convention to Hong Kong, the issue will only then be placed on the agenda of the Joint Liaison Group. To date the government has chosen to adopt a tactic of delay in relation to the extension of the Convention and this appears likely to continue. The possibility that the matter could be delayed even further in the JLG so that extension of the Convention, if it comes at all, may still be years away is unacceptable in view of the clearly expressed views of the Hong Kong Legislative Council. If it is necessary to consider the matter in the JLG as a matter of politics and practicality, then the United Kingdom government should put the issue on the agenda immediately and seek conditional approval from China to the extension of the Convention to Hong Kong. This is a course of action has been adopted in relation to other treaties.

JUST PUBLISHED

An important recent publication which appeared in June this year is Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N P Engel, 1993). This book, a revised and updated edition of Nowak's German edition of 1989, is the only up to date complete commentary on the International Covenant on Civil and Political Rights. It contains discussions of the drafting history of the provisions of the Covenant, as well as references to the Human Rights Committee's general comments and case law and other sources as well; it is an indispensable work for anyone interested in the Covenant as an international legal instrument.

Of interest to those in the field of public law will be D Clark and G McCoy, *Administrative Law in Hong Kong* (Singapore: Butterworths, 1993), a revised edition of the book authored by Clark a few years ago. This book should be available in October. Also to appear during October is A Byrnes & J Chan (eds), *Hong Kong Public Law and Human Rights: A Sourcebook* (Singapore: Butterworths, 1993). This is a collection of Hong Kong constitutional, public law and human rights documents, together with international human rights materials, accompanied by introductions and references to relevant literature. It contains, among other documents, English texts of the Joint Declaration, the Basic Law, the Letters Patent and Royal Instructions, the Memorandum on Hong Kong's New Airport, the Chinese Constitution, the Bill of Rights Ordinance, the Commissioner for Administrative Complaints Ordinance and the Interpretation and General Clauses Ordinance. It also contains a number of international human rights documents, including the major United Nations human rights treaties, the general comments and recommendations of the Human Rights Committee, the Committee on Economic, Social

and Cultural Rights and the Committee on the Elimination of Discrimination Against Women. In the final section it includes the text of the Canadian Charter and Bill of Rights, the US Constitution, the New Zealand Bill of Rights and the fundamental rights provisions of the Indian Constitution. Each document or series of documents is accompanied by a brief introduction, which should be of use to practitioners and researchers unfamiliar with them.

A further publication of interest is the *Hong Kong Public Law Reports* (edited by A Byrnes, J Chan, G Edwards and W Fong) and published by Hong Kong University Press. The first volume (1991 *Bill of Rights* cases) will appear within a couple of weeks and the first part of volume 3 (containing 1993 *Bill of Rights* cases) will be available in early November. While the reports will concentrate initially on *Bill of Rights* cases, they will also cover important cases in other areas of public law. An order form is included in this issue of the *Bulletin*.

CASES

APPLICATION OF THE BILL OF RIGHTS: EXCEPTIONS AND SAVINGS (BILL OF RIGHTS ORDINANCE, S 11)

Reservations to ICCPR -- Immigration -- Applicability of Bill of Rights to decisions relating to stay in Hong Kong -- Right of family members with right of abode to invoke rights in Bill of Rights

R v Director of Immigration, ex parte Wong King-lung and others; R v Director of Immigration, ex parte So Kam-cheung and others; R v Director of Immigration, ex parte Lau Shek-to and others **(1993) HCt, MP Nos 4151 of 1992, 70 and 564 of 1993, 22 June 1993, Jones J**

This case involved three applications for judicial review of the refusal of the Director of Immigration to exercise his discretion to permit a person who has no right of abode in Hong Kong to remain in Hong Kong. The mother in the first case and the daughter in the second case had entered Hong Kong illegally. The daughter in the third case was a lawful visitor in Hong Kong. The Director of Immigration refused to exercise his discretion under s 13 of the *Immigration Ordinance* in the first two cases, and under s 11 in the third case, to permit them to remain in Hong Kong.

The other applicants were their respective family members, all of whom had the right of abode in Hong Kong. They contended that their entitlement to protection of their families by the State under article 19 of the *Bill of Rights* and, so far as the children were concerned, their rights to protection by the State under article 20 of the *Bill of Rights* would be infringed by the refusal of the Director of Immigration to permit the applicants without right of abode to stay in Hong Kong. Section 11 of the *Immigration Ordinance* confers the power on the Director of Immigration to vary or cancel any applicable conditions of stay applicable to persons lawfully in Hong Kong, or to exempt such persons from any or all prescribed conditions of stay. Section 13 confers on the Director of Immigration the power to authorise any person who landed in Hong Kong unlawfully to remain in Hong Kong, subject to such conditions of stay as the Director thinks fit.

The respondent argued as a preliminary point that s 11 of the *Bill of Rights Ordinance* precluded any application that seeks to challenge the decisions of the Director of Immigration regarding the entry into, stay in and departure of Hong Kong of any person who does not have a right of abode in Hong Kong and that therefore the court could not entertain the merits of the arguments based on the *Bill of Rights*.

Section 11 of the *Bill of Rights Ordinance* provides:

> **"11. Immigration legislation**
>
> As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

When the United Kingdom ratified the ICCPR and extended it to Hong Kong, it entered the following reservations:

"The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12(4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories."

"The Government of the United Kingdom reserve the right not to apply article 13[3] in Hong Kong in so far as it confers a right of review of a decision to deport an alien and a right to be represented for this purpose before the competent authority."[4]

Held (upholding the preliminary objection):[5]

1. Section 11 of the *Bill of Rights Ordinance* is the domestic enactment of the reservation entered by the United Kingdom in relation to its immigration legislation when it ratified the International Covenant on Civil and Political Rights. The United Kingdom was entitled to enter reservations to the provisions of the Covenant, provided those reservations were not incompatible with the object and purpose of the treaty.6 The reservations relating to immigration legislation were consistent with the object and purpose of the Covenant.

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[3] The equivalent of article 9 of the *Bill of Rights*.

[4] This reservation is incorporated into Hong Kong law by s 12 of the *Bill of Rights Ordinance*, which provides:

"12. Persons not having the right of abode

Article 9 does not confer a right of review in respect of a decision to deport a person not having the right of abode in Hong Kong or a right to be represented for this purpose before the competent authority."

[5] The parties agreed to argue the preliminary point first. The hearing of further arguments, based on traditional judicial review grounds, was adjourned to a later date.

[6] Cp Vienna Convention on the Law of Treaties, article 19, which provides:

" **Article 19**
Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

2. The principles of interpretation appropriate for the interpretation of provisions restricting or limiting the enjoyment of rights, as embodied in the *Siracusa Principles*,[7] were not applicable to the construction of the United Kingdom's reservations to the Covenant which were adopted in Part III of the *Bill of Rights Ordinance*.

3. Section 11 of the *Bill of Rights Ordinance* is clear and unambiguous. It precludes any challenge by any person, whether (s)he has a right of abode in Hong Kong or not, against a decision of the Director of Immigration relating to the entry, stay and removal of persons who do not have the right of abode in Hong Kong. However, s 11 did not exclude the operation of the *Bill of Rights* in other respects to protect the rights of persons in Hong Kong who did not have a right of abode, for example in relation to torture, or cruel, inhuman or degrading treatment under article 3 of the *Bill of Rights* or a breach of their rights while held in custody.

Per curiam

Whilst it is necessary to exercise the present policy having regard to the great problems caused by illegal immigration, the Director of Immigration should not exercise his discretion under ss 11 and 13 too rigidly. All right-thinking members of society would regard a policy that requires the removal of a child who is less than two years old without her parents, the five-year-old daughter, and the mother of the five young children decidedly unattractive and unworthy of a government that professes to support human rights. The interests of maintaining the family unit, when children are involved, should be a most important consideration to be taken into account by the Director of Immigration when exercising his discretion. This is particularly so when a family has lived together in Hong Kong for a substantial period of time.

M Lee QC and J Chan, for the applicants in MP No 4151 of 1992 and MP No 70 of 1993 (instructed by Wong, Hui & Co), and for the applicants in MP No 564 of 1993 (instructed by Boase & Cohen); W Marshall QC and M Datwani, for the respondent.

RIGHT NOT TO BE ARBITRARILY DEPRIVED OF ONE'S LIBERTY (BILL OF RIGHTS, ARTICLE 5(1); ICCPR, ARTICLE 9(1))

Crimes Ordinance (Cap 200), s 123

***R v Hui Kwok-fai* (1993) DCt, 8 September 1993, Judge Kilgour**

In this case a challenge was made to the s 123 of the *Crimes Ordinance* (Cap 200) on the ground that it was inconsistent with article 5(1) of the *Bill of Rights*, since it permitted a person to be imprisoned for a criminal offence, without the prosecution having to show that the defendant knew or should have known how old the girl concerned was. Judge Kilgour rejected the challenge; written reasons are awaited.

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[7] *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (1985) 7 *Human Rights Quarterly* 3.

S Wong, for the Crown; S Haldane, solicitor, of Haldane Midgley & Booth, for the defendant.

EQUALITY BEFORE THE COURTS (BILL OF RIGHTS, ARTICLE 10; ICCPR, ARTICLE 14(1)

Closure order in respect of vice establishment -- Whether violates guarantee of equality

***Re Ming Yuen Villa* (1993) Mag, TMC 503453 of 1992 and TMC 3650 of 1992, 12 July 1993, Miss B Kwan**

This case involved a challenge to ss 153C and 153I of the *Crimes Ordinance* (Cap 200). These sections form part of a scheme contained in the *Crimes Ordinance* providing for the closure for a period of premises in respect of which a person has been convicted of offences under ss 139 (keeping a vice establishment), 143 (letting premises for use as a vice establishment), 144 (permitting premises to be kept as a vice establishment), and 145 (permitting a vessel to be used for prostitution). Following the conviction of a person for one of these offences, the procedure for closing the premises may be initiated. The first step is the affixing to a conspicuous part of the premises a notice addressed to the tenant and owner of the premises which gives details of the conviction and a warning that, should another offence be committed within a specified period, a closure order will be made in relation to the premises. At the same time a notice is to be placed in one English and one Chinese language newspaper with the same information.

Where a closure order has been made against premises, s 153I provides that a mortgagee or chargee of the premises who would be entitled or permitted to occupy or possess the premises or be the immediate landlord of the occupier of the premises may apply for the suspension of the closure order. If satisfied of various matters, the court may suspend the order for two years. Section 153C provides that a bona fide purchaser, mortgagee or chargee for value of an interest in the premises who has acquired that interest after the conviction on which the closure order was based and before registration of that order under the *Land Registration Ordinance* (Cap 128) may apply for the order to be rescinded.

The applicant in this case sought the suspension of a closure order made against certain premises. The applicant argued that ss 153C and 153I were inconsistent with the guarantee of equality contained in articles 10 and 22 of the *Bill of Rights*, since they drew distinctions between different classes of persons and were therefore discriminatory.

Held:

1. To be consistent with the equality of guarantee before the courts, a distinction drawn by legislation between two classes of persons must be rational, reasonable and proportionate to the achievement of a legitimate purpose. Unrelentingly identical treatment is not always required, although identical treatment was the starting point, and an y departure from that must be justified.

   R v Man Wai-keung (No 2) [1992] 2 HKCLR 207, applied.

2. The purpose of combatting organised prostitution was a legitimate one, and the measures adopted to pursue that were legitimate and proportionate. The exclusion from the consequences of a closure order of those who are truly innocent of any

previous dealings with or in those premises is a reasonable measure, as is the power to impose strict conditions on the use by anyone else of premises once used in connection with prostitution.

RIGHT TO A FAIR HEARING BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL IN THE DETERMINATION OF A CRIMINAL CHARGE (BILL OF RIGHTS, ARTICLE 10; ICCPR, ARTICLE 14(1))

See Appendix A for summaries of a number of cases in the Human Rights considered complaints that the rights under article 14 of the ICCPR had been infringed.

Right to a fair hearing -- Obligation of prosecution to provide transcripts and translations of unused material

R v Deputy District Judge Lee, ex parte Chow Po-bor and another **(to be reported in (1993) 3 HKPLR)**

In this case (noted at *Bill of Rights Bulletin*, v 2, n 2, p 31) Mayo J dismissed an application for judicial review of the decision of a district judge made in the course of criminal proceedings. Among other matters Mayo J held that there was no duty on the prosecution to provide transcripts and translations of recordings which were not to be used in the prosecution case and about which there was evidence that there was nothing in the unused material that would assist the defence.

The order of Mayo J in the judicial review application was pronounced on 8 January 1993 and perfected on 21 January 1993. Prior to 15 January 1993 the Court of Appeal had no jurisdiction to hear an appeal from a judgment or order of the High Court made on an application for judicial review relating to a criminal cause or matter. On 15 January 1993, the new s 14A of the *Supreme Court Ordinance*, inserted by the *Supreme Court (Amendment) Ordinance* (No 2 of 1993), came into operation. That section conferred on the Court of Appeal jurisdiction to entertain appeals from the High Court made on an application for judicial review and relating to a criminal cause or matter. Section 2 of the amending *Ordinance* provided that the amendments made by the *Ordinance* "shall not apply in relation to any judgment given or order made" prior to 15 January 1993.

The applicants appealed against the decision to the Court of Appeal, relying on the new s 14A and arguing that the order of Mayo J had only been "made" when it had been perfected, ie on 21 January 1993.

The Court of Appeal rejected the appeal on the preliminary issue of jurisdiction, holding that an order is made on the day when it is pronounced by the judge.

The applicants intend to apply for special leave to appeal to the Judicial Committee of the Privy Council on the merits.

Right to a fair hearing -- Absence of witnesses whose evidence is adverse to accused

R v Cheung Tam-hung **(1993) Mag, NK No 50545 of 1992, 24 March 1993, Mr S J Geiser**

The defence sought to argue that the unavailability of two witnesses for examination was an infringement of their rights under articles 10 and 11(2)(e) of the *Bill of Rights*;, and that the prosecution was an abuse of the process of the court because it was 'pro forma' prosecution .

In relation to article 11(2)(e) of the *Bill of Rights*, the Magistrate commented:

> "In order to satisfy any tribunal that there has been a breach of this article, it seems to me to be incumbent upon the defendant to establish that the attendance of that particular witness, or in this case, these two hostesses, would be of assistance to the defendant and that their failure to attend court in fact prejudices the defence. I can only repeat what I have said earlier in this ruling, and that is that on a preliminary reading of the statements that these two hostesses made, I find that there can be no possible prejudice to the defendant if this trial proceeds in the absence of these two hostesses. I say therefore that I find that there has been no breach of the Bill of Rights in this or any other regard and I refuse to stay the proceedings on this ground."

Editorial comment

The issue of absent witnesses and the right to a fair hearing has been canvassed in a number of local cases; they include: *R v Ng Kam-fuk* [1993] HKDCLR 29, and *R v Chan Chak-fan*, (1993) DCt, DC Case No 674 of 1992, 8 February 1993, Judge Britton). In *Ng Kam-fuk* the issue whether the evidence given by the missing witness would be adverse to the defendants was not raised. The court was satisfied that a fair trial would not be possible in the absence of the prosecution witness who had emigrated (see *Bill of Rights Bulletin*, v 2, n 1, at p 11). The point was taken up in *Chan Chak-fan* where the court refused to grant a stay of proceedings and distinguished *Ng Kam-fuk* on the basis that the evidence that would be given by the missing witnesses, who were illegal immigrants and had been repatriated, would be adverse to the defendant. However, the court made it quite clear that, notwithstanding the detrimental content of the witnesses' statements, the prosecution was under a duty to make the witness available to the defence. In that case the witness had been made available (see *Bill of Rights Bulletin*, v 2, n 2, at p 15). We submit this is the correct starting point. In a recent decision of the European Court of Human Rights in *Edwards v United Kingdom*, Judgment of 16 December 1992, Series A, No 247-B, the Court, in considering article 6(1) of the European Convention, stated:

> "The Court considers that it is a requirement of fairness under paragraph 1 of Article 6, indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings."

The danger of courts' engaging too readily in an inquiry at an early stage of the proceedings into whether the evidence to be given by the missing witness prejudicial to the defendant is obvious; apart from the danger of pre-judgment, the defendant may feel compelled to disclose at least part of his defence in order to show the relevance of the evidence of the missing witness. This is particularly so if the defendant finds it essential to his case to cross-examine the missing witness. On the other hand, it must be right that the court should not order a stay unless the defendant can show that his right to fair trial has

been prejudiced. On a practical level, defence counsel may have to bear in mind the niceties of how much of the defence has to be disclosed before they mount this challenge, especially if the issue of a missing witness and the right to fair hearing is to be taken as a preliminary point.

PRESUMPTION OF INNOCENCE (BILL OF RIGHTS, ARTICLE 11 (1); ICCPR, ARTICLE 14 (2))

***Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man and Tsoi Sau-ngai* [1993] 3 WLR 329 (to be reported in (1993) 3 HKPLR)**

These cases involved two consolidated appeals brought by the Attorney General against judgments of the Court of Appeal and the High Court of Hong Kong, in which those courts had held that s 30 of the *Summary Offences Ordinance* (Cap 228) and ss 25(1) and (4) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405) respectively were inconsistent with article 11(1) of the *Bill of Rights* and had been repealed with effect from 8 June 1991.

The respondent in the first appeal (Lee Kwong-kut) 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 s 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 give an account to the satisfaction of that magistrate, 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: *R v Lee Kwong-kut* (1991) 1 HKPLR 337.

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 Court of Appeal dismissed the appeal of the Attorney General in June 1992, holding that the provision was inconsistent with article 11(1) of the *Bill of Rights*: [1992] 2 HKCLR 76. The Judicial Committee of the Privy Council granted special leave to the Attorney General to appeal.

On the appeal the respondent argued that s 30 was inconsistent with articles 3, 5, and 11(1) of the *Bill of Rights*. The Attorney General argued that the provision was consistent with those provisions and, in particular, that s 30 was a strict liability offence and that such offences were not inconsistent with the *Bill of Rights*.

The respondents in the second appeal had been charged on indictment with one count under s 25 (1) of the *Drug Trafficking (Recovery of Proceeds) Ordinance*. That section provides that a person commits an offence if he enters into or is otherwise concerned in an arrangement whereby the retention or control by a person of that person's proceeds of drug trafficking is facilitated, if he knows or have reasonable grounds to believe that the person carries on or has carried on or benefitted from drug trafficking. It is a defence under s 25 (4) for the person to show that he did not know or suspect that the

arrangement related to the proceeds of drug trafficking or that the arrangement would facilitate the retention or control of the proceeds of drug trafficking.

The defendants challenged ss 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*. Gall J held that the provisions constituted a prima facie violation of article 11(1) and that the Crown had failed to demonstrate that they were permissible restrictions according to the tests laid down in *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127.

Held (dismissing the first appeal and allowing the second appeal):

Interpretation of the Hong Kong Bill of Rights

1. The *Hong Kong Bill of Rights Ordinance*, being an instrument intended to protect fundamental human rights and freedoms, should be given a generous and purposive construction.

2. Decisions from other common law jurisdictions, including the United States and Canada, and international decisions, in particular those of the European Court of Human Rights, can give valuable guidance as to the proper approach to the interpretation of the Hong Kong Bill, particularly where the decisions in the other jurisdictions are in relation to an article in the same or substantially the same terms as that contained in the equivalent provision of the Hong Kong Bill. However, it must not be forgotten that decisions in other jurisdictions are persuasive and not binding authority and that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong.

   R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127, approved.

Application of the Bill of Rights to acts committed before 8 June 1991

3. Section 8 and article 11(1) of the *Bill of Rights* establish a defendant's right "to be presumed innocent until proved guilty according to law". That right came into existence on the coming into force of the Hong Kong *Bill of Rights Ordinance* and so it would apply in any trial taking place thereafter. It is not the date of the offence but the date of trial which is conclusive. If it had been necessary to do so, the same result could have been achieved by saying that in this context a contrary intention appears, so s 23 of the *Interpretation and General Clauses Ordinance* (Cap 1) does not apply.

Article 11(1) - the presumption of innocence

4. Article 11(1) is one of a group of provisions contained in articles 10 and 11 of the *Bill of Rights* which are designed to ensure that, before an individual is convicted of a criminal offence, he will have a fair trial and that justice will be done. In general it required that the prosecution prove the guilt of the accused beyond reasonable doubt.

5. However, although article 11(1) is not subject to any express limitation, it does embody an implicit flexibility and is subject to implied limitations, so that a contravention of the provision does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial. This implicit

flexibility allows a balance to be drawn between the interest of the person charged and the State.

6. A determination whether an exception to the general rule that the prosecution bears the burden of proof is inconsistent with the *Bill of Rights* will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what the essential ingredients are, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form.

7. If an exception to the general rule requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Leary v United States, 395 US 6, 23 L Ed 2d 57 (1969), considered.

8. In applying the Hong Kong Bill, it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process now established in Canada in order to assess whether an exception to the general rule that the burden of proof should rest upon the prosecution throughout a trial is justified. Normally, by examining the substance of the statutory provision which is alleged to have been repealed by the Hong Kong Bill, it will be possible to come to a firm conclusion as to whether the provision has been repealed or not without too much difficulty and without going through the Canadian process of reasoning. The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton LJ in *R v Edwards* [1975] QB 27. If this is the situation, article 11(1) is not contravened.

R v Edwards [1975] QB 27, approved.

9. In a case where there is real difficulty, where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of section 1 of their Charter. However, in doing this the tests which have been identified in Canada should be treated as providing useful general guidance and do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. This is particularly so as regards proportionality, since it is the need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule.

Section 30 of the Summary Offences Ordinance

10. Section 30 is an offence which contains three elements: (1) the possession or conveying of the property by the defendant, (2) the reasonably suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession. The third element is not a special defence, but an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the

property. The third ingredient was the most important element of the offence, since it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law.

11. The substantive effect of s 30 was to place the onus on the accused to establish the most significant element of the offence, namely that he can give an explanation as to his innocent possession of the property. This reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. It was not a reasonable exception to the general rule and was thus inconsistent with article 11(1), the Crown not having sought to justify the exception.

Section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance

12. The purpose of s 25 was to make it more difficult for those engaged in the drug trade to dispose of the proceeds of their illicit traffic without the transactions coming to the knowledge of the authorities. Section 25 creates an offence, which involves an absolute prohibition on engaging in the activities referred to in the section with someone whom you know or have reasonable grounds to believe is a person who carries on or has carried on or has benefited from drug trafficking, subject to an exception contained in s 25(3) and a special defence contained in s 25(4). Section 25 is an offence which falls within the classes referred to by Lawton LJ in the passage cited from his judgment in *Edwards*.

13. It is not important whether section 25(4) is regarded as creating a defence or an exception if it does not constitute part of the substance of the offence. The substance of the offence is contained in section 25(1), as to which the onus is on the prosecution.

14. Unless the prosecution can prove that the defendant has been involved in a transaction involving the relevant person's proceeds of drug trafficking and that at that time he had the necessary knowledge or had reasonable grounds to believe the specified facts, the defendant is entitled to be acquitted. However, once the defendant knows or has reasonable grounds to believe that the relevant person is a person who carries on or has carried out drug trafficking or has benefited from drug trafficking; then the defendant knows that he is at risk of committing an offence and that he can only safely deal with that person if he is in a position to satisfy section 25(3) or (4). If the defendant chooses not to take the precautionary action under section 25(3) then he knows he can only safely proceed by relying on section 25(4). To be able to achieve this the defendant will have to take any steps necessary to ensure that he does not have the knowledge or suspicion referred to.

15. It would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps. In the context of the war against drug trafficking, for a defendant to bear that onus under section 25(4) is manifestly reasonable and clearly does not offend article 11(1).

16. Section 30 of the *Summary Offences Ordinance* and s 25 of the *Drug Trafficking (Recovery of Proceeds) Ordinance* can be regarded as examples of situations close to the opposite ends of the spectrum of what does and does not contravene article 11(1).

17. If the conclusion that placing a legal or persuasive burden on the accused to prove the matters in s 25(2) was reasonable was wrong, s 25(4) could have been rendered consistent with the *Bill of Rights* by regarding the words "to prove" as being

repealed. Section 3(2) of the *Bill of Rights Ordinance* repeals existing legislation "to the extent of the inconsistency" and if the words" to prove" are removed from section 25(4) the second respondents would be no longer under a legal or persuasive burden of proof to establish the defence contained in section 25(4). Instead, they would be under an evidential burden merely requiring them to raise the issue. This burden could not conceivably contravene article 11(1).

Per curiam:

While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature.

N Bratza QC and S R Bailey, for the Attorney General; G J X McCoy and K Oderberg, for the respondent in the first appeal (Lee Kwong-kut); A Hoo QC and K Chan, for the first respondent in the second appeal (Lo Chak-man); M Thomas QC and P J Dykes, for the second respondent in the second appeal (Tsoi Sau-ngai).

Editorial comment

The approach adopted by the Privy Council in these cases, in our view, does little to ensure that the *Hong Kong Bill of Rights* will be a dynamic and effective means of ensuring the protection of human rights in Hong Kong before and after 1997. While the judgment pays obeisance to the standard authorities enjoining a broad and purposive interpretation of human rights guarantees, this is outweighed by the contrary messages of considerable restraint and maintenance of the status quo contained elsewhere in the judgment and manifested in the manner in which the Privy Council itself suggests that scrutiny of legislation under the *Bill of Rights* be carried out. It is no surprise that the Privy Council adopted what is in essence a fairly conservative approach; what is unsatisfying is the way in which it failed to give clear guidelines on a number of issues which were before it (in some cases muddying the waters), as well as the limitations of the analytical framework it proposes be adopted in relation to cases involving the presumption of innocence.

The Privy Council did confirm, as a rhetorical matter at any rate, the approach towards interpretation endorsed by the Hong Kong Court of Appeal in *R v Sin Yau-ming*, (1991) 1 HKPLR 88, [1992] 1 HKCLR 127, namely, that a broad and purposive approach should be adopted in interpreting the *Bill of Rights*. It also confirmed that, in interpreting the *Bill of Rights*, the Hong Kong courts may refer to decisions in other common law jurisdictions, including Canada and the United States, and of the European Court of Human Rights. While these decisions may provide valuable guidance as to the proper approach to the interpretation of the *Bill of Rights*, the Privy Council rightly pointed out that they are of persuasive value only and should not be slavishly followed. Further, the Board confirmed existing Hong Kong case law to the effect that the guarantee of the presumption of innocence applied to proceedings underway as of 8 June 1991, and was not restricted to trials for offences allegedly committed after that date (although its reasoning for that conclusion is less clear than that of the Hong Kong courts).

Once it moves beyond these matters, the Privy Council's judgment becomes less convincing and satisfactory. The tone of the judgment is set by Lord Woolf's words in the closing section of the judgment ([1993] 3 WLR at 346):

> "While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public.. . ."

No one would object to the need for realism, good sense and avoidance of things being "allowed to get out of hand". The question is rather how one ensures this balance, in view of the fact that the legislature has enacted a Bill of Rights which gives an important emphasis to individual rights. The danger is that such sentiments can easily become an easy justification for adhering to the status quo without undertaking the fresh examination of existing law and practice which the enactment of a Bill of Rights should entail. Indeed, this passage has become the almost constant refrain of the government in the Hong Kong courts in defending *Bill of Rights* challenges; its subliminal impact is considerable, despite its analytical limitations.

On the substantive issue of how one should determine whether provisions imposing a burden of proof on the defendant are inconsistent with the presumption of innocence, the Privy Council eschews what it describes as the unnecessarily complex Canadian approach, endorsing a broad unified approach to determining whether such provisions are a reasonable limitation on the right to be presumed innocent. The Canadian approach, adopted by the majority of the Hong Kong Court of Appeal in *Lee Kwong-kut*, emerges from the line of cases starting with *R v Oakes*, and leading to *R v Whyte* (1988) 42 CCC (3d) 97, and *R v Chaulk* (1990) 62 CCC (3d) 193. The two-part Canadian approach involves first a determination whether there has been a prima facie infringement of the presumption of innocence; if this is found, the infringement may then be justified under s 1 of the *Charter*. A prima facie infringement will normally be found when a legal burden of any sort is placed on the defendant. In *Whyte* the Supreme Court of Canada adopted the position that the characterisation of the fact to be proved by the defendant did not affect the first stage of the inquiry; it did not matter whether the defendant was required to disprove an essential or important element of the offence or was required to prove an excuse, qualification or existence of a licence; the relevant question was but whether (s)he faced the possibility of conviction if (s)he failed to prove the fact. Once there is a prima facie violation of the presumption of innocence, under s 1 of the *Charter* the Crown bears the burden of justifying the breach by showing that (a) the impugned provisions pursue a sufficiently important objective which is related to pressing and substantial concerns in a free and democratic society; (b) there is a rational connection between the objective and the means chosen; (c) the means adopted causes minimal impairment to the right or freedom in question; and (d) the effects on the limitation of rights and freedoms are proportional to the objective.

The Privy Council suggests that a pragmatic, intuitive approach is what is called for: by examining the substance of a statutory provision the court will be able to come to a firm conclusion as to whether there is a breach of the presumption of innocence. Although the Privy Council describes the Canadian approach as unnecessarily complex, what is most disappointing is what it offers as a substitute for that test. In his judgment, Lord Woolf writes ([1993] 3 WLR at 341):

> "Some exceptions [to the general rule that the prosecution must prove the defendant's guilt beyond reasonable doubt] will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of

an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less significant departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential elements of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v United States* (1969) 23 L Ed 2d 57, 82,'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'"

And in a later passage he comments ([1993] 3 WLR at 343-344):

". . . it is their Lordships' opinion that, in applying the Hong Kong Bill, it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process now established in Canada in order to assess whether an exception to the general rule that the burden of proof should rest upon the prosecution throughout a trial is justified. *Normally, by examining the substance of the statutory provision which is alleged to have been repealed by the Hong Kong Bill, it will be possible to come to a firm conclusion as to whether the provision has been repealed or not without too much difficulty and without going through the Canadian process of reasoning* . . .. The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton LJ [in *R v Edwards* [1975] QB 27].[8] If this is the situation Article 11(1) is not contravened.

In a case where there is real difficulty, where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of section 1 of their Charter. However in doing this the tests which have been identified in Canada do not need to be applied

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[8] The Privy Council had earlier ([1993] 3 WLR 329 at 334) quoted the following passage from the judgment of Lawton LJ in *Edwards* [1975] QB 27 at 39-40:

". . . this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception."

The Privy Council then commented that "the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare." ([1993] 3 WLR 329 at 334, quoting Lord Griffiths in *R v Hunt* [1987] AC 352 at 735)

> rigidly or cumulatively, nor need the results achieved be regarded as conclusive. They should be treated as providing useful general guidance in a case of difficulty." (emphasis added)

In essence, the Privy Council has gone back to *Oakes*, drawing a distinction between essential or important elements of an offence; where proof of such matters is placed on the defendant, it is less likely that the provision will be consistent with the presumption of innocence. However, this distinction can be extremely difficult to draw, particular in the case of new statutory offences.

These passages throw up a number of other issues and appear to muddy what were fairly clear waters until this decision. It is unclear, for example, whether a presumption will be held consistent with article 11(1) once it is shown that there is a rational connection between the proved and presumed facts, or whether it is also necessary to satisfy tests of proportionality and minimal impairment (as endorsed in *Sin Yau-ming* on the basis of Canadian authority), or some other test (if so, what test?). Apart from a reference to the case of licences and the difficulty the prosecution might have establishing that a defendant has a licence, and the case of insanity, Lord Woolf gives us little guidance as to the sorts of factors that should be considered when deciding whether a departure from the normal principle is justifiable.

Unlike the Canadian courts, the Privy Council has failed to examine the philosophy underlying the presumption of innocence, and to identify the interests that the presumption of innocence tries to protect. It also overlooks the many different types of reverse onus provisions which have troubled both the Hong Kong and the Canadian courts and the proliferation of those provisions in Hong Kong legislation. (See A Byrnes, "The Impact of the Hong Kong Bill of Rights on Litigation", in J Sihombing (ed), *Law Lectures for Practitioners 1992* (Hong Kong: Hong Kong Law Journal, 1992), at pp 152-235).

The Privy Council suggests that the fact that the Canadian courts tend to reach the same result in the end as other courts which do not follow the same analytical framework is a reason for not adopting a similar framework. Such an approach is likely to lead to replication of the status quo, and fails to ensure one of the major benefits of a Bill of Rights, namely the examination in the light of current (sometimes new) standards and values of laws and practices which may have been in existence for decades or even centuries. While the Canadian courts may perhaps go to excessive lengths in this process, it is a more satisfactory approach in many respects than that adopted by the Privy Council. Although "the anvil of pleading" may be an important source of wisdom and common sense, longevity is no guarantee of consistency with contemporary human rights standards. To start from the assumption that it is will very likely be a self-fulfilling prophecy.

The Privy Council held that the Canadian approach may be adopted in the "borderline" cases. Yet it is not clear what a "borderline" case is, although the challenged provisions and the categories of cases identified by Lawton LJ in *Edwards* appear not to be. Not surprisingly, judges in Hong Kong still continue to refer to the Canadian approach in determining the constitutionality of various reverse onus provisions, even after the Privy Council decision in *Lee Kwong-kut*.

Another issue on which the decision gives rise to uncertainty is in relation to evidential burdens. Towards the end of his judgment Lord Woolf remarks that there would not be any question of incompatibility with the *Bill of Rights* if s 25(4) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* were construed to impose an evidential, as opposed to a legal, burden of proof on the defendant. However, it is not clear whether this is because Lord Woolf considers that an evidential burden is reasonable in this particular case, or because he considers that the imposition of an evidential burden can never infringe article 11(1). If the former, we once again have no criteria by which to judge the reasonableness of evidential burdens; if the latter, there is no authority or discussion to support this conclusion. It may be noted that the Court of Appeal held in *R v Wong Hiu-*

chor [1993] 1 HKCLR 107 that the imposition of an evidential is a prima facie infringement of article 11(1) that must be justified.

Intriguingly, although the Board upheld s 25(4) as consistent with article 11(1), it did not address the other arguments which had been put before it on the first appeal and adopted by the respondents in the second appeal. Those arguments were based on articles 3 and 5(1) of the *Bill of Rights*. While no doubt the Board would have come to the same result, it seems curious to allow an appeal without discussing arguments which might have led to the dismissal of the appeal.

Lord Woolf's comments on the need to approach the *Bill of Rights* with realism and good sense, and to keep it in proportion have already been referred to. While it is right that interpretation of the *Bill of Rights* should be carried out with common sense and realism and there is always a fine balance between individual rights and community interest, Silke VP rightly reminded us in *Sin Yau-ming* that after the *Bill of Rights* came into effect, the legislature was no longer supreme, and the balancing process had to proceed with a bias in favour of the individual. The Privy Council approach does not seem to particularly compatible with this perspective. It echoes the traditional common law, and sometimes unwarranted, deference to the legislature, which clearly reflects the British tradition where the legislature is supreme and its wisdom is not to be challenged in court by a constitutional *Bill of Rights*.

Control of Obscene and Indecent Articles Ordinance (Cap 390), s 21 (1)(a)

R v Cheng Pui-kit, Mag App No 165 of 1992

For details of this case, see *Bill of Rights Bulletin*, v 1, n 3, p 19. The case was adjourned in late May by the Court of Appeal pending the judgment of the Privy Council in *Attorney General v Lee Kwong-kut* and *Attorney General v Lo Chak-man*. The appeal in this case is to be heard by the Court of Appeal in October.

The validity of the new presumptions in the *Dangerous Drugs Ordinance* (Cap 134), sections 47 (1) and (2)

R v Lum Wai-ming, Crim App No 329 of 1992 (on appeal from the decision of Deputy Judge Burrell, reported at [1992] 2 HKCLR 221)

Following the Court of Appeal's decision *R v Sin Yau-ming* (1991) 1 HKPLR 88, [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, in the following terms:

"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 *R v Lum Wai-ming* [1992] 2 HKCLR 221 (noted *Bill of Rights Bulletin*, v 1, n 4, p 13), 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 [No 2]* [1993] 1 HKCLR 51 (noted *Bill of Rights Bulletin*, v 1, n 4, p 15) Ryan J held that the new sections 47 (1)(b) and 47 (2) were consistent with the *ICCPR*. In *R v Tran Viet Van* [1992] 2 HKCLR 184 (noted *Bill of Rights Bulletin*, v 1, n 4, p 16) 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).

The defendant in *Lum Wai-ming* has appealed against his conviction, challenging the applicability of the new presumptions to his case (on the basis of *Tran Viet Van*), as well as on the basis of their consistency with article 11(1) of the *Bill of Rights*. The case is to come before a single judge on the issue of legal aid under the Legal Aid in Criminal Cases Rules on 13 October 1993.

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), ss 4(2), 4(3)

R v Wong Ma-tai (1993) DCt, Case No STCC 129 of 1990, 4 June 1993, Deputy Judge C Y Wong (for earlier proceedings see _Bill of Rights Bulletin_, v 2, n 2, p 24)

The defendant had been convicted of drug trafficking and the prosecution invoked against the defendant the assumptions contained in ss 4(2) and 4(3) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405). Section 4(2) provides:

"The High Court or the District Court, as the case may be, may, for the purpose of determining whether the defendant has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug trafficking, make the following assumptions, except to the extent that the defendant shows that any of the assumptions are incorrect in his case."

