

Bill of Rights Bulletin

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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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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*. **Andrew Bruce QC** is Senior Assistant Crown Prosecutor with the Attorney General's Chambers, Hong Kong. He has appeared for the Government in a number of appellate cases in which *Bill of Rights* issues have been raised. **Editorial comments** are the sole responsibility of the editors (Andrew Byrnes and Johannes Chan) and should not be taken to represent the views of the University, the Faculty of Law or any other person.

SUBSCRIPTIONS

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INFORMATION ON DEVELOPMENTS

We are always grateful for 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 would like to thank Gerry McCoy, Jeremy Croft, Angela Ho, Ian Deane, Alexandre Tikhonov, Judges Jackson and Lugar-Mawson, and the UN Centre for Human Rights (as well as others) for providing us with information included in this issue of the *Bulletin*. We would also like to thank Nancy Choi, who is responsible for the administrative side of the *Bulletin*, as well as Scott Wilkens, Henry Luce Scholar presently with the Centre. This issue is based on the information available to the Editors as of mid-June 1996.

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R v Wong Hiu-chor (1992) 2 HKPLR 288; [1993] 1 HKCLR 107
R v Wong Lai-shing (1993) 3 HKPLR 766
R v Wong Ma-tai (No 1) (1992) 2 HKPLR 490
R v Wong Ma-tai (No 2) (1992) 2 HKPLR 508
R v Wong Sau-chuen (1994) 4 HKPLR 129, [1995] 1 HKCLR 8
R v Wong Sik-ming (1994) 4 HKPLR 488
R v Wong Wai (1994) 4 HKPLR 245
R v Wong Yan-fuk (1993) 3 HKPLR 341, [1994] 2 HKCLR 139
R v Wright, ex parte Lau Wing-wo (1993) 3 HKPLR 126
R v Yau Chi-keung (1994) 4 HKPLR 453, [1994] 2 HKC 64
R v Yeung Chi-chiu and another (1994) 4 HKPLR 677
R v Yiu Chi-fung (1991) 1 HKPLR 167
R v Yu Yem-kin (1994) 4 HKPLR 75
Re Reid (1991) 1 HKPLR 275
Re Rich Sir Ltd (1991) 1 HKPLR 296
Re Sin Hoi (1992) 2 HKPLR 18; [1992] 1 HKLR 408 (CA)
Re Suthipong Smittachartch and the United States of America (1992) 2 HKPLR 249; [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)
Thanat Phaktiphat v Chief Superintendent of Lai Chi Kok Reception Centre (1995) 5 HKPLR 73
Re Tin Sau-kwong (1994) 4 HKPLR 727

EDITORIAL

GENERAL*

There has been rather a long delay since the publication of the last issue of the *Bulletin*, for which we apologise. The major reason for the delay was the fact that a number of important judgments were pending until recently. While this issue notes only seven new cases decided since the last issue, a number of them are of fundamental importance.

The general trend of the case law -- little or no success before the courts on Bill of Rights arguments and a somewhat parochial reaffirmation of the Bill of Rights as embodying little more than existing common law guarantees -- has continued. It has been mainly in the area of procedure that the courts have been prepared to countenance Bill of Rights arguments (though even this trend has not been consistent), and, in the cases in which Bill of Rights claims succeeded, the courts held that the claim made would also succeed under common law. In the cases noted in this issue there has been no case in which a statutory provision has been held to be inconsistent with the Bill of Rights Ordinance; the only Bill of Rights arguments that were upheld by a court were of a jurisdictional nature, namely that a publicly-funded university is a "public authority" within the meaning of the Bill of Rights Ordinance, and applications for a stay of proceedings because of a missing witness and for the exclusion of evidence (both of which also succeeded on common law grounds).

CASE LAW DEVELOPMENTS

The most important decision since the last issue is the decision of the Privy Council in *Ming Pao Newspapers Ltd v Attorney General* (see page 51) below. This case involved an appeal by *Ming Pao* against a conviction under s 30 of the Prevention of Bribery Ordinance in which the newspaper challenged the consistency of s 30 with the guarantee of freedom of expression in art 16 of the Bill of Rights. While the appellants eventually succeeded in having the charge dismissed, this was on the basis that the provision did not apply to a situation in which there was no suspect in the investigation; the Judicial Committee, affirming the Court of Appeal, stated its view that the provision itself was consistent with the Bill of Rights.

The Privy Council also drew a line under the challenge to Hong Kong's system of functional constituencies when in early June it refused the appellants in the case of *Lee Miu-ling* special leave to appeal to the Privy Council against the judgment of the Court of Appeal, *Lee Miu-ling v Attorney General (No 2)* (1995) 5 HKPLR 585, [1996] 1 HKC 105 (see page 57 below).

In a defamation case, *Hong Kong Polytechnic University and others v Next Magazine Ltd and another* (see page 20 below) Keith J held, as a preliminary issue, that the Hong Kong Polytechnic University was a "public authority" within the meaning of s 7(1) of the Bill of Rights Ordinance. Accordingly, art 16 of the Bill of Rights was relevant to the action insofar as it was brought by the University and its President.

In *R v Town Planning Board, ex parte Real Estate Developers Association* (see page 28 below) Leonard J rejected a challenge to the composition of the Town Planning Appeal Board based on common law grounds of bias and art 10 of the Bill of Rights. In this judgment Leonard J reviews a number of important issues relating to the scope of art 10 of the Bill of Rights and, among other holdings, appears to doubt the position established by the international case law that art 10 provides a right of access to court generally where a right of the appropriate sort is determined, rather than only in those cases where there are judicial or quasi-judicial proceedings on foot or entitled to be brought under existing law.

In *R v Kwong Kui-wing and others* (see page 43 below) Judge Lugar-Mawson reviewed the development of the law in Hong Kong relating to the compatibility of evidentiary presumptions with the right to be presumed innocent guaranteed by art 11(1) of the Bill of Rights. In a challenge to ss 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap 134) -- which embody presumptions relating to the possession and knowledge of the nature of dangerous drugs -- he concluded that the two provisions were consistent with the guarantee.

In another presumption of innocence case, *R v Ng Wing-keung Paul and another* (see page 23 below), Judge Sweeney rejected a challenge to s 51(5) of the Inland Revenue Ordinance (Cap 112), which provides that a person signing a tax return is "deemed" to be "cognizant of all matters therein".

In *R v Singh* Judge Jackson delivered two rulings in which he upheld Bill of Rights arguments in conjunction with common law arguments. In *R v Singh (No 1)* (see page 35 below) he granted a permanent stay of proceedings in reliance on art 10 of the Bill of Rights and the common law ground of abuse of process on one charge, since in his view the testimony of a missing witness was essential to the fair trial of the defendant. In this ruling he referred to a 1994 ruling not previously noted in the Bulletin in *R v Paul Lam Tat-chung* (noted at page 36 below). The second ruling, *R v Singh (No 2)* (see page 49 below), concerned the admissibility in subsequent criminal proceedings of a statement given in disciplinary proceedings by a police officer who was obliged to provide such statements. The judge held that to admit the statements would be inconsistent with the right to equality before the law and the right not to be compelled to confess guilt or to testify against oneself.

We also note in this issue three decisions from last year, which we failed to note in the previous issue.¹ The first of these is *R v Cheung Ka Fai* (1995) 5 HKPLR 407, [1995] 3 HKC 214 (CA) (see page 17 below), dealing with the power of the courts under s 6(1) of the Bill of Rights Ordinance to exclude evidence that may have been obtained as a result of a violation of the right to privacy guaranteed by art 14 of the Bill of Rights. The second was *R v Law Chi Wai* (1995) 5 HKPLR 417, [1995] 3 HKC 446 (see page 39 below). In this case the Court of Appeal rejected a challenge to s 55(1) of the Crimes Ordinance (Cap 200) -- which creates an offence of possession of an explosive substance -- on the ground that the provision was inconsistent with the right to be presumed innocent guaranteed by art 11(1) of the Bill of Rights. The third case was *Attorney General v China State Construction Engineering Corp* (1995) 5 HKPLR 421, [1996] 1 HKC 53 (see page 41 below). In this case the High Court (Gall J) rejected a challenge to s 38A(2) of the Immigration Ordinance (Cap 115), which provides that a site controller of a construction site is guilty of an offence if it is proved that an illegal immigrant was on the construction site (subject to a defence if the defendant can show that it took all practicable steps to prevent this).

Finally, we note the important decision of the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* (1996) 6 HKPLR 13 (see page 23 below). While not a Bill of Rights case, the decision is an important one, since it revisits and reaffirms fundamental protections under the common law against arbitrary and unlawful deprivation of personal liberty.

“ALL THE WORLD’S A LITTLE STRANGE . . .”? THE ADMINISTRATION’S APPROACH TO HUMAN RIGHTS

We have commented previously on the reluctance of the administration to accept judgments by courts, international bodies, NGOs and commentators on the consistency of its policies with human rights standards, unless those judgments happen to coincide with the administration’s own views -- and irrespective of where the weight of the arguments lies. One example, from the recent *Supplementary Report* under the ICCPR illustrates this tendency. In this report the government states the following in relation to the Human Rights Committee’s conclusion that the Hong Kong system of functional constituencies is inconsistent with the guarantee of universal and equal suffrage in art 25 of the ICCPR:

“35. It is against this background that the United Kingdom and Hong Kong Governments must dissent from the Committee’s assessment that the concept of functional constituencies gives undue weight to the views of the business community or discriminates unreasonably or disproportionately between different classes of voters. Nor do they share the view taken by the Committee of the scope and effect of the reservation to Article 25(b)

¹ Two of the cases were noted in an insert placed in a number of copies of the *Bulletin*.

of the Covenant that was made by the United Kingdom Government when it ratified the Covenant. Accordingly, they respectfully maintain their view that the electoral system which now obtains in Hong Kong in respect of elections to the Legislative Council is appropriate and justifiable in present circumstances and gives rise to no incompatibility with any of the provisions of the Covenant.”

It is curious that the government report makes no reference to the judgment of Keith J in the High Court in *Lee Miu Ling* (or indeed the Court of Appeal decision). At first instance the judge held that the reservation to art 25(b) was spent once a fully elected legislature was introduced and also, it seems, that the system of functional constituencies is at odds with the guarantee of universal and equal suffrage contained in art 25 of the ICCPR. This is once again evidence of the government's underlying approach to the interpretation of human rights guarantees: it is prepared to accept and rely on the views of the courts when they correspond with its own view; but when the courts -- after having heard the government's arguments -- reach a conclusion contrary to the government's view but one which is reasonable in the light of the international and national legal arguments, then these decisions somehow become unconvincing and illegitimate.

It is therefore perhaps not surprising that the British and Hong Kong governments' preferred approach to many important issues is to prevent or limit review of its laws and policies by independent bodies, as well as attempting to reverse legislatively cases in which it loses. Thus, one sees first in the refusal of the governments to provide Hong Kong citizens with access to an individual complaint mechanism at the international level, then the immunisation from challenge in the Hong Kong courts of the electoral system and major aspects of the immigration laws by means of the provisions of the Letters Patent and reservations to the Covenant (incorporated in the Bill of Rights Ordinance), and further in the depreciation of the considered conclusions of one international expert body after another. What is surprising about recent government reports to UN treaty bodies is that, despite the protestations that the administration has given serious consideration to the conclusion of these bodies, virtually nothing has been changed in terms of government policy, and the wording of the government's response is almost verbatim from report to report. Such inflexibility is, we believe, an unfortunate feature of the administration's track record in the field of human rights.

The second tendency -- legislative override of decisions on matters of principle which the government disagrees with or finds inconvenient -- one sees in the ultimately successful efforts to limit the impact of the decision of the Privy Council in *Tan Te Lam* by the passage of the Immigration (Amendment) Ordinance 1996 and the suggestion that similar steps might be taken in the wake of the Privy Council's judgment in *Ming Pao*, to eliminate the relatively small area of protection afforded to the media by that judgment.

The same approach is evidenced in the administration's continued intransigence and bitter opposition to private member's initiatives in the field of equal opportunities. The legacy of the administration's apparent obsession with

always having its own way has been that, in the area of anti-discrimination law, Hong Kong has been saddled with an enormously complex and flawed legislative framework and a cumbersome administrative structure. The most unfortunate aspect of this development is that there were other, better options which the administration steadfastly refused to consider and, indeed, fought against.

While it is always easier to be critical from the sidelines than to govern, it is difficult to resist the impression that the shutters are well on their way to being lowered on any serious proactive commitment by the administration in many fields of human rights.

OTHER DEVELOPMENTS

Equal opportunities legislation

On 20 May 1996 Dr Fanny Cheung Mui-ching took office as the first Chairperson of the Equal Opportunities Commission, the body established by the *Sex Discrimination Ordinance* to administer that Ordinance and the *Disability Discrimination Ordinance*. The members of the Commission have been appointed and the first meetings of the Commission have already taken place. As yet the substantive provisions of the *Sex Discrimination Ordinance* and the *Disability Discrimination Ordinance* are not in operation. It is expected that these provisions, other than those related to employment discrimination, will come into operation in September.² The employment-related provisions are expected to come into operation once relevant Codes of Practice are adopted, possibly by the end of 1996. Recently, legislator Lee Cheuk-yan made an unsuccessful attempt to bring all substantive provisions of the Ordinances into force as of the beginning of September through consideration by the Council of the two commencement notices made by the responsible policy secretaries. However, his motion was ruled out of order by the President.

The administration released its consultation paper on age discrimination in early June, but has not yet released the results of its consultation on discrimination in relation to family status and sexuality. In the meantime, however, the administration has continued to oppose private members' bills dealing with family status, sexuality and age discrimination, and has sought to delay them by whatever means are at its disposal (mainly arguments that the Bills have charging effect). Nevertheless, the President of the Legislative Council has recently ruled that the *Equal Opportunities (Family Responsibility, Sexuality and Age) Bill*, put forward by legislator Lau Chin-shek as part of a coalition of legislators supporting comprehensive anti-discrimination legislation,

² Sections 62, 64 and 65 of the Disability Discrimination Ordinance and ss 63, 64, 67, 68 69 and Schedule 6 of the Sex Discrimination Ordinance came into operation on 20 May 1996: LN Nos 184 and 185 iof 1996: *Hong Kong Government Gazette*, 10 May 1996, Legal Supplement No 2, B856 and B858.

does not have charging effect. This Bill is expected to be introduced into the Council in early July 1996. Other private members' bills, including a racial discrimination bill and a bill embodying amendments to the sex and disability discrimination legislation are still wending their way through the process of obtaining necessary approvals for introduction.

The Hong Kong government addresses a number of matters related to discrimination legislation in its *Supplementary Report under the ICCPR* (see Appendix D). Its continuing reluctance to carry out its international obligations in relation to a number of forms of discrimination and its concerted opposition to private members' initiative are a most unfortunate chapter in the final stages of British administration of Hong Kong.

Commonwealth Judicial Colloquium on international human rights norms and the human rights of women held in Hong Kong 20-22 May 1996

From 20-22 May 1996, judges and officials from a number of Commonwealth countries in the Asia-Pacific region (including four judges from Hong Kong) met at the University of Hong Kong to consider the human rights of women, and how domestic courts might give effect to developing international standards of gender equality. The participants considered issues such as nationality laws that discriminate against women, violence against women, other forms of sex discrimination, and the rights of the girl child.

The Judicial Colloquium was organised by the Gender and Youth Affairs Division of the Commonwealth Secretariat, and the Commonwealth Magistrates and Judges Association, in collaboration with the Centre for Comparative and Public Law at the University of Hong Kong. Justice Dame Silvia Cartwright of the High Court of New Zealand, a member of the United Nations Committee on the Elimination of Discrimination against Women, co-chaired the colloquium with Justice P N Bhagwati, former Chief Justice of India and currently a member of the United Nations Human Rights Committee that recently reviewed Hong Kong's human rights record. The Chief Justice and Attorney General officiated at the opening ceremony and the Solicitor General closed the Colloquium.

The Hong Kong Colloquium followed the first Commonwealth Judicial Colloquium to focus on gender issues organised by the Commonwealth Secretariat in collaboration with the Commonwealth Magistrates and Judges Association in Victoria Falls, Zimbabwe in August 1994. That Colloquium, attended by judges from Africa, adopted the Victoria Falls Declaration, which sets out the importance of judges' and lawyers' being aware of international standards guaranteeing the human rights of women.³ It also recommends a number of measures that could be adopted to promote the better implementation

³ The text of the Victoria Falls Declaration appears in *Bill of Rights Bulletin*, v 3, n 2, October 1994, Appendix C

of those standards in national law. The Secretariat also organised a similar Colloquium at the United Nations Fourth World Conference on Women in Beijing in September 1995.

The Colloquium adopted *Conclusions*, which reaffirmed the Victoria Falls Declaration, and called on judges and others to explore further the ways in which international human rights standards may be used in national courts to advance the human rights of women. The text of the *Conclusions* appears in Appendix F. Papers from the Colloquium will be published by the Commonwealth Secretariat in due course.

INTERNATIONAL DEVELOPMENTS CONCERNING HONG KONG

TREATY INACTION

Convention on the Elimination of All Forms of Discrimination Against Women

The Convention has still not yet been extended to Hong Kong; the question of that extension is under consideration by the Joint Liaison Group, since it involves international rights and obligations that would continue beyond 1997. In hearings before the Home Affairs Panel in February 1996, the administration provided further details about the reservations which it would wish to have included in any instrument of extension of the Convention to Hong Kong. The proposed reservations mirror a number of those entered by the United Kingdom (which recently revised its reservations, a process which has delayed the consideration by London of possible extension to Hong Kong), as well as including a number of Hong Kong-specific reservations.

Proposed reservations relating to Hong Kong are

- (a) the understanding that the Convention allows Hong Kong to maintain its existing laws, regulations, customs and practices, which provide for women to be treated more favourably than men;
- (b) that the affairs of religious denominations and orders in Hong Kong should not be affected by obligations under the Convention and
- (c) that the Hong Kong Government has the right to continue to apply the provisions of Hong Kong immigration law;
- (d) a reservation to preserve the position in respect of the rent concession under Annex III to the Joint Declaration and the small house policy.

Other proposed reservations relate to specific articles of the Convention and correspond closely to the United Kingdom's existing reservations (reproduced in Appendix G below). They relate to the following articles:

- **Article 9 - Equality in nationality laws**

Article 9 of CEDAW requires States Parties to grant women equal rights with men (a) to acquire, change or retain their nationality and (b) regarding the nationality of their children. A similar reservation to that made by the UK to this article is proposed for Hong Kong in order to cover the continuation of certain temporary or transitional provisions in the British Nationality Act 1981 as it applies in Hong Kong. It is proposed that the reservation would be removed after June 1997 when the Act in question will no longer apply to Hong Kong.

- **Article 11 - Equality in employment**

- (a) *Retirement benefits*

Article 11 of the Convention obliges States Parties to take all appropriate measures to eliminate discrimination against women in the field of employment. Among the areas covered by this obligation is the right to social security in the case of retirement. A reservation proposed in order to cover any private retirement schemes which might provide differential treatment in respect of retirement and death benefits for people of different sex.

- (b) *Discrimination based on Maternity*

Article 11(2) provides specifically for the protection of women from discrimination on the grounds of marriage or maternity. The Employment Ordinance (Cap 57) provides that a female employee has to fulfil a certain qualifying period of employment for entitlement to maternity leave and maternity leave with pay, and for protection against dismissal on the basis of pregnancy. The proposed reservation is to cover existing law in this area.

- **Article 15 - Equality in legal and civil matters**

Article 15 of CEDAW provides that States Parties shall accord women equality with men before the law. A reservation under this article is proposed "for the avoidance of doubt", to clarify the United Kingdom's understanding that that only the relevant discriminatory provision of a contract or other legal instrument would be deemed null and void, not necessarily the whole contract or instrument.

TREATY ACTION

Hearings before the Committee on the Elimination of Racial Discrimination (March 1996)

On 4 and 5 March 1996 the Committee on the Elimination of Racial Discrimination (CERD) reviewed the 13th report submitted by the United

Kingdom in respect of its metropolitan territory, together with the 13th report in respect of Hong Kong.

As with the hearings before the Torture Committee in November 1995 (when Hong Kong was also considered along with the metropolitan UK), there was considerable interest from both UK and Hong Kong-based NGOs in the hearings before the Committee. For almost the first time in the work of the Committee the members were provided with a great deal of information directly by NGOs. Some dozen or more UK NGOs, together with 4 or 5 from Hong Kong, submitted written material to members. The Hong Kong Human Rights Monitor, the Legislative Council and the Indian Resources Group submitted reports, and the Centre for Comparative and Public Law submitted a brief note summarizing the major concerns that had been raised at the seminar on the Convention held at the end of 1995.

The formal hearing before the Committee was preceded by an open meeting for NGOs to brief Committee members. Convened by the country rapporteur for the UK, Professor Theo van Boven of the Netherlands, the hour-long meeting was attended by 6 or 7 Committee members, some 30 NGO representatives (including two from Hong Kong) and, intriguingly, representatives from the Hong Kong government.

The UK government delegation consisted of 9 members overall, 5 from the UK (one of whom was responsible for Hong Kong and the other dependent territories), and 5 from the Hong Kong government (ie 6 out of 10 officials were covering Hong Kong). Following the UK introduction, Henry Steel from the UK (Adviser to the Foreign and Commonwealth Office on the dependent territories) and Stephen Wong from the Attorney General's Chambers introduced the Hong Kong report. Stephen Wong introduced the report in a manner similar to previous introductions before the other UN treaty bodies -- stressing the government's commitment to international human rights treaties and to ensuring their continued applicability to and in Hong Kong and outlining in a fairly formalistic manner the various measures that have been taken as part of the government's program to provide a range of remedies such as COMAC, expansion of legal aid, special human rights lists in the courts, etc. Much was made of the guarantees against racial discrimination in the Bill of Rights, but no mention was made of the threats to the Bill of Rights emanating from the proposals to amend or repeal it, nor of the views expressed by the Chief Justice and other judges, nor of the fact that the *Expatriate Civil Servants'* case mentioned by the government is the only case involving racial discrimination (and that not legally aided) brought under the Bill of Rights.

He then updated various paragraphs of the report. Of particular interest was his discussion of anti-discrimination legislation in Hong Kong. Noting the enactment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance, he referred to the consultations on sexuality and family status discrimination, and the coming consultation on age. So far as racial discrimination legislation was concerned, he noted that once the resources being used for the existing consultation exercises are released (probably in the

autumn of 1996) the government would carry out a study on racial discrimination, presumably to be followed by a consultation, to determine whether racial discrimination exists in Hong Kong and, if it does, what measures are appropriate to address it. He noted that the government would be examining legislation to identify any provisions that conferred benefits on persons of one race but not on persons of other races, and would then amend offending legislation. No commitment was made to enact legislation prohibiting racial discrimination by private parties, nor to the fact that the Hong Kong government had strenuously opposed private member's Bills in this area.

Finally, the government stated that it intended to submit the 14th report in respect of Hong Kong shortly and hoped that the Committee would be able to consider it before the summer of 1997.

The Committee's concerns

The main commentator on the UK/HK reports was the country rapporteur, Professor Van Boven. In a 45-minute long commentary (a third of which dealt specifically with Hong Kong), he raised a large number of questions and concerns about the two reports. He and other members of the Committee commended the UK/HK governments on the quality of the reports, the fact that the UK reported regularly, and the size of the delegation. He also expressed appreciation for the NGO interest and their contributions.

Professor Van Boven made a number of points of general concern or relating to the dependent territories, as well as a number of Hong Kong-specific comments:

Of general applicability

- He was critical of the UK's reservation to article 4,⁴ which he considered to be redundant and unfortunate (other members of

⁴ Article 4 provides:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

a. Shall 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;

b. Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

the Committee took a slightly different view on its effect, but agreed that it should be withdrawn); he also was critical of the reservation to article 6,⁵ which he also considered to be redundant;

- He reminded the government of the recommendations made in 1993 by the Committee that the Convention should be incorporated in domestic legislation in the dependent territories, and expressed skepticism at the justification for not doing so (contained in paras 1-5 of the HK report), in view of the fact that the ICCPR had been directly incorporated into the law of Hong Kong.
- He called on the UK to make a declaration under article 14 of the Convention accepting the right of individual petition in respect of the metropolitan territory and the dependent territories.

Hong Kong specific comments

- He reiterated criticism that, while the Bill of Rights Ordinance provided protection against racial discrimination by government and public authorities, there was no domestic legislation prohibiting racial discrimination by private actors. He expressed the view that this was a serious gap and constituted a failure to comply with article 2(1)(d) of the Convention. He asked the government whether it would rectify the lacuna and enact racial discrimination legislation.
- He expressed special concern about the position of foreign domestic helpers in view of their vulnerable situation, referring to the concluding observations of the Committee on Economic, Social and Cultural Rights in November 1994 concerning the two-week rule, and the difficulties of bringing cases against employers for breach of contract. He asked what the Hong Kong authorities had done to redress the situation.
- He also referred to the treatment of the Vietnamese boatpeople in Hong Kong (especially the children), referring to the similar concerns expressed by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. He drew attention to the use of violence by CSD and police in relation to the boatpeople and asked for further information from the government.

c. Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

⁵ States Parties shall assure to everyone within their jurisdiction 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 contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

- He expressed skepticism that the same reasons that made legislation to implement article 4 inappropriate in the UK also applied to Hong Kong and asked whether the HK government was prepared to reconsider the issue and enact legislation to implement article 4.
- In relation to articles 5(d)(ii) and (iii), he expressed considerable concern about Hong Kong residents of South-Asian origin who would effectively become stateless after 1997, drawing attention to the obligations of the UK under article 10 of the Convention on the Reduction of Statelessness
- In relation to article 6, he referred to the Committee's General Recommendation which encourages the establishment of national commissions. He noted that the government had not responded favourably to Anna Wu's proposals to establish a Human Rights Commission and asked the government whether it was prepared to reconsider its stance.
- In relation to article 7 he asked that the concluding observations of the Committee be disseminated as broadly as the reports to the Committee.
- In relation to future reporting, he noted that as China was a party to the Convention, Hong Kong would remain subject to international supervision in its implementation of the Convention. He drew attention to the "one country, two systems" concept and the high degree of autonomy guaranteed to Hong Kong by the JD and the Basic Law, and expressed the "strong wish" that a "suitable and special arrangement" for reporting in respect of Hong Kong could be worked out between the Central People's government and the HK SAR government.

Other members

Most of the other members of the Committee associated themselves with Professor Van Boven's analysis and concerns, although a number of them added additional concerns or underlined issues that they considered of particular importance. Among the further comments made specifically in relation to Hong Kong were the position of the ethnic minorities (referring to material submitted by the Indian Resources Group), the non-incorporation of the Convention into the law of Hong Kong or other dependent territories, the treatment of Vietnamese, and the need to ensure the greater use of Chinese in the legal system.⁶

The government's response

Overall, there was little difference in the Hong Kong government's responses to those it has recently made to the other treaty bodies before which it

⁶ A comment made by the Chinese member of the Committee, Ms Zou Deci, who also referred to the situation of the ethnic minorities, and the situation of the Chinese minority in Northern Ireland.

has appeared. So far as continued reporting is concerned, the government noted that China was a State party to the Convention and explained that it had discussed the present modalities of reporting with them. In relation to the ethnic minorities, the delegation identified a number of the incidents of citizenship which it said BNO and BOC holders would enjoy, and referred to the "guarantee" given by Prime Minister Major on 4 March 1996 in Hong Kong that if the ethnic minorities came under pressure to leave, they would be permitted to come to Britain. No adequate answer was given to the questions raised about the differential treatment of white subjects in the Falklands and Gibraltar.

On other issues raised in relation to Hong Kong, the government basically reiterated its long-standing justifications for its positions and, once again, there appeared to be no real preparedness to change policy on these issues. On the issue of racial discrimination legislation, the government simply stated that it will consider the desirability of enacting such legislation. No undertaking was given to support the proposed private member's initiative on racial discrimination legislation, and the government appeared unconcerned by the conclusion that failure to have such legislation constituted a violation of its international obligations.

The concluding observations

The Committee's concluding observations were adopted at the end of the session and are reproduced in full in Appendix A. They contain a number of comments relating specifically to Hong Kong. The Committee:

- stated that the study on racial discrimination proposed to begin by the end of the present year was "a constructive means of determining the extent of problems in the area of racial discrimination and reviewing all laws that may in a discriminatory manner confer exclusive benefits on members of a particular race." (para 10)
- expressed its concern "at the failure to include in the 1991 Population Census questions which would help determine the ethnic and racial composition of the population", as such data is necessary for determining the difficulties that minority groups may be facing and whether and how any such difficulties may be due to discrimination (para 18)
- expressed its concern that the adoption of the Bill of Rights Ordinance does not protect persons in Hong Kong from racial discrimination to which they may be subjected by private persons, groups or organizations, as provided for in article 2, paragraph 1(d) of the Convention. (para 19)
- "noted with interest" the government's statement that South Asian residents of Hong Kong are granted some form of British nationality, whether of a British National Overseas (BNO) or a British Overseas Citizen (BOC), so that no resident of Hong Kong would be left stateless following the transfer of sovereignty and expressed its concern that "such status does not entitle the bearer the right of abode in the United Kingdom and contrasts

with the full citizenship status conferred upon a predominantly white population living in another dependent territory”, noting that “most of the persons holding BNO or BOC status are Asians and that judgments on applications for citizenship appear to vary according to the country of origin, which leads to the assumption that this practice reveals elements of racial discrimination”. (para 20)

- expressed concern about the “two-week rule”, which prohibits foreign workers from seeking employment or remaining in Hong Kong for over two weeks from the expiration of their employment contracts. The committee expressed the view that “in view of the fact that the overwhelming majority of the persons affected by this rule are female Filipino foreign domestic workers, this rule appears to have discriminatory aspects under the terms of the Convention which may leave workers vulnerable to abusive employers.” (para 21)
- noted in connection with Vietnamese asylum-seekers the “serious indications” that “the conditions to which these persons are subjected during their often prolonged detention in refugee centres constitute a violation of their human rights and require urgent attention”, and also expressed concern about educational facilities for children in the camps. (para 22)

The Committee recommended in relation to Hong Kong that:

- efforts be made to determine the ethnic and racial composition of the population (para 35)
- the Bill of Rights Ordinance be amended to extend the prohibition of discrimination to acts committed by private persons, groups or organizations, as provided for in article 2, paragraph 1(d), of the Convention. (para 35)
- the “two-week rule” be modified to allow foreign workers to seek new employment in Hong Kong when their employment contracts are terminated. (para 35)
- the question of citizenship status of Hong Kong residents belonging to ethnic minorities of Asian origin be reviewed to ensure that their human rights are protected and that they are not discriminated against, as compared with residents of other former colonies of the United Kingdom. (para 36)
- the fourteenth periodic report due on 5 April 1996 be submitted as an updating report, that it contain information on the metropolitan territory as well as on the dependent territories, including Hong Kong, and that it address all the points raised in these observations. (para 37)

Submission of the fourteenth report under the International Convention on the Elimination of All Forms of Racial Discrimination

The fourteenth report under the International Convention on the Elimination of All Forms of Racial Discrimination in respect of Hong Kong is due

to be submitted later this year. The government has called for submissions from members of the community on matters that should be addressed in the report (see Appendix C). The report is likely to be considered by the Committee on the Elimination of Racial Discrimination in March 1997.

Submission of initial report under the Convention on the Rights of the Child

The government has submitted its initial report under the Convention on the Rights of the Child. It is a voluminous document and can be obtained from the Home Affairs Branch. It is also available (free) on the Law-on-Line World Wide Web server (<http://www.lawhk.hku.hk> -- under *Human rights documents - Hong Kong and UN treaty bodies - The Committee on the Rights of the Child and Hong Kong*).

The report is scheduled to be considered by the Committee on the Rights of the Child on 2 and 3 October 1996.

Submission of supplementary report in respect of Hong Kong under the International Covenant on Civil and Political Rights and hearing before the Human Rights Committee (June 1996)

The United Kingdom government submitted the supplementary report requested by the Human Rights Committee to the United Nations in early June. The English version of the report is reproduced in Appendix D. It is expected to be considered by the Committee at its session to be held from 21 October - 8 November 1996.

Submission of comprehensive report under the ICESCR

The government has submitted its first comprehensive report (under the new reporting cycle) report under the International Covenant on Economic, Social and Cultural Rights. It is a voluminous document and can be obtained from the Home Affairs Branch. It is also available (free) on the Law-on-Line World Wide Web server (<http://www.lawhk.hku.hk> -- under *Human rights documents - Hong Kong and UN treaty bodies - The Committee on Economic, Social and Cultural Rights and Hong Kong*).

The report will be considered by the Committee on the Economic, Social and Cultural Rights at its autumn 1996 session. The dates presently scheduled for consideration of the report are 26 November 1996 (morning) and 27 November 1996. The Committee has sent a list of written questions to the government based on the preliminary examination of the report by a working group of the Committee in May 1996. The text of those questions is reproduced in Appendix E.

HONG KONG PUBLIC LAW REPORTS

The texts of all Bill of Rights cases of any significance are now available to subscribers to the University's Law-On-Line service for a relatively modest charge. The collection of cases is up to date as of June 1996 and nearly all cases can be searched in full text format. Eventually, all the judgments that have been reported will appear in the form in which they are published in the *Hong Kong Public Law Reports* (most already contain HKPLR page references). The database can be accessed through Law-On-Line: <http://www.lawhk.hku.hk> -- choose the *Human Rights* collection, which also contains a considerable amount of material on Hong Kong and human rights treaties that can be accessed without charge.

The publication of vols 1-4 of the *Hong Kong Public Law Reports* is almost complete. Volume 4, part 3 will appear shortly and volume 4, part 4 probably around the end of the summer. Volume 5, containing all Bill of Rights cases from 1995, to be published by Butterworths as a bound volume, is in press and should be available shortly. Readers may have noticed that for 1996 cases the *Hong Kong Public Law Reports* are now being published as part of the *Hong Kong Cases* series; each issue of HKC will contain cases from HKPLR at the back of the issue. These cases will also be issued in a separate bound volume at the end of each year. *Hong Kong Cases*, including the HKPLR from volume 5, are also being made available through LEXIS.

CASES

REMEDIES – JURISDICTION OF THE COURTS TO GRANT RELIEF (BILL OF RIGHTS ORDINANCE, s 6)

Interception of telecommunications – Whether a breach of right to privacy - Whether court has power to exclude evidence obtained as a result of breach of Bill of Rights

***R v Cheung Ka Fai* (1995) 5 HKPLR 407, [1995] 3 HKC 214 (Court of Appeal, Crim App No 198 of 1992, Litton VP, Mortimer and Ching JJA, 22 August 1995)**

The applicant (A1) was convicted on one charge of conspiracy to traffick in dangerous drugs. The heroin was concealed in the hollowed-out legs of rosewood furniture, and the frame of a marble-top coffee table and sent to Canada. The evidence against A1 was provided by surveillance photographs which showed A1 and a few other men, at various times, moving the rosewood furniture and the coffee table from one place to another, the final destination being the freight-forwarder's warehouse. The prosecution also sought to rely on taped conversations between various parties, which heavily implicated A1.

The fact that a conspiracy existed to export heroin from Hong Kong to Canada was not in dispute. The question before the jury was whether A1 took part in the conspiracy. In the course of the trial, the indictment was amended to add A1's wife and another person as co-conspirators. Counsel for A1 submitted that the judge had failed to direct the jury concerning the common law rule that a husband and wife were legally incapable of conspiring together and had led the jury to believe that A1 could be found guilty even if the only other conspirator had been his wife.

Counsel for A1 also argued that the taped conversations ought to be excluded as they had been recorded in breach of A1's right of privacy. The calls in question had been intercepted by the Royal Canadian Mounted Police. The British Columbia Court of Appeal had ruled these conversations inadmissible in proceedings against the accused's wife in Canada, holding that the relevant wire-tap authorisation was invalid, since the police affidavits had failed to disclose reasonable and probable cause that the target was involved in any drug transaction. The accused argued that the interceptions amounted to an unlawful or arbitrary interference with his privacy, and that the use of the conversations at trial constituted a violation of art 14 of the Bill of Rights. He further argued that the court had a discretion under s 6(1) of the Bill of Rights Ordinance to exclude evidence which had been obtained in violation of the accused's right to privacy.

Held, dismissing the appeal:

1. A husband and wife were legally incapable of conspiring together, as they were considered as constituting one person in law, they were presumed to have but one will. Therefore, a charge of conspiracy implicating a husband and wife alone must be bad, and no conviction could follow. However, by the very nature of the conspiracy with which this case was concerned, if A1 was involved, he must have been involved with at least two other persons apart from his wife. On the evidence adduced at the trial, a finding that A1 had conspired with his wife and no one else would have been perverse. Therefore, the failure to give such a direction would not have affected the outcome and did not amount to a material irregularity at the trial.
2. It was common ground that the test of the admissibility of evidence is relevance. As the taped conversations constituted relevant and cogent evidence against A1 at his trial, the judge was right to rule them admissible in evidence. *R v Sang* [1980] AC 402 applied.
3. The Bill of Rights is part of the fabric of the law of Hong Kong but is not a self-contained code. It would be an extraordinary thing if, by applying the normal rules of evidence and procedure, a piece of evidence was admissible and yet, by the operation of s 6(1) of the Hong Kong Bill of Rights Ordinance (Cap 383), it was inadmissible. This would, in effect, be to operate a dual system of justice. Therefore, s 6(1) did not have the effect of conferring an independent jurisdiction on the judge to exclude the taped conversations.

Simon Westbrook (Paul Kwong & Co) for the first applicant; John McNamara (Paul Kwong & Co) for the second applicant; M C Blanchflower (Crown Prosecutor) for the respondent.

Editorial comment

In rejecting the argument by one of the accused that the use of evidence obtained by interceptions was a violation of his right to privacy and should be excluded in the exercise of the court's power under s 6(1) of the Bill of Rights Ordinance, Litton VP, for the court, stated the following ((1995) 5 HKPLR at 416, [1995] 3 HKC at 223):

"As can be seen, the argument in effect boils down to this: assuming that the interceptions amounted to some violation of A1's 'privacy' in terms of art 14(1), should the trial judge have made an order, pursuant to s 6(1), excluding the evidence?"

This is, in effect, the same argument which is conclusively dealt with by applying the common law rule in *R v Sang*. The Bill of Rights is part of the fabric of the law of Hong Kong. It is not a self-contained code. It would be an extraordinary thing if, by applying the normal rules of evidence and procedure, a piece of evidence is admissible and yet, by the operation of s 6(1) of the Bill of Rights Ordinance, it should be inadmissible. This would, in effect, be to operate a dual system of justice. In our judgment, s 6(1) has no such effect.

This removes the necessity of having to consider whether 'wire tap[s]' constitute 'arbitrary or unlawful interference with privacy' and the consideration of cases in the international sphere such as *Malone v United Kingdom* (1984) 7 EHRR 14 which deal with art 8(1) of the European Convention become unnecessary."

This approach is consistent with a number of earlier decisions of the superior courts of Hong Kong in which they have refused to accept that the creation of a statutory right (or a quasi-constitutional right) has any implications for the power of the courts to exclude evidence obtained in violation of that right. They have preferred simply to invoke the decision of the House of Lords in *R v Sang* as resolving the issue definitively, even though the United Kingdom has no similar Bill of Rights guarantee.

The court's suggestion in this case that permitting the broad guarantees of the Bill of Rights to have an impact on the existing rules of evidence would be "an extraordinary thing" and amount to the operation of a "dual system of justice" is, with respect, misconceived. A more orthodox approach would surely be to start by construing the Bill of Rights Ordinance generously and purposively and, if the court considered that so construed the Ordinance gave it the power to exclude evidence obtained in breach of the Bill of Rights, then the statute would prevail over the law laid down in *R v Sang*. Alternatively, one could take the view that the common law rule in *R v Sang* should evolve in a direction which would give effect to fundamental human rights as enshrined in the Bill of Rights. In view of the drafting history of the Bill of Rights, the purposive approach to its interpretation approved by the Privy Council, and the reasoning of courts elsewhere, it must surely be the case that the legislative endorsement of a human rights guarantee has some implications for the use of evidence obtained in breach of that right. As a result, the courts should be viewed as possessing a discretion whether to admit such evidence, even though the existence of the discretion would not necessarily lead to the exclusion of evidence in all, or even many, cases. This is the approach adopted by Jerome Chan J in *R v Yu Yem-kin* (1994) 4 HKPLR 75 at 98-101 and the New Zealand Court of Appeal in *R v Accused* (1991) 7 CRNZ 407, 417 (see *Bill of Rights Bulletin*, vol 2, no 1, at p 33), neither of which is referred to by the Court of Appeal in the present case. In our view, these decisions represent a preferable and intellectually more satisfying approach than the Hong Kong Court of Appeal's approach in this case, which essentially appears to be that the common law rule in *R v Sang* is engraved in stone and that the Bill of Rights Ordinance could not have been intended to affect the status quo in this respect.

SCOPE OF APPLICATION OF BILL OF RIGHTS ORDINANCE – MEANING OF “PUBLIC AUTHORITIES” (s 7)

Application – Public authorities – Whether university a public authority – Criteria to be applied

Hong Kong Polytechnic University and others v Next Magazine Ltd and another (1996) HCt, No A3238 of 1995, Keith J, 7 June 1996 (to be reported in 6 HKPLR)

The defendants were the publisher and editor-in-chief of *Next* magazine, which published an article on 2 September 1994 which alleged, among other matters, that the Hong Kong Polytechnic University had turned a blind eye to the lack of academic qualifications of its lecturers. The University, together with its president and a lecturer, commenced libel proceedings against the defendants.

The defendants issued summonses seeking orders under RSC O 15 r 6(2) that the first and second plaintiffs cease being a party to the action. They argued that the public interest required that public bodies such as the University should be subject to close scrutiny by the press and that to the extent that the proceedings were brought by the University and its president, they had no basis at common law, and constituted a violation of the guarantee of freedom of expression in art 16 of the Bill of Rights.

The application came before a master, who dismissed the summonses. The defendants appealed to a judge of the High Court. The appeal was conducted on the basis that it was an appeal against orders under O 18 r 19(1) refusing to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The judge decided to hear as a preliminary issue the applicability of the Bill of Rights Ordinance and adjourned argument on the other issues pending the resolution of this issue.

Held:

1. An application to strike out a statement of claim on the ground that it disclosed no reasonable cause of action was to be determined on the basis of the facts pleaded in the statement of claim, and no evidence was admissible on such an application. However, since the question whether the University was a public authority was dependent on facts not pleaded in the statement of claim, it was not possible to determine the matter on that basis. Nevertheless, as the parties had agreed the facts necessary to make that determination, the matter could be dealt with as the trial of a preliminary issue on the basis of agreed facts.

2. The Bill of Rights Ordinance was in the nature of a constitution and should be given a generous and purposive interpretation. As the purpose of the Ordinance was to incorporate provisions of the International Covenant on Civil and Political Rights (ICCPR) into Hong Kong law, it was necessary to look to the ICCPR to identify the purpose of s 7(1). However, although the ICCPR was intended to guarantee protection against certain actions of the State, it did not identify what constituted the State for this purpose, nor was much assistance to be gained from the international case law on the subject.

Tam Hing-ye v Wu Tai-wai (1991) 1 HKPLR 261, [1992] 1 HKLR 185; *Minister of Home Affairs v Fisher* [1980] AC 319; *Attorney-General of The Gambia v Jobe* [1984] AC 689, considered.

3. In s 7(1) the phrase 'the Government' referred to the legislative, executive and judicial organs of the state. Accordingly, the phrase 'public authority' referred to bodies which are not a part of the legislative, executive and judicial branches of the Government of Hong Kong.
4. For a body to be a public authority within the meaning of s 7(1) of the Bill of Rights Ordinance, it is not sufficient for it to be entrusted with functions to perform for the benefit of the public and not for private profit; there must be something in its nature or constitution, or in the way in which it was run, apart from its functions, which brings it into the public domain. This may take the form of public funding, of a measure of governmental control or monitoring of its performance, or some form of public accountability.
5. While the University was not subject to government control, the nature of its functions, the purpose for which those functions were performed and the fact that it was funded to a great extent from public funds lead to the conclusion that it is a public authority within the meaning of s 7(1) of the Bill of Rights Ordinance.

R v Hong Kong Polytechnic, ex parte Jenny Chua Yee-yen (1992) 2 HKPLR 334, referred to.

Joseph Fok (Johnson, Stokes & Master), for the plaintiffs; Wong Hin Lee and Johannes Chan (T S Tong & Co), for the defendants.

Editorial comment

It is perhaps surprising that there have been so few cases on the meaning of "public authority" under the Bill of Rights Ordinance. This judgment is therefore important since it is the first case to examine the issue in any detail and to lay down a test for determining what constitutes a "public authority". The approach adopted is in general welcome. Under this test, a number of public bodies, such as the Hospital Authority, the Mass Transit Railway Corporation, Government-funded schools, and many disciplinary bodies may fall within the scope of the Bill of Rights Ordinance. A broad interpretation and generous application of "public authority" may expand the protection afforded by the Bill of Rights to cover many rights violations by public bodies that are not part of government, and thus alleviate some of the impact of the Court of Appeal's decision in *Tam Hing-ye v Wu Tai-wai*

(1991) 1 HKPLR 261 (in which the court held that the Bill of Rights Ordinance had no application to inter-citizen litigation).

The judgment leaves open the question whether a body may be regarded as a "public authority" when discharging some functions but not when discharging others, a situation that is familiar from the field of judicial review where a body may be amenable to judicial review in respect of some of its functions (because they are of a "public law" character) but not in respect of others (because they are of a "private law" nature). : see, for example, *R v Mass Transit Railway Corporation, ex p Hong Kong Standard Newspapers Ltd* (1993) 3 HKPLR 419. There are two ways in which one might approach this issue. The first would be to accept this bifurcation and conclude that the Bill of Rights applied only to those functions of the body that were "public", assuming that it is possible to identify them without difficulty. For example, one might argue that a university is not acting as a public authority when it is, for example, administering a privately endowed scholarship or when engaged in an employment dispute with its staff. This approach was that apparently adopted by the Bar Disciplinary Tribunal in *Hong Kong Bar Association v Anthony Chua* (1994) 4 HKPLR 637.

The other, and possibly preferable, approach is to treat the body concerned as a public authority for all purposes. The Bill of Rights Ordinance will then apply, but its application may vary according to the nature of the functions being exercised. Therefore, a university, in discharging functions which are essentially private in nature, would not be subject to the same constraints as it would be if it were discharging functions of a public nature. Once again, this assumes that the various functions can be so classified. It remains to be seen which approach the courts will adopt in future.

There are continuing attempts to reverse the effect of *Tam Hing-ye* legislatively. Legislator Bruce Liu prepared a draft Bill of Rights (Amendment) Bill, the effect of which would have been not merely to render the Bill of Rights applicable to all legislation whether or not it affected relations between private parties, but to provide that the Bill of Rights Ordinance would "bind" everyone, as was provided for by the first draft of the Bill of Rights Ordinance. However, the President of the Legislative Council ruled that this Bill had a charging effect and could not be introduced without the administration's consent -- which was not forthcoming. However, the Bill to be introduced by legislator Lau Chin-shek, the *Equal Opportunities (Family Responsibility, Sexuality and Age) Bill*, also contains a provision the purpose of which is to reverse the decision in *Tam Hing-ye*, though only in relation to legislation. Interestingly, the President of the Council ruled that this Bill had no charging effect.

LIBERTY OF THE PERSON (ART 5(1), BILL OF RIGHTS)**Immigration Ordinance (Cap 115) s 13D(1)**

Legality of detention Vietnamese boatpeople – Detention pending removal – Whether power of detention subject to implicit limitations – Whether detention could only be for reasonable period necessary for attaining purpose of detention – Whether facts relevant to question of detention pending removal jurisdictional facts – Whether Vietnam prepared to accept repatriation of detainees whom it regarded as non-Vietnamese nationals

Tan Te Lam v Superintendent of Tai A Chau Detention Centre (1996) 6 HKPLR 13 [Privy Council Appeal No 55 of 1995, Judicial Committee of the Privy Council, Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill, Lord Steyn and Sir Brian Hutton, 27 March 1996]

Vietnamese boat people started to arrive in Hong Kong in 1975. The Hong Kong government originally adopted a policy of granting to the asylum-seekers first asylum in Hong Kong. In 1982, the Hong Kong government, whilst adhering to the policy of first asylum, took and exercised power to detain all those arriving from Vietnam in closed centres pending resettlement elsewhere in the world. In 1988, the policy of first asylum was abandoned. The replacement policy consisted of two stages. First, on arrival the asylum-seeker would be screened to see if he qualified for refugee status in Hong Kong. Secondly, if he did not qualify, he would be repatriated to Vietnam. Powers of detention were provided under s 13D of the Immigration Ordinance (Cap 115) to hold Vietnamese asylum-seekers in detention centres pending, first, the determination of whether they were entitled to refugee status in Hong Kong and second, if not granted refugee status for a further period, pending their removal to Vietnam. A voluntary repatriation scheme was operated by the United Nations High Commissioner for Refugees upon reaching an understanding with the government of Vietnam. Processing of applications for voluntary repatriation was supposed to be completed within three months of the application being submitted. An application for voluntary repatriation involved disclosure by the applicant of his nationality. The Hong Kong government had no direct control over the operation of the voluntary repatriation scheme.

In 1991, the Hong Kong government established a scheme called the Orderly Repatriation Programme, for the compulsory repatriation to Vietnam of those migrants who had not qualified for refugee status in Hong Kong but who refused to volunteer for repatriation under the voluntary repatriation scheme. Particulars of proposed returnees under the compulsory scheme were submitted to the Vietnamese authorities in a form that did not specify the returnees' nationality, though such a form gave sufficient details to enable the Vietnamese authorities to check a person's particulars against his local household

registration or his residential file. There was considerable delay on the part of the Vietnamese authorities in processing the particulars.

The appellants were the eighth to eleventh applicants (A8, A9, A10 and A11) in an application for writs of habeas corpus against the superintendents of the detention centres where they were being detained. The first seven of the applicants were released from detention at various stages between the commencement of proceedings and the delivery of the judgment of the judge of the High Court. A9, A10 and A11 were all of Chinese ethnic origin. They were treated by the Vietnamese authorities as non-nationals because each, whilst resident in Vietnam, had been issued with a Foreign Resident's Permit which described him or her as having Taiwanese nationality and which had to be renewed periodically. All three had been refused refugee status in Hong Kong. They have refused to apply for voluntary repatriation. They were detained in Hong Kong, first pending determination of their refugee status application for respective periods of 25, 10 and 24 months and then pending removal from Hong Kong for respective periods of 20, 25 and 44 months. Their particulars were submitted to the Vietnamese authorities for compulsory repatriation in December 1994 but the Vietnamese authorities did not respond.

A8 was of Chinese ethnic origin but was born in Vietnam. When he applied for voluntary repatriation after he was refused refugee status, he wrongly stated his nationality to be Taiwanese on the basis of a forged Taiwanese document procured for him by his father. His application for voluntary repatriation was subsequently withdrawn. His particulars were then forwarded to the Vietnamese authorities for the purpose of compulsory repatriation. No response was received from the Vietnamese authorities at any time. He was detained in Hong Kong, first pending determination of his refugee status application for 22 months and then pending removal from Hong Kong for 40 months.

The appellants contended before the High Court that their detention was unlawful by reason of, inter alia, the fact that their further detention for an indefinite period would be unreasonable given the very long periods during which they had already been detained; and the fact that their detention could not be 'pending removal' since there was no possibility of their removal from Hong Kong under the compulsory scheme in view of the policy of the Vietnamese authorities not to accept the repatriation of those they treated as non-Vietnam nationals. The High Court judge hearing their applications ordered the release of A9, A10 and A11 because he was satisfied of the refusal of Vietnam to accept them for repatriation. The judge refused any relief to A8 because he considered that Vietnam would accept A8 for repatriation under a recently agreed procedure when the true facts were made clear. (See *Re Chung Tu Quan* [1995] 1 HKC 556.)

The respondent appealed to the Court of Appeal in respect of A9, A10 and A11. A8 appealed against the judge's decision. The Court of Appeal held that the judge's approach was wrong in law, that the court's jurisdiction in respect of Vietnamese refugees was supervisory only. It was sufficient for the Director of

Immigration to show that the appellants were detained for the purpose of repatriation and that that purpose was not spent. Therefore, the Court of Appeal allowed the appeal of the Director in relation to A9, A10 and A11 and dismissed the appeal by A8. (See *Superintendent of Tai A Chau Detention Centre v Tan Te Lam* [1995] 3 HKC 339, (1995) 5 HKPLR 149.) The appellants appealed, with the leave of the Court of Appeal, to the Judicial Committee of the Privy Council.

Held, allowing the appeals:

1. In conferring a power to interfere with individual liberty by enacting s 13D(1) of the Immigration Ordinance, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited.
2. In the absence of contrary indications in the statute which conferred the power to detain pending removal, such a power was subject to the following limitations: (a) the power could only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal; (b) if it became clear that removal was not going to be possible within a reasonable time, further detention was not authorized; and (c) the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time.

R v Governor of Durham Prison, ex p Hardial Singh[1984] 1 WLR 704 approved.

3. There was no conflict between the principles enunciated in the case of *Hardial Singh* and s 13D(1) of the Immigration Ordinance. Subsection (1A) of that section expressly envisaged that the exercise of the power of detention conferred by sub-s (1) would be unlawful if the period of detention was unreasonable but imposed specific requirements that in judging such reasonableness, all the circumstances including (in the case of a person detained pending his removal from Hong Kong) the extent to which it was possible to make arrangements to effect his removal and whether or not the person had declined arrangements made or proposed for his removal.
4. Facts relevant to the question whether the appellants were being detained pending removal were prima facie jurisdictional facts, the determination of which, in the absence of express words to the contrary in the legislation, went to the jurisdiction of the Director of Immigration to detain or to the exercise of the discretion to detain.

5. There was no indication that the legislature, in enacting s 13D(1) of the Immigration Ordinance, intended the Director of the Immigration to have the power to determine jurisdictional facts. The court should be astute to ensure that the protection afforded to human liberty by habeas corpus should not be eroded save by the clearest words. There was nothing in the language of the Immigration Ordinance to suggest that this power to determine jurisdictional facts was intended. Further, substantial amendment to s 13D in 1991 by the legislature did not include the introduction of a provision limiting the courts power to determine jurisdictional issues of fact.
6. A9, A10 and A11 were not being detained pending removal. There was no sufficient reason to overturn the findings of the High Court judge that it was the policy of the Vietnamese government not to accept repatriation of non-Vietnamese nationals. It was incorrect to consider that the account given by the appellants as to their interviews with Vietnamese officials amounted only to opinion evidence; the appellants were stating that the ground stated for the rejection of their application by the Vietnamese officials was that they were non-Vietnamese nationals. It was also incorrect to dismiss statements made by the Vietnamese vice-consul since he was a representative of the Vietnamese government in Hong Kong concerned with repatriation; prima facie his statement as to Vietnamese policy on repatriation was likely to be correct. In view of the lack of response from the Vietnamese authorities about A8's case, it appeared that the policy of not accepting those whom they regard as non-Vietnamese nationals was still being applied by them to A8. In the circumstances, A8 should be released immediately.
7. In habeas corpus, the burden lies on the detainer to prove on the balance of probabilities, facts to justify continuing detention.

Per curiam

In assessing the reasonableness of the continuing detention of Vietnamese migrants, s 13D(1A)(b)(ii) required the court to have regard to whether or not the person has declined arrangements made or proposed for his removal. The fact that the detention was self-induced by reason of the failure to apply for voluntary repatriation was a factor of fundamental importance in considering whether, in all the circumstances, the detention was reasonable.

Michael Beloff QC and GJX McCoy (Pam Baker & Co) for the appellants;
David Pannick QC, William Marshall QC, Roxana Cheng and Javan Herberg (Crown Solicitor) for the respondents.

Editorial comment

Following the decision of the Privy Council, the Hong Kong government introduced into the Legislative Council a bill to limit the effect of the decision.

Subclause 13D(1AA) of the Immigration (Amendment) Bill 1996⁷ provided that, where a Vietnamese boatperson was being detained and a request had been made to the Vietnamese government for approval to remove the person to Vietnam, a court "shall not find that the purpose of his detention has failed or become spent, unless, at the time of making such a finding, the Government of Hong Kong had been notified either directly by the Government of Vietnam or through the UNHCR that the request had been rejected." Subclause 13D(1AB) provided that nothing in subsection (1AA) prevent a court from determining that a person had been detained for an unreasonable period. The administration originally proposed to introduced the Bill and have all three readings dealt with on the same day.

The Bill gave rise to considerable criticism, both as to its content and the speed with which the administration proposed to railroad it through the legislature. The Legislative Council was unwilling to deal with the Bill so rapidly, and the consideration of the Bill was subsequently more intensive that would have been the case had the government's timetable been adhered to. Objections to the content of the Bill came from the Bar Council, the Law Society, international and national NGOs. Of particular concern was the attempt of the administration to circumscribe the matters that a court could take into account when ruling on the lawfulness of detention; some critics also charged that the Bill permitted arbitrary detention and violated the Bill of Rights. The government's response was that the Bill did not permit arbitrary detention, did not violate the Bill of Rights (as well as claiming that the reservation relating to immigration legislation also appearing in s 11 of the Bill of Rights Ordinance) immunised any attack in the courts on this ground, and that the court was still able to rule on the question of the reasonableness of a prolonged period of detention.

In response to the criticism the administration introduced a less severe version of the Bill, which still came in for considerable criticism. Unhappily, riots at Whitehead shortly before the Council's vote on the amended Bill was the background against which the Council passed the Immigration (Amendment) Ordinance 1996 by a narrow margin.

⁷ *Hong Kong Government Gazette*, 19 April 1996, Legal Supplement No 3, C656.

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

Town Planning Ordinance (Cap 131), ss 3, 4, 6

*Town planning – Composition of Town Planning Appeal Board -
-Whether presence of Director of Planning and government
officials on Board violated guarantee or rules of natural justice
– “suit at law” – “determination of rights and obligations”*

*R v Town Planning Board, ex parte Kwan Kong Company Ltd (1995) 5
HKPLR 261, [1995] 3 HKC 254*

An appeal against the decision of Waung J was set down for hearing on 9-12
12 July 1996, provisionally before Litton VP, Godfrey and Ching JJA.

*R v Town Planning Board, ex parte Real Estate Developers Association
(1996) HCt, MP No 2457 of 1995, 8 June 1996, Leonard J (to be
reported in (1996) 6 HKPLR)*

On 24 December 1993 the Town Planning Board gazetted and exhibited sixteen Outline Zoning Plans (OZPs) which affected the development potential of sites in Kowloon and New Kowloon. The applicant, an association comprising members who owned most of the sites affected by the sixteen OZPs, lodged a written statement of objection with the Town Planning Board pursuant to s 6 of the Town Planning Ordinance (Cap 131). On 8 September 1994 the Board, pursuant to s 6(3) of the Town Planning Ordinance, refused the objections in the absence of the applicant, and heard the applicant, pursuant to s 6(6) of the Ordinance, at a meeting held on 6 January 1995. After hearing the applicant, the Board adjourned the determination of the objections. At subsequent meetings, in the absence of the applicant, the Board resumed consideration of the applicant's objections together with a number of similar objections. On 21 April 1995, the Board decided to refuse all the applicant's objections. The members of the Board present at the meeting on 21 April 1995 were different from those who attended the meeting on 6 January 1995.