Section 4(3) provides:

"Those assumptions are --

(a) that any property appearing to the court --

(i) to have been held by him at any time since his conviction; or

(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 a payment or reward in connection with drug trafficking carried on by him or another;

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him or another; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a payment or reward, he received the property free of any other interests in it."

In his earlier decision Deputy Judge Wong had ruled that these assumptions were a prima facie infringement of article 11(1) of the *Bill of Rights* and fell to be justified as reasonable and proportionate restrictions on the enjoyment of that right. The Crown argued that ss 4(2) and 4(3) were justified restrictions on the right, in view of the fact that the word "may" in the provisions created a permissive rather than a mandatory assumption.

Held:

1. The Crown bears the burden on the issue of justification, that is, the issue of whether a provision which is prima facie in breach of the *Bill of Rights* could be retained because it is justified. The standard is that of proof on the balance of probabilities.

2. There was nothing in the *District Court Ordinance* (Cap 336) or the *Criminal Procedure Ordinance* (Cap 221) to give the court the power to review its previous ruling of December 1992.

3. There were no real differences between a presumption and an assumption. It was appropriate to apply the law applicable to presumptions to the assumptions contained in ss 4(2) and 4(3) of the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405).

4. The Crown's invocation of the assumptions in ss 4(2) and 4(3) was in effect the same as preferring new charges against the defendant, except that the defendant was not charged and the Crown was not required to adduce evidence to prove those new "charges".

5. Therefore, although strictly speaking the defendant was not being tried for any criminal charge, for the purposes of determining the Crown's application for the confiscation of assets, it was necessary for the court to make findings which would have led to verdicts of conviction or acquittal if charges were preferred. Accordingly, it would be wrong not to apply all the rules of a criminal trial to the proceedings, including the provisions of the *Bill of Rights Ordinance*.

6. It was only a general proposition, and not an absolute rule, that if a statutory provision containing assumptions is a permissive one -- permitting but not requiring facts to be assumed -- then it is consistent with article 11(1) of the *Bill of Rights*. There may be an exception to that general proposition if the facts of the case and the pre-existing legislative provision so warrant. Once assumptions come into play, it makes no difference whether they were permissive or mandatory; the defendant bears a legal, and not an evidential, burden of satisfying the court on the balance of probabilities that what was assumed was incorrect.

7. The characterisation of an assumption as mandatory or permissive only concerns whether evidence of basic facts will or may give rise to the assumptions. In neither

case is the Crown required to prove the facts which it asks the court to presume. The difference between mandatory and permissive assumptions was that with the former, once the Crown has established beyond reasonable doubt the basic facts, it is as good as proving what is to be assumed. In the case of permissive assumptions, the Crown had to prove more than the basic facts; it must persuade the court that the basic facts proved reasonably led to the facts which are to be assumed. This is the crux of the test of rational connection.

8. Under s 4 the court had a discretion whether or not to make the relevant assumptions after the Crown proved the basic facts. Depending on the nature of the basic facts, the court, in the proper discharge of its duty, was bound to make those assumptions. Hence, though the raising of the assumptions is permissive, in reality, the making of those assumptions is almost inevitable.

9. In the light of *Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man* [1993] 3 WLR 329, while it was not necessary to apply the Canadian approach in every case, in borderline or difficult cases it provided useful general guidance. In assessing the reasonableness of s 4, it was appropriate to examine the issues of proportionality, rational connection and minimal impairment.

9. The requirement of proportionality was met as drug trafficking is a serious problem in Hong Kong, and every means must be taken to try to curb and put an end to it.

10. Because the Crown was required to prove beyond reasonable doubt quite substantial and detailed basic facts in order to raise the assumptions, and because the facts to be assumed reasonably flowed from those basic facts, there was a rational connection between the basic facts and the facts to be assumed.

11. Although the defendant bore the legal burden of proving that the facts assumed were "incorrect", (s)he did not have to show that they were "untrue", which is a more onerous task. The legislature is not required to search out the least intrusive means of attaining its objective, merely to choose from a range of means which impairs the right(s) as is reasonably possible. Accordingly, the requirement of minimal impairment was satisfied.

12. The Crown had justified the infringements of articles 10 and 11(1) of the *Bill of Rights* by ss 4(2) and 4(3).

Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man [1993] 3 WLR 329 (PC), considered and applied.

G Rhead and S R Bailey, for the Crown; Mr McMarray, for the respondent.

Editorial comment

Both in this case and in a case before Leonard J in the High Court (*R v Ko Chi-yuen* (1992) HCt, Crim Case No 286 of 1991, 22 December 1992, noted *Bill of Rights Bulletin*, v 2, n 2, p 25) the upshot was that the challenged provisions were found to be consistent with article 11(1) of the *Bill of Rights*. However, it may be noted that earlier this year the European Commission of Human Rights declared admissible (that is, admitted for consideration on the merits) an application in which the corresponding confiscation provisions under the *Drug Trafficking Offences Act 1986* (UK) were challenged on the ground that they are inconsistent with article 7 of the *European Convention on Human Rights*, since a confiscation order applying to property acquired before the commencement of the Act amount to the imposition of a retrospective criminal penalty. See *Welch v United Kingdom*, Application No 17440/90, decision on admissibility of 12 February 1993. Article 7 of the *European Convention* provides:

"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

An argument challenging similar provisions on the ground that they amounted to the retrospective imposition of a criminal penalty was rejected by a majority of the Court of Appeal of the Bahamas in *Commissioner of Police v Woods* [1990] LRC (Const) 1 (noted *Bill of Rights Bulletin*, v 2, n 1, p 43).

***Immigration Ordinance* (Cap 115), sections 37C (1)(a), 37 (2)(b)**

***R v Hui Lan-chak and others* (1993) CA, Crim App No 287, 7 September 1993, Yang CJ, Macdougall VP, and Barnett J (together with *R v Leung Kwok-sing*, Crim App No 538 of 1993)**

This case involved an appeal from the decision of Judge Lugar-Mawson (1992) DCt, Case No 556 of 1992, 8 September 1992 (noted *Bill of Rights Bulletin*, v 2, n 1, p 5). The appellant appealed against his conviction on the ground that the proceedings against him were a nullity, since institution of proceedings under s 37C required the Governor's consent, which had not been obtained. The argument was based on the requirement contained in s 3 of the *Territorial Waters Act* 1878 (UK).

On appeal the Court of Appeal accepted the argument that the *Territorial Waters Act* still applied to prosecutions under s 37C and that the consent of the Governor (as well as that of the Attorney General) was required for prosecutions under that section.

D R Fung QC and P J Dykes (instructed by the Director of Legal Aid), for the appellants; I G Cross QC and M A Crabtree, for the Crown.

***Import and Export Ordinance* (Cap 60), s 18A(1)(b)**

***R v So Kwok-wing and Ma Hing-ming* (1993) HCt, Mag App No 324 of 1993, 8 July 1993, Litton JA**

This case involved appeals against conviction by two persons convicted of offences under s 18A(1)(b) of the *Import and Export Ordinance* (Cap 60). So had been convicted of knowingly conveying cargo without intent to assist another person to export the cargo without a manifest. Ma had been convicted of knowingly having removed the cargo with the same intent. The appellants argued that there was insufficient evidence to establish that they had *knowingly* assisted in the carriage and removal of unmanifested goods. At the trial the Crown argued, and the court accepted, that the presumption in s 18A(2) of the *Ordinance* had been triggered, and, in the absence of evidence to the contrary, the necessary mens rea was thereby established.

Section 18A of the *Ordinance* provides:

"(1) Any person who knowingly--

(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,

with intent to export the cargo without a manifest or with intent to assist another person to export the cargo without a manifest is guilty of an offence and liable on conviction to a fine of $500,000 and to imprisonment for 2 years.

(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 without a manifest, the first mentioned person will be presumed to have such intent in the absence of evidence to the contrary."

Section 35A (2) provides:

"(1) Any person who knowingly --

(a) has possession of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

(c) assists with the carrying, removing, depositing, harbouring, keeping or concealing of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

with intent to evade the restriction or prohibition or to assist another person to evade the restriction or prohibition is guilty of an offence and liable on conviction to a fine of $500,000 and to imprisonment for 2 years.

(2) Any person who--

(a) has possession of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

(c) assists with the carrying, removing, depositing, harbouring, keeping or concealing of any article, the carriage of which is restricted under regulations under this Ordinance;

. . .

in circumstances that give rise to a reasonable suspicion that there is intent on the part of that person to evade a restriction or prohibition or to assist another person to evade a restriction or prohibition, the first mentioned person will be presumed to have such intent in the absence of evidence to the contrary."

Litton JA commented (at p 5 of the judgment):

"It must be borne in mind that the statutory presumption under s. 18A(2) does not arise upon a mere conjecture. To stand the acid test of Article 11(1) of the Bill of Rights there must be a fully rational and realistic connection between the provided facts and the facts to be presumed. See *Wong Hiu-chor* [[1993] 1 HKCLR 107 [*Bill of Rights Bulletin*, v 2, n 1, p 18]."

Litton JA went on to hold that s 18A(2) properly construed meant that the circumstances must viewed as a whole and "there must be absence of evidence to the contrary before the presumption avails the prosecution."

In view of the fact that one of the magistrate's principal findings of fact could not be allowed to stand and that there was evidence to the contrary on the issue of men rea, Litton JA allowed the appeal, holding that the presumption had not been triggered and that therefore there was insufficient evidence of mens rea.

A Tsang (instructed by K F Wong & Co), for the appellants; K Zervos, for the Crown.

Import and Export Ordinance (Cap 60), s 18(1)(b)

***R v Hung Wai-shing and others* (1993) Mag, FL No 4217 of 1992, 29 July 1993, Mr T Tsang**

The magistrate had ruled in February 1993 that s 18(1)(b) of the *Import and Export Ordinance* (Cap 60) constituted a prima facie breach of articles 5(1), 10 and 11(1) of the *Bill of Rights* and fell to be justified by the Crown (see *Bill of Rights Bulletin*, v 2, n 2, p 28). The case was then adjourned for the hearing on justification, which took place in July 1993.

The magistrate ruled:

"2. For the purpose of considering the 'justification', I have regard to the recent Privy Council appeals [Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man]. I consider that s 18(1)(b) of Cap 60 is a case which I should pay regard to the approach developed by the Canadian courts, but I should not apply it rigidly. Further, I need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule.

3. On the question of rationality, I hold that there are good reasons for the offence under s 18(1)(b) being one of strict liability nature which comprise no mental element, bearing in mind the social objective of the legislation. I also hold that there are good reasons for distinguishing two categories of defendants, namely those considered to be 'owner' and those considered not, and so providing for the availability of the 'due diligence' defence under s 18(2) to the 'owner' defendants but not for the second category of defendants. It is a reasonable limit on equality as could be demonstrably justified in a free and democratic society.

4. On the question of 'proportionality', I hold that the Crown fails to justify the imposition of potential imprisonment for a strict liability offence such as s 18(1)(b). In this respect, I have carefully considered the case of *Reference re s 94(2) of the Motor Vehicle Act* and *R v Gray* (1988) 44 CCC (3d) 222.

5. I therefore declare the provision for imprisonment under s 18(1)(b) of Cap 60 (ie the words 'and to imprisonment for 2 years') repealed, it being the only extent of inconsistency with the Bill of Rights Ordinance."

Editorial note

In *R v Lui Tak-hoi* (1993) CA, Mag App No 1 of 1993, 21 July 1993, Yang CJ, Power and Macdougall VPP, the Court of Appeal confirmed that s 18(1) of the *Import and Export Ordinance* created an offence of strict liability, while s 18A was an offence requiring proof of mens rea.

Import and Export Ordinance (Cap 60), s 31, 34 and *Import and Export (General) Regulations*, r 4

R v Li Tat (1993) CA, Mag App No 1065 of 1991, 30 July 1993, Macdougall VP, Bewley and Ryan JJ[9]

The appellant had been convicted of charges of exporting goods from Hong Kong otherwise than under and in accordance with a licence, contrary to regulation 4 of the *Import and Export (General) Regulations* (Cap 60). The appellant's company, Bright Garment Co, had been granted licences to export clothing to Germany. The licences provided that goods covered by the licence must be of Hong Kong origin, defined as "having undergone principal processes in Hong Kong". If goods are not of Hong Kong origin and are purportedly exported under such a licence, the export of the goods is not in accordance with the licence.

The appellant's company had subcontracted the manufacture of the clothing concerned to a company called the Filper Knitting Company, the manager of which had made a declaration that the goods were of Hong Kong origin in accordance with the licence condition. The appellant had admitted to customs officials that Filper Knitting had told him that the goods had been manufactured by a sub-contractor in China. The magistrate held that this and other evidence was inadmissible hearsay and that there was no admissible evidence of the place of origin of the goods.

The magistrate, however, relied on s 94A of the *Criminal Procedure Ordinance* (Cap 221). She considered that the effect of s 94A was that the appellant bore the burden of proving on the balance of probabilities not only that he had a licence to export the goods, but also that the exporting was done in accordance with the licence. In the absence of such proof she convicted the appellant.

The appellant appealed on a number of grounds. First, he argued that the appropriate provision to consider was s 34 of the *Import and Export Ordinance* (Cap 60), which provided that the defendant bore the onus of proving a list of matters relating to the export of goods (including proof that an article is intended to be exported in accordance with the terms of a licence), but did not provide that a defendant bore the burden of proving the actual exportation of the item. The appellant argued that this was reflected the intention of the legislature that the defendant did not have to prove this matter.

Secondly, the appellant argued that, if the interpretation of regulation 4 by the magistrate was correct, then the regulation was ultra vires the enabling legislation and therefore void in accordance with s 28(b) of the *Interpretation and General Clauses Ordinance* (Cap 1).

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[9] This judgment is likely to be the subject of an application for leave to appeal to the Privy Council.

Finally, the appellant argued that, if regulation 4 were construed so as to cast a burden on the exporter to prove that the articles were manufactured in accordance with the licence, it would be inconsistent with the guarantee of the right to be presumed innocent contained in article 11(1) of the *Bill of Rights*.

Section 34 of the *Ordinance* provides:

"34.(1) In any proceedings under this Ordinance the onus of proving--

(a) the place--

(i) from which an article has been imported; or

(ii) to which an article is intended to be exported; or

(b) that an article--

(i) has been imported in accordance with the terms of a licence;

(ii) is intended to be exported in accordance with the terms of a licence;

(iii) has been imported for the sole purpose of exporting the article;

(iv) has been lawfully placed in or on any vessel, aircraft or vehicle for the purpose of exporting the article;

(v) has been lawfully removed from any vessel, aircraft or vehicle in or on which it was imported;

(vi) has been lawfully delivered to or placed in any premises or placed after it has been imported; or

(vii) has been recorded in the manifest of the vessel, aircraft or vehicle in or on which it has been imported or is intended to be exported,

shall lie upon the defendant in any such criminal proceedings and the claimant in any forfeiture proceedings.

(2) For the purposes of this section the provisions of Part IV of the Evidence Ordinance (Cap 8) shall apply as if proceedings under this Ordinance were civil proceedings."

Held (dismissing the appeal):

1. Section 31(1)(b) of the *Import and Export Ordinance* specifically provides power to make regulations prohibiting the import and export of any article except under and in accordance with the terms and conditions of a licence; regulation 4 fell within the scope of that power.

   R v Customs and Excise Commissioners [1986] 2 All ER 164, considered.

2. The failure of s 34(1)(b) of the *Import and Export Ordinance* to provide that the onus of proving goods had actually been exported lay on a defendant in proceedings under the *Ordinance* was deliberate, the reason being that the provision applied to a

range of persons in addition to the actual exporter, who has available to him in Hong Kong the evidence that goods were manufactured in Hong Kong, if in fact they were so manufactured. The only case in which regulation 4 would cause the exporter any real difficulty was if the declared manufacturer is not the true manufacturer. Accordingly, the correct interpretation of regulation 4 was that it did place the onus on the exporter to proved export in accordance with the terms of the licence.

3. Proof of exportation of the goods covered by a licence, although in most cases a formality, was an important element of the offence. It was therefore necessary to consider whether placing such a burden on the exporter was reasonable. In considering that question, it was appropriate to take into account the fact that the Crown had no prospect whatever of proving that goods are not of Hong Kong origin and that the maintenance of control over exports and imports is a matter of some importance to the community. In the case of a bona fide exporter the burden is a comparatively light one; the fact that the burden will be impossible for a non-bona fide exporter to discharge is irrelevant. Therefore, it is reasonable that the exporter should bear the burden of proving that he has actually exported goods manufactured in accordance with the conditions of the licence.

Attorney General v Lee Kwong-kut [1993] 3 WLR 249, applied.

R v Edwards [1975] QB 27 at 39; *R v Hunt* [1987] AC 352 at 374, considered.

RIGHT TO BE INFORMED OF CHARGE IN A LANGUAGE WHICH ONE UNDERSTANDS (BILL OF RIGHTS, ARTICLE 11(2)(A); ICCPR, ARTICLE 14(3)(A))

***R v Tse Kim-ho; R v Peter Wong Wai-pong* (1993) Mag, ESV Nos 500070/92 and 500072/92, 2 and 19 April 1993, Mr P C White**

The two defendants in these cases were charged with traffic offences contrary to the *Fixed Penalty (Criminal Proceedings) Ordinance* (Cap 240). Each defendant was served with a summons printed in a combination of the English and Chinese languages. The defendants argued that the section of the *Ordinance* under which the summonses were issued was repealed by s 3 of the *Bill of Rights Ordinance* because the language of each summons constituted a fundamental breach of the defendants' right to be informed "promptly and in detail in a language which he understands" of any charges against him, guaranteed by article 11(2)(a) of the *Bill of Rights*.

Furthermore, the defendants challenged s 9(1) of the *Fixed Penalty (Criminal Proceedings) Ordinance*, under which the recipient of a fixed penalty is, upon receipt of a summons, given a further opportunity to avoid court proceedings by paying a fixed penalty, additional penalty, and costs. They argued that this suggested that the defendants were guilty and should have paid the fixed penalty in the first place rather than choose to waste the court's time and thereby attract additional penalties. They contended that there is an implicit assumption in Cap 240 that a suspected offender is guilty, and that this assumption is contrary to the right, guaranteed by article 11(1) of the *Bill of Rights*, to be presumed innocent until proved guilty.

The defendants also argued that their right to a fair hearing, guaranteed by article 10 of the *Bill of Rights*, had been violated. They argued that a settlement made by the parties as a result of the alleged offenders' succumbing to the pressures created by s 9 of Cap 240 -- the threat of an additional penalty and costs -- is contrary to article 10.

The defendants sought to have the court strike out both summonses and dismiss all charges.

The Crown argued that s 9 of Cap 240 does not invite an assumption that an alleged offender is guilty or deny him his right to a fair trial. They noted that provisions similar to s 9 had been held to be in conformity with the corresponding article of the *European Convention*.

Held (dismissing the summonses and the charges):[10]

1. Once in court, matters are necessarily and properly explained in such a manner that both the presumption of innocence and the right to a fair hearing are sufficiently reinforced. Therefore, the defendants' participation in that judicial process is not prejudiced by the Crown's earlier invitation, contained in s 9 of Cap 240, to enter a plea bargain. This was so notwithstanding the somewhat zealous nature of that invitation.

2. The guarantee contained in article 11(2)(a) of the *Bill of Rights*, although expressed to apply "in the determination of a criminal charge", was not restricted to the trial itself, but necessarily extended to the pre-trial stage.

3. In view of s 7 of the *Bill of Rights Ordinance*, which provided that the *Ordinance* bound "public authorities", the administrative procedures established by the government to achieve its motor vehicle traffic policy objectives were subject to the *Bill of Rights*. The issuance of a summons under Cap 240 is such a procedure.

4. The purpose of the issue of a summons was to inform the person to whom it was addressed of the existence and nature of the charge preferred against him or her.

5. There can be no compromise with the need for strict compliance with article 11(2)(a). Its wording was clear, and without that protection the risk of misinformation and consequent confusion was such that a significant proportion of recipients was effectively denied a right of fundamental importance. Furthermore, absent that protection, the recipient of a summons issued under Cap 240 was also denied the early opportunity to recall and collect evidence, and may lead to resentment and cynical distrust of the system in a substantial number of cases.

6. When a summons is evidently addressed to a person of Chinese origin, if the summons does not inform in Chinese, it was a non-effective performance of the government's duty to inform the defendants pursuant to the *Bill of Rights*, article 11(2)(a). This article grants recipients of summonses the right to be informed of the charge against him "promptly and in detail in a language which he understands".

7. It was inappropriate for the court to grant an adjournment or amendment to overcome the potential failure of the system to fulfil its article 11(2)(a) requirements. Therefore, the summonses, which contain the only information in the court file, must be dismissed, along with the informations and the charges.

P Li, for the Crown; A Mak (instructed by the Duty Lawyer Scheme), for the defendants.

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[10] This decision is likely to be the subject of an appeal by way of case stated.

Editorial comment

Criticism that it is unfair -- particularly to unrepresented defendants -- that the material parts of summonses and charge sheets in criminal proceedings do not contain a Chinese charge sheet date back to the late 1970s. One justification proffered has been that, since the charge or complaint inevitably refers to a statute, it would be misleading to provide a Chinese translation when the relevant statute does not have an authentic Chinese text. This does not appear to be a compelling reason for failure to do so. Given the importance of these documents and the serious consequences that may flow from criminal proceedings initiated by these documents, even a less than perfect (or authentic) translation is essential. The decision in *Tse Kim-ho* may once reflect a renewed judicial concern about this issue and it is incumbent upon the government to tackle this problem promptly and effectively. Steps are being taken to remedy the lack of Chinese translations; it is to be hoped that the changes will be implemented with despatch.

The magistrate spends some time discussing whether article 11(2)(a), being part of an article which is expressed to apply "in the determination of any criminal charge", can have any application to pre-trial proceedings. He concludes, quite correctly, that article 11(2)(a) does have such an application (indeed, it must in order to give it a substantial field of operation). In our view, it would unduly formalistic to approach article 11(2) with the assumption that the guarantees have no application to pre-trial procedures unless it is clear that this is the only stage at which they can be applied or at which they can have a significant operation. Some of the article 11(2) guarantees (such as the right to an interpreter) have their primary operation at the trial itself, others at the pre-trial stage, while others may be capable of applying at various stages of proceedings (the right to legal assistance and the right not to incriminate oneself).

Accordingly, we would argue that article 11(2) applies to all stages after criminal proceedings have been instituted. The international and Hong Kong authorities establish that for the purposes of article 10 and 11(2)(c) a person is "charged" with a criminal offence once (s)he is given an official notification by the competent authority of an allegation that (s)he has committed a criminal offence: see *R v Lam Tak-ming* (1991) 1 HKPLR 222 at 232-233 (DCt) and *Bill of Rights Bulletin*, v 1, n 4, pp 42 and 59. Thus, all pre-trial proceedings would form part of the determination of a criminal charge and would be covered by article 11.

RIGHT TO ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF ONE'S DEFENCE (ARTICLE 11 (2)(B))

See *R v Deputy District Judge Lee, ex parte Chow Po-bor and another*, above at page 12.

RIGHT TO TRIAL WITHOUT UNDUE DELAY (BILL OF RIGHTS, ARTICLE 11(2)(C); ICCPR, ARTICLE 14(3)(C))

***R v Chiu Te-ken*; *R v David Chiu Tat-cheung* (1992) HCt, Criminal Case No 122 of 1992, Leonard J, 31 March 1993 (date of delivery of ruling); 20 April 1993 (date of handing down written ruling)**

The defendants were charged with 13 counts of conspiracy to commit offences against s 19(1) of the *Theft Ordinance*, seven of which were against the first defendant only and six against both defendants. The first defendant was charged with a further count of conspiracy to defraud the Commissioner of Banking. The periods covered by the indictment was between 1 December 1983 and 30 November 1985. The first and second

defendants were respectively charged on 31 October 1988 and 2 February 1989. After a series of hearings the trial was eventually set down for 19 April 1993, and was estimated to last for six months. The defendants applied for a permanent stay of proceedings on the ground that their trial would constitute an abuse of process by reason of delay at common law and a violation of their rights to a fair trial and rights to a trial without undue delay guaranteed to them under articles 10 and 11(2)(c) of the *Bill of Rights*.

Held (ordering a stay of proceedings against the first defendant only):

1 The court has power at common law to stay proceedings in order to prevent an abuse of its process. A stay of proceedings should be ordered only in exceptional circumstances.

2. It is for the applicants for a stay to show on the balance of probabilities that owing to the delay they will suffer serious prejudice such that no fair trial can be held.

Attorney General of Hong Kong v Charles Cheung Wai-bun [1993] 3 WLR 242, [1993] 2 All ER 510 (PC), discussed.

3. In considering whether to stay criminal proceedings either at common law or under the *Bill of Rights*, the court should take into account:

(a) the length of the delay;
(b) reasons given by the prosecution to explain or justify the delay;
(c) the conduct of the parties;
(d) proven or likely prejudice to the accused; and
(e) the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.

R v Charles Cheung Wai-bun (1992) HCt, Crim Case No 160, Duffy J, followed.

4. In the circumstances of this case the only appropriate remedy at common law and under the *Bill of Rights* is a stay of proceedings. No new remedies are provided by the *Bill of Rights*.

5. Article 10 is not merely declaratory of the common law right to a fair and public hearing. The *Bill of Rights* incorporated into domestic law the provisions of the International Covenant on Civil and Political Rights. In construing the provisions of the *Bill of Rights* the Hong Kong courts should follow the guidelines for interpretation set out in *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127: the courts are no longer guided by the ordinary canons of statutory construction nor by the dicta of the common law. However, any distinction there may be between rights at common law and those under the *Bill of Rights* made no difference to the result in the circumstances of this case.

6. The right to trial without undue delay under article 11(2)(c) is not an absolute right, but a violation of this right is an important factor to be considered in an application for a stay. The remedy for a violation of article 11(2)(c), where a fair trial is still possible, is likely to be an order designed to expedite the trial.

7. For the purposes of article 11(2)(c), a person is "charged" with an offence as of the time when (s)he is officially advised by a competent authority that he is suspected of having committed a criminal offence. Post-charge delay is to be viewed against the background of pre-charge delay.

R v Charles Cheung Wai-bun, followed.

8. The long delay from the time when the questioned loans came to the attention of the Commissioner of Banking to the date when the trial was scheduled to begin was unjustified. Part of the delay was caused by the fault of the Crown, and part of the delay was due to time spent awaiting court hearings. The courts are part of the criminal justice system and delay in any part of the system is relevant under article 11(2)(c). The defendants were not responsible for the delay, except for a period of about ten weeks, which was insignificant in the overall delay. The various challenges the defendants took prior to committal were bona fide and not to be held against them.

9. As a result of long and unnecessary delays in the investigation and in the preparation of the prosecution's case for the committal proceedings, the defendants were prejudiced in the preparation of their defence. There was a very strong inference of prejudice to the memories of witnesses from the long period which has elapsed, even though much of the case depends on documentary evidence. The prejudice to the first defendant was far greater as he had suffered a serious deterioration in his intellectual and memory functions, which had gravely affected his ability to make full answer and defence.

10. The public interest factor has diminished with the passage of time and the change of circumstances. On the one hand, the offences were very serious. On the other hand, no one suffered any financial loss. There was no collapse of the banking system, nor was there a political crisis. The alleged offences took place long time ago and Hong Kong has now a much better regulated financial system.

11. The procedure governing the determination of the issue of fitness to be tried under s 75 of the *Criminal Procedure Ordinance* has no application to pre-trial procedure. The proposition that, where a person is fit to plead, there can be no basis for a stay, is incorrect. The accused is entitled to adduce evidence to show that, during the period where undue delay is alleged, he has suffered intellectual deterioration which has had a prejudicial effect on his ability to make full answer and defence at his future trial.

12. Since s 75 of the *Criminal Procedure Ordinance* had no application to the present proceedings, it was not necessary to decide whether it has been repealed by the *Bill of Rights*, nor was it necessary to decide whether s 76 had been repealed. There were impressive arguments that mandatory commitment to a mental hospital under s 76 would be inconsistent with the *Bill of Rights*. Even so, this would not affect s 75, which seemed to be consistent with the *Bill of Rights*.

13. In all the circumstances, the first defendant would be deprived of his right to a fair trial at common law and under article 10 of the *Bill of Rights*. His trial would therefore be an abuse of process and accordingly, the proceedings against him were stayed. The second defendant has failed to show on the balance of probabilities that a fair trial for him was not possible.

J Pethes and Sou Chiam, for the Crown; A Scrivener QC and P J Dykes (instructed by Baker & McKenzie), for the first defendant; J Caplan QC and W Haldane (instructed by Haldane, Midgley & Booth), for the second defendant.

R v William Hung, Crim App No 177 of 1992

The defendant in this case was convicted by Duffy J of offences relating to dangerous drugs. At the trial he had argued as a preliminary point that his right to trial within a reasonable time or to release under article 5(3) of the *Bill of Rights* and his right to trial without undue delay under article 11(2)(c) had been infringed. Duffy J found that the

defendant's right under article 5(3) had been infringed, but his right under article 11(2)(c) had not been: [1992] 2 HKCLR 90 (noted *Bill of Rights Bulletin*, v 1, n 4, p 29).

The defendant has lodged an appeal against the decision of Duffy J on these issues; the appeal is listed for hearing on 21 October 1993.

RIGHT TO CALL AND EXAMINE WITNESSES (BILL OF RIGHTS, ARTICLE 11 (2)(E))

See *R v Cheung Tam-hung*, at page 13 above.

Power under immigration legislation to detain witnesses for purpose of giving evidence at a criminal trial -- Whether power extends to detention of defence witness -- Relevance of article 11(2)(e) of the *Bill of Rights*

***Re Pham Si Dung* (1993) HCt, MP No 2626 of 1993, 5 August 1993, Kaplan J; and MP No 3111 of 1993, 6 September 1993, Deputy Judge Yeung; 13 September 1993, Deputy Judge Yam**

Pham Si Dung ("the witness"), the respondent, was a Vietnamese asylum-seeker, who had been detained from July 1991 until February 1993 pending screening. In February 1993, he applied to return to Vietnam voluntarily, before his application for refugee status had been heard and determined. In February 1992, during the time when he was detained at Sek Kong camp, a fire and riot occurred, as a result of which a number of people were killed. In September 1992 the witness made a statement to the solicitors of one of the defendants to charges of murder and riot arising out of that incident. The statement was to the effect that the defendant concerned had been in the bed space he shared with the witness at the time of the commotion. As a result of this statement, the solicitors for the defendants served an alibi notice on the Crown in September 1992. The trial of the thirteen defendants commenced on 1 November 1992 and was anticipated to end sometime between Chinese New Year and Easter 1994.

On 25 February 1993 the Security for Security made an order under s 32(4)(a) of the *Immigration Ordinance* (Cap 115) ordering the detention of the witness for a period of no more than 28 days. On 25 June 1993 an Assistant Director of Immigration made an order for the removal of the witness under s 13E of the *Ordinance*, the order to be carried out once his evidence had been given. Gall J, the trial judge, made identical orders under s 32(4)(b) on 23 April, 13 May, 2 June, 23 June and 12 July 1993, ordering the detention of the witness in order to give evidence.

The Attorney General sought a further order of detention of the witness under s 32(4)(b). However, the witness argued that the Security for Security may only make an order under s 42(4)(a) if there is in effect a removal order made under s 13E. The making of an order under s 32(4)(a) is a prerequisite for the exercise by a judge of the power under s 32(4)(b). In his case the only order made under s 13E had been made on 25 June 1993, some four months after the Security for Security made an order under s 32(4)(a).

Section 32(4) of the *Immigration Ordinance* provides:

> "(4) Notwithstanding subsections (1), (1A), (2), (2A), (3) and (3A), a person who is to be removed from Hong Kong under section 18 of 13E or in respect of whom a removal order is in force may be detained--

(a) under the authority of the Secretary of Security for not more than 28 days; and

(b) by order of a court on the application of the Attorney General for further periods, not exceeding 21 days upon any one application,

for the purpose of giving evidence at the trial of any offence or of facilitating inquiries into any offence or suspect offence."

Held:

1. The making of a removal order under s 13E was a necessary prerequisite to the making of an order by the Secretary for Security under s 32(4)(a). In this case there was no s 13E order in force at the time when the Security for Security made his order under s 32(4)(a). A necessary condition precedent to the exercise of that power had not been satisfied and the Secretary's order was therefore not valid.

2. As there was no valid order of the Secretary for Security made under s 32(4)(a), the court had no jurisdiction to make any further orders for detention under s 32(4)(a).

Kaplan J, in rejecting the Crown's argument that a removal order under s 13E was not required for the making of an order under s 32(4)(a) and that it was sufficient if the person was in the category of persons against whom an order under s 13E could be made, commented:

> "To read these words in the literal sense for which Mr. Bailey contended would be to create a most uncertain position. It must not be forgotten that we are here dealing with the liberty of an individual. It is essential when dealing with such matters that the person affected should know precisely, under which section of the Ordinance, he is being detained or removed."

Although he considered that it was not appropriate for him to consider the merits of the application to detain the witness, the judge nevertheless went on to comment:

> "I have considerable sympathy with the position of this respondent. whether he should be detained in Hong Kong until he can give evidence is a matter which, as I have said, will have to be considered by another judge when the position has been regularized. However, I find it difficult to see why this respondent, who has for some months now been kept in Hong Kong against his will, should be further detained in a closed camp. I have no jurisdiction to grant him bail that can only be done by the Director or by a police officer under s 36 of the Immigration Ordinance. However, I would have thought that it is not beyond the wit of man to devise some arrangements which would enable this respondent to be granted some form of limited visa until such time as he concludes his evidence. No doubt, this will involve recognizances and possibly very stringent reporting requirements. Without giving any consideration to the legal arguments raised about the lawfulness of his present detention, the simple fact of the matter is that, in a civilized society, every effort should be made to ensure that innocent people are not detained in closed camps any longer that is humanly necessary. I hope that careful consideration will be given to the observations which I have made."

Before Deputy Judge Yeung, MP No 3111 of 1993, 6 September 1993

On 9 August 1993 the Secretary for Security made another order under s 32(4)(a) detaining the witness until 6 September 1993 and, following a request from the twelfth

defendant's solicitors, the Attorney General applied for an order under s 32(4)(b) for a further period of 21 days. The matter came before Deputy Judge Yeung. The Attorney General argued that the order should be granted in order to ensure the enjoyment by the twelfth defendant of his rights under articles 10 and 11 of the *Bill of Rights*. The witness argued that the power in s 32(4)(b) was a power that could be exercised only upon the application of the Attorney General and that the legislative debates showed that the intention of the legislature was that it was only prosecution witnesses who could be detained under the section.

Held:

1. The language of the s 32(4)(b) was ambiguous or obscure as to whether an application for the detention of a defence witness could be made under the section. It was accordingly permissible to refer to the debates in the Legislative Council in order to determine the legislature's intention.

   Pepper v Hart [1992] 3 WLR 1032, applied.

2. The Legislative Council proceedings showed that the intention of the legislature in enacting s 32(4)(b) was to enable the Attorney General to apply to the court for the further detention of a person subject to a removal order only where the person was a potential prosecution witness.

3. Insofar as the present application was for the purpose of detaining the respondent to give evidence for the defendant, it was misconceived.

   The judge commented in the course of his judgment:

   ". . . I must say that I have considerable sympathy for the position of the Attorney General. A witness for a Defendant in a murder trial is in the custody of the Crown . . . Unless [a] valid order for his detention is obtained that is no assurance that government policy [of returning the applicant to Vietnam] would not be adhered to and the Crown could be accused of being part of conscious effort to deprive . . . the Defendant [of] the chance to call a favourable and material witness. The Crown may have to resist an application to stay the proceedings.

   Indeed . . . I have the greatest doubt whether our present system of the administration of justice is adequate to deal with the situation as revealed in the present proceedings . . ."

Before Deputy Judge Yam, 13 September 1993

On 13 September 1993 Deputy Judge Yam issued a warrant pursuant to s 37 of the *Criminal Procedure Ordinance* (Cap 221) for the arrest of Pham Si Dung and two other witnesses, in order to ensure their availability as witnesses at the trial. The question whether they were to be released on bail or held in custody until the trial was to be considered later. The Director of Immigration indicated his preliminary view at the hearing that, if the judge ordered the witnesses to be kept in custody, he would consider this as overriding any removal order, but that if the witnesses were released on bail, he would consider it appropriate to carry out the removal of the witnesses.

RIGHT NOT TO TESTIFY AGAINST ONESELF OR TO CONFESS GUILT (BILL OF RIGHTS, ARTICLE 11 (2)(G); ICCPR, ARTICLE 14(3)(G))

See the note on *K v Austria*, page 55 below.

RIGHT TO REVIEW OF CONVICTION AND SENTENCE BY A HIGHER TRIBUNAL (BILL OF RIGHTS, ARTICLE 11(4); ICCPR, ARTICLE 14(5))

Unavailability of shorthand transcript of District Court criminal proceedings -- Deficiencies in original transcript supplied to Court of Appeal

***R v Chan Kwok-tung and Chan Sui-muk* (1993) CA, Crim App No 482 of 1991, 12 March 1993, Silke VP, Power and Macdougall JJA**

The two defendants had been jointly charged, together with persons unknown, with a number of offences of wounding with intent contrary to s 17 of the *Offences Against the Person Ordinance* (Cap 212). Both were convicted on all charges and sentenced to 5 years' imprisonment on each charge, the sentences to run concurrently.

The defendants sought leave to appeal against the convictions on a number of grounds: (a) that the conviction was against the evidence and the weight of the evidence; (b) that the trial judge had erred in law in relying on the evidence of identification given by two police witnesses to support the convictions; and (c) there had been a material irregularity in the course of the trial in that the judge had failed to keep a proper or adequate record of the evidence which thereby deprived the defendants of the right guaranteed to them by article 11(4) of the *Bill of Rights* to have their convictions properly reviewed by a higher court; and (d) the convictions were unsafe and unsatisfactory.

The transcript made available to the parties and the Court of Appeal was corrupt, not having been properly checked by the trial judge before it was transmitted to the Court of Appeal. The trial judge subsequently provided a list of corrections to the transcript in response to a request by the Court of Appeal.

The defendants argued that the effect of s 79 of the *District Court Ordinance* (Cap 336) was to require a complete shorthand record to be made of proceedings in the District Court. Section 79 provides that the practice and procedure applicable in the High Court should, "so far as the same may be applicable", be followed "as nearly as may be" in criminal proceedings in the District Court. Section 79 of the *Criminal Procedure Ordinance* (Cap 221), applicable to High Court criminal proceedings, provides that a "record (whether by means of shorthand notes, by mechanical means or otherwise) . . . or such other record as the trial judge may direct, shall be taken . . . at the trial of any person who, if convicted, is entitled or may be authorised to appeal to the Court of Appeal."

The defendants also argued that their rights under article 11(4) of the *Bill of Rights* had been violated for the following reasons:

> (1) since proceedings before the District Court are not taken down by a shorthand note taker, any transcript emanating from the District Court does not permit an appellate court to review properly a conviction, the right guaranteed by article 11(4); and

(2) in the present case, the deficiencies in the transcript provided to the Court of Appeal were such that it was not possible for the Court of Appeal properly to review the defendants' convictions.

Held (refusing the applications for leave to appeal):

1. Section 79 of the *District Court Ordinance*, when read in conjunction with s 79 of the *Criminal Procedure Ordinance*, did not require as a matter of law that a shorthand note taker record the evidence given in criminal trials before the District Court. It was a matter for the trial judge to direct what form a transcript should take, provided a full record of the evidence given is available.

2. Article 11(4) of the *Bill of Rights* is not infringed by the failure to take a shorthand record of criminal proceedings in the District Court, provided that the transcript supplied to the Court of Appeal is accurate, contains a full record of the evidence and permits the Court of Appeal properly to review proceedings in the lower court.

3. In the present case, the deficiencies in the transcript originally provided had been eliminated and any ambiguities resulting from minor deficiencies in the recording of the cross-examination had been explained away by the trial judge. There was no violation of article 11(4), nor had the applicants been disadvantaged in such a manner as to make the convictions unsafe or unsatisfactory.

4. It was clear that the trial judge was fully aware of both the importance of the identification evidence and its deficiencies and had not adopted a wrong approach to the assessment of that evidence.

Per curiam

"We fully sympathise with the contention that in this electronic and technological age the provision of some form of mechanical recording in the District Court is fully warranted. The District Courts deal with a large number of criminal trials. The workload of judges of that court is heavy. Trials are becoming more complicated. For the judges, as we apprehend most of them do, to take their own manuscript notes of the evidence is a burden which should not be placed upon them."

K Egan (instructed by Kenneth C C Man & Co), for the applicants; D G Saw, for the Crown/respondent.

***R v Chan Chi-hung* (1993) CA, Crim App No 4 of 1993, 1 September 1993, Macdougall VP, Litton and Bokhary JJA**

For a discussion of the substantive holdings relating to article 12(1) of the *Bill of Rights*, see page 49 below. A further issue raised before the Court of Appeal was the failure of the district judge to deliver his written reasons for sentence at the same time as (or shortly after the time when) the sentence was passed. While this point was not pursued, in his judgment Litton JA (Bokhary JA agreeing) commented (at pp 4-5):

"Before I turn to the argument based on article 12(1) of the Bill of Rights, it might be helpful if I made a few observations concerning the reasons for sentence. Ideally, District Judges should give the full reasons for verdict and sentence at the time when the verdict and sentence is pronounced. Justice is then openly and fully administered, and this has the practical advantage of finality: the judge would not then need to revisit the matter, perhaps months

later, when required to give full reasons for verdict and sentence for the purposes of an appeal. This may even result in the long run in a considerable saving of time.

However, District Judges operate under a grave handicap. They do not have the advantage of a tape-recording and transcription service. The members of this Court, after a matter has been dealt with in court, have the benefit of a transcript of the tape-recording within a day or two. Any inelegance of language or mistake made in the course of the oral pronouncement can be immediately corrected on paper. We are therefore able to 'place on record' the reasons for our decisions within a short space of time. This is denied to the District Judges who have to record everything by hand. Moreover, the District Judges are operating under tremendous pressure. To a judge hard pressed to dispose of one matter in order to deal with the next, a quick short-term solution may appear attractive. Having to write everything out by long hand, it may be thought far too time-consuming to put down in writing the full reasons for sentence, even though the thought process is complete. Thus, both the oral reasons, and the notes which go into the record, might well understandably be in 'shorthand'. The *ex post facto* 'Reasons for Sentence' produced for the purpose of an appeal then become, not an after-thought to justify the previous decision, but an expanded version of what the judge would have written down if time had permitted.

The fault, as I see it, lies mainly in the back-up service. It is wholly unacceptable, in a sophisticated legal system like ours that District Judges (and for that matter Magistrates) should be required to operate in this antiquated way. At whatever level of the Judiciary one views the matter, it is seldom possible to have oral reasons given immediately at the conclusion of proceedings which are word-perfect. They always need honing and fine-tuning. If a District Judge should, as His Honour Judge Lugar-Mawson did in this case, consider it proper, months after the hearing, to produce full 'Reasons for Sentence', he should not be criticised for that fact alone unless the circumstances surrounding the passing of sentence were explored. This case ended just before the Christmas vacation. Could the judge have, conveniently, adjourned the case for, say, a day in order to give full reasons? Operationally, this may not have been possible. This could well explain the course he took. These matters were not fully explored at the hearing because they were, in effect, abandoned by Mr. McCoy and I therefore say no more about this point."

Editorial comment

One can only endorse the comments of Litton JA and the court in *R v Chan Kwok-tung and Chan Sui-muk* so far as the facilities provided to the District Court and other courts in Hong Kong. These are not the first judicial pleas for an acceptable standard of support services and it appears that they will not be the last. It is inexcusable in a society such as Hong Kong that the government continues to fail to respond to pleas from the judiciary for basic support services which are taken for granted in other comparable jurisdictions. The failure is even more unsatisfactory in view of the fact that the provision of these facilities would in many respects permit the speedier despatch of business by the courts and thus alleviate the backlogs and delays in the hearing of cases, which have already given rise to a number of stays on this ground. One wonders whether the government will only be moved to act if the courts begin to allow appeals on a wholesale basis on grounds resulting from the lack of adequate support services.

To the extent that the provision of adequate facilities would permit judges to avoid the unsatisfactory situation referred to in *Chan Chi-hung*, namely that reasons for verdict

and sentence may often not be fully given until the time they are required for the purposes of an appeal, such measures would also benefit the defendant who, after all, should be entitled to a full explanation of the reasons for a verdict against him and the sentence in imposed on him. While it may be true to say, as Litton JA does, that the "*ex post facto* 'Reasons for Sentence' produced for the purpose of an appeal then become, not an after-thought to justify the previous decision, but an expanded version of what the judge would have written down if time had permitted", there is a danger that this may not always be the case. One might note in passing that in the present case the judge provided an "Addendum to Reasons for Sentence" (dated 15 March 1993) (summarised at page 50) and expanded upon his earlier reasons provided to the Court of Appeal, in order to respond to a decision of the Court of Appeal (*R v Lai Kai-ming*) delivered *after* sentence had been passed on the defendant. The written reasons initially provided to the Court of Appeal in this case made no mention of the *Bill of Rights*. Surprisingly, the Court of Appeal makes no reference in its judgment to five of its own previous decisions dealing with the dangers of and irregularities involved in a judge producing (additional) written reasons long after a verdict is given, although these decisions were cited to the court in this case.

RIGHT TO THE BENEFIT OF A LESSER PENALTY WHERE STATUTE AMENDED AFTER COMMISSION OF OFFENCE (BILL OF RIGHTS, ARTICLE 12(1); ICCPR, ARTICLE 15(1))[11]

Right to the benefit of lesser penalty -- Whether guarantee applicable where offence substantially amended between time of offence and sentencing -- *Bill of Rights*, art 12(1) -- Crimes Ordinance (Cap 200), LHK 1984 ed, s 76 -- Crimes Ordinance (Cap 200), s 100

There have been six recent decisions of the Court of Appeal dealing with the interpretation of article 12(1) of the *Bill of Rights*. All these cases deal with the effect of amendments enacted in the *Crimes (Amendment) Ordinance 1992* (No 49 of 1992). The first in the series, *R v Lai Kai-ming* (to be reported in (1993) 3 HKPLR) was noted in *Bill of Rights Bulletin*, v 2 n 2, p 36).

Article 12(1) of the *Bill of Rights* provides:

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

***R v Sze Yung-sang* (1993) CA, Crim App No 486 of 1992, 23 March 1993, Silke VP, Penlington and Nazareth JJA**

The defendant had been convicted on 5 November 1992 on two counts of possession of forged banknotes, contrary to s 76(1) of the *Crimes Ordinance* (Cap 200). Section 76 provided that it was an offence to be knowingly in possession of forged bank notes and carried a maximum penalty of 14 years' imprisonment. One count related to the possession of 368 US$100 notes, the other to the possession of 2 such notes. The offences had been committed on 18 July 1991.

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[11] See also note on *Welch v United Kingdom*, at page 25 below.

Section 76(1) provided:

> "(1) Any person who without lawful authority or excuse purchases or receives from any person, or has in his custody or possession, a forged bank note, knowing the same to be forged, shall be guilty of an offence and shall be liable on conviction to imprisonment for 14 years."

Between the time of the commission of the offences and the date of the trial, s 76 of the *Crimes Ordinance* was amended and substantially re-enacted as s 100 of the *Crimes Ordinance* by the *Crimes (Amendment) Ordinance* (No 49 of 1992), which commenced operation on 26 June 1992. Under the new provision two offences were created. Section 100(1) provides:

> "(1) A person who has in his custody or under his control anything which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin, intending either to pass or tender it as genuine or to deliver it to another with the intention that he or another shall pass or tender it as genuine, commits an offence and is liable on conviction to imprisonment for 14 years.
>
> (2) A person who has in his custody or control, without lawful authority or excuse, any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin, commits an offence and is liable on conviction on indictment to imprisonment for 3 years.
>
> (3) . . .".

The defendant appealed against the sentences imposed upon him. He argued that article 12(1) of the *Bill of Rights*, as interpreted by the Court of Appeal in *R v Lai Kai-ming*, meant that he had been entitled to be sentenced on the basis of a maximum term of imprisonment of 3 years under the new s 100(2) rather than on the basis of a maximum period of imprisonment of 14 years under the old s 76.

Held (allowing the appeal and imposing a reduced sentence):

1. The effect of article 12(1) of the *Bill of Rights* is that, where there has been an amendment to legislation that reduces the maximum sentence for an offence passed between the commission of the offence and the date of sentence, the offender enjoys the benefit of the amendment and is to be sentenced in light of the reduced penalty. This is so, even where the amendment redefines the offence, and is not confined to cases where the legislation simply reduces the maximum penalty.

   R v Lai Kai-ming, applied.

2. The defendant was therefore entitled to be sentenced on the basis of a maximum sentence of 3 years' imprisonment. Although the trial judge had sentenced the defendant to slightly more than one-third of the maximum, it was not appropriate simply to sentence the defendant to one-third of the lower maximum sentence, since that would result in a sentence which, for what is a serious crime, would be derisory. The approach to be adopted was to consider the maximum sentence and consider any mitigating factors.

   Attorney General v Lee Kwong-kut (1993) 3 HKPLR, [1993] 3 WLR 329

   E L McGuinniety (instructed by the Director of Legal Aid), for the applicant; A Papadopoulos, for the Crown.

***R v Chan Chuen-kam and others*, (1993) CA, Crim App No 186 of 1991, 16 June 1993, Kempster VP, Litton and Bokhary JJA**

Chu Kwok-wah, one of the applicants for leave to appeal, had been convicted on 17 April 1991 of five offences, all of which were committed between 28 July 1988 and 27 July 1989. The offences were offences against ss 70(1), 70(2) and 74(1) of the *Crimes Ordinance* (Cap 200), LHK 1984 ed. He was sentenced on 19 April 1991 to concurrent sentences of 8 years' imprisonment.

The sections under which Chu had been convicted were amended by the *Crimes (Amendment) Ordinance 1992* (No 49 of 1992), which commenced operation on 26 June 1992. Although the amending *Ordinance* reformulated the sections under which the defendant had been convicted, the offences remained substantially the same. However, the maximum period of imprisonment which could be imposed upon conviction was reduced from life to 14 years.

Chu sought leave to appeal against sentence to the Court of Appeal, invoking article 12(1) of the *Bill of Rights*. He claimed that he was entitled to the benefit of the lower maximum penalty provided for by the amended sections.

Held (rejecting Chu's application for leave to appeal):

1. The appropriate time for determining whether a defendant is to benefit from the guarantee in article 12(1) of the *Bill of Rights* is at the time of sentencing. It did not assist the applicant that article 12(1) had become part of the law of Hong Kong at the time of his appeal.

2. Since neither article 12(1) nor the amended provisions of the *Crimes Ordinance* had been part of the law of Hong Kong at the time when Chu was sentenced, he was not entitled to the benefit of the lesser penalties.

R v Lai Kai-ming; *R v Sze Yung-sang*; *Attorney General v Lee Kwong-kut* (PC), considered.

S Opi and S Bailey, for the Crown; Chan Chuen-kam, in person; Chang Hong-on, in person; K Egan (instructed by Sinclair Roche), for the third applicant; M Poll (instructed by Susan Liang & Co), for the fourth applicant.

Editorial comment

The non-applicability of article 12(1) to cases in which there is a change in penalty between the time a person is sentenced and the time any appeal is finally disposed of may be less clear-cut than the Court of Appeal suggests. While it seems that article 12(1) can have no application after the final disposition of an appeal, its applicability to the period during which an appeal is on foot is less clear. Opsahl and de Zayas write of the identical provision of the Covenant (article 15(1):

> "Its minimum scope must be that it applies to cases in progress, before the sentence is passed in the first instance. Whether it also applies when the law is changed before judgment is final and after an appeal has been made, seems to be an open question, but any difficulty here would still be manageable. After final judgment it could only be applied as granting a right to a review of the sentence."

> Torkel Opsahl and Alfred de Zayas, "The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights", (1983) *Canadian Human Rights Yearbook* 237, at 248.

In his commentary on the Covenant, Manfred Nowak notes that a proposed British amendment to the draft, which sought to prescribe the application of a lighter penalty only up to the time of conviction, was defeated: *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N P Engel, 1993), at 279. He writes (at 279-280):

> "With . . . prison sentences and fines [other than capital and corporal punishment and life imprisonment], on the other hand *final and conclusive conviction* must be viewed as the time at which the duty on States Parties to apply retroactively a lighter penalty comes to an end.
>
> . . . criminal courts of all levels must in every case apply retroactively a law providing a lighter penalty that was enacted after the commission of the underlying criminal offence. Once a conviction has become final and conclusive, this duty continues to apply only to irreversible penalties."

In *Fals Borda v Colombia*, Comm No 46/1979, *Selected Decisions of the Human Rights Committee* (New York: United Nations, 1985), vol 1, p 139, para 13.5, the Human Rights Committee seems to assume that article 15(1) has no application after appeals have been disposed of; but it is not clear from that decision whether the provision applies to cases where the law is changed when an appeal is still underway.

The Court of Appeal may therefore have been too quick to rule out the possibility that article 12(1) may apply at the appellate stage. However, even accepting the view that article 12(1) does apply when there are appellate proceedings still on foot, it would still seem that, if the time for appeal has expired, or, if there is no period within which an appeal must be brought and an appeal is sought to be brought following a change in penalty, that article 12(1) could not itself be the sole basis on which an appeal could be brought. The more difficult issue is whether, by seeking leave to appeal out of time on an arguable ground of appeal that is likely to lose, a defendant could enliven a "genuine" appeal so as to obtain the benefit of a change in penalty following conviction and sentence.

R v Mohammad Faisal (1993) CA, Crim App No 540 of 1992, 22 June 1993, Power VP, Mortimer and Kaplan JJ

The defendant had been charged with two counts of possession of forged bank notes, contrary to s 76(1) of the *Crimes Ordinance* (Cap 200). The offences were alleged to have been committed on 3 July 1991 and involved the possession of 5 US$100 notes and 100 additional notes of the same denomination. The defendant pleaded guilty and was sentenced by the judge on the basis of the maximum penalty of 14 years' imprisonment provided for by s 76(1). Section 76(1) provided:

> "(1) Any person who without lawful authority or excuse purchases or receives from any person, or has in his custody or possession, a forged bank note, knowing the same to be forged, shall be guilty of an offence and shall be liable on conviction to imprisonment for 14 years."

Between the time of the commission of the offences and the date of the trial, s 76 of the *Crimes Ordinance* was amended and substantially re-enacted as s 100 of the Crimes Ordinance by the *Crimes (Amendment) Ordinance* (No 49 of 1992), which commenced operation on 26 June 1992. Under the new provision two offences were created. Section 100(1) provides:

"(1) A person who has in his custody or under his control anything which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin, intending either to pass or tender it as genuine or to deliver it to another with the intention that he or another shall pass or tender it as genuine, commits an offence and is liable on conviction to imprisonment for 14 years.

(2) A person who has in his custody or control, without lawful authority or excuse, any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin, commits an offence and is liable on conviction on indictment to imprisonment for 3 years.

(3) . . .".

The defendant appealed against the sentences imposed upon him. He argued that article 12(1) of the *Bill of Rights*, as interpreted by the Court of Appeal in *R v Lai Kai-ming*, meant that he had been entitled to be sentenced on the basis of a maximum term of imprisonment of 3 years under the new section 100(2) rather than on the basis of a maximum period of imprisonment of 14 years under the old s 76.

The Crown argued that s 100 covered exactly the same offences which formerly fell under s 76, but divided them into two categories, one involving simple possession (s 100(2)) and one involving possession with intent to pass (s 100(1)). As the facts made it clear that the defendant had been charged under s 76(1) with an offence which involved intention, albeit as an aggravating factor, the corresponding offence was s 100(1), under which the same maximum sentence of 14 years' imprisonment applied.

Held:

1. The offence corresponding to the former s 76 was the new s 100(2), since neither s 76 nor s 100(2) provided for intention to pass forged notes as an element of the offence. Section 100(1) created a new offence, under which it was necessary to show intention. Section 76 had therefore been replaced by s 100(2) and the applicant was entitled to benefit from the lesser penalty of 3 years provided for under s 10(2).

Per curiam

"Before parting from this case we feel we must comment on the failure of both prosecution and defence to appreciate the maximum sentence for this offence. We find it hard to understand why the prosecution were unaware of the change. The changes in the legislation were prepared by the Drafting Division of the Attorney General's Chambers and we are surprised that these important changes were not specifically drawn to the attention of the Prosecutions Division. Clearly better liaison is called for to prevent this happening again. The failure to appreciate these changes was exacerbated by the fact that the trial judge actually referred both counsel to the changes in the substantive law at the commencement of the hearing. There has been a spate of appeals brought in similar circumstances to this appeal with the result that substantial public funds have been expended in putting these matters right."

E L McGuinniety (instructed by the Director of Legal Aid), for the applicant; M Holmes, for the Crown.

R v Wan Siu-kei (1993) CA, Crim App No 486 of 1992, 1 September 1993, MacDougall VP, Litton and Bokhary JJA

In this case and the following case (_R v Chan Chi-hung_, page 49 below) the Court of Appeal grappled once again with the application of article 12(1) of the *Bill of Rights* in cases where the offence with which the defendant had been charged had been reformulated between the time of commission of the offence at the time at which the defendant was sentenced. The cases concerned once again amendments effected by the *Crimes (Amendment) Ordinance 1992* and involved cases in which the repealed offence was replaced by two offences, one of which was more serious than another and which carried a heavier penalty. In *Wan Siu-kei* the Court sought to lay down clear guidelines in the light of the earlier cases; *Chan Chi-hung* involves an application of those principles.

In *Wan Siu-kei* the defendant had been convicted of one count of the offence of possession of forged banknotes, contrary to s 76(1) of the *Crimes Ordinance*. The offence was committed on 18 July 1991; the defendant was convicted on 5 November 1992 and sentenced on that day. As noted above, the section under which the defendant was charged had been repealed with effect from 26 June 1992 and replaced by the new s 100, which created a number of new offences. The old s 76 offence was split into two, one involving possession of forged notes with intention to pass them as genuine (or to deliver them to another person for that purpose), and one involving mere possession. Under the old s 76, the maximum terms of imprisonment was 14 years, while under the new provisions the maximum terms of imprisonment were 14 years and 3 years.

The defendant was sentenced to 5 years' imprisonment and appealed against sentence, on the ground that article 12(1) of the *Bill of Rights* applied and he was therefore entitled to be sentenced on the basis of the maximum of 3 years' imprisonment contained in the new s 100(2).

Held (dismissing the appeal by a majority):[12]

Per Bokhary JA (with whom Litton JA agreed)

1. The proposition that emerges from *Lai Kai-ming* is that article 12(1) goes to substance rather than form; when a person comes to be sentenced, and the substance and reality of the matter is that the maximum penalty for his criminal conduct has been reduced between commission of the offence and sentencing, then he is to be sentenced on the basis of the reduced maximum.

   In *Lai Kai-ming* the defendant, whose criminal conduct consisted of possession without specific intent, benefited from the change in the law which, whatever its form, had the effect of reducing the maximum penalty for such conduct from 14 to 3 years' imprisonment, so that he was entitled to be sentenced on the basis that the maximum penalty to which he was liable to only 3 years' imprisonment.

2. (Macdougall VP agreeing) Such an approach to the interpretation of article 12(1) conforms to the wording and spirit of the relevant article of the *Bill of Rights*; promotes substance rather than form; and ensures that sentencing proceeds upon

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[12] Macdougall VP, while agreeing with the substantive conclusions of the other members of the Court of Appeal (who were of the view the appeal should be dismissed), considered that the court was bound by its earlier decision in *R v Faisal* and that accordingly the appeal should be allowed on that basis.

current standards, providing everyone with the leniency which they deserve but none with any windfall which they do not deserve.

3. (Macdougall VP agreeing) As with other provisions of the *Bill of Rights*, article 12(1) should be broadly and generously construed. The approach advanced by the appellant on the basis of *Faisal*, that one should look only to the way in which the charge is formulated and not to the factual circumstances in order to determine whether a lighter penalty has been introduced for the "offence", was to interpret article 12(1) "restrictively", an approach which was at variance with the guidelines to interpretation of the *Bill of Rights* adopted in *R v Sin Yau-ming* and the approach adopted in *Lai Kai-ming*.

R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127; *R v Lai Kai-ming* (to be reported in (1993) 3 HKPLR), considered.

4. (Per Bokhary JA, Litton JA semble agreeing) If it were accurate to say that other decisions of the Court of Appeal had adopted a different view of the proper interpretation of article 12(1), it would be necessary to choose which precedent to follow. In that case, *R v Lai Kai-ming* should be followed, the competing interpretation being wrong in principle and unsupported by any binding authority.

5. In the present case there was ample evidence that the appellant had possessed the specific intent required under the new s 100(1) of the *Crimes Ordinance*, namely the intent himself of passing the notes as genuine or to have delivered them to another person for that other person to pass them as genuine. Accordingly, the corresponding offence was s 100(1), since had s 100 been in force at the time of the offence, he would have been charged under s 100(1). That provision carried the same maximum term of imprisonment as the section under which the appellant had been charged. Thus, it could not be said that provision had been made by law for the imposition of a lighter penalty and therefore article 12(1) was not applicable to the case.

R v Lai Kai-ming, followed; *R v Sze Yung-sang*, not followed; *R v Faisal*, not followed.

Per Macdougall VP (dissenting on the issue of whether the issue had been decided by the Court of Appeal in an earlier decision and whether the Court was therefore bound by that decision to allow the appeal):

6. The contention that the basis on which the appeal in *Lai Kai-ming* was allowed was that the defendant had been in possession of the false instruments without any intention to use them, and that therefore the circumstances of his case were covered by the new s 75(2) of the *Crimes Ordinance*, thereby attracting a maximum sentence of only 3 years' imprisonment, was unsustainable.

7. The division of the Court of Appeal which decided *R v Mohammad Faisal* had plainly rejected the argument that, if the facts reveal that a defendant convicted of an offence against the old section 76(1) had knowingly been in possession of forged banknotes with the intention either to pass or tender them as genuine or to deliver them to another with the intention that he or another shall pass or tender them as genuine, the maximum sentence applicable is that provided for by s 100(1), not s 100(2), namely, 14 years' imprisonment.

8. The decision in *Faisal* could not be distinguished from the present case and, even though the members of the court in the present case did not agree with the approach adopted in *Faisal*, they were bound to follow the earlier decision.

A Schapel, for the Crown; A Ma (instructed by K C Wong & Co), for the appellant.

***R v Chan Chi-hung* (1993) DCt, Case No 820 of 1992, 15 March 1993, Judge Lugar-Mawson; affirmed on appeal (1993) CA, Crim App No 4 of 1993, 1 September 1993, Macdougall VP, Litton and Bokhary JJA**

In this case the defendant was convicted on guilty plea of two charges relating to forged credit cards. The first charge was brought under s 76(2) of the *Crimes Ordinance*, the second under s 76A of the same *Ordinance*. The crimes were committed on 18 May 1992 and the defendant was convicted on 22 December 1992. Amendments to the *Crimes Ordinance* reformulating these offences came into operation on 26 June 1993.

The first charge (s 76(2))

The repealed s 76 provided:

"(1) Any person who without lawful authority or excuse purchases or receives from any person, or has in his custody or possession, a forged bank note, knowing the same to be forged, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 14 years.

(2) Any person who, without lawful authority or excuse and knowing the same to be forged, has in his custody or possession any forged seal or die the forgery of which with intent to defraud or deceive is made punishable by section 73 shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 7 years."

A credit card fell within the definition of "die" in the (repealed) s 68, the forgery of which was an offence under the (repealed) s 73(4)(b), which provided:

"(4) Forgery of the following seals of dies, if committed with intent to defraud or deceive, shall be an be an offence and punishable upon indictment with imprisonment for 7 years--

. . .

(b) any seal or die provided, made or used by any person, firm or company for the purpose of the affairs of such person, firm or company."

The replacement provision, the new s 75 of the *Crimes Ordinance* creates two offences of custody or control, the first a more serious one:

"(1) A person who has in his custody or under his control an instrument which is, and which he knows or believes to be, false, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice, commits an offence and is liable on conviction on indictment to imprisonment for 14 years.

(2) A person who, without lawful authority or excuse, has in his custody or under his control an instrument which is, and which he knows or believes to be, false, commits an offence and is liable on conviction on indictment to imprisonment for 3 years."

The second charge (s 76A(1))

The repealed s 76A(1) provided:

"(1) Any person who has in his custody or possession any document, equipment or article fit and intended for use in the forgery of any document or other thing commits an offence and is liable upon conviction on indictment to imprisonment for 14 years."

The new s 76 creates two offences:

"(1) A person who makes or has in his custody or under his control a machine or implement, or any paper or other material, which to his knowledge is or has been specially designed or adapted for the making of any instrument, with the intention that he or another shall make a false instrument and that he or another shall use that false instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice, commits an offence and is liable on conviction on indictment to imprisonment for 14 years.

(2) A person who, without lawful authority or excuse, makes or has in his custody or under his control a machine or implement, or any paper or other material, which to his knowledge is or has been specially designed or adapted for the making of any false instrument, commits an offence and is liable on conviction on indictment to imprisonment for 3 years."

Judge Lugar-Mawson considered whether the accused was to be sentenced under the heavier or lighter limb of the new section in each case:

OLD		NEW
s 76(2) 7 years		s 75(1) 14 years
		s 75(2) 3 years
s 76A(1)	14 years	s 76(1) 14 years
		s 76(2) 3 years

The defendant had argued that in each case he was entitled to be sentenced with regard to the maximum provided by the new ss 75(2) and 76(2), relying on article 12(1) of the *Bill of Rights*.

Held (by Judge Lugar-Mawson):

1. In a case where an offence has been repealed between the time of commission of the offence and sentencing and has replaced by a number of new offences so that article 12(1) of the *Bill of Rights* may apply, a court must determine which of the new offences corresponds to the repealed offence. In order to do so, the judge should examine the facts found by him after trial, or admitted by the accused after a plea of guilty. The judge should then determine which offence the defendant would be likely to have been charged with, had the relevant acts been committed after the amendments commenced operation. If the maximum penalty for the later corresponding offence was less than the maximum penalty for the offence of which the defendant had been convicted, then the defendant was entitled to benefit from the lesser penalty. In this case the trial judge should determine whether the mens

rea of the defendant would have been sufficient to justify a charge under the new ss 75(1) and 76(1) rather than the new ss 75(2) and 76(2).

2. Accordingly, so far as a charge under the old s 76(2) is concerned, if the facts showed that the accused had the intention that he or another would use the instrument to induce somebody to accept it as genuine and by reason of that acceptance to do, or not do, an act to his own or another's prejudice (the mens rea requirement in the new s 75(1)), then the judge is entitled to take the view that the offence is grave enough to justify sentencing the accused up to the old maximum punishment of 7 years' imprisonment provided for in the repealed s 76(2).

   However, if the facts show that he did not have that intent, or are ambiguous as to whether he had it and show no more than that he had the custody or control of the instrument without lawful authority or excuse, the judge should, following *Lai Kai-ming*, accept that article 12(1) of the *Bill of Rights* means that his maximum sentencing powers are those provided for in the new s 75(2), namely a maximum of 3 years' imprisonment.

3. So far as a charge under the old s 76A(1) is concerned, if the facts show that his custody or control was with the threefold mens rea requirement provided for in the new s 76(1), then the judge is entitled to take the view that the offence is grave enough to justify his sentencing the accused up to the old maximum of 7 years' imprisonment in the old s 76A(1). If the facts do not show that knowledge and intent, the judge, following *Lai Kai-ming*, should accept that his sentencing powers are those provided for in the new s 76(2) of 3 years' imprisonment.

4. In the present case the facts showed that the accused had not only had the intention expressed in the new s 75(1), but that he had actually used the credit card with that intention. It was therefore incumbent upon the trial judge when considering the appropriate sentence to do so on the basis of the maximum of 7 years' imprisonment provided for under the old s 76(2).

5. Similarly, as the admitted facts of the second offence established the mens rea requirement of the new s 76(1) offence, the maximum sentence available was that of 14 years' imprisonment provided for under the old s 76A(1).

Before the Court of Appeal (1 September 1993, Macdougall VP, Litton and Bokhary JJA)

The judgment of the Court of Appeal was delivered on the same day as the judgment in *R v Wan Siu-kei* (above). The court adopted the same approach as in *Wan Siu-kei*, as well as making comments on the fact that the district judge had written his reasons after the sentence had been imposed and on the lack of recording and transcription facilities available in the lower courts in Hong Kong (see page 40 above).

Held (Macdougall VP dissenting):

1. As had been discussed in *Wan Siu-kei*, there were two possible approaches to the interpretation of article 12(1), the "broad" approach approved in *Wan Siu-kei*, and the "restrictive" approach adopted in *Faisal*. The latter was inconsistent with the proper approach to the interpretation of the *Bill of Rights* approved in *Sin Yau-ming* and *Lai Kai-ming*.

2. While the Court of Appeal was bound to follow its own clear previous decisions, this rule did not prevent it from adopting the "broad" approach. The question of whether the court should have regard to the underlying facts in considering the

application of article 12(1) was not argued in *Sze Yung-sang* and, to the extent that *Faisal* was authority for adopting the "restrictive" approach, it was not consistent with previous decisions of the Court of Appeal and, accordingly, the court was not bound to follow it.

3. The facts of the case showed that not only did the appellant have the credit cards in his possession, but he had the intention of using them, that is to induce somebody to accept it as genuine, and by reason of so accepting it to do some act to that person's prejudice. That intent would be sufficient to bring his case within the new s 75(1) and would thus attract a maximum term of 14 years' imprisonment. There had therefore been no provision made by law for a lighter penalty. The judge was therefore correct in sentencing him on the basis of the maximum of 7 years' imprisonment under the old s 76(2).

4. The position was similar in relation to the charge under the old s 76A(1). The facts showed the existence of intent on the part of the defendant which would have satisfied the mens rea requirement provided for in the new s 76(1). Accordingly, no lighter penalty for the defendant's criminal conduct had been provided by law, and the judge had acted correctly in sentencing him on the basis of the maximum of 14 years' imprisonment provided for by the old s 76A(1).

Per Macdougall VP (dissenting on the issue of whether the issue had been decided by the Court of Appeal in an earlier decision and therefore bound by that decision to allow the appeal):

The decision in *Faisal* could not be distinguished from the present case and, even though the members of the court in the present case did not agree with the approach adopted in *Faisal*, they were bound to follow that decision.

A Schapel, for the Crown; G McCoy (instructed by Chan & Kong), for the appellant.

Editorial comment

What is striking about the six decisions of the Court of Appeal dealing with article 12(1) is the failure by the court in a single one of them to refer to any of the international materials on the identical provision in the *International Covenant on Civil and Political Rights*. While the drafting history of the provision and commentaries on it do not provide a determinate answer to the questions posed in this line of cases, it does provide the context and some insight into a number of relevant issues which were discussed. There have also been a number of decisions of the Human Rights Committee touching on article 15(1) which do not appear to have been cited to or by the Court of Appeal.

Another curious feature of *Wan Siu-kei* and *Chan Chi-hung* is the use of the terms "broad" and "restrictive" to describe the competing approaches to the interpretation of article 12(1). The notion underlying a broad and generous approach to interpretation of a human rights guarantee is surely to ensure that more individuals will benefit in more circumstances from that guarantee. To describe the general approach taken in *Lai Kai-ming* -- that is, article 12(1) is not restricted to cases in which the exact offence is retained and only the penalty is varied -- as "broad" is a reasonable description of that approach, since it expands the range of circumstances in which defendants will benefit from that guarantee. This is an approach consistent with the broad and generous approach appropriate to the interpretation of the *Bill of Rights*.

The difficulty, however, lies in characterising an approach which means that a defendant is less likely to benefit from a reduced penalty as "broad". Yet this is the effect of *Wan Siu-kei*, since by focusing on the facts of an individual case, it is less likely that the defendant will be considered eligible to benefit from the guarantee, as the outcome of *Wan Siu-kei* and *Chan Chi-hung* makes clear. It is therefore perhaps something of a misnomer to describe the approach which requires the particular conduct of the defendant to be examined as a "broad" approach.

Conversely, to describe the approach adopted by the Court of Appeal in *Faisal* as "restrictive" may also be somewhat misleading. It is "restrictive" in the sense that it "restricts" the matters to be considered to formal matters, but the effect of this "restrictive" approach is to extend the benefits of a reduced penalty to more defendants. If this terminology is adopted, we have the curious result that a "broad" approach (which is sought to be legitimated by reference to *Sin Yau-ming*) means fewer defendants enjoy the benefits of the guarantee than under the "restrictive" approach. Whatever the merits of the two competing lines of authority in the Court of Appeal, it would perhaps be preferable to avoid the characterisation of the two competing approaches as "broad" and "restrictive" in a manner which turns those notions on their head.

RIGHT NOT TO BE TRIED AGAIN FOR AN OFFENCE FOR WHICH ONE HAS BEEN FINALLY ACQUITTED (BILL OF RIGHTS, ARTICLE 11(6); ICCPR, ARTICLE 14(7))

***R v Lau Shuk-man and another* (1993) Mag, KT No 501755 of 1992, 23 March 1993, Mr W C Li**[13]

The defendants had been charged with burglary and were acquitted by the magistrate. The Crown sought a review of the acquittal pursuant to s 104 of the *Magistrates Ordinance* (Cap 227). The defendants argued that to use the review procedure to challenge the jury function performed by the magistrate rather than to correct a clear error was an improper use of the procedure and was also inconsistent with article 11(6) of the *Bill of Rights*. 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 each country."

Held:

> It would be inconsistent with article 11(6) of the *Bill of Rights* to seek a review of the acquittal in this case.
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> The magistrate commented:
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> "I also agree with Mr Tolliday-Wright that it is against the Bill of Rights to ask for review in this case. I would not go so far as to say Article 11(6) had repealed Section 104, but if the review was not taken out in the best of faith, and resulted in causing great anxiety on the defendants, if not usurping their rights, autrefois acquit, it must be an infringement of the Bill of Rights, and both defendant should have redress against that. Unfortunately, I do not have the jurisdiction to order/make redress or award costs, however this

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[13] We are grateful to David Tolliday-Wright for providing us with information about this case.

must not be taken by the Prosecution to warrant the use of Review as a machinery to express their displeasure of an acquittal. It is indeed setting a dangerous precedent."