The applicant applied for and obtained leave to apply for judicial review of the Board's decision. The applicant argued that the determination of the objections, and particularly the participation of the Secretary for Planning, Environment and Lands and the Director of Planning in the deliberation process, violated the rules of natural justice and constituted a violation of its right to fair hearing under art 10 of the Bill of Rights. The applicant further reserved its argument that the imposition of a plot ratio in the draft OZPs was ultra vires the Town Planning Board on the ground that the court was bound by a Court of Appeal decision on this issue.

Held (refusing the application):**The rule against bias**

1. It is a well-established principle of natural justice that no person can act as a judge in his own cause. The proper test is one of a real danger of bias, that is, having ascertained all the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard, or have unfairly regarded, with favour or disfavour, the case of a party to the issue under consideration by him.

Panel on Takeovers and Mergers v William Cheng Kai Man (1995) 5 HKPLR 482, [1995] 3 HKC 517 and *R v Gough* [1993] AC 646, followed.

2. The Secretary for Planning, Environment and Lands and the Director of Planning were appointed as chairman and vice-chairman respectively of the Town Planning Board by the Governor pursuant to s 2(1) of the Town Planning Ordinance. Their presence at the meeting determining the applicant's objection was therefore lawful and, indeed, essential in view of the requirement in s 2(2) that one of them had to be present in a meeting so as to form a quorum. However, whilst the legislation permitted their appointment, it did not require it, and they were not statutory or ex officio appointees.
3. In the context of a s 6 inquiry, the functions of the Town Planning Board are not judicial or quasi-judicial. The Board is conducting an administrative inquiry involving the exercise of judgment in the area of planning policy. The representatives of the Planning Department were present at the objection hearing as advisers to assist the Board rather than as parties to adversarial proceedings defending an interest.
4. An administrative tribunal conducting a hearing is under a duty to act fairly and impartially. The presence of officials was authorised by the statute and of great value to the Board. It would not be in the interest of good administration to strike down the decision complained of because of the lawful participation of official members when there was nothing to suggest that they failed to approach their task fairly and impartially.

Fair hearing

5. The applicant's complaint that it had not been provided with certain materials which were placed before the Board was misconceived. As far as the papers prepared for the Board by the Secretary were concerned, they were clearly designed to assist the members of the Board by reminding them of the salient features of the matters to be decided and they made reference to the minutes and papers of previous meetings. There was no suggestion that any minutes were inaccurate or misleading or significantly incomplete. The applicant must already have known the substance of the relevant matters referred to in the papers, and it had no right to comment on the objections put forward by other objectors.

The principle that 'he who decides must hear'

6. In view of the composition of the Board and the desirability that as many of its members as possible should contribute to a decision on a question of planning judgment, it would be an unrealistic expectation that, where the applicant exercised its statutory right to make oral submission to the Board, only those members who had heard the oral argument would decide on its objections.
7. Mere convenience is not an excuse for overriding the principle that he who decides must hear, but it is proper for the court to take into account practicability and the advantage to be derived from the procedure adopted. While it would be practicable to restrict voting upon a particular objection to those who had heard the oral submissions made by the objector in question, it was also necessary for the Board to consider other materials from different sources in a consistent manner.
8. A body exercising administrative functions or making investigation or conducting preliminary inquiries owes a constitutional duty to perform these functions fairly and honestly and to the best of its ability. However, procedures and standards that are appropriate to the conduct of ordinary civil litigation between private parties may not be applicable to procedures involved in the making of administrative decisions. What is a fair procedure to be adopted at a particular inquiry will depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. An essential requirement is that the person concerned should have a reasonable opportunity of presenting his case.
9. In the present circumstances, all those present on 21 April and taking part in the decision not to amend the sixteen OZPs were fully apprised of all the oral and written representations which the Board had received up to that time in connection with the applicant's objection. It was particularly important that the credibility of witnesses was not an issue. The applicant had had a reasonable opportunity to present its case, which had received full and fair consideration by the Board.

Failure of the Planning Department to supply raw data

10. While certain individuals from the Planning Department performed roles in the Town Planning Board the two bodies were quite separate, and any failure on the part of the Planning Department could not be attributed to the Board. On the evidence as a whole, the applicant had had "a fair crack of the whip".

Caltex Oil Hong Kong Ltd v Governor in Council [1995] 1 HKC 80 distinguished.

Bill of Rights

Approach to interpretation

11. As a constitutional document, the Bill of Rights Ordinance should receive a generous and purposive interpretation, and the court should not interpret it in the same way as it interpreted any other ordinance of Hong Kong, namely, in accordance with established rules of interpretation of the common law. However, a generous and purposive interpretation does not permit a court to rewrite the Ordinance. An interpretation which equated what was desirable with what was in the statute would amount to judicial legislation under the guise of autonomous interpretation. *Kwan Kong Co Ltd v Town Planning Board* (1995) 5 HKPLR 261, [1995] 3 HKC 254 followed in part.
12. Judicial restraint was called for in interpreting art 10 of the Bill of Rights so that it should not be construed as providing for more than it contains, or more than is necessarily to be inferred from what it contains. *Golder v United Kingdom* (1975) 1 EHRR 525 and *Kwan Kong Co Ltd v Town Planning Board* (1995) 5 HKPLR 261, [1995] 3 HKC 254 followed.

Rights and obligations

13. Adopting a generous and purposive approach to interpretation, an inquiry under s 6(6) of the Town Planning Ordinance did relate to rights of members of the applicant relating to their ownership of land. *R v Town Planning Board, ex p Auburntown Ltd* (1994) 4 HKPLR 194, [1994] 2 HKLR 272, followed.
14. Article 10 of the Bill of Rights applies only to judicial or quasi-judicial proceedings.

Determination

15. While the Town Planning Board's decision is decisive on the question whether the draft plan should go to the Governor in Council in an amended or unamended form, it is not decisive of the question of the final form of the OZP. That decision which does determine rights is that of the Governor in Council, and it is incorrect to say that any draft OZP submitted to the Governor in Council will inevitably be approved. The Board was conducting an administrative consultative process, provided for by statute and designed to enable it to take into account all shades of opinion before forming a view as to the final form of its recommendations to be made to the Governor in Council. Thus, there was no determination of the applicant's rights by the Board, and art 10 had no application to the proceedings under s 6(6) of the Town Planning Ordinance.

Right of access to court

16. Whether the Hong Kong government had failed in its alleged duty under art 10 to provide a suitable tribunal for a final determination of the rights of the applicant in this case fell outside the scope of the application of judicial review. The availability of judicial review is also a material consideration in deciding whether any right conferred by art 10 was guaranteed under Hong Kong law.

Independent and impartial tribunal

17. In carrying out an inquiry under s 6 of the Town Planning Ordinance, the Board acted as an independent and impartial tribunal. When the Secretary for Planning, Environment and Lands and the Director of Planning acted as members of the Town Planning Board, they were not acting as members of the Planning Department. Members of the Planning Department who are called upon to assist the Town Planning Board in its deliberations are not acting in furtherance of some private interest of the Planning Department; they are serving the public interest in putting their knowledge and expertise at the service of all the members of the Board. Their presence on the Board cannot import systemic bias.

Per curiam

“An argument based on the rules of natural justice which will not succeed on the basis of the common law is unlikely to be improved by the invocation of the Bill of Rights Ordinance. It is a matter for regret that it has become the fashion to prolong litigation, thereby causing unnecessary expense, by piling upon respectable common law arguments optimistic submissions based on the Bill of Rights Once the common law arguments were disposed of, the Bill of Rights arguments were academic.”

Neville Thomas QC, Robert Kotewall QC, Anthony Ismail and Johannes Chan (Bernard Wong & Co), for the applicant; Philip Havers QC and Nicholas Cooney (Crown Solicitor), for the respondent.

Editorial comment

This is the third in a series of High Court decisions examining the consistency with art 10 of the Bill of Rights of the objection process before the Town Planning Board under s 6 of the Town Planning Ordinance.⁸ Each of the cases has addressed the following issues:

- whether the process of considering an objection to a variation in the permitted use of land in a draft town plan involves a “right or obligation in a suit at law”
- whether the decision by the Town Planning Board was a “determination” of such a right in light of the fact that it was the Governor in Council who finally approved the draft plan
- whether the presence on the Board of government officials who had close involvements in matters relating to the preparation of the relevant plan meant that the Board was no longer an “independent and impartial tribunal”.

⁸ The two previous cases are *R v Town Planning Board, ex parte Auburntown Ltd* (1994) 4 HKPLR 194, [1994] 2 HKLR 272 and *R v Town Planning Board, ex parte Kwan Kong Co Ltd* (1995) 5 HKPLR 261, [1995] 3 HKC 254.

Although there has been some divergence of opinion among the three judges on these issues, they have all agreed that the objection procedure and the composition of the Town Planning Board does not fall foul of the right to an independent and impartial tribunal in the determination of one's rights and obligations in a suit at law guaranteed by art 10.

In this case Leonard J rejected the narrow (so-called) "common law" approach to interpretation of the Bill of Rights adopted by Waung J in *R v Town Planning Board, ex parte Kwan Kong Company Ltd*, and agreed with Rhind J in *R v Town Planning Board, ex parte Auburmtown Ltd* that the court should adopt a generous and purposive approach to the interpretation of the Bill of Rights.

He also held, as had Rhind J, that the promulgation of town plans affected the "rights" of an applicant. All three judges found that there was no "determination" of rights, but for slightly different reasons. Rhind J found the process to be legislative in nature; Waung J found it to be policy-making; and Leonard J found it determinative of whether a draft plan should be submitted to the Governor in Council but not determinative of the final form of the draft plan. Leonard J, however, parted company with Rhind J on the issue of whether the Town Planning Board was an independent and impartial tribunal, agreeing with Waung J that it was. Neither Leonard J nor Waung J found that the presence of the Secretary for Planning, Environment and Lands and the Director of Planning on the Town Planning Board was objectionable or imported systemic bias. A definitive ruling has to await the judgment of the Court of Appeal in *Kwan Kong*, which is set down for hearing in July.

Despite his acceptance of a generous and purposive approach to the interpretation of the Bill of Rights, Leonard J's comments in the following passage suggest an ambivalence about its invocation:

"An argument based on the rules of natural justice which will not succeed on the basis of the common law is unlikely to be improved by the invocation of the Bill of Rights Ordinance. It is a matter for regret that it has become the fashion to prolong litigation, thereby causing unnecessary expense, by piling upon respectable common law arguments optimistic submissions based on the Bill of Rights. In the present case, copies of the reports of over 80 decisions were tendered by the Applicant and about half of them related to the Bill of Rights. Once the common law arguments were disposed of, the Bill of Rights arguments were academic."

It is not clear whether the judge's comments are to be understood in the context of the present case or as making a more general point about the utility of the Bill of Rights in administrative law matters. While it is clearly undesirable that valuable court time be spent on lengthy consideration of arguments that have little foundation, it would appear that the potential impact of art 10 on the Bill of Rights is an issue deserving thorough judicial examination in appropriate cases -- as it has indeed in these three cases, as well as other cases in the District Court, High Court and Court of Appeal. The broader implications of art 10 for Hong Kong's system of

administrative law are indeed murky, and there are, as we have mentioned above, considerable differences of view on a number of aspects of the guarantee.

It is not clear from the judge's comments whether he considered that once the challenge to the impartiality of the Board based on common law grounds failed in this case there was nothing additional to be gained from relying on the similar guarantee in art 10, or whether he considers more generally that, once common law arguments have failed, then art 10 provides no additional assistance to a person challenging the independence or impartiality of a tribunal, or claiming a denial of the (contentious) right of access to court (which Leonard J appears to reject, but other judges apparently accept).

While the substantive guarantees of due process under the common law overlap substantially with those guaranteed by art 10 of the Bill of Rights, it cannot be right to assume a priori that the Bill of Rights adds nothing to those guarantees. In the first place, the international jurisprudence suggests that the right to an 'independent' tribunal may be broader than the right to a fair and impartial decision-maker that the common law guarantees.

Secondly, and perhaps more importantly, the common law rules are subject to exclusion by statute, while the Bill of Rights Ordinance (or the ICCPR through the Letters Patent) will prevail over inconsistent legislation. This was recognized by Leonard J himself: "The common law, however, can be overridden by statute and the most important effect, as it seems to me, of the Bill of Rights is that it puts an obstacle, even if be not insurmountable, in the way of any legislature which seeks to remove those rights protected both by the common law and the Bill of Rights." (at p 57)

The protection of the Bill of Rights is, of course, even more extensive if one accepts that art 10 also guarantees a right of access to court (which Leonard J does not). While the issue is a complex and difficult one, the long-established case law of the European Court of Human Rights firmly supports the existence of this aspect of the right, although there is debate over its extent in particular categories of cases; the minority judgments on which Leonard J and Waung J relied have no real currency as the governing international law on this issue. Such indications as there are in the jurisprudence of the Human Rights Committee also suggest that the Human Rights Committee's view is similar to that of the European Court. The Bill of Rights Ordinance was enacted in 1991 against the background of a long line of cases establishing the right of access to a court; to interpret it by reference to a 1975 minority judgment which hearkens back to the position in Europe in the late 1940s and early 1950s seems a rather problematic approach to adopt.

Nevertheless, the notion that art 10 might require a radical reworking of the existing administrative law system by requiring review on the merits of every administrative decision may legitimately give rise to a certain amount of surprise. (Indeed, a number of European Convention states took exception when the implications of the equivalent provision of that Convention was held to require major changes to their systems of administrative courts.) However, the setting up of the Administrative Appeals Board in 1995, which takes jurisdiction over appeals in

many administrative matters that formerly went to the to the Governor in Council and which is independent and enjoys full jurisdiction to review the merits of the decisions appealed against, appears to be an explicit recognition of the requirement of a right of access to a court by the administration. Indeed, the administration expressly admitted that the establishment of the Town Planning Appeal Board in 1992 was prompted by the requirements of the Bill of Rights.

The issue will fall to the Court of Appeal to resolve. In the light of its general approach in recent cases and the views that have been already expressed in earlier cases on art 10, it seems likely that the Court of Appeal will take a restrictive view of the guarantee, and will view it as little more than a restatement of the basic principles of fairness embodied in the existing rules of natural justice.

R v Town Planning Board, ex parte Wing On Company Ltd (1996) HCt, MP No 1456 of 1995

See *Bill of Rights Bulletin*, v 3, n 4, at page 24. The parties reached a settlement and the proceedings were discontinued.

RIGHT TO A FAIR HEARING (ARTICLE 10, BILL OF RIGHTS, ART 14(1), ICCPR)

Right to fair hearing – Missing witness – Whether defendants so prejudiced that a fair trial could not be obtained – Permanent stay of proceedings – Criminal procedure – Abuse of process – Stay of proceedings – Missing witness – Appropriate test – Whether defendant could obtain a fair trial in absence of witness – Stay granted

R v Singh (No 1)(1996) DCt, Case No 695 of 1994, 7 February 1996, Judge Jackson

The defendants were police officers who had been charged with a number of offences including an offence of accepting an advantage as public servants, contrary to s 4(2) of the Prevention of Bribery Ordinance (Cap 210). A man specifically named in the Crown's summary of facts who was alleged to have offered to the defendants a gift or reward died in November 1993, and was therefore unable to be present during the trial of the defendants either as a Crown or defence witness, or as a defendant. Another man, who was on the Crown's list of witnesses, had refused to attend the trial to testify as a Crown witness. As a result, prior to the arraignment of the defendants, they applied for a permanent stay of proceedings in relation to this charge. The defendants claimed that the absence of the two witnesses meant that they could not obtain a fair trial and that to proceed with the trial would be an abuse of process at common law and a violation of the rights to a fair hearing and to cross-examine witnesses against one, guaranteed respectively by articles 10 and 11(2)(e) of the Bill of Rights.

Held, granting a permanent stay in respect of one count:

Right to examine witnesses against one

1. Article 11(2)(e) of the Bill of Rights had no relevance to the application for a stay, since neither of the missing witnesses was going to be a witness against the first or second defendant.

Right to a fair hearing at common law and under art 10 of the Bill of Rights

2. The continuation of proceedings against a defendant amounts to an abuse of process and, *semble*, a violation of art 10 of the Bill of Rights, where a material witness has died or has disappeared, and as a result the defendant is prejudiced in the preparation and conduct of his defence. What is important is the degree of prejudice suffered by the defendant. The trial should not proceed if the evidence which the missing witness could have been expected to have given is of such a material nature that the defendant could not receive a fair trial in the absence of the witness.
3. In assessing the importance of the evidence of the missing witness, the court should consider all the evidence relevant to the issue, including any statements made by the missing witness. The proper test is whether the unavailability of the witnesses adversely affected the fairness of the trial, and not whether the missing evidence would have been determinative of the issues. If no injustice will result from the absence of the missing witness, the court may, in its discretion, permit the trial to proceed.
4. Neither the death of the witness nor the absence of the other witness alone would, in isolation, be sufficiently prejudicial to the defendants in receiving a fair trial. However, the combination of both factors, which was quite exceptional, justified the exercise of a discretion to grant a permanent stay of proceedings in relation to the charge under s 4(2) of the Prevention of Bribery Ordinance.

W D Moultrie and Miss E Tsang (Attorney General's Chambers), for the Crown; Lawrence Lok QC (Haldanes) for the first and second defendants; Christopher Grounds (Karbhari & Chan) for the third defendant.

Missing witness – Whether absence of witness violated rights to fair trial and to examine witnesses – Necessary to show prejudice – Evidence of witness crucial to accused's defence – Abuse of process – Remedy – Stay

R v Paul Lam Tat-chung and another (1994) DCt, 25 April 1994, Judge Jackson

The two defendants, a medical practitioner and his wife, faced one charge of conspiracy to defraud the Hong Kong government, the School Medical Services Scheme (‘the Scheme’) and others and, in the alternative, three charges of false accounting. (The prosecution offered no evidence on a fourth charge of false accounting.)

The alleged offences related to the defendants' involvement with the Scheme. The purpose of the Scheme, administered by the School Medical Service Board ('the Board'), was to make available to school pupils inexpensive medical care. Participation in the Scheme was voluntary and parents of pupils who wished to participate made an annual contribution, to which was added a more substantial sum by the Government. Doctors who wished to participate in the Scheme were first approved by the Board; their names were then circulated to participating schools, which selected one or more doctors from that list to whom they would refer the pupils from their schools. A participating doctor was required to provide treatment and medication without charge to pupils from schools which had selected that doctor from the Board's list. Doctors who participated in the Scheme and were selected by a school were paid an amount per participating student at the school, on a monthly basis.

In 1984 and 1985 the Board adopted resolutions, providing that any doctor found to be paying the pupil participation fee back to the school concerned would be required to resign from the Scheme, setting an upper limit of 3,500 to the number of pupils a doctor could treat under the Scheme, and stipulating that payments by the Board be made to individual doctors, ie personally and not to the organisation to which the doctor belonged.

The prosecution alleged that the defendants conspired with others (including C, the Secretary of the Board), to use dishonest means to cause the Board to act contrary to its public duty, in particular to obtain remuneration dishonestly and in breach of the Board's rules.

The first defendant joined the Scheme in 1980 and by 1987/88 the number of pupils on his panel had increased from 5,442 to 22,882. The sums paid in respect of those students over that period amounted to more than \$5m. The first defendant employed another doctor, Kwan, whom he asked to sign a doctor application form and opened a joint bank account with the second defendant. The Board paid Scheme monies into this account, but Kwan did not operate the account, all withdrawals from it being made by the second defendant. Subsequently, in response to the first defendant's request, Kwan approached another doctor, Lee, whom he persuaded to sign a doctor application form, which incorrectly stated that Lee was in partnership with Kwan. Lee was not required to provide service to any student under the Scheme.

The prosecution further alleged that the first defendant had approached another doctor, Ho, who was a participating doctor and entered into an arrangement with him which substituted Kwan as the Scheme doctor for the school. However, the pupils who had previously come to Ho while he was formally the Scheme doctor for the school, still came to him for treatment; Ho received a sum from the first defendant which was stated to be his consultation for providing services to those pupils.

The first defendant also allegedly made arrangements with another doctor, Law, to provide services to Scheme pupils. The second defendant and

Law opened a joint bank account into which the Scheme money was paid. All transactions on that account were carried out by the second defendant.

It was also alleged against the first defendant that he had rebated, directly or by way of "donations", the pupil participation fee to a number of schools.

In addition to the conspiracy charge a number of false accounting charges relating to the falsification of doctor application forms were laid against the defendants.

Prior to their arraignment the two defendants sought a permanent stay of the proceedings on the ground that a material witness and co-conspirator, C, was now dead. They claimed that C was the key figure in the administration of the Scheme and could have given evidence that was crucial to the defendants' case; he had testified at an earlier trial and had made an affirmation before his death relevant to the defendants' involvement. The defendants argued that as a result they were prejudiced in both the preparation and conduct of their defence such that they could not obtain a fair trial, and that it was not possible for the court to alleviate that unfairness.

Held (granting a permanent stay of proceedings):

1. The continuation of proceedings against defendants may amount to an abuse of process at common law and a violation of arts 10 and 11(2)(e) of the Bill of Rights where a material witness has died and the defendants are thereby prejudiced in the preparation and conduct of their defence.

R v Grob and Hart, Southwark Crown Court, 15 January 1990 (unreported); *R v Chiang Shi-hui* [1992] 2 HKDCLR 5, considered.

2. In assessing the degree of prejudice resulting from the absence of a witness, it is necessary to consider the importance of the missing witness to the case. If the evidence which he could have been expected to have given is of such a material nature that the defendant cannot receive a fair trial in his absence then the trial should not proceed. In assessing the importance of the evidence of the missing witness, it is necessary for the court to consider all evidence relevant to the issue, including any statements made by the missing witness. The proper test is whether the unavailability of the witness adversely affected the fairness of the trial, and not whether the missing evidence would have been determinative of the issues.

R v Kwan Kwok-wah and others (1992) 2 HKPLR 353; *R v Machiya* [1990] 1 HKC 73 followed.

3. The role played by C in the administration of the Scheme was pivotal to the Scheme and his evidence would have been crucial to a full and proper evaluation of the allegations made by the prosecution.

4. Neither the first defendant nor the second defendant could receive a fair trial in the absence of C. The unfairness and prejudice cannot be removed or contained by appropriate judicial directions. To permit the proceedings to continue in those circumstances would involve a violation of arts 10 and 11(2)(e) of the Bill of Rights and amount to abuse of process at common law. A stay of both the conspiracy charge and the alternative charges would therefore be granted.

**RIGHT TO BE PRESUMED INNOCENT UNTIL PROVED
GUILTY ACCORDING TO LAW (ARTICLE 11 (1), BILL OF
RIGHTS; ARTICLE 14(2), ICCPR)**

Crimes Ordinance (Cap 200), ss 55(1), 55(2)

*Possession of explosive substance – Offence of absolute liability -
- No presumption that accused knew nature of substance –
Defence of reasonable belief not applicable to case where object
in possession was itself an explosive substance*

*R v Law Chi Wai (1995) 5 HKPLR 417, [1995] 3 HKC 446 [(Court of
Appeal, Crim App No 260 of 1995, 7 September 1995, Power ACJ,
Bokhary and Ching JJA]*

The applicant was convicted of possession of explosive substances contrary to s 55(1) of the Crimes Ordinance (Cap 200). The particulars of the charge were that he 'knowingly had in his possession explosive substances, namely, four detonators'. The applicant claimed that he had picked the explosives up two years before and that if he had known they were dangerous, he would not have kept them.

On appeal, counsel for the applicant argued that s 55(1) contravened art 11(1) of the Hong Kong Bill of Rights Ordinance (Cap 383) in that it raised an irrebuttable presumption that a person charged under it knew that the particular substance was an explosive one. Counsel for the applicant also argued that the applicant's possession fell within the defence under s 55(1), which provides that a person shall not be guilty of the offence if he had the substance in his possession or custody or under his control for a 'lawful object'.

Section 55(1) provides:

Any person . . . whether or not he knows it to be an explosive substance, knowingly has in his possession or custody or under his control anything which is an explosive substance shall, unless he can show that he . . . has it in his possession or custody or under his control for a lawful object, be guilty of an offence . . .

Held, dismissing the application:

1. Section 55(1) was an offence of absolute liability and created no presumption. The words "whether or not he knows it to be an explosive substance" did not appear in the equivalent English section (s 4(1) of the Explosive Substances Act 1883), under which mens rea was a necessary ingredient of the offence. The addition of these words and the record of proceedings of the Legislative Council made it clear that the intention of the legislature was to create an absolute offence.
2. Article 11 of the Bill of Rights did not invalidate any legislation providing for an absolute offence.
3. The defence of "lawful object" under s 55(1) should not be available where, for instance, a person has the explosive substance as a plaything or as an ornament. If such a defence was available, the section would be deprived of much of its force. It was not necessary for the purpose of the present case to define the exact scope of the words "lawful object"; however, the section was unhappily worded and would benefit from legislative clarification.
4. It was the duty of the judge to make and record findings of fact. These should be included in reasons for verdict, which should be complete in themselves. The trial judge had not done this in this case.
5. While the trial proceeded on the basis that knowledge of the explosive nature of the substance was necessary, this error did not prejudice the applicant.

P J Dykes (Director of Legal Aid for the applicant; IG Cross QC and A A Bruce (Crown Prosecutor) for the Crown.

Editorial comment

The court rejected the argument that s 55(1) embodied a presumption that the person charged under it knew that the particular substance was an explosive one, and held that the offence was an absolute offence and created no presumption. Accordingly, art 11(1) was inapplicable. The court also commented that "[t]he Bill of Rights does not invalidate any legislation providing for an absolute offence", without however referring to any of the extensive judicial and academic discussion of this issue in Hong Kong (in particular the decision of the Court of Appeal in *Attorney General v Fong Chin Yue* (1994) 4 HKPLR 430, noted in the *Bill of Rights Bulletin*, vol 3, no 2, p 28, in relation to an implied defence of honest and reasonable belief).

Immigration Ordinance (Cap 115), ss 38A(2), 38A(3)

Offence of being site controller in charge of site on which illegal immigrants are found – Defence that site controller took all practicable steps to prevent presence of illegal immigrants – Whether strict liability offence inconsistent with presumption of innocence

Attorney General v China State Construction Engineering Corp (1995) HCt, Mag App No 732 of 1995, 16 October 1995, Gall J (reported in (1995) 5 HKPLR 421, [1996] 1 HKC 53)

The defendant had been charged with an offence under s 38A(2) of the Immigration Ordinance (Cap 115). That section provides that a site controller of a construction site is guilty of an offence if it is proved that an illegal immigrant was on the construction site. Section 38A(3) provides that it is a defence to a charge under s 38A(2) for the person charged to prove that he took all practicable steps to prevent illegal immigrants from being on the construction site.

Before the magistrate the defendant argued that the provision was inconsistent with the right to be presumed innocent guaranteed by art 11(1) of the Bill of Rights. The Crown argued that, since s 38A(2) was a strict liability offence alleviated by a due diligence defence, it was therefore consistent with article 11(1) of the Bill of Rights. The magistrate held that the provision was inconsistent with art 11(1) of the Bill of Rights and repealed by virtue of s 3(2) of the Bill of Rights Ordinance: see (1994) 4 HKPLR.

The Crown appealed by way of case stated against the decision of the magistrate.

Held, allowing the appeal and remitting the case to the magistrate:

1. The proper approach to be followed in determining whether an offence is a strict liability is that laid down in *Gammon (Hong Kong) v Attorney General* [1985] AC 1.

2. Applying the *Gammon* analysis, it was clear that s 38A(2) created a strict liability offence. The offence was not ‘truly criminal’ in character; the prohibited conduct is not prohibited because it is inherently evil but because it is necessary to regulate those who enter Hong Kong unlawfully and remain without proper consent. It was clear that the intention of the section was to oust the presumption of mens rea to the extent that the prosecution need not prove any knowledge of any kind in respect of the defendant. Illegal immigration into Hong Kong and the presence of illegal immigrants as workers on construction sites were matters of social concern sufficient to displace the presumption of mens rea. Finally, the displacement of the presumption would have the effect of promoting the objects of the statute by encouraging greater vigilance on the part of the site controller to avoid the presence of illegal immigrants on sites under its control. No harm would be done to the site controller if it had to show that it had taken all reasonable steps to prevent illegal immigrants from being on the site.

Gammon (Hong Kong) v A-G [1985] AC 1 applied.

3. What constitutes ‘practical steps’ under s 38(1) of the Immigration Ordinance is to be determined with respect to the conditions applicable to each particular site.
4. A strict liability offence might at some point involve a violation of the right to liberty and security of the person. However, there will be no violation where it is determined by a process of construction that a statutory offence is one of strict liability, as the determinations made in the course of that process will satisfy the requirements of the Bill of Rights, not only as to the issue of mens rea but also in respect of any element of that offence or any defence afforded by the statute.

Attorney General v Fong Chin Yue (1994) 4 HKPLR 430, [1995] 1 HKC 21 applied.

5. If an offence is found to be one of strict liability by the process of construction set forth in *Gammon*, the offence will meet the criteria laid down in *Attorney General v Lee Kwong Kut* in relation to art 11(1) of the Bill of Rights.

Attorney General v Lee Kwong Kut (1993) 3 HKPLR 72, [1993] 2 HKCLR 186, [1993] AC 951, referred to.

Timothy Casewell (of the Attorney General’s Department), for the Crown.
Teresa Cheng (Kwok & Chu) for the respondent.

Editorial comment

See also *R v Dragages and Travaux* (Mag), noted *Bill of Rights Bulletin*, v 2 n 4, p 18 (dealing with s 38A of the Immigration Ordinance). For other decisions not referred to in the judgment which deal with the issue of whether strict liability offences are consistent with arts 5(1) and 11(1) of the Bill of Rights, see *R v Law Chi Wai* (1995) 5 HKPLR 417, [1995] 3 HKC 446 (CA), *R v*

Hui Kwok-fai (1993) 3 HKPLR 752 (DCt), *R v Wong Lai-shing* (1993) 3 HKPLR 766 (Mag), *R v Chong Ka-man* (1993) 3 HKPLR 789 (Mag), *R v Hui Lan-chak* (1992) 2 HKPLR 423 (DCt), *R v Lee Kin-fai* (1992) 2 HKPLR 466 (DCt), *R v Joshi* (1992) 2 HKPLR 564 (Mag). See also P Wesley-Smith, "Strict Liability in the Hong Kong Courts" (1994) 24 *HKLJ* 40- 55, and "Offences of Strict Liability" in P Wesley Smith, *The Sources of Hong Kong Law* (Hong Kong University Press, 1994), ch 16, pp 255-271].

Dangerous Drugs Ordinance (Cap 134), ss 47(1)(a) and (c)

Possession of dangerous drugs – Presumption that person in possession of object containing dangerous drugs had such drugs in his possession – Presumption that person proved or presumed to have dangerous drugs in his possession knew the nature of the drug – Whether consistent with presumption of innocence

R v Kwong Kui-wing and others (1996) DCt, DC Case No 1306 of 1994, 8 February 1996, Judge Lugar-Mawson

The first defendant was charged, with two others, with an offence of trafficking in a dangerous drug, contrary to s 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap 134). The evidence on which the prosecution based its case was that the defendant had been in physical possession of a bag containing cannabis in a taxi. There was no evidence that the first defendant had opened the bag while it was in his possession and, in a record of interview, the defendant claimed that he had no knowledge of the contents of the bag.

In support of its case the prosecution relied on the presumptions contained in ss 47(1)(a) and (2) of the Dangerous Drugs Ordinance, which provide:

47(1)(a) Any person who is proved to have had in his physical possession anything containing or supporting a dangerous drug shall, until the contrary is proved, to be presumed to have had such drug in his possession.

47(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.

The first defendant submitted that he had no case to answer, on the ground that ss 47(1)(a) and 47(2) were inconsistent with the presumption of innocence contained in art 14(2) of the International Covenant on Civil and Political Rights and accordingly, by virtue of art VII(3) of the Hong Kong Letters Patent 1917-1993,⁹ were invalid.

⁹ [Eds] Article VII(3) of the Letters Patent has now been renumbered as art VII(5) and replaced by a new art VII(3).

Held, rejecting the no case submission:

The relevance of previous decisions

1. It was incumbent on the court when construing art 14(2) of the ICCPR to follow binding pronouncements on art 11(1) of the Bill of Rights, which was in identical terms to that art of the Covenant.
2. Although there had been two decisions of the single judges of the High Court on the questions before the court, it was not beyond doubt that they should be followed. First, it was unclear whether decisions of single judges of the High Court are binding on the District Court, although judicial comity would require a District Judge to follow those decisions unless convinced that they were wrong. Secondly, it was arguable that the approach adopted in those decisions had been subsequently disapproved by the Privy Council.

Police Authority for Huddersfield v Watson [1947] KB 842 applied; *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72, *R v Chan Wai-ming (No 2)* (1992) 2 HKPLR 231, and *R v Lum Wai-ming* (1992) 2 HKPLR 182, considered.

The applicable test for determining consistency with the right to be presumed innocent

3. The current state of the law relating to the consistency of presumptions with the right to be presumed innocent could be summarised in the following propositions:
 - (a) Presumptions, whether they be presumptions of fact or law, are not per se incompatible with the rights given in art 11(1), or art 14(2); they must, however, be confined within reasonable limits.
 - (b) In deciding whether a provision which creates a presumption is kept within those limits, the court must construe the provision having regard to the substance and reality of the language creating the offence, rather than its form. If, under that provision the prosecution is required to prove the essential ingredients of the offence and the defendant is given the burden of establishing that he held a licence to do the act, or that he falls into a category of persons who are exempt from the criminal activity against which the provision is directed, or that the circumstances under which he acted are such that he was entitled by law to act as he did - the *Edwards* tests - there is no contravention of art 11(1) or art 14(2).
 - (c) If, after construing the position the court finds that it is not a proposition (b) type of provision, but is one which requires certain matters to be presumed until the contrary is shown; then, unless it can be said with a substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, art 11(1) and art 14(2) will be contravened and the provision cannot be justified.

(d) If after construction the court is of the view that the provision only requires the prosecution to prove mere matters of formality, then it is highly unlikely that the provision can be upheld.

(e) There will be rare cases where the application of the above tests produce no clear answer and where there is difficulty. In those cases, the test propounded in Canada relating to the application of section 1 of the Canadian Charter of Rights and Freedoms can be applied.

Attorney General v Lee Kwong-kut (1993) 3 HKPLR 72 considered.

Application of the test to ss 47(1)(a) and 47(2)

- 4 Neither provision created any offence or formed the ingredients of any offence; they were merely evidential aids which could be applied in proof of certain matters. The facts which could be presumed by reliance on the two provisions could be proved without recourse to either presumption, for example by way of an admission or by evidence of an accomplice. The provisions were most often relied on in prosecutions for possession of and trafficking in dangerous drugs.
5. In relation to an offence of possession the prosecution could only rely on the presumption in s 47(1)(a) once it had proved that the defendant was in possession of an object containing or supporting a dangerous drug, and that the dangerous drug was in that object. These matters were not matters of mere formality, and it was only after proof of these matters that ss 47(1)(a) and 47(2) operated to raise the presumption that the defendant was in possession of the drug and aware of its nature. Similarly, in relation to the offence of trafficking the prosecution had to prove possession of the object and, that its contents were dangerous drugs before relying on the presumption; furthermore, the prosecution had to prove that the defendant possessed the drug for the purpose of trafficking in order to obtain a conviction.
6. The two provisions were not of the type identified in *R v Edwards*.
7. It could be said with substantial assurance that fact presumed by s 47(1)(a) (possession of a dangerous drug contained in a container) was more likely than not to flow from the proved fact of physical possession of that container. Accordingly, it was consistent with art 14(2) of the Covenant.

R v Chan Wai-ming (No 2) (1992) 2 HKPLR 231, and *R v Lum Wai-ming* (1992) 2 HKPLR 182 followed; *Leary v United States*, 395 US 6, 23 L Ed 2d 57 (1969); *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 considered.

8. However, the presumption contained in s 47(2) could not be said to satisfy the *Leary* test, since in many cases it would be a fact presumed by virtue of s 47(1)(a) that gave rise to the presumption in s 47(2), whereas the *Leary* test was directed to the case of a presumed fact arising from a proved fact.

9. As this issue was close to the borderline, it was appropriate to apply the Canadian approach approved in *Lee Kwong-kut* to determine the consistency of the provision with the presumption of innocence.
10. To the extent that s 47(2) was a presumption upon a presumption, its validity depended upon the underlying presumption. As s 47(1)(a) was a valid presumption, insofar as the presumption of knowledge in s 47(2) was triggered by the presumption of possession in s 47(1)(a), s 47(2) was valid.

R v Chan Wai-ming (No 2) (1992) 2 HKPLR 231, and *R v Lum Wai-ming* (1992) 2 HKPLR 182, applied.

Duncan Percy (on fiat) and Andrew Bruce, Senior Assistant Crown Prosecutor (on 23 January 1996), for the Crown; Daniel Marash (Haldanes), for the first and second defendants; Jonathan Midgley (of Haldanes), for the third defendant.

Inland Revenue Ordinance (Cap 112), s 51(5)

Taxation – False returns – Presumption of knowledge of contents of tax returns – Whether presumption irrebuttable – Whether presumption reverses burden of proof of an important element of the offence – Whether presumption rational, proportional and causing minimal impairment

R v Ng Wing-keung Paul and another (1996) DCt, District Court Case No 657 of 1995, 17 May 1996, Judge Sweeney (to be reported in (1996) 6 HKPLR)

The first defendant was charged with various offences under s 82(1)(c) and (g) of the Inland Revenue Ordinance (Cap 112), which provide:

“(1) Any person who wilfully with intent to evade or to assist any other person to evade tax...

(c) makes any false statement in connection with a claim for any deduction or allowance under this Ordinance;

...

(g) makes use of any fraud, art, or contrivance, whatsoever or authorizes the use of any such fraud, art, or contrivance,...

shall be guilty of an offence...”.

The Crown alleged that the first defendant made fraudulent claims for tax deduction in the four tax years between 1988 and 1992 by means of falsely representing that he had purportedly paid certain sums as commission to some sub-agents in each of those financial years. The Crown alleged that the Commissioner for Inland Revenue had investigated the 39 names provided by the first defendant in Schedule 3 of each relevant year's Tax Return and had discovered that 37 of those "sub-agents" had not received any such commissions

or payments from the first defendant. The first defendant claimed that he did not know that false claims had been made in the relevant tax returns and that he did not wilfully make false claims with an intent to evade tax. At the close of the prosecution case the first defendant made a submission of no case to answer on evidential grounds. The court, in rejecting this submission, referred for the first time to s 51(5) of the Inland Revenue Ordinance. Section 51(5) provides:

“A return, statement, or form purporting to be furnished under the Ordinance by or on behalf of any person shall for all purposes be deemed to have been furnished by that person or by his authority, as the case may be, unless the contrary is proved, and any person signing any such return, statement, or form shall be deemed to be cognizant of all matters therein.”

At the close of the defence case, the first defendant submitted that the second limb of s 51(5), read with s 82(1), constituted a violation of his right to be presumed innocent under art 11(1) of the Bill of Rights, either by creating an irrebuttable presumption of guilty knowledge on the part of the first defendant, or by imposing an unjustifiable onus of proof of an essential element of an offence on the first defendant, and s 51(5) was therefore repealed to the extent of inconsistency. The Crown conceded that if s 51(5) created an irrebuttable presumption, it would be inconsistent with the Bill of Rights.

Held:

1. A constitutional instrument, and in particular that part of it which protects and entrenches fundamental rights and freedoms, is to be given a generous and purposive interpretation. Where a legislative provision is found to be inconsistent with the guarantees set out in the Bill of Rights Ordinance, the onus then lies on the Crown to justify it. Such onus is to be discharged on the preponderance of probability. The evidence of the Crown needs to be cogent and persuasive. The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the International Covenant on Civil and Political Rights and its aims and objects, with a bias towards the interests of the individual.

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

2. A mandatory presumption of fact established by legislation may be compatible with art 11(1) of the Bill of Rights if it be shown by the Crown, due regard being paid to the enacted conclusion of the legislature, that the fact to be presumed rationally and realistically follows from that proved and also if the presumption is no more than proportionate to what is warranted by the nature of the evil against which society requires protection.

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

3. When used in statutes, the words "deem", "deemed" and "shall be deemed" usually imply an element of finality, but that meaning is not inflexible or invariable. Whether they establish a conclusive or a rebuttable presumption depends largely upon the context in which they are used, always bearing in mind the purpose to be served by the statute and the necessity of ensuring that such purpose is served.

Consolidated School District of San Leon Village No 1425 v Ronselay (1960) 23 DLR (2d) 32 and *R v Fraser* (1911) 45 NSR 218 applied.

4. The second limb of s 51(5) creates only a rebuttable presumption that the person who signs his tax returns is cognisant of all matters therein unless the contrary is proved. This conclusion is fortified by the words on the statutory declaration of the tax return to the effect that the contents thereof are true to the best of the taxpayer's knowledge and belief, which must import a rebuttable presumption and which reflect the intention of the legislature.

R v Lee Shea-sze (1986) 2 HKTC 164 and *R v Kwok Hing-for* (1991) 3 HKTC 447 considered.

5. In order to secure a conviction for an offence under s 82(1)(c) or (g), it is not enough for the prosecution to prove that the taxpayer knew the contents of the tax returns he signed. The prosecution must further prove that the taxpayer wilfully intended to evade tax. Mere knowledge of the contents of one's tax return is not necessarily knowledge of the truth, accuracy or effect of the contents. Accordingly, s 51(5) does not create a presumption of an important element of the offence in question.
6. Further, insofar as s 51(5) creates a legal as distinct from an evidential burden on the taxpayer to disprove that he was cognizant of the contents of the tax returns that he had signed, it is rational, proportional and causes minimal impairment to the right of the accused to be presumed innocent. The presumed fact, namely cognizance of the contents of the tax returns, flows rationally from the proved fact, the taxpayer's signature on his tax returns. The presumption is proportional, as there would be great difficulty for the Inland Revenue to prove that the taxpayer had read his returns before signing them. It merely requires the taxpayer to take some responsibility for his tax returns. The presumption only minimally impairs the right of the first defendant, as it would be easy for him to adduce evidence to show that he did not know the contents of the tax returns, as evidence of that fact would be peculiarly within his own knowledge.

Andrew Bruce (Senior Assistant Crown Prosecutor) and Stanley Chan (Senior Crown Counsel), for the Crown; Martin Lee QC, Johannes Chan and Richard Wong (Pang, Tang, Wan & Choi) for the first defendant; Eric Kwok (Christine M Koo & Co), for the second defendant.

RIGHT TO EXAMINE WITNESSES AGAINST ONE (BILL OF RIGHTS, ARTICLE 11 (2)(E))

See *R v Paul Lam Tat-chung and another* (1994) DCt, 25 April 1994, Judge Jackson, at page 36 above.

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

Whether statements given in disciplinary proceedings by a police officer who was obliged to provide such statements be admissible in criminal proceedings which were not contemplated at the time the statements were made – Whether consistent with guarantee of equality before the law and right not to confess guilt in Bill of Rights – Equality before the law – Right not to be compelled to confess guilt or to testify against oneself – Right not to be denied because of one's status as a police officer

R v Singh (No 2) (1996) DCt, Cases Nos 695 of 1994 and 839 of 1995, 13 February 1996, Judge Jackson (to be reported in (1996) 6 HKPLR)

The defendants were police officers who had been charged with various offences. Following a successful application for a permanent stay of proceedings against the first and second defendants in respect of one of the counts (see page 35 above), the Crown sought to adduce into evidence a record of interview between the second defendant and an inspector of the Internal Investigations Branch of the Royal Hong Kong Police Force. The interview had been conducted with a view to disciplinary action in respect of matters which had come to light during a criminal investigation, which investigation had not resulted in any criminal prosecution for want of evidence. As a serving officer the second defendant was obliged to answer the questions put to him by the officer of the Internal Investigations Department under the relevant provisions of the Police Force Ordinance and the Police Discipline Regulations. He was not cautioned before he answered the questions. The second defendant objected to the admissibility of the record of interview on the ground that it violated his right not to confess guilt or testify against himself under art 11(2)(g) of the Bill of Rights, and the right to equality before the law guaranteed to him by arts 10 and 22 of the Bill of Rights.

Held, excluding the record of interview:

1. The guarantee of protection against self-incrimination under common law and the Bill of Rights means that a suspect is entitled to be protected, at least to an extent, against incriminating himself by being told of the likely consequences of anything that he may choose to say. This rule applies to both civilian suspects and a suspect who is a police officer.
2. A distinction should be drawn between statements made or interviews conducted for the purpose of internal investigation and those made or conducted for the purpose of criminal proceedings. Where a police officer understands, as in the present case, that an interview is for the purposes of internal investigation only, the officer cannot be presumed to know that anything he says may be used against him in criminal proceedings without being informed of this. If an interview conducted with a view to disciplinary proceedings revealed matters which were subsequently shown to be evidence of a serious criminal offence, the proper course is to interview the defendant again under caution.
3. It is the duty of a police officer is to answer any questions put to him in a disciplinary investigation. It would be a violation of art 22 of the Bill of Rights if a statement which would have been inadmissible in criminal proceedings if made by a civilian who has not been cautioned were admissible against a police officer because the officer had made it in an internal investigation.
4. Although the second defendant was not protected against self-incrimination in disciplinary proceedings, he should have been protected against self-exposure to criminal process. Accordingly, the record of interview would not be admitted into evidence.

W D Moultrie and E Tsang (Attorney General's Chambers), for the Crown; Lawrence Lok QC (Haldanes) for the second defendant; Christopher Grounds (Karbhari & Chan) for the third defendant.

**RIGHT TO PRIVACY (ART 14, BILL OF RIGHTS; ART 17,
ICCPR)**

See *R v Cheung Ka-fai*, at page 17 above.

RIGHT TO FREEDOM OF EXPRESSION (ARTICLE 16, BILL OF RIGHTS; ARTICLE 19, ICCPR)

Prevention of Bribery Ordinance (Cap 201), ss 30(1), 33

Prevention of Bribery Ordinance – Disclosure of details of an investigation of an offence alleged or suspected to have been committed under the Prevention of Bribery Ordinance – Whether restriction is “provided by law” – Whether restriction is “necessary” for the protection of public order/ordre public and maintaining respect for the rights and reputations of others – “provided by law” – “necessary” – “pressing social need” – Mandatory disqualification

Ming Pao Newspapers Ltd and other v Attorney General, Judicial Committee of the Privy Council, Privy Council App No 8 of 1996, 20 May 1996, Lord Keith of Kinkel, Lord Jauncey of Tullichettle, Lord Mustill, Lord Nicholls of Birkenhead, Sir Ralph Gibson ((1996) 6 HKPLR)

The appellants were a newspaper company, and the editor-in chief, executive chief editor and deputy chief editor of one of its publications, the *Ming Pao Daily News*. They were charged with the offence of disclosing, without lawful authority or reasonable excuse, to other persons, namely readers of *Ming Pao Daily News*, details of an investigation in respect of an offence alleged or suspected to have been committed under the Prevention of Bribery Ordinance, contrary to s 30 of the Prevention of Bribery Ordinance (Cap 210).

The article which was the subject of the charge related to a Government land auction held on 26 May 1994, during which several land developers joined together in a successful bid to keep down the prices of the land sold. The event was extensively covered by the Hong Kong media. On 18 July 1994, following the receipt of a complaint from a member of the public, the Independent Commission Against Corruption (ICAC) began investigating the matter. On 2 August 1994, two ICAC investigators sought interviews with the reporters of *Ming Pao Daily News* who had been assigned to cover the auction. On 3 August 1994, *Ming Pao Daily News* published the article which gave rise to the charge. The relevant parts of the article read:

“ICAC took steps to meet reporters in its investigation in relation to the developers’ joint bidding (for) land.”

and:

“The ICAC is investigating whether anyone had infringed any Ordinance in a land auction held on 26 May this year in which over 10 developers combined to bid for land.”

The article went on to explain that in order to gather information, ICAC investigators had approached media organisations with a view to meeting reporters and others who had attended the bidding process. It added: "The target of this ICAC investigation has not yet been ascertained."

The appellants pleaded not guilty to the charge, and submitted that they had no case to answer, on the basis that s 30(1) of the Prevention of Bribery Ordinance was inconsistent with the guarantee of freedom of expression contained in art 16 of the Bill of Rights and had therefore been repealed. The submission was upheld by the magistrate, who held that s 30 had been repealed on this ground (see (1994) 4 HKPLR 621). He also held that there could only be an offence under s 30(1) where there was a "suspect or an allegation of a bribery ordinance offence against a specified person". The Attorney General appealed by way of case stated on the issue of the consistency of s 30(1) with the Bill of Rights. In July 1995, the Court of Appeal allowed the appeal, holding that the second limb of s 30(1) of the Prevention of Bribery Ordinance was necessary for the protection of effective law enforcement and respect for the rights and reputations of other persons, and was therefore consistent with article 16 of the Bill of Rights: (1995) 5 HKPLR 13. The appellants appealed to the Privy Council, which heard arguments both on the issue of the proper construction of s 30(1) and its consistency with the Bill of Rights.

Held, allowing the appeal:

Construction of s 30(1) of the Prevention of Bribery Ordinance

1. There could only be an offence under s 30(1) of the Prevention of Bribery Ordinance where there was a suspect or an allegation of a bribery ordinance offence against a specified person. As there was no evidence that at the date of publication of the newspaper anything other than a general investigation was being carried on by ICAC with no suspect being in view, no offence could have been committed under s 30(1).¹⁰

Consistency of s 30(1) with the guarantee of freedom of expression in the Bill of Rights

2. A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction. *Attorney-General of The Gambia v Jobe* [1984] 1 AC 689 at 700 and *Attorney General of Hong Kong v Lee Kwong-kut* [1993] AC 951, (1993) 3 HKPLR 72 at 90 applied.
3. The guarantee of the right to freedom of expression constitutes one of the essential foundations of a democratic society and therefore any restriction of this right must be narrowly interpreted and must be proportionate to the aims sought to be achieved.

¹⁰ The Judicial Committee noted that, while this holding was sufficient to dispose of the appeal, it was nonetheless appropriate to consider also the question of the compatibility of s 30(1) with the Bill of Rights in view of the importance of the issue.

The Observer and The Guardian v United Kingdom (1991) 14 EHRR 153 at 191; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 551; *James v The United Kingdom* (1986) 8 EHRR 123 at 145 and *Attorney-General v Guardian Newspapers (No 2)*[1990] AC 109 at 283 followed.

4. In determining the proportionality of the means adopted to achieved the legitimate aims, the views expressed by the local courts are entitled to careful consideration by the Board unless it appears that the advantage of local knowledge played no part in the reasoning.

Hector v Attorney-General of Antigua and Barbuda [1990] 2 AC 312, *La Compagnie Sucriere de Bel Ombre v Mauritius*, 13 December 1995, applied.

5. In determining whether the second limb of s 30(1) is necessary to preserve the integrity of investigations into corruption in Hong Kong, Hong Kong courts are entitled to construe the word "necessary" in its normal meaning rather than equating it with "pressing social need". Even if it were appropriate to construe the word "necessary" as implying a pressing social need, there is a pressing social need to stamp out the evil of corruption in Hong Kong, and the protection of the integrity of an investigation by the ICAC is essential and necessary to achieve this important aim.

6. The second limb of s 30(1) aims at preserving the integrity of investigations into corruption in Hong Kong. The protection for the reputation of the suspect is only of secondary importance. The provision is a proportionate measure necessary to attain the aim of protecting the integrity of an investigation by the ICAC as:

(a) The second limb of s 30(1) is subject to the defence of lawful authority or reasonable excuse;

(b) Disclosure ceases to be restricted after the arrest of a suspect;

(c) Bribery offences are particularly difficult to detect and the maintenance of secrecy as to an investigation is even more important than in relation to other types of offences in order not to put the suspect on his guard;

(d) The effectiveness of the first limb of s 30(1), which had been accepted as necessary, would be completely destroyed in the absence of the second limb.

(e) The fact that disclosure of investigations into other offences is not so severely restricted does not render s 30 (1) disproportionate or unnecessary in view of the secretive nature of bribery offences.

7. The second limb of s 30(1) cannot be restricted to disclosure where prejudice was caused or likely to be caused to an ICAC investigation because of the difficulty of establishing prejudice. If the restriction is to be effective it cannot draw distinctions between prejudicial and non-prejudicial disclosures, nor have regard to the state of mind of the discloser.

8. Both the Legislative Council and the local court, with their knowledge of local conditions in Hong Kong, had endorsed the decision that s 30(1) is necessary to preserve the integrity of investigations into corruption. These decisions cannot be described as 'so unreasonable as to be outside the State's margin of appreciation', and the Board could see no reason to interfere.

Consistency of s 33 of the Prevention of Bribery Ordinance with art 16 of the Bill of Rights

9. Section 33 is clearly severable from s 30(1), which already carries an in-built penalty. Therefore, even assuming that s 33 was inconsistent with art 16 of the Bill of Rights, s 33 cannot vitiate s 30(1).

Lord Lester of Herne Hill QC, Johannes Chan and Javan Herberg
(Johnson Stokes & Master), for the appellants; Daniel Fung QC
(Solicitor General); Andrew Bruce (Attorney General's Chambers),
for the respondent.

Editorial comment

The Privy Council decision contains a useful summary of the general principles governing the right to freedom of expression. It affirms that freedom of expression, being one of the essential foundations of a democratic society, can only be subject to restrictions that are proportionate to the aims sought to be achieved by the restrictions.

On the other hand, the aspect of the Privy Council's decision that gives rise to some concern is its remarks on the doctrine of margin of appreciation. Referring to the Board's earlier case law in which it had deferred to the local courts on matters where it appeared that a knowledge of the local context was an important factor in view of its unfamiliarity with local conditions, the Judicial Committee applied the same reasoning here. In addressing the question whether the restriction on freedom of expression contained in s 30(1) of the Prevention of Bribery Ordinance was necessary for preserving the integrity of investigations into corruption in Hong Kong the Board accorded considerable weight to the views of the Hong Kong courts and the Hong Kong legislature, in view of the assessment of local conditions that the Board considered was involved in making that assessment. In deferring to this local knowledge, the Judicial Committee described its approach as allowing a 'margin of appreciation' to the local courts and legislature.

The doctrine of the 'margin of appreciation', much discussed by the European Court, is one that has been eschewed by the Human Rights Committee (with one early exception) when discussing whether a restriction is necessary. Whether it is appropriate for a *national* court -- even one such as the Privy Council which is located geographically outside the territory for which it is the supreme appellate court -- to adopt a doctrine developed in the practice of a supranational court -- which is even further removed from the legal, political and social context of the countries over which it sits -- may be questioned.

Furthermore, it is also well-established in international law that the scope of margin of appreciation may vary with the subject matter. Accordingly, a wide margin has been accorded to the control of obscenity and indecency, as there is hardly any consensus on these moral issues (see *Handyside v United Kingdom* (1976) 1 EHRR 737), whereas a narrow margin of appreciation was accorded to the protection of integrity of the authority of the judiciary or matters pertaining to the rule of law, on which a fairly universal standard exists (See *Sunday Times v United Kingdom* (1979) 2 EHRR 245). In this respect, it could reasonably be maintained that the nature of corruption, the difficulties in detecting corruption offences and the need to preserve the integrity of investigations into corruption offences are universal. The fact that corruption is more prevalent in one place is arguably insufficient to justify a wide margin of appreciation being accorded in the consideration of the necessity for legislation which aims at protecting the integrity of investigations into corruption offences.

However, at the end of the day, it is the nature of the scrutiny carried out by the Privy Council or the Hong Kong courts that is of importance: is it sufficiently searching to ensure that fundamental rights and freedoms are only restricted where it can be shown to be necessary? The Privy Council is clearly taking a hands-off approach to such "local" issues; the Board's approach appears to suggest that, short of something that is tantamount to *Wednesbury* unreasonableness on the part of the Hong Kong legislature and courts, it will not interfere. The Board, however, appeared not to have considered in any detail whether the standard of scrutiny of s 30 adopted by the Legislative Council was comparable to that required under the Bill of Rights. Furthermore, the judgment provides much less by way of guidance for the Hong Kong courts and the local legislature on the standard that they, with the benefit of their local knowledge, should apply in evaluating claims of necessity. One assumes that the Board does not intend the local courts to defer to the legislature to the same extent as is appropriate for the Judicial Committee in London, but beyond that there is little to go on.

It is also somewhat disappointing that the Privy Council did not see fit to clarify the scope of the defence of lawful authority and reasonable excuse, which was heavily relied upon by the Attorney General in justifying s 30(1). There is at present an amendment to s 30(1) proposed by legislator Christine Loh that a disclosure would only constitute an offence if it is prejudicial to an ICAC investigation. The judgment of the Privy Council creates difficulty for an amendment along these lines. There is also a proposal to introduce a public interest defence to s 30(1). On the other hand, in response to the Privy Council's decision, the administration was reported to be considering proposing an amendment to s 30 of the Prevention of Bribery Ordinance to close the modest "loophole" exploited by the appellants by removing the need for the existence of a suspect as precondition to the commission of an offence under s 30.

Defamation – Relevance of Bill of Rights where plaintiff a public authority – Whether university a public authority – Criteria to be applied

See *Hong Kong Polytechnic University and others v Next Magazine Ltd and another* at page 20 above.

Prisons Ordinance (Cap 234), s 25(2) – Prison Rules (Cap 234 sub leg), rr 56, 77, 202(2)– Prison Standing Orders, SO 397, para 8 – Code on Access to Information 1995

Freedom of expression – Permissible restrictions – Censorship of newspapers provided to prisoners – Legitimate purpose – Whether provided by law – Whether necessary and proportionate – Whether waived by signing of consent form – Freedom of information – Access to information – Request by prisoner’s legal adviser for copy of prison standing order – Whether it should have been made available – Right of prisoner to have access to court

Chim Shing Chung v Commissioner of Correctional Services (1995) 5 HKPLR (High Court, Sears J)

An appeal has been lodged against the decision of Sears J. The appeal is listed for hearing on 30 July 1996. In *Woods v Minister of Justice, Legal and Parliamentary Affairs* 1995 (1) SA 703 the Supreme Court of Zimbabwe, in a judgment declaring unconstitutional certain limitations on the right of a prisoner to send and receive letters, reviews a number of aspects of the law relating to the rights of prisoners and the permissibility of restrictions on those rights.

RIGHT TO VOTE AND TO BE ELECTED WITHOUT UNREASONABLE RESTRICTIONS (ARTICLE 21, BILL OF RIGHTS; ARTICLE 25, ICCPR)

Legislative Council (Electoral Provisions) Ordinance (Cap 381)

Elections – Functional constituencies – Whether functional constituencies system which gives members a vote in addition to the vote in geographical election consistent with the Bill of Rights or Letters Patent – Whether disparity in size between different functional constituencies and hence disparity in voting power consistent with the Bill of Rights or Letters Patent

Lee Miu Ling and Law Pui v Attorney General

In this case, which involved a challenge to the system of functional constituencies, the applicants had been unsuccessful before Keith J (see *Lee Miu-ling v Attorney General (No 2)* (1995) 5 HKPLR 181) and before the Court of Appeal (see (1995) 5 HKPLR 585, [1996] 1 HKC 105).