RIGHT TO PRIVACY (BILL OF RIGHTS, ARTICLE 14; ICCPR, ARTICLE 17, ICCPR)

***R v Lo Hon-hin* (1993) HCt, Mag App No 857 of 1992, 27 May 1993, Barnett J**

The defendant was charged with the offence of wilful obstruction of a police officer in the due execution of his duty, contrary to s 36(b) of the *Offences Against the Person Ordinance* (Cap 212). The acts which the defendant was alleged to have committed, included the failure to produce his identity card when requested to do so by a police officer pursuant to the officer's power under s 17C of the *Immigration Ordinance* (Cap 115). He was convicted by the magistrate and appealed.

On appeal the defendant argued, inter alia, that the power conferred by s 17C of the *Immigration Ordinance* could not be used by the police for purposes unconnected with investigations into immigration offences, and also that s 17C was inconsistent with articles 8 and 14 of the *Bill of Rights*.

Barnett J held that it was not necessary to consider the former issue, and rejected the arguments based on the *Bill of Rights* in the following passage (p 19 of the judgment):

> "He [counsel for the appellant] also suggested, somewhat faintly, that Section 17C might be inconsistent with the Bill of Rights Ordinance and therefore repealed by Section 3 thereof. For the latter submission, Mr. Bernacchi relied upon Article 8 which relates to liberty of movement; and Article 14 which relates to protection of privacy, family, home, correspondence, honour and reputation. For my part, I am at a loss to understand how Section 17C impinges upon those particular rights and I have no hesitation in rejecting that argument."

The judge went on to hold that, whatever the position was under the *Immigration Ordinance* or the *Police Force Ordinance*, there was ample power conferred on police officers by the *Dutiable Commodities Ordinance* and regulations made under it to demand the production of ID cards as part of verifying that a private club was being run in accordance with its licence.

Editorial comment

Although the *Bill of Rights* issue was a fairly minor one in this case and does not appear to have received extensive examination, in our view the provisions of s 17C do give rise to *Bill of Rights* issues. We would argue that the conferral of a power to stop and demand proof of identity from individuals, without any requirement of suspicion (reasonable or otherwise), is a restriction of a person's liberty of movement. The issue is rather whether, in the circumstances of Hong Kong, such a power constitutes a reasonable restriction on that right.

We note that the Law Reform Commission of Hong Kong, in a report which otherwise gives relatively little attention to the *Bill of Rights* implications of police powers in Hong Kong (*Report on Arrest* [Topic 25], released last year), noted that the power to check ID cards conferred by s 17 of the *Immigration Ordinance* could possibly give rise to arguments that article 14 (and article 5(1)) of the *Bill of Rights* were violated, since there

was no requirement of reasonable suspicion. However, the Commission concluded that the present power to conduct ID checks justifiable in view of the continuing problem of illegal immigration to Hong Kong. (pp 14-15, paras 3.1-3.4)

The Commission also drew attention to the fact that it is the frequent practice of police officers to carry out EPONICS searches when ID checks are made. These checks provide information about prior criminal convictions, the existence of outstanding arrest warrants, whether the person has been reported missing and whether the person is thought to be violent. This practice, apparently not provided for "by law" within the meaning of the *Bill of Rights*, also probably constitutes an infringement of the person's right to privacy. For such an infringement to be permissible under article 14 of the *Bill of Rights*, it must be shown to be both lawful and non-arbitrary. The Commission recommended in its report that, when a police officer is carrying out an ID check -- the purpose of which is to ascertain that proper proof of identity is being carried -- it should not be the practice that details of a person's prior criminal record be made available to the officer, since that record has no relevance to the question of whether proper identification is being carried. (p 21, para 3.28-3.29)

FREEDOM OF EXPRESSION (BILL OF RIGHTS, ARTICLE 16; ICCPR, ARTICLE 19)

The negative aspect of the right to freedom of expression

In *R v Allen, ex parte Tse Chu-fai* (noted *Bill of Rights Bulletin*, v 2 n 1, p 27) and *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) 3 HKPLR 1 (noted *Bill of Rights Bulletin*, v 2, n 2, p 37) Jones J considered the argument that article 16 of the *Bill of Rights* also had a negative aspect, namely to right not to impart information, and that any restrictions on that right by which a person was forced to provide information had to be provided by law and necessary for the achievement of one of the purposes specified in article 16(3). Jones J rejected the argument, holding that article 16 was concerned with freedom of opinion and expression and did not embody an implied right not to impart information.

In this context it is of interest to note the approach adopted by the European Commission of Human Rights in *K v Austria*, Application No 16002/90, Report of 13 October 1992. In that the case the applicant, who had been charged with having purchased heroin from two other people (who were also charged). The applicant was called as a witness at the trial of the two alleged sellers, at a time when his own trial was still pending. He refused to give evidence on the ground that this violated his right not to give evidence against himself or to confess guilt. The court ordered him to do so and , when he persisted in his refusal, he was fined and detained in custody.

Before the European Commission the applicant argued, inter alia, that the compulsion to testify violated his right to freedom of expression under article 10 of the *European Convention*, since that right also includes the negative freedom to withhold information. The Commission (at para 45) agreed with the applicant that the right to freedom of expression by implication also guarantees a negative right not to be compelled to express oneself. It also noted that this negative right may be subject to interference in accordance with the provisions of article 10(2). The Commission held that in this case the compulsion had not been justified in view of the risk to the applicant of incriminating himself, but it forbore from expressing a view on "whether in all arguable cases the risk of self-incrimination precludes the duty to testify". (para 52)

The line of analysis adopted by the Commission may provide a means of circumventing a narrow interpretation of the guarantee in article 11(2)(g), under which the

right is only engaged once a person is charged and in respect of inquiries or testimony in relation to those charges. Cp *Duty Free Shoppers Hong Kong Ltd v Wong Kwok-pong* (1991) 1 HKPLR 150.

***Ballantyne, Davidson, McIntyre v Canada*, Human Rights Committee, Communication Nos 359/98 and 385/89, views adopted on 31 March 1993, (1993) 14 HRLJ 171**

This case involved the compatibility with the guarantee of freedom of expression with articles 19, 26 and 27 of the ICCPR of Quebec legislation which required the use of French only in public bill-posting and commercial advertising outdoors, as well as inside means of public transport and establishments such as shopping centres. The legislation had been declared by the Supreme Court of Canada to be inconsistent with the guarantee of freedom of expression in the Canadian Charter, but the Quebec legislature had utilised the "override" provision contained s 33 of the Charter to exclude the operation of the Charter in relation to a re-enacted form of the restrictions.

In relation to article 19 of the Covenant the Committee (by a majority) addressed the issue of whether commercial speech was covered by article 19 and, if so, whether the restrictions were necessary for the preservation of French culture. It stated (paras 11.3-11.4):

> "article 19, paragraph 2 [*Bill of Rights*, article 16(2)] must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.
>
> 11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) of article 19, and must be necessary to achieve the legitimate purpose. While restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect for the rights of others. The rights of others could only be the rights of the francophone community within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. . . . The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2."

The Committee also concluded that, although the anglophone community was a minority within Quebec, it could not be described as a "minority" withhin the meaning article 27 of the ICCPR, since it was in the majority in Canada as a whole and it was a group's position in the State overall that was relevant to determining its status as a minority. The Committee also concluded the legislation did not violate the guarantee of equality before the law in article 26 of the ICCPR, since both anglophones and francophones seeking to reach English-speaking customers were treated equally.

RIGHT OF PEACEFUL ASSEMBLY (BILL OF RIGHTS, ARTICLE 17; ICCPR, ARTICLE 21)

Unlawful assembly -- Police powers to prevent breach of the peace -- Police power to cordon off areas -- Freedom of assembly

***R v Chan Sau-sum and others* (1993) Mag, ESS No 502544-8/92, 16 June 1993, Mr Wright; decision on review sought by the third and fourth defendants, 7 September 1993**

This case involved a challenge to various provisions of the *Public Order Ordinance* (Cap 245), on the grounds that some of its provisions were inconsistent with the guarantees of freedom of assembly and freedom of speech contained in articles 17 and 16 of the *Bill of Rights*.

The case arose in the early morning of 5 June 1992, when a substantial number of people (including the defendants) gathered in a park and then proceeded towards the premises of the New China News Agency ("the NCNA"), where they encountered a body of police officers. Prior to their arrival the police had already cordoned off the area outside the NCNA building. Some of the members of the group informed the police officers that the group wanted to approach the front of the NCNA to stage a protest. The police told the group that they could approach the NCNA in small numbers, a condition to which a small number agreed -- this group was allowed to approach the NCNA. The majority of the group did not accept the condition, and debated among themselves alternatives, one of which was to force their way through the police line to reach the NCNA. About two hours later, a large group attempted to push aside the police; there was a melee which lasted for few minutes during which time several persons succeeded in entering the controlled area where they were apprehended. The situation became calm, and those apprehended were allowed to rejoin the crowd. The crowd then dispersed.

The four defendants were charged with violating s 18 of the *Public Order Ordinance* (Cap 245), which provides:

> "(1) When three or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly.
>
> (2) It is immaterial that the original assembly was lawful if being assembled, they conducted themselves in such a manner as aforesaid.
>
> (3) Any person who takes part in such an assembly which is an unlawful assembly by virtue of subsection (1) shall be guilty of the offence of unlawful assembly and shall be liable --

(a) . . . .

(b) on summary conviction, to a fine of $5,000 and to imprisonment for 3 years"

The second, third and fourth defendants denied the charges on varying grounds, which can be summarised as follows: s 18 of the *Public Order Ordinance* had been repealed by the *Bill of Rights*; even if s 18 had not been repealed, it should be considered in light of article 17 of the *Bill of Rights*, which provides for the right of peaceful assembly; the actions of the police in cordoning off the area was unlawful and thus the defendants were entitled to use reasonable force to enter the area; there was no evidence to show that the defendants' conduct was such as to cause any person reasonably to fear that the persons so assembled would commit a breach of the peace or provoke others to do so; the summonses were duplicitous and should be quashed; and there was no evidence to justify a conviction (especially regarding the second defendant).

Article 17 of the *Bill of Rights* provides:

"Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of rights and freedoms of others."

Held (acquitting the second defendant and convicting the third and fourth defendants):[14]

1. There was no inconsistency between article 17 of the *Bill of Rights* and s 18 of the *Public Order Ordinance*. There was no distinction to be drawn in this context between the term "peaceful assembly" in article 17 and "lawful assembly" in s 18. Section 18 made no inroads on the right guaranteed by article 17, but merely provided what may happen if those exercising the right to peaceful assembly do so in such a manner that it is no longer peaceful.

2. Where a police officer acts unlawfully, a person is entitled to resist such an act. The extent of such resistance depends upon the facts of the case. In this case, the actions of the police in cordoning off the area were not unlawful and thus the defendants were not entitled to use reasonable force to gain entry to the area.

3. The Royal Hong Kong Police Force has a general duty pursuant to s 10 of the *Police Force Ordinance* to take lawful measures for, inter alia, preserving the public peace, preventing injury to life and property, regulating processions and assemblies in public places or places of public resort, and preserving order in public places. Furthermore, s 17(4) of the *Public Order Ordinance* gives police the power to bar access to a public place if they believe a public meeting or procession is likely to occur in that place and the participants do not make the proper application or obtain a licence pursuant too ss 7 and 13 of the *Ordinance*. The group in this case had not applied for or been granted a licence. Under the circumstances, it was entirely lawful for the police to establish the cordon in this case.

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[14] The first defendant had also been charged with the additional offence of attempted theft of a police car. Shortly after the trial began, he agreed to be bound over and the Crown offered no evidence against him. The trial then proceeded against the remaining three defendants.

4. The test for determining whether there is a reasonable fear of a breach of the peace is an objective one. The evidence in this case shows that "persons, in the broad sense", at the scene did "conduct themselves in a disorderly, intimidating, insulting or provocative manner . . . likely to cause any person reasonably to fear" a breach of the peace. This arises from the conduct of those persons both preparatory to the rush on the police cordon and during the attempt itself to break through the cordon. The former conduct was clearly provocative, whilst the latter was certainly disorderly.

5. It is only persons whose conduct constitutes active participation in an unlawful assembly who violate s 18 of the *Public Order Ordinance*. That participation need not be physical involvement, but can be encouragement or the like. It is not sufficient for a conviction to show merely that a defendant was present at the scene of an unlawful assembly. There was sufficient evidence to show beyond a reasonable doubt the guilt of the third and fourth defendants, and they were convicted. There was insufficient evidence against the second defendant and the summons against her was dismissed.

R v Choi Yiu-cheong and To Kwan-hang

The third and fourth defendants applied for a review of conviction on 22 June 1993, the hearing of which was adjourned to 6 and 7 September 1993. The review proceeded on the basis that s 18 of the *Public Order Ordinance* did not contravene the *Bill of Rights*, and concerned, inter alia, the issue whether the police had, in the circumstances of the case, exercised their powers in such a manner to be inconsistent with the provisions of the *Public Order Ordinance* or the *Bill of Rights*. Fresh evidence relating to the demonstrations outside the NCNA on 3 June 1993 and in August 1993 were adduced in the review. The defendants further argued that the police had no legal power to cordon off the area outside the NCNA building; s 10 of the *Police Force Ordinance* did not provide such powers, and s 17(4) of the *Public Order Ordinance* was, insofar as it was dependent on ss 7 and 13 of the *Public Order Ordinance*, inconsistent with article 17 of the *Bill of Rights*.

The defendants also argued that the cordoning off of the area outside the NCNA was contrary to articles 16 and 17 of the *Bill of Rights*. The Crown took issue on the constitutionality of s 17(4), and further argued that there was common law power for the police to take preventive measures to prevent an imminent breach of the peace. The Crown denied that the police action in cordoning off the area outside the NCNA was unlawful and contrary to the *Bill of Rights*, and even so, this would not justify the defendants in engaging in provocative and disorderly conduct under s 18 of the *Public Order Ordinance*.

Held:

1. Section 10 of the *Police Force Ordinance* concerned the duties of the police and did not confer any power on the police officers. Their powers had to be derived from other statutory provisions or common law.

2. For the purposes of s 18 of the *Public Order Ordinance*, the proper test was whether the defendants' conduct was likely, and not liable, to cause a breach of the peace.

3. The fresh evidence adduced was of marginal relevance and could be factually distinguished.

4. Having considered all the cases and arguments there was no reason to alter the earlier decision. Therefore the convictions of the third and fourth defendants confirmed.

Obiter

"This case highlights a lacuna in the Magistrate Ordinance, which does not provide me with power to order costs. Had I had the power, I would have exercised it in this case."

S Bailey and A Luk, for the Crown; M Lee QC and J Chan (instructed by C Y Kwan), for the second, third and fourth defendants at the trial, and for the third and fourth defendants on the application for review.

RIGHT TO FREEDOM OF ASSOCIATION (ARTICLE 18, BOR; ARTICLE 22, ICCPR)

See Appendix B for the text of the report of the ILO Committee on Freedom of Association in relation to a recent complaint against China.

RIGHT TO PROTECTION OF ONE'S FAMILY (BILL OF RIGHTS, ARTICLE 19; ICCPR, ARTICLE 23)

R v Director of Immigration, ex parte Cheung Kuk-ching **(1993) HCt, MP No 1697 of 1993, 21 June 1993, Liu J**

This was an application for judicial review against a refusal by the Director of Immigration to exercise his discretion under s 13 of the *Immigration Ordinance* (Cap 115) to permit her to remain in Hong Kong. In response to various arguments made on behalf of the applicant, Liu J stated:

"The applicant seeks to call in aid Articles 19 and 20 of the Hong Kong Bill of Rights as well as Article 10 of the International Convention [sic] on Economic Social and Cultural Rights 1966 and other international human rights commitments with which Hong Kong is or may be a party or involved in other capacity. These international conventions or commitments focus on, inter alia, the respected attributes of family members including the children, all being also Hong Kong residents in this case. It is quite unnecessary in this application to discuss the subtlety of s.11 of the Hong Kong Bill of Rights Ordinance. These international covenants and/or commitments can be said to have done no more than recognising the plight and hardship of or in an issue of this nature. None of them is expected to, or would, vary the threshold of hardship or shift the goal-post in a mundane issue so commonly faced by the Deputy Director of Immigration. There is not even evidence that the impact of any of these international covenants and commitments had in fact been neglected by the Deputy Director of Immigration."

RIGHT TO EQUALITY AND NON-DISCRIMINATION (BILL OF RIGHTS, ARTICLE 22; ICCPR, ARTICLE 26, ICCPR)

See *Re Ming Yuen Villa* (1993) Mag, TMC 503453 of 1992 and TMC 3650 of 1992, 12 July 1993, Miss B Kwan, noted under article 10 (page 11 above).

OTHER CASES RAISING ISSUES OF INTERNATIONAL HUMAN RIGHTS

STATELESSNESS

R v Director of Immigration, ex parte Pan Ze-yan (1993) CA, Civ Apps Nos 163, 164 and 173 of 1992

On 11 September 1992 Mayo J dismissed an application for judicial review by a number of persons originally of Chinese nationality who had subsequently obtained Lesotho passports which had been revoked. The applications were brought with the purpose of preventing the removal of the applicants from Hong Kong on the ground that they did not possess a valid travel documents. Mayo J dismissed the applications for reasons noted at *Bill of Rights Bulletin*, v 2, n 1, p 36.

On 14 May 1993 the Court of Appeal dismissed an appeal against the judgment of Mayo J, essentially on the basis that the application was misconceived. There was no removal order; the only decision amenable to judicial review was the decision to refuse to grant the applicants a change of status and it could not be said that the Director's implementation of the policy of requiring persons without valid travel documents to leave Hong Kong upon the expiry of their permission to stay was unlawful, made without jurisdiction or was *Wednesbury* unreasonable.

Much of the judgment is concerned with the deficiencies of the manner in which the cases were pleaded and conducted before Mayo J. However, Litton JA commented in relation to the appellants' argument (and the implication of Mayo J's findings) that, had the applicants in fact established that they were stateless, the Director may well have acted unlawfully in ordering removal, that "it is axiomatic that the municipal courts of the territory do not exist for the enforcement of international obligations incurred by the United Kingdom government on behalf of Hong Kong." He also commented that the issue of statelessness, as defined by the Convention on the Status of Stateless Persons, was "not justiciable in the local courts, and there is no legal framework within Order 53 for the determination of such an issue". Litton JA also rejected an argument based on article 9 of the *Bill of Rights*, noting that, given the facts of the cases, "it would be difficult to see how any such argument could possibly have succeeded".

Bokhary JA commented: "For my own part, I say nothing on the full range of the implications of international obligations on administrative decision-making. Whatever such range, it cannot avail these applicants on these appeals."

After the dismissal of their appeal, the appellants lodged a fresh application for judicial review, challenging the removal orders made against them. Leave was granted and the application has been set down for hearing from 12-15 October before Mayo J.

J Fenton (instructed by George Y C Mok & Co); G McCoy and S Choy (instructed by Charles Yeung, Clement Lam & Co), for the various appellants; V Hartstein, for the respondent.

Editorial comment

It is a matter of some concern from an international perspective that, as a general matter, the courts of Hong Kong are so reluctant to take a more generous approach to the relevance of international obligations to the exercise of administrative discretions which are sweeping and which impinge directly on the subject-matter of obligations assumed by the

United Kingdom in respect of Hong Kong. While the orthodox position is that treaty obligations are not (directly) justiciable, this does not mean that they cannot and should not be required to be taken into account in the exercise of broad statutory discretions and that, in some circumstances at least, failure to give effect to a treaty obligation might amount to *Wednesbury* unreasonableness. The apparently sweeping rejection by Litton JA of the relevance of the Convention on the Status of Stateless Persons to the case before the court is unfortunate, especially as it does not appear that there was full argument on this issue; Bokhary JA, on the other hand, expressly left open the questions whether unincorporated international obligations may be relevant to administrative decision-making in some circumstances, but held that they were not in the present case. However, one would have thought that this is one of the clearest areas in which the subject-matter of the treaty obligation and the discretion under national law overlap substantially and that it is an entirely appropriate case to insist that the treaty obligations be given due weight, if not adhered to. Unfortunately, in the course of the case it was never established that the applicants had in fact been rendered stateless, so that the issue was not squarely addressed. The fresh judicial review is likely to address the issue of the relevance of international treaties to administrative discretions. There is nevertheless little to indicate that the Court of Appeal would have been particularly receptive to the argument.

While there are important considerations relating to separation of powers underlying the orthodox view relating to the non-justiciability of treaty obligations in domestic courts, it may be noted that courts in other common law jurisdictions have gone much further towards trying to harmonise international obligations and domestic law than the Hong Kong courts seem prepared even to contemplate. In view of the fact that so much of Hong Kong's future stability depends on the legitimacy and observance of various international treaties, it is unfortunate that the Hong Kong judiciary does not seem prepared to do more to ensure that international obligations are observed in the domestic arena, in cases where both the legislature and the executive have failed to do so.

R Beddard, *Human Rights and Europe* (Cambridge: Grotius Publications, 3rd ed 1993)

R Cullen, "Australian Offshore Native Title: Aspiration or Actuality?", Faculty of Law, University of Hong Kong, Law Working Paper Series, Paper No 10, July 1993

F Ermacora, M Nowak & H Tretter (eds), *International Human Rights: Documents and Introductory Notes* (Vienna: Law Books in Europe, 1993) (contains the basic international and regional texts, as well as CSCE documents and documents of the European Communities)

Y Ghai, "Some Thoughts on the Cambodian Constitution", Faculty of Law, University of Hong Kong, Law Working Paper Series, Paper No 9, July 1993

Human Rights Watch, *Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty* (September 1992)

J Laws (Sir), "Is the High Court the Guardian of Fundamental Constitutional Rights?", [1993] *Public Law* 59-79

Organisation of American States, *Basic Documents Pertaining to Human Rights in the Inter-American System* (Washington: OAS, 1992)

Organisation of American States, *Report of the Inter-American Commission of Human Rights 1992* (Washington: OAS, 1993)

W A Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Grotius Publications, 1993)

A Shaw and A Butler, "Arbitrary arrest and detention under the New Zealand Bill of Rights: The New Zealand Courts stumble in applying the International Covenant", [1993] *New Zealand Law Journal* 139-143

D P Stewart, "US Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations", (1993) 14 *Human Rights Law Journal* 77-83

K Tomasevski, *Women and Human Rights* (London & New Jersey: Zed Books, 1993)

UNICEF, *The State of the World's Children 1993* (New York: UNICEF/OUP, 1993)

APPENDIX A

HUMAN RIGHTS COMMITTEE DECISIONS UNDER THE OPTIONAL PROTOCOL

The following consists of edited extracts from United Nations Press Release HR/3436 (9 July 1993):

"HUMAN RIGHTS COMMITTEE CONCLUDES CONSIDERATION ON 15 CASES ALLEGING VIOLATION OF HUMAN RIGHTS

The Human Rights Committee has recently concluded examination of communications from 17 individuals alleging that their basic human rights had been violated and that they had exhausted all domestic remedies. The complaints included violation of the right to life, denial of the right to a fair trial, being subjected to cruel, inhuman or degrading treatment, denial of effective remedy to citizens whose rights were being violated by legislation, the right to liberty and security of the person, the right to equal protection of the law, arbitrary or unlawful interference with privacy and family life, the right to liberty of movement, freedom of thought and expression, as well as to take part in political life.

The communications involved citizens or residents of Jamaica, Canada, the Netherlands, Australia, Trinidad and Tobago, and Hungary. The Committee adopted views on ten of these cases and declared the other five inadmissible. It examined these confidential communications in closed meeting at its forty-seventh session, held at New York from 22 March to 8 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.

Views Adopted on Ten Cases

The Committee adopted views on seven cases involving Jamaican citizens sentenced to death or to life imprisonment who claimed that they had been denied the right to a fair trial. The authors alleged various irregularities such as inadequate or no legal representation; that the judge abused his discretion in ruling a statement inadmissible or misdirected the jury; violation of due process of the law; failure to exclude questionable evidence; that court officials were biased against the defendant; failure of the court to produce a written judgment, although required by law to do so; inadequate time to prepare a defence; and denial of the right to trial "without undue delay".

The other three cases concerned citizens of Canada, who complained their right to freedom of expression had been violated, and of Trinidad and Tobago, who alleged that he had been denied the right to a fair trial and had been mistreated by the police and also in prison.

In *John Campbell v. Jamaica* (Communication No. 3907/1988), the author claimed that he was denied a fair trial, in particular, that his legal representation was inadequate. His legal aid lawyer allegedly did not question the judge's refusal to accept the crucial testimony by the defendant's son and the son was detained in order to force him to testify against him. Furthermore, the lawyer sought no witnesses to testify on the author's behalf.

The author also claimed that he did not know whether he was in fact represented by his attorney during the hearing of the appeal, as all his written requests for clarifications went unanswered.

The Committee noted with concern that the author was not notified of the name of his court-appointed lawyer until after the appeal was dismissed, in effect violating his right to defend himself in person or through legal assistance of his own choosing. It was not apparent from the information before the Committee that special circumstances existed to justify the detention of the author's minor child. Moreover, serious questions arose about possible intimidation and about the reliability of the testimony obtained under these circumstances. The Committee therefore concluded that the author's right to a fair trial was violated. Since the final sentence of death was passed without having met the requirements for a fair trial, it must be concluded that the right to life had been violated. In view of the above, the Committee considered that the appropriate remedy entailed release of the author and that the State party was under an obligation to ensure that similar violations did not occur in the future.

Concerning the case of *Howard Martin v. Jamaica* (Communication No. 317/1988), the author alleged that his trial was unfair, that the trial judge erred in not directing the jury on the issue of involuntary manslaughter and also erred in summing up the case for the jury with respect to the issues of self-defence, provocation and the author's intent. Furthermore, referring to the delays in the execution of his death sentence, the author contended that the length of time spent on death row and the permanent anxiety he lived in constituted degrading treatment, causing him unnecessary mental and physical suffering.

The Committee found that the disturbingly long delay between the judgment of the Court of Appeal and the dismissal of the author's petition to the Judicial Committee was largely attributable to the author. If affirmed its jurisprudence that even prolonged periods of detention under a severe custodial regime on death row could not generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person was merely availing himself of appellate remedies. The Committee was of the view that the facts before it did not disclose a violation of any of the provisions of the International Covenant.

In the case of *Victor Francis v. Jamaica* (Communication No. 320/1988), the author contended that he was denied a fair trial, in that the evidence of the witnesses against him was contradictory and the prosecution did not produce any evidence to establish that he owned a gun. Moreover, the Court of Appeal's failure to issue a written judgement violated his right to be tried without undue delay and to have his conviction and sentence reviewed. This had led to the dismissal of his petition before the Judicial Committee of the Privy Council which, in effect, left him with no available legal remedy. The author finally alleged that four soldiers and warders had entered his cell one night, beat him badly on the head, pushed him with a bayonet, emptied a urine bucket over his head, and threw his food and water on the floor and his mattress out of the cell. Prison authorities who witnessed the assault apparently did not make any attempt to intervene.

The Committee was of the opinion that the failure of the Court of Appeal to issue a written judgement more than nine years after the dismissal of the appeal violated the right to be tried without undue delay and to have a conviction and sentence reviewed by a higher tribunal. It also found that the final sentence of death was passed without there having been any possibility of appeal, thereby violating the right to life. As the State party had not replied to the Committee's request for clarification concerning the alleged ill-treatment in detention, it concluded that this amounted to degrading treatment and also violated the right of a person deprived of his liberty to be treated with humanity and respect. The failure to provide a right of appeal meant that Mr. Francis did not receive a fair trial within the meaning of the Covenant. In the circumstances of the case, an effective remedy would

entail his release, as well as entitlement to remedy in connection with the other violations of his rights, including appropriate compensation.

In *Loxley Griffiths v. Jamaica* (Communication No. 274/1988), the author charged that he was denied the right to a fair trial, including in particular that two prosecution witnesses sought to influence members of the jury. He also claimed that the time spent on death row, close to 11 years prior to commutation of sentence, amounted to cruel, inhuman and degrading treatment.

On the basis of the information before it, the Committee could not conclude that the judge's instructions to the jury were arbitrary or biased. Nor were the allegations concerning jury tampering substantiated. In the circumstances, the Committee found that the author had not been denied the right to a fair trial. Moreover, it noted that the question whether prolonged detention on death row constituted cruel, inhuman, or degrading treatment was not brought before the Jamaican courts or any other competent authority. Therefore, it could not consider this allegation on its merits. The Committee reiterated that prolonged judicial proceedings did not per se constitute cruel treatment, especially if appeals or reviews are being sought or are under way. It concluded that the facts presented did not reveal a breach of any provision of the Covenant.

In the case of *Leaford Smith v. Jamaica* (Communication No. 282/1988), the author alleged that his trial was unfair because he had inadequate time to prepare his defence, that certain discrepancies in the evidence were not addressed, and that the absence of a written judgement deprived him of an effective appeal.

It was the Committee's view that four hours on the morning of the trial was insufficient time to allow for preparation of a defence in a capital case, and that the lack of time severely hindered the defendant and his counsel in compiling information and in choosing and calling witnesses. The Committee also ruled that the author's right to be tried without undue delay and his right to have his conviction and sentences reviewed by a higher tribunal was violated by the failure of the Court of Appeals, over a period of four years, to provide him with a written judgement which the Judicial Committee of the Privy Council could use as a basis for review. Finally, the Committee was of the opinion that these violations deprived Mr. Smith of the strict procedural guarantees the International Covenant provided for defendants in capital cases. It was the Committee's view that Mr. Smith was entitled to be released.

Michael Bailey, in *Bailey v. Jamaica* (Communication No. 334/1988), contended that he was denied a fair trial, that his legal representation was inadequate and that while on death row he was severely beaten by prison warders who hit him with batons, pipes, and clubs, then refused him access to the prison doctor. He said that a request for a visit from the Parliamentary Ombudsman to investigate the beating led to threats from the prison warders.

The Committee considered that the State had not refuted the author's claim that he suffered beating and injuries at the hand of prison officers, and that warders threatened him when he sought to pursue his complaint with the Ombudsman. Thus, his claims had been substantiated. In view of the fact that Mr. Bailey was beaten repeatedly and then left without medial attention in spite of injuries, the Committed was of the view that his right to protection from cruel and inhuman treatment had been violated, and that as a prisoner he had not been treated with humanity and respect. The Committee considered that the State owed Mr. Bailey appropriate compensation and said the State should ensure that similar violations did not occur in the future.

In the case of *Trevor Collins v. Jamaica* (Communication No. 356/1989), the author claimed that he had been denied the right to trial without undue delay, also that he was effectively unrepresented before the Court of Appeal. The material before the Committee did not disclose whether the author had complained to the judge that time and

facilities to prepare a defence were inadequate. It also was not clear that the absence of witnesses on his behalf was not the result of a considered decision by the author's counsel.

However, it was the Committee's view that the counsel, who claimed an appeal had no merit, effectively left Mr. Collins without legal representation. Also, the failure of the Court of Appeals over a period of three years to provide a written judgement effectively kept him from seeking review of his case by the Privy Council, thus denying him his right under the Covenant to appeal his conviction and sentence and also denying him his right to a trial without undue delay. In capital cases, such shortcomings in legal procedure amounted to a denial of the right to life as specified in the Covenant, the Committee said, and the author was entitled to be released.

John Ballantyne, Elizabeth Davidson, and Gordon McIntyre challenged Canada (Communications Nos. 359/1989 and 385/1989) over a bill enacted by the Province of Quebec which prohibited them from advertising their businesses on external signs in any language other than French, when their mother tongue and that of many of their clients was English. The Committee concluded that the legal measure did not violate the complainants' rights as members of a "minority" because under the language of the Covenant - in which the term "State" applied to the entire country of Canada - English-speaking people were not in the minority. The Committee also determined that the law in question did not breach the authors' rights under the Covenant to equality before the law. Since everyone in the province, whether English - or French-speaking, had to abide by the measure, they were equally at a disadvantage in advertising for English-speaking clients.

However, the Committee ruled, the law did violate the authors' right to freedom of expression. Such expression included commercial activities, and the Covenant's test for restrictions to freedom of expression was not met in this case. The French-only rule was not necessary to achieve the legitimate purpose of the law (protection of the rights of Canada's Francophone minority) and it was not necessary to preserve order. The State could not restrict, outside the spheres of public life, the freedom to express oneself in the language of one's choice. The Committee called upon the State party to remedy the violation by appropriately amending the law.

In the case of *Balkisson Soogrim v. Trinidad and Tobago* (Communication No. 362/1989), the author claimed that certain irregularities had denied him the right to a fair trial and that he had been beaten and physically abused at the hands of the police following his arrest, as well as in prison.

The Committee noted contradictory accounts provided by the author and the State over whether the author received appropriate treatment and medical care while on death row. It did conclude, however, that the author was beaten by prison warders on several occasions, thus subjecting him to inhuman and degrading treatment in violation of Article 7 of the Covenant, and of Article 10, which requires that persons deprived of their liberty be treated with humanity and respect. The Committee was of the view that Mr. Soogrim was entitled to a remedy, including appropriate compensation and that the State should ensure that such violations did not occur in the future.

Inadmissible Cases

E.W. et al., authors of Communication No. 429/1990, claimed their right to life was threatened by a decision to prepare to deploy or actually deploy nuclear cruise missiles in the Netherlands. The Committee was of the opinion that the authors could not be considered "victims" under the meaning of the Optional Protocol, as they were not separately, specifically and imminently affected by the alleged violations, and so the communication was inadmissible.

Communication No. 499/1992, from *K.B.*, a citizen of Australia, claimed she had been held against her will in a psychiatric hospital and that several of her rights under the Covenant had been violated, prior to the entry into force of the Optional Protocol for Australia on 25 December 1991. The complaint was ruled inadmissible because the Optional Protocol may not be applied retroactively.

N.P., of Jamaica, author of Communication No. 404/1990, claimed that his rights to life and to a fair trial were violated because the judge did not properly instruct the jury on the burden of proof necessary to establish guilt on a charge of murder. He also claimed his rights to humane treatment were violated. The Committee concluded that the allegations were not sufficiently substantiated and hence the complaint was inadmissible.

Communication No. 490/1992, from *A.S. and L.S.* of Australia, alleged that during a trial involving an investment partnership, the authors' rights as persons before the law, to equality before the law, to freedom from discrimination, and to protection from arbitrary attacks on privacy, home and reputation were violated. True events complained of had allegedly taken place prior to 25 December 1991, the date of entry into force of the Optional Protocol for Australia. The Committee determined that the complaint was inadmissible because the Optional Protocol may not be applied retroactively.

T.P., a citizen of Hungary, author of Communication No. 496/1992, alleged, among other charges, that following his return to Hungary from a Soviet labour camp after World War II, he was deprived of property and the right to practice his profession, was improperly confined to prisons and mental hospitals, and was subjected to inhuman and degrading treatment prior to the entry into force of the Optional Protocol for Hungary on 7 December 1988. The Committee concluded that the communication was inadmissible because the terms of the Optional Protocol cannot be applied retroactively.

APPENDIX B

286TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION

CASE NO. 1652[16]

COMPLAINT AGAINST THE GOVERNMENT OF CHINA PRESENTED BY THE INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS (ICFTU)

674. In a communication dated 2 June 1992, the International Confederation of Free Trade Unions (ICFTU) filed a complaint against the Government of China for violation of trade union rights. The complainant organization made fresh allegations and provided additional information in communications dated 4 June and 24 August 1992.

675. The Government submitted its statements in communications dated 19 October 1992 and 13 January 1993.

676. China has ratified neither the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), nor the Right to Organise And Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

677. The ICFTU stated in its complaint that, three years after the brutal suppression of fundamental human rights and trade union rights in June 1989 the Government of the People's Republic of China has once again demonstrated its utter disregard for the principle of freedom of association.

678. To be more precise, the ICFTU reports that, on 3 April 1992, the National People's Congress adopted a new Trade Union Act, after a so-called process of discussion that lasted for 14 years. According to the ICFTU, the provisions of this Act are contrary to the standards of the ILO and to the recommendations formulated by the Freedom of Association Committee for Case No. 1500.

679. According to section 1, the Act has been promulgated to enable the trade unions to "further socialist modernization". As one official commentary on the Act indicates, "furthering socialist modernization" means acting on the instructions of the Chinese Communist Party and being guided by the Marxist-Leninist thought of Mao Zedong; consequently, according to the ICFTU, the unions are denied the right to formulate their own programmes, as established in Article 3(1) of Convention No. 87. By passing this legislation, the public authorities have therefore committed an act of interference in breach of Article 3(2) and Article 8(2) of the Convention.

680. Moreover, the ICFTU states that under the provisions of the Act, the local unions are firmly controlled by the Chinese Federation of Trade Unions, which in its turn. is under the strict control of the Chinese Communist Party. While the workers may, theory, form organizations on their own initiative, these unions cannot acquire legal

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[16] For an earlier case against China, see *Case No 1500 v China*, 270th Report of the Committee on Freedom of Association, ILO Doc GB.245/5/8 (1990), paras 287-334. For further developments, see 275th Report of the Committee on Freedom of Association, ILO Doc GB./248/7/11 (1990), paras 323-363.

personality unless they are approved by the Chinese Federation of Trade Unions, in breach of Articles 2 and 7 of Convention No. 87.

681. According to the ICFTU, other provisions of the Act indicate that the main reason for its adoption was to establish the unions as intermediaries between workers and employers with a view to protecting the latter. Thus, for example, the provisions in respect of work stoppages specify that the unions "shall work with the managements or parties concerned and conduct talks on such reasonable demands of the workers as can be satisfied, and normalize production as soon as possible". In respect of health and safety, the unions may only suggest that management take appropriate measures. The same also applies in respect of wages and health and safety in joint venture enterprises. According to the ICFTU, recent reports bear witness to the fact that such enterprises can freely declare redundancies, as happened in the case of the Shangai-Bell enterprise in 1991.

682. Government action is likewise directed against independent trade unions militants. Mr. Han Dongfang, the leader of the Beijing Autonomous Workers' Federation, has been forcibly been prevented from carrying out his trade union activities and has been subjected to continual pressure -- including physical brutality -- with a vie to putting a stop to his campaign for free and independent trade unions. On 19 March 1992, Han Dongfang was prevented by the police from holding a minor demonstration on Tian-An-Men Square, during which he intended to demand the authorization to form independent trade unions.On 14 May 1992, he was beaten unconscious by court officials who had summoned him to discuss a dispute concerning an apartment. According to the ICFTU, Han Dongfang, who was released in April 1991 after two years of detention without trial, is being persecuted by his employer, the Beijing Railway Authority. On 30 May 1992, the enterprise refused to issue him with a document needed when applying for a passport, whereas, under intense international pressure, the authorities had announced that he would be free to leave the country. The enterprise also told his wife that it would not pay the bill from the hospital where he had been treated following the beating he had received in the court. The ICFTU emphasized the fact that Mr. Han Dongfang had stated that he was prepared to cooperate with the Federation of Chinese Trade Unions if the latter became democratic and genuinely concerned with the workers' interests, which it has not done up to the present.

683. On the contrary, the ICFTU continues, the Free Trade Union of China, a new independent, clandestine organization which proclaimed its existence on 15 May 1992, maintains that the Federation of Chinese Trade Unions and the Communist Party have formed an alliance with a view to eliminating all independent worker organizations. Thus, in March 1992, the Communist Party circulated a directive to all state enterprises, referring to the unions as "anti-Party" and "anti-socialist" organizations and demanding an in-depth investigation to track down the Free Trade Union of China.

684. The ICFTU emphasizes that hundreds of workers are being detained for having exercised their trade union rights. It has supplied a list of leading members and advisers from autonomous labour federations detained (see Annex17). Administrative detention measures and forced labour - which the system calls education through work - are still being applied to workers who are involved in trade union activities. In this respect, the ICFTU mentions the case of Tang Yuanjuan, assistant mechanic in the Changchun No. 1 automobile factory, who was consigned with four of his companions to forced labour in the Lingyuan camp in the province of Lianong. They had been sentenced in November 1990 to between two and 20 years' imprisonment for having organized peaceful demonstrations and discussions with their colleagues.

685. In its communication of 4 June 1992, the ICFTU alleged that Mr. Han Dongfang had been arrested by the Beijing police on 3 June with three independent union militants who were not identified at the time. Han Dongfang and his companions had intended to organize a silent demonstration in Beijing on 4 June to commemorate the third

[17] [Eds} Annex is not included

anniversary of the Government's suppression of the democratic movement. After spending the night at the police station, Mr. Han Dongfang was taken to his home by the police who ordered him to remain at home and surrounded his house with vehicles. According to the ICFTU, he is now under house arrest.

686. In its communication of 24 August 1992, the ICFTU reported that the three persons arrested at the same time as Mr. Han Dongfang are Messrs. Zou Guoqiang, Zhang Jinli and Song Jie. Two other Beijing militants, Lee Jingsheng and Wang Guoqi, were arrested on the same day.

B. The Government's reply

687. In its communication of 19 October 1992, the Government stated that the accusations made against it were unfounded. This was a serious case of interference in the internal affairs of a sovereign State. A totally false connection had been made between a civil dispute concerning Han Dongfang's apartment and the question of freedom of association. The inclusion of this "complaint" in the list of cases submitted to the Committee on Freedom of Association was thus inappropriate and totally unacceptable to the Government.

688. According to the Government, the ICFTU "complaint" at least demonstrated that organization's prejudice against China and its ignorance of the situation. In fact, the Government had always placed great importance on the protection of freedom of association. The Constitution contained provisions clearly stating that Chinese citizens enjoyed extensive rights, especially in the field of trade unions. According to article 35 of the Constitution, citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

689. On 3 April 1991, the National People's Congress adopted a new Act concerning trade unions. In conformity with the Constitution, section 3 of the Act clearly establishes that "all persons engaged in manual or intellectual work and employed by an enterprise, an institution or an office in Chinese territory, and who are primarily wage-earners, have the right to form and join trade unions, in conformity with the law, regardless of their ethnic status, their race, sex, occupation, religious beliefs or level of education". According to the Government, this proves that the right of workers to form and join organizations of their choice is guaranteed in full.

690. As regards Mr. Han Dongfang, the Government states that, on 14 May, this person quarrelled with members of the court personnel over a dispute concerning his apartment. A stop was put to his attacks against the court. In August, Han Dongfang withdrew his complaint. This has nothing to do with freedom of association.

691. The Government added that the cases concerning members of workers' autonomous federations, illegal organizations, had been settled in conformity with the judicial procedures in force in China. Explanations in this respect had already been provided in the context of Case No. 1500. Han Dongfang and his wife had recently left China having obtained the necessary passes under the normal procedures. They are at present in the United States. It is not difficult to deduce, according to the Government, that the "complaint" of the ICFTU is politically motivated. The reputation of the ILO would be called in question if this "complaint" were to be included in the list of cases before the Committee, contrary to the position expressed by the Government.

692. In its communication of 13 January 1993, the Government stated that the ICFTU accusation that the new Trade Union Act (which stipulates that the trade unions should "further socialist modernization") has deprived the workers' organizations of their freedom to formulate their programmes in conformity with Article 3(1) of Convention No. 87, was indefensible. The Government points out that section 1 of this Act states that "it

was formulated in accordance with the Constitution of the People's Republic of China and with a view to guaranteeing the position of the trade unions in the country's political, economic and social life, to define their rights and obligations and to establish their role in the cause of socialist modernization". The primary objective which guided the preparation of the Act was to ensure the place of the trade unions in national life. China's Constitution proclaims that "China is a socialist State led by the working class", and the Trade Union Act states that "the trade unions are mass working class organizations formed by the workers of their own free will". The Government maintains that all these provisions clearly demonstrate that the trade unions in China are mass organizations formed by the country's ruling class, which means that the important position of the unions in the country's social life and the extensive rights that they enjoy are fully guaranteed.

693. The Government goes on to state that the progressive advance and remarkable achievements of socialist modernization, which have made the country flourish and its people prosper, have made it possible for the workers to improve their living conditions considerably. This cause has won the support of the working masses, and the statutes of the Chinese trade unions, approved by the National Congress of Trade Unions of China, expressly stipulate that "the principal role of the working class must be brought fully into play in the construction of material and spiritual socialist civilizations". It is therefore obvious, according to the Government, that the new Trade Union Act, by demanding that "the unions should play a role in socialist modernization", is a response to the demands and aspirations of the workers and corresponds to the fundamental interests of hundreds of millions of Chinese workers and their organizations.

694. The Government also declares that, in their activities, the Chinese trade unions have always acted independently, in accordance with Chinese law and trade union statutes. Section 4 of the new Act stipulates that the unions "shall work independently in conformity with the trade union statutes", and that "the National Congress of Trade Union Representatives shall undertake to elaborate or revise the Chinese trade union statutes". The Act further contains provision that "the State shall defend the legitimate rights and interests of the trade unions against all violations". The Government concludes that Chinese law and practice are in conformity with the right of the trade unions to draw up their own constitutions and rules, as guaranteed by Convention No. 87.

695. In respect of the ICFTU allegation that Articles 2 and 7 of the Convention on freedom of association are being violated in China, since the grass-roots unions are placed under the strict control of the National Federation of Trade Unions of China, and since the establishment of trade unions requires the authorization of the Federation, the Government maintains that it is untenable. The Government quotes from the new Trade Union Act, which stipulates that "a National Federation of Trade Unions of China shall be established as the country's amalgamated trade union organization" (section 12), and that "the establishment of grass roots organizations, regional trade union federations, sectoral trade union organizations at national or local level shall be subject to the approval of the organization immediately above it" (section 13), and it considers that these articles concern the principle governing the organization and operation of the trade unions, making it possible to increase the number of trade union members and to gather together the opinions of the trade unions at different levels, so that the workers' rights and interests may be the better protected.

696. The Government explains that the establishment by law of an amalgamated federation of trade unions at national level was determined by China's historical and present context and is in keeping with the aspirations of the vast majority of workers and their unions. The emergence, during the "Cultural Revolution" of 1966 to 1976, of innumerable trade union organizations, with the accompanying trade union pluralism and sectarianism, exacerbated the contradictions among the workers and gave rise to agitation and instability in the country. The workers, who had suffered from this fragmentation, called for trade union unity in order the better to support the interests of the workers as a whole. The new Trade Union Act clearly states that workers have the right to join trade

unions or to organize them in conformity with the law, without any distinction whatsoever. Consequently, the Government considers that the relevant provisions of the Act are entirely compatible with Articles 2 and 7 of Convention No. 87.

697. As for the allegation by the ICFTU that "the main reason for the adoption of the new Act concerning the trade unions is to establish the unions firmly in their role of intermediaries between the workers and the employers with a view to defending the interests of the latter as is borne out by the provisions concerning work stoppages", the Government considers this to be an arbitrary judgement and a tactless and absurd interpretation. It points out that section 6 of the new Act stipulates "by defending the global interests of the entire Chinese people, the trade unions are protecting the legitimate rights and interests of the workers", that it has increased the rights of the trade unions and that, at the same time, many other laws also contain concrete provisions concerning the trade unions' defence of the workers' interests. The Government quotes, as examples, the Act concerning industrial enterprises owned by the entire people and the Act concerning safety in mines, under the terms of which the workers' assemblies are government bodies enabling the workers to engage in democratic management, that "the union committees at the workplace deal with the day-to-day affairs of the workers' assemblies" and that the workers' assemblies have the right to examine, approve or veto, as the case may be, a number of decisions concerning the enterprises. It is therefore clear, according to the Government, that the body of relevant laws unequivocally protects the trade unions in order to preserve the workers' interests.

698. In respect of the participation of trade unions in the "amicable settlement" of such problems as work stoppages or selective strikes, the Government specifies that this is also a right designed to ensure the solution of "problems that have been raised by the employees in a reasonable manner and that can be settled". On this basis, it helps "to restore the normal order of production". The Government adds that negotiated settlement of disputes between employees and employers is an internationally accepted practice.

699. As to the matter of strikes, the Government states that, while the Constitution has not prescribed this right, it has not banned it; nor have the other laws. Such work stoppages and strikes as have occurred (according to the Government, a few dozen in 1990 in the province of Guangdong occasioned by the violation of statutory provisions and labour contracts in foreign-owned enterprises, and a few work stoppages in unprofitable or loss-making state enterprises) were settled fairly as a result of consultations between the parties concerned in the spirit of the defence of the interests of the workers and of the enterprises, and the preservation of social stability.

700. In respect of the allegation concerning the arbitrary dismissal of 46 workers by the Shanghai-Bell Company in 1991, the Government declares that this accusation is unfounded and that a Ministry of Labour investigation has revealed that only four workers were dismissed for having infringed disciplinary regulations, 55 other workers having left the enterprise for various reasons (return to the unit of origin after expiry of the transfer contract, decision by the workers not to request extension of contracts that had reached their term, retirement, departure for another country, health reasons). It explains that, in accordance with the regulations on labour management in joint venture enterprises, these enterprises have the right to dismiss workers who have seriously infringed labour regulations. It is obvious therefore that the above-mentioned cases are part of the normal movement of labour and not arbitrary dismissals.

701. Returning to the situation of Mr. Han Dongfang, the Government claims to have obtained the following information from the departments concerned: Han Dongfang and a few other persons were prevented, at the beginning of June 1992, from organizing a demonstration in Tien-An-Men Square because they had not registered in advance with the competent Beijing local government departments, in violation of local government regulations concerning demonstrations and assemblies. According to the Government, Zhou Guoqiang, Zhang Yanan, Song Jie and other persons who were with Han Dongfang

have never been questioned, interrogated or detained by the police. Han Dongfang, who was involved in a property dispute, came into conflict with the tribunal personnel and disrupted the proceedings of the court without good reason, following which he was arrested. The Government repeats its statement that Han Dongfang, having withdrawn from this civil action of his own accord in August 1992, obtained permission to leave China and is at present living with his wife in the United States.

702. In respect of the "complaint" concerning Tang Yuanjuan, employed at the Changchun No. 1 automobile factory, and his accomplices, the Government states that, according to the police authorities in the town of Changchun, a tiny handful of persons, among them Tang Yuanjuan, in a vain attempt to overthrow the lawful Government of China by subversion, violated Chinese criminal laws. Tang Yuanjuan and his accomplices, Lin Wei and Leng Wanbao, received prison sentences of 10, three and seven years respectively, for the crime of subversion.

703. The Government has also supplied information concerning the list of persons accompanying the ICFTU complaint and states that, having questioned the police authorities, it has obtained the following information: 13 persons have been released, acquitted of criminal responsibility; 11 persons have received prison sentences of between three and 15 years for disturbance of public order, the crime of subversion against the Government, looting or theft. It adds that a certain Chen has not been identified as no first name was given, and that the other persons on the ICFTU list have never been questioned, interrogated or detained, either by the state security services or by the police authorities (see annex).

704. The Government concludes by formally stating that, in view of the Trade Union Act and bearing in mind the above, the "complaint" filed by the ICFTU against China is totally unfounded.

C. The Committee's conclusions

705. Before examining the substance of the case, the Committee considers itself obliged to reply to the objections raised by the Government in respect of procedure. The Government considers that the accusations made against it constitute a serious act of interference in the internal affairs of China and that the inclusion of the complaint on the list of cases pending before the Committee is both inappropriate and unacceptable.

706. The Committee notes that the Government had already developed this same type of argument on the occasion of an earlier case concerning China. [See 268th Report, Case No. 1599, para. 691.] The Committee is obliged to refer to the comments formulated by it on that occasion. The Committee is bound to point out that the ILO, by virtue of its Constitution, was established, in particular, to improve conditions of labour and to promote freedom of association in the various countries. It follows, as emphasized by a Commission on Inquiry appointed by the Governing Body [see Official Bulletin, special supplement, Vol. LXVII, 1984, series B, para. 466], that the matters dealt with by the Organization in this connection no longer fall within the exclusive sphere of States and that the action taken by the Organization for the purpose cannot be considered to be undue interference in internal affairs, since it falls within the terms of reference that the ILO has received from its Members with a view to attaining the aims assigned to it. The Committee therefore considers the Government's objection to be devoid of legal relevance.

707. In respect of the statement concerning the inappropriateness of opening a case, the Committee is bound to point out that the complaint filed is perfectly admissible, since it was submitted by an organization possessing general consultative status within the ILO. It was therefore transmitted to the Government by the ILO which was bound to act thus under the terms of the procedure.

708. Bearing all these elements in mind, the Committee therefore considers itself obliged to examine the matter in question.

709. The Committee points out that this case concerns questions of law and questions of fact. In respect of the first aspect of the case, the complainant organization alleges that the new Trade Union Act adopted in April 1992 is contrary to ILO standards and principles. As for the questions of fact raised by the ICFTU, they concern pressure - including physical pressure - brought to bear against independent trade union militants, conviction, detention, and dismissal of workers and measures to obstruct the functioning of independent unions, in particular the Free Trade Union of China which announced its existence in May 1992.

710. In respect of the new Trade Union Act, the ICFTU condemns in particular the obligation on the trade unions to further socialist modernization; the control exercised by the Federation of Chinese Trade Unions on the grass-roots organizations; and the obligation on the unions, in cases of work stoppages, to take part in consultations and to normalize production as soon as possible, and the obligation of trade unions to follow the instructions of the Communist Party.

711. The Government, for its part, argues that the Act, by demanding that socialist modernization be turned to good account, is acting in response to the workers' aspirations as expressed by the National Trade Union Congress. The unitary nature of the Trade Union Federation is likewise in keeping with the will of the workers and is explained by China's historical and present context. Finally, trade union participation in the amicable settlement of problems is intended to ensure their solution, in conformity with international custom.

712. The Committee has examined those provisions of the Trade Union Act referred to in the allegations. It points out that, under the terms of section 1, the Act was adopted in order to guarantee the status of trade unions in the country's political, economic and social life, to define the rights and obligations of trade unions and to enable them to take an active part in socialist modernization. The Committee considers that this provision is couched in general terms without imposing particular obligations and, for this reason, does not constitute a violation of freedom of association.

713. However, the Committee observes that this provision is supplemented by other sections that place greater constraints on the trade union organizations. Thus, under the terms of section 5 "the trade unions shall organize and educate workers and employees . . . in order to . . . defend the power of the socialist State". In accordance with section 8 "the trade unions shall mobilize and educate workers and employees so that they . . . respect work discipline". They "shall organize workers and employees by conducting socialist emulation campaigns at the workplace". Finally, section a stipulates that "the trade unions shall educate workers and employees . . . in order to strengthen their ideological convictions".

714. The Committee considers that the functions assigned to the trade unions by this body of. provisions must necessarily limit their right to organize their activities, contrary to the principles of freedom of association. It is of the opinion that the obligations thus defined, which the unions must observe, prevent the establishment of trade union organizations that are independent of the public authorities and of the ruling party, and whose mission should be to defend and promote the interests of their constituents and not to reinforce the country's political and economic system.

715. In respect of the control exercised by the Federation of Chinese Trade Unions over the grass-roots organizations, the Committee points out that, by virtue of section 11, "the trade union organizations at the various levels shall be formed in accordance with the principle of democratic centralism" and "the trade union organizations at a lower level are subject to the trade union organizations of the levels immediately above them".

Furthermore, under the terms-of section 4, "the National Congress of Trade Union Members shall establish and amend the constitutions of trade unions in China". Section 13 specifies that "the establishment of grass-roots trade unions, local federations and national or local branch organizations shall be subject to approval by the unions at the level immediately above". Finally, "the Single Federation of Trade Unions of China shall be established for the entire country".

716. It appears obvious therefore, in the Committee's view, that this legislation imposes a single trade union structure in the country. The Committee has indeed taken note of the Government's statements that the unitary nature of the Federation is in keeping with the will of the workers and can be explained by China's historical and present context. However, the Committee is bound to emphasize that, even in a situation where, historically speaking, the trade union movement has been organized on a unitary basis, the law should not institutionalize this situation by referring, for example, to the Single Federation by name, even if it is referring to the will of an existing trade union organization. In fact, the rights of workers who do not wish to join the Federation or the existing trade unions should be protected, and such workers should have the right to form organizations of their own choosing, which is not the case in a situation where the law has imposed the system of the single trade union.

717. The Committee also takes the view that subjecting grass-roots organizations to the control of trade union organizations at a higher level, the approval of their establishment by the latter, and the establishment by the National Congress of Trade Union Members of the constitutions of Chinese trade unions constitute major constraints on the right of the unions to establish their own constitutions, organize their activities and formulate their programmes.

718. As regards labour disputes, the Committee takes note that "the union shall participate in conciliation procedures in the event of a labour dispute within the enterprise. The regional institutions responsible for arbitration in cases of labour disputes shall include representatives of the trade unions at the appropriate levels" (section 20 of the Trade Union Act). Moreover, "in the case of a work stoppage or go-slow in an enterprise, the union, in association with the administrative authorities or the parties concerned in the enterprise, shall seek, by means of consultation, to satisfy the reasonable requests of the employees and workers, so as to ensure a return to normal production as soon as possible" (section 25).

719. The Committee takes note of the role that the Act assigns to trade union organizations with a view to settling labour disputes. These provisions, couched in general terms, do not in themselves imply that it is illegal to resort to strike action. The Committee further notes that neither the Constitution nor the Trade Union Act deal with the right to strike, either to authorize it or to ban it. However, the Committee is aware of the terms of the provisional regulations concerning labour disputes in state enterprises, which were published in the Official Gazette of 31 August 1987 and came into effect on 15 August 1987. These regulations establish conciliation and arbitration procedures to resolve collective and individual labour disputes. Where the conciliation procedure results in an agreement, the two parties are bound to respect and apply the agreement rigorously. Should no agreement be reached, one of the two parties may request arbitration (section 14). In the event of an objection to the arbitral award, one or both parties may appeal to the People's Court of Justice (section 25). Finally, any person involved in a labour dispute who causes a disturbance in the mediation and arbitration proceedings or disrupts normal work or production processes will be punished in accordance with the provisions of the final regulation concerning public safety of the People's Republic of China (section 28).

720. The Committee observes that these provisions appear to introduce a conciliation and arbitration procedure to settle labour disputes which allows no possibility of resorting to strike action, as this would appear to be liable to sanctions under the terms of section 28. If such is indeed the case, this situation would be contrary to the principles

of freedom of association. The Committee therefore requests the Government to provide details on legislation and practice in respect of the settlement of collective labour disputes and to specify in particular whether the provisional regulations of 1987 are still in force.

721. As regards the allegations of fact formulated by the ICFTU, the Committee takes note of the observations submitted by the Government concerning the situation of Mr. Han Dongfang, leader of the Beijing Autonomous Workers' Federation. The Committee, while regretting the fact that he had initially encountered difficulties with regard to leaving the territory, notes in particular that Mr. Han Dongfang was finally allowed to leave China and that he is at present living in the United States. Nevertheless, it asks the Government to supply its observations on the allegations according to which Mr. Han Dongfang has been subjected to pressure, including physical beatings.

722. The Committee notes, on the other hand, that Mr. Han Dongfang and several other persons mentioned by the complainant were prevented from organizing a demonstration in Tien-An-Men Square in June 1992, but that they had not been arrested.

723. With regard to the ICFTU allegation that Messrs. Tang Yuanjuan and two of his four companions, Lin Wei and Leng Wambao, had been sentenced by the police authorities of the town of Changchun to ten, three and seven years of imprisonment and forced labour, respectively, the Committee notes that, according to the Government, these named persons had committed acts of subversion and attempted to overthrow the Government. The Committee, considering that these comments are of too general a nature to allow it to pronounce an opinion with full knowledge of the facts requests the Government to specify precisely what concrete acts were committed by the persons concerned that they should have been convicted of subversion. However, in this respect the Committee must recall, as it already did in Case No. 1500 [see 279th Report, para. 637] that the "education through labour" system constitutes a clear infringement of basic human rights, the respect of which is essential for the exercise of trade union rights.

724. With regard to the list provided by the ICFTU in the annex to its complaint, containing the names of persons who, according to that organization, were arrested and in some cases sentenced, the Committee notes that the Government has supplied information on all persons appearing on that list. According to this information, 13 persons have been released, acquitted of criminal responsibility, and 11 persons have received prison sentences ranging from between three and 15 years, in particular for subversion, disturbance of public order looting or theft. The other persons mentioned on the list have, according to the Government, never been questioned, interrogated or detained.

725. Although noting that certain persons mentioned in the complaint have been released, the Committee is bound to express its acute concern at the severity of the sanctions pronounced by the tribunals, very often on grounds of disturbance of public order, charges which, in view of their general character, might make it possible to repress activities of a trade union nature. As it did on the occasion of Case No. 1500, the Committee requests the Government to arrange for the cases in question to be re-examined in order to put an end to these detections. The Committee requests the Government to provide it with information concerning further developments in this respect.

726. With regard to the allegations concerning the dismissal of workers at the Shanghai-Bell enterprise, the Committee notes that the Government has explained that four workers were dismissed for breach of disciplinary regulations. As the communication from the complainant made no mention of trade union grounds for these dismissals, the Committee is not in a position to pronounce an opinion in this respect.

727. Finally, the Committee points out that the ICFTU had alleged that a Communist Party directive had demanded an in-depth investigation to track down the Free Trade Union of China, an independent organization which had announced its existence in

May 1992. The Committee requests the Government to submit its comments on this allegation.

The Committee's recommendations

728. In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:

(a) Taking note that many provisions of the Trade Union Act adopted in April 1992 are contrary to the ILO's fundamental principles concerning the right of workers without distinction whatsoever to form and join organizations of their own choosing without previous authorization and the right of trade unions to establish their constitutions, organize their activities and formulate their programmes, the Committee requests the Government to take the necessary steps to ensure that the provisions in question, mentioned in the conclusions, are modified.

(b) The Committee requests the Government to provide information on legislation and practice in respect of collective labour dispute settlement and to indicate in particular whether the provisional regulations of 1987 are still in force.

(c) The Committee asks the Government to supply its observations on the allegations according to which Mr. Han Dongfang has been subjected to pressure, including physical beatings.

(d) The Committee requests the Government to state precisely what concrete acts were committed by Messrs. Tang Yuanjuan, Lin Wei and Leng Wambao that they should have been convicted of subversion by the police authorities of Changchun.

(e) Although noting that certain persons mentioned in the complaint have been released, the Committee expresses its serious concern at the severity of the sanctions pronounced by the tribunals against the workers who are members or leaders of workers' autonomous federations; it asks that these cases be re-examined in order to put an end to the detention of these workers mentioned in the annex. It requests the Government to provide it with information on further developments in this respect.

(f) The Committee requests the Government to submit its observations on the allegations concerning the demand by the Communist Party that an in-depth investigation be conducted to track down the Free Trade Union of China.

[ANNEX OMITTED]

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BILL OF RIGHTS

BULLETIN

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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.

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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.

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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, Mary Yuen, Nicholas Pirie, Ching Y Wong, Steven Wong and Sasha Haldane (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 4 Janauary 1994. We apologise for any errors or omissions.

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EDITORIAL

RECENT CASE LAW DEVELOPMENTS

The period since the publication of the last issue of the *Bulletin* has seen only a small number of cases in Hong Kong, including two cases before the Court of Appeal.

The first case which came before the Court of Appeal, *R v Wong Yan-fuk* (page 19 below, to be reported in (1993) 3 HKPLR), involved a challenge to section 4(4) of the *Massage Establishments Ordinance* (Cap 266). The Court of Appeal held that the provision was inconsistent with article 11(1) of the *Bill of Rights* and was therefore repealed. In that case the court held that the guarantees of the presumption of innocence have an application after conviction, in relation to facts not proved at trial.

The second Court of Appeal decision, *R v William Hung*, involved an appeal from the decision of Duffy J, who had denied an application for a stay based on common law abuse of process and a violation of the guarantee in article 11(2)(c) of the right to trial without undue delay (although he did hold that the defendant's rights under article 5(3) to trial within a reasonable time or to release had been violated). Following Privy Council authority (most recently *Attorney General v Charles Cheung Wai-bun* (1993) 3 HKPLR 62), the Court of Appeal reaffirmed the position that in general the same considerations apply to determination of a stay under the *Bill of Rights* as apply in deciding on an application based on the common law. The court held that this case was not one of the exceptional cases in which there might be a difference of approach between the common law and the *Bill of Rights*, although it gave no indication of the criteria which might make a case exceptional. One interesting feature of the case is that the Court of Appeal affirmed the approach taken by Duffy J in allowing a reduction in sentence in response to the violation of the defendant's right under article 5(3) of the *Bill of Rights*.

By contrast, *R v Flickinger*, the District Court granted a stay of proceedings on the ground of oppression, while refusing to grant a stay on the ground of undue delay under either the common law or the *Bill of Rights*. In *R v Fong Fu-ching*, another stay application relying on undue delay was refused.

A challenge to the power conferred on the District Court to make closure orders under section 27 of the *Buildings Ordinance* (Cap 123) came before the District Court in *Building Authority v Business Rights Ltd* (page 14 below). The challenge was based on the guarantees of equality in articles 10 and 22 of the *Bill of Rights* and the right to be protected against unlawful or arbitrary interference with one's home, as well as on the right of access to court contained in article 10. Judge Downey rejected the challenge on all grounds. However, following *Commissioner of Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141, he did note that, viewed in isolation, a provision such as section 27 -- which essentially gave the District Court a rubber stamp function -- might well fall foul of article 10 of the *Bill of Rights*. The other opportunities for review of decisions on the merits and law provided for by the *Buildings Ordinance* were, in his view, sufficient to satisfy the guarantee contained in article 10.

A number of cases have grappled with the contentious issue of whether article 5(1) of the *Bill of Rights* is merely a procedural guarantee, requiring only that any arrest or detention should be provided for by law (in the formal sense of that term) and that any deprivation of liberty be carried out in accordance with that law, rather than permitting a substantive review of the reasonableness of the criteria and procedures contained in the law. In a number of recent District Court and Magistrates Court decisions (*R v Hui Kwok-fai*, page 8 below; *R v Chong Ka-man*, page 9 below), judges or magistrates have held,

incorrectly in our view, that article 5(1) provides merely a procedural protection and does not allow a strict liability offence to be challenged on the ground that it permits arbitrary deprivation of liberty (there have been a couple of decisions in the Magistrates Court going the other way). The cases and a critique of them appears at page 12 below.

INTERNATIONAL DEVELOPMENTS

HUMAN RIGHTS COMMITTEE -- NEW GENERAL COMMENT AND DECISIONS UNDER THE FIRST OPTIONAL PROTOCOL TO THE ICCPR

At its July 1993 session the Human Rights Committee adopted a new *General comment* under article 40 of the International Covenant on Civil and Political Rights. *General comment 22 (40)* deals with the right to freedom of thought, conscience and religion contained in article 18 of the Covenant, which is the equivalent of article 15 of the *Bill of Rights*. The text of the *General comment* appears at Appendix A. The text of *General comments 1-21* appear in A Byrnes and J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993) at pp 350-383.

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The Committee on the Elimination of Racial Discrimination (CERD), the body of independent experts which examines reports submitted under the International Convention on the Elimination of All Forms of Racial Discrimination has recently adopted new guidelines on the form and content of reports to be submitted by States Parties to the Convention. The guidlines are reproduced at Appendix B. The Convention has applied to Hong Kong since 1969 and the United Kingdom's 12th report in respect of Hong Kong (which appears in Byrnes and Chan at pp 502-506) is awaiting consideration by CERD.

HUMAN RIGHTS TREATY ACTION IN RELATION TO HONG KONG

Reports under United Nations human rights treaties

A number of reports are due to be submitted to the United Nations or considered by United Nations treaty bodies in the course of 1994. A chart setting out information in this regard appears at page 6.

Reports under the Economic, Social and Cultural Rights Covenant

The United Kingdom has recently submitted its reports relating to the implementation of articles 10-12 and 13-15 of the International Covenant on Economic, Social and Cultural Rights in Hong Kong. Those reports are reproduced at Appendix C. Articles 10 to 12 of the Economic Covenant deal with the protection of the family, mothers and children; the right to adequate food, clothing and housing; and the right to health. Articles 13 to 15 deal with the right to education, and the rights to take part in cultural life and to enjoy the benefits of scientific progress and of one's own scientific, literary or artistic production. The text of these reports will be included in a future issue of the *Bulletin*. The reports will probably be considered by the Committee on Economic, Social and Cultural Rights at its session in December 1994.

Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

The initial report in respect of Hong Kong is due to be submitted to the United Nations in January 1994.

Treaty action? The Hong Kong government and the Convention on the Elimination of All Forms of Discrimination Against Women

It appears from comments recently made by the Secretary for Home Affairs, Mr Michael Suen Ming-yeung, that the Hong Kong Government may be coming round to the view that the Convention on the Elimination of All Forms of Discrimination Against Women should be extended to Hong Kong. The *South China Morning Post* of 31 December 1993 reported (at p 2):

> "Since the consultation period on the Green Paper on Equal Opportunities for Women and Men began in August, about 500 submissions have been received by the Government.
>
> 'The arguments in support of the CEDAW are very persuasive. It would be difficult for us to come up with credible arguments not to extend CEDAW,' Mr Suen said.
>
> Mr Suen said he had to work in consultation with other policy branches in preparing an agreed programme for the extension of the convention."

One hopes that the Government will finally move with despatch on this issue and not allow the extension to be further delayed. It is now over a year since the Legislative Council voted that such a step be taken without delay. It would be laudable if, by the time when the United Nations World Conference on Women meets in Beijing in 1995, the Convention not only applied to Hong Kong but if Hong Kong had already submitted its initial report under the Convention.

CLARIFICATION

In the last issue of the *Bulletin* we commented on the aftermath of the decision of the Privy Council in *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72, in which the Privy Council upheld the decision of the Court of Appeal (affirming the magistrates decision) that section 30 of the *Summary Offences Ordinance* (Cap 228) was inconsistent with article 11(1) of the *Bill of Rights*. We noted in particular that a number of prosecutions under this section had been brought (or continued) between the time when the provision was first declared repealed by the magistrate, but also after the Court of Appeal decision and, in one case, after the decision of the Privy Council.

We wrote:

> "[T]here seems to be little reason why the government should not take steps in relation to the s 30 cases, particularly those where the government itself persisted in prosecutions after the Court of Appeal had declared the section repealed.
>
> . . .
>
> The blame for continuing with such prosecutions must be shared by the prosecution, defence counsel and the courts concerned, but one wonders why it was the prosecution continued with such prosecutions after the Court

of Appeal decision. In the present case one might ask whether the reluctance of the administration to respond to the Privy Council's judgment by taking practical measures is consistent with a good faith interpretation of its undertaking under article 2 of the ICCPR to 'respect and ensure' the rights guaranteed by the Covenant and to ensure that a person whose rights are violated has an 'effective' remedy, not just in formal terms, but as a practical matter. That the Attorney General should be prepared to take such remedial action only after more public money is spent on mounting, defending and hearing the inevitable challenge is a matter of considerable concern."

We have subsequently received the following information from the Attorney General's Chambers:

"Following the ruling of Mr J Acton Bond in the case of *Lee Kwong-kut*, the DPP wrote in October 1991 to the Commissioner of Police instructing that pending section 30 trials were to be adjourned pending the Court of Appeal's decision and new section 30 charges should be laid 'as sparingly as possible'. In view of the delay in having the matter listed before the Court of Appeal, the DPP sought an expedited hearing and advised the Commissioner of Police in April 1992 that no new section 30 charges were to be laid without the specific advice of the Attorney General's Chambers -- in particular any possible section 30 charges were to be referred to [the prosecutor responsible for *Bill of Rights* matters]. Police files for the trials adjourned between October 1991 and April 1992 (approximately 50) were referred . . . for review. Almost all were written off *before* the decision of the Court of Appeal -- those that were not were written off immediately after that decision by being brought up before Magistrates and the Crown offering no evidence.

Despite the DPP's instructions, there were cases where the Police did lay charges without seeking advice after April 1992 (and before the CA decision) -- Court Prosecutors identified such matters, referred them [to AGC] and were advised to offer no evidence (or amend the charge if sufficient evidence was available).

. . . It is *possible* that the Police could have laid charges in ignorance of the DPP's instructions and in direct contravention of an instruction from the office of the Commissioner of Police circulated throughout the Police Force. If so, such action was in error and the charges would have been dropped immediately they came to the attention of anyone aware of either the directions of the DPP or CP. The Bulletin Editorial indicates that there was a deliberate policy to continue section 30 prosecutions after the decision of the Court of Appeal in *Lee Kwong-kut* -- the fact is nothing could be further from the truth.

The figure of 386 cases for convictions of section 30 offences after 8.6.91 is correct -- but the large majority of these relate to trials conducted *before* the Acton-Bond ruling, let alone the Court of Appeal decision. Those after the Acton-Bond ruling in large measure were please of guilty by defendants (who often insisted on having the matter dealt with immediately rather than face a long adjournment pending the CA decision)."

We readily accept that the DPP and the Attorney General's Chambers acted in an exemplary fashion taking the actions they did; so also the Commissioner of Police in issuing the relevant circular. Our earlier comments were not intended to suggest that there was a deliberate policy to continue with section 30 prosecutions without regard to the decisions in the courts and we accept that this was not the case. However, the information

available to us does confirm that a small number of cases escaped this net and either proceeded to a conviction upon a plea of guilty after the Court of Appeal decision or were stopped only when defence counsel pointed out that section 30 had been repealed. These would appear to have been cases that slipped through the net, as occasionally happens in large organisations.

The question which still remains, however, is this: if the Director of Public Prosecutions thought it appropriate to take the action which he did following the Acton-Bond decision, why is the Attorney General now refusing to take action on his own initiative to have the convictions which were entered under section 30 quashed and/or expunged from the records of those persons affected? Should public money be spent to provide legal aid for those affected to fight the matter in the courts, where the claim may even be opposed by Crown counsel (also paid for out of public funds?) It would seem much simpler -- and would no doubt be cheaper -- to deal with the matter in the same way the Crown dealt with those cases in which convictions were held void because of a failure to obtain the Governor's consent to prosecutions.