On 6 June 1996 the Judicial Committee of the Privy Council declined to grant the applicants special leave to appeal against the judgment of the Court of Appeal.

Right of equal access to the civil service – Permanent resident in art 21 of the Bill of Rights refers to Hong Kong Permanent Resident as defined in the Immigration Ordinance – Access to the civil service includes access to opportunities for promotion – Access on general terms of equality – Unreasonable restriction – Prohibition of transfer by expatriate officers from contract terms to local terms – Whether racial discrimination – Positive discrimination – Proportionality – Hong Kong Permanent Resident

R v Secretary for the Civil Service, ex p Association of Expatriate Civil Servants of Hong Kong (1995) 5 HKPLR 490 (1995) 5 HKPLR [HCt, MP No 3037 of 1994, 31 October 1995, Keith J]

The applicants have lodged an appeal against the decision of Keith J. The appeal is set down for hearing on 10 September 1996.

EQUALITY AND NON-DISCRIMINATION (ARTICLE 22, BILL OF RIGHTS; ARTICLE 26, ICCPR)

See *R v Singh (No 2)* (1996) DCt, Cases Nos 695 of 1994 and 839 of 1995, 13 February 1996, Judge Jackson (see page 49 above). In that case the District Court held that it would be a violation of art 22 of the Bill of Rights if a statement which would have been inadmissible in criminal proceedings if made by a civilian who has not been cautioned were admissible against a police officer because the officer had made it in an internal investigation.

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APPENDIX A

CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION¹

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

1. The Committee considered the 13th periodic report of the United Kingdom of Great Britain and Northern Ireland (CERD/C/263/Add.7 and CERD/C/263/Add. 7 Part II) at its 1139th, 1140th and 1141st meetings (CERD/C/SR. 1139, 1140 and 1141), held on 4 and 5 March 1996, and adopted the following concluding observations.

A. INTRODUCTION

2. The Committee welcomes the thirteenth periodic report of the United Kingdom of Great Britain and Northern Ireland and one of its Dependent Territories (Hong Kong). It notes with satisfaction the State party's timely submission of the report, as well as the detailed answers provided to the questions posed at the present session and to the issues raised by the Committee in its concluding observations in connection with the twelfth periodic report. The Committee recognizes that since the United Kingdom became a party to the convention many legislative and other measures have been taken to implement the provisions of the Convention.

3. The Committee noted with regret that Part II of the report deals with the implementation of the Convention in only one Dependent Territory (Hong Kong) and that no information has been submitted with respect to the other Dependent Territories. It nonetheless expresses appreciation for the Government's engagement in a frank and constructive dialogue with the Committee, including on the legal issues about which the Government is, much to the regret of the Committee, in disagreement with the Committee.

4. The Committee expresses appreciation for the specific information received from non-governmental organizations based in the State party, which helped it to clarify the situation and contributed to the quality of the dialogue.

¹Adopted by the Committee at its forty-eighth session, 26 February - 15 March 1996

5. It is noted that the State party is not envisaging to make the declaration provided for in article 14 of the Convention, and that a number of members of the Committee requested the State party to reconsider its position on this matter.

B. FACTORS AND DIFFICULTIES IMPEDING THE APPLICATION OF THE CONVENTION

6. The Committee notes that a large number of manifestations of racism and racially motivated attacks and incidents directed against members of ethnic minorities continue to occur in the territory of the State party.

C. POSITIVE FACTORS

7. The legislative proposal to allow the Commission on Racial Equality to accept legally binding undertakings and the introduction of new legislative provisions to tackle the issue of persistent harassment are welcome developments. The special effort made by the Government to increase the representation of ethnic minorities in the police force is also noted with satisfaction, as is the attention being paid in recent years to collecting data on and investigating racially motivated crimes, deaths in detention and complaints of police brutality.

8. The new Grants for Education Support and Training, which aims to elevate the English skills of students from ethnic minority groups, is viewed as a constructive way to raise the standards of academic achievement of these students.

9. The commitment to enact a race relations law for Northern Ireland, although much belated, is also welcome.

10. With respect to Hong Kong, the study on racial discrimination proposed to begin by the end of the present year is viewed as a constructive means of determining the extent of problems in the area of racial discrimination and reviewing all laws that may in a discriminatory manner confer exclusive benefits on members of a particular race. Where discrimination is found to exist, the study could serve as an important basis for the development of solutions.

D. PRINCIPAL SUBJECTS OF CONCERN

11. Note is taken of the fact that the 1976 Race Relations Act, by which many of the provisions of the Convention are given effect in domestic law, is subordinate to a wide range of rules and may be superseded by new rules or laws. The legal framework prohibiting racial discrimination is further weakened by the non-incorporation of the Convention into domestic legislation, the absence of a bill of rights espousing the principle of equality before the law and non-discrimination and the lack of recourse of individuals to petition an international body such as the Committee. In addition, concern is expressed

that the laws relevant to the implementation of the Convention do not appear to be uniformly applied throughout the territory of the United Kingdom; specifically, the Race Relations Act does not extend to Northern Ireland and some provisions of the Criminal Justice Act do not apply to Scotland.

12. A special concern is expressed over the issue of religious discrimination, in connection with anti-Muslim sentiment. Discrimination against Muslims may be closely related to questions of race and ethnicity but no legislation is in place to effectively deal with this type of discrimination.

13. Concern is expressed over the interpretation of article 4 as presented in the State party's interpretative statement regarding this article and reaffirmed in the present report. Such an interpretation is not only in conflict with the established view of the Committee, as elaborated in its General Recommendation XV(42), but also amounts to a negation of the State party's obligation under article 4(b) of the Convention to outlaw and prohibit organisations which promote and incite to racial discrimination.

14. In connection with article 5 of the Convention, it is noted with serious concern that among the victims of death in custody are a disproportionate number of members of minority groups, that police brutality appears to affect members of minority groups disproportionately, that allegations of police brutality and harassment are reportedly not vigorously investigated and perpetrators, once guilt is established, not appropriately punished. Persons belonging to ethnic minority groups are under-represented in political and public life, as reflected in their representation among the voting public, the police and armed forces and holders of public office. Deep concern is expressed about reports that they suffer significantly higher levels of unemployment relative to the rest of the population and that disproportionate numbers of black children are being excluded from schools.

15. Special concern is also expressed for the Irish Traveller community, whose situation affects their right to public health care and social services under article 5(e). It is noted that the policy of designating land for the use of Travellers has contributed to their lower standard of living and has curtailed their freedom of movement by limiting the places which they might inhabit.

16. Serious concern is expressed at the absence of comprehensive race relations legislation in Northern Ireland. Equally, concern is expressed at the lack of positive efforts to bridge the cultural gaps in Northern Ireland between mainstream society and minority groups, particularly the Chinese and Irish Traveller communities. This has resulted in a disturbing reluctance by many members of these groups to make use of health and other social services.

17. Concerning the treatment of foreigners, serious concern is expressed that the proposed Asylum and Immigration Bill, published on 30 November 1995, would alter the status of many persons living in the United Kingdom in an adverse and discriminatory manner. This bill, if enacted, would, *inter alia*, prohibit employers from employing persons who are in the process of

appealing a decision which rejected their petition to remain. It would also deny a number of social services to persons who have been granted permission to remain in the United Kingdom, including asylum-seekers, and others who have been granted permanent leave to stay but have not been naturalized. It is a matter of deep concern that most of the affected persons would be persons belonging to ethnic minorities.

18. With respect to Hong Kong, concern is expressed at the failure to include in the 1991 Population Census questions which would help determine the ethnic and racial composition of the population. The identification of minority groups and subsequent analysis of their political, economic and social status is a precondition to determining the difficulties that minority groups may be facing and whether and how any such difficulties may be due to discrimination.

19. It is noted with concern that the adoption of the Bill of Rights Ordinance, while a welcome measure, does not protect persons in Hong Kong from racial discrimination to which they may be subjected by private persons, groups or organizations, as provided for in article 2, paragraph 1(d) of the Convention.

20. The Government's statement that South Asian residents of Hong Kong are granted some form of British nationality, whether of a British National Overseas (BNO) or a British Overseas Citizen (BOC), so that no resident of Hong Kong would be left stateless following the transfer of sovereignty is noted with interest. It is, however, a matter of concern that such status does not entitle the bearer the right of abode in the United Kingdom and contrasts with the full citizenship status conferred upon a predominantly white population living in another dependent territory. It is noted that most of the persons holding BNO or BOC status are Asians and that judgments on applications for citizenship appear to vary according to the country of origin, which leads to the assumption that this practice reveals elements of racial discrimination.

21. Concern is also expressed about the "two-week rule", which prohibits foreign workers from seeking employment or remaining in Hong Kong for over two weeks from the expiration of their employment contracts. In view of the fact that the overwhelming majority of the persons affected by this rule are female Filipino foreign domestic workers, this rule appears to have discriminatory aspects under the terms of the Convention which may leave workers vulnerable to abusive employers.

22. In connection with Vietnamese asylum-seekers in Hong Kong, there are serious indications that the conditions to which these persons are subjected during their often prolonged detention in refugee centres constitute a violation of their human rights and require urgent attention. Of principal concern is the absence of educational facilities for the children in these centres.

E. SUGGESTIONS AND RECOMMENDATIONS

23. The Committee recommends that the State party submit information on why anti-discrimination legislation, specifically the 1976 Race Relations Act and the 1994 Criminal Justice and Public Order Act, is not applied equally throughout the territory of the United Kingdom. Further, the Committee recommends that the Race Relations Act be reexamined with a view to elevating its status in domestic law so that it may not be superseded by new rules or laws. The Committee also recommends that the United Kingdom reconsider its interpretation of article 4.

24. The Committee recommends, with respect to articles 5 and 6, that the adequacy of legal aid available to alleged victims of racial discrimination be reviewed and that all complaints of police brutality be vigorously and independently investigated and the perpetrators punished. It recommends that investigations into deaths in custody be carried out expeditiously by independent inquiry mechanisms. The Committee further recommends that comprehensive, action-oriented studies be undertaken to ascertain the reasons behind the low participation of persons belonging to ethnic minority groups in elections, both as voters and as candidates for public office, the reason for their low representation in the police and armed forces, and the reason for their disproportionately high level of unemployment.

25. Noting with satisfaction the willingness of the State party to inform the Committee in a more comprehensive manner about the role and the functioning of industrial tribunals dealing with complaints relating to discrimination in employment, the Committee recommends that in the next periodic report special attention be given to such aspects as accessibility, procedures and types of redress.

26. The Committee recommends that the next report of the State party contain detailed information on complaints and sentences related to acts of racial or ethnic discrimination.

27. The Committee recommends that, during the further consideration of the 1995 Asylum and Immigration Bill, published on 30 November 1995, full consideration be taken of the provisions of the Convention. Detailed information about its application and the ethnic composition of potentially affected persons is requested in the fourteenth periodic report.

28. The Committee recommends that effective programmes be established to care for the health and educational needs of the Irish Traveller community in Great Britain and Northern Ireland.

29. The Committee takes note of the establishment of the Ethnic Minorities Advisory Committee (EMAC) in 1991 to assist the Judicial Studies Board in addressing racial and multi-cultural issues in courts. The Committee requests that information be submitted in the fourteenth periodic report

indicating whether training from EMAC is obligatory for all judges and how many judges actually receive training by the date of submission of that report.

30. In view of the fact that many of the persons found not to be entitled to remain in the United Kingdom are members of minority groups, the Committee reiterates its position that States are obligated under the Convention not only to enact appropriate legislation but also to ensure their effective implementation.

31. The Committee recommends that the provisions of the Convention be taken into full account in the drafting of comprehensive race relations legislation for Northern Ireland. The Committee recommends that an effort be made to make available in the principal minority languages important public information, particularly concerning basic health care.

32. With respect to articles 5(e) and 7 of the Convention, the Committee repeats its recommendation that in the next report information be included regarding the development of plans to improve the economic and social conditions of minority groups through various measures in the field of employment and training, housing, social services, health and education, in particular that the fourteenth periodic report include specific information on the number of persons from minority groups assisted through the programmes in place or to be introduced. The report should also address the manner in which such persons were assisted and the effect of the programmes on their overall welfare. Among the programmes discussed should be the Single Regeneration Budget, the Equal Opportunities Ten-Point Plan for Employers and the various educational grants for minority students.

33. Noting with concern the absence of legislation in Northern Ireland to outlaw racial discrimination and the Government's statement that close consideration is being given to this issue, the Committee recommends that a bill be promulgated as soon as possible.

34. The Committee notes with interest that action is taken to address the needs of children from the Black and other minority communities who are excluded from schools and recommends that the Government regularly collect and analyze data relating to the academic progress of children, broken down by ethnicity, to develop policies and programmes with a view to eliminating disadvantages based on race.

35. With respect to Hong Kong, the Committee recommends that efforts be made to determine the ethnic and racial composition of the population. The Committee recommends that the Bill of Rights Ordinance be amended to extend the prohibition of discrimination to acts committed by private persons, groups or organizations, as provided for in article 2, paragraph 1(d), of the Convention. The Committee recommends that the "two-week rule" be modified to allow foreign workers to seek new employment in Hong Kong when their employment contracts are terminated.

36. The Committee recommends that the question of citizenship status of Hong Kong residents belonging to ethnic minorities of Asian origin be reviewed to ensure that their human rights are protected and that they are not discriminated against, as compared with residents of other former colonies of the United Kingdom.

37. The Committee recommends that the fourteenth periodic report due on 5 April 1996 be submitted as an updating report, that it contain information on the metropolitan territory as well as on the dependent territories, including Hong Kong, and that it address all the points raised in these observations.

APPENDIX B

HONG KONG GOVERNMENT CALL FOR SUBMISSIONS

SUPPLEMENTARY REPORT ON HONG KONG UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The United Nations Human Rights Committee (UNHRC) considered the fourth periodic report on Hong Kong under the ICCPR in October 1995. In its Concluding Observations¹ the Committee asked that a brief further report be submitted by 31 May 1996 which it will wish to consider in Autumn 1996.

2. The Committee requested that this supplementary report cover new developments with regard to the enjoyment of human rights in HK, pursuant to the recommendation contained in the Committee's Concluding Observations, and the statement by its Chairperson. Details are given below and in the attached Annex. You are invited to send your views on these issues to the Secretary for Home Affairs not later than 8 March 1996. Comments received will be considered in the drafting of the contribution that will be submitted to the British Government for the report to the UNHRC.

3. The UNHRC raised the following issues:-

1. Submission of reports after 1997: developments in respect of the Chairman's Statement attached with the concluding observations paragraphs 4 and 26 paragraph numbers refer to the text of the Annex].
2. Investigation of complaints against alleged violation of human rights by the police: concern about the credibility of the investigation process; recommended inclusion of non-police members in such investigations [paragraphs 11 and 21]
3. Language used in charge forms, charge sheets and court documents: concern that such documents are in English only; recommend acceleration of efforts to introduce Chinese versions paragraphs 12 and 20]

¹ [Eds] For the *Concluding observations* of the Committee, see *Bill of Rights Bulletin*, vol 3, no 4, December 1995, Appendix E, and (1995) 5 HKPLR 631.

4. Protection of women: concern over the situation of women and the implementation and scope of the Sex Discrimination Ordinance; recommended adoption of comprehensive discrimination legislation [paragraphs 13 and 23]
5. Vietnamese migrants concern - in relation to Articles 9 and 10 of the Covenant - at the long detention and living conditions of Vietnamese asylum seekers, the situation of the children living in the camps, and the conditions under which removals are carried out. Recommendation that the Government take steps to improve conditions in the camps with special attention to the children; refugee status of detainees to be speedily determined with right of judicial review and legal aid, removal of non-Vietnamese non-refugees to be closely monitored [paragraphs 17 and 24]
6. Electoral matters: concern that functional constituencies give undue weight to the views of the business community, discriminate among voters on the basis of property and functions and - notwithstanding the reservation against Article 25 of the Covenant - violate Articles 2.1, 25 (b) and 26. Recommendation that steps be taken to ensure that the electoral system complies with Articles 21, 22 and 25 of the Covenant [paragraphs 19 and 25]
7. Human Rights Commission: recommended reconsideration of the establishment and competence of such a Commission [paragraph 22]
8. New development: request for a report on new developments with regard to the enjoyment of human rights in Hong Kong.
4. Please send your views to the Secretary for Home Affairs:

31/f., Southorn Centre
130 Hennessy Road
Wanchai, Hong Kong

(Fax: 28346176)

not later than 8 March 1996.

APPENDIX C

OUTLINE OF THE UNITED KINGDOM'S FOURTEENTH REPORT IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

In March 1996 the United Nations Committee on the Elimination of Racial Discrimination (CERD) considered the United Kingdom's thirteenth report under the ICERD including that part of it that relates to Hong Kong. In its concluding observations reproduced at the Annex to this outline), the Committee asked that the fourteenth report, due in 1996, be submitted as an updating report and that it address all the points raised in the observations. Accordingly, as well as updating the 13th report as necessary, the report will, so far as Hong Kong is concerned, address the issues below.

2. You are invited to send your views on these issues to the Secretary for Home Affairs not later than 14 June 1996. Comments received will be considered in the drafting of the contribution that will be submitted to the United Kingdom Government for inclusion in its 14th report to the CERD.

3. In relation to Hong Kong, the CERD raised the following issues-

(a) Study of racial discrimination: the Committee viewed the Hong Kong Government's proposal to study racial discrimination "as a constructive means of determining the extent of problems in the area of racial discrimination." [paragraph 10 - paragraph numbers refer to the Annex]

(b) Population Census: the Committee expressed concern that the 1991 Census did not include questions which would help determine the ethnic and racial composition of the population. It recommended that efforts be made to determine that composition [paragraphs 18 and 25].

(c) Legislation against racial discrimination: the Committee expressed concern that the Bill of Rights Ordinance (BORO) did not protect persons in Hong Kong from racial discrimination to which they might be subjected by private persons, groups or organisations. It recommended that the BORO be amended to extend the prohibition of discrimination to acts committed by such persons, groups or organisations. [paragraphs 19 and 35].

(d) Ethnic minorities of South Asian origin (nationality): the Committee expressed concern that conferment of the status of British National (Overseas) or of that of British Overseas Citizen on Hong Kong residents of South Asian origin did not entitle these persons to the right of abode in

the United Kingdom. It recommended that the question of their citizenship status be reviewed [paragraphs 20 and 36].

(e) Domestic helpers: the Committee recommended that the "two-week rule" be modified to allow foreign domestic helpers whose contracts were terminated more time to seek new employment [paragraphs 21 and 35].

(f) Vietnamese migrants: the Committee expressed concern about conditions in the detention centres, particularly in respect of education facilities for the children [paragraph 22].

4. Please send your views to the Secretary for Home Affairs -

31/F, Southorn Centre
130, Hennessy Road
Wanchai
Hong Kong
(Fax: 2591 6002)

not later than 14 June 1996.

APPENDIX D

SUPPLEMENTARY REPORT BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS¹

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¹ June 1996

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**SUPPLEMENTARY REPORT BY THE UNITED
KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
IN RESPECT OF HONG KONG UNDER THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL
RIGHTS**

Introduction

The Committee considered the United Kingdom's fourth periodic report in respect of Hong Kong under the Covenant on 19 and 20 October 1995. In its Concluding Observations (CCPR/C/79/Add.57 of 3 November 1995) the Committee requested the Government of the United Kingdom to submit a brief further report, by 31 May 1996, on new developments with regard to the enjoyment of human rights in Hong Kong, pursuant to the recommendations contained in the Committee's Concluding Observations and in the statement by its Chairperson, on behalf of the Committee, concerning the continuing submission of reports in respect of Hong Kong after the change of sovereignty on 1 July 1997.

2. This supplementary report is submitted in response to that request. It deals in turn with each of the recommendations contained in the Committee's Concluding Observations and also with various other concerns expressed by the Committee in those Observations. It also seeks to update the information previously provided to the Committee on other aspects of the enjoyment of human rights in Hong Kong. The process of promoting and protecting human rights in Hong Kong is a continuous and dynamic one. This report describes the position at the time when the report was finalised (late May 1996). But there may be further developments on various issues to record by the time the Committee examines the report. The United Kingdom Government hopes to have the opportunity to bring the Committee further up to date when its delegation takes part in that examination.

Submission of reports

3. In paragraph 4 of its Concluding Observations the Committee noted the relevant provisions of the Sino-British Joint Declaration of 19 December 1984 and also its own previously expressed views on the continuation, after 1 July 1997, of reporting obligations in respect of Hong Kong under article 40 of the Covenant. It specifically reiterated that, as those obligations will continue to apply, the Committee will be competent to receive and consider reports that must be submitted in relation to Hong Kong.

4. So far as the Joint Declaration is concerned, and as the United Kingdom Government has previously drawn to the attention of the Committee, the last paragraph of Chapter XIII of Annex I (JD 156), which is reflected in

Article 39 of the Basic Law (BL 39), constitutes an express undertaking by the Government of the People's Republic of China - an undertaking which is itself binding in international law - to ensure that the provisions of the two International Covenants (the ICCPR and the ICESCR), as applied to Hong Kong, will remain in force on and after 1 July 1997. The obligations imposed by the two Covenants, which are thereby assumed in respect of Hong Kong by the Chinese Government, include, specifically, the obligation to submit to the respective treaty monitoring bodies the reports required by article 40 of the ICCPR and article 16 of the ICESCR.

5. The United Kingdom Government has fully briefed the Chinese Government on the ways in which the Covenants are now applied in Hong Kong. It has made known its views as to how the Chinese Government may fulfil its obligations under JD 156.

6. The protection of human rights in Hong Kong afforded by the Covenants is highly valued by the people of Hong Kong. Accordingly, they set great store by the provisions in the Joint Declaration and the Basic Law which secure the continuing application of the Covenants on and after 1 July 1997 and, specifically, which enable the respective Committees to continue to discharge their responsibility, through the reporting systems established by the Covenants, to monitor the observance of the Covenants in Hong Kong.

7. The United Kingdom Government has raised this issue with the Chinese Government at the highest levels. It will continue to work for a satisfactory resolution.

Languages used in charge forms, charge sheets and court documents

8. In paragraph 20 of its Concluding Observations the Committee recommended that Chinese versions of official charge forms, charge sheets and court documents should be introduced as soon as possible.

9. The Judiciary is committed to putting in place, before 1 July 1997, a truly bilingual court system which allows the use of Chinese, along with English, in courts of all levels. It has made considerable progress towards that goal and is confident of achieving it in good time. The current state of progress is as follows -

(a) Summonses issued by the Magistrates' Courts

Descriptions of most standard offences are now available in both English and Chinese. The Judiciary and the Government are jointly devising bilingual statements of offences for use in summonses. They expect to complete the task by mid-1996. At the same time, the Judiciary is upgrading its computer system so that, by 1 July 1997, it will be able to issue all summonses in both languages;

(b) Charge sheets

Paragraphs 170 and 171 of the United Kingdom's fourth periodic report under the Covenant in respect of Hong Kong described the progress made towards the introduction of bilingual charge sheets. There have been significant developments since that report was submitted. Bilingual sheets are now in use in the Magistrates' Courts, the District Court and the High Court. This development was phased-in between August and December 1995. The experimental forms used in the police pilot scheme (also described in paragraphs 170 and 171 of the fourth periodic report) are now in use throughout the Police Force. But these forms are not yet fully bilingual because authentic Chinese translations are not yet available for all the relevant Ordinances. As an interim measure, the police are using a bilingual glossary of terms commonly used for laying charges;

(c) Restriction on the use of Chinese in the District Court and the Lands Tribunal

This restriction was lifted in February 1996. Accordingly, plaintiffs and defendants may now file documents in either Chinese or English; and

(d) Higher courts

The Official Languages (Amendment) Ordinance was enacted in July 1995, removing the restriction on the use of Chinese in the higher courts. The Judiciary aims to extend the use of Chinese to High Court criminal cases in January 1997; to High Court civil cases in March 1997; and to all Court of Appeal cases in June 1997.

Investigation of complaints against the police

10. In paragraph 11 of its Concluding Observations the Committee expressed concern about the investigative procedures in respect of allegations of human rights violations by the police and in paragraph 21 it suggested incorporating non-police members in the investigation of all complaints against the police.

11. Paragraphs 25 and 26 of the fourth periodic report recognised that there were areas where the complaints handling system needed improving. They described the measures that the Hong Kong Government was taking to accomplish this. Since that report was submitted, the Hong Kong Government has taken the following further measures in that direction -

(a) the Independent Police Complaints Council (IPCC) has been enabled to interview witnesses;

(b) video/tape recording facilities have been installed in the Complaints Against the Police Office (the CAPO) to ensure that interviews are transparent; and

(c) there has been increased publicity for the independent monitoring role of the IPCC.

12. Other measures now in train, or shortly to be put in train, include the following-

(a) *Comparative study of overseas police complaints systems*

This is a joint study by the IPCC and the Hong Kong Government. The aim is to learn from the experience of other jurisdictions and to identify what further improvements might be made. The study has entailed visits to the USA, Canada, Australia, Japan and Singapore. The findings will be reported in May/June 1996;

(b) *IPCC Observers Scheme*

Since April 1996 members of the IPCC have been able to observe the CAPO investigation process;

(c) *Independent review of CAPO procedures*

In January 1996, the Hong Kong Government seconded a senior civil servant to the IPCC to carry out this review, which will be completed in June/July 1996; and

(d) *IPCC to become a statutory body*

The Hong Kong Government is working on a Bill to put the IPCC on a statutory basis. Before finalising the Bill, it will need to take into account the findings of the comparative study ((a) above) as well as the working of the IPCC Observers Scheme ((b) above) and the outcome of the independent review of CAPO procedures ((c) above).

Human Rights Commission

13. In paragraph 22 of its Concluding Observations the Committee recommended a reconsideration of the Hong Kong Government's decision on the establishment and competence of a Human Rights Commission.

14. The United Kingdom and Hong Kong Governments has carefully reconsidered this matter in the light not only of the Committee's recommendations but also of similar views expressed by some NGOs and other members of the community in Hong Kong. They have concluded that the Hong Kong Government's original assessment - described and explained in paragraph 10 of the fourth periodic report - was correct. They remain convinced that a Human Rights Commission is not the best way forward in the particular circumstances of Hong Kong. As explained in the fourth periodic report, human rights in Hong Kong are founded on the rule of law, an independent judiciary and a justiciable Bill of Rights (established by the Bill of Rights Ordinance (the

BORO)). There is a sound and comprehensive legal aid system; an effective ombudsman (the Commissioner for Administrative Complaints (the COMAC)) and a range of other institutions for the investigation and redress of complaints; a fairly elected legislature; and a progressive approach to human rights education. The Hong Kong Government also operates in the full view of a free and active press, and its policies and practices are subject to rigorous monitoring by local and international NGOs.

15. This system has served Hong Kong well and provides a suitable framework for securing and enhancing the protection of human rights in the territory. The United Kingdom and Hong Kong Governments strongly maintain the view that it is more sensible to build on this framework than to devise an entirely new institution with a wide-ranging but imprecise remit in the field of human rights.

16. To address areas of specific concern, the Hong Kong Government has made legal aid more readily available in cases involving the BORO, has given the judiciary additional resources to reduce court waiting-times, and has improved the ombudsman system. It is establishing a statutory Equal Opportunities Commission to tackle discrimination on the grounds of sex and disability and a Privacy Commissioner to promote and enforce compliance with new data protection laws.

Comprehensive anti-discrimination legislation

17. In paragraph 23 of its Concluding Observations the Committee recommended that comprehensive anti-discrimination legislation be adopted, aiming at eliminating all forms of discrimination prohibited under the Covenant (and not already prohibited by existing Hong Kong law).

18. The Hong Kong Government is fully committed to the elimination of discrimination and the promotion of equal opportunities for all. But because legislation in this area would have far-reaching implications for the community as a whole, it believes that a step-by-step approach - allowing both the Government and the community thoroughly to assess the impact of such legislation in the light of experience - offers the best and most suitable way forward for Hong Kong.

19. Accordingly, the Hong Kong Government has conducted two discrete studies of discrimination - on the grounds of family status and on the grounds of sexual orientation - to identify the extent of problems in these areas and options for addressing them. As part of the study process, consultative documents were published in January 1996 to solicit public views. The consultation period closed on 31 March and the Hong Kong Government is now analysing the submissions which it received. The findings of that analysis will help the Government determine the way forward. Legislation is an option that will be examined. A similar study on the question of age discrimination in employment is now in progress. A fourth study, on the issue of racial

discrimination, will start later this year. Meanwhile some Members of the Hong Kong Legislative Council have stated an intention to introduce Members' Bills on these and other aspects of discrimination.

Sex Discrimination Ordinance

20. In paragraph 8 of its Concluding Observations the Committee welcomed the enactment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance and the proposed establishment, in 1996, of an Equal Opportunities Commission. The Commission in fact officially came into being on 20 May 1996 with the formal appointment of its Chairperson and other members. It will become fully operational once all its staff are in place, probably in the autumn of 1996. But a preparatory team is already making arrangements to ensure that the Committee is in a position to start work without delay.

21. In paragraph 13 of its Concluding Observations the Committee expressed regret that the Sex Discrimination Ordinance was not yet in force. It also expressed concern about the limit on the damages that might be awarded under it; about the absence of a power to order the reinstatement of women who had lost their jobs because of sex discrimination; about significant exemptions which it contained; and about the fact that its application was limited to discrimination based on gender and marriage. In paragraph 23 the Committee recommended that these deficiencies be overcome by appropriate amendments.

22. For practical reasons, the Hong Kong Government has considered it necessary to set up the Equal Opportunities Commission before bringing the provisions of the Sex Discrimination Ordinance into force. International experience indicates that most complaints involving discrimination arise in the key area of employment: most people who encounter discrimination do so in the work place. The Hong Kong Government therefore considers that the urgent priority is to develop clear, concise codes of practice - written in plain, non-legalistic language - to help employers and employees understand the new laws and how they affect their day-to-day working relationships. At the same time, the Hong Kong Government believes that it should not give effect to a new form of legislation that impinges so closely on everyday social interaction before that legislation is made accessible to the public in the form of the codes. It considers that the task of devising the codes is best entrusted to a dedicated, expert body. Accordingly, it has placed this project high on the initial task list of the Equal Opportunities Commission, which is the primary executive body for the implementation of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance. The Sex Discrimination Ordinance's provisions on employment matters will come into force once the codes are ready. However, appreciating that the apparent delay in implementing that Ordinance was giving rise to concern, the Hong Kong Government directed the preparatory team for the Equal Opportunities Commission to undertake the necessary background research. That research was well underway when the Commission came officially into being on 20 May 1996.

23. The question of a power to order reinstatement, the question of limits on damages and the question of exemptions were all thoroughly debated in the Legislative Council during the passage into law of the Sex Discrimination Ordinance. That Ordinance nevertheless empowers the Equal Opportunities Commission to monitor its working and to formulate proposals for its amendment should it or the Governor consider that to be necessary. In those circumstances, the Hong Kong Government took the view that it should not preempt the work of the Equal Opportunities Commission by considering changes to the Ordinance before the Commission itself came into operation. The Hong Kong Government notes that a Member of the Legislative Council proposes introducing a Member's Bill amending both the Sex Discrimination Ordinance and the Disability Discrimination Ordinance. It hopes that the Bill's proponents will accept its view that the Equal Opportunities Commission should first have the opportunity to enforce and monitor the operation of the two Ordinances and that it will then be the Commission that will be best placed to assess the need for, and the nature of, any changes to them.

24. The steps being taken by the Hong Kong Government to determine how best to deal with discrimination that does not fall within the scope of the Sex Discrimination Ordinance or the Disability Discrimination Ordinance are discussed in paragraph 19 above. As is there explained, the Hong Kong Government takes the view that each different form of discrimination raises different considerations and that each, therefore, requires careful examination and analysis, separately and in its own rights. Hence the studies that have been, or will shortly be, put in train, as described in paragraph 19: these will help the Hong Kong Government determine the way forward in areas of discrimination not already covered by the two Ordinances.

Vietnamese migrants

25. In paragraph 17 of its Concluding Observations the Committee noted with satisfaction the efforts by the Hong Kong Government, in cooperation with the United Nations High Commissioner for Refugees (UNHCR), to care for the needs of the Vietnamese migrants living in detention centres in the territory. But it expressed concern about the long-term detention of many of those persons and about their living conditions while in detention, and in paragraph 24 it urged the Hong Kong Government to improve their living conditions, particularly in respect of the children and to ensure that the refugee status of all detainees was speedily determined, with right of judicial review and legal aid. The process of deportation and removal of non-refugees of Vietnamese origin should, the Committee recommended, be closely monitored to prevent abuse.

26. **Living conditions.** The Hong Kong Government, together with the UNHCR and other agencies and organisations, makes every effort to provide decent and humane living conditions for the Vietnamese migrants in the detention centres. The Hong Kong Government provides the migrants with three meals daily, according to dietary scales approved by the Department of Health. Vegetarian meals are provided for those who prefer them, and additional food is

provided to pregnant women and the sick, on medical advice. The Hong Kong Government also provides clothing and such things as eating utensils and toiletries according to a fixed scale. As regards medical care, the Hong Kong Government provides general out-patient clinics and first aid services. Medecins Sans Frontieres provides well-baby clinics, and Christian Action provides dental services under the auspices of the UNHCR. Persons who need medical services which cannot be provided in the detention centres are referred to hospitals and specialist units outside the centres. In the centres there are toilets, compartmentalised shower facilities with warm water during the winter, and open washing areas. The migrants are free to send and receive letters and parcels, and they are provided with televisions and newspapers. In addition, the UNHCR operates information centres with newspapers, journals, and videos - including videos produced in Vietnam - to keep the migrants informed of developments in Vietnam. Open space is available for outdoor activities and there are also TV and recreation rooms. Counselling, welfare and assistance are provided by the Social Services Section of the UNHCR and special attention is given to vulnerable groups such as the disabled, children and the elderly. The Hong Kong Family Planning Association provides educational programmes, clinical programmes and face-to-face counselling. The religious needs of the migrants are also catered for: regular services and visits are provided by the three main religious groups (Catholic, Protestant and Buddhist). As was pointed out in paragraph 100 of the fourth periodic report, conditions in the detention centres are not kept hidden from public scrutiny: the centres are frequently visited by representatives of international and local non governmental organisations who report on what they find. Their comments and criticisms are considered very seriously by the Hong Kong Government, which has taken all reasonable measures to meet them whenever they have been shown to be well-founded. In these circumstances, the Hong Kong Government cannot accept that the living conditions in the detention centres give rise to any violation of articles 9 or 10 of the Covenant or, specifically, that the detainees are treated otherwise than "with humanity and with respect for the inherent dignity of the human person."

27. **The children.** The Hong Kong Government shares the special concern of the Committee about the situation of the children of Vietnamese migrants who live with their parents in detention centres pending their parents' repatriation to Vietnam. But it is not the Hong Kong Government which has brought about the need for them to be in the centres or which chooses to prolong that need. The power to bring it to an end lies with the parents, who are aware that they have no legal right to remain in Hong Kong and no valid reason for not returning to Vietnam. The United Kingdom and Hong Kong Governments want them to return to Vietnam as soon as possible, for the benefit of their children as well as themselves, through the arrangements provided by the UNHCR. However, so long as these children remain in Hong Kong, the Hong Kong Government recognizes and respects its duty under the Covenant to ensure their human rights and it has consistently sought to discharge that duty by taking all reasonably practicable measures, appropriate to the status and special needs of children, to promote and protect their rights and their welfare. In this context

the attention of the Committee is drawn to paragraphs 371-386 of the United Kingdom's initial report in respect of Hong Kong under the Convention on the Rights of the Child (CRC/C/11/Add.9, submitted on 14 February 1996) and to the measures taken and the facilities provided, as there described, specifically for the benefit of Vietnamese migrant children.

28. **Determination of refugee status.** With relatively few exceptions (mainly, new-born babies and recent arrivals from Vietnam) all the Vietnamese migrants now in Hong Kong have already been screened to determine their refugee status. This exercise was effectively completed in October 1994. The screening system was designed in consultation with the UNHCR, which was also closely involved in, and monitored, its implementation. The UNHCR reviewed all negative decisions and exercised its right to reverse the screening decisions in the case of over 1,500 migrants. There have been judicial reviews of various screening decisions and the courts have found the screening system itself to be fair and reasonable. Vietnamese migrants have the same access to the judicial system as everyone else in Hong Kong; they are likewise eligible for legal aid. One case, involving Vietnamese migrants formerly settled in China, will be heard by the Privy Council in July this year.

29. Recently, the Judicial Committee of the Privy Council reversed a decision by Hong Kong's Court of Appeal by ordering the release from detention of four migrants from Vietnam who were all of Chinese ethnic origin but who had, or had at some point claimed to have, ties with Taiwan as a result of which they apparently were, or would be, regarded by the Vietnamese authorities as foreign nationals, though the Vietnamese authorities had not yet responded to the request by the Hong Kong Government to receive them as returning migrants. (This is the case referred to in paragraph 108 of the fourth periodic report.) The details of the reasons given by the Judicial Committee for ordering their release varied according to the particular facts of the respective cases. But, essentially, the Judicial Committee held that, in the light of the Vietnamese authorities' known policy of refusing to accept persons whom they regarded as foreign nationals and in the absence of contrary indications in the relevant Hong Kong legislation, it was unlawful for the Hong Kong Government to keep the appellants in detention "pending removal" to Vietnam once there was reason to believe, despite the absence of a response from the Vietnamese authorities, that they would not be accepted; and in any event that it was unlawful to keep them in detention pending removal once it had become clear that removal was not going to be possible within a reasonable time. At the time when this report was finalized, the Hong Kong Government had released about 275 migrants whom it believed fell within the ambit of the Privy Council judgement. Meanwhile, the Vietnamese authorities have agreed to study again the question of "non-nationals". A response is awaited from the Taiwan authorities as to whether they will admit any of these migrants for resettlement.

30. There is good evidence that the policy of the Vietnamese Government concerning the acceptance of non-nationals is flexibly applied: to the knowledge of the Hong Kong Government the Vietnamese authorities have

cleared for return some 99 families whom they regarded as non-nationals. To clarify the position in future cases, a new provision has been added to the Immigration Ordinance to the effect that, where a request has been made to the Vietnamese Government for the repatriation of a person, the purpose of that person's detention "pending removal" shall include awaiting a response to that request from the Vietnamese Government. However, the provision makes clear that this in no way limits the ability of the courts to determine, in any particular case, that a person is being detained otherwise than "pending removal" or, specifically, that he has been detained for an unreasonable period.

31. **Removals and deportations.** The process of removing and deporting persons who have been definitely determined not to be refugees is indeed closely monitored to ensure that there is no abuse. The monitoring process - which has been in place since September 1994 - follows the recommendations of an inquiry by non-official Justices of the Peace into an operation to transfer certain Vietnamese migrants from one detention centre to another which took place on 7 April of that year (see paragraph 116 of the fourth periodic report). It is carried out by independent monitors comprising representatives of NGOs (Oxfam, Christian Action and Medecins Sans Frontieres) and non-official Justices of the Peace. To ensure that the process is transparent, the monitors prepare reports on all removal operations, and those reports are published in full.

32. **Voluntary return.** The Hong Kong Government has no wish to keep any Vietnamese migrants in detention in Hong Kong. But the vast majority of Vietnamese migrants now in Hong Kong have exhausted the process of determining whether or not they are genuine refugees and have in fact been found to be non-refugees in accordance with the 1951 Convention and its 1967 Protocol. Accordingly, they have no legal right to remain in Hong Kong and no valid reason not to return to their own country. The Hong Kong Government and the UNHCR have counselled them - and continue to counsel them - to return voluntarily to Vietnam. Those who agree to do so are given every assistance. In addition to a UNHCR reintegration allowance of US\$240 which is paid to each migrant on return to his home village, every person who returns voluntarily receives a grant of US\$200 in Hong Kong before departure. The safety and well-being of those who return to Vietnam is monitored both by the UNHCR and by the British Embassy, and the reports indicate that there have been no cases of ill-treatment or persecution. In these circumstances, and so long as the persons in question refuse to leave Hong Kong voluntarily, the Hong Kong Government has no practical alternative to keeping them in detention: but it of course accepts and seeks to observe its duty to ensure, by all practicable means, that their human rights under the Covenant and other relevant instruments are at all times fully respected.

Electoral matters

33. In paragraph 19 of its Concluding Observations the Committee expressed the view that the present electoral system in Hong Kong in respect of

elections to the Legislative Council - in particular the arrangements relating to functional constituencies - was not in conformity with Articles 2.1, 25(b) and 26 of the Covenant, and in paragraph 25 it recommended that steps be taken to bring it into conformity with those provisions.

34. Functional constituencies have been part of Hong Kong's political system since 1985, when elections to the Legislative Council were first held. Their purpose was to provide a representative voice for the territory's economic and professional sectors, reflecting their importance in the community. These constituencies - and the system of election to them - have served Hong Kong well. But the electoral system is not static, and it will continue to develop as circumstances in the territory change, which of course includes the transfer of sovereignty. The present network of functional constituencies must be seen as a transitional stage in the evolution of Hong Kong's political system. The ultimate aim, as declared in Article 68 of the Basic Law, is the election of all the members of the Legislative Council by universal suffrage.

35. It is against this background that the United Kingdom and Hong Kong Governments must dissent from the Committee's assessment that the concept of functional constituencies gives undue weight to the views of the business community or discriminates unreasonably or disproportionately between different classes of voters. Nor do they share the view taken by the Committee of the scope and effect of the reservation to Article 25(b) of the Covenant that was made by the United Kingdom Government when it ratified the Covenant. Accordingly, they respectfully maintain their view that the electoral system which now obtains in Hong Kong in respect of elections to the Legislative Council is appropriate and justifiable in present circumstances and gives rise to no incompatibility with any of the provisions of the Covenant.

OTHER DEVELOPMENTS

Bill of Rights Ordinance

36. In October 1995, the Legal Affairs Sub-group of the Preliminary Working Committee (PWC), established by the Chinese Government, advised the Chinese Government that, in their view, three sections of the Bill of Rights (the BORO) had the effect of giving the BORO a status above all other laws including, after 1997, the Basic Law. These provisions were, the Sub-group advised, inconsistent with the Basic Law and should be repealed after 30 June 1997. The sections in question were -

- (a) section 2(3), which deals with the interpretation of the Ordinance and the incorporation into domestic law of provisions of the Covenant as applied to Hong Kong;
- (b) section 3, which provides for the repeal of inconsistent pre-existing legislation; and
- (c) section 4, which states a general principle for construing future legislation.

37. The Sub-group also advised that provisions in (or made under) six Ordinances which had been amended to ensure that they were in line with the BORO were now, as a result of the amendments, inconsistent with the Basic Law and should be restored to their original form. The Ordinances in question (or the relevant provisions made under them) were the Societies Ordinance, the Television Ordinance, the Telecommunication Ordinance, the Broadcasting Authority Ordinance, the Public Order Ordinance and regulations under the Emergency Regulations Ordinance. The purpose and effect of the amendments in question were explained in the fourth periodic report in the sections of that report relating to articles 4, 19, 21 and 22 of the Covenant.

38. The Sub-group further advised that two other Ordinances were also inconsistent with the Basic Law and would need to be repealed. These were -

(a) the New Territories Land (Exemption) Ordinance, which now makes it possible for women to inherit land in the New Territories in cases of intestacy (see paragraph 356 of the fourth periodic report); and

(b) the Legislative Council Commission Ordinance, which provides for the provision of administrative support and services to Members of the Legislative Council.

39. The BORO does not have - nor can it have nor does it purport to have - a status different from that of any other Ordinance in Hong Kong. Like all Ordinances, it will be subject to the Basic Law. Indeed, because its purpose is precisely to give effect in Hong Kong to the provisions of the Covenant as applied to Hong Kong, it implements and is fully consistent with Article 39 of the Basic Law (and paragraph 156 of the Joint Declaration) which expressly provides that the provisions of the Covenant as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. There is therefore no valid reason either to tamper with the BORO itself or to restore to their earlier form the Ordinances and other laws that were amended specifically to ensure that they were in line with the BORO (and therefore with the Covenant).

40. The Sub-group's proposals have accordingly caused widespread concern in Hong Kong. The United Kingdom Government believes that the question of amendment of the BORO, and of those Ordinances amended pursuant to it, should be left to be considered by the Government of the Hong Kong Special Administrative Region. The United Kingdom Government has raised this matter with the Chinese Government at the highest levels. It will continue to do so.

Provisional Legislature

41. The Legislative Council was elected in September 1995. The electoral arrangements are described in paragraphs 311-316 of the fourth periodic report. In March 1996, the Preparatory Committee for the establishment of the Hong Kong Special Administrative Region (established by

the Chinese National People's Congress) passed a resolution to set up a provisional legislature.

42. The position of the United Kingdom and Hong Kong Governments is clear. The Legislative Council has been fairly and openly elected through arrangements that are consistent with the Joint Declaration and the Basic Law. These arrangements meet the community's wish for credible and representative institutions which are capable of enduring beyond 1997. It is in Hong Kong's interests that the Legislative Council elected in September 1995, which has a clear and legitimate mandate, is allowed to serve its full term. This is the best way to ensure continuity for Hong Kong's legislature and for the views of Hong Kong people to be properly represented in this institution.

43. Neither the United Kingdom Government nor the Hong Kong Government accepts that there is any need for a provisional legislature. Neither the Joint Declaration nor the Basic Law makes any reference to such an institution. The United Kingdom Government has made its position clear to the Chinese Government on various occasions, including during a meeting between the British Prime Minister and his Chinese counterpart in March 1996. It will continue to make its views known to the Chinese Government.

Ethnic minorities

44. The "ethnic minorities" comprise persons who are British Dependent Territories citizens (BDTCs) by virtue of their connection with Hong Kong but who are not ethnic Chinese and who have no nationality other than British. British Dependent Territories citizenship will cease at midnight on 30 June 1997. However, like other Hong Kong BDTCs, persons belonging to these ethnic minorities can, under the Hong Kong (British Nationality) Order 1986, apply for the status of British National (Overseas) (BN(O)), provided that they do so before 1 July 1997. They then retain that status for life. If they do not so apply before 1 July 1997, they will automatically become British Overseas citizens (BOCs) on that date if they would otherwise be stateless. If they do then become BOCs, their children and, in most cases, their grandchildren will also be BOCs if otherwise they would be stateless at birth. Neither BN(O) status nor BOC status confers a right of abode in the United Kingdom. But the Joint Declaration and the Basic Law guarantee the right of abode of these persons in the Hong Kong Special Administrative Region after 1 July 1997. No member of the ethnic minorities will be stateless after the transfer of sovereignty and the position of these persons in Hong Kong is secure.

45. Representatives of the ethnic minorities have pressed the United Kingdom Government to grant British citizenship to persons belonging to these minorities. This would give them the right of abode in the United Kingdom. The United Kingdom Government has stated that if, against all expectations, any person who was solely a British national came under pressure to leave Hong Kong, the United Kingdom Government of the day would consider with considerable and particular sympathy his or her case for admission to the United Kingdom. This earlier assurance was clarified and reinforced when the British

Prime Minister said in Hong Kong in March that any member of the ethnic minority community, being solely a British national, who came under pressure to leave Hong Kong would be guaranteed admission to the United Kingdom. The ethnic minorities, whose families have been in Hong Kong for many generations, want to stay in Hong Kong. The United Kingdom Government believes that this reassurance will give them the confidence they need to stay.

Right of abode in Hong Kong

46. The United Kingdom Government is pressing for agreement with the Chinese Government through the Sino-British Joint Liaison Group on how to implement the Basic Law provisions on the right of abode in Hong Kong. Those concerned need to know in advance of 1 July 1997 how their own position in Hong Kong will be affected. Agreement has already been reached in part, but some questions, such as the right of abode for ethnic Chinese permanent residents who hold a foreign passport and for other foreign nationals, are still to be resolved.

47. During his visit to China in January 1996, the United Kingdom Secretary of State for Foreign and Commonwealth Affairs received from the Chinese Vice-Premier and Foreign Minister, Mr Qian Qichen, an assurance that all those who now had permanent residence in Hong Kong would be able to retain it after 1997. The United Kingdom and Hong Kong Governments welcome this assurance. The Standing Committee of China's National People's Congress has recently taken a decision on the implementation of Chinese nationality law in relation to the Hong Kong Special Administrative Region. This has a direct bearing on the right of abode in Hong Kong. The United Kingdom and Chinese Governments will continue their dialogue with a view to an early resolution of this issue.

Ease of travel (visa-free access)

48. A high degree of convenience of travel for the people of Hong Kong is important for maintaining Hong Kong's status as an international business and financial centre. The Sino-British Joint Liaison Group is considering how best to achieve that goal.

49. After 1997, most permanent residents of Hong Kong will hold the BN(O) passport, issued by the British Government, and/or the Hong Kong Special Administrative Region (HKSAR) passport, issued by the HKSAR Government. In January 1996, the British and Chinese Governments signed an 'Agreed Minute' on the responsibilities of the Chinese Government, the present Hong Kong Government and the future HKSAR Government in preparing the HKSAR passport. The preparatory work is now under way. The Agreed Minute has helped to answer some of the questions which other countries will need to consider in deciding whether to allow HKSAR passport holders visa-free entry. In March 1996, during his visit to Hong Kong, the British Prime Minister announced that the United Kingdom Government would allow visa-free entry for HKSAR passport holders visiting the United Kingdom. The United Kingdom and

Hong Kong Governments hope that other countries will follow this example. At present, BN(O) passport holders enjoy the convenience of visa-free access to some 80 countries and territories. The United Kingdom and Hong Kong Governments will continue to discuss with the Chinese Government how best to maintain and improve freedom of travel for Hong Kong residents.

50. It is also important that Hong Kong continues to maintain a liberal visa regime beyond 1997. This is in the interest of Hong Kong to enable it to maintain its position as an international business and financial centre, as well as an important tourist destination.

Freedom of expression

51. **Review of laws.** The Hong Kong Government has continued to review existing laws which may affect freedom of expression, including press freedom and to take steps to repeal or amend any which are obsolete or may threaten that freedom. In the 1995/96 Legislative Council session, it will introduce legislation to repeal provisions conferring powers which could be used to pre-censor radio broadcasts (see paragraph 220 of the fourth periodic report) and to amend the vague definition of "false messages" in the Telecommunication Ordinance (see paragraph 233 of the fourth periodic report). It will also amend the Prison Rules which relate to the supervision of prisoners' correspondence.

52. **Official secrets.** In July 1995, the United Kingdom Government submitted proposals to the Chinese Government, through the Sino-British Joint Liaison Group, on how to "localize" the Official Secrets Acts and adapt the Crimes Ordinance. The United Kingdom and Hong Kong Governments believe that these proposals -

- (a) balance the need to protect freedom of expression by the individual with the need to protect public order and security;
- (b) are consistent with the Joint Declaration, the Basic Law, the Bill of Rights and the Covenant as applied to Hong Kong; and therefore
- (c) provide a practical basis for legislation that would be capable of continuing in force after 1997.

53. These proposals have been made with reference to Article 23 of the Basic Law, which requires the Hong Kong Special Administrative Region to enact laws *inter alia* "to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets". They are under active discussion in the Joint Liaison Group. Both the British and Chinese sides are currently clarifying various issues that have arisen in the course of the discussion. The United Kingdom Government continues to urge on the Chinese Government the need for early and substantive progress.

54. **Privacy and the law.** The Hong Kong Government is carefully considering recommendations, made by a sub-committee of the Hong Kong Law

Reform Commission, on the regulation of surveillance and the interception of communications. The main thrust of the report, which was issued for public consultation in April 1996, is that there is an increasing need to ensure the privacy and security of telecommunications. The sub-committee has recommended updating the existing laws in this area to provide adequate and effective safeguards.

55. The sub-committee takes the view that-

(a) physical surveillance is a sufficiently serious intrusion into a person's privacy to warrant the use of criminal sanctions;

(b) the intentional interception of, or interference with, communications (transmitted by mail or by an electronic telecommunications system) should be an offence;

(c) the intentional interception of, or interference with, a communication by means of a technical device - whether or not the communication itself is mediated by means of such a device, but subject to the proviso that the interception concerned could not have been effected without the use of such a device - should be an offence; and

(d) where there are legitimate grounds for the surveillance or interception of communications, there should be a requirement for such action to be authorized by warrant issued by the High Court. Such a warrant should be issued only for the purpose of preventing or detecting serious crime or for the purpose of security, defence or international relations in respect of Hong Kong. The judge must be satisfied that the information cannot reasonably be obtained by other means.

56. The sub-committee will take account of comments received - including those of the Hong Kong Government - before producing its final report for endorsement by the Law Reform Commission as a whole. The Hong Kong Government will study the Law Reform Commissions' report before reaching a view on what changes to the existing legislation will be necessary. It will then bring forward legislative proposals at the earliest possible date.

57. **Media self-censorship.** The Hong Kong Government is aware that self-censorship has become an area of concern, especially among journalists. Its policy is to maintain an environment in Hong Kong in which a free and active press can operate under minimum regulation - regulation which does not fetter freedom of expression or editorial independence. The Hong Kong Government does not believe, therefore, that it should intervene in matters of self-censorship and editorial independence. It considers that a free and vigilant press, whose rights and freedoms are guaranteed by law, is ultimately the most effective safeguard against self-censorship.

APPENDIX E

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

List of issues to be taken up in connection with the consideration of the third periodic report of the United Kingdom of Great Britain and Northern Ireland (Hong Kong) concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add.10)¹

I. GENERAL INFORMATION

Information and publicity

1. Please indicate whether non-government agencies were given the opportunity to participate in the preparation of this report.
2. To what extent is the Hong Kong population aware of the existence of this report and of the obligation of the Government to submit periodic reports on the realization of economic, social and cultural rights as provided for in the International Covenant on Economic, Social and Cultural Rights.

II. ISSUES RELATING TO THE GENERAL PROVISIONS OF THE COVENANT (ARTICLES 1 TO 5)

Article 2.2: Non-discrimination

3. Please discuss in detail how the current situation in the Whitehead Detention Centre is being addressed by the Government while bearing in mind its obligations to protect the economic, social and cultural rights of the refugees, as set forth in the Covenant.
4. In the "step-by-step approach" mentioned in para. 5 of the report in relation to anti-discrimination legislation, what are the indicators to establish a "clear need for action"? In relation to this, what measures have been taken towards eliminating all forms of discrimination.

¹ UN Doc E/C.12/Q/UKHK.1 (28 May 1996)

5. Please comment on para. 13 of the concluding observations of the Human Rights Committee (CCPR/C/79/Add.57, 9 November 1995) in relation to the situation of women in Hong Kong and in particular to the Sex Discrimination Ordinance.

6. What legal remedies are available for persons with disabilities who claim being the victims of discrimination and/or harassment and vilification?

7. In reply to the recommendation of the Committee on Economic, Social and Cultural Rights in its concluding observations (para. 32, E/C.12/1994/19 of 21 December 1994), the Hong Kong Government in para. 22 of the report argues against the desirability of establishing a human rights commission by referring to a series of specific measures to address the concerns of the community which are already in place. The report claims that these measures are sufficient and in fact more effective as means of addressing human rights concerns. It also states that these measures are listed in the ICCPR report and that these measures are individually discussed under "relevant articles of that Covenant". In the same spirit of openness and cooperation, please discuss the specific measures undertaken to address the rights set forth under the International Covenant on Economic, Social and Cultural Rights.

8. Please provide a detailed update on the Equal Opportunities Commission, the statutory body with primary responsibility for the implementation of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance, both of which were enacted in early 1995. Discuss the reasons why, as of December 1995, neither of these two ordinances has commenced operation.

III. ISSUES RELATING TO SPECIFIC RIGHTS RECOGNIZED IN THE COVENANT (ARTICLES 6 TO 15)

Article 6: Right to work

9. While the official unemployment rate in Hong Kong is set at 3%, there are indications that the employment situation is deteriorating and it is reported that the number of unemployed women is disproportionately high. Please provide specific information on the situation of unemployment including statistics disaggregated by gender and age.

10. A large number of women is reportedly unable to find employment because they are over 30 years of age. What steps has the Government taken to enforce sanctions against employers who discriminate against women because of age?

11. What penalties are imposed upon illegal immigrants and tourists who breach their conditions of stay by taking up employment? What measures are in place to protect the economic, social and cultural rights of such persons?

Article 7: Right to just and favourable conditions of work

12. What legal remedies are available for foreign domestic helpers who have been subjected to abuse by their employers? What are the difficulties encountered in the application of such remedies? Please provide statistics on such cases of abuse, as well as the action undertaken by Government to address them.

Article 8: Trade-union rights

13. Please comment on the criticism of the International Confederation of Free Trade Unions, regarding the inadequacy of Hong Kong labour laws in the protection of the right to strike.

Article 9: Right to social security

14. Please provide statistics, that are disaggregated according to gender and age, on persons receiving old age allowance, in particular as compared with the total population of the elderly.

15. Para. 72 of the report refers to a comprehensive review of social security arrangements scheduled for completion in early 1996. What are the more significant findings of these review? What improvements in the Comprehensive Social Security Assistance scheme have been brought about as a result?

Article 10: Protection of the family, mothers and children

16. Please provide a detailed discussion on the measures taken by the Government to protect the economic, social and cultural rights of children of split families.

17. Discuss the involvement of the Government in the administration and day to day operations of the "small group homes" referred to in para. 101 (c) of the report.

18. Para. 104 of the report states that "the police do not classify spouse abuse as a crime of disturbance distinct from domestic violence". Please elaborate further and include a discussion of child abuse as well.

19. What efforts have been exerted by the Government towards:

(a) educating the general public regarding domestic violence; and

(b) instilling awareness among women in particular about the legal protection remedies available to them as part of the Government's compliance to its obligations set forth under the International Covenant on Economic, Social and Cultural Rights?

20. According to the Hong Kong Committee on Children's Rights, reported cases of sexual abuse of children have increased from 2% in 1990 to 17% in 1994. Please discuss the extent of Government intervention in such cases, as well as the difficulties encountered.

21. Please discuss the procedures prescribed to police officers attending to incidents of domestic violence. Include a discussion of the training such officers receive as mentioned in para. 107 of the report.

22. Please provide details of the "multi-disciplinary guidelines" drawn up by the working group on battered spouses especially as they relate to women, as well as the publicity strategy to heighten public awareness of the issue. These matters are referred to in para. 110 of the report.

23. What alternative benefits and protection does the Government provide for working women who are not entitled to maternity leave?

24. What is the reason for the clause on a maximum of "two surviving children" to qualify a working mother to maternity leave with pay? How does this reason conform to the obligations set forth in the Covenant regarding protection of the family?

25. Discuss the comparative maternity benefits to which women in the public and private sector are entitled under the Employment Ordinance.

26. What are the findings of the Advisory Committee on School Guidance regarding the possible causes of adolescent suicide? What remedial measures has it recommended and what has been the response of the Government to its recommendations?

27. Please provide an update on the work of the research team commissioned by the Coordinating Committee for the Welfare of Children and youth at risk to develop a screening tool for early detection of those at risk.

28. Please provide a frank assessment of government efforts against illicit drug trafficking, as well as its efforts towards rehabilitating the victims of substance abuse. Include a discussion of the difficulties encountered.

Article 11: Right to an adequate standard of living

29. Please provide more information on the efforts undertaken by the Government to ensure public assistance to "those in need" as mentioned in para. 163 of the report, including statistics disaggregated by gender and age.