The decision in *Lee Kwong-kut* also reveals the problem of "retrospective" repeal. As any legislation which is inconsistent with the *Bill of Rights* is repealed as from 8 June 1991, all actions taken or criminal charges laid pursuant to the repealed statutory provision between 8 June 1991 and the date when the statutory provision was declared inconsistent by the court are be rendered null and void. As has been noted by various commentators, this problem will become more acute as time passes. Indeed, this fact was a matter taken into account explicitly by Judge Kilgour in *R v Hui Kwok-fai* (page 8 below), in order to support a narrow construction of article 5(1) of the *Bill of Rights*.

REPORTS DUE OR RECENTLY SUBMITTED UNDER UNITED NATIONS HUMAN RIGHTS TREATIES IN RESPECT OF HONG KONG (AS OF NOVEMBER 1993)[1]

Convention[2]	Applied to Hong Kong	Last report	Next report due	Consideration by treaty body
ICERD	1969	1992[3]		
ICCPR	1976	1989/1991[4]	August 1994	Probably 1995
ICESCR	1976	1993 (arts 10-12, 13-15)[5]		December 1994
			1994 (all articles)	----
CAT	1992	--	January 1994 (initial)	Probably late 1994
CRC	Not yet extended to HK	--	--	----
ICEDAW	Not yet extended to HK	--	--	----

[1] The text of all these treaties, together with the text of the United Kingdom's reservations, appears in A Byrnes & J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993).

[2] For an explanation of the abbreviations, see the next page.

[3] The text of this report appears in A Byrnes & J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993) at pp 502-505 and in A Byrnes & J Chan (eds), *Bill of Rights Bulletin*, v 2, n 1, November/December 1992, Appendix D.

[4] The reports and the summary records of the consideration of them by the Human Rights Committee appear in A Byrnes & J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993) at pp 419-501.

[5] The text of these reports appears in A Byrnes & J Chan (eds), *Bill of Rights Bulletin*, v 2, n 4, December 1993, Appendix C.

Abbreviations

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CAT	Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ICEDAW	Convention on the Elimination of All Forms of Discrimination Against Women

CASES

RIGHT NOT TO BE ARBITRARILY DEPRIVED OF ONE'S LIBERTY (BILL OF RIGHTS, ARTICLE 5(1); ICCPR, ARTICLE 9(1))

Crimes Ordinance (Cap 200), s 123

R v Hui Kwok-fai **(1993) DCt, Crim Case No 1124 of 1992, September/October 1993, Judge Kilgour**

The defendant had been charged with an offence under section 123 of the *Crimes Ordinance* (Cap 200), which provides:

> "A man who has unlawful sexual intercourse with a girl under the age of 13 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life."

Previous authority had established that the prosecution was required to prove only that the victim was a girl under 13 and that the accused had had unlawful sexual intercourse with her. The Crown is not required to prove that the victim was in fact under 13, and a belief that the girl was over 13 has been held not to provide a defence to the charge.

The defendant applied to strike out the charge on the ground that section 123 was inconsistent with articles 5(1), 10 and 11(1) of the *Bill of Rights* and had therefore been repealed by virtue of section 3(2) of the *Bill of Rights Ordinance*.

Held (dismissing the application):

Article 5(1) of the *Bill of Rights*

1. Article 5(1) of the *Bill of Rights* does not address the substantive content of laws which, if contravened, may result in a deprivation of liberty, but is directed at ensuring a reasonable and justified application of the law, not whether the law itself is reasonable and justified.

2. The use of the word "arbitrary" in article 9(1) of the ICCPR and article 5(1) of the *Bill of Rights* implies a guarantee of a reasonable and justified application of the powers of arrest and detention provided for in a law which confers those powers. It is essentially a procedural protection against the deprivation of liberty.

3. The wording of article 5(1) of the *Bill of Rights* was different from section 1 of the *Canadian Charter*, which provided protection against the deprivation of liberty other than in accordance with "the principles of fundamental justice". There was no basis for contending that, by enacting article 5(1) and providing protection against deprivation of liberty except on such grounds as are established by law", the legislature intended the wholesale importation of Canadian law. It was therefore not appropriate to interpret article 5(1) in the manner in which section 1 had been interpreted, namely as permitting substantive scrutiny of laws permitting deprivation of liberty rather than providing a procedural protection.

4. A further reason for not interpreting article 5(1) in a manner analogous to section 1 of the *Canadian Charter* was that, where a law was declared inconsistent with the *Charter*, the ruling of inconsistency operated prospectively, that is from the date of the declaration. Under the *Bill of Rights Ordinance*, legislation inconsistent with the *Bill of Rights* was repealed with effect from 8 June 1991. If the Canadian approach were adopted, the possibility (or perhaps probability) would arise that a law could be held to have been repealed in June 1991 many years after cases had been decided.

Articles 10 and 11(1) of the *Bill of Rights*

5. Neither article 10 nor article 11(1) of the *Bill of Rights* provides more than procedural protection. Article 10 is a guarantee of a fair hearing, not a guarantee of a fair law, and does not provide a judicial mandate to examine the fairness or reasonableness of laws.

6. Neither article 10 nor article 11(1) of the *Bill of Rights* prevents the enactment of absolute liability offences.

Per curiam

In Hong Kong as in most other civilised jurisdictions laws are enacted to protect the young from the sexual depredations of their elders. It is this legislature's clear intention that young girls be protected and if necessary from themselves. Thus the fact that a defendant may believe that a girl is over thirteen, or the fact that she consented has deliberately been ruled as of no consequence in fashioning this offence.

Applying that realism and good sense urged on us by Lord Woolf in *Attorney General v Lee Kwong-kut*(1993) 3 HKPLR 72, there seems to be nothing fundamentally unfair about a law that seeks to protect girls under thirteen from being coerced or encouraged into sexual intercourse even if they are willing.

S Wong, for the Crown; S Haldane, for the defendant.

***Crimes Ordinance* (Cap 200) s 124(1)**

***R v Chong Ka-man* (1993) Mag, Case No SPC616/93, Magistrate J Barnes**

The defendant was charged with an offence under section 124(1) of the *Crimes Ordinance* (Cap 200), which provides:

> "(1) Subject to subsection (2), a man who has unlawful sexual intercourse with a girl under the age of 16 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years."
>
> [Section 124(2) deals with the situation which arises in relation to a marriage which is invalid by reason of the wife being under the age of 16.]

The defendant challenged s 124(1) on the ground that it was inconsistent with articles 5(1) and 11(1) of the *Bill of Rights*. He argued that the absence of a mens rea requirement relating to the age of the girl was a violation of the *Bill of Rights*. The defendant submitted that the court could construe the provision consistently with the *Bill of*

Rights by reading in a due diligence defence, that is by requiring the Crown to prove either that the defendant knew or should have known that the girl was under the age of 16.

Held (rejecting the challenge):

1. The wording of article 5(1) of the *Bill of Rights* was different from section 1 of the *Canadian Charter*, which provided protection against the deprivation of liberty other than in accordance with "the principles of fundamental justice". It was not appropriate to interpret article 5(1) of the *Bill of Rights* in the manner in which section 1 had been interpreted, namely as permitting substantive scrutiny of laws permitting deprivation of liberty rather than providing a procedural protection. Section 124(1) was therefore not inconsistent with article 5(1) of the *Bill of Rights* because of the absence of a mens rea requirement as to age.

   R v Hui Kwok-fai (1993) DCt, Crim Case No 1124 of 1992, noted above page 8, followed.

2. The only duty of a court considering the consistency of legislation with the *Bill of Rights* is to decide whether that legislation is or is not inconsistent with the Hong Kong Bill. It is not for the courts to redraft legislation or for that matter make suggestions for the form of future legislation, where the legislation is found to be inconsistent with the *Bill of Rights*.

   R v Sin Yau-ming (1991) 1 HKPLR 88 at 104, [1992] 1 HKCLR 127 at 138, referred to.

3. It was not possible to construe s 124(1) as containing an implied "due diligence" test, since it was the clear intention of the legislature to impose strict liability in relation to the age of the victim.

4. Article 11(1) of the *Bill of Rights* does not prohibit the creation of a strict liability offence.

Dutiable Commodities Ordinance (Cap 109), sections 17(1), (6), (8) and 48

R v Fong Chin-yue and others, SK No 16038 of 1993

In this case a challenge to provisions of the ***Dutiable Commodities Ordinance*** (Cap 109) is being made on the ground that they impose absolute liability and that this is inconsistent with article 5(1) of the *Bill of Rights*.

Gambling Ordinance (Cap 148), sections 5, 6

R v Wong Lai-shing (1993) Mag, TNC No 5833 of 1993, 19 October 1993, Mr P Li

The defendants had been variously charged with offences against sections 5 and 6 of the *Gambling Ordinance* (Cap 148), including the offence of managing a gambling establishment contrary to section 5(b) of the *Ordinance*, assisting in the management of a gambling establishment contrary to section 5(c), and gambling in a gambling establishment contrary to section 6.

Section 5 of the *Ordinance* provides:

"Any person who on any occasion--

(a) operates a gambling establishment;

(b) manages or otherwise has control of a gambling establishment;

(c) in any capacity assists, either directly or indirectly in the operation or in the management of a gambling establishment,

commits an offence and is liable--

(i) on summary conviction to a fine of $5,000,000 and to imprisonment for 2 years; or

(ii) on conviction on indictment to a fine of $5,000,000 and imprisonment for 7 years."

Section 6 of the *Ordinance* provides:

"Any person who gambles in a gambling establishment commits an offence and is liable--

(a) on first conviction to a fine of $10,000 and to imprisonment for 3 months;

(b) on second conviction to a fine of $20,000 and to imprisonment for 6 months;

(a) on third or subsequent convictions to a fine of $30,000 and to imprisonment for 9 months."

The defendants charged under section 6 challenged the provision on the ground that its failure to incorporate a requirement that the prosecution prove that the defendant knew that (s)he was gambling in a gambling establishment meant the section was inconsistent with article 5(1) of the *Bill of Rights*. The argument made, primarily by reference to Canadian authority, was that in the case of a true criminal offence it was necessary to provide for a minimum mens rea.

Held (dismissing the *Bill of Rights* challenge):

1. Article 5(1) provided more than a merely procedural protection which ensured that arrest or deprivation of liberty would be carried out in accordance with a national law. Rather, it had a substantive aspect, which required in addition that the law authorising the arrest or detention not be arbitrary.

2. The term "arbitrary" is this context means unjust, unreasonable or capricious, involving a lack of predictability or otherwise inappropriate. However, it could not be assumed that the case law which had developed under section 7 of the *Canadian Charter* could be applied without modification when interpreting the term "arbitrary".

3. The criteria laid down in *Gammon* for determining whether a statutory provision imposed strict liability incorporated an assessment of whether in the circumstances of the particular statute it was just to interpret a provision as imposing strict liability. Accordingly, a statutory provision which is construed in the light of the *Gammon* criteria as imposing strict liability is not inconsistent with the substantive guarantee of justice in article 5(1).

4. Even if the Canadian approach were adopted, the result would be the same. The Canadian position was that it is a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself necessitate a level of fault which reflects the particular nature of the offence. For regulatory offences a minimum requirement of negligence is warranted.

5. The offence under section 6 was a regulatory offence and, in view of the various defences to liability provided for in section 3 of the *Ordinance*, a person proved to be gambling in a gambling establishment is in no sense "entirely innocent" whatever the state of his actual knowledge as to the nature of the premises, ignorance of the nature of the premises itself being a form of negligence.

6. Under section 5 the prosecution is not absolved from proving any of the elements of the offence, namely that there is gambling on premises which are a gambling establishment and that the accused operates, manages or assists in such with knowledge that the premises is a gambling establishment. The accused is only required to prove that the gambling is lawful, that is, within section 3(2)-(8). The provision falls squarely within the category of provisions referred to in *R v Edwards* [1975] QB 27, 39-40 and accordingly is not inconsistent with the presumption of innocence in article 11(1).

Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man (1993) 3 HKPLR 72, applied.

Editorial comment

The issue whether article 5(1) of the *Bill of Rights* is no more than a procedural guarantee -- guaranteeing that any deprivation of liberty must be provided for by law in the formal sense (statute or common law in the Hong Kong context) and must take place in accordance with that law -- or whether it also permits a substantive review of the grounds on which arrest or detention is permitted under the law has arisen in a number of Hong Kong cases.

To date there have been a number of judgments or rulings directly addressing the issue in the District Court and the Magistrates Court; no superior court has yet pronounced on the issue, although it has been the subject of argument in a number of cases, including *Attorney General v Lee Kwong-kut* in the Court of Appeal and Privy Council and the Court of Appeal in *R v Wong Yan-fuk* (page 19 below).

The majority of decisions so far have concluded:

1. that article 5(1) does not permit the substantive review of the law which authorises arrest or detention -- provided that there is such a law and the arrest or detention is carried out in accordance with it; the protection afforded by article 5(1) is spent.

2. a fortiori, in interpreting article 5(1), the Canadian authorities on s 7 of the *Charter* are not relevant.

With respect to the courts which have decided that article 5(1) does not provide substantive protection, it appears that this conclusion is extremely dubious and reflects an approach to the interpretation of fundamental rights provisions deprecated by the Privy Council as "the austerity of tabulated legalism". The drafting history of article 9(1) of the Covenant shows fairly clearly that the provision provides more than a procedural protection and protects one against detention in accordance with laws which are themselves unjust, and subsequent case law also supports this conclusion.

The third sentence of article 5(1) plainly provides a procedural guarantee, namely that a person can only be arrested in accordance with the terms of and procedure laid down by a law. The second sentence ("No one shall be subjected to arbitrary arrest or detention") can be interpreted as merely reiterating this -- "arbitrary" meaning on this view "illegal" -- or it can be read as an additional substantive guarantee. If one were to heed the rhetoric that the *Bill of Rights* is to be given "a generous and purposive construction", then it would seem sensible to conclude that the drafters did not simply mean to repeat themselves, but that the second sentence provides an additional guarantee. (see Hassan, "The Word 'Arbitrary' as used in the Universal Declaration of Human Rights", (1969) 10 *Harvard International Law Journal* 225, 228.)

This interpretation would appear to be confirmed by the drafting history and subsequent commentaries on article 9(1). For example, when article 9 of the ICCPR was being drafted the representatives of Australia, Denmark, France, Lebanon and the United Kingdom noted the inadequacy of a guarantee which relied only on procedures prescribed or established by domestic law with respect to arrest and detention:

> "'The words "as established by law" in paragraph 2 although intended as a safeguard against abuse, do not appear to be effective for that purpose. As was pointed out in the course of debate, any dictator would be prepared to accept such an article.' (Report of the Fifth Session of the Commission on Human Rights, Lake Success, May-June 1949, UN Doc E/1371, pp 31-33 Item (b))."[1]

As Mr P Li noted in *R v Wong Lai-shing*, the Committee of Experts which reported in 1970 on the implications for States parties to the European Convention of Human Rights of the adoption of the ICCPR commented (*Report of the Committee of Experts on Human Rights to the Committee of Ministers* (Council of Europe, 1970), paras 27, 29 and 106):

> "The U.N. Commentary shows that the term 'arbitrary' was intended to cover two separate notions: 'illegal' and 'unjust'. This is particularly evident as regards the prohibition of 'arbitrary arrest or detention', because the following sentence requires that any deprivation of liberty must be in accordance with the law. If it was thought necessary to insert the additional requirement that it shall not be 'arbitrary', then 'arbitrary' must mean something other than 'illegal'. The word 'arbitrary' was added to introduce the notion of justice, for it was recognized that national legislation might at times be arbitrary or arbitrarily applied.
>
> . . .
>
> To sum up, it would appear that the terms 'arbitrary' and 'arbitrarily' are intended to mean both 'illegal' and 'unjust', and may also include the conceptions 'capricious' or 'unreasonable'."
>
> "The experts considered that, while the Covenant text [of article 9(1)] is vague and uncertain, it would appear from the travaux preparatoires that the intention was to introduce the concept of justice in addition to that of conformity with the law . . .".

Furthermore, the Human Rights Committee in *Van Alphen v Netherlands*, Communication No 305/1988 commented (at para 5.8):

> "The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest

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[1] Quoted in *X v United Kingdom* , European Commission of Human Rights, Application No 6998/75, Report of 13 October 1980, Series B, No 41, p 38, para 132.

> must not only be lawful but reasonable in all circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime . . ."

Against this background it seems difficult to maintain that article 5(1) provides only a procedural protection. One hopes that the courts, when faced squarely with this issue again, will take account of the background to article 9(1) and the international consensus on the article's substantive content. It may be that the conclusions of the courts in these few cases have been influenced by the perceived lack of merit in the challenges based on article 5(1). The outcomes could, however, have also been justified on the basis of a broader construction of article 5(1), namely that, while the provision does permit substantive review, in the context of sexual abuse or gambling cases, the imposition of strict liability is a fair and proportionate measure for the achievement of a legitimate and important objective (the protection of children and addressing the phenomenon of gambling and related activities). Such an approach would also reflect the Privy Council's injunction that the *Bill of Rights* must be approached with realism and good sense, while nonetheless interpreting the rights themselves in a broad and generous manner.

The narrow and restrictive approach adopted by the courts in these cases may render the courts helpless to protect individual rights when in a future case they face a draconian provision which quite unreasonably imposes strict liability.

EQUALITY BEFORE THE COURTS (BILL OF RIGHTS, ARTICLE 10; ICCPR, ARTICLE 14(1))

***Magistrates Ordinance* (Cap 227), section 104**

***Attorney General v New Times Limited*, Mag App No 814 of 1993**

This case was heard by the Court of Appeal on 30 December 1993 and judgment was reserved. The case involves a challenge to a failure to provide an acquitted defendant with details of an appeal lodged by the Crown until some months after the appeal had been lodged.

RIGHT TO A FAIR HEARING BEFORE A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL IN THE DETERMINATION OF RIGHTS AND OBLIGATIONS IN A SUIT AT LAW (ARTICLE 10, BOR; ARTICLE 14(1), ICCPR)

***Buildings Ordinance* (Cap 123), s 27**

***Building Authority v Business Rights Ltd* (1993) DCt, Civil Case No 940 of 1993, Judge Downey, 26 November 1993**

The respondent (Business Rights Ltd) was the owner of a plot of land in Shek O village, on which his predecessor had erected a three-storey building without the approval of the applicant and in spite of a warning letter from the applicant on 7 November 1990. On 30 January 1991 the applicant made a demolition order which has not been complied with. As a result, the applicant sought a closure order pursuant to s 27 of the *Buildings Ordinance* (Cap 123). Notice of intention to apply for a closure order was served on the respondent on 21 November 1991. The respondent appealed unsuccessfully against this decision. However, as the result of the appeal was not announced until August 1992, the

applicant issued, on 8 October 1992, a fresh notice of its intention to apply for a closure order. The respondent again unsuccessfully appealed against this decision in February 1993.

Following this, the applicant applied to the District Court for a closure order. The hearing of the application was initially fixed for 23 September 1993, but was subsequently adjourned pending a subsequent application by the respondent to the High Court for relief, which was unsuccessful. In the present proceedings, the respondent opposed the application for a closure order on the grounds that the legislative machinery of control found in Part II of the *Buildings Ordinance*, in particular section 27 of the *Ordinance*, infringed articles 10, 14 and 22 of the *Bill of Rights*.

Section 27(1) of the *Buildings Ordinance* provides:

"(1) Upon the application of--

(a) the Building Authority, where he is of the opinion that--

(i) any building is dangerous or liable to become dangerous; or

(ii) any building should be closed in order to enable any works, which he is empowered to carry out or cause to be carried out under this Part, to be carried out without danger to the occupiers or to the public; or

(b) the owner--

(i) where a notice has been served upon him by the Building Authority requiring closure of a building under section 26; or

(ii) where the Building Authority has supplied a certificate to him showing that a building should be closed in order to enable building works to be carried out without danger to the occupiers or to the public;

the District Court shall on being satisfied that notice has been given in accordance with the provisions of subsection (2) make a Closure Order . . "

Held (granting the closure order):

Equality before the law (article 22)

1. The owners of land in the New Territories may obtain wider exemptions from the requirements of the *Buildings Ordinance* than owners of land in the other parts of Hong Kong. While s 24B of the *Buildings Ordinance*, which confers a wide discretion on the District Court to grant closure orders, applies to New Territories land, whereas s 27 of the *Buildings Ordinance*, which imposes apparently narrow and mandatory functions on the District Court, applies to land elsewhere in Hong Kong, the distinction is based on geographical differences and not upon discrimination on the ground of national or social origin, property, birth or other status. Accordingly, sections 24 and 27 of the *Buildings Ordinance* do not violate article 22 of the *Bill of Rights*.

Arbitrary and unlawful interference with home (article 14)

2. While the making of a closure order clearly involved an interference with a person's home, article 14 prohibits only unlawful or arbitrary interference. The respondent has had numerous opportunities to challenge the original and subsequent decisions of the Building Authority, but had either failed to do so or had done so unsuccessfully. The respondent had not established that the Building Authority's handling of the case had been either arbitrary or unlawful.

Right to fair hearing in the determination of rights and obligations in a suit at law (article 10)

3. The making of a closure order by the District Court involves the determination of "rights and obligations in a suit at law" and hence such act attracts the scrutiny of the court for its compatibility with article 10 of the *Bill of Rights*.

Commissioner for Inland Revenue v Lee Lai-ping (1993) 3 HKPLR 141, followed.

4. While the *Bill of Rights* must be given a liberal and purposive interpretation, its interpretation should be approached with realism and good sense. Article 10 of the *Bill of Rights* is aimed primarily at ensuring that lawful rights and legitimate expectations are not defeated by the arbitrary or unnecessary conduct of public authorities, and that persons accused of contravening the rights of others, whether private or public, receive a certain minimal protection in the form of a fair trial of the disputed issues. It is not intended, and should not be construed, so as to condone unlawful activity by anyone, or to enlarge the rights of persons involved in illegal activities.

5. Viewed in isolation, a statutory provision such as s 27 of the *Buildings Ordinance*, which enables the Building Authority to obtain a closure order from the District Court, when the court is not permitted to inquire into the merits and hear representations or evidence from those who will be adversely affected may be inconsistent with article 10 of the *Bill of Rights*.

6. However, considered in context, s 27 is the final stage in a series of stages in the legislative machinery for dealing with contraventions of the *Buildings Ordinance*, and the statutory scheme as a whole provides ample opportunities for appealing against decisions of the Building Authority to an appeal tribunal which meets the requirements of article 10. The fact that s 27 does not allow the District Court to inquire into the validity of the demolition order therefore does not constitute a violation of article 10 of the *Bill of Rights*.

Per curiam

The Building Authority should re-consider its usual practice when seeking a closure order. Supporting affirmations for such application should be filed in the District Court not less than 7 days before the District Court is invited to make the order. They should not just recite the statutory language. More details of the factual history of the case, particularly on how and when the Building Authority became empowered to carry out the works in question, or why the building is or liable to become dangerous, should be given.

A Au (of the Attorney General's Chambers), for the applicant; N Pirie (instructed by S H Leung & Co), for the respondent.

Editorial comment

The decision of the court that any failure of section 27 to satisfy the right of access to an article 10 tribunal in determining whether a closure order has properly been made is not fatal to the statutory scheme if review complying with article 10's requirements is available before another body is clearly correct. However, it may be that the constitution of The Appeal Tribunal, the primary appeal body which does provide the opportunity for substantive review, does not satisfy the requirement in article 10 that any hearing be before an "independent and impartial tribunal". Apart from some remarks in passing, the judge does not undertake a detailed examination of the composition of or the procedures applicable to the Appeal Tribunal.

Pursuant to section 43 of the *Buildings Ordinance* an appeal tribunal is appointed by the Governor and consists of three members, "of whom one shall be nominated by the Building Authority, one shall be an authorized person and one shall be appointed to represent property owners." (s 43(2)) Section 43(3) provides that members shall be remunerated except for those persons "who are in full-time employment in any office of emolument under the Crown".

The section thus appears to contemplate that one of the members (the one to be nominated by the Director of Buildings and Lands) may be a civil servant. In such a case it seems at least arguable that the tribunal might not satisfy the requirement of independence and impartiality required by article 10.

Control of Obscene and Indecent Articles Ordinance (Cap 390)

R v Cheng Pui-kit, CA, Mag App No. 165 of 1992 (on appeal from SK No. 5333 of 1991, Mr Ian Carlson Esq, 18 October 1991 (1991) 1 HKPLR 324

For details of this case, see *Bill of Rights Bulletin*, v 1, n 3, p 19. This is an appeal from the decision of Mr I Carlson in the Magistrates Court. Duffy J referred the appeal to the Court of Appeal on 10 July 1992. The appeal was adjourned in May 1993 by the Court of Appeal pending the outcome of the judgment of the Privy Council in *Lee Kwong-kut*. The appeal was further adjourned and is scheduled to be heard in February 1994.

R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd (1994) HCt, MP No 1245 of 1993

The first applicant was charged with an offence of publishing an indecent article without the statutory warning, contrary to section 24 of the *Obscene and Indecent Articles Ordinance*. The article concerned was a photo appearing in an article in one issue of *Ming Pao Weekly Magazine*. The photo, without the accompanying Chinese text, had been submitted to the Obscene Articles Tribunal and received an interim classification of Class II. The applicants were not aware of the interim classification, which had been published in two newspapers pursuant to section 19 of the *Ordinance*. As a result, the applicants had not applied for a full hearing within 5 days of the interim classification taking effect and the same became final. The applicants applied for judicial review against the classifications, arguing, inter alia, that the classification procedure as laid down in the *Ordinance* was inconsistent with article 10 of the *Bill of Rights*. The case was set down for hearing from 12-14 January 1993 before Mayo J.

RIGHT TO A FAIR HEARING BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL IN THE DETERMINATION OF A CRIMINAL CHARGE (BILL OF RIGHTS, ARTICLE 10; ICCPR, ARTICLE 14(1))

See *R v Flickinger* at page 25 below.

PRESUMPTION OF INNOCENCE (BILL OF RIGHTS, ARTICLE 11 (1); ICCPR, ARTICLE 14 (2))

Gambling Ordinance (Cap 148), section 19(2)

R v Choi Ka-on, Mag App No 316 of 1992

The Court of Appeal heard this case on 10 December 1993 and reserved its decision. As of early January 1994, no judgment had been delivered.

Immigration Ordinance (Cap 115), section 38A

R v Dragages et Travaux (1993) Mag, WSC 10241 of 1993, Magistrate M Yuen

This case involved a challenge to section 38A of the *Immigration Ordinance* (Cap 115) on the ground that it was inconsistent with articles 11(1) and 22 of the *Bill of Rights*. Section 38A provides in relevant part:

> "(2) Where it is proved that a person to whom section 38(1) applies was on a construction site, the construction site controller of that construction site commits an offence and is liable to a fine of $250,000.
>
> (3) It is a defence in proceedings for an offence under this section for the person charged to prove that he took all practicable steps to prevent persons to whom section 38(1) applies from being on the construction site."

The defendant argued that section 38A(3) violate the presumption of innocence guaranteed by article 11(1), since it placed an onus on the accused, and the section also violated article 22 in that the controller was unfairly discriminated against when compared with other economic sectors such as a factory owner, a restaurant owner or a lawyer.

Held:

1. There were two elements to the offence created by section 38A which the prosecution had to establish beyond reasonable doubt: that an illegal immigrant was found on a construction site, and that the defendant was the controller of the site. The offence was one of strict liability, with a defence provided to the defendant, who could avoid liability by proving on the balance of probabilities that he had taken all practicable steps to prevent illegal immigrants form being on the site.

2. The failure to take all practicable steps was an ingredient of the offence created by section 38A. However, the provision was not inconsistent with article 11(1), since the defence amounted to a proviso with the category of provisions described in *R v Edwards*.

Attorney General v Lee Kwong-kut (1993) 3 HKPLR 72, considered.

3. Adopting the more liberal approach of *R v Whyte*, section 38A(3) was a prima facie infringement of article 11(1) which had to be shown to satisfy tests of rationality, proportionality and minimal impairment.

4. The objective pursued by section 38A, addressing the problem of illegal immigrants, was an important and legitimate goal.

5. Placing the burden on the site controller to prove that he took all practicable steps to prevent the presence of illegal immigrants on construction sites was rational and proportionate measure, taking into account the following matters (inter alia):

   -- the fact that it was almost impossible for the prosecution to prove the steps taken by the controller

   -- the low likelihood that illegal immigrants would be on construction sites for purposes other than employment or to seek employment

   -- the fact that the controller was not strictly liable but could make out the defence of all practicable steps.

6. The provision did not violate the guarantee against non-discrimination in article 22 of the *Bill of Rights*.

Editorial note

One particularly interesting feature of this decision is the extensive reference made to Hansard, both for the purpose of interpreting the provision and for the purpose of assessing the objectives of the measure and its rationality and proportionaliity for the purposes of *Bill of Rights* analysis.

Right to be presumed innocent until proved guilty according to law -- Whether guarantee applies only to conviction or whether it has an application to sentencing -- Increased penalty for first offender where premises have been subject of a previous conviction by some other person

Massage Establishments Ordinance **(Cap 266), s 4**

***R v Wong Yan-fuk* (1993) CA, Mag App No 414 of 1993, Silke VP, Bokhary JA and Bewley J, 18 November 1993**

The appellant pleaded guilty to one count of managing an unlicensed massage establishment, contrary to section 4(1) of the *Massage Establishments Ordinance* (Cap 266) and was sentenced to imprisonment for six months.

He appealed against conviction and sentence and the matter was reserved by Mayo J to the Court of Appeal. The appeal against conviction was based on two grounds: that the facts set out in the statement of facts agreed between the prosecution and defence had not been read out in court (as it should have been), and that the magistrate had not noted that there had been an interpreter present throughout the proceedings (the presence of whom was required by article 11(2)(f) of the *Bill of Rights*).

The appellant based his appeal against sentence on a number of grounds, including the argument that he had been sentenced under section 4(4) of the *Ordinance* and that this provision was inconsistent with the presumption of innocence guaranteed by article 11(1)

of the *Bill of Rights* and had therefore been repealed. Section 4(4) provides that a person convicted of an offence under section 4(1) is liable to a higher penalty (that prescribed for second and subsequent offences) if it is shown that within 3 years prior to his conviction another person was convicted of such an offence in relation to the same premises, unless the defendant satisfies the court that at the time of his offence he did not know and had no reason to suspect that another person had been so convicted.

Section 4 of *Ordinance* provides:

"(1) 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.

(2) For the avoidance of doubt it is hereby declared that it shall not be a defence that a person charged with an offence under subsection (1) did not know that the operation of the massage establishment which is the subject of the offence was not licensed.

(3) Any person who commits an offence under subsection (1) shall subject to subsection (4) be liable --

(a) on first conviction to a fine of $50,000 and to imprisonment for 6 months;

(b) on a second or subsequent conviction to a fine of $100,000 and to imprisonment for 2 years.

(4) A person convicted of an offence under subsection (1) shall be liable to the penalty prescribed by subsection (3)(b) if within 3 years prior to the date of his conviction another person was convicted of an offence against that subsection committed in relation to the same place or a part thereof to which his conviction relates unless he satisfies the court that at the time of the offence under subsection (1) for which he is convicted he did not know and had no reason to suspect that another person had been so convicted."

Section 15 provides, among other things, that:

"For the purpose of any proceedings under this Ordinance a document purporting to be a

. . .

certificate signed by a police officer of the rank of Superintendent or above that the person named in the certificate was on the date specified in the certificate convicted of an offence contrary to section 4 and that the offence was committed in relation to any place stated in the certificate shall be admitted in evidence in any proceedings under section 4 on its production and without further proof and, until the contrary is proved, it shall be presumed that--

(i) the person who signed the certificate was a police officer of the rank stated in the certificate; and

(ii) any person named in the certificate was on any date specified in the certificate convicted of an offence contrary to section 4 and that the offence was committed in relation to any place stated in the certificate."

Held (dismissing the appeal against conviction, but allowing the appeal against sentence):

Appeal against conviction

1. There was no substance in the appeal against conviction: while the statement of agreed facts should have been read out in court and confirmed by the defendant, the failure to do so did not vitiate the plea of guilty which was unequivocal and complete in itself and was not dependent on any facts. The omission did not vitiate the magistrate's decision to accept the guilty plea. Nor did the agreed facts recite any facts which aggravated the offence; in any event, such an omission would only go to sentence rather than conviction.

2. There was no dispute that the appellant had been provided with the assistance of an interpreter throughout the proceedings. The failure of the magistrate to make a note of the interpreter's presence -- no doubt because it was a matter too routine and obvious to call for a note -- gave no ground for an appeal when the appellant's right to an interpreter had been respected.

Appeal against sentence

3. Quite apart from the question of the consistency of section 4(4) with article 11(1), the appeal against sentence should be allowed, since the sentence imposed had been too severe in the circumstances of the case, the magistrate had not alerted the defendant to the onus which he had to discharge under section 4(4) (even though on the second day of trial the appellant was unrepresented), and because the convictions of other persons which triggered the operation of section 4(4) had not been properly proved.

4. The words "proved guilty" in article 11(1) of the *Bill of Rights* are not to be construed narrowly to mean no more than convicted of the offence charged. Rather, those words are to be construed purposively and should be understood as meaning proved guilty of the acts or omissions punishable.

5. Article 11 was not confined in its protection to the process of trial and conviction; a number of the guarantees contained in the article, such as the right to an interpreter and the presumption of innocence (in relation to acts other than those proved by the prosecution or admitted by the defendant) applied to the sentencing process.

6. The approach to be adopted to determining whether a provision was inconsistent with the presumption of innocence was that laid down by the Privy Council in *Attorney General v Lee Kwong-kut*, namely the courts will look to matters of substance rather than merely of form. The question is twofold: first, whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard; and, secondly, where an exception is made to that general principle, whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines.

   Attorney General v Lee Kwong-kut (1993) 3 HKPLR 72, [1993] 3 WLR 329, [1993] 3 All ER 939, applied.

7. The substantive effect of section 4(4) was to make a first offender liable to the punishment for a repeat offender, if another person had similarly offended before him and he knew or had reason to suspect that. As a matter of substance, the most significant element of the subsection was the existence of knowledge or of reason

for suspicion on the part of the defendant; and the onus of disproving this was placed on the defendant.

8. It was not reasonable and proportionate to place a burden on the defendant to prove that he did not know or have any reason to suspect that another person had been convicted in respect of the same premises. The problem of regulating unlicensed massage parlours was not of the same order as the problems caused by drug trafficking; it was not unknown for the prosecution to prove knowledge (and proof of reason for suspicion was easier to establish). Accordingly, section 4(4) was inconsistent with the *Bill of Rights* and had therefore been repealed.

Per curiam

When determining whether a departure from the general principle that the prosecution must prove the case against the accused is permissible, application of a test along the lines suggested by Lawton LJ in *R v Edwards* [1975] QB 27 at 39-40 would often be all that is required; however, it was not the case that application of such a test would invariably be all that is required.

Editorial comment

This contribution by the Court of Appeal to the interpretation of the *Bill of Rights* is welcome in a number of respects, although it is unfortunate that the reasoning of the court is opaque in a number of respects. The decision reaffirms that, in interpreting article 11(1), the courts should look to matters of substance rather than merely of form, and holds that the presumption of innocence applies to post-conviction matters such as sentencing (a conclusion which applies, presumably, to confiscation of property following a conviction).

However, the approach of the court in analysing section 4(4) is not easy to understand from an analytical perspective and it is difficult to extract from the case much in the way of general principles for dealing with future cases (indeed, Bokhary JA states that the provision challenged appeared to be "unique"). It seems the court adopts the provisions challenged in *Lee Kwong-kut* and *Lo Chak-man* as the two extremes of a a spectrum, and tries to place section 4(4) on this scale. The application of the analysis developed in the context of a provision which places the burden of disproving a matter essential to guilt to a provision which permits an increased sentence does not appear to be a particularly happy one, despite the apparent analogy.

The court also makes only passing reference to the issue of whether section 4(4) is reasonable and whether it is a proportionate response to the social evil of operating massage establishments and associated activities, and the difficulties of controlling them.

In light of the Privy Council's lack of enthusiasm for Canadian authorities, the court eschews reliance on them, though Bokhary JA apparently finds the *Edwards*-based framework proffered by the Privy Council somewhat unsatisfactory. Whatever the drawbacks of the Canadian cases, they have the merit of supplying a clear analytical framework within which the issue of reasonableness and proportionality can be considered. The present case illustrates exactly the type of problems to which the kind of intuitive approach advocated by the Privy Council in *Lee Kwong-kut* gives rise.

RIGHT TO TRIAL WITHOUT UNDUE DELAY (BILL OF RIGHTS, ARTICLE 11(2)(C); ICCPR, ARTICLE 14(3)(C))

Right to trial without undue delay -- Relationship between common law and Bill of Rights -- Right to trial within a reasonable time or to release -- Remedies -- Violation of right to trial without undue delay -- Whether court obliged to grant stay once undue delay is shown --

***R v William Hung* (1993) CA, Crim App No 177 of 1992, Yang CJ, Penlington and Bokhary JJA, 26 October 1993**

The appellant had been arrested on 26 September 1990 and was charged with a number of offences relating to the possession of and trafficking in dangerous drugs. He was remanded in custody from that time until 13 March 1992, when Duffy J (before whom the appellant's trial had commenced on 5 March 1992), granted him bail.

Before Duffy J the appellant sought a stay of the proceedings against him. He argued that arguing that he was entitled to a stay both under the common law rules relating to abuse of process and also because his rights to trial within a reasonable time (article 5(3) of the *Bill of Rights*) and to trial without undue delay (article 11(2)(c) of the *Bill of Rights*) had been violated.

Duffy J, while holding that the appellant's right to trial within a reasonable time had been violated by his being held in custody for 526 days (17 months), rejected the application for a stay based on common law grounds and held that the appellant's right to trial without undue delay under article 11(2)(c) had not been violated: [1992] 2 HKCLR 90. The defendant was subsequently convicted on one count of trafficking in dangerous drugs, contrary to sections 4(1)(a) and (3) of the *Dangerous Drugs Ordinance* (Cap 134) and was sentenced to nine years' imprisonment. In sentencing the appellant, the judge took as a starting point a period of 12 years' imprisonment and reduced this period by 3 years in order to reflect the extended period he had spent in custody pending trial. In so doing the judge gave additional credit for the violation of his right under article 5(3) of the *Bill of Rights*.

The appellant appealed to the Court of Appeal against conviction and sentence.

Held (dismissing the appeal against conviction, but allowing the appeal against sentence):

1. At common law where an application for a stay of proceedings is made on the ground of undue delay, no stay should be granted unless the defendant shows on the balance of probabilities that he will suffer prejudice to the extent that no fair trial can be held, subject to the qualification that it may be appropriate to infer prejudice where there has been lengthy delay.

   Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 3 WLR 249; *Tan v Cameron* [1992] 2 AC 205, followed; *Attorney General's Reference (No 1 of 1990)* [1992] 1 QB 630 at 643-644, considered.

2. The task of the court in determining a stay application is not simply to decide whether or not there has been an infringement of the defendant's entitlement to be tried without undue delay and, if there has, automatically to stay the prosecution. Rather, in such a case its duty is to grant such remedy as is within its jurisdiction and as it considers just and appropriate in the circumstances.

Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 3 WLR 249, applied.

3. In analysing an undue delay claim, it is appropriate to adopt the following three-stage inquiry:

a. First, whether there has been undue delay in bringing the defendant to trial.

b. If so, whether a stay is an appropriate and just remedy for the violation of the defendant's right that has taken place. The test to be applied, other than in exceptional cases, is that applicable at common law, namely whether delay has precluded a fair trial.

c. If not, whether the case is an exceptional one in the sense in which a stay should be granted under the *Bill of Rights* even though a stay would not be granted under common law.

4. In the circumstances of the present case the period of 17 months between the appellant's arrest and the commencement of the trial involved undue delay.

5. Despite the existence of undue delay, it could not be said in the circumstances of the present case -- in particular the simplicity of the crucial issue at trial of the defendant's knowledge -- that the delay had precluded a fair trial.

Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 3 WLR 249, applied.

6. While there may be a difference between the approach to be adopted to determine stay applications under the common law and applications under the *Bill of Rights*, there was nothing in the circumstances of the present case which carried the application beyond the general run of stay applications into the rare category of applications which are capable of succeeding upon a test different from the one generally applied in such applications.

Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 3 WLR 249, considered.

7. In sentencing the appellant, a more appropriate starting point would have been a period of imprisonment of 10 years rather than the 12-year period the judge adopted. However, the judge had been perfectly entitled to reduce that period to reflect not only the time spent in custody (which is normally taken into account in the computation of the time a defendant serves pursuant to his sentence) but also appropriately to recognize in a case of undue delay the effect upon a person of a prolonged wait before his trial on a criminal charge, particularly one of great severity. The appropriate sentence was therefore 7 years' imprisonment.

Attorney General v Ching Kwok-hung [1991] 2 HKLR 125, considered.

A Macrae (instructed by the Director of Legal Aid), for the applicant; S Wong (of the Attorney General's Chambers), for the Crown.

Abuse of process -- Undue delay -- Oppression

R v Flickinger **(1993) DCt, Crim Case No 77 of 1993, Judge Britton 16, 20 September 1993**

The defendant was charged in Hong Kong with common law conspiracy to defraud, the offence alleged to have taken place in 1986. He absconded from the jurisdiction and was arrested in New Zealand on 29 April 1989. After a prolonged legal battle in New Zealand, he was extradited to Hong Kong in November 1990. He first appeared before a magistrate in Hong Kong on 30 November 1990 and was remanded in custody. Bail was granted on 20 December 1991, but was revoked by the High Court shortly thereafter and he remained in custody until 21 January 1993. On 6 February 1991 he elected for a full committal, which concluded on 3 December 1991 with the finding of a case to answer. He was unrepresented at the committal. Although he was granted legal aid, the grant of legal aid was confined to representation at the trial and preparation for the trial. The Legal Aid Department revoked the defendant's legal aid certificate on 28 August 1991, but it was subsequently restored in May 1992. Various pre-trial hearings took place before Mr Justice Duffy between September 1992 and January 1993. On the trial date in early February 1993 the case was transferred back to the District Court for trial.

On 3 May 1993 the defendant applied for a permanent stay of prosecution on the grounds of abuses of process under common law, and a violation of his right to a fair hearing and the right to trial without undue delay guaranteed by articles 10 and 11(2)(c) of the *Bill of Rights*.

Held (ordering a stay of proceedings):

1. The revocation of the legal aid certificate was largely the result of the defendant's own fault. He has not suffered any specific prejudice as a result. Even if he has been handicapped in having to prepare for his defence in the appalling conditions in the remand centre, any handicap had been adequately overcome by the subsequent restoration of legal aid well before the hearing.

2. The allegation that the committing magistrate attempted to induce improperly the defendant to cut short the committal proceedings was unfortunate but unfounded. No matter how benevolent the magistrate's intention, it was an act of folly to have private meetings with an unrepresented defendant without the presence of the prosecution.

3. It was reasonable possible to infer from evidence, which remained unrebutted, that one of the counsel formerly involved in the prosecution had acted mala fide. However, since that counsel had not been involved in the case for over three years, and any adverse effect (if any) his conduct may have had on the defendant's receiving a fair trial had long since dissipated.

4. The duty of a prosecuting counsel is to present his case fairly and in the overall interests of justice. It is inappropriate for a Crown Counsel to be act both as counsel and a witness in the same case, if the counsel appears as anything other than a purely formal witness..

5. The defendant had not been prejudiced by the non-availability of a number of witnesses whom he wished to call as defence witnesses. Some of these witnesses were available but the defendant had not attempted to contact them. Some of them could not give relevant or admissible evidence. The statements of the other witnesses did not show anything which would be helpful to the defendant.

6. Article 10 of the *Bill of Rights* guarantees the defendant a right to a fair trial and article 11 guarantees the enjoyment of the rights contained in it in full equality. The effect of s 22A(3) of the *Evidence Ordinance* seems to be that while the prosecution may use computer records to prove their case, a defendant director may not use them to challenge the case against him. This seems hardly fair. However, as the records sought to be introduced in this case had been generated on a machine that may not be a computer at all, the printed records from the machine were in any event available and the defendant had no suffered any prejudice, it was not necessary to decide whether s 22A(3) of the *Evidence Ordinance* is consistent with the *Bill of Rights*.

Undue delay

7.(a) There had clearly been undue delay in this case. The delay, which was neither intended nor desired, was the resulted from three causes: the actions of the Crown, those of the defendant, and institutional delay.

Delay resulting from the prosecution's actions

(b) The prosecution was only partly to blame for the delay. Although the Crown had acted bona fide in its choice of the High Court as the trial venue and had not sought to deny the defendant's basic rights, its decision as to the trial venue, a decision which lies entirely within the discretion of the Crown, was a mistaken decision, clouded by a certain degree of entrenched but unfair belief that the defendant was indulging in a war of attrition.

Delay resulting from the defendant's actions

(c) While a defendant cannot take advantage of any delay which he has caused even by legitimate pre-trial manoeuvres in determining whether the overall delay is reasonable or not, the court is entitled to take a more benevolent view of delay caused by the bona fide and justifiable exercise of one's rights. The defendant's actions, particularly his opposition to the extradition proceedings, has contributed to a delay of about 14 to 15 months. The prosecution was also responsible for the delay in the extradition proceedings by laying a large number of unnecessary charges. The actions of the defendant were bona fide and there was no evidence of deliberate delaying tactics on his part.

(d) The purpose of the introduction of paper committals was not to deprive a defendant of his rights or ability to test the evidence, but to save time and money where the defendant did not require a committal. A contested preliminary enquiry is part of due process, and should never be thought of as a waste of time.

Institutional delay

(e) There had been lengthy institutional delay and the case had not been brought to trial with any special diligence. However, some allowance had to be made in the in the period immediately following the commencement of the *Bill of Rights* in order to enable the administration to adjust to its requirements.

R v William Hung [1992] 2 HKCLR 90, followed.

Prejudice

8. General prejudice is to be inferred from the fact that witnesses' memories will be clouded by the passage of time. The defendant suffered no specific prejudice as a result of the late service of statements relating to another arguably related conspiracy trial against one of his former employees.

Duty of the prosecution to make material witnesses available

9. Where the prosecution have a statement from a witness who can give material evidence, but decide not to call him, they have a duty to make that person available as a defence witness and supply his particulars. While they are under no duty to supply a copy of the statement, it is the better practice to do so.

R v Anthony Lawson (1990) 90 Cr App R 107, followed.

Right to adequate facilities for the preparation of one's defence -- article 11(2)b)

10. Article 11(2)(b) of the *Bill of Rights* required that, if the police were entitled to use a computer for the analysis of material computer records, the defendant in custody should have been afforded a similar facility in order to enable him to prepare his defence.

11. A violation of the defendant's rights under the *Bill of Rights* is not sufficient in itself to warrant a stay of the proceedings. Prejudice resulting from such violation must be shown.

12. The defendant had never applied either to the court for an order under the *Bill of Rights Ordinance* for the Legal Aid Department to provide a computer. This failure represents a contributory factor in any breach of his rights under the *Bill of Rights*. The failure to provide the defendant with a computer, though a relevant factor to be taken into account, is not a sufficient ground alone to warrant a stay.

13. Alterations to the original data on the computer whilst it was in the possession of the police had caused no specific prejudice to the defendant, as the substance of the relevant data remained unchanged and available.It had, however, caused further unnecessary delay which is entirely the fault of the police.

Public interest

14. Public interest refers to the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime. While the element of public interest is to be placed on the prosecution side, its importance has diminished with the passage of time and the changing circumstances in forex trading in Hong Kong over the years.

Abuse of process

15. The discretion to stay proceedings on the grounds of undue delay or other form of abuse of process should be sparingly exercised. The burden of establishing that a stay should be granted is on the defendant.

16. If there is unjustifiable delay the court must examine all the causes of that delay. If there is fault on the part of the prosecution, the hurdle which the defendant must

jump is set at a lower level. If there is delay caused by the defendant, he cannot profit from such delay as is attributable to him. Where the defendant is only partially responsible for the delay, the court has to assess the degree of delay his actions have caused and whether those actions were justifiable. The greater that degree and the less justifiable his actions then the less able he is to rely upon the delay as a basis for a stay. Justifiable delay on his part must still be weighed in the balance.

17. The court should also consider if there is prejudice caused to the defendant and, if so, if it is of such a serious nature as to bring about the risk that he will not be able to receive a fair trial. In determining this question the court should take into account the checks and balances available at the trial which will enable the court to ameliorate the consequences of any prejudice.

18. The key question is whether in all the circumstances there is a serious risk that the defendant would not receive a fair trial if it was to proceed. If not, the trial must proceed.

19. The same principle that a permanent stay of proceedings should be the exception rather than the rule applies when the application is based on the ground of oppression. The correct test is whether an independent observer sitting in the back of the court, knowing all the facts, would regard the continuance of the trial unfair and oppressive. If not, the trial should proceed. The court must take into account all the relevant facts, conducting a balancing act in the round, and place itself as best in the position of that independent observer.

Common law and the Bill of Rights

20. There are differences of approach between the common law and the *Bill of Rights*. While the common law principles governing the grant of stay may be highly persuasive, the *Bill of Rights* is not declaratory of the common law. Under section 6 of the *Bill of Rights Ordinance*, the remedy of a stay may be granted if it is appropriate and just to do so. What is "appropriate" may not necessarily be "exceptional" as called for by the common law. However, both the common law and the *Bill of Rights* try to ensure that a fair trial can take place. The term "fair trial" in article 10 encompasses a trial which is not oppressive. There is no material or practical difference resulting from the two approaches in this particular case.

R v Egan (1993) 3 HKPLR 27, not followed; *Attorney General v Charles Cheung Wai-bun* (1993) 3 HKPLR 62, discussed.

Right to trial within a reasonable time or to release -- article 5(3)

21. The defendant's right to trial within a reasonable time or to release from custody pending trial had been violated. Special diligence must be paid to the prosecution of cases detained in custody pending trial.The risk of the defendant's absconding was easily outweighed by the time he was required to spend in custody awaiting his trial. This violation had been remedied and, while not a factor determinative of his right under article 11(2)(c), is one which will count in his favour in the balancing exercise.

Stay of prosecution

22. The present case was a borderline case and the defendant had failed to discharge the burden of establishing this as an exceptional case which warranted a stay of

proceedings. Whilst there was a risk that the defendant may not get a fair trial, the risk could be contained by a proper and fair approach at trial. The application for a stay on the ground of undue delay both at common law and under the *Bill of Rights* should therefore be refused.

23. However, taking into account the appalling and perilous personal circumstances of the defendant, the time he had spent in custody, which would have exhausted the possible sentence that would be passed were he to be convicted, the heightened expectation created by the High Court that the trial would soon be over, the scathing remarks of the High Court judge on the conduct and continuance of the prosecution, the mala fides on the part of the former prosecuting counsel in the early years of this prosecution, an independent observer would say to himself that whilst these factors may not amount to oppression or harassment, it would be oppressive and unfair to continue with the prosecution. A permanent stay should therefore granted on this ground.

S Westbrook (on fiat), for the Crown; R Buchanan, for the defendant.

Editorial comment

The question of the relationship between common law abuse of process and the *Bill of Rights* has been raised without a definitive resolution in a number of cases. In *R v Egan* (1993) 3 HKPLR 277 the court took the view that the *Bill of Rights* in this respect was merely declaratory of the common law. In R v *Ng Kam-fuk*, Judge Tyler thought that there was a difference in terms of burden of proof between common law abuse of process and the right to speedy trial under Article 11(2)(c) of the *Bill of Rights*. In *Attorney General R v Charles Cheung Wai-bun* (1993) 3 HKPLR 62 the Privy Council expressly left open the question whether there was any difference between common law and the *Bill of Rights*. In *R v William Hung* the Court of Appeal accepted that, while in general the same considerations applied whether the application was made under the common law or the *Bill of Rights*, in exceptional cases there might be a difference in approach between the *Bill of Rights* and common law. Yet the Court of Appeal did not elaborate on what the exceptional cases were. In *R v Deacon Chiu* [1993] 2 HKCLR 21 at 31, Leonard J differed from the view expressed by Deputy Judge Jones in *R v Egan*, noting that the *Bill of Rights* should be regarded "as having conferred a separate and indepedent right not only to be tried fairly but also, even if the trial itself will be fair, to be tried without undue delay." In *R v Flickinger* Judge Britton expressed a similar view, holding that the *Bill of Rights* was not declaratory of the common law. He suggested that under the *Bill of Rights*, the grant of a stay of proceedings, which should be ordered if this is a just and appropriate remedy under section 6 of the *Bill of Rights Ordinance*, was not subject to the same stringent test under common law principle that a stay of proceedings would only be granted in exceptional cases. However, on the facts of the case before him, there was no difference in result between the common law or the *Bill of Rights* approach.

We believe that this is a welcome development. If the *Bill of Rights* is to acquire a life of its own, the courts must adopt an approach which does not set the common law as the outer limits of the guarantee conferred by the *Bill of Rights*. We agree that the *Bill of Rights* should be approached with realism and good sense. Yet this phrase has been invoked to justify many decisions in the past which cannot be comfortably reconciled with the proclaimed generous and liberal interpretation of a constitutional bill of rights. The courts have in a number of casess paid unnecessary deference to the executive and legislature, in some decisions refusing to go beyond the boundaries of the common law even when this is warranted. The refusal to recognise that article 5(1) has a substantive content for article 5 is just one example. In the words of Silke VP in *R v Sin Yau-ming*, "we are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training . . . From this stems the entirely new

jurisprudential approach." Unfortunately, this apt advice from the Court of Appeal seems to have receded in the memory of the government and some of the courts.

Another apsect of *Flickinger* is that the court accepted that the term "fair trial" in article 10 must encompass a trial that is not oppressive. Yet, while rejecting an application for a stay on the ground of abuse of process because of delay and because of violation of the *Bill of Rights*, Jugde Britton nevertheless granted a stay on the ground of oppression. If he is right that the notion of fair trial must exclude an oppressive trial, the consequence would seem to be that there was a violation of article 10 of the *Bill of Rights* as well as abuse of process under common law.

***R v Fong Fu-ching and another* (1993) DCt, Crim Case No 787 of 1992, 19 October 1993, Judge Lugar-Mawson**

The defendants were arrested on 4 October 1991 and charged on 7 August 1992 with two counts of conspiracy to defraud contrary to common law, a period of 10 months. They applied to the court for a stay of proceedings on the ground of delay, arguing that their rights under articles 5(3), 10 and 11(2)(c) of the *Bill of Rights* had been violated by the 10-month delay.

Held:

1. Save in a very few cases, the approach of a court to an application for a stay of proceedings based on delay was the same at common law as it is under the *Hong Kong Bill of Rights Ordinance*.

   Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62 at 70-71, [1993] 1 HKCLR 249 at 255, applied.

2. The test to be applied is whether in view of the delay the proceedings can be fair. The burden of proof is ont he defendant to establish on the balance of probabilities that the proceedings cannot be fair. Delay by itself is not enough to justify a stay of proceedings.

   Tan v Cameron [1992] 2 AC 205 at 223-224; *Attorney General's Reference (No 1 of 1990)* [1992] 3 WLR 9 at 11; and *Attorney General v Charles Cheung Wai-bun* (1993) 3 HKPLR at 68, [193] 1 HKCLR at 253, applied.

3. In this application the only evidence before the court was that there was a delay of 10 months between arrest and charge. No reasons for the delay had been given, nor was there any evidence as to the effect this delay has had on either of the accused. The defence have come nowhere near discharging the burden placed upon them in bringing this application and the application should therefore be dismissed.

   D Fitzpatrick, for the Crown; Cheng Huan QC and Peter Wan, for the defendants.

RIGHT TO THE BENEFIT OF A LESSER PENALTY WHERE STATUTE AMENDED AFTER COMMISSION OF OFFENCE (BILL OF RIGHTS, ARTICLE 12(1); ICCPR, ARTICLE 15(1))

See the discussion of recent amendments to the *Interpretation and General Clauses Ordinance* (Cap 1) at page 32 below.

***R v Lam Kwok-keung* (1993) CA, Crim App No 530 of 1992, 19 August 1993, Power VP, Penlington JA and Sears J**

The appellant had been charged with the offence of being in possession of forged dies (including forged credit cards and other items), contrary to s 76A of the *Crimes Ordinance* (Cap 200). He entered a plea of guilty in the District Court and was convicted. He was sentenced to a term of imprisonment of four years.

Section 76A of the *Crimes Ordinance* was repealed by Ordinance No 49 of 1992, with effect from 26 June 1992. The provision was in effect replaced by the new sections 75 and 76 of the *Crimes Ordinance*. Each of the new provisions contained in subsection (1) a more serious offence of possession of a false instrument with intention to use it and possession of a machine or implement designed for forging instruments with the intention of using it; in both cases the maximum sentence of imprisonment that could be imposed under the new provision remained unchanged at 14 years. Each of the new provisions also created in subsection (2) a less serious offence of simple possession of a false instrument or of a machine or implement suitable for producing such an instrument; the maximum penalty for these offences was in both cases three years' imprisonment.

The judge calculated the appropriate period of imprisonment on the basis of a maximum period of imprisonment of 14 years, unaware that the legislation had been amended. The defendant appealed on the ground that under article 12(1) of the *Bill of Rights*, he was entitled to be sentenced according to the new maximum of three years' imprisonment.

On appeal the Crown accepted that, while the defendant could have been charged with the more serious offence under both sections 75(1) and 76(1), that was only so if the Crown could prove, or the defendant had admitted, an intention to use the credit cards of the instruments for an unlawful purpose. Since the Crown had not proceeded with two more serious charges, the prosecution conceded that the applicable maximum was 3 years' imprisonment, either under s 75(2) or s 76(2).

Held (allowing the appeal and reducing the appellant's sentence):[2]

1. Where legislation is changed after the date of the offence but before the date of sentence, the defendant is entitled to be sentenced on the basis of the maximum penalty in force at the time of sentence, not at the time the offence is committed. Accordingly, the appellant should have been sentenced on the basis of a maximum sentence of three years' imprisonment.

   R v Lai Kai-ming (1993) 3 HKPLR 58, followed.

2. The circumstances of the case called for a sentence of two and a half years, which would be discounted to two years in view of the appellant's guilty plea.

Per curiam

Credit card forgery is a serious problem and the reputation of Hong Kong is very much at issue in such matters. A maximum sentence of three years for an offence of this sort is plainly inadequate. Despite the fact that this particular problem first came before the court in January 1993, no attempt seems to have been made to correct what is clearly an anomaly in the law.

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[2] [Eds] See also *R v Wan Siu-kei* (1993) 3 HKPLR 228 and *R v Chan Chi-hung* (1993) 3 HKPLR 243.

W Haldane (instructed by Kwan & Kwan), for the applicant; P K Madigan (of the Attorney General's Chambers), for the respondent.

RIGHT NOT TO BE SUBJECTED TO UNLAWFUL OR ARBITRARY INTERFERENCE WITH ONE'S HOME (ARTICLE 14, BILL OF RIGHTS; ARTICLE 17, ICCPR)

See ***Building Authority v Business Rights Ltd*** (1993) DCt, Civil Case No 940 of 1993, Judge Downey, 26 November 1993, at page 14 above.

RIGHT TO EQUALITY AND NON-DISCRIMINATION (BILL OF RIGHTS, ARTICLE 22; ICCPR, ARTICLE 26, ICCPR)

See ***Building Authority v Business Rights Ltd*** (1993) DCt, Civil Case No 940 of 1993, Judge Downey, 26 November 1993, at page 14 above.

OTHER CASES RAISING ISSUES OF INTERNATIONAL HUMAN RIGHTS

STATELESSNESS

R v Director of Immigration, ex parte Li Jin-fei and others **(1993) HCt, MP Nos 1988 and 2351 of 1993, 15 December 1993, Mayo J**

This case involved an application for judicial review by a number of persons originally of Chinese nationality who had subsequently obtained Lesotho passports which had been revoked. An earlier applicatyion for judicial review had been dismissed by Mayo J and an appeal against that decision was dismissed by the Court of Appeal (*R v Director of Immigration, ex parte Pan Ze-yan* (1993) CA, Civ Apps Nos 163, 164 and 173 of 1992: see *Bill of Rights Bulletin*, v 2, n 1, p 36 and v 2, n 3, p 61).

Mayo J dismissed the application, holding that it was an abuse of process.

NEW LEGISLATION AND PENDING BILLS

ORDINANCES

Interpretation and General Clauses (Amendment) (No 2) Ordinance **(No 89 of 1994), Hong Kong Government Gazette, 17 December 1993, Legal Supplement No 1**

This *Ordinance*, which commenced operation on 17 December 1993, enacts a number of changes to the *Interpretation and General Clauses Ordinance* (Cap 1). Of particular interest from the *Bill of Rights* perspective is the fact that s 26 of the amending *Ordinance* repeals section 92 of Cap 1. That section, which provided that where the penalty for an offence was changed between the time of commission of the offence and the time of conviction, the offender was liable to the penalty prescribed at the time of the commission of the offence. Insofar as this provision required that a court impose a heavier earlier penalty rather than a subsequent lighter penalty, it was inconsistent with article

12(1) of the *Bill of Rights*, which provides that the offender should benefit from the lighter penalty. Article 12(1) has been the subject of a number of recent decisions of the Court of Appeal; for a review see *R v Wan Siu-kei* (1993) 3 HKPLR 228 and *R v Chan Chi-hung* (1993) 3 HKPLR 243.

The repealed provision has been replaced by a new provision to be inserted in the *Criminal Procedure Ordinance* (Cap 221). The new section 101J, inserted by section 33 of the amending *Ordinance*, provides:

> "(1) Subject to subsection (2), where an act or omission is an offence and the penalty for the offence is amended between the time a person commits an offence and he is convicted of the offence, the offender is liable to the penalty prescribed at the time of the offence.
>
> (2) If the amended penalty is a lighter penalty, the offender is liable to the lighter penalty."

The provision does not seek to address directly the issues which were thrown into relief by *R v Faisal* (1993) 3 HKPLR 220 and *R v Wan Siu-kei* (namely, whether it is the offence or the conduct of the particular accused which is relevant for determining whether a subsequent penalty is a lighter one). The provision also appears to apply only to a change in the law up to the time of conviction rather than up to the time of sentencing. This would not appear to be consistent with article 12(1) of the *Bill of Rights*, since that provision apparently provides protection up to the time of sentencing, though arguably not beyond that time (*R v Chan Chuen-kam* (1993) 3 HKPLR 215). In *R v Lai Kai-ming* (1993) 3 HKPLR 58, for example, the penalty for the offences to which the defendant pleaded guilty was changed between the time of the plea and the time of sentencing. The Court of Appeal in that case held that article 12(1) applied and the accused benefited from the reduction in penalty. In view of this decision, it may be appropriate to amend the new provision to bring it completely into line with the *Bill of Rights*.

Public Officers (Variation of Conditions of Service) (Temporary Provisions) Ordinance, No 95 of 1993, Hong Kong Government Gazette, 17 December 1993, Legal Supplement No 1

This *Ordinance*, which commenced operation on 17 December 1993 and will expire on 20 April 1994 unless the Legislative Council by *Ordinance* otherwise determines, prevents the Government from permitting civil service officers employed on overseas terms to be reappointment on local terms (and vice versa), as well as preventing the variation for terms during the term of an appointment. The *Ordinance* started life as a private member's Bill and is intended to prevent the Government from implementing its policy to permit officers employed on overseas terms to transfer to local terms in appropriate cases. This is the first time in Hong Kong that a private member's bill has been used to thwart government policy.

BILLS

Electoral Provision (Miscellaneous Amendments) (No 2) Bill, Hong Kong Government Gazette, 10 December 1993, Legal Supplement No 3, C1517

This Bill contains a number of proposals for changes to the electoral system for elections to the Urban Council, Regional Council and District Boards, which are to take place in the latter part of 1994. In particular, the Bill reduces the minimum voting age from 21 to 18 (clause 7); provides that each elector shall have a single vote for a single

elected member in single-seat geographical constituencies (clauses 2 and 5); and adopts the "first past the post system" for determining which candidate wins in a particular constituency. The Bill also proposes the abolition of the appointed membership of the Urban and Regional Councils and the District Boards.

Post-Release (Supervision of Prisoners) Bill, Hong Kong Government Gazette, 17 December 1993, Legal Supplement No 3, C1536

This Bill provides for the release of prisoners under supervision prior to the completion of their terms of imprisonment. Prisoners are eligible to be considered for early release once they have served at least two thirds of the actual term of imprisonment (plus any period of forfeiture of remission). The Bill establishes a Post-Release Supervision Board, the functions of which include considering whether a prisoner should be granted early release under supervision, and to consider applications for the variation, suspension or discharge of supervision orders.

The Bill also provides for the revocation or suspension of a supervision order (and a consequent return to custody of the person affected), and it is in this context that human rights considerations may arise. Clause 13 of the Bill provides that the Board may order the suspension of a supervision order (whereupon the Commission for Correctional Services "shall recall the person to prison and reimprison him") where:

> "(a) the Board is satisfied that any person who is subject to a supervision order has, without lawful authority or reasonable excuse, failed to comply with any term or condition of the order; or
>
> (b) it appears to the Board that any person who is subject to a supervision order--
>
> (i) is proposing to commit an offence or to act in a manner likely to cause serious harm to the public; or
>
> (ii) having been recalled to prison under sections 14 or 15 was, at the time of his recall, proposing to commit an offence or to act in a manner likely to cause serious harm to the public . . .".

Clause 14 of the Bill provides the Chairman [sic] of the Board with the power to recall a person temporarily to prison for a period of up to 14 days "[w]here it appears . . . that there are grounds upon which an order under section 13 could be made by the Board." Clause 15 confers on the Commissioner the power to recall the person to prison and to detain him for up to 72 hours pending a decision under clause 14, where the Commissioner believes that there are grounds upon which an order might be made under clause 13 and where he considers it to be in the public interest that the person be detained in custody without delay.

The Board may not make any order under section 13 without providing the person affected with an opportunity to see all relevant materials before the Board and to make representations to the Board.

RECENT PUBLICATIONS

Hong Kong

J Allan, "Rights without Anchors: Hong Kong Adrift", in R Wacks (ed) *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), 41-60

A Byrnes & J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993)

A Byrnes, J Chan & G Edwards (eds), *Hong Kong Public Law Reports*, vol 1, 1991 (Hong Kong: Hong Kong University Press, 1993)

A Byrnes, J Chan, G Edwards & W Fong (eds), *Hong Kong Public Law Reports*, vol 3, (1993) parts 1 and 2 (Hong Kong: Hong Kong University Press, 1993 and 1994)

J Chan, "The Right to Speedy Trial", (1993) 2(1) *Asia Pacific Law Review* 12-25

A Carver "Trade Unions and the Rule of Law in Hong Kong: Lessons for Industrial Hong Kong's Jurisprudence", paper presented at LAWASIA '93 (Labour Law Section), Colombo, Sri Lanka, September 1993

G Edwards & A Byrnes (eds), *Hong Kong's Bill of Rights: The First Year* (Proceedings of a conference held on 20 June 1992) (Hong Kong: Faculty of Law, University of Hong Kong, 1993)

J C Olivera, "The extension to Macao of the International Covenants on Human Rights", paper presented at LAWASIA '93 (Constitutional Law Section), Colombo, Sri Lanka, September 1993

S Nossal, "Housing Benefits Discrimination", (1993) 23 *Hong Kong Law Journal* 313-317

C Petersen, "Reproduction and Family Planning: Individual Right or Public Policy", in R Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), 261-306

Of general interest

T Allen, "Commonwealth Constitutions and the Right not to be Deprived of Property", (1993) 42 *International & Comparative Law Quarterly* 523-552

A Butler, "Constitutional Rights in Private Litigation: A Critique adn Comparative Analysis:, (1993) 22(1) *Anglo-American Law Review* 1-41

C Caleo, "Implications of Australia's Accession to the First Optional Protocol to the the International Covenant on Civil and Political Rights", (1993) 4 *Public Law Review* 175-192

A Chen, "Developing Theories of Rights and Human Rights in China", in R Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), 123-150

A Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Pres, 1993)

R Coomaraswamy, "To bellow like a cow: Women, ethnicity and the discourse of rights (Barriers and ideology in South Asia", paper presented at LAWASIA '93 (Women's Rights Section), Colombo, Sri Lanka, September 1993, S.7, p 1

H Cullen, "Education Rights or Minority Rights?", (1993) 7 *International Journal of Law and the Family* 143-177

S Frommel, "Europe: Taxpayers and the Right of the Accused to Remain Silent", (1993) 20(10) *Tax Planning International Review*, October 1993, 3-20

Y Ghai, "Asian Perspectives on Human Rights", (1993) 23 *Hong Kong Law Journal* 342-357

D Hodson, "The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness", (1993) 7 *International Journal of Law and the Family* 1

N Jayawickrama, "An Asian Convention on Human Rights", paper presented at LAWASIA '93 (Women's Rights Section), Colombo, Sri Lanka, September 1993, S.3, p 16

J Murdoch, "Safeguarding the Liberty of the Person: Recent Strasbourg Jusriprudence", (1993) 42 *International & Comparative Law Quarterly* 494-522

M Muttetuwegama, "Rights of Women: A consideration of some enforcement mechanisms", paper presented at LAWASIA '93 (Women's Rights Section), Colombo, Sri Lanka, September 1993, S.7, p 11

APPENDIX A

GENERAL COMMENT ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[1]

General comment No. 22 (48) (art. 18)

1. The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18 (1) is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4(2) of the Covenant.

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.

3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19(1). In accordance with articles 18(2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.

4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, *inter alia*, the freedom to choose their religious leaders, priests and teachers, the

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[1] Adopted by the Committee at its 1247th meeting (forty-eighth session), on 20 July 1993: UN Doc CCPR/C/21/Rev.1/Add.42 (7 September 1993).

freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

5. The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18(2) bars coercions that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as for example those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant are similarly inconsistent with article 18(2). The same protection is enjoyed by holders of all beliefs of a non-religious nature.

6. The Committee is of the view that article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18 (4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

7. According to article 20, no manifestation of religions or beliefs may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its General Comment 11 [19], States parties are under the obligation to enact laws to prohibit such acts.

8. Article 18 (3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of the parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18 (3), both as a matter of law and of their application in specific circumstances.

9. The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the

population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. The measures contemplated by article 20, paragraph 2, of the Covenant constitute important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed toward those groups. The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination. Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.

10. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of the ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.

APPENDIX B

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

GENERAL GUIDELINES REGARDING THE FORM AND CONTENTS OF REPORTS TO BE SUBMITTED BY STATES PARTIES UNDER ARTICLE 9, PARAGRAPH 1, OF THE CONVENTION[1]

Adopted by the Committee at its 475th meeting (twenty-first session) on 9 April 1980, incorporating the additional guidelines for the implementation of article 7 adopted at the 571st meeting (twenty-fifty session) on 17 March 1982 and as revised at the 984th meeting (forty-second session) on 19 March 1993[1]

1. In accordance with article 9, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, each State party has undertaken to submit to the Secretary-General of the United Nations, for consideration by the Committee on the Elimination of Racial Discrimination, a report on the legislative, judicial, administrative or other measures which it has adopted and which give effect to the provisions of the Convention: (a) within one year after the entry into force of the Convention for the State concerned, and (b) thereafter every two years and whenever the Committee so requests. Article 9, paragraph 1, also provides that the Committee may request further information from the States parties.

2. In order to assist the Committee in fulfilling the tasks entrusted to it pursuant to article 9 of the Convention and further to facilitate the task of States parties in the preparation of their reports, the Committee has decided that it would be useful to inform States parties of its wishes regarding the form and content of their reports. Compliance with these guidelines will help to ensure that reports are presented in a uniform manner and enable the Committee and States parties to obtain a complete picture of the situation in each State as regards the implementation of the provisions of the Convention. This will also reduce the need for the Committee to request further information under article 9 and its rules of procedure.

3. It should also be noted, in this connection, that the Committee stated in its General Recommendation II of 24 February 1972 that, since all the categories of information requested from States parties refer to obligations undertaken by States parties under the Convention, the necessary information in conformity with these guidelines should be provided by all States parties without distinction, whether or not racial discrimination exists in their respective territories.

4. In selecting information for inclusion in their reports, States parties should bear in mind the definition of the term "racial discrimination" as reflected in article 1, paragraph 1, of the Convention, as well as the provisions of article 1, paragraphs 2, 3 and 4, which refer to situations not considered as racial discrimination.

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[1] UN Doc CERD/C/70/Rev. 3 (23 July 1993). [Eds] The text of the Racial Discrimination Convention can be found in A Byrnes & J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993) at pp 284-297. The most recent report in respect of Hong Kong under the Convention is reproduced in the same collection at pp 502-505.

5. The report should also reflect in all its parts the actual situation as regards the practical implementation of the provisions of the Convention and the progress achieved.

PART I. GENERAL

6. General information on the land and people, general political structure, general legal framework within which human rights are protected and information and publicity should be prepared in accordance with the consolidated guidelines for the initial part of reports of States parties to be submitted under the various international human rights instruments, as contained in document HRI/CORE/1.

PART II. INFORMATION RELATING TO ARTICLES 2 TO 7 OF THE CONVENTION

7. Describe briefly the policy of eliminating racial discrimination in all its forms and the general legal framework within which racial discrimination as defined in article 1, paragraph 1, of the Convention is prohibited and eliminated in the reporting State, and 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 are promoted and protected.

8. The ethnic characteristics of the country are of particular importance in connection with the International Convention on the Elimination of All Forms of Racial Discrimination. Many States consider that, when conducting a census, they should not draw attention to factors like race lest this reinforce divisions they wish to overcome. If progress in eliminating discrimination based on race, colour, descent, national and ethnic origin is to be monitored, some indication is needed of the number of persons who could be treated less favourably on the basis of these characteristics. States which do not collect information on these characteristics in their censuses are therefore requested to provide information on mother tongues (as requested in para. 1 of HRI/CORE/1) as indicative of ethnic differences, together with any information about race, colour, descent, national and ethnic origins derived from social surveys. In the absence of quantitative information, a qualitative description of the ethnic characteristics of the population should be supplied. The remainder of this part should provide specific information in relation to articles 2 to 7, in accordance with the sequence of those articles and their respective provisions.

9. The Committee requests States parties to incorporate in this part, under the appropriate headings, the texts of the relevant laws, judicial decisions and regulations referred to therein, as well as all other elements which they consider essential for the Committee's consideration of their reports.