30. Para. 176 of the report states that after serious consideration of the Committee on Economic, Social and Cultural Rights' recommendation of embodying the right to housing into domestic law, the Hong Kong Government has concluded that further legislation on the matter is unnecessary because the existing legislation relating to housing is adequate. Please discuss in great detail

how such existing legislation protects the right to housing as enshrined in the Covenant.

31. Please provide statistics spanning the past five years on the number of families as well as individuals inadequately housed.

32. Para. 193 of the report discusses the rent allowances under the Comprehensive Social Security Assistance scheme. To what extent are these rental subsidies adequate?

33. What percentage of Hong Kong population belong to the "sandwich class" families as referred to in paras. 202 and 203 of the report.

34. Para. 206 of the report states that the Government demolishes about 3000 illegal housing units every year. How is this practice consistent with its obligations under the Covenant especially in relation to General Comment No. 4 of the Committee on Economic, Social and Cultural Rights which states among other things that "instances of forced evictions are prima facie incompatible with the requirements of the Covenant" (HRI/GEN/1, 4 September 1992)?

35. What are the chances for gainful employment for persons who are rehoused in "urban fringe areas"?

36. Para. 216 of the report discusses the licensing requirements for bedspace apartments, which may result in displacing about fifty percent of the current number of lodgers. Discuss the measures undertaken by the Government to assist these displaced lodgers, and to ensure that their economic, social and cultural rights are protected under any and all circumstances that may prevail.

37. Discuss the requirements which qualify elderly persons to the specially designed accommodations referred to in para. 222 of the report.

38. Please discuss in greater detail the measures undertaken by the Government to assist persons living in "cage-homes". Include a timeframe within which the Government expects to eradicate this deplorable phenomenon.

39. What measures have been implemented by the Government to assist and protect the economic, social and cultural rights of persons adversely affected by the phasing out of rent control.

Article 12: Right to physical and mental health

40. Please provide more information on the adoption of non-discriminatory policies in the workplace where it concerns those infected with HIV-AIDS.

41. Discuss Government measures in ensuring the right to health to persons with mental disabilities.

Article 13: Right to education

42. Please provide statistics over the past five years on the number of students who undergo qualifying examinations to undergraduate programmes in the tertiary level and the percentage - disaggregated by gender - who qualify and who do not qualify.

43. To what extent has human rights education been integrated into the orientation services for new immigrants from China?

APPENDIX F

THE CONCLUSIONS OF THE ASIA/PACIFIC REGIONAL JUDICIAL COLLOQUIUM FOR SENIOR JUDGES ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS RELEVANT TO WOMEN'S HUMAN RIGHTS¹

HONG KONG, 20-22 MAY 1996

Having regard to the central place of the Victoria Falls Declaration in the recognition and enforcement of the human rights of women, the participants in the Hong Kong colloquium of judges, lawyers and law academics from the Commonwealth countries of the Asia/Pacific region, reaffirmed the principles of the Victoria Falls Declaration² and expressed their commitment to uphold and implement those principles.

Recalling the Declaration on the Elimination of Violence against Women, the discussions at the Commonwealth Heads of Government Meeting in New Zealand in 1995, the Beijing Declaration and Platform for Action and the conclusions of the meeting of Commonwealth Law Ministers in April 1996, the participants expressed their deep concern at the large scale violence against women and the girl-child which is taking place in various forms in most countries of the Commonwealth. Violence against women is a manifestation of historical unequal power relations between women and men which have led to domination over and discrimination against women and is a social mechanism by which the subordinate position of women is sought to be perpetuated. All Commonwealth Governments should condemn violence against women and girls as a violation of fundamental human rights, including the right to personal security and the right to be free from discrimination on the basis of sex. No law, custom, tradition, culture or religious consideration should be invoked to excuse violence against women. Judges and judicial officers at all levels should be gender-sensitive and aware of the need to protect women against violence through a proactive interpretation of the law.

¹ Unedited version

² [Eds] The text of the Victoria Falls Declaration appears in *Bill of Rights Bulletin*, v 3, n 2, October 1994, Appendix C.

The participants expressed particular concern at the many forms of violence against women in the family. This violence is widespread, but frequently goes unnoticed and unrestrained because of oppressive social, cultural or religious traditions and values. These factors have led to the subordination of women and continue to dominate social attitudes because of lack of awareness of basic human rights of women, as well as their economic dependence on men. It is incumbent on law enforcement agencies, the legal profession and the courts to intervene appropriately in relation to violence in the family and not to allow its perpetuation through indifference or inadequate response.

Participants recognised the importance of custom, tradition, culture and religion as a part of individual and group identity. They recognised that these concepts were sometimes interpreted so as to be oppressive to women. They stressed the need to preserve and enhance worthy customs, while at the same time discouraging those that have an adverse impact on women and girls.

Participants recognised that a majority of the world's refugees and internally displaced persons are women and children and that these persons are an especially vulnerable group who are frequently denied their basic human rights and subjected to violence and sexual exploitation. The importance of judicial sensitivity to gender specific violations of human rights in dealing with cases relating to physical or mental abuse and or claims to refugee status was underlined.

Recalling that the 1995 Meeting of Commonwealth Heads of Government at Auckland urged all Commonwealth Governments to ratify the Convention on the Elimination of All Forms of Discrimination against Women and underlining the importance of accession, ratification and implementation of this Convention and other human rights treaties to the advancement at the national level of the human rights of women and the girl child, the participants noted that it would be desirable if all States in the region became parties to and implemented the Convention.

The participants noted that many opportunities exist for judges and other judicial officers to draw on the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, the common law and customary law. In so doing, they drew attention to the wealth of decisions from countries with shared jurisprudential traditions where judges had engaged in such creative interpretation and application. The importance of educating the judiciary and the legal profession with respect to international human rights standards and principles relevant to gender issues was stressed, as well as the need for national judiciaries to carry out studies on gender bias in the judicial process.

Participants noted that it was important that the judiciary reflect the population it serves. Accordingly, it encouraged the exploration of ways to ensure a gender balance in the judicial system.

Participants identified a number of areas where there are clear violations of the human rights of women which might be addressed by the utilisation of international norms in domestic decision making. These included, in particular, discrimination in matters of nationality, citizenship, property and inheritance, which has serious implications for the exercise and enjoyment by women of other fundamental human rights. Participants also encouraged the review of legislation to ensure its consistency with international human rights obligations undertaken by individual countries.

Noting the complementarity between the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, participants drew attention to the special vulnerability of the girl-child to violations of human rights and identified this as a matter requiring particular judicial attention. They noted that the principle of the best interests of the child could be used to promote the full enjoyment by the girl child of her rights.

Participants noted that litigation to advance the human rights of women was limited at both the national and international levels. They emphasised women's limited access to the judicial process to enforce their rights and they proposed the further development of a number of measures to increase women's access to justice, including legal literacy programmes and assisted legal advice and representation. Participants drew attention to the important role that the media could play in creating an awareness of the human rights of women. They suggested that consideration might also be given to encouragement of representative actions and relaxing traditional limitations on locus standi. They also supported the adoption of an optional complaints mechanism for the Women's Convention.

APPENDIX G

UNITED KINGDOM'S RESERVATIONS TO THE
CONVENTION ON THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN¹

Upon signature:

The Government of the United Kingdom of Great Britain and Northern Ireland declare that it is their intention to make certain reservations and declarations upon ratification of the Convention.

Upon ratification:

A. On behalf of the United Kingdom of Great Britain and Northern Ireland:²

(a) The United Kingdom understands the main purpose of the Convention, in the light of the definition contained in Article 1, to be the reduction, in accordance with its terms, of discrimination against women, and does not therefore regard the Convention as imposing any requirement to repeal or modify any existing laws, regulations, customs or practices which provide for women to be treated more favourably than men, whether temporarily or in the longer term; the United Kingdom's undertakings under Article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly.

.....

(c) In the light of the definition contained in Article 1, the United Kingdom's ratification is subject to the understanding that none of its obligations under the Convention shall be treated as extending to the succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious

¹ [Eds] This version of the United Kingdom's reservations to the Convention (which incorporates revisions resulting from Britain's withdrawal of certain reservations in March 1996) was downloaded in May 1996 from the on-line version of United Nations, *Multilateral Treaties Deposited with the Secretary-General* (<http://www.un.org/Depts/Treaty>).

² [Eds] Similar reservations entered in relation to a number of dependent territories are not reproduced here.

denominations or orders or to the admission into or service in the Armed Forces of the Crown.

(d) The United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the United Kingdom as it may deem necessary from time to time and, accordingly, its acceptance of Article 15 (4) and of the other provisions of the Convention 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.

.....

Article 9

.....

The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of Article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.

Article 11

.....

The United Kingdom reserves the right to apply all United Kingdom legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement (including retirement on grounds of redundancy), whether or not derived from a Social Security scheme.

This reservation will apply equally to any future legislation which may modify or replace such legislation, or the rules of pension schemes, on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention.

The United Kingdom reserves the right to apply the following provisions of United Kingdom legislation concerning the benefits specified:

.....

- b) increases of benefits for adult dependants under section 44 to 47, 49 and 66 of the Social Security Act 1975 and under sections 44 to 47, 49 and 66 of the Social Security (Northern Ireland) Act 1975;

.....

The United Kingdom reserves the right to apply any non-discriminatory requirement for a qualifying period of employment or insurance for the application of the provisions contained in Article 11 (2).

Article 15

In relation to Article 15, paragraph 3, the United Kingdom understands the intention of this provision to be that only those terms or elements of a contract or other private instrument which are discriminatory in the sense described are to be deemed null and void, but not necessarily the contract or instrument as a whole.

Article 16

As regards sub-paragraph 1 (f) of Article 16, the United Kingdom does not regard the reference to the paramountcy of the interests of the children as being directly relevant to the elimination of discrimination against women, and declares in this connection that the legislation of the United Kingdom regulating adoption, while giving a principal position to the promotion of the children's welfare, does not give to the child's interests the same paramount place as in issues concerning custody over children.

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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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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*. **Andrew Bruce QC** is Senior Assistant Crown Prosecutor with the Attorney General's Chambers Hong Kong. He has appeared for the Government in a number of appellate 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 are always grateful for 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 would like to thank Gerry McCoy, Jeremy Croft, John Dean, Gladys Li and the staff of the UN Centre for Human Rights (as well as others) for providing us with information included in this issue of the *Bulletin*, as well as Jayantha Jayasuriya for his assistance. We would also like to thank Nancy Choi, who is responsible for the administrative side of the *Bulletin*. This issue is based on the information available to the Editors as of mid-February 1997.

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EDITORIAL

GENERAL

The period since the last issue of the *Bulletin* has once again seen a number of significant cases handed down dealing with interpretation of various provisions of the Bill of Rights Ordinance. In the political arena the amendments to the Bill of Rights Ordinance long foreshadowed by the Preliminary Working Committee have now come a step closer to taking effect with their adoption by the Standing Committee of the National People's Congress, following their earlier endorsement by Mr Tung Chee-wa, who was selected in December 1996 to be the first Chief Executive of the Hong Kong Special Administrative Region. At the international level Hong Kong has appeared before three different United Nations human rights bodies to report under the implementation of various human rights treaties, occasions which involved a detailed examination and critique of the situation in Hong Kong by those bodies.

CASE LAW DEVELOPMENTS

The cases decided under the Bill of Rights show that there are still a number of fundamental issues which have not yet been resolved under the Bill of Rights Ordinance and evidence the role that the Bill of Rights and, in the future, the human rights guarantees of the Basic Law, can play in resolving important controversies.

In *Association of Expatriate Civil Servants v Secretary for the Civil Service* (1996) 6 HKPLR 333 (see page 42 below) the Court of Appeal dealt with an appeal from a judgment of Keith J in an important case involving challenges to various aspects of the government's civil service localisation policy. The court was prepared to go further than Keith J (who had held that five of the decisions challenged were inconsistent with art 21 of the Bill of Rights) and found that a number of other decisions were also inconsistent with that article.

Article 21 was also the subject of the decision of Sears J in *Senior Non-Expatriate Officers' Association and others v Secretary for the Civil Service* (see page 40 below). In this case the judge rejected a challenge to the prohibition imposed on senior civil servants to stand for election to the Selection Committee.

In *Kwan Kong Co Ltd v Town Planning Board* (1996) 6 HKPLR 237 (see page 19 below) the Court of Appeal, upholding the decision of Waung J in the High Court (though on somewhat different grounds), had the chance to examine art 10 of the Bill of Rights and the question whether it guaranteed a right of access to an independent and impartial tribunal in any case in which a person's rights were affected. While confirming once again a broad and purposive approach to interpreting the Bill of Rights and that the phrase "suit at law"

meant more than formal legal suits before the courts, the decision still leaves open a number of important questions about the scope of this right.

The question of whether art 5(1) of the Bill of Rights permitted substantive review of the grounds on which a person could be deprived of liberty (or were limited to providing procedural protection) was revisited by the Court of Appeal in *R v Mak Chuen-hing* (see page 17 below). In a challenge to s 6 of the Gambling Ordinance (Cap 148) the court accepted that substantive review was possible and followed its earlier decision in *Attorney General v Fong Chin-yue* (1994) 4 HKPLR 430, in which it had held that generally a defence of honest and reasonable belief would be available to a strict liability offence.

In *R v Ng Wing-keung Paul* (see page 23 below) the Court of Appeal upheld the decision of the District Court (see *R v Ng Wing Keung Paul* (1996) 6 HKPLR 299), rejecting a challenge to s 51(5) of the Inland Revenue Ordinance on the ground that it was inconsistent with the right to be presumed innocent in article 11(1) of the Bill of Rights.

In *R v Tsang Wai-keung* (see page 25 below) the High Court rejected a challenge to s 62A of the Cross Harbour Tunnel Ordinance. That section provides that, where it is suspected that the driver of a vehicle has committed an offence in the tunnel area, a notice may be issued to the registered owner of a vehicle requiring the owner to provide the details of the driver of the vehicle at the relevant time. The challenge was based on the argument that, where the owner himself or herself had been the driver, this was tantamount to requiring him or her to confess guilt, contrary to art 11(2)(g) of the Bill of Rights. The court rejected the applicability of that guarantee to the investigatory stages (a position in conflict with relevant international authorities which were not referred to by the court) and held that in any event this provision would be a justifiable restriction on that right.

In *Chim Shing Chung v Commissioner of Correctional Services* (1996) 6 HKPLR 313) the Court of Appeal reversed the judgment of Sears J, who had upheld a challenge to a decision by the Commissioner of Correctional Services to remove racing supplements from a prisoner's newspaper on race days on the ground that this was not a permissible restriction on the prisoner's freedom to receive information (see (1995) 5 HKPLR 570). The Court of Appeal held that the Bill of Rights Ordinance had no application to the case since the effect s 9 of the Ordinance was to exclude from its scope legislation for the preservation of custodial discipline, the legislation under which the decision was made being held to be such legislation. The court dealt with the case as an ordinary administrative law challenge to the Commissioner's decision, and held that the applicant had not shown grounds for quashing the Commissioner's decision.

Permissible restrictions on the right to freedom of expression were also the subject of the decision of Keith J in *Hong Kong Polytechnic University v Next Magazine (No 2)* (1996) 7 HKPLR 41 (see page 36 below). This judgment followed an earlier judgment of Keith J in which he had held that the Hong

Kong Polytechnic University was a "public authority" within the meaning of the Bill of Rights and that its right to bring a defamation action was constrained by art 16(3) of the Bill of Rights (see (1996) 6 HKPLR 117. On this occasion, following similar English developments, the judge held that permitting the University to bring an action against a newspaper in relation to criticism of the University was not a permissible restriction on the right to freedom of expression.

In *Fok Lai-ying v Governor in Council*, both the High Court and the Court of Appeal considered whether the right not to be subjected to arbitrary or unlawful interference with one's privacy and home might be invoked in relation to orders for the compulsory resumption of land and, if so, whether that right had been violated. Cheung J at first instance held that art 14 had no application to legislation affecting property rights (see page 29 below). However, the Court of Appeal expressed the view that it was unnecessary to decide the issue, noting that it would be unwise to rule out the possibility that art 14 did apply; and that in any event there had been no arbitrary or unlawful interference with the applicant's home (see page 31 below).

In *Lau Wong-fat v Attorney General* (see page 50) the High Court allowed an application to strike out the plaintiff's action, by which he had launched a challenge to the constitutionality of the New Territories Land (Exemption) Ordinance on the ground of conflict with the right to freedom of religion, the right to protection of the family and the rights of minorities guaranteed by articles 17, 23 and 27 of the ICCPR (through art VII(5) of the Letters Patent). The action was struck out on the ground that it should have been commenced by way of an application for judicial review since a challenge to the constitutionality of a law was a public law action; however, the court did uphold the plaintiff's standing to bring the challenge. The court did not accept that the pleadings failed to state a reasonable cause of action so far as article 27 of the ICCPR was concerned (rights of minorities); the judge did not consider that it was necessary to decide whether there was a reasonable cause of action based on articles 17 and 23 of the ICCPR. The court also refused to consider arguments based on article 40 of the Basic Law.

Finally, in *Chieng A Lac and 1375 others v Director of Immigration and 5 others* (see page 13 below) Keith J considered the effect of s 11 of the Bill of Rights Ordinance on immigration legislation permitting the detention of Vietnamese boat people. In hearing a number of applications arguing that the detention of the applicants was unlawful on the ground that it violated articles 3, 5 and 6 of the Bill of Rights, the judge rejected the government's argument that the effect of s 11 was to exclude the possibility of a challenge to the lawfulness of the applicants' detention on the ground that it violated the Bill of Rights. However, he also held that the extent to which the claimed violations of the Bill of Rights could be taken into account on a habeas corpus application was limited, and he concluded that none of the Bill of Rights guarantees that had been invoked had been violated. He did, however, order the release of a number of applicants on other grounds.

POLITICAL DEVELOPMENTS RELATING TO THE BILL OF RIGHTS ORDINANCE

The Standing Committee of the National People's Congress has decided, as proposed by the Preliminary Working Committee and the Preparatory Committee, that certain sections of the Bill of Rights Ordinance should not be adopted as part of the law of the Hong Kong Special Administrative Region, on the stated ground that these render the Ordinance inconsistent with the Basic Law. Those sections are ss 2(3), 3 and 4. This decision would appear to mean that those sections will be excised from the Ordinance with effect from 1 July 1997. As part of the same decision the Standing Committee has decided that the amended Societies Ordinance and Public Order Ordinance (amended to bring them into line with the Bill of Rights) will not be adopted as laws of the Hong Kong SAR. In Appendix G, we reproduce a list of the laws that will not be adopted as Hong Kong SAR laws pursuant to the Standing Committee's decision.

It is in our view clear that the amendments to the Bill of Rights Ordinance have little to recommend them in legal terms, and are a largely political gesture that will do little to enhance confidence in Hong Kong's system after July. Instead, they will only help to undermine public confidence and Hong Kong's international reputation.

In previous issues we have argued that the stance that the Bill of Rights Ordinance is inconsistent with the Basic Law is flawed. That argument misrepresents basic common law approaches, disregards international legal obligations binding on the United Kingdom and China, and appears to achieve little or nothing in practical terms.

The effect of excising sections 2(3), 3 and 4 from the Bill of Rights Ordinance is unclear. Section 2(3) makes clear the evident purpose of the Bill of Rights Ordinance, namely to incorporate a number of provisions of the ICCPR which apply to Hong Kong as enforceable Hong Kong law, so as to ensure that the rights guaranteed by the Covenant are indeed enforceable before the courts. This is an obligation accepted by the United Kingdom upon ratification of the Covenant, and the Chinese government has accepted a similar obligation (ie to ensure that all applicable rights are enforceable under Hong Kong law) under the Joint Declaration and has enshrined that undertaking in article 39 of the Basic Law. Removing s 2(3) from the Bill of Rights Ordinance will do nothing to remove this international obligation, nor should it affect the power and obligation of the courts to give effect to the evident purpose of the Ordinance.

The effect of removing ss 3 and 4 is also unclear. Sections 3(1) and 4 are merely interpretation provisions which in theory restate well-established rules of statutory interpretation. Subsection 3(2), however, is more important, since it has the effect of repealing existing legislation (ie existing as of 8 June 1991) that is inconsistent with the Ordinance. That repeal took effect as a formal matter on 8 June 1991, though the fact of that repeal may not be declared until later, when an individual provision is challenged before the courts. Repealing s 3(2) does not undo the repeal, nor does it resurrect any of the repealed provisions. Article 160

of the Basic Law preserves "the laws previously in force in Hong Kong", which are to be adopted as the laws of the Hong Kong SAR provided that they do not contravene the Basic Law. Any pre-8 June 1991 provision repealed by the Bill of Rights Ordinance will not be part of the "laws previously force in Hong Kong [ie at the date of the change of sovereignty], and cannot therefore be adopted as the laws of the SAR. The same applies equally to post-1991 legislation inconsistent with the ICCPR as applied to Hong Kong, as they will be ultra vires the legislature by virtue of art VII(5) of the Letters Patent as soon as they are enacted. On this analysis, the removal of ss 3 and 4 does not change anything: all pre-1997 legislation have still had to be considered against the Bill of Rights and the Letters Patent in order to determine whether they are "laws previously in force in Hong Kong". Post-1997 legislation inconsistent with the ICCPR as applied to Hong Kong will be struck down by art 39 of the Basic Law (assuming that this provision is interpreted as being justiciable and having an effect similar to the present article VII(5) of the Letters Patent).

The only way in which the repeal of s 3(2) might have an effect would be if a court of the Hong Kong SAR took the view that, while repeals declared by the Hong Kong court before 1 July 1997 would still be given effect to, a SAR court should, in any challenge arising after 1 July 1997, refuse to declare a pre-1991 provision repealed (ie a provision that has not previously been the subject of a pre-1997 decision declaring it repealed), since to do so would have the effect, in substance, of giving effect to s 3(2) (which is presumed to be inconsistent with the Basic Law). The difficulty with this approach is that at a formal level it is at odds with the accepted effect of a repeal provision under common law and the decisions of the Hong Kong courts, which have held that the repeal effected by the Bill of Rights Ordinance does indeed take effect from 8 June 1991. A further difficulty is that even if this approach is adopted, those provisions which have not been declared repealed by a pre-1997 court may still be held to be inconsistent with the ICCPR as applied to Hong Kong and, being legislation inconsistent with art 39 of the Basic Law, will not be received as part of SAR law under art 160.

In short, it is extremely doubtful whether the proposed amendments will lead to a diluting of the effect of the Bill of Rights Ordinance -- assuming that the normal common law approach to statutory interpretation is adopted. What their effect will be -- apart from the evident principal purpose of settling a political score -- is to create uncertainty about the application of the rules of reception of law in the SAR, thereby very likely promoting litigation that could have easily been avoided and contributing to a lack of confidence about continuity and autonomy of the Hong Kong legal system.

OTHER DEVELOPMENTS

Equal opportunities legislation

As noted in earlier issues of the *Bulletin* in 1995 the Hong Kong legislature enacted the Sex Discrimination Ordinance (Cap 480) and the Disability Discrimination Ordinance (Cap 487).¹ The Equal Opportunities Commission, the statutory body established by the Sex Discrimination Ordinance to perform various functions under the two Ordinances, formally came into existence in May 1996,** though it began to function with a full complement of staff only in late 1996. The substantive provisions of the two Ordinances commenced operation on 20 September 1996 (non-employment provisions)# and 20 December 1996 (employment-related provisions).##

The Sex Discrimination Ordinance and Disability Discrimination Ordinance make it unlawful to discriminate against a person on the grounds of *sex, marital status and pregnancy* (SDO) and *disability* (DDO) in areas covered by the two Ordinances, as well as making unlawful various types of harassment.

An act of unlawful discrimination against (or harassment of) a person gives rise to *civil liability* on the part of the discriminator (and in certain circumstances, the person's employer or other person who has instructed or pressure that person to discriminate).**

A person who considers that he or she has been discriminated against may:

- lodge a complaint with the Equal Opportunities Commission, which will investigate the complaint and try to bring about a settlement; and/or
- bring an action in the District Court against the alleged discriminator seeking a remedy for the alleged discrimination,

¹ For a review of the background to the enactment of the two Ordinances, see Carole Petersen, "Equality as a Human Right: The Development of Anti-Discrimination Legislation in Hong Kong" (1996) 34(2) *Columbia Journal of Transnational Law* 335.

** Sections 62, 64 and 65 of the Disability Discrimination Ordinance and ss 63, 64, 67, 68 69 and Schedule 6 of the Sex Discrimination Ordinance came into operation on 20 May 1996: LN Nos 184 and 185 of 1996.

LN 394 of 1996 and LN 395 of 1996

LN 556 of 1996 and LN 558 of 1996

** There are also a number of criminal offences created by the legislation, but the primary type of liability for unlawful discrimination is civil liability.

within the respective time limits laid down by the relevant Ordinance.

In addition to the principal Ordinances a number of other statutory instruments have been adopted under the Ordinances. These include:

Sex Discrimination Ordinance (Cap 480)

- Sex Discrimination (Formal Investigations) Rules, LN 472 of 1996#
- Sex Discrimination (Investigation and Conciliation Rules), LN 473 of 1996#
- Sex Discrimination (Proceedings by Equal Opportunities Commission) Regulation, LN 539 of 1996#
- District Court Equal Opportunities Rules, LN 236 of 1996 (amended by LN 307 of 1996)##
- *Code of Practice on Employment under the Sex Discrimination Ordinance*

Disability Discrimination Ordinance (Cap 487)

- Disability Discrimination (Formal Investigations) Rules, LN 474 of 1996#
- Disability Discrimination (Investigation and Conciliation Rules), LN 475 of 1996#
- District Court Equal Opportunities Rules, LN 236 of 1996 (amended by LN 307 of 1996)##
- *Code of Practice on Employment under the Disability Discrimination Ordinance*

Of particular importance to the interpretation and practical application of the two Ordinances are the two Codes of Practice adopted under the Ordinances relating to discrimination in employment. Section 69(14) of the Sex Discrimination Ordinance and s 65(13) of the Disability Discrimination Ordinance provide:

“A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Ordinance before any court the code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.”

Commencement 20 December 1996

Commencement 20 September 1996

Commencement 20 September 1996

A number of private member's bills -- proposing amendments to the existing sex and disability discrimination legislation, as well as proposing legislation covering additional grounds of discrimination -- are presently before the Legislative Council.

The Equal Opportunities Commission has a website where Chinese and English versions of the Ordinances, the Codes of Practice and general information about the Commission can be obtained. The address is:

<http://www.eoc.org.hk/>

Consultation paper on race discrimination

In late February 1997 the Government issued a consultation paper on racial discrimination. Submissions on the consultation paper have been invited; the deadline is 30 April 1997. The text of the consultation paper is available through the Home Affairs Branch website: the address is **<http://www.info.gov.hk/hab/index.htm>**. This consultation exercise follows early consultations on discrimination on the ground of age and discrimination on the ground of sexuality. In both of these areas, despite the existence of clear evidence of discrimination, the Government has chosen not to introduce legislation. In the field of marital status discrimination there are presently both Administration and private members' proposals to make marital status discrimination unlawful.

COMMENCEMENT OF PERSONAL DATA (PRIVACY) ORDINANCE (CAP 486)

The Personal Data (Privacy) Ordinance (Cap 486) commenced operation on 20 December 1996 (with the exception of two sections). The Office of the Privacy Commissioner for Personal Data is established by the Ordinance to administer the legislation. The Office has prepared a number of informational publications on the implications of the Ordinance. Details of these and further information about the Ordinance and the work of the Privacy Commissioner can be found at the Office's website:

<http://www.pco.org.hk>

INTERNATIONAL DEVELOPMENTS CONCERNING HONG KONG

TREATY ACTION

Consideration by Committee on the Rights of the Child of initial report under the Convention on the Rights of the Child

The initial report of the United Kingdom in respect of Hong Kong under the UN Convention on the Rights of the Child was considered by the Committee on the Rights of the Child on 2 and 3 October 1996. The *Concluding observations* adopted by the Committee appear at Appendix A (page 54 below). The issue of continued reporting after 1997 has not been contentious as China is already a party to the Convention and the UK and Chinese governments have accepted that reporting in respect of Hong Kong will continue.

Consideration by Human Rights Committee of supplementary report in respect of Hong Kong under the International Covenant on Civil and Political Rights

The Human Rights Committee considered the supplementary report submitted by the United Kingdom government in respect of Hong Kong on 23 October 1996. In its *Concluding observations* (Appendix B, page 61 below) the Committee focused on one issue, namely the continuation of reporting obligations under the Covenant. The Committee underlined its view that there was an obligation on China to ensure that reports on the implementation of the ICCPR in Hong Kong continue to be submitted after 1 July 1997. The Committee also requested a final report from the United Kingdom covering the period up to 30 June 1997.

Consideration by the Committee on Economic, Social and Cultural Rights of report under the International Covenant on Economic, Social and Cultural Rights

On 26, 27 and 28 November 1996, the Committee on Economic, Social and Cultural Rights considered the first comprehensive report under the Covenant submitted in respect of Hong Kong (Hong Kong had appeared before the Committee in November 1994). The Committee adopted wide-ranging *Concluding observations* (Appendix C, page 64 below), in which it also stressed its view that China was under an obligation to ensure that reporting under the Covenant in respect of Hong Kong continued after 1 July 1997.

Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women was extended to Hong Kong by the United Kingdom with effect from 14 October 1996. Both the United Kingdom and China were already parties. The United Kingdom and Chinese governments have agreed that the Convention will continue to apply after 1 July 1997. The instrument extending the Convention to Hong Kong also contained a number of reservations limiting the extent of the obligations accepted under the Convention (a copy of those reservations appears at Appendix D (page 71 below)).

Under article 18 of the Convention, a State which becomes a party to the Convention is required to submit its initial report on the steps that it has taken to implement the Convention within one year of the entry into force of the Convention for the State party. In the case of Hong Kong, a report would accordingly be due by 13 October 1997. The manner in which China will report on Hong Kong is still being discussed. China submitted reports to the Committee in 1982 and 1986; its third report, due in 1990, had not been submitted by the end of the January 1997 session of the Committee on the Elimination of Discrimination against Women.

Submission of the fourteenth report under the International Convention on the Elimination of All Forms of Racial Discrimination

The United Kingdom government has submitted its fourteenth report in respect of the dependent territories (including Hong Kong) under the Racial Discrimination Convention (see Appendix F, at page 79). The report will be considered by the Committee on the Elimination of Racial Discrimination at its meetings on 3 and 4 March 1997. The Committee considered the thirteenth report relating to Hong Kong at its March 1996 session.

Information available on Websites

Most of the recent reports to United Nations treaty bodies under the various human rights treaties (as well as other current material) have been made available in English and Chinese on the Home Affairs Branch website: the address is:

<http://www.info.gov.hk/hab/index.htm>

These and earlier reports, as well as the concluding observations of the committees and some NGO reports, are available on the Law-on-Line website (*Databases -- Human rights -- International human rights documents -- Hong Kong and United Nations Treaty bodies*) for no charge. The address is

<http://www.lawhk.hku.hk/demo/unhrdocs/hrdoc1.htm>

Much United Nations human rights material can also be accessed via the University of Minnesota's Human Rights Library; the address is:

[http:// www.umn.edu/humanrts/](http://www.umn.edu/humanrts/))

The United Nations High Commissioner for Human Rights has also established a website:

<http://193.135.156.15/>

GENERAL COMMENT ADOPTED BY THE HUMAN RIGHTS COMMITTEE ON ARTICLE 25 OF THE ICCPR (ART 21, BILL OF RIGHTS)

On 12 July 1996 the Human Rights Committee adopted *General comment 25(57)* in which it considered art 25 of the ICCPR. The text of the *General comment* is reproduced in Appendix E (page 73). Article 25 of the ICCPR corresponds to art 21 of the Bill of Rights and the contents of the general comment will be of particular interest to those interested in the compatibility of Hong Kong's political arrangements with the provisions of the Covenant.

COMMONWEALTH HUMAN RIGHTS DIGEST

Interights has recently launched the *Commonwealth Human Rights Digest*. This new publication contains summaries of human rights decisions from a wide range of Commonwealth countries and will be a valuable resource for those seeking information about developments in countries whose law reports are not widely available. In Appendix H (at page 89), by kind permission of *Interights*, we reproduce the *Editorial Review*, in which the cases digested in the first issue are highlighted.

HONG KONG PUBLIC LAW REPORTS

We have heard that many practitioners are not aware that 6 volumes of the *Hong Kong Public Law Reports* (covering nearly all Bill of Rights cases in the period 1991-1996) have appeared. The first 4 volumes of *HKPLR* were published by Hong Kong University Press (the last issue of vol 4, vol 4 pt 4, appeared early this year). From volume 5 onwards, the *HKPLR* are being published by Butterworths Asia as follows:

vol 5: published only as a bound volume (in 1996)

vol 6: published at the back of the loose parts of *Hong Kong Cases* and is due to be published as a bound volume shortly (some (1996) 6 *HKPLR* cases appear at the back of the bound volumes of [1996] *HKC*)

vol 7: published at the back of the loose parts of *Hong Kong Cases* and will be issued as a separate bound volume at the end of the year.

Orders for the back volumes and ongoing subscriptions should be directed to the two publishers (it is possible to subscribe to *Hong Kong Public Law Reports* only, without subscribing to *Hong Kong Cases*). Details of cost and subscription arrangements can be obtained from the publishers. Attached at the back of this issue are order forms for the books.

Bill of Rights cases reported in the *Hong Kong Public Law Reports* (1991-present) are available on-line through the Law-On-Line project (for a small fee)(<http://www.lawhk.hku.hk/>). Bill of Rights cases from 5 HKPLR on are available on LEXIS in the Hong Kong and China library.

Citations to Bill of Rights cases decided since 1991 appear in the preliminary pages of each issue of the *Bill of Rights Bulletin*.

BUTTERWORTHS HUMAN RIGHTS CASES

Butterworths has also recently launched a new series of human rights reports, the *Butterworths Human Rights Cases* [BHRC]. Intended to make available national, regional and international decisions on human rights issues, the first two issues contained cases from the European Court of Human Rights, the International Criminal Tribunal for Former Yugoslavia, the Inter-American Commission on Human Rights, the UN Human Rights Committee, the United States Supreme Court, the Zambian Supreme Court, among others.

CASES

SCOPE OF APPLICATION OF BILL OF RIGHTS ORDINANCE – MEANING OF “PUBLIC AUTHORITIES” (s 7)

See *Hong Kong Polytechnic University v Next Magazine (No 2)* (1996) 7 HKPLR 41 (page 36 below). This judgment followed on the earlier judgment of Keith J in which he had held that the Hong Kong Polytechnic University was a “public authority” within the meaning of the Bill of Rights and that its right to bring a defamation action was constrained by art 16(3) of the Bill of Rights (see (1996) 6 HKPLR 117).

SCOPE OF APPLICATION OF BILL OF RIGHTS ORDINANCE – EXCEPTIONS (s 9)

See *Chim Shing Chung v Commissioner of Correctional Services* (at page 33 below) in relation to the scope s 9 of the Bill of Rights Ordinance, which exempts legislation relating to custodial discipline from the standards of the Bill of Rights in certain circumstances.

SCOPE OF APPLICATION OF BILL OF RIGHTS ORDINANCE – EXCEPTIONS

Chieng A Lac and 1375 others v Director of Immigration and 5 others (1997) HCt, 5 February 1997, Keith J

This case involved applications for writs of habeas corpus made by a number of Vietnamese boatpeople being held in detention, principally on the ground that they had been detained for an unreasonable length of time and that there was no reasonable prospect of their removal to Vietnam. The case was largely argued on traditional administrative law principles and is the first judicial consideration of the controversial amendments to the Immigration Ordinance introduced by the government to limit the impact of the decision of the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* (1996) 6 HKPLR 13.

Among the arguments made by the applicants was that their continued detention violated various articles of the Bill of Rights and was therefore unlawful. The argument was based on the conditions in which they were detained, the length of time they had been detained, and the reason for the

making of the detention orders. The applicants invoked articles 3, 5 and 6 of the Bill of Rights.

The respondents argued that the Bill of Rights was not engaged, on the ground that the effect of s 11 of the Bill of Rights Ordinance was that the relevant provisions and decisions taken under them were not subject to the guarantees of the Bill of Rights.

Section 11 provides:

“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.”

Section 13D(1AA) of the Immigration Ordinance (Cap 115) provides:

“(1AA) Subject to subsections (1AB) and (1AC), where --

- (a) a person is being detained pending his removal from Hong Kong; and
- (b) a request has been made to the Government of Vietnam by --
 - (i) the Government of Hong Kong; or
 - (ii) the United Nations High Commissioner for Refugees acting through his representative in Hong Kong,

for approval to remove the person to Vietnam, for the purposes of detention under subsection (1), ‘pending removal’ includes awaiting a response to the request from the Government of Vietnam.

(1AB) For the avoidance of doubt, nothing in subsection (1AA) shall be interpreted as giving authority to the Director under subsection (1) to detain a person for a purpose other than pending his removal from Hong Kong.”

(1AC) For the further avoidance of doubt, nothing in subsection (1AA) shall prevent a court, in applying subsection (1A), from determining that a person has been detained for an unreasonable period.”

Held:²

1. Section 11 of the Bill of Rights Ordinance did not exclude the operation of the Bill of Rights in the applicants' cases. In reaching this conclusion it was not necessary to resort to the principle of statutory construction which requires provisions which limit fundamental rights to be narrowly construed, since the proper construction of s 11 was apparent without the need to resort to such a principle.
2. Although s 13D(1) of the Immigration Ordinance could in a general sense be said to relate to the length of the applicants' stay in Hong Kong and the conditions in which they are confined while they remain in Hong Kong, the word "stay" has a special meaning in the context of immigration legislation, referring to the conditions with which an immigrant has to comply if he is to stay in Hong Kong. The phrase "conditions of stay" includes matters such as the length of time for which the immigrant is permitted to remain in Hong Kong, the place where he is to reside while he is in Hong Kong, or any limitations on his activity while he remains in Hong Kong, such as working or studying. The phrase does not relate to detention pursuant to the power to detain, since that is not a condition of stay with which the immigrant has to comply if he is permitted to remain in Hong Kong, the persons to whom the power of detention relates being persons who by definition are not given the right to remain in Hong Kong.
3. On an application for habeas corpus the issue was the lawfulness of the detention of the applicant and the proceedings could not be used to attack the conditions of detention when someone is legally detained. However, it is open to a detainee to argue that the conditions in which he is detained can render his detention unlawful but only to the extent that those conditions mean that the period of time for which he has been detention has become unreasonable. The relevant question was therefore not whether the conditions in which the applicants were detained were unlawful, but whether the nature of those conditions was such that it had rendered their detention unlawful, having regard to the length of time that their detention had lasted.
4. When it comes to the assessment of conditions of detention, there are no absolute standards. Conditions which may be harsh for one group of people may not be harsh for others. In assessing the conditions under which the applicants were detained, it was not right to assess the conditions by reference to Western standards; it was necessary to bear in mind the social, cultural and economic conditions in which the applicants grew up. Secondly, it was essential to take into account not only the physical conditions in the detention centres (which were obviously of primary importance), but also the educational, recreational and other facilities that were available.

² Only the Bill of Rights issues are noted here; the summary is based on a transcript of the judge's oral ruling.

5. Although there were no absolute standards, there were certain internationally recognized standards. The UN Standard Minimum Rules for the Treatment of Prisoners provided guidance, though it was necessary to treat those rules with some caution since although they purported to set out minimum standards they aim to achieve much more. The rules were aspirational and had to be applied in the light of local conditions and with an eye to the practical realities. In any event, an infringement of some of the rules does not automatically mean that the conditions as a whole constitute cruel, inhuman or degrading treatment.
6. The conditions in which the applicants were detained were not such as to have rendered their detention unlawful having regard to the length of time that their detention had lasted. Nor did the conditions infringe arts 3, 5 or 6 of the Bill of Rights.

**RIGHT NOT TO BE SUBJECTED TO TORTURE OR TO
CRUEL, INHUMAN OR DEGRADING TREATMENT (ART 3,
BILL OF RIGHTS; ART 7 ICCPR)**

See Chieng A Lac and 1375 others v Director of Immigration and 5 others
(see page 13 above).

**RIGHT OF ALL PERSONS DEPRIVED OF THEIR LIBERTY
TO BE TREATED WITH HUMANITY AND RESPECT FOR THE
DIGNITY OF THE HUMAN PERSON (ART 6, BILL OF
RIGHTS; ARTICLE 10, ICCPR)**

Immigration Ordinance (Cap 115), s 13D

See Chieng A Lac and 1375 others v Director of Immigration and 5 others
(see page 13 above).

**LIBERTY OF THE PERSON (ART 5(1), BILL OF RIGHTS, ART
9(1), ICCPR)**

Immigration Ordinance (Cap 115), s 13D

See Chieng A Lac and 1375 others v Director of Immigration and 5 others
(see page 13 above).

Gambling Ordinance (Cap 148), s 6

Whether right not to be deprived of liberty on such grounds and in accordance with such procedure as are established by law – Whether guarantee permits substantive review of law – Interpretation by reference to international origin of Bill of Rights – Absolute liability offences – Strict liability offences – Offence of having gambled in a gambling establishment – Defence of honest and reasonably held belief

Attorney General v Mak Chuen Hing and others (1996) CA, Mag App No 398 of 1996, 15 August 1996, Litton VP, Bokhary and Ching JJA [(1996) 6 HKPLR]

Section 6 of the Gambling Ordinance (Cap 148) provides that a person who gambles in a gambling establishment commits an offence and is liable to a fine and imprisonment, the level of the penalty varying according to whether the defendant has previously been convicted of an offence under the section. Section 2 of the Ordinance defines "gambling establishment" to include "any premises or place used for the purposes of or in connexion with unlawful gambling". The Gambling Ordinance (Cap 148) provides that gambling in Hong Kong is unlawful, unless it falls within one of the exceptions set out in s 3(2) to (8) of the Ordinance.

The defendants/respondents had been charged with offences under s 6 of the Ordinance. They argued that s 6 created an offence of absolute liability, so that a person would be convicted of the offence even if he held an honest and reasonable belief that the premises were not a gambling establishment. Accordingly, they claimed that the provision violated the Bill of Rights, in particular art 5(1), which guaranteed that a person could only be deprived of liberty "on such grounds and in accordance with such procedure as are established by law". They maintained that this guarantee required any law permitting deprivation of liberty to meet "a minimum standard of fairness" and that absolute liability offences failed to meet this standard. The magistrate accepted this argument and held the provision inconsistent with the Bill of Rights Ordinance; accordingly, he dismissed the cases against the defendants. The Attorney General appealed by way of case stated.

Held (allowing the appeal):

1. In construing the Hong Kong Bill of Rights, regard must be had to its international origin. Accordingly, the expression "in accordance with such procedure as are established by law" which appeared in art 5(1) of the Bill of Rights meant such minimal requirements of fairness as were impliedly agreed to by the parties to the International Covenant on Civil and Political Rights. The issue was whether s 6 of the Gambling Ordinance was so harsh and oppressive or so arbitrary in its application that it failed to meet that standard.

2. Under the Gambling Ordinance, gambling in Hong Kong is unlawful unless it falls within one of the exceptions set out in the Ordinance. Gambling in a gambling establishment was not such an exception, and accordingly it constituted an offence, as provided for in s 6.
3. In a prosecution under s 6 the prosecution bears the onus of proving that the activity involves unlawful gambling, in which task it is assisted by s 19(2) of the Gambling Ordinance. However, the prosecution is not required to prove that the defendant knew that the place where the gambling took place was a gambling establishment. In that sense the offence was therefore one of strict liability. *R v King Capital Club Co Ltd* [1991] 1 HKLR 88, followed.
4. The common law rules of construction have a high human rights content. No court would ascribe to the legislature the intention of creating a crime of absolute liability, with no possibility of a defence of honest belief or reasonable excuse, unless the context admits of no other view, particularly where the commission of the offence may result in imprisonment. This meant that, unless clearly excluded, a defence of honest and reasonable belief would be available to a person charged with a strict liability offence. *A-G v Fong Chin-yue* (1994) 4 HKPLR 430, [1995] 1 HKC 21, [1995] 1 HKCLR 193, followed; *Sweet v Parsley* [1970] AC 132, considered.
5. A proper construction of s 6 shows that it would admit a defence of an honest and reasonable belief, that is, it would be a defence to a charge under s 6 for a defendant to prove, on the a balance of probabilities, that he held an honest and reasonable belief in facts which, if the facts had been as he believed them to be, would have meant that the premises where he was gambling did not fall within the definition of gambling establishment. *R v King Capital Club Co Ltd* [1991] 1 HKLR 88, followed.

A A Bruce, QC and Mr Edmond Lee (of the Attorney General's Chambers) for the appellant; Philip J Dykes (assigned by the Director of Legal Aid), for first respondent; other 71 respondents, in person.

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

Town Planning Ordinance (Cap 131), s 6

Right to a fair hearing before an independent and impartial tribunal – Whether refusal of the Town Planning Board made “in a suit at law” – Whether art 10 applies to administrative proceedings – Whether determination by the Board – Whether Board independent and impartial in view of the presence of senior Government officials in determining the objections – Hong Kong Bill of Rights Ordinance (Cap 383), art 10 –

Kwan Kong Company Ltd v Town Planning Board (1996) CA, Civ App No 194 of 1995, Litton VP, Godfrey and Liu JJA, 11 July 1996 [(1996) 6 HKPLR 237]

The appellant was the registered owner of various lots in Kwun Tong. Under the block Crown Lease the land was restricted to agricultural use, but pursuant to a waiver given by the District Lands Office, the applicant was permitted to use the land for open storage. In 1987, the land was zoned as a green belt zone. In 1993, a draft plan was gazetted under which the land was rezoned for ‘Other Specified Use (mining and quarrying)’. The re-zoning was part of a scheme aimed at the rehabilitation of a quarry. Under this scheme, which had been recommended by a consultant’s report commissioned by the existing operators of the quarry, the quarry would be enlarged to twice its size and the existing quarry operators would be given a licence to operate it for another 20 years. In return, at the expiration of the licence, they would restore the degraded slopes of the quarry, and hand over to the Government two building platforms suitable for residential/commercial development. The scheme envisaged the resumption of the appellant’s land.

Pursuant to s 6(1) of the Town Planning Ordinance, the applicant lodged a written statement of objection, seeking to have the land excluded from the mining and quarrying zone and to have part of the land rezoned as residential (Group B) and part as green belt. Following its preliminary consideration, the Board refused to amend the draft plan. The appellant then exercised its statutory right pursuant to s 6(6) of the Ordinance to ask for a full hearing. The hearing was twice postponed to enable the appellant to submit a full submission, and was eventually fixed for 29 April 1994.

On 26 April 1994, the appellant, by its solicitors, sent a letter to the Board advising that the previous grounds of objections of the appellant still applied and that these objections and further submissions in relation to them were the preferred position of the appellant but that, if necessary, the appellant was prepared to accept a fall-back position, namely to rezone the land from Mining

and Quarrying and to Other Specified Use (comprehensive development to include residential units and supporting GIC and open space with interim quarrying activities and other formation work)(the new rezoning proposal). At the hearing, the appellant, through its counsel, abandoned the previous proposal in its submissions and addressed the Board on the new rezoning proposal only. The Board heard the appellant on the new rezoning proposal without objection, although the Vice-Chairman of the Board remarked that the new rezoning proposal might be out of time. After the hearing, the Board decided to reject the new rezoning proposal on the ground that it was made out of time, and to refuse to amend the draft plan. The hearing was chaired by the Vice-Chairman of the Board, who was the Director of Planning and the head of the Planning Department. The draft plan was prepared by the Planning Department, which was heavily involved in the rehabilitation scheme. The Planning Department opposed the appellant's objections throughout the process, and was represented at the objection hearing.

The appellant applied for judicial review of the decision of the Board refusing to amend the draft plan on two broad grounds: first, that the Board's decision was *Wednesbury* unreasonable, namely that the Board failed to consider the merits of the objections when it rejected the new rezoning proposal without warning the appellant that it was made out of time and when it knew that the appellant had already abandoned the old position; and secondly, that the decision of the Board violated the appellant's right to a fair hearing by a competent, independent and impartial tribunal guaranteed by art 10 of the Hong Kong Bill of Rights Ordinance and was therefore invalid and of no effect.

Leave to apply for judicial review was granted on 4 July 1995. On 5 July 1995, the Governor in Council approved the draft plan. At first instance, Waung J dismissed the application: (1995) 5 HKPLR 261. The applicant appealed.

Held (dismissing the appeal):

1. Section 6 of the Town Planning Ordinance provides a complete statutory regime for dealing with objections. Under s 6(2), a written statement of objection is required to set out the nature and reasons of the objection and any proposed alteration to the draft plan which would meet the objection. These requirements are imperative and not directory. Accordingly, the Board was right to disregard the new zoning proposal put forward by counsel at the hearing.
2. The Board had acted fairly in rejecting the appellant's objection. The hearing had been adjourned twice to suit the convenience of the appellant, who had been given every opportunity to put forward its opposition to the plan.
3. (Liu JA not deciding) A generous and purposive approach to construction is plainly called for in interpreting the Bill of Rights. Regard must be had to its international origin.

4. While the expression "suit at law" in art 10 of the Bill of Rights is wider than the phrase "legal proceeding in a court of law", it is not so wide as to embrace the administrative process dealing with objections to draft plans under s 6(6) of the Town Planning Ordinance.
5. (Liu JA not deciding) The proceedings before the Board were not concerned with the "determination" of any right. There are no contesting parties before the Board. All that the Board is empowered to do is to entertain the objection in accordance with the provisions of s 6 and then under s 8 to forward to the Governor in Council, with or without amendments, the draft plan for approval, together with a schedule of the objections. Any final "determination" is made by the Governor in Council, not by the Board.
6. (Liu JA not deciding) The function of the Board is to promote the "health, safety, convenience and general welfare of the community" by undertaking the systematic preparation of draft plans upon the directions of the Governor. It is difficult to see how that function can properly be discharged without the presence of at least some of the officials such as the Director of Planning, Secretary for Transport, Director of Environmental Protection or their representatives as members of the Board.
7. (per Litton VP) The relief sought could not be viewed as the foundation for an attack on the constitution of the Town Planning Board. It could not be construed as seeking a declaration to the effect that the provisions of the Ordinance setting up the Board have, since 8 June 1991, been repealed for being inconsistent with the Bill of Rights. This in itself was sufficient to dispose of the appeal.
8. (per Liu JA) As the appellant had failed to object to the presence of the Vice-Chairman at the hearing, it must be regarded as having waived its right and could not in subsequent judicial review proceedings attack his presence on the ground that it constituted systemic bias in judicial review proceedings: *R v Byles, ex p Hallidge* (1912) 77 JP 40 applied.

per Godfrey JA

For so long as the Bill of Rights remains on the statute book, it will in suitable cases enable the judges to protect the people of Hong Kong against the abuse of their civil and political rights by the legislature or (in the rare case where the common law does not already do so) by the executive. But its utility will be lessened, and its value cheapened, in direct proportion to the number of misguided attempts to invoke its provisions in situations with which it really has nothing to do.

Martin Lee QC, Wong Hin-lee and Johannes Chan (instructed by C T Chan & Co), for the appellant (applicant); Daniel Fung QC, Nicholas Cooney and Peter Wong (of the Attorney-General's Chambers), for the respondent.

Editorial comment

It is somewhat disappointing that the Court of Appeal failed to address a number of important issues raised on the appeal and on which the law in Hong Kong continues to be unclear. Among these issues are whether article 10 guarantees an implied right of access to court, or what constitutes a "competent, independent and impartial tribunal" in the context of administrative appeals. Apart from holding that "suit at law" is wider than formal legal suits but not wide enough to cover purely administrative or consultative processes, the court did not lay down any guidelines on what constitutes a "suit at law" within the meaning of article 10 of the Bill of Rights. Its judgment rested heavily on the finding that the decision of the Town Planning Board rejecting an objection under section 6 of the Ordinance was not determinative, as it was subject to the approval of the Governor in Council. Does it mean, therefore, that in future challenges should only be launched after the Governor in Council has approved the draft plan? The Court, without deciding this point, seems to suggest that even if the draft plan has been approved by the Governor in Council, this would only be the end of the consultative process and therefore article 10 would still not be engaged. If the land affected by zoning in the draft or approved plan is to be resumed in due course, as envisaged in this case, presumably the applicant could challenge the decision at the stage of resumption (but see *Fok Lai Ying v Governor in Council*, (1996) 7 HKPLR 63 (HCt) and (1996) 7 HKPLR 78 (CA), summarised respectively at pages 29 and 31 below). The difficulty is that if the value of the land is adversely affected by rezoning, as in *R v Town Planning Board, ex parte Auburntown* (1994) 4 HKPLR 194, or by a significant reduction in the plot ratio, as in *Real Estate Developers Association v Town Planning Board* (1996) 6 HKPLR 179, at what point is the applicant's right "determined"? It should be noted that in such cases there will be no resumption and under the Town Planning Ordinance, no compensation is payable.

At the end of the day, the real gist of the applicants' complaints in most of these town planning cases is an undue interference with their property without adequate compensation. Article 10 is an indirect, and albeit ineffective, way to air their grievance. This is largely because the Bill of Rights does not contain a provision protecting property rights as such. In a few months' time when the Basic Law comes into effect, constitutional challenges against unlawful interference with property right will become possible. Article 105 provides guarantees against the unlawful acquisition, use, disposal and inheritance of property and the right to compensation for lawful deprivation of property. It further states that "such compensation shall correspond to the real value of the property concerned at the time". Re-zoning or reduction of plot ratio without compensation would be a prime candidate for such constitutional challenges. Even if compensation is payable, say, under the Crown Land Resumption Ordinance, whether the compensation constitutes "the real value of the property concerned" will be a contentious issue, especially in view of the current practice of making *ex gratia* payment to raise the level of compensation to that of the market value; such payment is, as its name suggested, *ex gratia* and not as of right. Article 105 is likely to provide a fertile legal battle field.

**RIGHT TO BE PRESUMED INNOCENT UNTIL PROVED
GUILTY ACCORDING TO LAW (ARTICLE 11 (1), BILL OF
RIGHTS; ARTICLE 14(2), ICCPR)**

Inland Revenue Ordinance (Cap 112), s 51(5)

Taxation – False returns – Presumption of knowledge of contents of tax returns – Whether presumption irrebuttable – Whether presumption reverses burden of proof of an important element of the offence – Whether presumption rational, proportional and causing minimal impairment

***R v Ng Wing-keung Paul* (1996) CA, Crim App No 349 of 1996 [(1996) 7 HKPLR 53]**

The appellant had been convicted of 8 offences under ss 82(1)(c) and (g) of the Inland Revenue Ordinance (Cap 112), which provide:

- "(1) Any person who wilfully with intent to evade or to assist any other person to evade tax . . .
- (c) makes any false statement in connection with a claim for any deduction or allowance under this Ordinance; or
 - . . .
 - (g) makes use of any fraud, art, or contrivance, whatsoever or authorizes the use of any such fraud, art, or contrivance,...
- shall be guilty of an offence. . .".

The Crown case was that the appellant had made fraudulent claims for tax deduction in the four tax years between 1988 and 1992 by falsely representing that he had paid certain sums as commission to sub-agents in each of those financial years. The Commissioner for Inland Revenue had investigated the 39 names provided by the appellant in Schedule 3 of each tax return in those years, and had discovered that 37 of those "sub-agents" had not received any such commissions or payments from the appellant. The appellant claimed that he did not know that false claims had been made in the relevant tax returns and that he did not wilfully make false claims with an intent to evade tax. At the close of the prosecution case the appellant made a submission of no case to answer on evidential grounds. The court, in rejecting this submission, referred for the first time to s 51(5) of the Inland Revenue Ordinance. Section 51(5) provides:

"A return, statement, or form purporting to be furnished under the Ordinance by or on behalf of any person shall for all purposes be deemed to have been furnished by that person or by his authority, as the case may be, unless the

contrary is proved, and any person signing any such return, statement, or form shall be deemed to be cognizant of all matters therein."

At the close of the defence case, the appellant submitted that the second limb of s 51(5), read with s 82(1), constituted a violation of his right to be presumed innocent under art 11(1) of the Bill of Rights, either by creating an irrebuttable presumption of guilty knowledge on the part of the appellant, or by imposing an unjustifiable onus of proof of an essential element of an offence on the appellant, and s 51(5) was therefore repealed to the extent of the inconsistency.

The judge rejected the argument, holding that the provisions were not inconsistent with the Bill of Rights: see (1996) 6 HKPLR 299. The appellant was convicted and sentenced to 3 months' imprisonment on each of charges (to be served concurrently) and fined the sum of \$490,000. He appealed against the conviction and sentence. The main ground of appeal was that the appellant had had no case to answer because s 51(5) of the Inland Revenue Ordinance had been repealed by the Bill of Rights Ordinance because it was inconsistent with art 11(1) of the Bill of Rights. The appellant also argued that the convictions were unsafe and unsatisfactory because the appellant had signed the returns before the schedules containing the names of the agents to whom commissions were purportedly were attached to the return. He also appealed against sentence.

Held:

1. The appellant had signed each profit and loss account in the returns, each of which included an item stating that certain sums had been paid as commission of subagents who were to be identified in a schedule. No commission at all had been paid to any sub-agent. The annexure of the names in the schedules to the returns was a seamless continuation of the process begun by the appellant when he included the item in the returns and completed by him when the returns were submitted to the revenue authorities. The judge's conclusion that the appellant had done these acts, was aware of the situation and had the relevant intent were supported by an overwhelming case on the evidence and there could be no lurking doubt over his guilt.
2. The second matter deemed by s 51(5) -- that a person who signed a return was cognizant of the matters in the document -- was not irrebuttable. The phrase "unless the contrary is proved" appeared immediately following in the first deeming provision in s 51(5), the word 'and' immediately preceding the second deeming provision tied it to what went before. The effect of the provision, albeit not in the most felicitous language, was to allow for proof to the contrary.
3. The effect of s 51(5) was only that a person who signed a document was deemed to be aware of the contents of that document; it did not mean that the person is also deemed to know that the contents are false and what the truth happens to be.

4. While s 51(5) could be of some assistance to the prosecution by relieving it of having to prove certain matters, these are not matters which would of themselves conclude a case against an accused. The primary burden would remain on the prosecution, and no dishonesty is presumed or deemed. Section 51(5) of the Inland Revenue Ordinance, as properly construed, is extant and consistent with art 11(1) of the Bill of Rights.
5. A sentence of imprisonment with immediate effect was to be expected in a case involving tax evasion of undoubted gravity. *Attorney General v Ma Lai Wu* [1987] HKLR 744 followed.
6. (Bokhary JA, dissenting) It was inappropriate to suspend the sentences of imprisonment imposed. Not only were the offences committed by the applicant serious, but they were persistent and motivated by greed on the part of a man whose material wealth was considerable, and they were accompanied by a singular lack of remorse.

John Griffiths and Richard Wong (Pang, Tang, Wan & Choi) for the appellant; Andrew Bruce (Senior Assistant Crown Prosecutor) and Stanley Chan (Senior Crown Counsel), for the Crown.

**RIGHT NOT TO BE COMPELLED TO TESTIFY AGAINST
ONESELF OR TO CONFESS GUILT (ART 11(2)(G), BILL OF
RIGHTS; ART 14(3)(G), ICCPR)**

Cross Harbour Tunnel Ordinance (Cap 203) ss 62A(1), 62A(5)

**Whether right applied to period prior to charge – Offence of failing
to provide details of driver of a vehicle – Self-incrimination**

Attorney General v Tsang Wai Keung (1996) HCt, Mag App No 661 of
1996, 29 October 1996, Patrick Chan J [(1996) 7 HKPLR]

The appellant was the registered owner of a motor cycle, which Cross Harbour Tunnel staff had observed on 6 March 1996 using a toll booth that was not designated for use by motor cycles and failing to respond to a direction, both of which were offences under the Ordinance. The appellant was then requested pursuant to s 62A of the Cross Harbour Tunnel Ordinance (Cap 203) to provide the particulars of the rider of the cycle. The appellant responded by sending a copy of art 11(2)(g) of the Hong Kong Bill of Rights Ordinance. He was eventually charged with an offence under s 62A(1) and (5) of the Ordinance, which provides that it is an offence to fail to provide such information when it has been requested and to obey a direction of an officer of the tunnel company. He was convicted by a magistrate after a trial and fined \$1,000.

The appellant appealed against his conviction and sentence. The main ground of appeal which he pursued on the appeal was that s 62A(1) was inconsistent with the right guaranteed by art 11(2)(g) of the Bill of Rights of a

person charged with a criminal offence not to be compelled to testify against himself or to confess guilt. The appellant also argued that under s 62A a notice demanding particulars of the driver at the relevant time could be lawfully issued only if a tunnel officer had formed a reasonable suspicion that an offence had been committed, and that the tunnel company staff could not have formed a reasonable suspicion of the commission of an offence in this case. He also argued that his sending a copy of art 11(2)(g) in response to the notice meant that he had not failed to reply to it.

Held (dismissing the appeal against conviction and sentence):

1. The right not to be compelled to be a witness against oneself guaranteed by art 11(2)(g) of the Bill of Rights applies only where a person has been charged with a criminal offence. It provides protection only against a legal compulsion to testify at trial and does not apply at the investigatory stage. There was no difference in substance between this guarantee and the guarantee contained in s 11 (c) of the Canadian Charter.
2. On the face of it, the right not to be compelled to confess guilt may be exercised when a person is brought before a police officer or person in the authority during the investigation process and it may also be exercised when he is asked to plead to a charge in court. However, considering that this guarantee appears in the context of a group of rights which are all closely connected with a criminal trial and immediately after the right not to be compelled to testify (which could only refer to court proceedings), the right guaranteed in paragraph (g) must refer to a defendant's right not to be compelled to plead guilty to the charge or confess his guilt in court. To interpret it as guaranteeing a right not to be compelled to confess guilt before the trial, ie to a police officer or person in authority, would mean that it would be out of place and incompatible with the other rights guaranteed in the same article. *R v Allen, ex p Ronald Tse Chu-fai* (1992) 2 HKPLR 266 applied; *R v Lee Tak-cheung* (1992) 2 HKPLR 547 approved
3. Even if art 11(2)(g) of the Bill of Rights did apply to s 62A of the Ordinance, it could not be said that s 62A was inconsistent with that guarantee. First, the guarantee would have been relevant only in those cases in which the registered owner was the driver of the vehicle. Secondly, an admission by a defendant pursuant to a request under s 62A (which applied in relation to a number of offences under the Ordinance) was not in itself determinative of guilt, since it was only one ingredient of these offences; and it was in any event only prima facie evidence.
4. Furthermore, s 62A was in any event a rational and proportionate response to a serious problem. The purpose of this provision (and similar provisions in the Road Traffic Ordinance) was to ensure that a driver who committed a road traffic offence or was involved in an accident which caused injury but who had not stopped could be identified and that appropriate action could be taken against him or her.

5. It was not necessary to decide whether s 62A required that tunnel staff should have formed a reasonable (and not just actual) suspicion that a driver had committed offences before a notice demanding the driver's details at the relevant time could be sent. The tunnel staff had the power to give directions to drivers of vehicles within the tunnel area, and in the present case there had been ample grounds on which the tunnel staff could have entertained a reasonable suspicion that the driver of the cycle had disobeyed a traffic sign and failed to stop as instructed.
6. Sending a copy of art 11 of the Bill of Rights in response to the notice under s 62A did not constitute a reply to the notice and was tantamount to a refusal to respond to it.
7. The sentence imposed by the magistrate was neither manifestly excessive nor wrong in principle.

Andrew Bruce QC (Senior Assistant Crown Prosecutor), for the Crown; appellant in person.

Editorial comment

It is unfortunate that in a number of road traffic offence cases involving significant and complex Bill of Rights issues (such as the present) defendants have been unrepresented. While this arguably raises the issue of equality of arms guaranteed by article 10 (and should perhaps be addressed by the court by requesting the appointment of an *amicus curiae*), it also has had an impact on the quality of the decision-making in these cases, inasmuch as a full range of relevant comparative case law had not been considered by the courts concerned. In this case, as in *R v Crawley* (1994) 4 HKPLR 62, the court did not have the benefit of European Court decisions that dealt with the same or very similar issues.

In this case Patrick Chan J held that none of the rights guaranteed by article 11(2) referred to the time before the accused was charged with an offence. This is certainly not true if "charge" refers to the laying of formal charges. However, in both international and Hong Kong case law, it is well established that, for the purposes of article 11(2)(c), "charge" means the official notification given by the competent authority to the defendant that he or she is suspected of having committed a criminal offence; hence time begins to run at the time of arrest and not at the time of the formal laying of charges: see, for example, *R v Deacon Chiu* (1993) 3 HKPLR 483.

In this case, the court supported its finding by noting that art 11(2)(g) referred not only to the right not to be compelled to "testify against himself", but also the right not to be compelled "to confess guilt". It held that one could only "testify" in court, and therefore, although "to confess guilt" is wide enough to cover the stage of investigation, the scope of the latter expression should be read down in light of the earlier expression. Accordingly, article 11(2)(g) only

protected the right not to confess guilt at the trial, and not at the investigation stage.

This approach to interpretation is fundamentally flawed. In the first place, there is no reason to confine the word "testify" to testifying in court, bearing in mind the warning of Lord Mustill in *R v Chan Chi Hung* (1995) 5 HKPLR 1 at 11 that "the Covenant springs from a consensus of nations, many of whose legal systems adopt a less stringent and analytical approach to the interpretation of instruments than is taken for granted in countries whose systems originated in the common law". Even if "testify" could only mean "testify in court", one would have expected that a generous and purposive interpretation of the Bill of Rights would require the court to adopt a wider meaning of the accompanying phrase "to confess guilt" so as to encompass testimony outside court, rather than to restrict the scope of the phrase with wider meaning.

Could the guarantee in art 11(2) be extended to apply to the time of investigation? It is true that some of the rights in art 11(2) cannot be extended to the time of investigation, such as the right to have free assistance of an interpreter in court, but to hold that art 11(2) can never extend beyond the time before the laying of charge or arrest is unduly restrictive, and is inconsistent with the international jurisprudence on this issue. It must not be overlooked that art 11 is only one facet of the right to a fair hearing guaranteed by art 10. The European Court of Human Rights has held on a number of occasions that that the right to fair hearing in article 6 of the European Convention applies at the investigation stage: see, for example, *Murray v United Kingdom* (1996) 22 EHRR 29 and, more recently, *Saunders v United Kingdom* (17 December 1996). As we noted in our commentary on *R v Lee Tak-cheung* (see *Bulletin*, v 1, n 4, at p 49), in *Jijón v Ecuador* the Human Rights Committee appeared to accept that article 14(3)(g) of the ICCPR (the equivalent of article 11(2)(g) of the Bill of Rights) applied to pre-trial/pre-charge investigation. None of these authorities were referred to by the court in the present case. In *Murray v United Kingdom*, the European Court, in noting that article 6 of the European Convention (the equivalent of article 10 of the Bill of Rights) applies at the stage of preliminary investigation into an offence by the police, stated:

"Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6." (paras 45, 62)

In the case of *Saunders* (noted in *Bill of Rights Bulletin*, v 3 n 2, October 1994, at p 53) the European Commission of Human Rights held that material which the applicant had been compelled to provide during a Department of

Trade and Industry investigation before he was charged and which was then used against him at trial, violated his right to a fair hearing. The European Court of Human Rights came to the same decision in its judgment of 17 December 1996. It is disappointing that this important point seems to have been determined in Hong Kong by at least three courts,³ none of which appears to have been aware of the contrary international authority or the academic commentaries on the issue.

**RIGHT NOT TO BE SUBJECTED TO UNLAWFUL OR
ARBITRARY INTERFERENCE WITH ONE'S PRIVACY OR
HOME (ARTICLE 14, BILL OF RIGHTS; ARTICLE 17, ICCPR)**

*Right not to be subject to arbitrary interference with one's home
– Whether failure to give notice to property owners whose
property were to be resumed amounts to an arbitrary or
unlawful interference with their private rights*

Fok Lai-ying v Governor in Council and others (1996) HCt, MP No 940
of 1996, 26 September 1996, Cheung J⁴ [(1996) 7 HKPLR 53]

The applicant was the owner of a three-storey house with an open space in Shatin. By a letter dated 31 January 1996, the Director of Lands informed the applicant that a large part of the open space of her home would be resumed under the Crown Lands Resumption Ordinance. She challenged the validity of the resumption on three grounds: first, the resumption was against the principle of natural justice as she was entitled to know the particulars of the resumption and be afforded an opportunity to make representations before the decision to resume her land was made. Secondly, she argued that the resumption was not for a public purpose: notwithstanding the inclusion of a statement in the body of the notice of resumption that the resumption was required for a public purpose, the heading of the notice set out a more restricted purpose which was clearly unsustainable in the present case. Thirdly, she maintained that the failure to give her an opportunity to make representations to the Executive Council before the resumption was made amounted to an arbitrary or unlawful interference with her rights under art 14 of the Bill of Rights.

³ See *R v Lee Tak-cheung* (1992) 2 HKPLR 547; *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) 3 HKPLR 1 (HCt) and *R v Tsang Wai-keung*, noted above.

⁴ See also the decision of the Court of Appeal, noted at p 31 below.

Held (declaring the decision to resume the applicant's land null and void):⁵

1. The Crown Lands Resumption Ordinance empowers the government to compulsorily acquire the property of a person, although payment of compensation is required. This is a draconian power and, if the owner is not to be notified in advance and given the opportunity to make representations before the resumption, the Ordinance must clearly and expressly indicate this. The circumstances in which it may be said that the legislature intends to exclude the right of the property owner to be heard must be narrowly construed.
2. Section 3 of the Ordinance requires the consultation, not only of the Executive Council, but also of the property owner who is directly affected by a decision to resume his land. The fact that notice to the property owner is required to be given under the Ordinance after the resumption has been made does not preclude a duty to give notice before the resumption. Nor do s 11(1)(b), which provides for a cut-off day for the valuation of the resumed property, and s 19, which provides for the conclusive nature of a notice stating that resumption is for a public purpose, negative a duty to act fairly before the resumption. *In re an application by K O Y Investment Co Ltd and Others* [1983] HKLR 28, not followed.
3. There is no clear and express indication showing that the legislative intent was to exclude the need to hear the property owner who is directly affected by the resumption. While matters of public policy are involved in the resumption of land, they can go hand in hand with the public being afforded an opportunity to be consulted and raise objections. The practical difficulties of consulting the property owners were exaggerated and not insurmountable. The question of profit-making does not come into play in the present case. The existence of two subsequent statutes containing provisions for notice and objection does not mean that the Crown Lands Resumption Ordinance must intend to exclude the right to be heard.
4. The applicant had not been afforded an opportunity to make representations to the Executive Council before the resumption. She was not given details of the resumption. Without knowing these details, she was not able to make a reasoned representation of her case. Hence the requirement of fairness had not been observed.
5. The reference to the requirement for a public purpose in the Notice of Resumption will activate the conclusive evidence provision of s 19. Once the Governor in Council had decided that the resumption was for a public purpose, the description of the purpose in a more restricted manner in the heading of the Notice did not detract from the fact that the resumption was for a public purpose.

⁵ This decision was reversed on appeal on 4 December 1996: see (1996) 7 HKPLR 78, noted below.

6. Article 14 of the Bill of Rights, which is intended to protect the privacy of an individual, has no application to the present case, as it does not include the right to hold and own property. It is unnecessary to decide whether the failure to give notice to the property owner whose property is to be resumed amounts to an arbitrary or unlawful interference with her private right.

Resumption of land – Whether right not to be subjected to unlawful or arbitrary interference with one’s home – Whether right applicable in case of land resumed for a public purpose with payment of compensation – Provision to be construed generously – Statutory scheme for resumption of land for public purposes neither unlawful nor arbitrary

*Fok Lai-ying v Governor in Council and others (1996) CA, Court of Appeal (Civ App No 200 of 1996, 4 December 1996, Litton VP, Godfrey and Ching JJA) [(1996) 7 HKPLR 78]**

F was the owner of an agricultural lot in the New Territories, on part of which a three-storey house was erected; the remainder of the lot was an open paved area. In December 1995 a resumption notice was published in the *Gazette* stating that the Governor had ordered part of this lot, together with other agricultural lots in the same area, to be resumed for a public purpose (a village expansion scheme), pursuant to s 3 of the Crown Lands Resumption Ordinance. F applied for judicial review of the Governor’s decision, arguing that the respondent had failed to observe the requirements of procedural fairness in reaching his decision, since he had failed to give her prior notice of his intention to order the resumption and had not provided her with an opportunity to make representations. She also argued that the resumption violated her right not to be subjected to unlawful or arbitrary interference with her home, as guaranteed by art 14 of the Hong Kong Bill of Rights. At first instance, Cheung J held that the respondents had been obliged to provide the applicant with an opportunity to make submissions before the resumption was ordered, and, in view of the failure to do so, the judge quashed the order for resumption of land. In relation to the Bill of Rights, Cheung J held that art 14 had no application to the case, since the Bill of Rights did not guarantee rights to the enjoyment of private property. The respondents appealed to the Court of Appeal.

Held (allowing the appeal):

1. Where a statute confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances. However, fairness is not an abstract concept; it depends upon the context of the decision, in particular the statute creating the decision-making power. Fairness means fairness to all concerned. The principle cannot be applied in favour of one individual at the expense of the community and contrary to the statutory scheme.

* The Court of Appeal has granted the appellants leave to appeal to the Privy Council.

2. Administrative law governs the activities of all government departments. It is vitally important that any implication of law arising from the express words of a statute should not only be fair but also practical in operation and easy to comprehend.
3. In the context of the Crown Lands Resumption Ordinance, the Governor was bound to consult only the Executive Council before ordering resumption; he was not obliged to give the landowner prior notice or an opportunity to make representations. *Re an application by K O Y Investment Co Ltd* [1983] HKLR 28 followed; *Cooper v Wandsworth Board of Works* (1863) 14 CB(NS) 180 and *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 distinguished.
4. In any event, in this case F had had ample opportunities to make representations to the Government concerning the village expansion scheme and had in fact done so.
5. While it was not necessary in the present case to decide whether art 14 of the Bill of Rights provided protection against interference with property used as a home, it might be unwise to shut the door completely in the face of a home-owner in a case such as the present by deciding that it did not when, given the international origin of the Bill of Rights, the interpretation of the word "home" in art 14 was necessarily wide.
6. In any event, even if art 14 was engaged in the present case, there was no violation of that article; the scheme for resumption of land for public purposes set out in the Crown Lands Resumption Ordinance was neither an arbitrary nor an unlawful interference with F's home.

RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION (ART 15, BILL OF RIGHTS; ART 18, ICCPR)

See *Lau Wong-fat v Attorney General*, at page 50 below.

**RIGHT TO FREEDOM OF OPINION AND EXPRESSION
(ARTICLE 16, BILL OF RIGHTS; ARTICLE 19, ICCPR)**

Prisons Ordinance (Cap 234), s 25(2) – Prison Rules (Cap 234 sub leg), rr 56, 77, 202(2)– Prison Standing Orders, SO 397, para 8 – Code on Access to Information 1995

Freedom of expression – Permissible restrictions – Censorship of newspapers provided to prisoners – Legitimate purpose – Whether provided by law – Whether necessary and proportionate – Whether waived by signing of consent form – Freedom of information – Access to information – Request by prisoner’s legal adviser for copy of prison standing order – Whether it should have been made available – Right of prisoner to have access to court

Chim Shing Chung v Commissioner of Correctional Services (1996) CA, Civ App No 16 of 1996, 31 July 1996, Litton VP, Liu and Ching JJA [(1996) 6 HKPLR 313]

The applicant/respondent was a prisoner in Stanley Prison who had arranged, in accordance with the relevant prison rules, to have a newspaper delivered to him every day. In order to receive the newspaper he had been required to sign a form prepared by the Correctional Services Department. Among other matters this form provided that the prison authorities ‘ha[d] the right to check the content of the newspaper. The pages covering gambling or any indecent material will be taken out by the authority without any prior notice. I understand that I can by no means ask the authority to give those page[s] back to me.’

The applicant had a particular interest in horse racing and followed the racing sections of the paper. In May 1995, by order of the Commissioner of Correctional Services, the prison administration decided to remove special racing supplements which formed part of the newspaper on race days (Wednesday and Saturday). Racing information which was in the general body of the newspaper on race days was not removed, nor was any racing information removed on non-racing days.

The applicant challenged the decision to remove the racing supplements from his newspaper by way of judicial review. On 2 November 1995, Sears J quashed the decision of the Commissioner on the ground that there was no legal basis for the decision, that it was *Wednesbury* unreasonable, and that it violated the respondent’s right to receive information guaranteed by art 16(2) of the Bill of Rights: (1995) 5 HKPLR 570. The Commissioner appealed.

The Commissioner argued that r 56 of the Prison Rules provided a legal basis for the decision to remove the supplements. Rule 56 provided: ‘Prisoners may receive books or periodicals from outside the prison under such conditions as the Commissioner may determine.’ The Commissioner also argued that Standing Order 397 (h) provided a further legal basis for his decision. This Standing Order

purported to confer on the prison superintendent the discretion to withhold or withdraw any newspaper or part of a newspaper, on a regular basis, if he believes on reasonable grounds that its availability in the institution will jeopardize the institutional security or custodial discipline. Newspaper covering only horse racing information will obviously fall into the category to be rejected for entry into an institution." Finally, he argued that the decision was not unreasonable, but a legitimate exercise of judgment in the administration of prisons that was not open to review on the merits by the courts.

In relation to the Bill of Rights, the Commissioner argued that s 9 of the Hong Kong Bill of Rights Ordinance meant that the guarantees of the Bill of Rights had no application to restrictions on the enjoyment of rights by prisoners if those restrictions were authorised by law.⁶ He further argued that in any event the removal of the supplements was a lawful and permissible restriction on the applicant's right to receive information under art 16(2) of the Bill of Rights, as gambling on the races was a serious problem in prisons and removal of information about races helped to prevent gambling by prisoners.

Held (allowing the appeal):

Illegality

1. The term "periodical" in r 56 of the Prisons Rules refers to a magazine whose successive issues are published at regular intervals longer than a day but shorter than a year; it includes a newspaper, which is published periodically, day by day. To exclude a newspaper from the scope of r 56 would result in an absurd situation: there would then be no rule authorising the introduction of newspapers into prisons and, for generations, persons supplying newspapers to prisoners would have been committing criminal offences under s 18(1) of the Prisons Ordinance.
2. Rule 56 should receive a fair, large and liberal construction and interpretation. It covers not only the conditions under which newspapers are received but also the content of the newspapers to be received. It authorizes the Commissioner to permit the receipt of newspapers by the respondent under the conditions that the racing supplement be first extracted.

⁶ Section 9 of the Hong Kong Bill of Rights Ordinance provides:

"9. Armed forces and persons detained in penal establishments

Members of and persons serving with the armed forces of the government responsible for the foreign affairs of Hong Kong and persons lawfully detained in penal establishments of whatever character are subject to such restrictions as may from time to time be authorized by law for the preservation of service and custodial discipline."

Irrationality

3. Judicial review is concerned, not with the decision, but with the decision-making process. Competing policy considerations, which are matters of value judgment based on priorities which the decision-maker considers relevant, are not matters which courts of law can properly weigh. Therefore, evidence on how the policy of extracting racing supplements from newspapers supplied to prisoners or its discontinuance has led to an increase in gambling and related offences in prisons are irrelevant matters for the court to consider.
4. In considering that there was no causal connection between the provision of racing information and illegal gambling in prisons and the ineffectiveness of the censorship policy, the trial judge had, in effect, stepped into the Commissioner's shoes to judge the merits of the policy. The causal connection between removing racing supplements and the diminution of gambling cannot be "proved"; it is a matter of value judgment. Effectiveness of policy is a matter of degree, and the success or failure of policies is not the test of legality. These are matters for the Commissioner's judgment, not the court's.

Bill of Rights

5. Prisoners are subject to custodial discipline and do not enjoy the full range of rights guaranteed by the Bill of Rights. The restrictions on their right to receive information are authorized by law. By virtue of s 9 of the Bill of Rights Ordinance, the Bill of Rights is not engaged in this case.

Editorial comment

This decision is once again a disappointing illustration of what has, with some exceptions, recently been the rather parochial approach to interpretation taken by the Court of Appeal. In this case the court concluded that s 9 of the Bill of Rights Ordinance meant that the guarantees of the Bill of Rights had no application to legislation and decision challenged. Section 9 provides that "persons lawfully detained in penal establishments of whatever character are subject to such restriction as may from time to time be authorized by law for the preservation of . . . custodial discipline." The court held simply that the decision challenged was authorised by law, related to persons lawfully detained, and was for the purpose of custodial discipline. No further inquiry was undertaken.

In light of the comments made by the Human Rights Committee in its *General Comment 24(52)* and the earlier Hong Kong case law interpreting phrases in the ICCPR and the Bill of Rights Ordinance such as "provided by law" or "according to law" as requiring substantive assessment of the law (see, e.g. *R v Sin Yau-ming* (1991) 1 HKPLR 88), it is curious that the court did not approach the interpretation of s 9 in this manner. If it had done so, as earlier decisions of the Privy Council and the Court of Appeal appear to suggest it should have, then the court should have undertaken a substantive review of the laws authorising the censorship of the newspapers according to the standards of necessity, rationality and proportionality accepted in earlier decisions (as, indeed as had

been done by Sears J at first instance). The legislature can hardly be presumed to have exempted any and all legislation from scrutiny under the Bill of Rights by s 9; arbitrary, unreasonable or unjust limitations on the rights of prisoners would therefore arguably not be exempt from challenge under the Bill of Rights.

It would not be unreasonable to require that any restriction based on s 9, in this case the removal of racing supplements on race days, must be rationally connected to achieving the purpose of preservation of custodial discipline and be a proportionate response to the problem. Had the court asked itself these questions, it would have been necessary for the court to go into the questions of how availability of racing supplements is related to increased illegal gambling in prisons, the alternatives to removing racing supplements, and the effectiveness of such a policy. It is true that questions of policy remain primarily a matter for the executive or legislature. Yet the Bill of Rights requires the court to play a supervisory role, assessing the compatibility of policies with the requirements of the Bill of Rights. In this regard, the tests of necessity and proportionality go further than the notion of *Wednesbury* unreasonableness under the common law.

Nevertheless, from the court's conclusion on the challenge based on common law grounds, it is highly probable that even applying this approach it would have reached the same conclusion. Nevertheless, the principle that guarantees of basic rights should be construed generously and limitations upon them should be scrutinized carefully is one that it is important not to overlook.

This decision may be compared with the judgment of Keith J in *Chieng A Lac* (above at page 13), in which that judge held that s 11 of the Bill of Rights Ordinance did not exclude review of the legality of the fact and conditions of detention under the standards of the Bill of Rights, without needing to have regard to the principle that restrictions on rights should be read narrowly.

Defamation – Whether a public authority such as a university may bring defamation action in relation to matters which are of public interest – Whether restriction on freedom of expression necessary and proportionate

Hong Kong Polytechnic University and others v Next Magazine Ltd and another (No 2) (1996) HCT, Action No A3238 of 1995, 10 December 1996, Keith J [(1996) 7 HKPLR 41]

The defendants were the publisher and editor-in-chief of *Next* magazine, which published an article on 2 September 1994 alleging, among other matters, that the Hong Kong Polytechnic University had turned a blind eye to the lack of academic qualifications of some of its teaching staff. The University, together with its president and a lecturer, commenced libel proceedings against the defendants.

The defendants issued summonses seeking orders under RSC O 15 r 6(2) that the first and second plaintiffs cease being parties to the action. They argued

that the public interest required that public bodies such as the University be subject to close scrutiny by the press and that, to the extent that the proceedings were brought by the University and its president, they had no basis at common law, and constituted a violation of the guarantee of freedom of expression in art 16 of the Bill of Rights.

The application came before a master, who dismissed the summonses. The defendants appealed to a judge of the High Court. The appeal was conducted on the basis that it was an appeal pursuant to O 18 r 19(1), namely an appeal against orders refusing to strike out the statement of claim on the grounds that it disclosed no reasonable cause of action, constituted an abuse of process and under the inherent jurisdiction of the court. The judge decided to hear as a preliminary issue the applicability of the Bill of Rights Ordinance and adjourned argument on the other issues pending the resolution of this issue. On 7 June 1996, Keith J held that the first plaintiff was a public authority and hence the Bill of Rights Ordinance was applicable: (1996) 6 HKPLR 117. The hearing on the substantive issues resumed.

Held (striking out the first plaintiff's statement of claim)

1. The status, functions and funding of a university and its activities means that it operates in the public sphere and accordingly it is of the highest public importance that it should be open to uninhibited public criticism. To permit it to bring an action for defamation would have an inhibiting effect on the freedom of the press to comment on activities of bodies which operate in the public sphere. *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, followed.
2. The immunity of the press from defamation suits imposes an obligation on the press to engage in public debate in a responsible and measured fashion. So far as investigative journalism is concerned, this immunity can only relate to topics which it is in the public interest to disclose. The content of the article in question satisfied this test. Accordingly, it was contrary to the public interest for the defamation action to be maintained by the University.
3. There is no difference in principle between the common law of England on the subject of freedom of expression and art 16 of the Bill of Rights. Accordingly, to the extent that these proceedings were being maintained by the University, they infringe the right to freedom of expression guaranteed by art 16 of the Bill of Rights.

4. Freedom of expression constitutes one of the essential foundations of a democratic society. It is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established. These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the 'interests of national security' or for 'maintaining the authority of the judiciary, it is nevertheless incumbent on the press to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, followed.
5. The law of defamation constitutes a prima facie infringement of the right to freedom of expression guaranteed by art 16(2); if a public authority wishes to bring an action for defamation, it will have to show that the restriction on freedom of expression that the action represents is a permissible one. Where a public authority brings an action for defamation, the action will not be a permissible restriction on the right of the press to freedom of expression if its effect is to stifle legitimate public debate on a topic of serious public interest.
6. To permit the University to maintain the present action for defamation would be a disproportionate restriction on the right of the magazine to expose the malpractice which it alleges because (a) the article concerned a topic of serious public interest; (b) the threat of a defamation action could have an inhibiting effect on other sections of the press from publishing a similar article. The need to prove the truth of what is asserted to establish the common law defence of justification may well deter a would-be critic from voicing criticism, even if the criticism is true, because of doubt whether it can be proved or because of concern at the expense of having to do so; and (c) there are other remedies available to the University. It was also open to the University to refute the allegations made in the article by issuing public statements of its own.
7. The President of the University was entitled to maintain the defamation action in his own right because the article accused him of turning a blind eye to the lack of qualifications of members of the academic staff.
8. The circumstances in which the law permits a departure from the rights guaranteed by the Bill of Rights are extremely limited, but in those exceptional cases where such a departure is permitted, no infringement of the Bill of Rights takes place. *R v Secretary for the Civil Service, ex p Association of Expatriate Civil Servants of Hong Kong* (1995) 5 HKPLR 490 explained.
9. Order 18 r 19(1)(a) is not the appropriate rule under which relief should be sought, as a reasonable cause of action in defamation had been pleaded on the part of the University and its president. The issue was whether public policy or art 16 of the Bill of Rights prevented them from maintaining it. The attacks should be brought under O 18 r19(1)(d), being an abuse of process, or more logically under the inherent jurisdiction of the court.

Joseph Fok (Johnson, Stokes & Master), for the plaintiffs; Wong Hin Lee and Johannes Chan (T S Tong & Co), for the defendants.

Note: The University has appealed against the decisions of Keith J that the University was a public authority within the meaning of the Bill of Rights Ordinance ((1996) 6 HKPLR 117) and that the University was barred from bringing a defamation suit on matters of public interest ((1996) 7 HKPLR 41, noted above). The appeal is set down for 8 and 9 May 1997.

Editorial comment

The court's adoption of a liberal test of what constitutes a "public authority" within the meaning of s 7 of the Bill of Rights Ordinance is welcome. In light of this decision, the finding of the Bar's Disciplinary Tribunal in *Hong Kong Bar Association v Anthony Chua* (1994) 4 HKPLR 637, which held that the Hong Kong Bar Association, in promulgating its Code of Conduct, was a private body, can probably not be accepted as a correct statement of the law.

The court left unanswered the question whether a body could be a public authority for some purposes, and not a public authority for other purposes. For example, in dealing with contractual dispute with its staff, is it possible that the University is acting as an ordinary employer and not as a public authority? The court seems to suggest that the nature of the dispute in question could be taken into account in applying the Bill of Rights, but it is not a factor relevant to the determination of the earlier question (the nature of the body), the answer to which may take the body concerned outside the scope of the Bill of Rights Ordinance altogether.

Contempt of court – Whether article probably not read by jury can constitute a contempt

Attorney General v Cheung Kim Hung and Next Magazine (1997) HCt, MP No 2160 of 1996

This is a contempt of court case arising from the case of *Cheung Ng Sheong v Eastweek*, a defamation trial before a judge and jury (see (1995) 5 HKPLR 428 (CA)). On the day before counsel made their final speeches to the jury, Next magazine published an interview with Professor Cheung Ng Sheong. The article stated that the legal fees incurred by Professor Cheung in the defamation hearing were about \$2.4 million. This turned out to be the sum awarded as damages by the jury. The Court of Appeal found no evidence to suggest that the jury has read the article, but set aside the damages on other grounds. The Court also referred the article to the Attorney General, who instituted the contempt proceedings. The matter was set down for hearing on 17-19 March 97 before Rogers J.

RIGHT TO PROTECTION OF THE FAMILY (ART 19, BILL OF RIGHTS; ART 23, ICCPR)

See Lau Wong-fat v Attorney General, at page 50 below.

RIGHT TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS; RIGHT TO VOTE AND BE ELECTED (ARTICLE 21(A) AND (B), BILL OF RIGHTS; ARTICLE 25(A) AND (B), ICCPR)

Whether restrictions on directorate officers serving on the Selection Committee reasonable and necessary – Hong Kong Bill of Rights, art 21(a)

Senior Non-Expatriate Officers' Association and others v Secretary for the Civil Service (1996) HCt, MP No 2937 of 1996, 13 September 1996, Sears J [(1996) 7 HKPLR 91]

The applicants were directorate officers in the Hong Kong Civil Service, who wished to be nominated for election to the Selection Committee, the body which was to be established by the People's Republic of China to select the Chief Executive and the members of the provisional legislature of the Hong Kong Special Administrative Region, who would formally take up office on 1 July 1997 with coming into existence of the Hong Kong SAR. While the position of Chief Executive was provided for in the Basic Law, the Basic Law made no explicit reference to a provisional legislature, a body which China decided to establish following disagreement between the United Kingdom and Chinese governments on the question whether the existing Legislative Council could continue after 30 June 1997 as the first legislature of the Hong Kong SAR. The Hong Kong Government, and also the British Government, considered the establishment of the Provisional Legislative Council unnecessary and in conflict with the Basic Law.

Paragraph 3 of the Decision of 4 April 1990 of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region provides that the Selection Committee, consisting of 400 members, was to be broadly representative and to consist of representatives from four defined sectors set out in the Decision. According to a decision of 10 August 1996 of the Preparatory Committee for the Hong Kong Special Administrative Region, among the criteria for membership of the Selection Committee was the requirement that members support the principle of 'One Country, Two Systems' and the Basic Law, and be willing and ready to recommend the candidate for the office of the first Chief Executive and to elect members of the Provisional Legislative Council.

On 13 August 1996, the Hong Kong Government issued a circular to all members of the Civil Service, setting out the Government's policy on civil servants taking part in the conduct of public affairs, namely, to ensure that civil

servants should enjoy their civil and political rights as citizens, but at the same time to maintain the impartiality and apolitical nature of the Civil Service. The circular provided that while civil servants may decide for themselves whether they wish to put forward their names for membership of the Selection Committee, subject to compliance with all relevant Civil Service Regulations and circulars, ‘all Directorate Officers, Administrative Officers, Police Officers, and Information Officers may not serve on the Selection Committee’ [sic].

The applicants commenced judicial review proceedings shortly before the close of nomination for election to the Selection Committee to challenge the prohibition on serving as members of that body. It was common ground that the circular had the force of a Civil Service Regulation, and its breach could lead to dismissal and loss of pension.

Held (dismissing the application):

1. In all democratic societies, the general principle has always been that civil servants, particularly senior civil servants, should remain neutral and apolitical so that there is no perception or accusation of bias, or conflict of interest and that they are seen to be loyal to the Government of the day.
2. The restriction imposed by the Government on directorate officers serving as members of the Selection Committee was both reasonable and rational. The directorate officers is a well-recognized class of civil servants. The Government has been consistent in treating them separately from other civil servants in terms of their right to join political organizations, to participate in political activities, to nominate candidates for election or to indicate their support for candidates to the Legislative Council in any other ways, in order to maintain their political neutrality. Service on the Selection Committee will be a high profile political activity. Given the Hong Kong Government’s stance on the Provisional Legislative Council, a senior civil servant would find himself in an invidious position of conflict of interest if he sat on the Selection Committee.
3. There was no violation of art 21(a) of the Bill of Rights because the restrictions placed by the Government were both reasonable and necessary. By becoming a civil servant, a person forfeits certain rights. Senior civil servants must recognize that the loss of some rights enjoyed by other citizens is a small price to pay to preserve the integrity of the Civil Service and to ensure that there is good government.

Editorial comment

In *Debreczny v Netherlands*, the Human Rights Committee considered the application of article 25 of the Covenant to a somewhat similar situation. The author of the communication was a police officer who worked under the direct authority of the mayor of a municipality. He stood for election to the local council, which was chaired by the mayor. Following his election to the council, the council refused to accept his credentials as a member, pursuant to s 25 of the Municipalities Act, which laid down the positions deemed incompatible with membership in a municipal council. The Act excluded those officials who held positions subordinate to the mayor.

The Committee held that the restrictions on membership of the Council were justified in that they were intended to protect the democratic decision-making process by avoiding conflicts of interest, and were reasonable. (*Debreczny v Netherlands*, Comm No 500/1992, decision of 3 April 1995, UN Doc CCPR/C/57/1 at p 66 (1996)).

**RIGHT TO HAVE ACCESS, ON GENERAL TERMS OF
EQUALITY TO PUBLIC SERVICE IN HONG KONG (ART
21(C), BILL OF RIGHTS; ARTICLE 25(C), ICCPR)**

Right of equal access to the civil service – Rights of permanent residents – Access to the civil service – Unreasonable restriction – Discrimination and preferential treatment – Rationality, proportionality, genuine need and fairness – Whether scheme restricting transfer of expatriate officers on overseas agreement terms to local pensionable and permanent terms a violation of the right of equal access to the civil service

Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service (1996) CA, Civ App No 260 of 1995, 22 November 1996, Bokhary, Mortimer and Ching JJA [(1996) 6 HKPLR 333]

The appellant was a trade union whose membership consisted of overseas officers of the Civil Service. Together with four individual officers, the appellant challenged a scheme introduced by the Secretary for Civil Service which imposed restrictions on, inter alia, the promotion and transfer from overseas agreement terms to local pensionable and permanent terms of service of overseas officers. In general, civil servants are employed on either overseas or local conditions of service. On their recruitment to the Civil Service, officers are appointed on either pensionable or agreement terms. The Government had decided that from 28 May 1985 all appointments of officers from overseas would be on agreement terms. Serving officers from overseas on agreement terms would be given a once-and-for-all option to apply for transfer to permanent terms, provided that a suitable local candidate was not likely to be available within the next five years or so. From 30 June 1992, even those overseas officers on agreement terms who had been appointed before 28 March 1985 were not permitted under any circumstances to transfer to permanent terms. Renewal of the agreement of an overseas officer was also subject to the unavailability of a qualified and suitable local replacement.

On 30 July 1993, as a result of a threat of court action by the overseas officers, the Government decided that overseas officers on agreement terms who were permanent residents of Hong Kong would be allowed to transfer to local conditions of service (‘the original transfer scheme’). The original transfer scheme allayed the worry of overseas officers who were also permanent residents that they would be replaced by a qualified and suitable local candidate in the future. However, the scheme met with a hostile reception from the associations

representing local officers, as well as from members of the responsible Legislative Council Panel. A private member's bill was passed to freeze the scheme.

After many months of discussions, the Government revised the original transfer scheme. Under this revised scheme, an overseas officer on agreement terms was no longer permitted to apply for transfer to local conditions of service. Instead, he was permitted to apply for transfer to terms modelled on local conditions of service. Moreover, if there was a qualified and suitable local officer available to replace him, and if a local officer was recommended for promotion, the overseas officer would be offered appointment on terms modelled on local conditions of service at one rank below his existing rank, though he would retain his existing salary ("the modified transfer scheme"). In the meantime, the Government also proposed that all ranks other than basic ranks would be opened up for competition on the expiry of the agreements (whether overseas or local) ("the opening-up scheme"). Under this scheme, the incumbent officer and officers one rank below would compete for the post, and the most meritorious officer would be appointed.

Finally, in view of the stipulation contained in the Basic Law that after 1 July 1997 certain senior posts be held only by Chinese citizens who are permanent residents of the Hong Kong SAR with no right of abode in any foreign country, the Government decided to limit the number of overseas officers who would be promoted to certain senior posts in the Administrative Service. The Attorney General introduced a Succession Posts Scheme accelerating the promotion of local officers in the Attorney General's Chambers to the senior directorate. The applicants challenged various features of the original transfer scheme, the modified transfer scheme, and the opening-up scheme. They also challenged the two decisions relating to the Succession Posts Scheme. On 24 June 1994, the Government published proposals for a uniform set of conditions of service for all civil servants. Two of the proposals were also challenged in these proceedings. Keith J held that 5 decisions of the Government challenged were inconsistent with art 21(c) of the Bill of Rights: (1995) 5 HKPLR 490. The appellant appealed, and the respondent cross-appealed.

Held (allowing the appeal and dismissing the cross-appeal):

Locus standi

1. The court ought not to decline jurisdiction to hear an application for judicial review on the ground of lack of standing, where any responsible person or group seeks, on reasonable grounds, to challenge the validity of governmental action.

Permanent resident

2. In general, the mere presence of a person in Hong Kong attracts the rights guaranteed by the Bill of Rights.

3. While art 21 of the Bill of Rights speaks of "permanent resident", art 25 of the ICCPR speaks of every "citizen". The difference is unavoidable because Hong Kong is not an independent state and does not have citizens such states do. Nonetheless, art 21 of the Bill of Rights should be interpreted to conform with art 25 of the ICCPR as closely as possible.
4. As a general principle of international law, a state is not bound to recognize the conferral by a state of its nationality on a person under the municipal law of that state unless that law is consistent with legal principles enjoying general international recognition. However, international law does not operate to determine for a state's internal purposes who are that state's nationals; this determination is made by the state's municipal law. While in general there is no distinction in international law between "citizenship" and "nationality", municipal law may distinguish different types of nationals by conferring full political rights only on its citizens. The fact that a person may not enjoy full political rights therefore does not of itself mean that (s)he is not a national of the country from the perspective of international law.
5. In art 25, the term "citizen" connotes a national with full political rights. The closest thing Hong Kong has to such a person is a person with the right to participate in public life guaranteed by art 21 of the Bill of Rights. This right would be a hollow one unless the person guaranteed it could enter Hong Kong at will and remain there as (s)he liked. Consequently, the term "permanent resident" in art 21 of the Bill of Rights means a Hong Kong permanent resident within the meaning of the Immigration Ordinance, that is, a person with the right of abode in Hong Kong.
6. The definition of Hong Kong permanent resident in the Immigration Ordinance, which favours those who are "wholly or partly of Chinese race", could not be condemned as being racist, given that some concession has to be made to the ethnic group which forms the vast bulk of the indigenous population.
7. It was legitimate for the Government to ask an officer employed on overseas terms who is seeking to transfer to local terms to demonstrate his or her commitment to Hong Kong by becoming a permanent resident.

Accrued leave

8. The Government's decision that, when an officer transferred from overseas agreement terms to local agreement terms, the officer should take all accrued vacation leave before the commencement of the local agreement, was unlawful as it purported to abrogate accrued rights. The fact that the old agreement was an overseas agreement and not a local agreement was not a sufficient basis for treating an officer in this position differently from those officers who had renewed a local agreement.

Language requirement

9. Differential treatment on the basis of Chinese language ability of officers seeking to transfer from overseas terms to local terms could only be justified if it could be shown: (a) that sensible and fair-minded people would recognize a genuine need for some such distinction; (b) that the particular distinction made to meet that need was itself rational; and (c) that the distinction was proportionate to the need. The application of these tests of fairness, genuine need, rationality and proportionality in any given case called for a careful assessment of the circumstances of that case. A contention that a differential treatment was necessary because problems would otherwise arise will not be accepted unless it is clear that there really would be serious problems which would be very difficult (even if not impossible) to overcome.
10. There was no evidence which would warrant the view that the civil service would be unable to operate efficiently just because some officers on permanent and pensionable terms were, by reason of their lack of Chinese, unable or limited in their ability to stand in for some of their colleagues in the same rank. The decision of the Secretary for Civil Service (as contained in the relevant memorandum) that the inability of an overseas officer to communicate directly with people in Chinese may count against him in the determination of his application to transfer to local terms if there is any post at the same *rank* in which the holder is required to communicate directly with people in Chinese (even though the post occupied by the transferring officers is not required to communicate directly with people in Chinese), because the applicant should be capable of acting in other posts at the same rank, was too wide and contrary to art 21(c) of the Bill of Rights. *R v Man Wai Keung (No 2)* (1992) 2 HKPLR 164, [1992] HKCLR 207 and *Lee Miu Ling v Attorney General* (1995) 5 HKPLR 585, [1996] 1 HKC 124, followed.
11. If the Government's position were that an officer's lack of spoken Cantonese would be taken into account where officers in his post, as opposed to his rank, are normally expected to act in any post or posts which require spoken Cantonese (even if the officer did not need Chinese in his particular post), this would be lawful. As the Government had only applied the language criterion in this manner in practice, no actual application for transfer had in fact been dealt with unlawfully.

Demotion

12. The decision that an officer transferring from overseas terms to local terms would be offered appointment at one rank below his existing rank but without prejudice to his salary and conditions of service at his existing rank when there was a suitable local replacement who is promoted to the transferee's existing rank was unlawful. The decision, which dealt with what happened to an officer upon transfer, affected him as a local officer. He was demoted a rank not because of any lack of merit on his part, but because of his status as an ex-overseas officer. When the Government does not seek to defend the distinction on its own merits but rather on the basis that it was in effect forced upon the Government, the courts must be extremely vigilant. The Government's fear that the Legislative Council would oppose the arrangement indefinitely was unfounded; nor could the Legislative Council seek to legislate away any of the rights secured by the Bill of Rights.

No promotion if less than 12 months' service remaining on overseas contract

13. The decision not to allow officers on overseas terms with less than 12 months service before the expiry of their current overseas agreement to be considered for promotion upon transfer to local conditions was unlawful because the Secretary for the Civil Service had taken into account an irrelevant consideration, namely CSR 109(1)(a), which applied only to officers who were leaving the service within 12 months.

Restriction on promotion of transferee

14. If lowering the rank of a transferee was unlawful, then a restriction on promotion after transfer to local agreement for the duration of that agreement was also contrary to art 21(c) of the Bill of Rights and unlawful.

Extension to earlier contract deducted from period of new contract

15. The decision that when an officer transferred from an overseas agreement to one modelled on local terms, any extension granted to the previous overseas agreement for completion of naturalisation procedures and/or as a result of the Public Officers (Variation of Conditions of Service (Temporary Provisions) Ordinance would be deducted from the period of the agreement was lawful. There was no evidence that this decision was made for political reasons or in bad faith.

Opening-up scheme

16. The judge's approach of looking at various features of the implementation of the opening-up scheme as embodied in other decisions and considering whether those decisions were lawful or unlawful, was correct. The decision to introduce the scheme was on its face and in itself lawful.

Language under the opening-up scheme

17. The decision that in assessing the relative merits of those competing under the opening-up scheme a candidate's ability to perform effectively and efficiently without an interpreter would be a consideration if a substantial portion of officers in the same rank were required to communicate directly with people in Chinese, was unlawful for the same reason and subject to the same qualification as that applied to the decision which applied to officers applying for transfer from overseas terms to local terms under the modified agreement scheme. The distinctions between the two schemes were immaterial.

Ceiling on certain posts

18. To take into account a person's potential for filling Principal Official posts when deciding whether or not to promote him to a post bordering those posts was justifiable. While potential is not an entirely convincing criterion, an active policy of generally accelerating the promotion of persons with the potential for filling Principal Official posts because there happened to be too few of them occupying sufficiently senior posts could be justified. It was realistic to say that by and large local officers have significantly greater potential for becoming Chinese citizens, and hence becoming eligible for Principal Official posts, than overseas officers.
19. However, fixing a ceiling on the number of overseas officers who would be appointed to certain senior grades in the administrative service went too far and was a disproportionate restriction contrary to art 21 of the Bill of Rights.

Succession Posts Scheme

20. The Attorney General's decision to introduce a new Succession Posts Scheme to accelerate the promotion of local counsel to the senior directorate, which stops short of fixing a ceiling, could be justified by the fairness, genuine need, rationality and proportionality tests, even though this decision fell very near the borderline.

Definition of "local" and language requirement for permanent and pensionable terms of service

21. The proposed definition of a "local" and the proposed requirement of a pass in a Chinese subject in the Certificate of Education Examination for appointment to new permanent and pensionable agreements were no more than provisional proposals which were subject to a further consultation exercise; they were therefore not susceptible to judicial review. *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1994] 2 WLR 409, explained.

No transfer to permanent and pensionable terms under transitional arrangements and under the Opening-up Scheme

22. These decisions not to permit transfers to permanent and pensionable terms under the transitional arrangements and under the opening-up scheme carved out of the general body of officers on local agreement terms a small group consisting of those who had previously been on overseas agreement terms. They deprived that group of officers on local agreement terms of access to the permanent establishment which other officers on local agreement terms had in the normal way. This distinction cannot be justified and is contrary to art 21(c) of the Bill of Rights.
23. Parity, even if it be parity of deprivation, does not look much like discrimination. However, while parity of deprivation hardly ever constitutes discrimination, it went too far to say that parity of deprivation would never constitute discrimination.

Michael R Scott, representative of the appellant; Adrian Huggins QC and Joseph Fok (instructed by Wilkinson & Grist), for the respondents.

Editorial comment

This case is an important one in the courts' evolving jurisprudence on the equality and non-discrimination guarantees of the Bill of Rights. The Hong Kong courts have adopted Bokhary JA's formulation in *R v Man Wai-keung (No 2)* (1992) 2 HKPLR 164 at 179 as a statement of the test of discriminatory distinctions:

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

In addition to its application in the present case this test has been applied by the Court of Appeal in *Lee Miu-ling v Attorney General (No 2)* (1995) 5 HKPLR 585, [1996] 1 HKC 124 (CA). While its formulation is somewhat different from that adopted by the Human Rights Committee in *General comment 18(37)*, the two formulations appear largely to coincide in substance.

The important question is how stringently the test will be applied. In *Lee Miu-ling v Attorney General (No 2)* (1995) 5 HKPLR 585 at 593, Bokhary JA himself, when considering whether disparities in the sizes of functional

constituencies were discriminatory, put the question negatively rather than positively, asking whether sensible and right-thinking people would condemn the arrangement, rather than inquiring whether such people would recognise a genuine need for it and consider the measure rationally related and proportionate to that need.

In this judgment, however, Bokhary JA applies the more demanding scrutiny suggested by his formulation in *Man Wai-keung*, particularly in relation to the question of language requirements for particular civil service positions. In assessing whether they were justified, the court considered not whether such arrangements would be condemned by right-thinking people, but whether the differential treatment was closely tailored to a real need, drawing on a number of cases decided under the Sex Discrimination Act 1975 (UK). The judge refined his test in the context of the case:

Its application in any given case calls for a careful assessment of the circumstances of that case. If it is contended that a distinction is needed because problems would otherwise arise, then that contention must be scrutinized. And it will not be accepted unless it is clear that there really would be serious problems which would be very difficult even if not impossible to overcome. Human rights are involved here. And courts and tribunals must guard such rights by guarding themselves against being persuaded to make too much of problems put forward with a view to justifying distinctions in the way people are treated."

In an important holding the court found that the demotion of officers on overseas terms who wished to transfer to local terms was a violation of article 21. In this regard the court rejected the suggestion that the desire to avoid a ongoing confrontation with the Legislative Council over the issue -- that is, that the decision was "in effect forced upon it [the government]" -- was an inadequate justification for the measure.

In reaching this conclusion, the court was critical of what it considered to be the approach taken to this issue by Keith J at first instance. The court read Keith J's judgment ((5 HKPLR 490 at 549D) as suggesting that it was a choice open to the government to choose between an infringement of the Bill of Rights and avoiding a significant deterioration in the morale of local officers by not taking such a step, and that choosing the infringement would be lawful.

In *Hong Kong Polytechnic University v Next Magazine Ltd (No 2)* (1996) 7 HKPLR 41 at 50, Keith J clarified what he had meant; noting that his use of the term "infringement" had referred to a "prima facie infringement of the Bill of Rights" that is, a case of differential treatment that would be held to violate the Bill of Rights unless a proper justification for it was advanced. The judge also notes that in v 3 n4 of this *Bulletin* we had read his judgment in this way (as indeed we had). In any event, it is clear that both the Court of Appeal and Keith J are in fact in agreement on the analytical framework to be applied, even though they reached different conclusions on a couple of issues.

RIGHTS OF MINORITIES (ART 23, BILL OF RIGHTS; ART 27
ICCPR)

New Territories Land (Exemption) Ordinance (No 55 of 1994) ss
3(a), 10

*Rights of indigenous inhabitants of the New Territories –
Abolition of customary rule providing for male succession to
land – Whether a violation of rights of minority – Whether a
violation of rights to freedom of religion, and right to protection
of family*

Lau Wong-fat v Attorney General (1996) HCt, Action No A6016 of 1994,
18 November 1996, Cheung J [(1996) 7 HKPLR]

Prior to 1994 the law governing the inheritance of land in the New Territories was Chinese customary law, according to which the land of an indigenous inhabitant of the New Territories who died intestate passed to the nearest male relative (and women were not eligible to inherit on intestacy). In June 1994 the New Territories Land (Exemption) Ordinance (‘the Exemption Ordinance’) was enacted. The effect of this Ordinance was to abolish the customary rule of succession according to the male line and to substitute the normal rules governing succession on an intestacy.

On 21 June 1994 the plaintiff, a prominent male New Territories leader, commenced proceedings by way of action against the Attorney General. In his statement of claim he pleaded that the provisions of the Exemption Ordinance were inconsistent with art VII(3) of the Hong Kong Letters Patent,* in that they violated a number of rights guaranteed by the International Covenant on Civil and Political Rights as applied to Hong Kong. The plaintiff alleged that the Ordinance violated art 18 (freedom of thought, conscience and religion), art 23 (rights in respect of marriage and family), and art 27 (rights of minorities) [arts 15, 19 and 23 of the Hong Kong Bill of Rights]. He also argued that the Exemption Ordinance was inconsistent with art 40 of the Basic Law.

The Attorney General applied to strike out the plaintiff’s statement of claim on a number of grounds. First, he argued that the action challenging the constitutionality of the law was a public law action and should have been commenced by way of an application for judicial review in accordance with RSC 0 53; to proceed by way of action was an abuse of process. Secondly, he argued that the plaintiff’s statement of claim should be struck out because it disclosed no reasonable cause of action. Thirdly, he argued that the plaintiff did not have standing to seek declaratory relief of this nature. In response the plaintiff argued among other matters that, as the Attorney General had only objected to the form of the proceedings 2½ years after they had been commenced, the

* Now renumbered as Art VII(5) of the Letters Patent.

plaintiff had been prejudiced by the delay since the time for commencing judicial review proceedings had long since expired.

Held (striking out the plaintiff's writ and statement of claim):

1. The essence of the plaintiff's claim was a challenge to the constitutionality of the Exemption Ordinance, which was a public law challenge. The proceedings should therefore have been begun by way of an application for judicial review pursuant to O 53. The distinction drawn by O 53 between public law and private law actions was not a mere matter of form; there were important substantive differences and sound policy reasons underlying the distinction. *O'Reilly v Mackman* [1983] 2 AC 237 and *Lee Miu Ling v Attorney General (No 2)* (1995) 5 HKPLR 585 applied.
2. The plaintiff's statement of claim should be struck out. The decision to commence proceedings by way of action had been a considered one, and notwithstanding the fact that no step had been taken by the defendant to raise the issue following the Court of Appeal's decision in *Lee Miu Ling* (which had made clear that such a case was a public law one), the public interest required a speedy determination of the issue. Since the case was still only at the interlocutory stages 2½ years after the commencement of proceedings, to allow it to proceed would be to defeat the purpose of O 53.
3. Pleadings should only be struck out where it is plain and obvious that the plaintiff has no reasonable cause of action. The plaintiff had raised an arguable case that the Exemption Ordinance had infringed the rights of the New Territories inhabitants under art 27 of the ICCPR (art 23 of the Bill of Rights) and it would therefore not be proper to strike out the claim on this basis. It was not necessary to express a concluded view on the case based on arts 18 and 23 of the ICCPR (arts 15 and 19 of the Bill of Rights). *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548, *Tang Kai-chung v Tang Chik-shang* [1970] HKLR 276; *In re South Place Ethical Society* [1980] 1 WLR 1565 considered.
4. As an indigenous inhabitant of the New Territories, the plaintiff arguably had a legal right to leave his land to his male descendants without making a will, a right of which the Exemption Ordinance had deprived him. This was enough to make out an arguable case that he had standing to bring an action for a declaration that the Ordinance was unconstitutional. *Meadows Indemnity v The Insurance Corporation of Ireland Plc* [1989] 2 LIR 298 considered.
5. Since the Basic Law entered into force only on 1 July 1997, when it would fall to the courts of the Hong Kong SAR to interpret the provisions of the Basic Law which are within the autonomy of the Hong Kong SAR, the courts did not presently have jurisdiction to interpret and apply the Basic Law to cases before them.

Kenneth Chow and Kenneth Lee (instructed by K C Ho & Fong), for the plaintiff; Johnny Mok (instructed by the Attorney General's Chambers), for the defendant.

[Editorial note: On the question of standing in public law litigation, see *Association of Expatriate Civil Servants v Secretary for the Civil Service* (1996) 6 HKPLR 333.]

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APPENDIX A

COMMITTEE ON THE RIGHTS OF THE CHILD, CONCLUDING OBSERVATIONS ON THE INITIAL REPORT OF THE UNITED KINGDOM IN RESPECT OF HONG KONG (OCTOBER 1996)

Concluding observations of the Committee on the Rights of the Child

United Kingdom of Great Britain and Northern Ireland: Dependent Territories (Hong Kong)*

1. The Committee considered the initial report of the United Kingdom of Great Britain and Northern Ireland: Dependent Territories (Hong Kong) (CRC/C/11/Add.9) at its 329th to 331st meetings held on 2 and 3 October 1996 and adopted* the following observations:

A. Introduction

2. The Committee expresses its appreciation to the State party for the timely submission both of its report and written responses to the Committee's list of issues. The Committee welcomes the information provided by the delegation in its introductory statement and for the cooperative spirit which characterised the dialogue in the Committee.

3. The Committee notes the special situation facing Hong Kong as a territory over which there will be changes of sovereignty as Hong Kong will revert to the People's Republic of China on 1 July 1997. The Committee takes note that matters relating to the continued application of the Convention to Hong Kong, including reporting arrangements are the subject of discussion between the United Kingdom Government and the Chinese Government through the Joint Liaison Group.

B. Positive aspects

4. Note is taken of the adoption of the Parent and Child Ordinance enacted in 1993 which removes legal disadvantages which previously applied to illegitimate children. The Committee also welcomes the adoption of the

* UN Doc CRC/C15/Add.63 (30 October 1996).

* Adopted at the 343rd meeting of the Committee on 11 October 1996.

Disability Discrimination Ordinance aiming to promote the integration of persons with a disability into the community.

5. The Committee welcomes the various measures being taken by the Government to address the dangers of guardians leaving children unattended at home.

6. Information provided on the operation by the Social Welfare Department of a telephone hotline to receive, inter alia, reports on child abuse cases is noted with appreciation. The Committee also takes note of the measures taken to promote awareness of common adolescent health problems and the telephone hotline service of the Central Health Education Unit of the Department of Health which has been set up to deal with calls relating to this issue. The recruitment of secondary school students as Health Ambassadors in training programmes on common adolescent health matters is also noted with great interest. Equally, the launching of the new Student Health Service as programme designed to cater for the health needs of school children aged between 6 and 18 is warmly welcomed as is the establishment of a Health Care and Promotion Fund which is designed to step up efforts on health promotion and disease prevention.

7. The Committee notes with appreciation the initiatives taken to make hospitals more baby and child friendly, including through the measures being taken to improve paediatric ward facilities in hospitals and also to provide play areas for children in paediatric wards and areas for parents to stay with their children in hospital. The Committee further welcomes the improvements to the Comprehensive Social Security Assistance Scheme, particularly with respect to improving benefits available to recipients as a measure for the implementation of articles 26 and 27 of the Convention.

8. The Committee welcomes the information presented by the delegation of the five research projects on children's rights currently being undertaken by universities and funded by the Government.

9. The Committee encourages the establishment of an independent body to consider complaints against the police in Hong Kong.

C. Principal subjects of concern

10. With the extension of the Convention to Hong Kong in September 1994 further reservations to the Convention applicable to the territory of Hong Kong were deposited by the Government of the United Kingdom. It is a matter of regret to the Committee that the State party has not yet taken a decision to withdraw its reservations and that these reservations, particularly as they relate to the issues of working hours for children, of juvenile justice and of refugees, are still in place.

11. The Committee welcomes the adoption of the Bill of Human Rights Ordinance, it notes however, that this Bill is unentrenched. The Committee while also recognising that the Bill contains provisions recognising the two major human rights Covenants, the articles of which also apply to children, the Committee considers it regrettable that the Bill contains no specific reference to the Convention on the Rights of the Child and its principles and provisions. In light of this reality and given the positive steps taken by the Government to adopt the Equal Opportunities Act and establish the Equal Opportunities Commission, it is also a matter of regret to the Committee that a similar strategy as pursued for gender equality has not been adopted for the rights of the child. In view of the Government's commitment to regularly review legislation and policy in light of the principles and provisions of the Convention, the Committee is concerned that sufficient priority does not appear to have been given in the reviewing process to the possibility of establishing an independent monitoring body on the rights of the child and of pursuing an integrated, holistic and comprehensive approach to the adoption of legislation on the rights of the child.