10. The information should be arranged as follows:

Article 2

A. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 2, paragraph 1, of the Convention, in particular:

1. Measures taken to give effect to the undertaking to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

2. Measures taken to give effect to the undertaking not to sponsor, defend or support racial discrimination by any persons or organizations;

3. Measures taken to review governmental, national and local policies, and to amend, rescind or nullify and laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

4. Measures taken to give effect to the undertaking to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.

5. Measures taken to give effect to the undertaking to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

B. Information on the special and concrete measures taken in the social, economic, cultural and other fields to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms, in accordance with article 2, paragraph 2, of the Convention.

Article 3

A. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 3 of the Convention, in particular, to the condemnation of racial segregation and apartheid and to the undertaking to prevent, prohibit and eradicate all practices of this nature in territories under the jurisdiction of the reporting State.

B. Information on the status of diplomatic, economic and other relations between the reporting State and the racist regime of southern Africa, as requested by the Committee in its General Recommendation III of 18 August 1972 and decision 2 (XI) of 7 April 1975.

Article 4

A. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 4 of the Convention, in particular measures taken to give effect to the undertaking to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, racial discrimination. 2/ in particular:

1. To declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

2. To declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and to recognize participation in such organizations or activities as an offence punishable by law;

3. Not to permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

B. Information on appropriate measures taken to give effect to General Recommendation I, of 24 February 1972, by which the Committee recommended that the States parties whose legislation was deficient in respect of the implementation of article 4 should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of article 4 (a) and (b) of the Convention.

C. Information in response to decision 3 (VII) adopted by the Committee on 4 May 1973 by which the Committee requested the States parties:

1. To indicate what specific penal internal legislation designed to implement the provisions of article 4 (a) and (b) has been enacted in their respective countries and to transmit to the Secretary-General in one of the official languages the texts concerned, as well as such provisions of general penal law as must be taken into account when applying such specific legislation;

2. Where no such specific legislation has been enacted, to inform the Committee of the manner, and the extent to which the provisions of the existing penal laws, as applied by the courts, effectively implement their obligations under article 4 (a) and (b), and to transmit to the Secretary-General in one of the official languages the texts of those provisions.

Article 5

Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 5 of the Convention; in particular, measures taken to prohibit racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law notably in the enjoyment of:

A. The right to equal treatment before tribunals and all other organs administering justice;

B. The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

C. Political rights, in particular the right to participate in elections -- to vote and to stand for election -- on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

D. Other civil rights, in particular those enumerated under article 5 (d), (i) to (ix), of the Convention;

E. Economic, social and cultural rights, in particular those enumerated under article 5 (e), (i) to (vi) of the Convention;

F. The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

Article 6

A. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 6 of the Convention, in particular, measures taken to assure to everyone within the jurisdiction of the reporting State effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms;

B. Measures taken to assure to everyone the right to seek from such tribunals just and adequate reparation or satisfaction for any damage as a result of such discrimination;

C. Information on the practice and decisions of the courts and other judicial and administrative organs relating to cases of racial discrimination as defined under article 1 of the Convention.

Article 7

Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 7 of the Convention, to General Recommendation V of 13 April 1977 and to decision 2 (XXV) of 17 March 1982, by which the Committee adopted its additional guidelines for the implementation of article 7.

In particular, the reports should provide as much information as possible on each of the main subjects mentioned in article 7 under the following separate headings:

A. Education and teaching;

B. Culture;

C. Information.

Within these broad parameters, the information provided should reflect the measures taken by the States parties:

1. To combat prejudices which lead to racial discrimination;

2. To promote understanding, tolerance and friendship among nations and racial and ethnic groups.

A. Education and teaching

This part should describe legislative and administrative measures, including some general information on the educational system, taken in the field of education and teaching to combat racial prejudices which lead to racial discrimination. It should indicate whether any steps have been taken to include in school curricula and in the training of teachers and other professionals, programmes and subjects to help promote human rights issues which would lead to better understanding, tolerance and friendship among nations and racial or ethnic groups. It should also provide information on whether the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of All Forms of Racial Discrimination are included in education and teaching.

B. Culture

Information should be provided in this part of the report on the role of institutions or associations working to develop national culture and traditions, to combat racial prejudices and to promote intra-national and intra-cultural understanding, tolerance and friendship among nations and racial or ethnic groups. Information should also be included on the work of solidarity committees or United Nations Associations to combat racism and racial discrimination and the observance by States parties of Human Rights Days or campaigns against racism and apartheid.

C. Information

This part should provide information:

(a) On the role of state media in the dissemination of information to combat racial prejudices which lead to racial discrimination and to inculcate better understanding of the purposes and principles of the above-mentioned instruments;

(b) On the role of the mass information media, i.e. the press, radio and television, in the publicizing of human rights and disseminating information on the purposes and principles of the above-mentioned human rights instruments.

11. If needed, the reports should be accompanied by sufficient copies in one of the working languages (English, French, Russian or Spanish) of all other supplementary documentation which the reporting States may wish to have distributed to all members of the Committee in connection with their reports.

12. On the basis of reports already submitted and those prepared and submitted according to the above guidelines, the Committee is confident that it will be enabled to develop or continue a constructive and fruitful dialogue with each State party for the purpose of the implementation of the Convention and thereby to contribute to mutual understanding and peaceful and friendly relations among nations in accordance with the Charter of the United Nations.

Notes

1/ The Committee's revision consisted of the insertion, under Part II, of a new paragraph concerning information on the ethnic characteristics of the country. It should be noted that the Committee, at its 913th meeting (thirty-ninth session) adopted a number of revisions to its general reporting guidelines, including the incorporation of former Part I, para. (a), under Part II and the deletion of former Part I, para. (c). Those changes have been reflected in the present document.

2/ With due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention.

APPENDIX C

REPORTS SUBMITTED BY THE UNITED KINGDOM IN RESPECT OF HONG KONG PURSUANT TO ARTICLE 16 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

SECOND PERIODIC REPORT IN RESPECT OF HONG KONG CONCERNING

ARTICLES 10-12 OF THE INTERNATIONAL COVENANT ON ECONOMIC,

SOCIAL AND CULTURAL RIGHTS SUBMITTED PURSUANT TO ARTICLE 16

OF THE COVENANT (1993)

GENERAL

Population: 5,764,000 (1991 estimate)

Area: 1075 km^2 (approx.)

Hong Kong is a Dependent Territory of the United Kingdom, administered by a Governor, aided by an Executive Council, and a Legislative Council. Under the terms of the Sino-British Joint Declaration on the Future of Hong Kong, Hong Kong will become, with effect from 1 July 1997, a Special Administrative Region of the People's Republic of China.

See also the Third Periodic Report under Article 40 of the International Covenant on Civil and Political Rights.

ARTICLE 10: PROTECTION OF FAMILY, MOTHERS AND CHILDREN

A. Overview

1. Considerable progress has been made in achieving the rights recognised in article 10 of the Covenant since the submission of the last report concerning articles 10-12. During the current reporting period the scope and quality of social welfare and health services have expanded significantly. Notable developments include:-

(a) the introduction in 1982 of a Fees Assistance Scheme to assist families with social needs and low incomes to pay for child care centre services;

(b) the establishment in 1983 of a Child Protective Services Unit within the Social Welfare Department to provide for closer attention to the welfare of abused children;

(c) improvements to the adoption service including amendments to the Adoption Ordinance, the streamlining of adoption procedures, the establishment of a monitoring system and the centralisation of pre-adoption service;

(d) the implementation in 1990 of a family aid service to provide training in home management to clients receiving counselling on family-related problems;

(e) the appointment in 1990 of a Commission on Youth to advise the Administration on matters pertaining to youth; and

(f) the enactment in June 1991 of the Bill of Rights Ordinance which incorporated provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong into the law of Hong Kong. These include articles 23 and 24 of the Covenant concerning rights in respect of marriage and family and rights of children.

2. In January 1990, a Working Party was set up by the Hong Kong Administration to conduct a review of social welfare services and to draft a White Paper setting out the future direction of social welfare development in Hong Kong. After extensive public consultation, the White Paper on Social Welfare into the 1990s and Beyond was published in March 1991. It recognised that new needs and problems are emerging which will require greater efforts in the context of the future provision of family and child welfare services. Family casework and counselling will remain the principal means whereby individuals and families are assisted to understand and deal with family problems. The Government will try to meet the demand for these services in full and allocate available resources flexibly in accordance with the needs of different areas.

B. Protection of the Family (paragraph 1)

3. A family welfare programme is well established in Hong Kong. The overall objectives of family welfare services are to preserve and strengthen the family as a unit and develop caring interpersonal relationship; to enable individuals and family members to prevent personal and family problems and cope with them when they arise, and to provide for needs which cannot be met from within the family. With these objectives in mind, support services have been developed to assist families when they are unable to discharge their caring and protective functions satisfactorily. The problems dealt with are mainly family relationship problems, child welfare, behavioural/emotional problems of young people and problems involving accommodation, finance and physical or mental health. Services provided include counselling, arrangements for schooling, training, employment, housing, financial assistance, home help service, family aid service, free legal advice, medical attention and residential service for vulnerable groups such as children, unmarried mothers, the aged and the disabled. A network of family services centres is operating on an area basis to bring services closer to those who need them. To preserve and strengthen the family as a unit, a comprehensive programme of family life education has been provided at the central and district levels since 1979.

C. Right in Respect of Marriage (paragraph 1)

4. The right of men and women voluntarily to enter into marriage with their full and free consent is guaranteed under the Marriage Ordinance. The Marriage Reform Ordinance further makes it clear that, on or after 7 October 1971, the customary marriages of "Kim Tiu" (i.e. bigamy for the purpose of propagation of the future generations of two or more branches of the same family) and the custom of "sampotsai" (i.e. betrothal of a child bride brought about without her consent) have been rendered illegal.

5. Section 18 of the Marriage Ordinance has been amended. The age at which a male or female can marry is 16 years. Parental consent is required if the person intending to marry is under 21 years of age. Until the enactment of the Age of Majority (Related Provisions) Ordinance in 1990, a person under the age of 21 who had been refused consent to marry by a parent or guardian could not marry. The Marriage Ordinance as amended now provides that, where consent has been withheld by a parent or guardian, the person affected can ask a District Court Judge to consent to the marriage and his consent shall have the same effect as if it had been by the person whose consent is refused.

6. In 1991, these measures were further strengthened by the enactment of the Hong Kong Bill of Rights Ordinance, Article 19(2) of which recognises the right of men and women of marriageable age to marry and found a family. Article 19(3) states that no marriage shall be entered into without the free and full consent of the intending spouses.

D. Maternity Protection (paragraph 2)

7. Under the Employment Ordinance, a female employee is entitled, subject to the fulfillment of certain qualifications of service, to maternity leave. A female employee who has worked for the same employer under a continuous contract for a period of not less than 26 weeks is entitled to maternity leave, but not to wages during the leave unless her contract of employment provides for such payment. If she has worked continuously for her employer for a period of not less than 40 weeks before the expected date of commencement of her maternity leave and has no more than two surviving children, she is entitled to be paid during such leave at not less than two-thirds of her normal rate of pay. Maternity leave normally begins four weeks before the expected date of confinement and ends six weeks after the actual date of confinement. An employee can give notice of her intention to take maternity leave to her employer at any time after her pregnancy has been certified. If she has worked for her employer for not less than 12 weeks prior to tendering such notice, she is protected from termination of employment by her employer during the period between the date on which she gives such notice and the date on which she is due to return to work.

8. Proper ante-natal and post-natal care for a pregnant female prisoner is provided by the Prison Medical Service. The new born child is allowed to stay in a prison institution with the mother during the normal period of lactation. The child may remain in the institution until the age of three or when the other has completed her sentence, whichever is the earlier. Appropriate welfare will be provided if the child needs further care.

E. Protection of Children and Young Persons (paragraph 3)

9. Under the Age of Majority (Related Provisions) Ordinance 1990, the age of majority is 18 in absence of any contrary provision in a document or Ordinance under consideration. Nevertheless, under section 39 of the Probate and Administration Ordinance and section 38(2) of the Trustee Ordinance a person under the age of 21 will remain incapable of being appointed as the sole executor of a will or sole trustee of a trust. The

minimum age for voting at elections is also set at 21, by section 9 of the Electoral Provisions Ordinance.

10. The overall objectives of child welfare services in Hong Kong are to support and strengthen families so that they may provide a suitable environment for the physical, emotional and social development of their children and to provide assistance to those disadvantaged and vulnerable children who are not adequately looked after by their families. The primary responsibility for the adequate care of children rests with parents and the separation of children from their families should be tolerated only when there is no better alternative. Society has an obligation to protect children from all forms of maltreatment and to provide services for the prevention and treatment of abuse.

11. All children and young persons are protected from moral and physical danger under the Protection of Women and Juveniles Ordinance without discrimination for reasons of parentage or other conditions. Statutory protective care is provided by the Social Welfare Department in the form of supervision and/or residential care for males and females under 18 years of age whose parents or guardians do not exercise proper care over them and for those under 21 years of age who have no parents or guardians or who are adopted other than by court order. There is a Child Protective Services Unit to provide intensive casework service to children who are being abused and an Adoption Unit to provide services for the adoption of children. A Child Custody Services Unit is also established to assist courts to conduct social enquiries on child custody and guardianship cases and to carry out statutory duties in respect of supervision cases arising from custody/guardianship matters.

12. The Child Care Centres Ordinance and Regulations enacted in 1975 ensure that children are adequately cared for and supervised in child care centres. The Child Care Centre Advisory Inspectorate of the Social Welfare Department deals with all matters related to the implementation of the Child Care Centres Ordinance and provides supervision over child care centres. A Fee Assistance Scheme was set up in 1982 through which parents who have a need to put their children in child care centres and who are unable to pay the fees are given financial assistance. As at 31 December 1991, 8047 children are receiving such assistance.

13. The minimum age for all employment in Hong Kong was raised from 14 to 15 on 1 September 1980 in line with the implementation of the policy on compulsory junior secondary education up to the age of 15, subject to the exceptions below.

14. The Employment of Children Regulations 1979 prohibit the employment of any child under 15 years of age in any employment, except that those aged 13 and over may be employed in a non-industrial establishment subject to certain restrictions, viz: (1) they cannot be employed in any prohibited occupation listed in the Schedule to the Regulations; (2) they cannot work before 7 a.m. or after 7 p.m., (3) in respect of children who have completed three years, i.e. Form 3, of secondary education, the hours of work per day are limited to a maximum of eight hours; and (4) in respect of children who have not completed three years, i.e. Form 3, of secondary education, the hours of work per day are limited to two hours during school days, four hours on other days during school terms and eight hours during the summer holidays, and they are required to produce school attendance certificates to show that they are attending school full time. The Regulations also require that a child employed at work should have not less than one hour's rest after five hours' continuous work. The aim of the Regulations is to prohibit employment which would interfere with a child's schooling or would endanger their moral and physical health, and at the same time maintain flexibility to allow for employment. Contravention of the Regulations carries a maximum fine of HK$20,000 (US$2,750).

15. Children who have attained the age of 14 but are under 15 may be employed under the Apprenticeship Ordinance. The Governor has specified 42 trades as designated trades under the Ordinance. In a designated trade, an employer can employ a young person

aged between 14 and 18 only as an apprentice under a contract of apprenticeship registered with the Director of Apprenticeship.

16. In addition, children under the age of 15 and any female under the age of 18 are prohibited under the Dutiable Commodities (Liquor) Regulations from working in premises licensed to sell liquor at any time [and] between 8 p.m. and 6 a.m. respectively. Employment of any female under the age of 18 years in these premises between 6 a.m. and 8 p.m. is also prohibited except with the written permission of the authorities.

17. The Employment of Young Persons and Children at Sea Ordinance stipulates that no child under 15 years of age shall be employed or permitted to work as a member of the crew of any vessel other than a vessel upon which only members of the same family are employed.

18. As regards young persons aged between 15 and 17 employed in industrial undertakings, their hours of work and rest periods are regulated by the Women and Young Persons (Industry) Regulations 1980 made under the Employment Ordinance. The standard working hours for young persons aged between 15 and 17 in industry are eight hours a day and 48 hours a week. However, by agreement between the employer and the young person employed, the working hours may exceed eight in a day or 48 in a week provided that the total number of hours worked by the young persons does not exceed 96 in any two consecutive weeks and the maximum working hours per day do not exceed 10. Young persons must have a rest interval of not less than half an hour after five hours' continuous work.

19. The same regulations prohibit the employment of young persons for night work. The regulations stipulate that young persons aged between 15 and 17 working in an industrial undertaking-shall not be employed earlier than 7 a.m. or later than 7 p.m. However, young person aged between 16 and 17 are permitted to work up to 11 p.m. in the case of shift work. Overtime employment for young persons aged between 15 and 17 is prohibited.

ARTICLE 11: RIGHT TO AN ADEQUATE STANDARD OF LIVING

A. Continuous Improvement of Living Condition

20. There has been significant improvement of the standard of living of average Hong Kong people during the past decade. The per capita gross domestic product (GDP) in 1991 at current market price is about HK$110,000 (US$14,200). This represents a growth by 64.1 percent in real terms over the per capita GDP in 1981. The median monthly household incomes in 1981 and 1991 at current market prices are HK$2,955 and HK$9,964 respectively. After discounting the consumer price inflation during the same period (which amounts to about 114 percent in terms of Consumer Price Index (A)), the growth in real terms is still substantial. In addition, the fact that 42% of Hong Kong households owned their own homes in 1990 as compared to 28% in 1981 also reflects the growing affluence of the population.

B. Right to Adequate Food (paragraphs 1 and 2)

21. The Hong Kong Government recognises the right of everyone to be free from hunger. Through a combination of imported food and primary production in Hong Kong, an adequate supply of food is always available for the whole community. The limited area of land available for agricultural use has led to continuous research to ensure the most economical and productive utilization of such land.

22. As regards the measures that have been adopted in Hong Kong and the progress made in achieving the observance of the rights recognised, a programme of agricultural and fisheries development activities has been undertaken. The overall objective is to facilitate the supply of food to the population of Hong Kong. The specific objectives are:

(a) to provide for efficient wholesale marketing of fresh primary food products;

(b) to apply to imported staple foodstuffs the minimum effective controls necessary to maintain supplies;

(c) to promote the development and to increase the productivity of such agriculture and fisheries as is economically viable and which contributes to Hong Kong's food supply;

(d) to ensure that a proportion of Hong Kong's food supply is produced locally;

(e) to devise and administer such legislation on animal and plant diseases as may be necessary; and

(f) in times of shortages, to assist in the search for alternative sources of supply.

23. The standards of provision are:

(a) orderly and hygienic wholesale facilities;

(b) the limitation of the number of registered rice importers to 46; and

(c) the complete control and prevention of all types of plant and livestock pests and diseases.

24. To implement the programmes in respect of agricultural industries, Government undertakes applied and adaptive research as necessary, provides diagnostic and ancillary services, gives technical, managerial and financial advice and assistance, and assumes development responsibilities -- especially in the form of irrigation projects. Producer associations and the orderly marketing of local farm produce are actively promoted and regulated. New concepts, techniques and material inputs to the industry are evaluated, and actively promoted when it is advantageous to do so. Controls are enforced to prevent the introduction and spread of plant and livestock pests and diseases; and to ensure economic and efficient production levels as well as production to acceptable standards of quality and hygiene. Vocational and technical training is provided for those directly and indirectly engaged in the industries.

25. Due to the demands of an ever increasing population, Hong Kong continues to lose agricultural land to urban development. This tends to decrease agricultural production but is compensated to some degree by the adoption of more intensive farming practices, and the implementation of an agricultural land rehabilitation scheme to return fallow land to production.

26. In implementing the programme in respect of the fishing industry, the Government undertakes exploratory fishing, applied and adaptive research as necessary, introduces and designs new craft gear and equipment, gives technical, managerial and financial advice, and assumes specific development responsibilities. The industry is encouraged to modernize and otherwise improve on traditional designs and techniques. Notable success has been achieved in a relatively brief period. Producer associations are

strongly encouraged, and the orderly marketing of local fishery products is actively promoted and regulated. Vocational and technical training is provided for the industry, e.g. navigation and engineering courses for fishermen, and marketing and management courses for those in ancillary sectors.

27. To implement the programmes in respect of the wholesale marketing of food products, the Government provides, administers and manages wholesale markets for fresh primary food products. Apart from the provision of temporary wholesale markets as a quick and interim means of addressing the pressing need to replace old and congested wholesale markets, Government plans to build and manage two modern integrated wholesale market complexes for imported vegetables, fruit, eggs, freshwater fish and poultry. Phase I of the first wholesale market complex was completed in August 1991 and the second complex is scheduled to start operations by August 1993.

28. As a result of continuing growth in the economy and the measures adopted, the nutritional status of the population of Hong Kong has risen over the years as indicated in the FAO statistics, viz.:

Daily Per Capita consumption

Period	*Calories* (No./day)	*Protein* (gm/day)	*Fat* (gm/day)
1987-89	2 845	86.8	111.1
1979-81	2 771	81.8	114.3
1972-74	2 642	78.6	92.6

D. Right to Adequate Housing (paragraph 1)

29. The Government's major task in the improvement of living conditions lies in the development of public housing.

30. About 2.9 million people (representing about 52% of the population) are living in various types of assisted housing: 44% in 645,000 public rental flats and 8% in 137,000 home ownership flats. This represents a significant growth compared with the figure of about 1.9 million people (or 42 percent of the population) in 1979/80. Despite this, there is still an outstanding demand for adequate housing mainly for two reasons: (i) the population has increased by more than 7 percent during the last decade, due to natural growth and immigration; (ii) Hong Kong families want continuously better quality housing at a price which they can afford. With land so very scarce and rents and prices of flats in the private sector among the highest in the world, the aspirations of the lower income groups for a better living environment will have to be met largely by Government.

31. As at the third quarter of 1991, there were a total of 1,886,500 living quarters in Hong Kong, of which 813,400 (43%) were public housing flats, 960,100 (51%) private flats and the remaining 112,900 (6%) temporary structures. Together they provide housing for 1,601,700 households in Hong Kong.

32. Under current policy, persons genuinely homeless may apply for shelter in a transit centre, and subject to verification, will be offered a space in a temporary housing area managed by the Housing Authority. According to the records kept by the Social Welfare Department, there were about 1,100 street sleepers as at the end of January 1992.

33. Services for street sleepers, including counselling service, financial and material assistance and referrals for residential care, are provided by Family Services Centres of the Social Welfare Department. These are supported by other units such as

Social Security Field Units and Medical Social Services Units. Street sleepers with more serious difficulties, such as those who are mentally ill, are handled by Outreach Teams. Voluntary organisations also provide services for street sleepers, including day relief centres, temporary shelters and hostels.

34. The Hong Kong Housing Authority, constituted in 1973, is responsible for advising the Governor on matters relating to housing and for the planning, construction, management and co-ordination of all aspects of public housing and associated amenities. It also acts as the Government's agent to clear land, prevent and control squatting, and maintain improvements to squatter areas.

35. The Housing Authority was reorganised on 1 April 1988 following the anouncement of a Long Term Housing Strategy (LTHS) in 1987. The LTHS provides a framework for the development of future housing programmes up to 2001. It aims to satisfy all the outstanding demand for public rental flats and that for home ownership by the turn of the century, to clear all urban squatters and temporary housing areas by the mid-1990s and to redevelop old public rental estates with sub-standard facilities. Under the revised financial arrangements, the Government has given a financial commitment of about US$1.3 billion to support the public housing programme and to provide land for public housing on concessionary terms. The Housing Authority has therefore greater financial autonomy in implementing the Strategy effectively.

36. There are now about 292,000 people living in squatter areas in Hong Kong. Under a squatter area improvement programme costing about US$ 23 million, about 140,000 persons have benefited from the seven year programme. There are still 84,000 persons living in temporary housing area (THAs) and cottage areas. The current programme is to provide about 40,000 public housing flats a year for rent and sale. Between 1985/86 and 1990/91, a total of 273,000 public housing flats were produced. Between 1991/92 to 2000/01, a total of 380,000 public housing flats will be produced, of which 199,000 will be produced in the first five years.

37. The number of *applicants* on the waiting list for obtaining assisted housing is 166,000 (involving a total of 490,000 persons). The average waiting time is 5 years (ranging from 4 months to 12 years, depending on the district chosen by the applicant). A number of measures have been taken to shorten the list. These include providing allocation to those considered to be in genuine need of housing in four months' time and to hardship cases under compassionate rehousing category in two months.

38. To enable lower-middle income families to own their homes, the Government introduced a Home Ownership Scheme in 1976 and a Private Sector Participation Scheme in 1978. These flats are sold to eligible families, exclusive of land value, at prices which are about 30% below market levels. The discount rate may vary in different sales exercises depending on prevailing market conditions, but the overall aim is to ensure that about half of the flats on offer are affordable to families within a prescribed income limit in any one sales exercise. Concessionary mortgage arrangements are offered to these families with interest rates slightly below market rates and repayment over 15 years. The home ownership rate in the public sector has gone up three times from 5% in 1982/83 to 19% by 1991/92. It is estimated that by 2001, the home ownership rate in the public sector stock will go up to about 39%.

39. Old estates with sub-standard facilities are redeveloped under the Comprehensive Redevelopment Programme. Since 1972, 307 old public housing blocks have either been demolished or converted to provide self-contained homes, thereby improving the living conditions of about 645,000 people. Another 413 blocks, affecting about 517,000 people will be cleared by 2001.

40. There has been a continuous improvement in the planning and design of public housing estates and their amenities. Estates built in recent years are all self-

contained complete with ancillary facilities such as shops, market stalls, restaurants, schools, clinics, welfare centres, kindergartens, community halls and play areas. Facilities for elderly and disabled people and other special groups are also provided where possible. A new rental block design has been introduced in recent estate layouts to provide a better internal and external environment, with greater emphasis on quality and flexibility.

41. The Planning Development and Territory Development Department are now carrying out planning and development works in 9 new towns, including the latest new town to be developed in support of the new airport project, and several rural townships to accommodate approximately 3 million people by 2000. As a result of this major programme the population of the New Territories has already risen from 1.6 million in 1985 to 2.3 million in 1991. The new towns are provided with a high standard of housing, community facilities, transport and employment opportunities. Extensive landscaping is also provided to foster an attractive environment for new town residents.

42. A priority in land supply is to make sufficient land available for construction of residential accommodation. In 1991, the private sector produced over 33,500 units and is expected to produce 33,500 units in 1992. The majority of these units are small or medium size flats of 100m2 or less.

43. About 74% of private housing is owner occupied. Most of the remaining private rental housing is subject to the application of the Landlord and Tenant (Consolidation) Ordinance. Essentially this provides security of tenure to all protected tenants and controls rent increases for domestic flats built before June 1981 and for tenancies created before June 1983; such rent increases are permitted to rise gradually towards market levels; generally by maximum increases of 30% every two years subject to a new rent not being less that a certain percentage of the prevailing market rent of the premises (which is at present 70%).

44. In 1991, the Government promulgated the Metroplan which aims to restructure the city and improve the living conditions of the urban areas. The primary objective of the Metroplan is to thin out the existing congested areas and improve the urban living environment. The population in urban areas will be kept at about 4.2 million.

ARTICLE 12: RIGHT TO PHYSICAL AND MENTAL HEALTH

A. Right to Health

Paragraph 2(a)

45. The Family Health Service of the Department of Health is responsible for promoting and maintaining the health of women of child-bearing age and children from birth to five years of age. It provides a comprehensive range of health care services, both preventive and curative, to these groups through 45 Maternal and Child Health Centres and 48 Family Planning Clinics.

46. The effect of promotional and preventive health programmes can be reflected in various health indices. From 1980 to 1990, the infant mortality rate fell from 11.8 to 5.9 per thousand live births. During this period, life expectancy at birth increased from 71.6 years for males and 77.9 years for females to 74.6 years and 80.3 years respectively. Maternal mortality rate remains very low at 0.04 per thousand total births in 1990.

47. The Comprehensive Observation Service of the Family Health Service aims at early detection of developmental abnormalities among children from birth to the age of

five so that early remedial treatment can be initiated. Developmental screening tests are performed at different key ages and children with suspected abnormalities are referred to relevant specialist clinics and child assessment centres for further examination.

48. The Child Assessment Centres serve children from birth to 11 years old. They provide comprehensive physical, psychological and social assessment as well as treatment, parental counselling and referral for appropriate placement of the children in the various institutions and centres run by the Government and voluntary agencies. At present, there are five multi-disciplinary child assessment centres in operation.

Paragraph 2(b)

49. As regards industrial hygiene, the Occupational Health Division of the Labour Department works to maintain and improve the physical and mental well-being of workers and to protect them against health hazards arising from employment. It provides an advisory service to the government and the public on matters concerning the health of workers and the hygiene of the workplace and supervises the health standards and practices in industry. A major responsibility of the Division is to investigate notified occupation diseases and potential health hazards for the determination of preventive action. In addition, the Division also conducts surveys in various industries on health and hygiene conditions, assists in the medical assessment of injured workers and promotes education in occupational health and control of industrial health hazards.

Paragraph 2(c)

50. The prevention, treatment and control of epidemic, endemic, occupational and other diseases present no difficulties.

51. The immunisation programme in Hong Kong protects children from 9 common childhood infections, namely, measles, mumps, rubella, diphtheria, whooping cough, tetanus, poliomyelitis, tuberculosis and hepatitis B. The major communicable diseases are under control and no epidemic has been reported.

Paragraph 2(d)

52. Major developmental projects include the full commissioning of two new hospitals with over 1,600 beds each as well as a convalescent and infirmary hospital with over 1,000 beds. Together with other extension and reprovisioning work on existing hospitals, an additional 7,900 beds are expected to be available by the end of this decade, bringing the total number of public hospital beds to 29,800. The ratio of public hospital beds to population will improve correspondingly from 3.8:1000 in 1991 to 5.0:1000 in 1999.

53. The management responsibility for all public hospitals has been brought under the Hospital Authority since December 1991. The Authority is established with the statutory functions of advising the Government on the public needs for hospital services and the resources required to meet those needs as well as to manage and develop hospital services in a way conducive to achieving greater efficiency, more public participation and better patient care.

54. Training in dentistry started in 1980 at the University of Hong Kong, which is supported by the Prince Philip Dental Hospital. The Tang Shiu Kin Dental Therapists Training School has offered an intensive 3-year training programme for Student Dental Therapists since 1978.

55. The School Dental Care Service, introduced since 1980, provides regular dental examinations, simple dental treatment and oral health education to primary school children. In 1990, 400,921 school children participated, representing 74 per cent of the primary school population.

56. Medical care is delivered at two levels: primary health care at out-patient clinics and health centres and in-patient care at hospitals. At the end of 1990, there were 6,260 medical doctors and 25,286 hospital beds. A comprehensive, almost free, medical service functions in Hong Kong whereby anyone in need is assured of medical care and attention in the event of sickness.

57. There have been recent improvements to primary health care, including the introduction of a medical records system and an appointments system at general out-patient clinics and of a pilot scheme to organise primary health care on a district basis with community participation.

B. Right to a Healthy Environment (Paragraph 2(b))

58. The 1980s saw the development of comprehensive control legislation for all areas of pollution. By 1989 an adequate legislative framework was in place, and a 10 year Environmental Protection Strategy was produced. This was embodied in the White Paper on Pollution, the Sewage Strategy, and the Waste Disposal Plan, all completed in 1989. The 10 year Strategy sets target dates for the achievement of a substantial number of environment pollution aims.

59. The Water Pollution Control Ordinance, first enacted in 1980, is the principal ordinance to control the pollution of the waters of Hong Kong. In 1990, comprehensive amendments to the Ordinance were made to impose stringent control of all discharges and deposits within specified water control zones through a licensing system administered by the Environmental Protection Department. Controls are now in force in six water control zones. The remaining territorial waters are planned to come within regulatory controls by 1995. Marine dumping activities are controlled by a licensing scheme under the Dumping at Sea Act 1974 (Overseas Territories) Order 1975. Disposal is normally restricted to uncontaminated dredged spoil materials. A comprehensive sewage strategy was adopted in 1988. It provides for stronger legislation to control effluent disposal, local sewerage improvements through 16 regional sewerage master plans, and a four-stage strategic sewage disposal scheme to transfer sewage collected in urban areas to a central sewage treatment plant on the Stonecutters Island before its disposal via a 30km oceanic outfall. Detailed design or construction works for six sewerage master plans have started whilst studies of the remaining master plans are either under way or will commence in the near future according to a phased programme. Detailed design of the first phase of the disposal scheme is expected to start in 1992.

60. The Waste Disposal Plan, published in December 1989, detailed initiatives on the disposal of solid waste outlined in the White Paper, "Pollution in Hong Kong - A Time to Act". Three major strategic landfills in the New Territories, serviced by a network of refuse transfer stations, will be constructed to replace older urban landfills and incinerators. The first of these refuse transfer stations, at Kowloon Bay, was commissioned in April 1990 and a second station is under construction at Chai Wan. Consultancies on others, at Shatin and Hong Kong Island West, are progressing. Work on the strategic landfills is also well advanced. Tenders for the design, construction and operation of the West New Territories Landfill, as part of a unified contract, have been called and tender preparation for the other two landfills is nearing completion.

61. The construction of a chemical waste treatment facility on Tsing Yi Island is underway and the facility is due to be commissioned late 1992. This has enabled the passage of specific Regulations under the Waste Disposal Ordinance to impose, for the first

time, strict controls on the production, transport and disposal of chemical wastes in the Territory.

62. New initiatives for the coming years include the further amendment to the Waste Disposal Ordinance, designed to tighten up and regulate the disposal of municipal waste, and impose controls on the transboundary movement of all wastes. On the construction front, several more refuse transfer stations are scheduled for construction as is a new centralised incineration facility to handle special wastes, including those from abattoirs and pathological waste from medical facilities.

63. The major vehicle for control of air pollution is the Air Pollution Control Ordinance 1983. Control of ozone depleting substances is achieved by the Ozone Layer Protection Ordinance 1989 (the requirements of the Montreal Protocol are being fully met). During 1989, the whole territory was declared an Air Control Zone, in which the stipulated Air Quality Objectives are required to be met. During 1990, the Air Pollution Control (Fuel Restriction) Regulations reduced the maximum permitted level of sulphur in industrial fuel oils from 2.5% to 0.5%. As a result, levels of sulphur dioxide in the air dropped sharply.

64. 1991 saw the initiation of a systematic strategy to control motor vehicle emissions. The Road Traffic (Amendment) Ordinance 1991, gave powers to set up centres for the testing of motor vehicle emissions, to call vehicles suspected of having poor emissions for testing, and to deregister vehicles which failed such tests. Large numbers of volunteer "spotters" identify vehicles with suspect emissions for checking. The Air Pollution (Amendment) Ordinance 1991, provided for the introduction of unleaded petrol, and the Air Pollution Control (Vehicle Design Standards) (Emission) Regulations 1991, made it mandatory for all petrol driven vehicles registered from 1 January 1992 to be fitted with catalytic converters and to be capable of working only on unleaded petrol.

65. A major publicity drive to get vehicle owners to switch to unleaded petrol saw 56% of petrol sales switch to unleaded within the first 10 months after the petrol went on sale. A major revision of the Air Pollution Control Ordinance, which should be enacted in the very near future, [will] introduce a comprehensive scheme of control for environmental asbestos, initiation of action to remove the exemption from licensing of certain previously exempt polluting industries, a tightening of control on "nuisance" emissions, and introduction of a statutory scheme whereby stated levels of chemicals will automatically be considered "dangerous to health" wherever found.

66. The Noise Control Ordinance 1988 provides a comprehensive framework of control of noise pollution. It provides in particular for control on percussive piling, and on the use of powered mechanical equipment at night and at weekends and on public holidays. The Noise Control (Handled Percussive Breakers) Regulations 1991, and the Noise Control (Air Compressors) Regulations 1991, provide for detailed controls on two particularly noisy types of equipment. A further revision to the Noise Control Ordinance (for introduction in 1993) will further tighten up controls on construction noise.

67. A comprehensive package of legislation is under consideration to control effluent from livestock farms flowing into environmental waters. This package of legislation, involving a licensing scheme for livestock farmers, is expected to be enacted in 1993-94.

68. An Energy Efficiency Advisory Committee was established in 1991 to advise on an appropriate policy on energy efficiency. Action to improve the efficiency with which energy is used in commercial buildings is expected to begin in 1992-93. Action is also in hand to consider introduction of a maximum permitted Overall Thermal Transfer Value to design of commercial buildings. Both these initiatives are based on the need to minimise the pollution caused by the production of energy.

69. During 1991, a number of initiatives were introduced not only to improve the planning process to ensure that the environmental impact of developments was properly quantified and any damage caused rectified, but also to try to rectify problems caused by past decisions. It was agreed in early 1992 that Environmental Impact Assessments were to be released for public information. Various environmental protection measures are to be included in the major revision of the Town Planning Ordinance, which is expected to be enacted within the next two years.

CUMULATIVE TABLE OF HONG KONG BILL OF RIGHTS CASES REPORTED TO DATE

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Attorney General v Lee Kwong-kut [1992] 2 HKCLR 76 (CA)
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Re Suthipong Smittachartch and the United States of America [1993] 1 HKLR 93
Tam Hing-yee v Wu Tai-wai (1991) 1 HKPLR 1 (DCt)
Tam Hing-yee v Wu Tai-wai (1991) 1 HKPLR 261, [1992] 1 HKLR 185; [1992] LRC (Const) 596 (CA)