12. While noting the positive steps taken to establish various mechanisms for the execution of policy and programmes for the implementation of the provisions of the Convention, the Committee remains concerned about the sufficiency of coordination activities between concerned governmental institutions so as to ensure that the rights of the child are given priority.

13. The Committee remains concerned that insufficient measures have been taken to ensure the fullest implementation of the general principles of the Convention, particularly those of its article 3 and 12, especially with respect to their incorporation in the choice, formulation and application of policy measures to promote and protect the rights of the child. In this regard it is noted that a system for integrating a child impact analysis into policy formulation and decision has not yet been put into place. It is also the view of the Committee that the persistence of certain attitudes relating to the perception of the role children should play in the family, school and society may be delaying the full acceptance of the implementation of the provisions of article 12 and 13 of the Convention in Hong Kong.

14. As regards the situation of illegal immigrant children from China and the issues it raises with respect to the question of families split between Hong Kong and China, the Committee is concerned that notwithstanding the increase in authorised permits arranged for these children and their families from 105 to 150, this is manifestly insufficient to meet the needs of the estimated 60,000 children currently in China who would have the right of abode in Hong Kong after 1 July 1996.

15. Despite the measures taken to address the problems of child abuse, neglect and the number of accidents affecting children these issues continue to give cause for concern. Equally, adolescent mental health issues, including the problem of youth suicide, is a matter of serious concern to the Committee.

16. The Committee is concerned about the apparent insufficiency of measures to encourage breast feeding. In this regard, the Committee notes that powdered baby's milk continues to be freely distributed in hospitals contrary to international guidelines on this matter. Equally, the extent to which the statutory provisions relating, *inter alia*, to maternity leave and conditions of employment for nursing mothers are compatible with the principles and provisions of the Convention remains a matter of concern to the Committee.

17. The Committee is of the view that insufficient attention appears to have been given to the implementation of article 29 of the Convention, particularly in respect of according the subject of human rights education the necessary status within the school curricula.

18. The broad question of the treatment of Vietnamese children in detention centres in Hong Kong deeply concerns the Committee. It is the observation of the Committee that these children have been and continue to be the victim of a policy designed to discourage further refugees coming into the area. While granting that the situation is a complex one, the policy of the continued detention of these children is incompatible with the Convention.

19. In addition, the Committee is of the view that the low age of criminal responsibility is not in conformity with the principles and provisions of the Convention and regrets the decision not to raise the age of criminal responsibility.

E. Suggestions and recommendations

20. The implementation of the Convention's principles and provisions requires that priority be given to children's issues, particularly in light of the principle of the 'best interests of the child' and on account of the fact that Governments have, in international fora, agreed to the principle of 'First Call for Children', including in the final document adopted by the World Conference on Human Rights. It is recommended, therefore, that in the formulation of policy options and proposals there should be an accompanying assessment of its impact on children so as to better advise decision makers in their choice of policy as to its effect on the rights of the child. It is also suggested that steps be taken to reflect and duly taken into account in national legislation the holistic and comprehensive approach to the implementation of the rights of the child as recommended by the Committee. The Committee recommends the establishment of an independent mechanism to specifically monitor the execution of Government policy in relation to the rights of the child. It is noted that an independent mechanism could also play an important role in informing the public and legislature of the actions being taken for the rights of the child. The Committee further recommends that children's rights be fully integrated in the discussions on issues concerning the transference of sovereignty over Hong Kong and be accorded high priority within the dialogue on these and related matters in the Joint Liaison Group.

21. The Committee encourages efforts to more closely involve civil society and non-governmental organizations in the monitoring and implementation of the Convention, including with respect to the development of a comprehensive policy strategy for children in Hong Kong.

22. As part of the on-going efforts to promote and protect the rights of the child, particularly in relation to the implementation of article 4 of the Convention, the Committee recommends that a further assessment be undertaken of the effectiveness of the present system of institutional coordination of policies and programmes on the rights of the child, especially in relation to child abuse. Moreover, the Committee would like to suggest that the collection and analysis of statistical data by age group be guided by the provisions of article 1 of the Convention. The Committee further suggests that consideration be given to undertaking or encouraging research on the development and use of indicators to monitor the progress of the implementation of all the principles and provisions of the Convention.

23. In connection with the on-going efforts to raise awareness of human rights and children's rights among the population of Hong Kong, the Committee suggests that consideration be given to the undertaking of further measures to inform the general public about the Convention on the Rights of the Child and to incorporate education about human rights and children's rights in training programmes for professionals. The Committee encourages the incorporation of questions on the awareness and understanding of the public of the Convention and its principles and provisions in future civic awareness surveys.

24. The Committee would like to suggest that further consideration be given to evaluating the effectiveness of measures to raise awareness for the prevention and combating of discrimination and promoting tolerance, particularly with respect to discrimination on the grounds of gender, ethnic origin, discrimination against disabled children and children born out of wedlock.

25. With respect to the implementation of article 12 of the Convention, the Committee encourages the undertaking of a study, from the perspective of children as bearers of rights, on the subject of children's participation in the family, school and society with a view to making recommendations on this matter.

26. The Committee recommends that further measures need to be taken to respond to the issue of illegal immigrant children from China, especially as regards the difficulties arising from families split between Hong Kong and China. It is the Committee's view that, in light of the best interests of the child, action should be taken on an urgent basis to reduce the waiting period for family reunification purposes and to raise the quota of permits and to consider other measures to deal with the problems that will arise in the future.

27. The Committee wishes to once again acknowledge the important efforts taken to deal with the question of child abuse. Notwithstanding this, the

Committee is of the view that the prevention of this violation of children's rights requires further attitudinal changes in society not only as regards the non-acceptance of corporal punishment, physical and psychological abuse but also with respect to greater understanding of respect for the inherent dignity of the child.

28. Despite the recent improvements in the number of social workers employed for dealing with child abuse cases, it is the view of the Committee that the case load of each professional may still be too high and the question of taking additional action to address such matters would deserve further study. The Committee encourages the efforts to accord high priority and pursue more intensely the establishment of day care centres in the community, including as a measure to prevent children being left unattended at home. In addition, the Committee encourages the initiative to ensure within future reviews of the Family Life Education Programme an assessment of its effectiveness in preventing child abuse.

29. With respect to improving the situation of disabled children, the Committee encourages the efforts being undertaken to integrate disabled children into regular schools, including through investment in structural changes to schools, the identification of such schools and support to the training of teachers to assist them in adjusting and adapting their teaching methods to the needs of disabled children.

30. The Committee recommends that a review be undertaken of the effectiveness of measures in place to support the policy of promoting and encouraging breast feeding. It is recommended that the question of the free distribution of powdered baby milk in hospitals as well as the compatibility of conditions of employment with the obligations laid down in the Convention to encourage breast feeding, should form an integral part of such a review.

31. The Committee suggests that a review be undertaken of the possible links between school pressures and adolescent health problems in view of the concerns raised on these issues during the Committee's discussion. The Committee also suggests that the reasons for suicides among youth and the effectiveness of programmes for the prevention of suicide among children might deserve further study.

32. The Committee recommends the incorporation of human rights education, including education about the Convention on the Rights of the Child as a core curriculum subject in all schools. The Committee notes that this would require that sufficient time would be allocated to this subject in the school timetable. The Committee also wishes to suggest that an evaluation of human rights awareness raising and education be undertaken in the future to determine its effectiveness in equipping children with tools for life, in encouraging their decision making and ability to think analytically from the perspective of human rights. The Committee also wishes to recommend that greater priority be accorded to the participation of children in school life, in the spirit of article 12 of the Convention, including in discussions about disciplinary

measures and curricula development. Ways and means of ensuring the fuller implementation of article 31 of the Convention also appears to deserve further study.

33. As regards the situation of the situation of Vietnamese children in detention, the Committee recommends that an evaluation of present and previous policy on this matter be undertaken to ensure that any errors made are not repeated in the future. The Committee recommends that for the remaining children in detention a solution to their situation must be found in light of the principles and provisions of the Convention. It is the view of the Committee, therefore, that measures must be taken immediately to ensure a marked improvement in the conditions of their detention and other measures to protect these children in the future must be put in place.

34. The Committee recommends that a review of legislation in relation to the issue of the age of criminal responsibility be undertaken with a view to raising this age in light of the principles and provisions of the Convention.

35. The Committee recommends wide public distribution and dissemination of the State party report, the summary records of the discussion in the Committee and the present concluding observations.

36. The Committee recommends that the Government prepare a progress report on the measures taken to give effect to the suggestions and recommendations contained in the present concluding observations by the end of May 1997.

APPENDIX B

**HUMAN RIGHTS COMMITTEE, CONCLUDING
OBSERVATIONS ON THE SUPPLEMENTARY REPORT OF
THE UNITED KINGDOM IN RESPECT OF HONG KONG
UNDER THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS (OCTOBER 1996)**

**Concluding Observations of the Human Rights Committee United
Kingdom of Great Britain and Northern Ireland (Hong Kong)***

1. At its 1535th and 1536th meetings, held on 23 October 1996, the Human Rights Committee considered a report submitted by the United Kingdom of Great Britain and Northern Ireland relating to Hong Kong (CCPR/C/117) in compliance with a special decision of the Committee (CCPR/C/79/Add.57). The Committee subsequently adopted¹ the following observations:

A

2. The Committee welcomes the presence of a high level delegation which included a significant number of officials of the Hong Kong Government. It expresses its appreciation in the representatives of the State party for the high quality of the report, and the detailed and frank answers provided by the delegation in response to the written and oral questions. The Committee notes with satisfaction that this information enabled it to engage in a highly constructive dialogue with the State party.

3. The Committee also welcomes the presence of a significant member of non-governmental organizations from Hong Kong. The information provided by these NGOs greatly assisted the Committee in its understanding of the human rights situations in Hong Kong.

B

4. At its 1453rd meeting, on 20 October 1995, the Committee² envisaged issues in connection with reporting obligations on the part of Hong Kong after the transfer of sovereignty to the People's Republic of China on 1 July 1997. It recalled that, in dealing with cases of dismemberment of States parties to the International

* UN Doc CCPR/C/79/Add.69 (8 November 1996)

¹ At its 1556th meeting (Fifty-eighth session), on 6 November 1996.

² Statement by the Chairperson on behalf of the Human Rights Committee (read out by the Chairman at the Committee's 1453rd meeting on 20 October 1995) contained in document CCPR/C/79/Add. 57).

Covenant on Civil and Political Rights, it had taken the view that human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered into by the predecessor State. Once the people living in a territory enjoy the protection of the rights under the International Covenant on Civil and Political Rights, such protection cannot be denied to them merely by virtue of dismemberment of that territory or its coming under the sovereignty of another State or of more than one State.³

5. The Committee reiterates that the existence and contents of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China make it unnecessary for the Committee to rely solely on the foregoing jurisprudence as far as Hong Kong is concerned. In this regard, the Committee pointed out that the parties to the Joint Declaration have agreed that all provisions of the Covenant as applied to Hong Kong shall remain in force after 1 July 1997. These provisions include reporting procedures under article 40: since the reporting requirements under article 40 will continue to apply, the Human Rights Committee expects that it will continue to receive and review reports submitted in relation to Hong Kong.

6. Accordingly, the Committee is ready to give effect to the intention of the parties to the Joint Declaration as far as Hong Kong is concerned, and to cooperate fully with the parties to the Joint Declaration to work out the necessary modalities to achieve these objectives.

C. Suggestions and recommendations

7. The Committees urge the United Kingdom of Great Britain and Northern Ireland (Hong Kong) Government to take all necessary steps to ensure effective and continued application of the provisions of the Covenant in the territory of Hong Kong in accordance with the Joint Declaration and the Basic Law.

8. The Committee reminds the United Kingdom of Great Britain and Northern Ireland Government of its continuing responsibility to ensure to the people of Hong Kong the rights protected by the Covenant and to carry out its obligations under the Covenant including in particular article 40; in that regard, it requests the Government of the United Kingdom to report on the human rights situation in the territory of Hong Kong up to 30 June 1997.

³ See document CCPR/C/SR.1178/Add.1, CCPR/C/SR.1200, CCPR/C/SR.1201 and CCPR/C/SR 1202.

APPENDIX C

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, CONCLUDING OBSERVATIONS ON THE INITIAL REPORT OF THE UNITED KINGDOM IN RESPECT OF HONG KONG (DECEMBER 1996)*

Concluding observations of the Committee on Economic, Social and Cultural Rights

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (HONG KONG)

1. The Committee considered, at its fifteenth session, the third periodic report submitted by the United Kingdom of Great Britain and Northern Ireland on articles 1 to 15 of the Covenant as applied in Hong Kong (E/1994/104/Add.10). The Committee considered this report at its 39th, 41st, 42nd, and 44th meetings held on 26, 27 and 28 November 1996. After having considered the report, the Committee adopted at its 55th meeting held on 6 December 1996, the following concluding observations:

Introduction

2. The Committee notes with satisfaction that the report submitted by the State party was prepared in accordance with the Committee's guidelines. It welcomes the large and high-level delegation composed of representatives from the United Kingdom of Great Britain and Northern Ireland and from Hong Kong. The information submitted in the report and that provided by the delegation in reply to both written and oral questions enabled the Committee to obtain a broad view of the extent of the State party's compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights. The Committee also expresses its appreciation for the written replies to its list of questions (E/C.12/Q/HON.1). The Committee notes with satisfaction that this information enabled it to engage in a constructive dialogue with the State party, particularly concerning the applicable law. However, it is regretted that a number of the Committee's questions relating to reports of what actually happens in practice were not answered.

3. The Committee also welcomes the presence of a significant number of non-governmental organisations from Hong Kong. The information provided by

* UN Doc E/C.12/1/Add.10 (6 December 1996)

these non-governmental organisations greatly assisted the Committee in its understanding of the human right situation in Hong Kong.

A. Positive aspects

4. The Committee notes with satisfaction that both the Sino-British Joint Declaration and the Basic Law affirm that the Covenant will continue to apply to Hong Kong after the resumption of sovereignty over the territory by the People's Republic of China as at 1 July 1997.

5. The Committee notes that the Government of Hong Kong has established conditions for a high level of economic prosperity.

6. The Committee welcomes the fact that non-governmental organizations, members of the Legislative Council and other interested parties have had an opportunity to contribute their comments on topics included in the report. The Committee lauds efforts made by the Hong Kong Government to promote public awareness of the Covenant, and to make available to the public at large a substantial number of copies of the report, in English and Chinese, both in printed form and on the Internet.

7. The Committee welcomes the enactment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance, in July and August 1995, respectively. It also notes with interest the establishment of the Equal Opportunity Commission in May 1996.

8. The Committee notes that the housing policy of the Government of Hong Kong endeavours to elaborate a long-term programme for public housing construction and to encourage private-sector housing construction so that adequate and affordable housing could be available to all residents of Hong Kong.

B. Factors and difficulties impeding the implementation of the Covenant

9. The Committee notes that the uncertainties arising from the resumption of sovereignty over Hong Kong by the People's Republic of China have clearly caused some difficulties on the part of the Hong Kong Government, in undertaking measures to its maximum capacity, towards the protection and promotion of the economic, social and cultural rights of its constituents.

10. The Committee notes that constraints arising from limited habitable land in Hong Kong and from the significant influx of immigrants into its territory, may result in difficulties in implementing certain articles of the Covenant. However it is also noted that Hong Kong has considerable resources at its disposal to overcome most problems posed by these obstacles.

11. The Committee notes that while the Government of Hong Kong has established conditions for a high level of economic prosperity, while the latest

figures on the Gross Domestic Product per capita in Hong Kong show a figure of US\$23,500 which is the fourth highest in the world, and while the Hong Kong Government has accommodated reserves, as of March 1996, of US\$20 billion, Hong Kong has one of the most uneven distributions of income in the world, where 20 per cent of the population take up 50 percent of the national wealth, but 250,000 households, i.e. 11 percent of the population live in absolute poverty, and 850,000 citizens live under the poverty line.

C. Principal subjects of concern

12. The Committee deeply regrets that the recommendations expressed in its concluding observations in 1994 have largely been ignored by the Hong Kong Government.

13. The Committee is concerned that the modalities for the continued submission of reports by Hong Kong after the resumption of sovereignty by the People's Republic of China are still at the state of negotiation and have not been resolved to date.

14. The Committee expresses its disappointment that the principal subjects of concern listed in its concluding observations in 1994 remain unresolved. The Committee reiterates its serious concern on the following issues.

- (a) The provisions of the International Covenant on Economic, Social and Cultural Rights continue to be excluded from the domestic law of Hong Kong, which already contains the provisions of the International Covenant on Civil and Political Rights.
- (b) The low level of awareness among the judiciary of international human rights law in general and of the International Covenant on Economic, Social and Cultural Rights in particular.
- (c) The Hong Kong Government continues to object to the establishment of a human rights commission.
- (d) The number of split families continues to grow at an alarming rate.
- (e) The repressive and discriminatory treatment of Vietnamese refugees in Hong Kong, particularly those who refuse repatriation to Vietnam.
- (f) The 'two-week rule' imposed upon foreign domestic helpers upon expiration of their contract continues to hinder their enjoyment of economic, social and culture rights.
- (g) The phenomenon of sub-human cage-homes remains a blight in the housing situation in Hong Kong.
- (h) The level of social security payments available to the elderly does not allow them to enjoy their rights under the Covenant.

15. The Committee is concerned that the Sex Discrimination Ordinance does not protect those individuals whose right to work is violated by inappropriate account being taken of their private sexual lives. The Committee further considers it a serious matter that women above the age of 30 suffer discrimination in employment.

16. The Committee regrets the "step-by-step" approach according to which legislation for the protection of vulnerable minorities is adopted primarily on the basis of public opinion surveys, that is, based on majority views.

17. The Committee is concerned that the principle of equal pay for work of equal value as elaborated in the non-binding Code of Practice of the Sex Discrimination Ordinance, has not been reflected in Hong Kong labour law, thus giving rise to discrimination against women.

18. The Committee expresses its concern over the unfavourable status of Hong Kong residents who possess British Overseas reside [sic], but who are not entitled to citizenship in any British territory after 1997, although allowed to reside in Hong Kong under Chinese law even if they are not Chinese citizens.

19. The Committee is concerned that in the field of employment, the Sex Discrimination Ordinance provides relatively insufficient remedies due to the absence of provisions on reinstatement and full recovery compensation, while both of these remedies are foreseen in the Disability Discrimination Ordinance.

20. The Committee expresses its concern about the extent of unemployment or underemployment as a result of rapid economic restructuring. In this connection, the Committee is particularly concerned about the significant numbers of women who are thereby forced out of the labour force and must sometimes resort to precarious activities.

21. The Committee is concerned that Hong Kong labour legislation does not provide protection against unfair dismissal, nor does it provides for a limitation on hours of work, for a paid weekly rest period and compulsory overtime pay. This situation is a major hindrance to the enjoyment of just and favourable conditions of work.

22. The Committee expresses its concern that trade union rights are unduly restricted in Hong Kong. In particular, the Committee is of the view that restrictions applied to affiliation with international trade union organizations, the prohibition on the formation of confederations of trade unions from different industries, as well as the legal right of employers to dismiss persons involved in strike activities, are incompatible with the Covenant.

23. The Committee expresses its deep concern that there is no comprehensive mandatory old-age social security scheme in Hong Kong and that approximately sixty per cent of the population is not protected by any public or private pension plans.

24. The Committee expresses its concern that large numbers of individuals and families who are eligible for comprehensive social security assistance (CSSA) do not apply for it, either because they are not aware of the CSSA, because they fear the cultural stigma attached to the concept of welfare assistance, or because they are discouraged from applying by certain practices of the authorities which are not in conformity with Hong Kong law, like the requirement of children's consent before parents may receive CSSA benefits.

25. The committee is concerned that CSSA recipients are not granted reimbursement for expenses for traditional medicine, given the fact Hong Kong residents frequently use traditional medicine and that Hong Kong courts grant such reimbursements in civil liability actions.

26. The Committee reiterates its deep concern over the growing numbers of split families in Hong Kong. The Committee is of the view that the Hong Kong Government has an obligation to ensure that the criteria applied in deciding on those eligible for legal migration into Hong Kong, are consistent with the provisions of the Covenant.

27. The Committee expresses its concern at the absence of a holistic child policy for the protection of children from all forms of abuse.

28. The Committee is deeply concerned that the standard of living of elderly singletons in the lowest twenty per cent income group who are not receiving CSSA, is lower than that of the CSSA recipients. The Committee notes that many of these singletons live in substandard accommodation.

29. The Committee regrets that the Hong Kong Government has not given any clear indication of a time frame within which it expects to eradicate the deplorable phenomenon of cage homes. The Committee is particularly concerned over the inadequate housing conditions extended by the Hong Kong Government to new immigrants from China resulting in many of them living in deplorable conditions.

30. The Committee expresses its concern over the inadequate care and protection of the mentally ill and disabled in Hong Kong. In particular the Committee notes with concern the apparent lack of initiative on the part of the Hong Kong Government to undertake public education to combat discrimination against those with mental disabilities.

31. The Committee takes note with concern that, while the Hong Kong Government has adopted an educational policy in relation to children of immigrant families from China, it has not undertaken sufficient efforts to ensure school placements for these children and to protect them from discrimination.

D. Suggestions and recommendations

32. In the light of the terms of the Sino-British Joint Declaration and of the recent practice of UN human rights treaty bodies, the Committee is of the firm view that, following the resumption of sovereignty over Hong Kong by the People's Republic of China, the People's Republic of China is under an obligation not only to ensure the enjoyment in the Hong Kong Special Administrative Region of the rights guaranteed by the Covenant but also to submit reports pursuant to Article 16 of the Covenant. The Committee therefore considers that it is competent to examine the implementation of the Covenant after 1 July 1997, on the basis of reports or such other material as will be before the Committee, and reiterates its willingness to receive reports in respect of the Hong Kong Special Administrative Region from the People's Republic of China or, if the authorities so decide, directly from the Hong Kong Special Administrative Region. The Committee encourages all parties concerned to work out as soon as possible the modalities of submitting such reports and to inform the Committee of these modalities. The Committee is convinced, however, that the best way to resolve this particular issue would be for the People's Republic of China herself to become a party to the International Covenant on Economic, Social and Cultural Rights.

33. The Committee urges the Hong Kong Government to consider with the utmost care the Committee's suggestions and recommendations embodied in its concluding observations of 1994, as well as those that follow, and to undertake whatever relevant concrete measures may be necessary.

34. The Committee strongly urges the Hong Kong Government to take every possible measure to develop a fair and open one-way permit approval mechanism, in order to facilitate the rapid family reunification.

35. The Committee recommends that the Government should undertake more effective measures for the retraining of those who have lost employment or are underemployed as a result of economic restructuring.

36. The Committee urges the amendment of the Sex Discrimination Ordinance to include provisions on reinstatement in employment as well as the removal of the current maximum amount for recovery compensation.

37. The Committee recommends the Government to lift repressive provisions and limitations in relation to trade union federations including the prohibition to establish international affiliation.

38. The Committee recommends a review of government policy in relation to unfair dismissal, minimum wages, paid weekly rest time, maximum hours of work and overtime pay rates, with the end in mind to bring such policy into conformity with the government's obligations set forth in the Covenant.

39. The Committee strongly recommends that the Hong Kong Government should reconsider the adoption of a universal, comprehensive retirement protection

scheme which seeks to ensure that disadvantaged groups are accorded full access to social security.

40. The Committee reiterates in the strongest possible term its recommendation that the Hong Kong Government should undertake as a matter of high priority the total eradication of cage-homes.

41. The Committee urges the Hong Kong Government to review the 7-year residence rule applied before providing housing to immigrant families from China, with a view to ensuring their right to adequate housing.

42. The Committee requests that within 45 days it receive a comprehensive response to its inquiry regarding three Vietnamese refugees who were denied medical and dental treatment, mainly for refusing to voluntarily return to Vietnam.

43. The Committee strongly recommends that the Hong Kong Government review the situation concerning persons with mental illness and disability and to ensure that their rights under the Covenant are fully protected.

44. The Committee recommends that measures to integrate children of immigrant families from China, into the general education system be implemented with maximum possible attention from government authorities.

45. The Committee recommends that these concluding observations be made widely available in English and Chinese within Hong Kong and that copies be provided by the Government to all members of the judiciary and to the relevant echelons of the public service.

APPENDIX D

RESERVATIONS ENTERED BY THE UNITED KINGDOM UPON THE EXTENSION TO HONG KONG OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (OCTOBER 1996)

Reservations entered on behalf of Hong Kong

GENERAL

(a) The United Kingdom on behalf of Hong Kong understands the main purpose of the Convention, in the light of the definition contained in Article 1, to be the reduction, in accordance with its terms, of discrimination against women and does not therefore regard the Convention as imposing any requirement to repeal or modify any existing laws, regulations, customs or practices which provide for women to be treated more favourably than men, whether temporarily or in the longer term. Undertakings by the United Kingdom on behalf of Hong Kong under Article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly.

(b) The right to continue to apply such immigration legislation governing entry into, stay in and departure from Hong Kong as may be deemed necessary from time to time is reserved by the United Kingdom on behalf of Hong Kong. Accordingly, acceptance of Article 15(4), and of the other provisions of the Convention, is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of Hong Kong to enter and remain in Hong Kong.

(c) In the light of the definition contained in Article 1, the United Kingdom's extension of its ratification to Hong Kong is subject to the understanding that none of its obligations under the Convention in Hong Kong shall be treated as extending to the affairs of religious denominations or orders.

(d) Laws applicable in the New Territories which enable male indigenous villagers to exercise certain rights in respect of property and which provide for rent concessions in respect of land or property held by indigenous persons or their lawful successors through the male line will continue to be applied.

SPECIAL ARTICLES

Article 9

The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change, or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of Article 9 on behalf of Hong Kong shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.

Article 11

The United Kingdom on behalf of Hong Kong reserves the right to apply all Hong Kong legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement (including retirement on grounds of redundancy) whether or not derived from a social security scheme.

This reservation will apply equally to any future legislation which may modify or replace such legislation, or the rules of pension schemes, on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention in respect of Hong Kong.

The United Kingdom on behalf of Hong Kong reserves the right of apply any non-discriminatory requirement for a qualifying period of employment for the application of the provisions contained in Article 11(2).

Article 15

In relation to Article 15, paragraph 3, the United Kingdom on behalf of Hong Kong understands the intention of this provision to be that only those terms or elements of a contract or other private instrument which are discriminatory in the sense described are to be deemed null and void, but not necessarily the contract or instrument as a whole.

APPENDIX E

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO 25 (57) (ART 25 OF THE COVENANT)

Human Rights Committee, General comment adopted under Article 40 of the International Covenant on Civil and Political Rights

General Comment No. 25 (57)^{1 2}

1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.

2. The rights under article 25 are related to, but distinct from, the right of peoples to self determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.

3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State) article 25 protects the rights of "every citizen". State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalisation may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents,

¹ Adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996.

² The number in parenthesis indicates the session at which the general comment was adopted.

enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.

4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.

5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.

6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 25 and no unreasonable restrictions should be imposed.

7. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws which are in accordance with paragraph (b).

8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

9. Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as

candidates for election. Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors. The rights and obligations provided for in paragraph (b) should be guaranteed by law.

10. The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.

11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.

12. Freedom of expression, assembly and association are also essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice. States parties should indicate in their reports the manner in which the difficulties highlighted in this paragraph are dealt with.

13. State reports should describe the rules governing the right to vote, and the application of those rules in the period covered by the report. State reports should also describe factors which impede citizens from exercising the right to vote and the positive measures which have been adopted to overcome these factors.

14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be reasonable and objective. If conviction of an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

15. The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of their candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office. The grounds for such exclusion should be reasonable and objective.

16. Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions, (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph (b). The grounds for the removal of elected office holders should be established by laws based on reasonable and objective criteria and incorporating fair procedures.

17. The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant political opinion may not be used as a ground to deprive any person of the right to stand for election.

18. State reports should describe the legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. Reports should describe conditions for nomination, e.g., age limits, and any other qualifications or restrictions. State reports should indicate whether there are restrictions which preclude persons in public-service positions (including positions in the police or armed services) from being elected to particular public offices. The legal grounds and procedures for removal of elected office holders should be described.

19. In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any one candidate or party. The results of genuine elections should be respected and implemented.

20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measure to guarantee the requirement of the secrecy of the vote during election, including absentee voting, where such a system exists. It implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.

21. Although the Covenant does not impose any particular electoral system, each system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.

22. State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. Reports should describe the electoral system and explain how the different political views in the community are represented in elected bodies. Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law. The practical implementation of these guarantees in the period covered by the report should be explained.

23. Subparagraph (c) deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.

24. States reports should describe the conditions for access to public service positions, any restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes. Reports should also indicate how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent.

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press able to comment on public issues without censorship or restraint and to inform public opinion. It also requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

26. The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.

27. Having regard to the provision of article 5, paragraph 1, of the Covenant, any rights recognized and protected by article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.

APPENDIX F

FOURTEENTH PERIODIC REPORT IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

CONTENT

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THE DEPENDENT TERRITORIES

INCORPORATION OF THE CONVENTION: GENERAL COMMENT (AN EXTRACT FROM THE UNITED KINGDOM GOVERNMENT'S METROPOLITAN REPORT)

In paragraph 10 of its concluding observations on the United Kingdom's 12th periodic report under the Convention, the Committee expressed its concern that the Convention had not been incorporated in the domestic legislation of the dependent territories and could not be invoked in the courts, and in paragraph 15 it accordingly recommended that the Convention should be so incorporated. That recommendation was discussed, in terms expressly applicable to all the United Kingdom's dependent territories, in paragraphs 2-4 of the United Kingdom's 13th periodic report in respect of Hong Kong (CERD/C/263/Add.7 (Part II)), and the United Kingdom draws the Committee's attention, for the purposes of the present report, to the explanation of the position that was given there. It remains valid for all the territories covered by this Part of the present report. However, the Committee's attention is particularly drawn to what was said in paragraph 4 of the 13th report cited above. In that context, the United Kingdom Government, having regard to the Committee's views, has invited the Governments of all the dependent territories to consider the introduction of legislation substantially corresponding to the United Kingdom's own Race Relations Act 1976, as amended, and for that purpose has recently furnished them with draft model legislation, on the lines of the 1976 Act, which could be adapted by each of the territories to meet its own particular circumstances. It will be seen from the individual reports below in respect of the several territories that many of their Governments have indicated their readiness in principle to proceed with the preparation of such legislation and that some of them have indeed completed or almost completed that process.

FOURTEENTH PERIODIC REPORT IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

INTRODUCTION

1. In this report, which, as recommended by the Committee in its concluding observations on the United Kingdom's 13th periodic report, is an updating report and addresses all the issues raised in those observations, the United Kingdom's 13th periodic report in respect of Hong Kong is referred to as "the previous report".

STUDY OF RACIAL DISCRIMINATION

2. In its concluding observations on the previous report, the Committee described the proposal to study racial discrimination "as a constructive means of determining the extent of problems in the area of racial discrimination." The Hong Kong Government has secured the necessary resources and aims to start work on the study later in 1996. Like earlier studies on sex and age discrimination, this will entail a comparative examination of experience and practice in overseas jurisdictions and extensive consultation within the local community. The purpose will be to assess whether problems exist in this area and, if so, how best to address them. The Hong Kong Government aims to complete work on the study and to report its findings to the Legislative Council in the 1996/97 legislative session.

ETHNIC COMPOSITION OF THE POPULATION

3. In its concluding observations on the previous report, the Committee expressed concern that the 1991 Census did not include questions which would help determine the ethnic and racial composition of the population. It recommended that efforts be made to determine that composition.

4. This recommendation was made too late for the Hong Kong Government to take it into account for its 1996 By-census which started on 16 March 1996. Like the main (1991) Census, the By-census included questions about place of birth, nationality and usual language. It did not include direct questions about racial or ethnic origin because of the Hong Kong Government's concern that such questions might give rise to unease amongst some sectors of the community. However, the Hong Kong Government notes that, despite similar concerns, the United Kingdom Government felt able to include such questions in its own most recent Census. The Hong Kong Government will

accordingly take account of the Committee's recommendation when preparing for the next Census.

LEGISLATION AGAINST RACIAL DISCRIMINATION

5. In its concluding observations on the previous report, the Committee expressed concern that the Bill of Rights Ordinance (BORO) did not protect persons in Hong Kong from racial discrimination to which they might be subjected by private persons, groups or organisations. It recommended that the BORO be amended to extend its provisions on discrimination to acts committed by such persons, groups or organisations.

6. The Hong Kong Government will examine the need for further legislation in the field of racial discrimination in its forthcoming study of that topic. Should the study indicate that there are real problems in this area, the Hong Kong Government will consider the need for legislation and other measures directed specifically at those problems - as it did in respect of discrimination on the grounds of sex and disability. It remains strongly of the view that the ordering of relations between private persons is better achieved through such specifically focussed legislation or other measures specifically aimed at particular problems than through the broad provisions of the BORO. The traditional and primary function of bills of rights, such as the BORO, is to protect citizens against the infringements of their rights by the State. Where what is involved is the possibility of such infringements being committed by private persons or groups, the Hong Kong Government considers it more productive to examine, individually and in concrete terms, the different ways in which such infringements occur, to consult the public on its findings and - taking into account both the findings and the public response to the consultation - to adopt the measures most appropriate for dealing with any problems that have been shown to exist.

7. In July 1996 a Member of the Legislative Council introduced a Member's Bill against racial discrimination. The Legislative Council has not yet embarked on a substantive debate of this Bill. The Hong Kong Government is of course firmly committed to the principle of equal opportunities for all and opposes discrimination on any grounds whatever. But, for the reasons already explained and conscious that the proposed legislation would have far-reaching implications for the community as a whole and for private persons in many aspects of their daily lives, it is convinced that there is a need for the community thoroughly to examine and to understand the issues - and the nature of any difficulties - before reaching conclusions on what measures, or combination of measures will best address whatever problems have been identified. The forthcoming study of racial discrimination reflects that conviction.

NATIONALITY: ETHNIC MINORITIES OF SOUTH ASIAN ORIGIN

8. In its concluding observations on the previous report the Committee noted the United Kingdom Government's assurances that no member of the ethnic minority community in Hong Kong with solely British nationality would be left stateless following the transfer of sovereignty, but the Committee expressed concern that neither the status of British National (Overseas) (BN(O)) nor that of British Overseas citizen (BOC) entitled holders to the right of abode in the United Kingdom. The Committee contrasted this with 'the full citizenship status conferred on a predominantly white population living in another dependent territory' and noted 'that most of the persons holding BN(O) or BOC status are Asians and that judgments on applications for citizenship appear to vary according to the country of origin, which leads to the assumption that this practice reveals elements of racial discrimination'. The Committee recommended that the question of the citizenship status of these persons be reviewed to ensure that their human rights were protected and that they were not 'discriminated against as compared with residents of other former colonies of the United Kingdom.'

9. The Committee can be assured that neither race, ethnic origin nor colour is a factor affecting decisions about British citizenship or the right of abode in the United Kingdom. Where a person born outside the United Kingdom acquires British citizenship, it is because he or she satisfies the criteria (establishing a relevant connection with the United Kingdom) laid down by the British Nationality Act 1981 or the particular criteria laid down in subsequent special legislation such as the British Nationality (Hong Kong) Act 1990. These criteria govern his or her rights irrespective of race, ethnic origin or colour - and the legislation in fact unambiguously excludes discrimination of that kind. As was explained in the previous report, section 44(1) of the 1981 Act provides that any discretion vested in the Secretary of State or a Governor shall be exercised without regard to the race, colour or origin of any person who may be affected by its exercise. Large numbers of Asians, indeed large numbers of persons of all races, ethnic origins and colours, have acquired British citizenship under these measures and, with it, the right of abode in the United Kingdom.

10. As stated in the previous report, the 1990 Act provides for up to 50,000 principal applicants resident in Hong Kong to be granted British citizenship. Spouses and minor children may be included in the applications. The purpose of the Act (which was essentially to give key personnel the confidence to remain in Hong Kong up to and after July 1997) was explained in the previous report. To date, over 130,000 persons in Hong Kong, mainly Chinese but including an estimated 700 members of the ethnic minorities, have in this way acquired British citizenship.

11. Most of the remainder of the British nationals in Hong Kong are at present British Dependent Territories citizens (BDTCs). They hold that status under the 1981 Act mostly by birth or residence in the territory and their position in this respect is the same as that of the inhabitants of all other United Kingdom dependent territories. The BDTC status of persons who enjoy it by

virtue of their connection with Hong Kong will of course automatically lapse once Hong Kong ceases to be a United Kingdom dependent territory on 1 July 1997. However, the Hong Kong (British Nationality) Order 1986, as amended by the Hong Kong (British Nationality) (Amendment) Order 1993 - both Orders being made under the Hong Kong Act 1985 - established machinery whereby any such persons might apply (before the respective relevant dates specified in the Order) for the successor status of British National (Overseas) (BN(O)) and, on making such application, would receive that status as of right: the majority of BDTCs have already done this. Those who have not acquired the status of BN(O)s by 1 July 1997 will automatically become British Overseas citizens (BOCs) on that date if they would otherwise be stateless.

12. Under Hong Kong law, persons who are currently BDTCs by virtue of their connection with the territory - and this of course includes the members of the ethnic minorities - have the right of abode in Hong Kong. Under Chapter XIV of Annex I to the Sino-British Joint Declaration and Article 24 of the Basic law of the future Hong Kong Special Administrative Region (HKSAR), persons who have the right of abode only in Hong Kong immediately before 1 July 1997 will continue to enjoy that right thereafter, as permanent residents of the HKSAR. This has been expressly reiterated in an assurance given by the Chinese Foreign Minister, Vice-Premier Qian Qichen, to the United Kingdom Secretary of State for Foreign and Commonwealth Affairs during the latter's recent visit to China. For the members of the ethnic minorities, most of whose families have lived in Hong Kong for generations, Hong Kong is their home and the place where they want to remain; and the provisions and arrangements just described constitute a guarantee of their right and ability to do so. But it is to be noted that the United Kingdom Government has given an added assurance that if, against all expectations, any person who was solely a British national came under pressure to leave Hong Kong, the United Kingdom Government of the day would consider with considerable and particular sympathy his or her case for admission to the United Kingdom. This assurance has been further strengthened by a statement made by the Prime Minister of the United Kingdom in Hong Kong in March 1996. He then gave the explicit undertaking that any member of the ethnic minorities, being solely a British national, who came under pressure to leave Hong Kong would be guaranteed admission to the United Kingdom.

13. The reference in the Committee's concluding observations on the previous report to the citizenship status enjoyed by "a predominantly white population living in another dependent territory" is taken to be a reference to the positions as regards Gibraltar or the Falkland Islands, both of which were alluded to in the course of the examination of that report. Both of those territories, however - and of course they remain colonies of the United Kingdom, so that their inhabitants continue, in general, to enjoy the status of BDTCs - have special features, as explained below, which have necessitated certain special citizenship arrangements and which make it impossible to draw meaningful comparisons between what has been done in those cases and what has been done for the members of the ethnic minorities in Hong Kong - except to note that in none of the cases is race a relevant factor.

14. In both Gibraltar and the Falkland Islands - as in the case of all United Kingdom dependent territories: see above - the basic form of British nationality that is acquired under the 1981 Act by virtue of a connection with the territory is the status of BDTC. The special arrangements for those two territories are additional to those for the acquisition of BDTC status, and neither form of arrangements turns in any way on, or pays any regard to, considerations of race, ethnic origin or colour: see section 44(1) of the 1981 Act (paragraph 9 above) which applies to both sets of arrangements. In the case of Gibraltar, the special arrangements flow directly from Gibraltar's geographical position, as a result of which Gibraltarians are considered as "nationals of the United Kingdom" for the purposes of the 'Community Treaties' of the European Union and accordingly have the right under the Treaties to move freely within the countries of the European Union and, in particular, to take up residence in the United Kingdom itself. It is simply to reflect and give effect to this that section 5 of the 1981 Act provides that Gibraltarians are entitled, if they apply, to be registered as British citizens. In the case of the Falkland Islands, the special arrangements were a product of the invasion of the Falkland Islands in 1982 and the hostilities which ensued. In the aftermath of those events and having regard to the attitude of the population of the Islands during and in consequence of them, the British Nationality (Falkland Islands) Act 1983, which originated as a Private Member's Bill, provided, in effect, that any Falkland Islanders (that is to say, persons who, under the 1981 Act, would be BDTCs by virtue of their connection with the Falkland Islands) who did not otherwise have the status of British citizens should have that status conferred on them. The practical effect of this measure was to confer British citizenship on a very small number of persons - it is estimated that only about 500 persons were immediately affected by it. This may be compared with the 700 members of the ethnic minorities in Hong Kong who have so far acquired British citizenship under the special arrangements made for Hong Kong, as described above.

DOMESTIC HELPERS

15. In its concluding observations on the previous report, the Committee expressed the concern that, since most of the persons affected by the 'two-week rule' were female foreign domestic helpers from the Philippines, it appeared to have discriminatory aspects under the terms of the Convention which might leave workers vulnerable to abusive employers. It recommended that the rule be modified to allow foreign workers to seek new employment in Hong Kong when their employment was terminated.

16. The rule was introduced in early 1987 to curb various abuses which had previously been extensive. These abuses included such practices as 'job-hopping', whereby workers deliberately terminated their contracts in order to change employers and stay on indefinitely in Hong Kong. These problems were recognised by the Judicial Committee of the Privy Council (on appeal from the Hong Kong Court of Appeal) in *Vergara & Arcilla v Attorney General* ([1989] 1 HKLR 233). The Judicial Committee, which is the apex of the Hong Kong judicial system, rejected a challenge, by way of judicial review, to the validity of

the two-week rule. It recognised that the former policy - which permitted foreign workers, upon ceasing employment, to stay in Hong Kong for up to six months - had been abused. In its judgement, the Judicial Committee said:

“Some [foreign domestic helpers] were deliberately breaking their contracts early in the six-month period in order to work in other part-time or full-time jobs until the period of stay had expired, or in order to find another employer. This gave rise to complaints by the employer who had made all the arrangements to bring the [helper] to Hong Kong and had paid the travel expenses. It also gave rise to complaints by local people who wished to secure employment as part-time domestic helpers and who found themselves in competition with [foreign domestic helpers] who had only been admitted to work full-time. Moreover it resulted in some cases in the employment of [foreign domestic helpers] in jobs for which, under general policy, foreign nationals were not admitted, for example, bars and clubs.”

17. The Hong Kong Government rejects any suggestion that the rule is based on or entails racial discrimination either in the literal sense of that term or in the broader sense which it has in the Convention. The Rule applies to all foreign domestic helpers and other ‘imported’ workers, whatever their country of origin. Most of the persons affected by the rule are indeed female domestic helpers from the Philippines, of whom there are currently about 130, 000 living and working in the territory. But it applies equally, and without discrimination, to domestic helpers from other countries - there are at present about 25,000 of these - and to the 15,000 (mainly male) ‘imported’ workers, most of whom come from China. The imposition of special restrictions on the employment of foreign workers, as distinct from workers who are permanent residents of the territory, is of course a natural and normal aspect of immigration control, and this particular restriction is an intrinsically appropriate, reasonable and proportionate response to the problems described above.

18. Nevertheless, all necessary measures are taken to ensure a fair balance between the legitimate interests of foreign domestic helpers (and other ‘imported’ workers) on the one hand and, on the other hand, those of their employers and the public interest, and to prevent ‘abusive’ treatment by employers. Thus, in exceptional circumstances - especially where there is evidence of abuse by employers, but also if employers are prevented from honouring their contracts because of death, financial difficulties or emigration - permission may be given for workers to change employment without first leaving the territory. A fuller account of the provisions which are in force, or the measures taken, for the protection of foreign workers and of the facilities available to them is given in paragraphs 42-53 of the United Kingdom’s third periodic report in respect of Hong Kong under the International Covenant on Economic, Social & Cultural Rights, which was submitted in January 1996 (E/1994/104/Add.10).

VIETNAMESE MIGRANTS

19. In its concluding observations on the previous report, the Committee stated that there were serious indications that the conditions to which Vietnamese migrants were subjected while being held in detention centres in Hong Kong constituted a violation of their human rights and required urgent attention. Of principal concern was the absence of education facilities for the children in the centres.

20. The general question of conditions in the detention centres is addressed in depth in paragraphs 25 - 32 of the United Kingdom's supplementary report in respect of Hong Kong under the International Covenant on Civil and Political Rights, which was submitted in May 1996. As stated in that report, the Hong Kong Government, together with the United Nations High Commissioner for Refugees (UNHCR) and other agencies and organisations, makes every effort to provide living conditions in the detention centres that are decent and humane. Full details of the measures taken and of the facilities provided are given in that report, in the paragraphs cited above.

21. As regards the children, it is not correct that there is an absence of educational facilities for them in the detention centres. Again, a full account of the situation is given in paragraph 377 of the United Kingdom's initial report in respect of Hong Kong under the Convention on the Rights of the Child which was submitted in February 1996 (CRC/C/11/Add.9). As is there shown, agencies sponsored by the UNHCR provide pre-school and primary education in the camps. The UNHCR used to provide secondary education but withdrew that service in July 1995. This decision was made pursuant to the re-affirmation, at the sixth meeting of the Steering Committee of the International Conference on Indochinese Refugees, that all Vietnamese migrants who had been determined to be non-refugees should return to Vietnam and that the services in places of first asylum should be streamlined. As the Committee will be aware, the UNHCR does not provide secondary education in other places of first asylum.

22. Since the implementation of the UNHCR's decision, and with the help from NGOs, the migrants have themselves organised secondary schooling for their children. The Hong Kong Government provides assistance in the form of accommodation, classroom furniture and educational materials (chalk, exercise books, pens, etc.). It also provides extra-curricular materials, such as sporting equipment, and is currently considering how it can assist with teachers' pay and the provision of textbooks.

CONTINUED APPLICATION OF THE CONVENTION

23. The issue of the continued application of the Convention was not one on which the Committee commented in its concluding observations on the previous report. However, it has been discussed in the Sino-British Joint Liaison Group and the Chinese side have indicated in that context their agreement that the Convention will apply to the Hong Kong Special Administrative Region on and after 1 July 1997.

APPENDIX G

LIST OF LAWS DECLARED BY THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS NOT TO BE ADOPTED AS LAWS OF THE HONG KONG SAR*

LAWS NOT TO BE ADOPTED

Application of English Law Ordinance (Cap 88)
Army and Royal Air Force Legal Services Ordinance (Cap 286)
Boundary and Election Commission Ordinance (Cap 432)
British Nationality (Miscellaneous Provisions) Ordinance (Cap 186)
British Nationality Act (Consequential Amendments) Ordinance (Cap 373)
Chinese Extradition Ordinance (Cap 235)
Colonial Armorial Bearing (Protection) Ordinance (Cap 315)
Compulsory Service Ordinance (Cap 246)
Electoral Provisions Ordinance (Cap 367)
Foreign Marriages Ordinance (Cap 180)
Legislative Council (Electoral Provisions) Ordinance (Cap 381)
Secretary of State for Defence (Succession to Property) Ordinance (Cap 193)
Trustees (Hongkong Government Securities) Ordinance (Cap 77)

LAWS SOME PROVISIONS OF WHICH WILL NOT BE ADOPTED

British Nationality Ordinance (implementing provisions)
Corrupt and Illegal Practices Ordinance (Cap 288) (sub leg A and C)
District Boards Ordinance (Cap 366)(provisions on elections)
Hong Kong Bill of Rights Ordinance (Cap 383), ss 2(3), 3 and 4
Immigration Ordinance (Cap 115), s 2 and Schedule 1 (definition of permanent resident)
Personal Data (Privacy) Ordinance (Cap 486), s 3(2)
Public Order Ordinance (Cap 245) (major revisions made since 27 July 1995)
Regional Council Ordinance (Cap 385) (provisions on elections)
Societies Ordinance (Cap 151) (major revisions made since 17 July 1992 by the Societies Amendment Ordinance (No 75 of 1992))
Urban Council Ordinance (Cap 101) (provisions on elections)

* Based on the report in the *HongKong Standard*, 24 February 1997, p 4.

APPENDIX H

**INTRODUCTION TO THE FIRST ISSUE OF THE
COMMONWEALTH HUMAN RIGHTS DIGEST (1996)**

**COMMONWEALTH
HUMAN RIGHTS
LAW DIGEST**

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EDITORIAL REVIEW

This first issue of the *Commonwealth Human Rights Law Digest* contains summaries of significant decisions of Commonwealth courts addressing human rights issues handed down between 1993 and 1996. The need for such a series stems from the dramatic increase over recent years in the number of cases coming before Commonwealth courts invoking fundamental human rights guarantees.

The *Law Reports of the Commonwealth* has for over a decade provided an invaluable service in publishing the full text of a large number of important Commonwealth judgments, many of which concern fundamental rights, while the Commonwealth Secretariat has published summaries of Commonwealth judicial decisions on all areas of the law, including human rights, in the *Commonwealth Law Bulletin*. While both these publications include some human rights cases, their wide scope inevitably limits the number of decisions they can report in this area.

The *Digest* aims to complement these publications by focusing only on human rights related decisions and reporting a large number of such cases. We hope that this will alert judges and lawyers to the existence of this body of jurisprudence, assist them to keep pace with the many developments now occurring in this field of the law and provide a means of identifying relevant jurisprudence for pending cases.

With this in mind, this first issue of the *Commonwealth Human Rights Law Digest* focuses to a large extent on unpublished decisions. As a result there is comparatively little or no case law from certain jurisdictions with regular law reporting such as Canada, the United Kingdom, South Africa, New Zealand and Hong Kong. The full text of human rights cases coming before these jurisdictions can be found in such publications as the *Canadian Rights Reporter*; *Butterworths Constitutional Law Reports* from South Africa; *the New Zealand Human Rights Reports*; and the *Hong Kong Public Law Reports*¹. We recognise however that not all judges and

¹ The *Bill of Rights Bulletin*, produced by the University of Hong Kong and containing summaries of the decisions of the Hong Kong Courts, should also be mentioned.

discretion to grant assembly permits contained within the legislation permitted the taking of arbitrary measures.⁸

In three of the decisions, the court went further to hold that the licensing of peaceful assemblies could not be reasonably justifiable: in both Zimbabwe and Zambia, because it could not be regarded as "reasonably justifiable in a democratic society" as required under their limitation clauses; and in Ghana, because it was not "reasonably justifiable in terms of the spirit of this Constitution".

Conscientious objection

Two decisions reported in this issue concern the subject of conscientious objection. The Supreme Court of Singapore upheld the prohibition on the Jehovah's Witnesses as a society, and of their publications, on the ground that they presented a threat to national security by discouraging the performance of military service.⁹ This decision may be compared with that of the Court of Appeal of Bermuda which held that the right to freedom of conscience not only includes the right not to serve in a combatant role but also the right not to serve in the military in any capacity whatsoever. The interference was not reasonably required in the interest of defence, as stated, since the effect on defence would be small.¹⁰

Delivering the judgment for the Bermuda Court of Appeal, Huggins JA pointed out that, in determining whether an infringement had occurred, the court was not to be concerned with the reasonableness of the "belief". The Zimbabwe Supreme Court was of a similar view in a case invoking freedom of conscience (but not concerning conscientious objection) in

holding that Rastafarianism held the status of a religion and that dreadlocks were a symbolic expression of that religion, i.e., that the court should only be concerned with the sincerity of the belief. In that case, the decision to deny registration to an advocate on the grounds of his dreadlocks hairstyle was held to be unconstitutional and void.¹¹

The scope of the right to freedom of movement

Adopting a broad and purposive approach appropriate to the interpretation of constitutional rights and recognising that for a right to be meaningful it must be effective, the Supreme Court of Zimbabwe and the Court of Appeal of Nigeria explored some of the parameters of the right to freedom of movement. This right was held to encompass the right to a passport¹²; and the right of a citizen that her alien spouse be granted a resident's permit¹³ and be permitted to seek gainful employment.¹⁴

The scope of the right to life

The Indian Constitution does not include an express guarantee against cruel, inhuman and degrading treatment. Nevertheless, the Supreme Court, in the early 1980s, in the case of *Francis Corali v. Union Territory of Delhi*, implied into the provision relating to the right to life, a right of "human dignity".¹⁵ In a decision reported in this issue the Supreme Court of India affirmed its earlier decisions to hold that hand or foot cuffing, unless applied under the most extreme circumstances and approved by the courts, would violate this implied right. Ignorance of the earlier decisions of the court by the police did not prevent the finding of such violation.¹⁶

The Indian Supreme Court in *Francis Corali* also interpreted the right to life to include, in the words of Bhagwati, J., "the bare necessities of life"

11 *Re Chikweche, infra*.

12 *Agbakoba v. Director, State Security Services & Anor, infra*; see also *Nyromgo v. Attorney General of Zambia* [1993] 3 LRC 256.

13 *Rattigan & Ors v. Chief Immigration Officer & Ors, infra*

14 *Salem v. Chief Immigration Officer & Anor, infra*

15 *Francis Corali v. Union Territory of Delhi*, AIR 1981 SC 746

16 *Khedat Mazdoor Chetna Sangath v. State of MP & Ors, infra*

8 The need for adequate guidelines and effective control of any discretion granted under legislation which hinders fundamental rights has also been recognised by the European Court of Human Rights and the Canadian Supreme Court. See, e.g., *Silver and others*, Judgment of 25 March 1983, A. 61, at 30 and 33; *Malone Case*, Judgment of 2 August 1984, A. 82 at 27. See also *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 147 DLR (3d) 58; 5 CRR 373.

9 *Chan Hiang Leng Colin & Ors v. Public Prosecutor, infra*.

10 *Atride-Stirling v. Attorney General, infra*.

situation where an accused would not be tried within a reasonable time.³⁰ Given this reasoning, the legislation under challenge, which provided that “the Court shall deny bail” under certain circumstances, would have been inconsistent on its face. Sawyer, J., however, applied the so-called “presumption of constitutionality” and interpreted the statute so as to impose no absolute duty on judges to deny bail, thus ensuring judicial discretion, and with it the legislation’s constitutionality. The High Court of Kenya, in the other reported decision, did not apply this presumption and accordingly held legislation prohibiting bail for certain offences null and void.³¹

Inconsistency with the right to personal liberty was not the only ground on which the High Court of Kenya found the legislation restricting bail unconstitutional. The court followed its earlier decision in *Ngui v. Republic of Kenya*³² to find such legislation also inconsistent with s. 60(1) of the Constitution which gives the High Court “unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.” A similar conclusion, that the granting of bail must be exercised on the basis of judicial discretion, was reached by the Supreme Court of Mauritius in *Nordally v. Attorney-General*³³ where it was held that:

The whole of our Constitution clearly rests on two fundamental tenets, the rule of law and the ... separation ... of powers. More particularly, according to section 10 and Chapter VII, the trial of persons charged with criminal offences and all incidental or preliminary matters pertaining thereto are to be dealt with by an independent judiciary ... We conclude therefore that it is not in accord with the letter or spirit of the Constitution, as it presently stands, to legislate so as to enable the Executive to overstep or bypass the Judiciary in its essential roles, namely those affording to the citizen the protection of the law...

30 This limited right, however, extended to all categories of offences.

31 *Ruto v. Attorney General & Anor*, *infra*.

32 [1986] LRC (Const) 308.

33 *Nordally v. Attorney-General and Another* [1987] LRC (Const) 599 at 603-4; see also *Smith v. Attorney-General, Bophuthatswana* 1984 (1) SA 196 (BS) at 200.

It is perhaps pertinent to note here that the Indian Supreme Court has indicated that the separation of powers form part of the “basic structure” of the Constitution such that it is not amenable to alteration, without a referendum, even by parliamentary constitutional amendment.³⁴

The treatment of prisoners

In two decisions from the Commonwealth Caribbean, conditions in detention were found to be inhuman and degrading. In the case of *Santicks v. The Attorney General*, before the Jamaican Supreme Court, the defendant failed to file any defence to the ‘blatant’ infringement of this right. An interlocutory judgment was, therefore, entered in the plaintiff’s favour and the court concerned itself with the issue of damages.³⁵ Sitting in the Supreme Court of the Bahamas, Sawyer J., in the other reported decision, warned that a person awaiting trial should not be subjected to what may be regarded as “pre-trial punishment” as this would be tantamount to a reversal of the presumption of innocence.³⁶ In another reported case, the same judge, in assessing damages, took into account the humiliation and indignity suffered by the plaintiff during his unlawful arrest and detention which included two bodily searches.³⁷

In Namibia, where the death penalty is expressly prohibited under the Constitution, the Supreme Court considered the constitutionality of the sentence of life imprisonment.³⁸ It was held to be constitutional as a sentence *per se*, in view of the particular context in which it is administered in Namibia. However, Mahomed, CJ. made clear in his judgment (with which the other members of the court agreed) that life imprisonment could not be justified if it effectively amounted to a sentence which “lock[ed]

34 *Kesavandanda Bharati v. State of Kerala*, (1973) 4 SCC 225, *Indira Ghandhi v. Raj Narayan*, AIR 1975 SC 2299. See also *Anwar Hossain Chowdhury v Bangladesh*, 1989 BLD (Spl) 1, *Darwesh M Arbey v Federation of Pakistan*, PLD 1980 Lahore 206.

35 *infra*.

36 *Beneby v. The Commissioner of Police*, *infra*.

37 *Tynes v Barr*, *infra*.

38 *Tcoeth v. The State*, *infra*.

maker will be exercised in accordance with that treaty.⁴⁷ As observed by Cooke, P. in the New Zealand Court of Appeal, “the law of international human rights and instruments is undergoing evolution.”⁴⁸

Special procedural requirements for actions against the State

In three reported decisions, courts had to decide whether certain unfulfilled procedural requirements for actions against the State or state officials would bar application for redress under the fundamental rights provisions of the constitution. The High Court of Uganda found that a statutory requirement of sixty days notice before any suit could be filed against the government applied only to civil actions and not applications under the constitution. Egonda-Ntende, J. was of the opinion that such a requirement would in itself constitute an unjustified hindrance to persons seeking the protection of the courts where their rights were already being, or were about to be, contravened; and that such persons were not to be denied access to the court by “procedural hiccups”.⁴⁹

The Supreme Court of South Africa, sitting in Transkei, cast doubt on the compatibility with the interim South African Constitution of shorter periods of limitations for actions against the State. White J. failed to see why common law periods of prescription could not apply in respect of claims against the police and why, in the absence of any prejudice, the

government persisted in hiding behind such “draconian” powers.⁵⁰ The Ciskei Division of the Supreme Court, in a later decision, struck down similar legislation as contrary to the right of equality before the law and the principle of equal access to courts of law.⁵¹ The same division had earlier found that a decree indemnifying “any person” from criminal prosecution with respect to acts carried out in the area and on the day of the “Bisho massacre”, contravened the right to a fair hearing, as justice was required to be done to both the accused and those allegedly affected by his or her ‘unlawful action’. Heath, J. explained that the decree would make the enforcement of a number of other rights impossible where contravened at Bisho on the day of the massacre and thus, in effect, infringed a whole host of rights.⁵²

Liability for breach of constitutional rights

In *Imanyara v. Attorney General*, the High Court of Kenya held that as a chief was not acting in the course of his lawful duty when he contravened the applicant’s rights, the Attorney General could not be held vicariously liable.⁵³ This may be contrasted with a decision of the Constitutional Court of Seychelles which held that the State was directly liable for any contravention of a constitutional right by its servants, in this case the police.⁵⁴

50 *Mbavisa v. Minister of Police, infra*; See also *Milly v. The Commissioner of Police & Anor, infra*, before the High Court of Trinidad and Tobago where Lucks J held that a liberal interpretation must be given to any time limit under the Constitution, and allowed an application to proceed, despite being instituted after expiry of the statutory one year period of prescription, as good reasons existed for the delay

51 *Zantsi v. Chairman of The Council of State & Anor, infra*

52 *Matankwa & Anor v. Council of State, Ciskei & Anor, infra*

53 *infra*

54 *Payer v. Attorney General, infra* The Privy Council adopted a similar view in 1978 in *Maharaj v. A G of Trinidad and Tobago* (No. 2) [1978] AC 385 at 396 and 399

[It is in their Lordships’ view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The [fundamental rights] chapter is concerned with public law, not private law. The claim for redress under [the chapter] is a claim against the state for what has been done in the

47 *infra*.

48 See also the earlier decisions of the New Zealand Court of Appeal and the Hong Kong High Court where this issue was considered but not decided: *Tavita v. Minister of Immigration, infra*; *Yin Xiang-Jiang & Ors v. Director of Immigration, infra*.

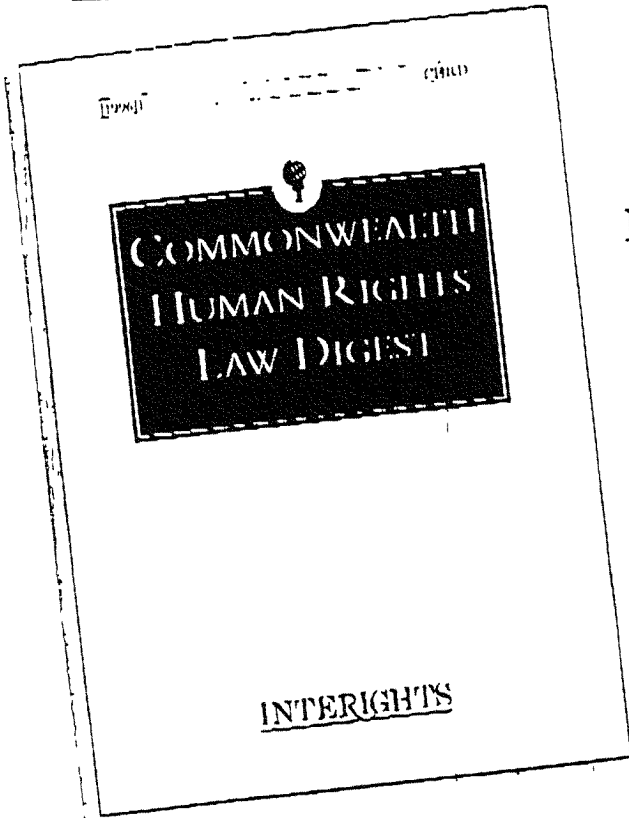
49 *Rwanyarare & Ors v. The Attorney General* (Ruling No. 2), *infra*; In *Rev. Longwe & Ors v. The Attorney General* (29 January 1993 unreported), Tambala J. in the High Court of Malawi reached a similar conclusion when he held that an application challenging the constitutionality of orders prohibiting the applicants from speaking at a series of meetings was:

a matter of great importance. It concerns the freedom and the right of an individual to participate in effecting peaceful change in the political system of his country. The decision on such an application must, in my view, depend on the substance and merits of the application and not on a procedural technicality.

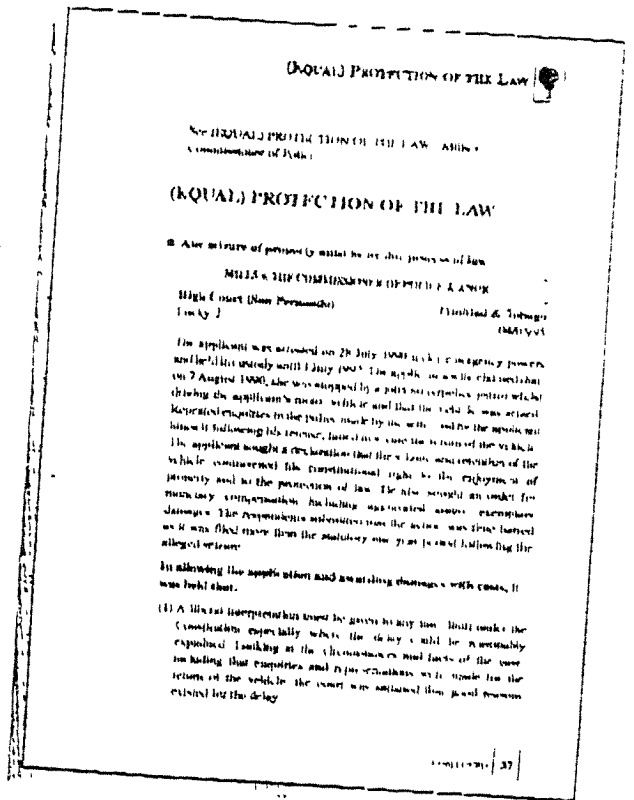
breach was sufficient to grant the remedy sought, the court found it unnecessary to examine the submissions alleging a breach of the right to freedom of expression and the prohibition of discrimination. Such a conclusion, that every constitutional rights provision invoked by the applicant need not be examined, may be different where an applicant prays for damages. In this respect the Zimbabwe decision may be contrasted with that of the Supreme Court of Sri Lanka in *Deshapriya & Anor v. Municipal Council, Nawara Eliya & Ors*,⁶³ where Fernando, J., after finding that a seizure of “anti-government” newspapers contravened the right to freedom of expression, went on to hold that it was also contrary to the prohibition of discrimination on the ground of political opinion and, furthermore, that the assessment of damages was aggravated by this additional breach.

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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* was established 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. Following the entry into force of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China on 1 July 1997, the *Bill of Rights Bulletin* will be renamed the *Basic Law and Human Rights Bulletin* and will cover developments under the Basic Law, as well as the matters previously covered in the first 4 volumes of the *Bulletin*, which were published from October 1991 to August 1997.

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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*. **Andrew Bruce SC** is Senior Assistant Crown Prosecutor with the Attorney General's Chambers, Hong Kong. He has appeared for the Government in a number of appellate 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 are always grateful for information about pending cases in which *Bill of Rights* or Basic Law issues raised and for copies of judgments in such cases. We would like to thank Gerry McCoy, Philip Dykes, John Dean, David Dufton, P Y Lo (as well as others) for providing us with information included in this issue of the *Bulletin*, as well as Kirstine Adams for her assistance. We would also like to thank Nancy Choi, who is responsible for the administrative side of the *Bulletin*. This issue is based on the information available to the Editors as of the end of August 1997.

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R v Lum Wai-ming (1994) 4 HKPLR 497 (CA)
R v Ma Man-ho (1991) 1 HKPLR 314
R v Man Wai-keung (No 2) (1992) 2 HKPLR 164; [1992] 2 HKCLR 207
R v Ming Pao Newspapers Ltd (1994) 4 HKPLR 621 (Mag)
R v Mirchandani (1992) 2 HKPLR 196; [1992] 2 HKCLR 174

- R v Ng Kam-fuk* (1992) 2 HKPLR 456, [1993] HKDCLR 29
R v Ng Ming (1994) 4 HKPLR 908, [1994] 3 HKC 320, [1995] 1 HKCLR 305
R v Ng Po-lam (1991) 1 HKPLR 25
R v Ng Yiu-fai (1992) 2 HKPLR 158; [1992] 2 HKCLR 122
R v Ng Wing Keung Paul (1996) 6 HKPLR 299 (DCt)
R v Ng Wing-keung Paul (1996) 7 HKPLR 53, [1997] HKLRD 142 (CA)
R v Pannu (1996) 6 HKPLR 217
R v Pannu (No 2)(1996) 6 HKPLR 216
R v Purkayasatha (1992) 2 HKPLR 371
R v Secretary for the Civil Service, ex p Association of Expatriate Civil Servants of Hong Kong (1995) 5 HKPLR 490
R v Secretary for the Civil Service, ex p Association of Expatriate Civil Servants of Hong Kong (1996) 6 HKPLR 333 (CA)
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 39, [1993] 2 HKCLR 51 (CA)
R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127; [1992] LRC (Const) 547 (CA)
R v So Sai-fong (1992) 2 HKPLR 695
R v So Mun-sung (1994) 4 HKPLR 318
R v Suen Shun (1992) 2 HKPLR 556 (Mag), (1992) 2 HKPLR 288; [1993] 1 HKCLR 107 (CA)
R v Sze Yung-sang (1993) 3 HKPLR 211, [1993] 2 HKCLR 18
R v Tai Yiu-wah (1994) 4 HKPLR 56, [1994] 2 HKC 63, [1995] 1 HKCLR 139
R v Tang Shui-kwan (1992) 2 HKPLR 518
R v To Kwan-hang and Tsoi Yiu-cheong (1994) 4 HKPLR 356, [1994] 2 HKC 293
R v Town Planning Board, ex parte Auburntown Ltd (1994) 4 HKPLR 194, [1994] 2 HKCLR 272
R v Town Planning Board, ex parte Kwan Kong Co Ltd (1995) 5 HKPLR 261, [1995] 3 HKC 254
R v Tran Viet Van (1992) 2 HKPLR 237; [1992] 2 HKCLR 184
R v Tse Kim-ho (1993) 3 HKPLR 298
R v Tsui Shek-law (1991) 1 HKPLR 346
R v Tung Chi-hung (1991) 1 HKPLR 282
R v Wan Kit-man (1992) 2 HKPLR 728, [1992] 1 HKCLR 224 (HCt)
R v Wan Siu-kei (1993) 3 HKPLR 228, [1994] 2 HKCLR 127
R v Wan Yin-man (1991) 1 HKPLR 359
R v William Hung (1992) 2 HKPLR 49; [1992] 2 HKCLR 90 (HCt)
R v William Hung (1993) 3 HKPLR 328, [1994] 1 HKCLR 47 (CA)
R v Wong Cheung-bun (1992) 2 HKPLR 82; [1992] 1 HKCLR 240 (HCt)
R v Wong Chiu-yuen (1992) 2 HKPLR 323
R v Wong Hiu-chor(1992) 2 HKPLR 288; [1993] 1 HKCLR 107
R v Wong Lai-shing (1993) 3 HKPLR 766
R v Wong Ma-tai (No 1) (1992) 2 HKPLR 490
R v Wong Ma-tai (No 2) (1992) 2 HKPLR 508
R v Wong Sau-chuen (1994) 4 HKPLR 129, [1995] 1 HKCLR 8
R v Wong Sik-ming (1994) 4 HKPLR 488
R v Wong Wai (1994) 4 HKPLR 245
R v Wong Yan-fuk (1993) 3 HKPLR 341, [1994] 2 HKCLR 139
R v Wright, ex parte Lau Wing-wo (1993) 3 HKPLR 126
R v Yau Chi-keung (1994) 4 HKPLR 453, [1994] 2 HKC 64
R v Yeung Chi-chiu and another (1994) 4 HKPLR 677
R v Yiu Chi-fung (1991) 1 HKPLR 167
R v Yu Yem-kin (1994) 4 HKPLR 75
Real Estate Developers' Association v Town Planning Board (1996) 6 HKPLR 179, [1996] 2 HKCLR 267
Re Reid (1991) 1 HKPLR 275
Re Rich Sir Ltd (1991) 1 HKPLR 296
Senior Non-Expatriate Officers' Association and others v Secretary for the Civil Service (1996) 7 HKPLR 91
Re Sin Hoi (1992) 2 HKPLR 18; [1992] 1 HKCLR 408 (CA)
Re Suthipong Smittachartch and the United States of America (1992) 2 HKPLR 249; [1993] 1 HKCLR 93

Tam Hing-ye v Wu Tai-wai (1991) 1 HKPLR 1 (DCt)

Tam Hing-ye v Wu Tai-wai (1991) 1 HKPLR 261. [1992] 1 HKLR 185. [1992] LRC (Const) 596 (CA)

Thanat Phaktiphat v Chief Superintendent of Lai Chi Kok Reception Centre (1995) 5 HKPLR 73

Re Tin Sau-kwong (1994) 4 HKPLR 727

EDITORIAL

GENERAL

The period since the last *Bulletin* has seen one of the momentous watersheds in Hong Kong's political and legal history. The resumption of Chinese sovereignty over Hong Kong, and the entry into force of a new constitutional instrument in the form of the Basic Law bring with them new challenges to the enjoyment of internationally guaranteed human rights in Hong Kong and new legal means with which to address them. The catalogue of rights contained in the Basic Law (in particular in Chapter 3), together with the continued assurance of the continuity of application and constitutional status of the two International Covenants and applicable international labour conventions means that Hong Kong people now enjoy more extensive formal protection of rights than they ever have. While the Bill of Rights Ordinance was -- even before its mutilation by the February decision of the Standing Committee of the National People's Congress -- destined to play a less significant role as time passed, the standards it embodied are those of the ICCPR which are now embodied in article 39 of the Basic Law.

To reflect the fundamental legal changes and the new array of constitutionally guaranteed rights that now form part of the Hong Kong legal system, this will be the last issue of the *Bill of Rights Bulletin* in its present form. From the next issue (which will be the first issue of volume 5), the *Bulletin* will be renamed the *Basic Law and Human Rights Bulletin*. Future issues of the *Bulletin* will cover cases decided under the Basic Law, and will continue to cover Bill of Rights cases, international human rights developments (particularly those of relevance to China and Hong Kong), and developments in the field of anti-discrimination law in Hong Kong.

CASE LAW DEVELOPMENTS

In the period from February to the end of June 1997, there have been a number of Bill of Rights cases in the Hong Kong courts. In only one of them was an argument based on a Bill of Rights point accepted by the courts (in the District Court, and that obiter), and in a number of cases the Court of Appeal followed its consistent recent trend of taking a narrow view of the operation and content of the Bill of Rights Ordinance.

In *Fok Lai-ying v Governor in Council* (see page 14 below) the Privy Council considered an appeal from the judgment of the Court of Appeal, reported at (1996) 7 HKPLR 78, in which the Court of Appeal had reversed the judgment of Cheung J at first instance (see (1996) 7 HKPLR 63). While agreeing with Cheung J that the process of resumption of land was subject to the duty to act fairly (in particular, the right to be heard had to be respected), the Privy Council dismissed the appeal on the ground that the appellant had in fact been granted, and had utilised, the opportunity to be heard. On the issue of whether article 14 of the Bill of Rights provided any protection against the resumption of an interest in land, the Privy Council appeared to accept that article 14's protection of one's "home" was engaged. The Board noted that, although article 14 was expressed in more positive terms than the corresponding article of the European Convention on Human Rights (article 8), the linguistic differences should not be given undue weight. The Board also expressed the view that determining whether a restriction on the rights protected by article 14 was permissible would

involve similar considerations to those taken into account under article 8 of the European Convention. In relation to the question whether the protection against "arbitrary" interference permitted review of the reasonableness of the law authorising such interference, the Board noted the views of the Human Rights Committee on the matter, but considered that it was not necessary to resolve that issue in this case, since there was nothing unfair, arbitrary or unlawful in the procedure followed. The Board was reluctant to pronounce on the issue since

"the present case touches on far-reaching issues. Within a few days the structure of the Hong Kong judicial system is to change. It is inappropriate for their Lordships to offer opinions on issues which may well in future cases fall to the Hong Kong courts to resolve, unless such opinions are necessary for disposal of cases before the Board."

In *Hong Kong Polytechnic University v Next Magazine (No 2)* (see page 17 below) the Court of Appeal allowed an appeal against the judgment of Keith J at first instance ((1996) 7 HKPLR 41) in which Keith J had held that the Hong Kong Polytechnic University could not maintain an action in defamation against the defendant. The Court of Appeal did not agree that a university was in a similar position to that of a local authority (as in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534) and held that the university could sue for defamation under common law. On the issue of whether permitting the university to sue would involve a violation of the right to freedom of expression in article 16 of the Bill of Rights, the court left open whether the university was a public authority within the meaning of s 7 of the Ordinance, but held that restrictions on the right to freedom of expression contained in the common law rules relating to defamation were in any event "provided by law" and permissible restrictions.

In *Attorney General v Cheung Kim Hung* (see page 21 below), Rogers J considered the relevance of the guarantee of freedom of expression in article 16 of the Bill of Rights in the context of contempt proceedings which had arisen out of the case *Cheung Ng Sheong, Steven v Eastweek Publisher Ltd & Anor* (1995) 5 HKPLR 428; [1995] 3 HKC 601. Rogers J held that the law of contempt, insofar as it related to the actions of the contemnor in this case, was a permissible restriction on the exercise of freedom of expression under article 16(3).

The consistency of s 32(1)(f) and (3) and s 37(1)(a) of the Post Office Ordinance (Cap 98) with article 16 of the Bill of Rights was challenged in *R v Ku Man-ho, Henry* (see page 23 below) before Mr D J Dufton in the Western Magistracy. That provision creates an offence of importing by post obscene video tapes. Following a detailed review of the applicable principles and international and comparative case law, the magistrate held that the restriction was permissible under article 16(3) of the Bill of Rights.

In *Lau Wong-fat v Attorney General* (see page 26 below) the Court of Appeal dismissed an appeal from a decision of Cheung J striking out a statement of claim in which the plaintiff sought to challenge the consistency of the New Territories (Land Exemption) Ordinance with the Letters Patent: see (1996) 7 HKPLR 148. The Court held that there was nothing in the Exemption Ordinance which violated articles 18 and 23 of the ICCPR [articles 15 and 19 of the Bill of Rights], agreeing with Cheung J in this respect. However, the Court of Appeal took the view that Cheung J had been wrong to conclude that the plaintiff had raised an arguable case that the Exemption Ordinance was a violation of the rights of persons belonging to an ethnic minority, guaranteed by article 27 of the ICCPR (article 23 of the Bill of Rights).

In *Lam Chi-keung* (see page 24 below) the Court of Appeal rejected a challenge to ss 3 and 4 of the Evidence Ordinance (Cap 8) on the ground that permitting a person to be convicted on the basis of the unsworn evidence of a child was a violation of guarantees of equality contained in articles 2(1), 14(1) and 26 of the ICCPR.

In *Cheng A Lac and 1375 others v Director of Immigration and 5 others* (see page 8 below) the Court of Appeal took a different view from Keith J at first instance on the applicability of the guarantees of the Bill of Rights to the continued detention of Vietnamese asylum-seekers. Keith J had held that s 11 of the Bill of Rights did not prevent the Bill of Rights from applying to detention pursuant to s 13D(1) of the Immigration Ordinance, since this detention did not relate to the application of that legislation to their "stay" in Hong Kong see (1997) 7 HKPLR 243 at 272. The Court of Appeal, however, was of the view that the effect of s 11 was to immunise from review under the Bill of Rights decisions of the Director in relation to a person's entitlement to enter, stay or remain in Hong Kong, including decisions to detain persons in a detention centre pursuant to the Immigration Ordinance

Finally, in *Chan Sze Ting and Lee Chin Ming v HKSAR* (see page 13 below) the Court of Appeal did not find it necessary to reconsider the issue of whether the guarantee against self-incrimination contained in article 11(2)(g) of the Bill of Rights applied to the investigatory stage.

In *Harvest Sheen Ltd v Collector of Stamp Revenue* (see page 31), Barnett J considered a challenge to s 14 of the Stamp Duty Ordinance on the ground that the requirement that a person who wished to appeal against an assessment pay the disputed amount before an appeal was a denial of the right of access to court guaranteed by article 10 of the Bill of Rights. While the judge decided the case on another issue, he went out of his way to indicate that he considered that the requirement did amount to a violation of article 10

In *Ma Wan Farming Ltd v Governor in Council* (see page 9 below) Keith J rejected the argument that the objection procedure under s 11 of the Roads (Work, Use and Compensation) Ordinance ("the Ordinance") was in contravention of article 10 of the Bill of Rights, following the approach of the Court of Appeal in *Kwan Kong Company Ltd v Town Planning Board* (1996) 6 HKPLR 237.

LEGISLATIVE DEVELOPMENTS

Among the private members' bills passed by the Legislative Council in the last week of its existence was the Bill of Rights (Amendment) Ordinance 1997.¹ The intention of that Bill, sponsored by legislator Lau Chin-sek, was to reverse the effect of the erroneous decision of the Court of Appeal in *Tam Hing-ye v Wu Tai-wai* (1991) 1 HKPLR 261. In that case the Court of Appeal held, without reference to the drafting history of the Bill of Rights or to the administration's expressed intention in the Legislative Council when amending the Bill of Rights Bill, that the Bill of Rights Ordinance was not intended to apply to legal relations between private citizens (even when created by legislation), but only to relations between individuals and the State. The original intention of the Bill of Rights has been the victim of

¹ Ordinance No 107 of 1997, *Hong Kong Government Gazette*, 30 June 1997, *Legal Supplement No 1*, A3895.

governmental amnesia, with a number of high government officials preferring not to recall the original intention and stating in various fora including the United Nations that the truncated operation of the Bill of Rights produced by *Tam Hing-ye* had been exactly what the government had always intended. That this fiction should be persisted in -- even after it has been pointed out that this was not in fact so -- is most regrettable and reflects an unfortunate expediency in the administration's approach to questions of legal principle

The effect of the amendment is unclear, in view of the February decision of the Standing Committee of the National People's Congress that ss 2(3), 3 and 4 of the Bill of Rights Ordinance were not to be adopted as laws of the Hong Kong SAR. In any event, the remedial effect of the amendment lasted but a few days: The Ordinance commenced operation on the date of its publication in the *Gazette* (27 June 1997), but the operation of the Ordinance was suspended, with effect from 18 July 1997, by the Legislative Provisions (Suspension of Operation) Ordinance 1997,² passed by the Provisional Legislative Council on 16 July 1997. We understand that the Government is considering the repeal of the Amendment Ordinance.

An interesting issue is whether the constraints introduced by *Tam Hing-ye* and destined, it seems, to remain untouched by legislative or judicial overruling, apply to the interpretation of article 39 of the Basic Law (assuming that this article is justiciable). It is clear that the ICCPR requires a State to address some forms of inter-citizen violations, accordingly, an interpretation of the article based on a sound understanding of international law should lead to the conclusion that *Tam Hing-ye* should in no way limited the applicability of article 39 to provisions of laws affecting relations between individuals and the State. Similar issues may also arise under other specific rights guarantees in the Basic Law.

OTHER DEVELOPMENTS RELATING TO HUMAN RIGHTS

Among the other important developments since February 1997 was the issue by the Chief Executive's Office of a *Consultation Document on Civil Liberties and Social Order* in April 1997. The paper, which proposed changes to the Societies Ordinance and the Public Order Ordinance which can only be described as regressive and inconsistent with the letter and spirit of the ICCPR, was much criticised by international and local human rights groups. Following the consultation, a number of amendments were made. However, despite some positive changes, they still failed to remedy a number of major problems in the Ordinance. Nonetheless, the amendments were passed by the Provisional Legislative Council on 1 July 1997.

The legislation to establish the electoral system under which the "first" legislature of the Hong Kong Special Administrative Region was introduced into the Provisional Legislative Council on 20 August 1997. The proposed legislation was contained in the Legislative Council Bill 1997, published on 15 August 1997.³ The proposed system considerably limits the

²The Government of the Hong Kong Special Administrative Region *Gazette*, 18 July 1997, *Legal Supplement No 1*, A329.

³The Government of the Hong Kong Special Administrative Region *Gazette*, *Gazette Extraordinary*, 15 August 1997, *Legal Supplement No 3*, C183.

electorate for the functional constituencies (when compared with the 1995 electoral system), and introduces a system of proportional representation for the geographical constituencies. In view of the fact that the Human Rights Committee took the view that the 1991 and 1995 systems were inconsistent with the rights contained in article 25 of the ICCPR, there seems little doubt that the system proposed by the Government is also inconsistent with those guarantees.

EQUAL OPPORTUNITIES LAW DEVELOPMENTS

On 18 June 1997 the Legislative Council adopted amendments to the Sex Discrimination Ordinance (Cap 480) and the Disability Discrimination Ordinance (Cap 487). These amendments were contained in the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance, sponsored by legislator Christine Loh.* Among other matters, this legislation removed the cap on damages under the Sex Discrimination Ordinance and explicitly provided for the remedy of reinstatement in an action brought under that Ordinance. The Ordinance is to come into operation on 15 October 1997.

In its last week of sittings the Legislative Council also adopted the Family Status Discrimination Ordinance.* This Ordinance, put forward by the government in response to private members' bills addressing discrimination on the basis of family responsibilities, age, sexual orientation and race, follows a similar structure to the Sex Discrimination Ordinance. It renders unlawful discrimination on the ground of a person's family status in a range of areas (including employment). "Family status" is defined in s 2(1) of the Ordinance as meaning "the status of having responsibility for the care of an immediate family member". The Ordinance is to come into operation on a day to be appointed by the Secretary for Home Affairs.

The Employment (Amendment) (No 4) Ordinance, a private member's bill sponsored by legislator Lee Cheuk-yan, was approved by the Legislative Council on 28 June 1997.*** The Ordinance is intended to provide a civil remedy for anti-union discrimination and to supplement the existing criminal offences under ss 21B and 21C of the Employment Ordinance. The Ordinance commenced operation on the date of its publication in the *Gazette* (27 June 1997), but the operation of the Ordinance was suspended, with effect from 18 July 1997 by the Legislative Provisions (Suspension of Operation) Ordinance 1997,**** passed by the Provisional Legislative Council on 16 July 1997.

* Ordinance No 71 of 1997, *Hong Kong Government Gazette*, 27 June 1997, *Legal Supplement No 1*, A2441. The earlier version of the amendment Ordinance published in the *Gazette* of 20 June 1997 as Ordinance No 70 of 1997 contained errors and did not represent the Ordinance as adopted by the Legislative Council.

* Ordinance No 91 of 1997, *Hong Kong Government Gazette*, 27 June 1997, *Legal Supplement No 1*, Part II, A3101.

*** Ordinance No 98 of 1997, *Hong Kong Government Gazette*, 30 June 1997, *Legal Supplement No 1*, A3809.

****The Government of the Hong Kong Special Administrative Region *Gazette*, 18 July 1997, *Legal Supplement No 1*, A329.

Other private members' initiatives proposing legislation to address addressing discrimination on the basis of family responsibilities, age, sexual orientation and race, were defeated

INTERNATIONAL DEVELOPMENTS CONCERNING HONG KONG

TREATY ACTION

Concluding observations of the CERD on the fourteenth report under the International Convention on the Elimination of All Forms of Racial Discrimination

The Committee on the Elimination of Racial Discrimination considered the fourteenth periodic report of the United Kingdom (including Hong Kong) under the Racial Discrimination Convention on 3 and 4 March 1997. The Committee adopted its concluding observations at the same session; these are reproduced at Appendix A.

Updating report under the Convention on the Rights of the Child

An updating report in respect of Hong Kong under the Convention on the Rights of the Child was submitted to the Committee on the Rights of the Child in May 1997. The report is reproduced at Appendix B. The report had been requested by the Committee when it reviewed the initial report of Hong Kong under the Convention in October 1996. It is not clear what steps the Committee will take in relation to this report prior to the next appearance of Hong Kong before the Committee.

Outline of topics for initial report under the Convention on the Elimination of All Forms of Discrimination Against Women

The government published for public comment an outline of the topics it proposes to deal with in the initial report in respect of Hong Kong under the Convention on the Elimination of All Forms of Discrimination Against Women. That outline is reproduced at Appendix C. The Convention was extended to Hong Kong with effect from 14 October 1996; the initial report under the Convention is therefore due by 13 October 1997. China has recently submitted its (combined) third and fourth periodic reports, but these have yet to be scheduled for consideration by the Committee on the Elimination of Discrimination against Women (CEDAW). From 1997, the Committee meets twice a year for three weeks, from mid-January to early February and in July.

Upon its extension to Hong Kong in October 1996, the United Kingdom entered a number of reservations restricting the scope of the obligations it assumed under the Convention in respect of Hong Kong (for the text see, *Bulletin*, v 4 n 2, February 1997, Appendix D).

Final report by UK government in respect of Hong Kong under the International Covenant on Civil and Political Rights

As requested by the Human Rights Committee when it reviewed a supplementary report in respect of Hong Kong in October 1996, the United Kingdom submitted a final report

on the implementation of the Covenant in Hong Kong on 30 June 1997. The text of that report appears at Appendix D. It is unclear what steps the Committee will take in relation to this report following the resumption of sovereignty over Hong Kong by China. Despite the views expressed by the Human Rights Committee that China is under an obligation to report in respect of Hong Kong, the Chinese government has not yet indicated that it is prepared to do so.

Chinese notification of continued applicability of human rights treaties to Hong Kong from 1 July 1997

In a diplomatic note dated 20 June 1997 addressed to the Secretary-General of the United Nations, the Permanent Representative of the People's Republic of China informed the Secretary-General of the continued applicability to Hong Kong of a number of multilateral agreements, including the major human rights treaties. These included the Racial Discrimination Convention, the Convention against Torture, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. These treaties were listed in Annex I to the Note, which contained "treaties . . . to which the People's Republic of China is a party [and which] will be applied to Hong Kong with effect from 1 July 1997 as they . . . (i) are applied to Hong Kong before 1 July 1997."

So far as the two Covenants are concerned, the main body of the Note stated: "The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997". The difference in treatment of the two Covenants appears to reflect the continuing disagreement over continued reporting under those two treaties. The Chinese government has not been willing to undertake to continue reporting under those two treaties, whereas it has been willing to do so in relation to the other four treaties mentioned above.

OTHER INTERNATIONAL DEVELOPMENTS

Convention on the Elimination of All Forms of Discrimination Against Women

The Committee on the Elimination of Discrimination against Women has adopted a new general recommendation dealing with the participation of women in political and public life. The text of *General recommendation No 23* (1997) appears at Appendix E.

COMMONWEALTH HUMAN RIGHTS LAW DIGEST

In v 4, n 2 of the *Bulletin* we incorrectly noted the name of the new digest of Commonwealth human rights law cases launched by Interights. The correct title is the *Commonwealth Human Rights Law Digest*. This new publication contains summaries of human rights decisions from a wide range of Commonwealth countries and will be a valuable resource for those seeking information about developments in countries whose law reports are not widely available. The *Editorial Review* from the first issue of the *Digest*, summarising the cases digested in the first issue, was reproduced at Appendix H of v 4, n 2 of the *Bulletin*.

CASES

SCOPE OF APPLICATION OF BILL OF RIGHTS ORDINANCE -- MEANING OF "PUBLIC AUTHORITIES" (s 7)

In *Hong Kong Polytechnic University v Next Magazine (No 2)* (see page 17 below) the Court of Appeal left open the question of whether the university was a "public authority" within the meaning of s 7 of the Ordinance

As noted above, the Bill of Rights (Amendment) Ordinance 1997⁴ was enacted by the Legislative Council with the intention of reversing the effect of the 1991 Court of Appeal decision in *Tam Hing-ye v Wu Tai-wai* (1991) 1 HKPLR 261, which restricted the application of the Bill of Rights to legal relations between private individuals and the Government/public authorities. That amendment was suspended, with effect from 18 July 1997, by the Legislative Provisions (Suspension of Operation) Ordinance 1997,⁵ passed by the Provisional Legislative Council on 16 July 1997

SCOPE OF APPLICATION OF BILL OF RIGHTS ORDINANCE -- EXCEPTIONS) (SECTION 11)

Immigration Ordinance (Cap 115), s 13D

Chieng A Lac and 1375 others v Director of Immigration and others (1997) CA

In this case the Court of Appeal took a different view from Keith J at first instance (see (1996) 7 HKPLR 243). The Court of Appeal held that s 11 of the Bill of Rights Ordinance did have the effect of excluding from review under the Bill of Rights of a decision by the Director of Immigration under s 13D(1) of the Immigration Ordinance to detain a person pending removal.

⁴ Ordinance No 107 of 1997, *Hong Kong Government Gazette*, 30 June 1997, *Legal Supplement No 1*, A3895.

⁵ *The Government of the Hong Kong Special Administrative Region Gazette*, 18 July 1997, *Legal Supplement No 1*, A329.

**RIGHT TO A FAIR AND PUBLIC HEARING BY AN INDEPENDENT
AND IMPARTIAL TRIBUNAL IN THE DETERMINATION OF
RIGHTS AND OBLIGATIONS IN A SUIT AT LAW (ARTICLE 10, BILL
OF RIGHTS; ARTICLE 14(1), ICCPR)**

Stamp Duty Ordinance Cap (117), s 14

*Right of access to court -- Stamp duty assessment -- Appeal available only when
disputed duty paid -- Whether right of access to court denied or unreasonably
limited*

***Harvest Sheen Ltd v Collector of Stamp Revenue* [1997] 2 HKC 380 (HCt)**

C, the second applicant, and her husband wished to purchase a house through a family company. The name of the first applicant, H Ltd, was reserved for the applicant and her husband on 4 March 1997. On 5 March C signed a provisional agreement for the purchase of the house, signing as "C ... for and on behalf of _____". As she was not sure of the company name, she left it blank, assuming that her solicitors would fill it in. On 13 March 1997 C and her husband were appointed directors of H Ltd, and the company ratified the purchase of the house.

On 19 March the solicitors submitted documents for stamping, which included the original agreement and a certified copy (in which H Ltd's name had, by an oversight, not been inserted) and Form 26 (in which H Ltd was named as the purchaser). After the discrepancy was pointed out by the assessors, the solicitors filled in H Ltd's name in the original agreement (but not the copy) and resubmitted the documents.

The assessor took the view that in effect there were two sets of documents which related to two separate transactions, viz a provisional sale and purchase agreement between the vendor and C dated 5 March, and a further agreement for sub-sale and purchase between C and H Ltd dated 19 March, and that duty was payable on each set of documents. The applicants challenged this view, maintaining that the documents involved only one transaction, a sale by the vendor to the company, and that duty was payable only once on the transaction.

Under s 14 of the Stamp Duty Ordinance, a person who is dissatisfied with an assessment may appeal to the District Court against the assessment. That appeal must be lodged within 1 month from the date on which the assessment is made, and the disputed duty must be paid before the appeal can be lodged.

C and H Ltd wished to appeal against the assessment. C claimed that she did not have the money to pay the disputed duty in advance. C and the first applicant thereupon sought judicial review of the decision of the assessor, arguing that he had erred in law in concluding that there had been two contracts. They also argued that the requirement in s 14 that the disputed duty must be paid before an appeal against an assessment could be lodged was inconsistent with the right of access to court contained in article 10 of the Bill of Rights Ordinance.

Barnett J held that the assessor had erred in law in finding that there were two contracts; he held that there had been only one contract, that C had entered into a contract on

behalf of an unnamed principal that had been subsequently ratified by the principal and that the agreement related back to 5 March

Although it was not strictly necessary to decide the issue, the judge indicated his views on the Bill of Rights argument

Held (obiter):

- 1 Article 10 should be given a generous and purposive construction. It should not be understood as only ensuring that once a person has managed to get before a court, he enjoys the guarantees set out in that article, and as not providing a litigant with any assistance to get into the court in the first place, no matter what difficulties and obstacles may be placed in the litigant's way. Article 10 was engaged in this case
2. While the right of access to a court may be limited, any such limitation must pursue legitimate objectives and be a reasonable and proportionate measure. In the present case the requirement that the disputed duty be paid before an appeal could be brought, a condition which could not be varied by the court or by the Collector, was not a reasonable or proportionate measure, since there will be cases where a would-be appellant simply cannot pay the duty assessed and is therefore effectively denied access to the court.
3. Accordingly s 14(1) of the Stamp Duty Ordinance was in part inconsistent with art 10 of the Bill of Rights and was repealed to the extent of the inconsistency. This would mean that that words "and on payment of stamp duty in conformity therewith" would be excised from the provision.

GJX McCoy QC and Victor Luk (William KW Leung & Co) for the applicants; Philip Dykes QC and Phyllis Wong (Crown Solicitor) for the respondent.

Editorial comment

The broad and generous approach taken to the construction of art 10 in this case is welcome. While the judge does appear to endorse the approach taken in *Golder*, which supports a general right of access to court in certain categories of cases, the present case did not in fact involve the critical issue raised by *Golder*. This is because s 14 of the Stamp Duty Ordinance does indeed confer a right to bring proceedings before a tribunal (the District Court) that satisfies the criteria set out in article 10; the problem is that it subjects the exercise of that right to unreasonably heavy burden that may have the practical effect of denying the right in some cases. The critical issue (which did not directly arise in this case) is whether the applicants would have had a right under article 10 to have a court hear their appeal on the merits and the law, if the Ordinance had not provided any avenue for appeal at all and judicial review was the only remedy available. The issue of whether article 10 does indeed provide a right of access to court has not been authoritatively resolved by the appellate courts of Hong Kong as yet. (While the Court of Appeal allowed an appeal from the decision of the High Court in *R v Town Planning Board, ex parte Kwan Kong Co Ltd* (1995) 5 HKPLR 261 in which Waung J rejected the existence of such a right, the Court of Appeal did not pronounce on this point: (1996) 6 HKPLR 237.)

Another matter is whether article 10 was indeed engaged in this case. There are a number of European Court authorities in which the Court has held that disputes between the government and private individual over revenue matters are not "civil rights and obligations" (in the ICCPR/BOR, the "rights and obligations in a suit at law") covered by article 10. The European cases on this issue were followed by Judge Cheung in *Commissioner of Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141, at 149-152. While the European Court has refined this position somewhat, and it is an open issue whether the classification based on the civil law's distinction between administrative law, civil law and criminal law should be carried over into a common law system, the matter has not been fully considered or resolved by the Hong Kong courts as yet.

Roads (Works, Use and Compensation) Ordinance (Cap 370), s 11

Whether statutory objection to the construction of major road work involved a determination of rights and obligations in a suit at law – "suit at law"

***Ma Wan Farming Ltd v Governor in Council* (1997) Court of First Instance, High Court -- Administrative Law List No 4 of 1997, Keith J, 30 July 1997**

The applicant was the registered owner of various lots of land in Ma Wan Island. In August 1994, Sun Hung Kai Real Estate Agency Ltd ("the developer") announced plans for a major development on the island, consisting of a theme park, a residential estate and a new village for the indigenous inhabitants of Ma Wan who would be displaced by the development. The applicant's land was situated within the proposed theme park. In the course of negotiations with the applicant, the developer stated that if no agreement could be reached, it would invite the Government to resume the applicant's land. The negotiations did not bear fruit.

In April 1995, the Secretary for Transport announced in the *Gazette* proposals for road works on Man Wan in connection with the development. These included a proposal for resuming some of the applicant's land. The *Gazette* notice referred to the relevant plans and a scheme annexed thereto, which would be available for public inspection at specified places. When the applicant's representatives asked for the relevant documents at the District Lands Office, one of the specified offices for inspection, they were supplied with the plans only. It was not in dispute that the scheme was not annexed to the plans at the time of inspection. The applicant's representatives were also told that no copies of the plans were available. Several weeks later the applicant's surveyors were provided with copies of the plans by the developer.

In June 1995, the applicant's surveyors lodged an objection to the proposals on behalf of the applicant. The objection was supplemented by a letter from the applicant's solicitors to the Governor in Council in January 1996. On 3 December 1996, the Governor in Council decided to authorize the road works without modification. The applicant applied for judicial review of this decision, arguing that there was a failure to comply with statutory duties and that the objection procedure under s 11 of the Roads (Work, Use and Compensation) Ordinance ("the Ordinance") was in contravention of art 10 of the Bill of Rights. After leave to apply for judicial review had been granted, the applicant was supplied with a copy of the plans, which were found to be different from the copies supplied to them by the developer.

Held (dismissing the application):

- 1 The requirement in s 5(b) of the Ordinance that the scheme be annexed to the plans was mandatory and applied not only at the time when these documents were prepared, but continued up to the time when these documents were made available for public inspection. The reason for this requirement was to ensure that the plans would not be inspected without there being an opportunity for the scheme (which was designed to explain the plans) to be inspected at the same time. This aim would be frustrated if these documents were physically separated at the time of inspection.
- 2 Section 8(5) of the Ordinance did not require the request for the supply of copies of plans to be complied with immediately or at a particular place. The refusal to supply the plans was ambiguous, and could not have meant that as a matter of policy copies of the plans would not be provided.
- 3 Notwithstanding the failure to keep the scheme annexed to the plans and the not unreasonable assumption on the part of the applicant that the scheme was not available for inspection, the applicant was not entitled to any relief because if knowledge of the scheme was necessary for them to lodge a meaningful objection, they could have asked the Secretary for Transport for a copy. The *Gazette* had referred to both the plans and the scheme. Besides, even if the applicant had had an opportunity to inspect the scheme, the objection which it would have lodged would have been no different from the objection which it had in fact lodged.
4. Even assuming that the applicant was misled by the developer's plans in that certain footpaths were not (according to the official plans) to be closed, the applicant had not been prejudiced by the difference in the plans. It would still have been possible for the applicant to propose the alternative routing proposal in its objection.
5. The nature of the objection procedure under the Ordinance could not be distinguished from that under the Town Planning Ordinance. Accordingly, the objection procedure under the Ordinance was not a "suit at law" and therefore art 10 of the Bill of Rights was not engaged. The only distinction between the two sets of procedure was that under the Ordinance, the Governor in Council's decision determined whether land was to be resumed and therefore determined finally a person's property right, but this went to the issue of determination, which was a separate issue. *Kwan Kong Company Ltd v Town Planning Board* (1996) 6 HKPLR 237 followed.
6. The applicant had not been denied an opportunity to comment on any oral or written representations made to the Governor in Council by or on behalf of the Secretary for Transport. Having read the ExCo brief, there was nothing in the materials placed before the Governor in Council on which the applicant could usefully have commented but which it could not have commented on before the decision.

**Martin Lee SC and Johannes Chan (instructed by Sit, Fung, Kwong & Shum),
for the applicant; Philip Dykes SC (instructed by the Department of Justice),
for the respondents.**

**RIGHT NOT TO BE COMPELLED TO TESTIFY AGAINST ONESELF
OR TO CONFESS GUILT (ART 11(2)(G), BILL OF RIGHTS; ART
14(3)(G), ICCPR)**

Prevention of Bribery Ordinance (Cap 201), ss 13(1) and (3)

*Privilege/right against self-incrimination – Application of guarantee to
demands for information prior to charge or trial*

*Chan Sze Ting and Lee Chin Ming v HKSAR (1997) CA, Mag App Nos 106 and 107
of 1997, 4 September 1997*

In this case, one of the issues raised was the interpretation of s 13(1) of the Prevention of Bribery Ordinance (Cap 201), which confers on the ICAC Commissioner the authority to delegate to an investigating officer the power to require persons to provide information, documentation or other articles. The applicants in this case argued, inter alia, that the provision did not permit a person who was the subject of an investigation to be required to provide such information if to do so would incriminate him. This argument was based on the argument that the common law privilege against self-incrimination had not been excluded by the statute. In the alternative, the applicants argued that Bill of Rights Ordinance required the provisions to be read in this way in order to render them consistent with the guarantee contained in article 11(2)(g) of the Bill of Rights that a person had the right not to be compelled to testify against himself or to confess guilt.

The Court held that in enacting s 13 the legislature had, by necessary implication, intended that the privilege against self-incrimination be abrogated. In its judgment the Court made no mention at all of the Bill of Rights arguments put forward by counsel for the appellants and replied to by counsel for the Government. The Court dismissed the appeals and refused to certify the issues involved as suitable for appeal to the Court of Final Appeal.

Editorial comment

Prior to this decision, the applicability of article 11(2)(g) to pre-trial and pre-charge investigations had been rejected by at least three courts,⁶ none of which appears to have been aware of the contrary international authority or of the academic commentaries on the issue. (see our commentary on recent international law developments in *Bulletin*, v 4 n 2, at pp 27-29; the decision of the European Court of Human Rights in *Saunders* referred to there has now been reported at (1997) 23 EHRR 313). The comparative case law was cited to the Court of Appeal in the present case.

It seems surprising, in view of the fact that the courts have previously adopted an interpretation of article 11(2)(g) which is flatly inconsistent with the relevant international case law, that the Court of Appeal did not see fit either to address the issue itself or to certify the issue as appropriate for consideration by the Court of Final Appeal. Although the issue of whether article 5(1) of the Bill of Rights provides protection against self-incrimination has

⁶ See *R v Lee Tak-cheung* (1992) 2 HKPLR 547; *R v Securities and Futures Commission, ex p Lee Kwok-hung* (1993) 3 HKPLR 1 (HCt) and *Attorney General v Tsang Wai Keung* (1996) 7 HKPLR 163.

been considered by the Court of Appeal (in *R v Securities and Futures Commission, ex p Lee Kwok-hung* (1993) 3 HKPLR 39), the Court of Appeal in that case did not consider the applicability of article 11(2)(g) (an argument rejected by Jones J at first instance). The Hong Kong courts have so far failed to give effect to the clearly expressed legislative intention that the Bill of Rights be interpreted consistently with the ICCPR, it can only be hoped that the Court of Final Appeal will be prepared to consider the issue and demonstrate that it is not as parochial in its interpretation as the Court of Appeal has sometimes been. However, since a majority of the Court of Final Appeal consists of those former judges of the Court of Appeal who have been involved in a number of Bill of Rights cases in which the generally restrained approach to interpretation has been laid down, a departure from prior jurisprudence seems unlikely (even if what is involved is the direct interpretation of provisions of the ICCPR under article 39 of the Basic Law).

RIGHT NOT TO BE SUBJECTED TO UNLAWFUL OR ARBITRARY INTERFERENCE WITH ONE'S PRIVACY OR HOME (ARTICLE 14, BILL OF RIGHTS; ARTICLE 17, ICCPR)

Right not to be subject to arbitrary interference with one's home -- Whether failure to give notice to property owners whose property were to be resumed amounts to an arbitrary or unlawful interference with their private rights

Fok Lai-ying v Governor in Council and others (1997) Privy Council, Lord Lloyd of Berwick, Lord Steyn, Lord Hoffmann, Lord Cooke of Thorndon, Lord Hope of Craighead, 18, 27 June 1997

The appellant was the registered owner of an agricultural lot in Shatin, on part of which a three-storey house was erected; the remainder of the lot (about 2,410 square feet) was an open space. The property was the home of the appellant, where she lived with her husband and children. In 1991, new layout plan was prepared under which part of the appellant's land would be resumed. Consultations were made with indigenous villagers. Since the appellant was not an indigenous villager, she was not privy to these consultations. The proposed resumption came to the appellant's notice only in early 1995. On 27 March 1995, her solicitors wrote to the Clerk to the Executive Council requesting her objection be brought to the notice of the Members of the Council when they considered the resumption.

On 5 May 1995, the District Planning Officer wrote to the appellant's solicitors informing them that the Clerk to the Executive Council was seeking views from the District Lands Officer regarding the appellant's objection letter of 27 March 1995, and that the District Planning Office would provide its input to the District Lands Officer for his co-ordinated reply to the Clerk. The letter further said that should the appellant have further questions she was invited to contact the office. The appellant or her advisers did not at that stage or ever take up the opportunity of asking any further questions, apart from asking for a copy of the engineering plan which was duly supplied. Nor did her advisers send any comment to the Planning Department about the proposed procedure. On 15 December 1995, a resumption notice was published in the Gazette stating that the Governor had ordered the resumption of part of the appellant's lot for a public purpose, pursuant to s 3 of the Crown Lands Resumption Ordinance. The portion to be resumed was about 2,112 square feet of open space, including most of the access drive and garden. The effect of the order was to

deprive the property of its only access for motor cars to a public road and of car parking spaces

The appellant applied for judicial review of the Governor's decision, arguing that the respondents had failed to observe the requirements of procedural fairness in reaching the decision, since she had not been provided with an opportunity to make representations before the decision was made. She also argued that the resumption violated her right not to be subjected to unlawful or arbitrary interference with her home, as guaranteed by art 14 of the Hong Kong Bill of Rights. At first instance, Cheung J held that the respondents had been obliged to provide the appellant with an opportunity to make submissions before the resumption was ordered, and, in view of the failure to do so, the judge quashed the order for resumption of land. Cheung J further held that art 14 had no application to the case, since the Bill of Rights did not guarantee rights to the enjoyment of private property: see (1996) 7 HKPLR 63.

On appeal, the Court of Appeal reversed the decision, holding that in the context of resumption, the Governor was bound to consult only the Executive Council; he was not obliged to give the landowner prior notice or an opportunity to make representations. It also indicated that art 14 of the Bill of Rights might be applicable, yet there was no violation even if it was engaged, because the scheme for resumption of land for public purposes with compensation was neither an arbitrary nor an unlawful interference with the appellant's home: (1996) 6 HKPLR 78. The appellant appealed to the Privy Council.

Held (dismissing the appeal):

1. The standards of fairness are not immutable. What fairness demands is dependent on the context of the decision, including the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer. *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 560 affirmed.
2. A person whose property is affected has an implied right to be heard before resumption of his property is ordered. To the extent that it was argued that the express provision of a limited right to be heard in the Crown Lands Resumption Ordinance, the Town Planning Ordinance and the Roads (Works, Use and Compensation) Ordinance would exclude an implied right to be heard, this approach was inconsistent with *Doody*, where a somewhat similar argument was rejected and the natural justice principle of supplementation applied. Practical inconvenience was insufficient to displace this principle. *In re an application by K O Y Investment Co Ltd* [1983] HKLR 28 not followed.

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3. While art 14 is expressed in more positive terms than art 8 of the European Convention and does not contain the express limitations found in clause (2) of the latter, it is directed against arbitrary or unlawful interference. In determining whether an interference is to be so characterised it may be appropriate to consider, among other matters, democratic necessities such as those listed in art 8(2) of the European Convention. Both articles may require a form of balancing exercise and the verbal differences should not be heavily stressed.
 4. The relevant aim of art 14 of the Bill of Rights is to preserve the integrity of the home. This must include the grounds or curtilage forming part of the home, although the circumstances that the actual living quarters are not interfered with may in some cases have a bearing on whether an interference is arbitrary or unlawful. For the purposes of this appeal, it is assumed without deciding that "arbitrary" 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.
 5. It cannot be assumed that the availability of compensation would necessarily mean that a compulsory acquisition of land is not arbitrary or unlawful.
 6. Applying s 3 of the Bill of Rights Ordinance, s 3 of the Crown Lands Resumption Ordinance should be construed, at least when the compulsory acquisition of a home or part of a home is at stake, to require a fair procedure including a reasonable opportunity of objection.
 7. The appellant had had a reasonable opportunity to raise further questions, of which she and her advisers had not availed themselves. Her objection had been considered by the Executive Council. She was told that the answers of various government departments to her objection would also be put before the Executive Council, and was given an opportunity to raise further questions or put forward further objection. She raised none. Accordingly, there was nothing unfair, arbitrary or unlawful in the procedure followed.

Prison Rules (Cap 234 sub leg), rr 9, 110, 77, 138(a), 143,154(2) -- Standing Order 244(1)

Prison -- Arbitrary search of a prisoner's cell -- Refusal of adequate or timely medical treatment --

Choi Sze Fai v Commissioner of Correctional Services (1997) HCt, MP No 1717 of 1996, Jerome Chan J, 5 May 1997

The applicant was an inmate of Stanley Prison. He alleged in an application for judicial review that a decision of the Commissioner of Correctional Services to search his cell was unlawful, arbitrary, and made for an improper reason or motive, and was therefore contrary to arts 6, 13 and 14 of the Bill of Rights as well as rr 9, 10 and 138(a) of the Prison Rules. He further alleged that he was refused adequate or timely medical treatment of his rheumatoid arthritis.

Held (dismissing the application):

1. The power to search the applicant's cell was set out in Standing Order 244 issued pursuant to the powers conferred upon the Commissioner under reg 77 of the Prison Rules.
2. After abandoning the ground that the decision to search his cell was without legal authority, the applicant could not rely on a new ground that the decision to search his cell was made for an improper purpose or with an improper motive. Such an allegation would bring a whole new dimension to the application which would necessitate the introduction of fresh evidence of a completely different nature. There was no justification for such a course.
3. The searches of the applicant's cell did not constitute a violation of art 14 of the Bill of Rights. Those searches were intended to be a precaution against prisoners secreting tools, implements, ropes or clothing which they might use in effecting their escape or materials from which these could be made. Disturbance of the prisoners' life had been kept to a level below that required by the Standing Orders. Such measures were both reasonable and necessary as a precaution against escape and against possession of prohibited articles by prisoners that might constitute a threat to the safety and well-being of other inmates.
4. The applicant had failed to substantiate his allegation of refusal of adequate or timely medical treatment.

Applicant in person; N J Cooney (Crown Solicitor), for the respondent.

**RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND
RELIGION (ART 15, BILL OF RIGHTS; ART 18, ICCPR)**

See *Lau Wong-fat v Attorney General*, at page 26.

**RIGHT TO FREEDOM OF OPINION AND EXPRESSION (ARTICLE
16, BILL OF RIGHTS; ARTICLE 19, ICCPR)**

Defamation – Whether a public authority such as a university may bring defamation action in relation to matters which are of public interest – Whether restriction on freedom of expression necessary and proportionate

*Hong Kong Polytechnic University and others v Next Magazine Ltd and another (1997)
7 HKPLR 286 (CA)*

The respondents were the publisher and editor-in-chief of *Next* magazine, which published an article on 2 September 1994 alleging, among other matters, that the Hong Kong Polytechnic University had turned a blind eye to the lack of academic qualifications of some of its teaching staff. The University, together with its president and a lecturer, commenced libel proceedings against the respondents. The respondents took out a summons under O 15 r 6(2) of the Rules of the Supreme Court for an order that the University and its president should cease to be a party. The application was dismissed by Master Cannon on 2 April 1996. On appeal, Keith J firstly held that the University was a 'public authority' within the meaning

of s 7 of the Hong Kong Bill of Rights Ordinance (Cap 383) (1996) 6 HKPLR 117 At the adjourned hearing, Keith J, treating by consent the summons before him as an application to strike out the University's claim under O 18 r 19, allowed the appeal, he held that the University had no right to sue for defamation either under the common law or the Bill of Rights, and ordered that the claim of the University be struck out: (1996) 7 HKPLR 41 The University appealed.

Held (allowing the appeal and restoring the order of the Master):

1. The University does not take part in the government of Hong Kong. It is not an organ of government, democratically elected or otherwise. It has a reputation which the common law would protect, and the public interest strongly favours the protection of the reputation of institutions of learning like the University. *Derbyshire County Council v Times Newspaper* [1993] AC 534 distinguished.
2. The reference to the Bill of Rights was misconceived. Under art 16 of the Bill of Rights, the right to freedom of expression may be restricted if the restriction is 'provided by law'. The 'law' is the common law, in particular the ability of bodies defamed to sue for libel. There is no rule of common law which restricts a university from maintaining a libel suit.

Quaere whether the university was a 'public authority' within the meaning of s 7 of the Bill of Rights Ordinance.

Adrian Huggins QC and Joseph Fok (instructed by Johnson Stokes & Master), for the appellants; Kenneth Kwok QC, Hin-lee Wong and Johannes Chan (instructed by T S Tong & Co), for the respondents.

Editorial comment

Although the members of the Court of Appeal in this case reached a unanimous conclusion that the University had a right to sue for defamation, they reached this result by slightly different analyses. The relationship between the common law restrictions on defamation actions by certain categories of public bodies and article 16(3) of the Bill of Rights is at the heart of the case. As in previous cases, the Court in essence adopted the position that the Bill of Rights added nothing to the protection provided for under the common law.

Litton VP held that a university had a legitimate interest in protecting its reputation and that the common law did not prevent a university from bringing such an action. In reaching this conclusion he noted a number of differences between the local authority in the *Derbyshire County Council* case and the university in this case, in particular that the university was not a political body that takes part in the government of Hong Kong. He did not consider that the policy underlying the *Derbyshire* bar on defamation actions applied to the university, or to all bodies which "operated in the public sphere" or which were designated as "public bodies" for particular statutory purposes.

On the applicability of the Bill of Rights, Litton VP stated that it was "somewhat doubtful" whether the University was a "public authority" within the meaning of s 7 of the Bill of Rights Ordinance and thus not at all clear that the Bill of Rights applied. In any event

he took the view that the right of the University to bring a defamation action conferred by the common law did not violate the right to freedom of expression guaranteed by article 16

Litton VP held that the restriction on the speaker's freedom of speech was "provided by law", since it was to be found in common law rules. He did not explicitly discuss whether the restriction was "necessary" for one of the permitted purposes set out in art 16(3), he apparently saw this as involving essentially the same policy issues as were taken into account when deciding whether the *Derbyshire* bar should be extended to universities. In other words, the availability of a defamation action was necessary to protect the rights of the university. He said (at 292):

"What are the restrictions 'provided by law'? The answer must be, the restrictions provided by the common law: in particular the ability of bodies defamed to sue for libel. And this brings the argument immediately back to the alleged disability to sue as exemplified by the *Derbyshire County Council* case."

Ching JA also held that the Bill of Rights did not affect the outcome (assuming, without deciding, that the university was a "public authority"). He said (at 293-4):

"I am firmly of the view that the Bill of Rights Ordinance (Cap 383) is wholly irrelevant to any issue in this appeal....[Article 16(3)] goes on to provide that there may therefore be restrictions on that freedom but they are only to be such as are provided by law and as are necessary for the respect of the rights or reputations of others. There is nothing in the Ordinance which directly prohibits an institution such as the appellant from bringing proceedings for defamation. Then one looks to see whether there are any laws, such as the common law, which restrict the rights to sue for defamation. The only authority cited to us is the *Derbyshire* case wherein it was held that a local authority cannot bring such an action. The appellant is not a local authority. The question then is whether the restrictions imposed upon a local authority in this respect should be extended to apply to an institution such as the appellant. If they should be, then it would have no right under common law to sue for defamation anyway and reference to the Bill of Rights Ordinance is therefore otiose."

Ching JA thus also appears to assume that, if a public institution is permitted to sue for defamation under the common law, such an action would be permissible under article 16(3) of the Bill of Rights (that is, protecting the reputation of the authority concerned is a necessary measure). While that may in fact turn out to be the case as a practical matter, the analysis undertaken under article 16(3) is analytically distinct from that undertaken in the *Derbyshire* case, though many similar factors are taken into consideration.

Godfrey JA was of the view that restricting the right of some public authorities to bring defamation actions did not mean that all public authorities should be barred from so doing; he considered that the university bore "no resemblance" to the sort of public authority with which the *Derbyshire* case was concerned. On the relevance of article 16(3) of the Bill of Rights he said (at 293):

"It has been argued that, whatever the position at common law, the Hong Kong Bill of Rights Ordinance (Cap 383) operates so as to rob the appellant of the right it would otherwise have to defend its reputation by invoking the law of defamation. This argument is wholly misconceived. Article 16 of the Hong Kong Bill of Rights would clearly operate to strike down any rule of common

law (or any legislation) which purported to protect the 'reputation' of the Regional or Urban Councils (or, for that matter, of the Legislative Council, or any other government body), but there is no such common law rule, and there is no such legislation. As the *Derbyshire* case shows, the common law rule is precisely the opposite. . Article 16 of the Bill of Rights contains a valuable and important restatement of the right of freedom of expression, recognised for centuries by the common law, but at the same time it recognises the validity of the restrictions placed on that right by the law of defamation, so far as those restrictions are necessary to protect the reputations of others. In the case of a government body such restrictions would, I agree, not be necessary, but the common law does not assert otherwise. In the case of the appellant, however, it has, in my judgment, the same right to maintain an action for protection of its reputation as has any other person or corporation properly claiming to have a reputation to protect."

Godfrey JA, however, does not explain in any detail why the restriction on freedom of expression represented by allowing universities to bring defamation actions is a permissible one under article 16(3) of the Bill of Rights, while barring a local authority (or the Regional or Urban Council) from so doing would fall foul of the Bill of Rights. Insofar as he agrees with the judgment of Litton VP, his conclusion is presumably based on the view that the question of necessity of a restriction is in effect considered in the common law policy analysis involved in deciding whether some categories of public institution should be prevented from bringing defamation actions.

Thus, each member of the Court of Appeal appears to take the view that the common law process of weighing up whether the public interest requires that some public institutions be prevented from bringing defamation actions is in substance the same task as is involved in analysing whether a restriction is permissible under the Bill of Rights.

It is perhaps unfortunate that the Court simply relied on the *Derbyshire* case as a paradigmatic example of the type of institution which should not be permitted to bring a defamation action, without discussing in more detail the interests at stake. Unlike the first instance judge, the Court of Appeal found it unnecessary to examine the interests to be protected by freedom of expression, the chilling effect of the law of defamation which has effectively silenced the opposition and the critics in many parts of the common law world, or the path taken by judges of other jurisdiction to extend the protection against defamation suit brought by political bodies, public figures and public institutions (see, for example, *Thorgeirson v Iceland* (1992) 14 EHRR 843 or *McKinney v University of Guelph* (1990) 76 DLR (4th) 545). By focusing on the common law alone, the Court of Appeal has arguably neglected considerations that should be taken into account when deciding the issue of necessity; its analysis fails to address in any depth the question of whether the common law is consistent with the international standards of protection expected under the Bill of Rights.

Another disappointing aspect of the judgment is that the Court of Appeal failed to decide what constitutes a "public authority". Litton VP thought it "somewhat doubtful" that the university was a public authority, while Godfrey and Ching JJA were prepared to assume, (without deciding) that it was, for the purposes of considering the Bill of Rights arguments. The scope of this term, which is not defined in the Bill of Rights Ordinance, determines the reach of the Bill of Rights. The phrase has been the subject of a number of lower court and disciplinary tribunal decisions, and an authoritative decision from the Court of Appeal would be helpful.

Keith J at first instance proposed various indicia that should be considered when determining whether a body is a "public authority". These included whether the institution was entrusted with functions to perform for the benefit of the public rather than for private profit, and whether there was something in its nature or constitution, or in the way in which it was run, apart from its functions, which brought it into the public domain, such as public funding, some measure of governmental control or monitoring of its performance, or some form of public accountability. While this may not be the perfect test, it provides a useful starting point. (See also our comments in *Bulletin*, v 4, n 1, at pp 21-22). Litton VP rejected the test of "operating in a public domain", and the court was not prepared to propose any substitute test, thereby leaving the law in a state of continuing uncertainty.

Although the Court of Appeal said that it was prepared to assume without deciding that the university was a public authority, the approach adopted by the court suggests that the court would be likely to exclude a university from the scope of the Bill of Rights, if that issue were necessary for decision in a given case. The court effectively treated the university as analogous to a private corporation. All three judges compared government and local authorities on the one hand, and private individuals and corporations on the other. They seemed to assume that anything which was neither government nor local authority would be private individuals and corporations, and hence the university fell within the latter category.

Adoption of this analysis would frustrate the evident intention of the legislature to create a category of "public authority" which lies somewhere between "government" and "individuals". In the last century when governmental powers were concentrated in the central government, it may have been fairly easy to identify the "government". However, today, when delegation of government functions and powers is the rule rather than the exception, and when privatisation and quasi-governmental bodies exercise various degrees of governmental powers and responsibilities, the concept of "government" becomes blurred. The effect of a narrow interpretation of "public authority", which would deprive the courts of an opportunity to scrutinize the activities of these bodies, would be an unfortunate development.

Contempt of court – Definition of contempt – Whether law of contempt prescribed by law and a necessary restriction on freedom of expression

Attorney General v Cheung Kim Hung and Next Magazine (1997) 7 HKPLR 295 (Rogers J)

The respondents were respectively the editor and the publisher of *Next* magazine. On 29 September 1994 *Next* published an article about a pending libel trial. The trial was a jury trial. The plaintiff in that trial was a well-known economist. The article referred to the expenses incurred by the plaintiff in retaining a Queen's Counsel and an overseas expert, and suggested that the bill at the end would be at least \$2.4 million. It was published shortly before the close of the trial. Although the existence of this article was not brought to the attention of the trial court, there were oblique references to it in the speeches of counsel on both sides when they addressed the jury in terms that they should ignore what they had read about the costs of the case. The jury awarded a sum of \$2.4 million as damages. The award was eventually set aside by the Court of Appeal on the ground that it was excessive: (1995) 5 HKPLR 428. The Court of Appeal also directed that a copy of the article be referred to the Attorney General, who commenced contempt proceedings against the respondents.

Held (committing the respondents for contempt):

- 1 Contempt may be broadly defined as the wrongful interference with the administration of justice. It is limited to what is necessary for the administration of justice and no more. Wrongful interference can take many forms; one of the common forms is the making of comments about current cases. This is of particular importance in a jury trial, as laypersons and in particular jurors have to be recognized as vulnerable to influences and pressures which impair their impartiality or cause them to form preconceived views. *Attorney General v The Times Newspapers* [1974] AC 273 at 309 followed.
2. The law of contempt is a permissible restriction on the right to freedom of expression under art 16(3) of the Bill of Rights. It is 'provided by law', because the law can be reasonably ascertained and the consequences of any given action can be foreseen to a reasonable degree. It pursues the objectives of respect for the rights of others and the protection of the right to fair hearing, and is necessary, given its ordinary meaning, for the protection of such objectives. *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 271 followed.
3. Taking into account the content of the article, its likely circulation, the timing of publication and the manner of presentation, the article posed a real risk that the due administration of justice would be impaired in an important aspect, namely that in coming to its conclusion the jury would take into account extraneous matters which were not part of the evidence. The article dealt with the question of damages, which was one of the issues the jury had to decide. Its circulation was such that it would bring about an imminent danger that persons likely to have been selected as jurors at the material time would very possibly either buy the magazine or have it in their household. The article was published in close proximity in timing with the deliberation of the jury on damages. It directed attention to the amount which the plaintiff had laid out in the libel case to regain his reputation, and was not a general discussion of the level of legal fees.

Nicholas CH Bradley, Senior Crown Counsel, for the Attorney General;
Kenneth Kwok QC, Hin-lee Wong and Johannes Chan (instructed by T S
Tong & Co), for the respondents.

Editorial comment

Contempt of court is an area of law well known for its uncertainty. In 1974, Lord Justice Phillimore noted in his report that "the greatest criticism of the existing law lies in its uncertainty as it affects the press": *Report of the Committee on Contempt of Court* (HMSO, 1974), p 37, para 83. In England, the law was tidied up by the Contempt of Court Act 1981, which was enacted as a result of the defeat of the British Government before the European Court of Human Rights in *Sunday Times v United Kingdom* (1979) 2 EHRR 245. No similar legislation was introduced into Hong Kong, which is left with the unsatisfactory and confusing pre-1981 common law. In 1985, the Law Reform Commission, after studying into this area, concluded that the time had come in Hong Kong for the enactment of a comprehensive Contempt of Court Ordinance: *Report on Contempt of Court*, para 2.6. No action has been taken by the Government.

In this sense the judgment of the court is to be welcomed: it clearly sets out the test for contempt, defining it as the wrongful interference with the administration of justice, and limiting it to what is necessary for the administration of justice and no more. However, this

judgment does not and cannot address the many facets of the law of contempt which have been addressed by the Law Reform Commission, for instance, the sub-judice rule, the defence of legitimate discussion of matters of general public interest, and so on. On the law of contempt and freedom of the press, the Law Reform Commission said

“We think that Lord Denning was right in describing the press as the ‘watchdog of justice’. It is not possible to exaggerate the importance of the media as a whole in this role. Responsible reporting and comment is not to be unjustifiably muzzled by the law of contempt. Restraints on the media are just as unacceptable if they stem from editorial fear of punishment due to the uncertainty of the law.”

These comments are as pertinent today as when they were made 12 years ago

Control of Obscene and Indecent Articles Ordinance (Cap 390), s 32

Obscene and indecent articles legislation – Compatibility with guarantee of freedom of expression

***R v Ku Man-ho Henry* (1997) Mag, Western Magistracy, Case No 2158 of 1997, Mr D J Dufton, 29 May 97**

The defendant was charged with an offence of importing by post three obscene video tapes, contrary to ss 32(1)(f), 32(3) and 37(1)(a) of the Post Office Ordinance (Cap 98). The defendant argued that s 32(1)(f) was inconsistent with arts 14 and 16 of the Bill of Rights. He argued that the restrictions imposed by ss 32(1)(f) and 32(3) on sending and importing obscene articles by post were over-broad and disproportionate. As the Control of Obscene and Indecent Articles Ordinance (Cap 390) did not prohibit adults from receiving obscene articles for private use only, the defendant contended that there was no justification for an absolute ban on receiving obscene articles via the mail.

Held:

1. Freedom of expression includes the right to receive information and ideas that offend, shock or disturb. *Handyside v United Kingdom* (1979) 1 EHRR 737 followed.
2. The restriction on freedom of expression is prescribed by law. Section 32 of the Post Office Ordinance is of general application and has been adopted in accordance with established constitutional procedures. The laws are published and are readily accessible to those who are affected by them, and are formulated with sufficient precision to enable citizens to regulate their conduct.
3. The determination of whether the restriction is necessary involves a balancing exercise that calls into question whether the restriction is proportionate. The onus is upon the Crown to justify the restriction. A wide margin of appreciation should be accorded to the control of obscenity, as there is little consensus on moral issues. *R v Sin Yau-ming* (1991) 1 HKPLR 88 followed.

4. Restriction of importation of obscene material by post pursues the legitimate aims of protection of morals and respecting the rights of others. No rigid distinction should be drawn between these aims in this context
5. The quantity of obscene articles and frequency of posting, age and identity are inextricably linked with the use of the obscene articles, whether that be for private use or commercial use. The act of importing contributes to proliferation, both in the quantity and in the geographic dispersal of obscene material. Likewise, a willing recipient adds to that proliferation. As the mail is one method of distribution, restriction on its use is necessary as it prevents a flouting of the primary prohibition. The fact that a person can import obscene articles for private use when entering Hong Kong cannot of itself entitle a person to import obscene articles by mail. After all, the defendant is merely refused one means of access to material deemed injurious to the public morals. Besides, the fact that the means chosen by the Legislative Council may not be the least drastic means available of achieving the objective is by itself insufficient to justify striking down the restriction. Accordingly, the restriction meets the requirement of proportionality, insofar as there is a rational connection between the measures and the objective of restraining the proliferation of obscenity. Even if one was to interpret the word "necessary" as implying a pressing social need, there is such a need to stamp out the proliferation of obscenity.
6. Even if there were a prohibition upon a person bringing through customs obscene material for private and personal use, such restriction could be justified as being necessary in a free and democratic society.
7. It cannot be said that the right to consume obscene articles in private is a most intimate part of private life. Nor is there an increased tolerance in Hong Kong of obscenity. There is no violation of the right to privacy.

Vincent Wong, Crown Counsel, for the Crown; Lee Tung Ming (instructed by Lo & Lo), for the defendant.

RIGHT TO PROTECTION OF THE FAMILY (ART 19, BILL OF RIGHTS; ART 23, ICCPR)

See *Lau Wong-fat v Attorney General*, at page 26 below.

RIGHT TO EQUALITY

Evidence Ordinance (Cap 8) ss 4(1) and (2)

Child witness – Unsworn evidence of child – Whether admissibility of unsworn evidence without an express requirement to consider the competence of the child witness and to bring home to him the importance of telling the truth a violation of the right against discrimination, the right of equality before the courts and tribunals, and the right of equality before the law – ICCPR, arts 2(1), 14, 26 – Letters Patent, art VII(5)

R v Lam Chi-keung [1997] 2 HKC 250 (CA)

The appellant was convicted of four offences of indecent assault on a girl then aged 12 years. A video-taped interview with social workers was accepted as the evidence-in-chief

of the girl. In this evidence, she stated that on four occasions in May and June 1995 when she visited the appellant's home to play with a young child, the appellant indecently assaulted her by touching her breasts and vagina. On cross-examination, her accounts of these matters varied and were inconsistent with her evidence in the video-taped interview. On his appeal against conviction the appellant argued that: (a) the magistrate had made no specific findings as to what conduct constituted the indecent assault on each occasion; (b) the magistrate had failed to determine whether the girl was competent to give evidence; (c) the magistrate had failed to have proper regard to the inconsistencies in the complainant's evidence; and (d) the video-taped evidence had been admitted in the absence of evidence or agreement that the social worker who conducted the interview was employed by the Government, as was required by s 79C(2) of the Criminal Procedure Ordinance. The appellant also argued that ss 4(1) and (2) of the Evidence Ordinance, which permits the admissibility of unsworn evidence of a child without an express requirement to consider the competence of the child witness or to bring home to a child witness the importance of telling the truth, constituted a violation of the appellant's rights under art 2(1), 14 and 26 of the ICCPR and should therefore be struck down as being contrary to art VII(5) of the Letters Patent.

Held (dismissing the appeal):

1. It was incumbent upon the magistrate to specify clearly what conduct of the defendant he found to constitute each indecent assault. When his reasons were read in full, it was quite clear that he had accepted the girl's specific allegations in the video interview. These allegations were specific and this ground of appeal therefore failed.
2. A child witness is to be regarded as a competent witness unless the contrary is shown. Sections 3 and 4 of the Evidence Ordinance require a child's unsworn evidence to be received whether or not the child would otherwise have been competent. Even if a child is unable to articulate the importance of telling the truth, the child's evidence is still admissible. If a child is of sufficient understanding to give evidence, as the child's evidence is unsworn, it is usually necessary for the judge to bring home to such a witness the importance of telling the truth, but how this is done is a matter in the judge's discretion. Even if the judge fails to do this, the child's evidence would not per se be inadmissible. Under the Evidence Ordinance, a child who is unable to give intelligible evidence is not per se ruled incompetent -- although the duty of the judge would likely be to ensure that no weight be given to such evidence. Hence, it is not necessary for a judge to enquire into the competence of a child witness before the child's unsworn evidence is admitted.
3. The argument that ss 4(1) and (2) of the Evidence Ordinance were inconsistent with art 2(1) of the ICCPR because they treated witnesses over 14 years of age less favourably than those under that age -- since those over 14 were at risk of being prosecuted for perjury in contrast to those under 14 -- could not be relied on by the appellant, since the claim concerned an alleged infringement of the child's right and not that of the appellant.
4. The effect of s 4 of the Evidence Ordinance, which permitted some defendants to be convicted on the basis of unsworn evidence while most defendants could be convicted only on the basis of sworn evidence, was not discriminatory on the ground of "other status" within the meaning of the ICCPR.

5. The protection of the right to equality before the courts of defendants facing conviction on the basis of unsworn evidence rests not upon the rules for the admissibility of evidence but on the standard of proof. Whether the evidence before the court is sworn or unsworn or whether the evidence is given by a child or an adult, it is the weight of the admissible evidence which determines the result. The administering of an oath and the threat of prosecution for perjury is unlikely to make a child's evidence more credible. Hence, the proper focus on "equality" is the criminal standard of proof. Accordingly, the abolition of the formal rule pertaining to the giving of evidence by child witnesses under s 4 of the Evidence Ordinance does not infringe arts 14(1) and 26 of the ICCPR.
6. While the magistrate needed to demonstrate that he had evaluated the complainant's evidence and taken into account the inconsistencies, it was not necessary for him to detail every inconsistency and conflict in his reasons for verdict. Those reasons showed that he had been alive to the inconsistencies and was concerned to examine them.
7. Under ss 79C(1) and (2) of the Criminal Procedure Ordinance, the videotaped interview of a child witness may only be admitted into evidence if it was conducted by a police officer or a social worker in the employment of the Government. The evidence showed that the social worker who conducted the interview was employed by the Government and therefore the video-recording was admissible.
Philip Ross (instructed by the Director of Legal Aid), for the appellant; I G Cross QC, Patrick Cheung and Agnes Chan (Crown Prosecutor), for the Crown/respondent.

RIGHTS OF MINORITIES (ART 23, BILL OF RIGHTS; ART 27 ICCPR)

New Territories Land (Exemption) Ordinance (No 55 of 1994) ss 3(a), 10

Rights of indigenous inhabitants of the New Territories – Abolition of customary rule providing for male succession to land – Whether a violation of rights of minority – Whether a violation of rights to freedom of religion, and right to protection of family

Lau Wong-fat v Attorney General (1997) 7 HKPLR 307 (CA)

Prior to 1994 the law governing the inheritance of land in the New Territories was Chinese customary law, according to which the land of an indigenous inhabitant of the New Territories who died intestate passed to the nearest male relative (and women were not eligible to inherit on intestacy). In June 1994 the New Territories Land (Exemption) Ordinance ('the Exemption Ordinance') was enacted. The effect of this Ordinance was to abolish the customary rule of succession according to the male line and to substitute the normal rules governing succession on an intestacy. The Governor gave his assent to the Ordinance on 23 June 1994.

On 21 June 1994 the plaintiff, a prominent male New Territories leader, commenced proceedings by way of writ against the Attorney General. In his statement of claim he

pleaded that the provisions of the Exemption Ordinance were inconsistent with art VII(3) of the Hong Kong Letters Patent, in that they violated a number of rights guaranteed by the International Covenant on Civil and Political Rights as applied to Hong Kong. The plaintiff alleged that the Ordinance violated arts 18 (freedom of thought, conscience and religion), art 23 (rights in respect of marriage and family), and art 27 (rights of minorities) [arts 15, 19 and 23 of the Hong Kong Bill of Rights]. He also argued that the Exemption Ordinance was inconsistent with art 40 of the Basic Law.

On the application of the Attorney General, Cheung J struck out the plaintiff's statement of claim on the grounds that the action constituted an abuse of process because the essence of the plaintiff's action was a challenge to the constitutionality of the Exemption Ordinance and was therefore a public law action, which should have been commenced by way of an application for judicial review in accordance with RSC O 53. The judge, however, observed that the plaintiff had made out an arguable case that the Ordinance had infringed the rights of the New Territories inhabitants under art 27 of the ICCPR (art 23 of the Bill of Rights) and had sufficient standing to bring an action for a declaration that the Ordinance was unconstitutional: (1996) 7 HKPLR 148. The plaintiff appealed.

Held (dismissing the appeal):

1. The decision of the Governor to assent to the Exemption Ordinance was judicially reviewable and the court would grant the appropriate relief if it were shown that the Ordinance contravenes art VII(5) of the Letters Patent by restricting the rights and freedoms enjoyed in Hong Kong in a manner inconsistent with the Bill of Rights/International Covenant on Civil and Political Rights.
2. There was nothing in the Exemption Ordinance which restricted the right to freedom of thought, conscience and religion (art 15 of the Bill of Rights) or the right in respect of marriage and family (art 19 of the Bill of Rights).
3. The Exemption Ordinance did not violate art 23 of the Bill of Rights. The indigenous inhabitants of the New Territories could not possibly be considered to be an ethnic minority for the purposes of art 23. Nor did the Exemption Ordinance deny the indigenous inhabitants the enjoyment of any of the rights which art 23 is expressed to protect. It did not prevent an indigenous inhabitant of the New Territories from making a will in favour of his male descendants to the exclusion of his female descendants, and so preserving the custom himself. It merely removed one instance of discrimination against women in an era in which the elimination of all forms of discrimination against women is a policy to which all civilised nations subscribe.

Article VII(3) of the Letters Patent was subsequently renumbered art VII(5).

- 4 Where a person seeks to establish that the decision of a person or body infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action, whether for a declaration or an injunction or otherwise. There are, however, cases in which it might be permissible to litigate public law issues in private law proceedings, such as where the invalidity of the decision of the public authority arises as a collateral issue in a claim for infringement of a private right.
5. While it was unnecessary to express a firm view on the procedural point, the only proper course for an applicant seeking to challenge, under the Bill of Rights, the validity of an Ordinance after the Governor had assented to it, would be by way of an application for a judicial review of the Governor's decision to assent, in which proceedings the court would be able to make a declaration that the Ordinance was of no effect. The position after 1 July 1997 should be left over for consideration after that date.

Robert Tang QC and Kenneth CK Chow (instructed by K C Ho and Fung), for the appellant/plaintiff; Patrick Fung QC and Johnny Mok (instructed by the Attorney General's Chambers), for the respondent/defendant

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APPENDIX A

CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON THE FOURTEENTH REPORT OF THE UNITED KINGDOM*

1. The Committee considered the fourteenth periodic report of the United Kingdom of Great Britain and Northern Ireland (CERD/C/299/Add 9) at its 1185th and 1186th meetings (CERD/C/SR.1185 and 1186), held on 3 and 4 March 1997. At its 1204th and 1209th meetings, held on 14 and 19 March 1997, it adopted the following concluding observations

A. INTRODUCTION

2. The Committee welcomes the opportunity to continue its dialogue with the State party. It also welcomes its fourteenth periodic report, and notes with appreciation that information on Crown Dependencies and Dependent Territories is contained therein. The Committee notes with great appreciation that the report provides answers in detail to concerns expressed and recommendations made by the Committee in its concluding observations following the consideration of the thirteenth periodic report of the State party (see documents CERD/C/263/Add.7 and A/51/18, paras. 219-255). The Committee further welcomes the comprehensive answers provided by the delegation in the course of the dialogue.

3. The Committee notes that the State party has not made the declaration provided for in article 14 of the Convention, and some of its members requested that the possibility of making such a declaration be considered.

B. FACTORS AND DIFFICULTIES IMPEDING THE IMPLEMENTATION OF THE CONVENTION

4. It is noted that the position maintained by the Government with regard to the non-incorporation of the full substance of the Convention within the domestic legal order, as well as its restrictive interpretation of the provisions of article 4 of the Convention, may hamper the full implementation of the provisions of the Convention.

5. Moreover, it is noted that the occurrence of racism and racially motivated attacks, as well as incidents directed against members of ethnic minorities, impede the implementation of the Convention.

* UN Doc CERD/C/304/Add.20 (23 April 1997).

C. POSITIVE ASPECTS

6 The various measures taken to increase the participation of members of ethnic minorities in public and government office and in the police are welcomed by the Committee. The adoption of the Housing Act 1996 to combat racial discrimination in the field of housing, the setting up of lay visiting schemes which encompass inspection and supervision of detention in police stations by members of local communities to prevent and combat ill-treatment in custody, the drafting of changes to the code of practice which regulates police powers and procedures in the exercise of stop and search exercises, the creation of a Racial Incidents Standing Committee to implement the report of the Racial Attacks Group to combat racially motivated incidents, and the adoption of a 10-Point Action Plan to raise the achievement of ethnic minority pupils following the publication of a report by the Office for Standards in Education are noted with appreciation by the Committee.

7 With respect to article 7 of the Convention, the holding of seminars and the setting up of training programmes for judges, magistrates and law enforcement officials, provided in particular by the Ethnic Minorities Advisory Committee and the Police Training Centres, which are aimed at the elimination of racial discrimination from the relationships between members of these professions and members of ethnic minorities, are welcomed by the Committee. The launching of a number of information campaigns against racial discrimination addressed to the public at large or to specific sectors of the public (such as the "Lets kick racism out of football" campaign) is also welcomed by the Committee.

8. The adoption of the Race Relations (Northern Ireland) Order 1997 is noted, all the more so since it contains special provisions relating to the Irish Traveller communities. The fact that direct access to the courts and industrial tribunals is granted for violations of the provisions of the Order outlawing racial discrimination in the fields of employment, training, education and housing and in the provision of goods and services is also welcomed by the Committee.

9. It is noted with satisfaction that, in accordance with the Committee's recommendations, the United Kingdom Government requested the authorities of the Crown Dependencies and the Dependent Territories to consider the introduction of specific legislation against racial discrimination within their respective legal orders, and that to this effect, it provided them with draft model legislation in line with its Race Relations Act 1976. It is further noted with satisfaction that some of these authorities have acceded to that request, i.e. those of Anguilla, Bermuda, the British Virgin Islands, the Falkland Islands and Saint Helena.

10. The adoption of the British Nationality (Hong Kong) Bill, which grants the right to members of ethnic minorities in Hong Kong who have no other nationality than their present British nationality to be registered as full British citizens, and thus to enjoy the right of abode in the United Kingdom, is noted with appreciation by the Committee.

11. It is also noted with satisfaction that, after 140 years, equal status has been accorded to Chinese with English in the Hong Kong courts at all levels, and that the Hong Kong government is undertaking the translation into Chinese of all the laws adopted in Hong Kong before 1989.

12 It is noted with satisfaction that the Hong Kong government is now providing education up to the secondary level to Vietnamese migrants in Hong Kong, and that education services are provided to all Vietnamese children in the detention centres free of charge. The fact that the syllabus takes into account the future reintegration of these children into the Vietnamese education system on their return to Viet Nam is viewed as a positive measure by the Committee.

D. PRINCIPAL SUBJECTS OF CONCERN

13. Concern is expressed that full effect has not been given to the provisions of the Convention within the domestic legal order, and that individuals cannot be protected from any discriminatory practices that have not been prohibited by Parliament.

14. Special concern is again expressed at the restrictive interpretation by the Government of the provisions of article 4 of the Convention. In this regard, it is noted that such an interpretation is in conflict with the State party's obligations under article 4 (b) of the Convention to prohibit organizations which promote and incite racial discrimination and to declare the participation therein an offence and is not in accord with the Committee's General Recommendation No. XV (42).

15. Concern is expressed that the race relations legislation concerning Northern Ireland tabled in Parliament contains two grounds for exemption, namely public order and public safety, which are additional to the ones already enshrined in the Race Relations Act of 1976, and that bodies working in the field of health, education, social services, planning and housing do not have the same positive legal duty to eliminate discrimination as that which applies to local authorities in Britain.

16. Concern is expressed by the Committee with respect to the continuing failure to incorporate questions relating to the racial or ethnic origin of persons in the Northern Ireland population census questionnaires. The Committee is of the view that the identification of minority groups and the analysis of their civil, political, economic and social status are a precondition for identifying the difficulties that they may be facing and for assessing whether and how such difficulties may be due to racial discrimination, and thus for evaluating the need to adopt specific measures, laws and regulations to overcome those difficulties.

17. With respect to the effective enjoyment of the rights provided for in article 5 of the Convention by all parts of the population without discrimination, concern is expressed at remaining instances of racial discrimination in the field of employment, notably the opportunities for professional promotions, in the private as well as in the public sectors, in the fields of housing and education, in the exercise of stop and search powers by the police, and with respect to occurrences of ill-treatment by the police.

18. It is noted with concern that the implementation of some of the provisions of the Asylum and Immigration Act 1996 may be detrimental to the protection of asylum seekers against any racial discrimination. In this regard, particular concern is expressed at the fact that asylum claims may a priori be considered to be unfounded, and thus be dealt with more swiftly, when the claimants come from certain countries considered by the United Kingdom not to "generally give rise to a serious risk of persecution", and at the fact that no right of in-

country appeal is granted to asylum seekers sent back to certain safe third countries. Moreover, while noting the assurances provided in the report that the Asylum and Immigration Act 1996 in itself will not affect the United Kingdom's obligations under the Convention, it is underlined that the definition of racial discrimination under article 1, paragraph 1, of the Convention includes the effect as well as the purpose of an act, and it is thus noted that the Asylum and Immigration Act 1996, in its effects, may be contrary to the Convention.

19. Concern is also expressed that specific legislation against racial discrimination is not yet available in all the Dependent Territories and Crown Dependencies, and that in some cases such legislation should be deemed unnecessary by the relevant authorities on the ground of the alleged non-existence of racial discrimination in the territories.

20. The absence of a provision in the Hong Kong Bill of Rights Ordinance protecting persons from racial discrimination to which they may be subjected by private persons, groups or organizations is a matter of concern for the Committee. In this regard, it is stressed that article 2, paragraph 1 (d), of the Convention makes it an obligation for States parties to prohibit, including by the adoption of legislation, racial discrimination "by any persons, groups or organizations".

21. With respect to the two-week rule applying to foreign workers in Hong Kong which prohibits them from seeking employment or remaining in Hong Kong more than two weeks after the expiration of their employment contracts, concern is expressed that such a rule may have discriminatory effects, since it applies mostly to domestic workers of Filipino origin, and that it may leave the workers concerned extremely vulnerable and in precarious conditions.

E. SUGGESTIONS AND RECOMMENDATIONS

22. The Committee recommends that the State party consider giving full effect to the provisions of the Convention in its domestic legal order.

23. The Committee reaffirms that the provisions of article 4 of the Convention are mandatory, as noted in its General Recommendation VII (32). The Committee stresses that the United Kingdom should again consider the possibility of adopting the necessary legislation as requested by the provisions of article 4. In doing so, the Government should take into account the Committee's General Recommendation XV (42).

24. The Committee recommends that questions relating to the racial or ethnic origin of persons be incorporated in the questionnaires established within the framework of the population census in all the territories under the jurisdiction of the United Kingdom. In this regard, the Committee stresses that such information is useful for the effective assessment of progress achieved towards the full implementation of the provisions of the Convention for the benefit of all groups of the population.

25. The Committee recommends that the United Kingdom continue and strengthen its efforts towards the full enjoyment by all ethnic groups of all the rights provided for in article

5 of the Convention. The Committee recommends in particular that close attention be given to the issue of the deaths in police custody and to the monitoring of the conditions and the treatment of persons detained in police stations.

26. The Committee suggests that in its next report the State party include, for a recent year, (a) a review of the number of cases commenced under the Race Relations Act 1976 and their outcomes, and (b) information on the number of prosecutions for offences of a racist character, with an indication of sentences imposed in representative cases.

27. The Committee further recommends that the implementation of the Asylum and Immigration Act 1996 be closely monitored, so as to avoid any possible discrimination against certain categories of asylum seekers and to ascertain that its effects may in no way “nullify or impair the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms” of the persons affected by this Act, in accordance with article 1, paragraph 1, of the Convention.

28. The Committee also recommends that further consideration be given by the authorities of Guernsey, Jersey, the Isle of Man, the Cayman Islands, Montserrat and the Turks and Caicos Islands to the adoption of specific legislation prohibiting racial discrimination, in line with the provisions of the Convention. Noting that racial discrimination is deemed not to exist in some territories, the Committee suggests that the preventive function of the principles laid down in the Convention be given priority in the drafting of any future legislation.

29. The Committee also recommends that special attention be given by the government of Hong Kong to the situation of the foreign workers subject to the “two-week rule” and that all the necessary measures, including the modification or repeal of this specific rule, be undertaken to ensure the protection of all their rights under the Convention.

30. The Committee further recommends that the fourteenth periodic report of the State party, as well as the present concluding observations, be given publicity and be widely disseminated among the public at large.

31. The Committee recommends that the State party’s next periodic report, due on 7 March 1998, be a comprehensive report and that it address all the points raised during the consideration of the report.

APPENDIX B

UPDATING REPORT BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN RESPECT OF HONG KONG UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD

May 1997

Introduction

1. The Committee on the Rights of the Child ("the Committee") considered the United Kingdom's initial report in respect of Hong Kong under Article 44 of the Convention ("the Convention") on 2 and 3 October 1996. In paragraph 36 of its Concluding Observations (CRC/C/15 Add 63), the Committee asked the Government to prepare a progress report by the end of May 1997 on the measures taken to give effect to the suggestions and recommendations of the Committee.

2. This report is submitted in response to that request and states the position as of May 1997. References in this report to paragraph numbers are, unless otherwise stated, to the paragraph numbers in the Concluding Observations.

3. The Hong Kong Government believes that its legislation, practices and policies generally conform with the Convention as applied to Hong Kong. The suggestions and recommendations of the Committee as set out in their Concluding Observations have been fully considered by that Government and its position on the various matters raised by the Committee is set out in the following parts of this report.

Continued application of the Convention

4. The Committee recommended (paragraph 20) that children's rights be discussed in the Sino-British Joint Liaison Group ("JLG"). It was agreed at the JLG in June 1992 that the Convention would continue to apply to Hong Kong after the transfer of sovereignty. We have proposed to the Chinese side in the JLG that the current reservations and declarations should continue to apply to Hong Kong after the change of sovereignty and the Chinese side have indicated that they have no difficulty with this proposal. Legislation, administrative measures and policies to implement the Convention are, however, matters within the responsibilities of the Hong Kong Government and, in the future, of the Government of the Hong Kong Special Administrative Region ("HKSAR"); they do not fall within the remit of the JLG.

5. *Future reporting.* The Chinese side in the JLG have indicated that the reporting procedures of the Convention on the Elimination of all Forms of Racial Discrimination will follow the current practice; the People's Republic of China will include Hong Kong in its own report to the relevant Committee. It is reasonable to expect that the People's Republic of China will adopt the same practice with regard to the Convention on the Rights of the Child to which it is a party.

Reservations under the Convention

6. The Committee regretted (paragraph 10) that there had been no decision to withdraw the reservations applicable to Hong Kong, particularly those relating to the working hours of children, refugees and juvenile justice. These reservations took account of the circumstances of Hong Kong in 1994 when the Convention was extended to the territory. They are reviewed regularly, but there has been no substantial change in the relevant circumstances and it is considered premature to withdraw them.

7. Working hours of children. There are regulations governing the hours and conditions of employment of young persons aged 15 to 17 in industrial undertakings. The Hong Kong Government is studying the extension of some of these regulations to the non-industrial sector and it would be able to bring any new regulations into effect in 1998. It will be in a better position to consider whether the reservation should be withdrawn after any new regulations have been brought into force.

8. Children seeking asylum in Hong Kong. The Hong Kong Government notes the Committee's concern but reiterates the position set out in paragraphs 371 to 376 of the Initial Report. There are still Vietnamese seeking asylum in Hong Kong and a reservation is needed to cover the relevant legislation and the extent of the services available in detention centres. Further details on Vietnamese migrants and their children are set out in paragraphs 44 and 45 of this report.

9. Juveniles in penal institutions. Young prisoners are separated from prisoners aged 21 and above. Offenders aged 18 to 20 are held together with those aged 14 to 17. The lack of suitable detention facilities and general overcrowding preclude a change in this practice. The Hong Kong Government is considering a plan to build a new prison to alleviate the overcrowding problem. Meanwhile, the reservation remains necessary.

Implementation of the Convention

Institutional mechanism to implement the Convention and child impact assessments

10. The Committee suggested (paragraph 20) that a holistic and comprehensive approach to implementing the Convention be taken into account in legislation and policy-making and recommended that an independent mechanism be introduced to monitor the implementation of policy on the rights of the child. The Hong Kong Government has carefully considered these proposals - as it has similar proposals put forward by local commentators - but has concluded that they are not necessary either to give effect to the Convention or as a practical response to its requirements. In this context, the Committee also recommended that in formulating policy proposals there should be "an accompanying assessment of [their] impact on children" as they affect the rights of the child. The Hong Kong Government takes the view that no new arrangements are necessary for this purpose.

11. The Convention covers various areas of government which are the responsibility of a number of different policy branches of the Hong Kong Government. These branches are assisted by boards and committees and non-governmental organisations ("NGOs") in planning and decision-making and where a particular area overlaps the

responsibilities of more than one branch there are arrangements for co-ordination between branches. The concepts of child protection and the "best interests of the child" are necessary considerations in all relevant decision-making in Hong Kong, whether respecting legislative proposals or policies, and are taken into account as a matter of course. Specific laws deal with different aspects of the Convention. The impact of legislation and the execution of policies is monitored by the Legislative Council, the Ombudsman and the Press as well as by being reviewed the policy branches concerned. These present arrangements allow for flexibility and a swift response to changing circumstances and to the concerns of the public, and no advantage is seen in replacing them with some unified administrative system, a single children's ordinance, or a single monitoring system.

Institutional co-ordination

12. The Committee made the further suggestion (paragraph 22) of a review of the effectiveness of the present system of co-ordinating policies and programmes, especially as regards child abuse. As indicated in paragraph 11 of this report, where there is an overlapping of areas of responsibilities of policy branches, there are arrangements for co-ordination. The "lead" branch will, as a matter of course, co-opt other branches or departments in considering and dealing with the issues. Co-operation at the highest level of the Administration is provided by the Chief Secretary's Committee Policy Groups - which comprise the most senior representatives of the relevant branches. The Home Affairs Branch (which is responsible for drafting reports under the Convention) acts as a bridge between Government, the Legislative Council and the public. Where necessary it seeks advice from the Government's experts on human rights and international law to ensure compliance with the Convention. Paragraphs 28 and 29 of this report provide an example of co-operation, including involvement of NGOs, in handling child abuse. The Hong Kong Government considers that the present arrangements for institutional co-operation adequately serve Hong Kong's needs.

Working with non-governmental organisations (paragraph 21)

13. The Hong Kong Government has long established and good working relationships with NGOs. NGOs are closely involved in the making of policies relating to the Convention by giving advice through boards and committees composed of representatives of NGOs and Government officials, and through direct communication with branches and departments. They have offered their views on the drafting of reports, including the Initial Report, assisted in the dissemination of the Convention and scrutinised Government's actions in giving effect to the Convention. NGOs themselves also take part in implementing the Convention, e.g. by providing counselling and care services for youths, abused children and split families.

Collection and analysis of statistical data

14. The Committee suggested (paragraph 22) that the collection and analysis of statistics should take account of the definition of the child as a person under 18 years. At present the practice in Hong Kong is to collect population data for each year of age but, in general, statistics are presented in quinquennial age groupings (i.e. 0 - 4, 5 - 9, 10 - 14, and so on). This general practice produces statistics for 15 - 19 years of age, but not 15 - 17.

However, statistics applicable to different age groups may be compiled at the request of branches and departments where that is necessary for particular studies or purposes, including the formulation of policy. The Committee's suggestion has been brought to the notice of branches and departments.

Development of indicators to monitor the implementation of the Convention

15. The Hong Kong Government considers that its existing practice is in line with the Committee's suggestion (paragraph 22) on the development and use of indicators to monitor progress in implementing the Convention.

16. One example of specifically designed indicators for monitoring and evaluation is that used to measure the effectiveness of the Police Superintendents' Discretion Scheme by determining the recidivist rate. Statistics are kept of the number of young persons who have been cautioned under the Scheme and a person is regarded as a recidivist if he is arrested before attaining the age of 18 years for a crime within two years of the date of a caution. Policy branches are examining other programmes to see if new indicators and studies to develop them are necessary.

Publicity and awareness

Raising public awareness of the Convention

17. The Committee suggested (paragraph 23) that consideration should be given to taking further measures to inform the general public of the Convention. The Hong Kong Government wishes to recall the action it has taken, using a variety of channels (the media, schools, public education, publicity campaigns and NGOs), to stimulate public awareness of children's rights. The Education Department has included human rights topics in the curricula of individual school subjects and in the guidelines on civic education. The Committee on Promotion of Civic Education ("CPCE") contributes with publications, announcements of public interest on television, seminars and roving exhibitions. The publications relating to children's rights include 30,000 copies of a pictorial version of the Convention, 80,000 copies of a storybook for children, 20,000 cassette tapes with stories on the principles of the rights of the child and teaching kits. One new project is the production of exhibition panels on the Convention which are available for loan to schools and voluntary agencies from May 1997. Others include roving exhibitions, television announcements in the public interest, workshops, handbooks and teaching kits which will cover children's rights as one of their topics. Further details are set out in the Appendix to this report.

18. The Committee has made a number of suggestions (paragraphs 23, 24 and 32) for evaluating public awareness and understanding of the Convention and of the need to prevent and combat discrimination, and for evaluating the effectiveness of human rights education. The Hong Kong Government agrees with these suggestions and will consider making appropriate provision in a future civic awareness survey. Independently, the Equal Opportunities Commission is closely monitoring discrimination on the grounds of sex and disability. The Government has just completed a consultation exercise on discrimination on the grounds of race and will submit the findings to the Legislative Council in June.

Distribution of the Initial Report, Summary Records and Concluding Observations

(paragraph 35)

19. The Convention and the Initial Report have been distributed to the public through District Offices, civic education exhibitions, youth conferences and NGOs. The booklets are available free of charge. The pictorial version referred to in paragraph 17 of this report, which is an abridged illustrated guide, was published to bring the message home to the public in a vivid manner. The guide has been distributed to schools, libraries and voluntary agencies.

20. The Summary Records and Concluding Observations of the October 1996 hearing are made available on request. The Concluding Observations, together with a Chinese version, have been distributed to members of the Legislative Council. The Hong Kong Government plans to publish the Observations in English and Chinese and to give them wide circulation when the authentic Chinese version is available from the Committee. The present report will also be published in two languages with the same wide distribution as the Initial Report.

Participation in school life, family and society

21. The Committee suggested (paragraphs 25 and 32) that greater priority be accorded, in the spirit of article 12 of the Convention, to the participation of children in school life and that a study be conducted from the perspective of children on their participation in family, school and society. The Hong Kong Government attaches importance to children's participation. This is reflected in Government and NGO's publicity and public education programmes that seek to develop public consciousness of the need for children to participate in society. Teaching staff are required to create a positive, inviting and caring school environment to encourage and facilitate students' participation. Staff development programmes train persons working with children to involve them in programme planning as befits their age and maturity. The CPCE and the Independent Commission against Corruption plan to produce a civic education package entitled 'Toward Good Citizenship'. The aim is to enhance public consciousness, including that of children, that everyone, of whatever age, has a responsibility for the welfare of others and for society as a whole. This package will be ready by mid-1997. Additionally, school and Family Life Education programmes encourage parents to listen to their children's views.

Immigrant families from China

Immigrants from China for family reunification

22. The Committee recommended (paragraph 26) that further measures be taken to deal with illegal immigrant children from China, especially with regard to split families. Hong Kong's immigration policy seeks to regulate immigration from the People's Republic of China, most of which involves family reunification, in a controlled and manageable manner under the 'One-way permit' scheme. Some people, however, attempt to jump the queue and enter Hong Kong illegally. In 1995, the daily quota for One-way permits was increased from 105 to 150 to cater for family reunification. Thirty places in the additional

quota are allocated to children who will have the right of abode in Hong Kong after the change in sovereignty. This has increased the number of Chinese immigrants, including children whose parent(s) are in Hong Kong and adults whose spouses are in the territory, entering for family reunion. The Hong Kong Government has urged the Chinese Government to approve family reunification by family units.

Helping the new immigrants

23. In view of the increasing number of immigrants from China, many of whom are children joining their families, the Hong Kong Government is making further efforts to provide them with both dedicated and general services with the object of integrating them into the local community smoothly and quickly. The Government will spend a total of \$168 million in 1997/98 in providing dedicated services for new arrivals from China. These resources will be used, among other purposes, for providing educational services and social welfare assistance for new immigrant children, including more school places, subventions to NGOs in providing language programmes, special orientation sessions and counselling services, and for a new school-base support scheme under which schools admitting new arrivals receive financial assistance from the Government. New arrivals are also entitled to the full range of general health care, social welfare, housing and employment services available to Hong Kong citizens.

Child abuse

Respect for children

24. In paragraph 27, the Committee express the view that the prevention of child abuse requires attitudinal changes in society with greater respect for the inherent dignity of the child. The Hong Kong Government believes that the general public are becoming more aware of the negative effect on society of child abuse, but is, nevertheless, increasing its efforts in its public education programmes to bring the message home. (See also paragraph 17 of this report.) A new initiative was the setting up of a Student Discipline Section in the Education Department in September 1996. One of the aims of this initiative was to promote a better understanding on the part of teachers of the role of punishment as a disciplinary measure and to develop a policy on discipline in schools. In 1996/97, 106 secondary schools took advantage of the services of this new Section.

Number of social workers

25. With reference to the Committee's view (paragraph 28) that the workload of social workers handling child abuse cases may still be too high, twenty social workers at senior practitioner level were added to the Child Protective Services Unit between 1994 and 1997. The case load of each officer has been reduced from an average of 35 in 1994/95 to an average of 27 in 1996/97. The Hong Kong Government provides in-service training to enhance social workers' competence and their effectiveness in managing their caseloads.

Facilities and services (paragraph 28)

26. The Hong Kong Government is pursuing the establishment of more facilities to help parents who cannot look after their children during the day. The expenditure for this

purpose is expected to increase by 3.6% in 1997/98 compared with the previous year. On 30 April 1997, there were some 42,000 child care centre places (day creche, day nursery, residential child care and special child care places) as compared to 40,000 at the end of April 1996. These places are provided by Government, aided, subvented and private child care centres.

27. In a related development, the Child Care Centres (Amendment) Bill 1996 included new provisions establishing mutual-help child care groups and prohibiting unsuitable persons acting as child minders. The Bill is being considered by the Legislative Council with a view to enactment in the present session.

28. The Committee (paragraph 22) made particular reference to the issue of child abuse in proposing a further assessment of the effectiveness of present policies. Paragraph 13 of this report notes that the Hong Kong Government works closely with NGOs. Taking child abuse as an example, the Working Group on Child Abuse, with participants from Government Departments and from various disciplines, including social workers from NGOs, proposes measures to combat child abuse and monitors their implementation. The 13 District Committees on Child Abuse (also with Government and NGO representatives) co-ordinate efforts at local levels. The Government also conducts district-wide educational programmes and publicity.

29. In April 1997, the Government established a Police Child Protection Policy Unit. Its purpose is to deal with cases of child abuse by establishing joint working protocols and procedures, and it liaises with NGOs through the Working Group on Child Abuse. Another Government task group (established in 1996 with representatives from different disciplines and organisations) compiled procedures for handling child abuse cases. The aim is to improve multi-disciplinary co-operation and effectiveness. The Government has also arranged briefing sessions and training programmes for NGOs.

Effectiveness of the Family Life Education Programme

30. In paragraph 28, the Committee encouraged the initiative taken to ensure within future reviews of the Family Life Education ("FLE") Programme an assessment of its effectiveness in preventing child abuse. The object of the FLE Programme is to increase parental knowledge and skills (including the cultivation of an informed approach to the role and application of discipline) and improve parents' consciousness of their responsibilities. FLE is one of the initiatives - noted in paragraph 24 of this report - to develop respect for the rights of children. It has been found that FLE Programmes do help parents to develop their skills as parents and their awareness of their parental duties and responsibilities. Although the Programme is not directly aimed at child abuse, it is believed to help in its prevention. And its effectiveness in increasing parents knowledge and skills is one of the subjects of an evaluation programme.

Disabled children

Integrating disabled children into regular schools (paragraph 29)

31. The Hong Kong Government plans to launch a pilot scheme on integration in September 1997 under which schools participating in the scheme will be provided with additional teachers and grants for supporting disabled pupils. Government specialists and inspectors will provide advisory services and training to teachers in those schools

32. It is also planned to improve existing schools by providing access facilities for the disabled where this is technically possible. The work will be done in stages. The first stage, covering some 100 schools, is expected to be completed in 1997/98. New schools planned for completion in 1997 or afterwards will be built to the latest designs which incorporate as standard facilities for the disabled including lifts, ramps and special toilets. It is expected that 10 primary and 12 secondary schools built to these standards will be completed between 1997 and 1999.

Breast feeding and infant care

Breast-feeding

33. The Committee recommended (paragraph 30) that a review be undertaken of the effectiveness of measures to encourage breast-feeding (including the question of the free distribution of powdered baby milk in hospitals). The Hospital Authority and Department of Health do not distribute free powdered milk. Babies are only fed powdered milk in hospitals when their mothers cannot or do not wish to breast-feed. The Hong Kong Government actively promotes breast feeding through pamphlets, television advertisements, nursing officers, ante-natal programmes and so forth. Monitoring of the effectiveness of these measures shows that the rate of breast feeding has increased from 19% in 1992 to 46% in 1996.

Conditions of employment to facilitate infant care (paragraph 16)

34. The Employment Ordinance prescribes the amount of maternity leave, the benefits and the protection available to female employees: see paragraph 219 of the Initial Report. In May 1996, the Hong Kong Government proposed to strengthen the provisions protecting pregnant employees by prohibiting employers from assigning to them heavy, hazardous and dangerous work, removing the restrictions on the number of surviving children which qualifies for maternity leave pay, and allowing them to defer two weeks of their ante-natal leave until after their confinement. The last provision aims to give working mothers more time with their new-born babies, and encourage and facilitate breast feeding. In December 1996, discrimination in employment on the grounds of pregnancy was rendered unlawful under the Sex Discrimination Ordinance. And in March 1997, the Hong Kong Government introduced an amendment to the Employment Ordinance providing, *inter alia*, for the award of compensation up to \$ 150,000 for pregnant employees dismissed without a valid reason.

Adolescent health

School pressure and health

35 The Committee suggested (paragraph 31) that a review be conducted of the possible links between school pressures and adolescent health problems. The Hong Kong Government recognises that pressures during the school years can have an impact on children's physical and mental health; there are dangers that excessive time spent on schoolwork, whether in school, in homework or in private tuition, at the expense of physical activity or play, and classroom competition, can contribute to mental stress. But the problem of stress is not solely a school problem. Parental expectations of academic success (which may demand increased workloads from schools or require their children to attend extra private tuition) and peer pressure may also induce stress and there are other non-scholastic factors - housing conditions, family difficulties - which may be significant.

36 The Hong Kong Government recognises these dangers and keeps the issue under constant review. As part of its aim of the all round development of the child, it encourages the inclusion of sports and arts in the school curriculum. Recognising the problem, schools have modified the volume of the workload or have established policies to limit the volume. The education authorities, working through teacher-parent associations and meetings, are attempting to get parents to recognise the damaging effect of pressure, whether at school or at home, on their children. Counselling is an important service in allaying school pressure. In addition to the school social work and health services (paragraphs 272 to 277 of the Initial Report) which provide assistance to students in need, the Government provides a telephone hotline service for assistance with adolescent health problems. The number of calls on these topics went up from 440,000 in 1993 and 1994, combined, to 570,000 in 1995 and 340,000 in 1996. 37. Another source of pressure for some students is the practice in some schools of teaching in English rather than in Chinese which is the mother tongue of most Hong Kong people. The problems arising from this were explained in paragraphs 376 to 380 of the Third Report in respect of Hong Kong under the International Covenant on Economic, Social and Cultural Rights. The remedial measures foreshadowed in paragraph 380 of that report should do much to alleviate these pressures and help students to study more effectively, and so enhance their self-esteem.

Suicide and effectiveness of preventive programmes (paragraph 31)

38. The Hong Kong Government has long been aware of the youth suicide problem. The reasons for youth suicide are diverse. Psychological autopsy of suicide victims reveals that poor family relations and personal problems account for most of the cases. School and learning problems follow. Paragraphs 272 to 277 of the Initial Report describe how the Government has been tackling the problem through families, schools and parent-school co-operation. The number of fatal and attempted suicide cases recorded by the Education Department for the school years 1992/93 to 1995/96 was as follows:

	School year			
	1992/93	1993/94	1994/95	1995/96
Fatal cases	22	12	14	17
Attempted cases	86	53	43	28

This shows a drop by 59% in the total number of fatal and attempted suicide cases reported over that period.

39. In February 1997, the University of Hong Kong completed research projects on the usefulness of peer support programmes in dealing with suicide and drug abuse in schools. This included the development of a manual for training "peer helpers". The Hong Kong Government is studying the report and will distribute the manual to schools. In addition, as part of a review of the social work service for school students and young people in need, a working group is evaluating the effectiveness of the school social work service and examining its future development having regard to other school-based and non-school-based supportive services for young people. This review will be completed by the end of 1997. At the same time, research is being conducted in secondary schools (under a project entitled 'Understanding the Adolescent') to develop a screening tool to identify young people at risk and to determine how such a tool could be used in schools to facilitate early identification.

Education on Rights of the Child

Training programmes for professionals

40. With reference to paragraph 23, human rights topics, including those on the rights of the child, are included in the degree courses and training programmes for professionals handling cases involving children, e.g. social workers, teachers, doctors and police officers. Professional on-the-job courses also cover relevant human rights topics. It is considered that these arrangements are adequate in keeping professionals abreast of the developments of the human rights regime.

School curriculum

41. The Committee's proposal (paragraph 32) to include human rights and the Convention as a core subject in schools will have to be considered in the light of competing demands for school time. As stated in paragraphs 349 to 351 of the Initial Report, human rights feature in the syllabus of a range of primary and secondary school subjects, e.g. general studies, social studies, economic and public affairs, government and public affairs, and liberal studies. A new syllabus of civic education is also being prepared which schools may offer as an optional subject from 1998; it will cover individual rights and responsibilities, equality, discrimination and international human rights.

Leisure and rest

42. The Committee recommended (paragraph 32) that fuller implementation of article 31 of the Convention (rest and leisure) deserved further study. The Hong Kong Government attaches importance to the development and promotion of arts, sports, heritage and extra-curricular activities for children. In addition to special events, children are encouraged through television, radio, advertisements, schools and youth centres to choose among a variety of extra-curricular activities and to take part in their leisure time. The Municipal Councils' and Government's activities in this respect are set out in paragraphs 356 to 370 of the Initial Report; the recurrent expenditure for 1996/1997 for arts activities amounts to over \$1,470 million, an increase of 28% over 1995/96.

43. Major annual events include -

(a) the Urban Council's Summer Fun Festival, International Arts Carnival, Children's Fun Week, Mid-autumn Lantern Design Competition and Exhibition and the Christmas Carnival. The budget for such events in 1996 totalled \$5.97 million, a 51% increase over 1995. A total of 134 activities drew an audience of 140,000 in 1996;

(b) the Regional Council's International Children's Arts Festival. The budget for 1996 was \$5.07 million, an 11% increase over 1995. The Festival staged 97 performances, workshops and fun days and drew an audience of 27,000 in 1996;

(c) the annual Summer Youth Programme which, in 1996, involved 1.05 million people on a total expenditure of \$53.28 million, an increase of 12% over 1995.

Vietnamese children in Hong Kong

44. The Committee suggested (paragraph 33) an evaluation of the present and previous policy on Vietnamese children in detention in Hong Kong. The Hong Kong Government's policies on illegal Vietnamese migrants are set out in Section VIII(A) of the Initial Report. The decision of the international community is that Vietnamese who are determined to be non-refugees must return to Vietnam. The United Nations Commissioner for Refugees and the Hong Kong Government have been counselling them to return home under the voluntary repatriation programme under which the migrants receive financial assistance to re-integrate into the community in Vietnam. Over 56,000 Vietnamese have returned to Vietnam voluntarily from Hong Kong since 1989 and another 10,000 have returned under the orderly return programme since 1991. Hong Kong is proceeding to repatriate the remaining 2,785 as quickly as possible. In the meanwhile, they are detained under the Immigration Ordinance.

45. The Hong Kong Government has endeavoured to provide decent and humane living conditions for those Vietnamese who are detained. They are provided with daily necessities and services, including medical services, education for children, recreation and family services and so forth. Although when the Initial Report was drafted it was envisaged that secondary education would cease in the detention camps, the Hong Kong Government

has, since September 1996, provided funds for the International Social Service to extend its community-type schooling to Vietnamese children to the age of 17

Minimum age of criminal responsibility

46. In response to the Committee's recommendation (paragraph 34) that the age of criminal responsibility be raised, the Hong Kong Government is undertaking a comparative study of the age of criminal responsibility in a number of jurisdictions

APPENDIX

PROJECTS UNDERTAKEN BETWEEN MID-1996 AND END-MAY 1997

PROJECT	TIME
300,000 copies of comic booklets for school children and their parents distributed	Since October 1996
Roving exhibitions in three shopping centres	October 1996-February 1997
A workshop for 400 kindergarden teachers	March 1997
TV announcements in the Public Interest	Since March 1997
400,000 copies of a handbook for parents distributed	Since April 1997
Exhibition panel on the Convention available for loan to schools and voluntary agencies	From May 1997.

NEW PROJECTS IN 1997/98

- A teaching kit for pre-school children
- A video for children
- A video for youngsters
- A video for teachers
- A series of comic books for youngsters
- A handbook for teachers
- Roving exhibitions.

APPENDIX C

AN OUTLINE OF TOPICS TO BE INCLUDED IN THE INITIAL REPORT UNDER THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

MAY 1997

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

1) The Sex Discrimination Ordinance

- Definition of “Sex Discrimination” in the Ordinance

ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure through law and other appropriate means, the practical realisation of this principle;*
- b) To adopt appropriate legislation and other measures, including sanctions where appropriate, prohibiting all discrimination against women;*
- c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;*
- d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;*
- e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;*
- f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute*

discrimination against women;

g) To repeal all national penal provisions which constitute discrimination against women."

1) The Sex Discrimination Ordinance

2) The Equal Opportunities Commission

- its establishment
- its functions

3) Changes to the Law

- review exercise of existing legislation to take out gender biased elements
- repealing of penal provisions which constitute discrimination against women

ARTICLE 3: APPROPRIATE MEASURES

"States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

1) Legal Basis for Elimination of Discrimination

- application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) to Hong Kong (cf. Basic Law Article 39)
- BORO articles 1 and 22

ARTICLE 4: TEMPORARY SPECIAL MEASURES

"1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

1) Temporary Measures

The Hong Kong Government has not adopted any temporary measures, namely “affirmative action” or “positive discrimination”, to accelerate de facto equality between men and women.

2) Maternity Protection

- measures adopted are referred to under Article 11

3) Special Measures provided for under section 48 of the Sex Discrimination Ordinance

ARTICLE 5: STEREOTYPING AND PREJUDICES

“States Parties should take all appropriate measures:

a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.”

1) Violence against Women

- legislation which protect women against violence: Offences Against the Person Ordinance, Crimes Ordinance, Domestic Violence Ordinance, Crimes (Torture) Ordinance
- BORO Article 3
- special training of the police to handle cases of domestic violence
- statistics on domestic violence cases
- services offered to victims of spouses battering: medical service; casework and counselling; hotline service; temporary shelters; child care, housing and financial assistance such as trust funds and comprehensive social security assistance
- programmes on sex equality by the Equal Opportunities Commission

2) Pornography

- Government’s policy dealing with sexually-offensive published and broadcast material

3) Education

- Civic Education Programmes of the Committee on the Promotion of Civic Education
- Measures adopted on the educational front to eliminate gender stereotypes are referred to under Article 10.

ARTICLE 6: EXPLOITATION OF WOMEN

“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

1) Measures to suppress prostitution

- Crimes Ordinance
- Sex Education

2) Application of Laws protecting Women against Violence to Prostitute Women

- Offences Against the Person Ordinance, Crimes Ordinance and Crimes (Torture) Ordinance

ARTICLE 7: EQUALITY IN POLITICAL AND PUBLIC LIFE AT THE NATIONAL LEVEL

“States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country, and in particular, shall ensure to women, on equal terms with men, the right:

- a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;*
- b) To participate in the formulation of government policy and the implementation thereof and to hold public and perform all public functions at all levels of government;*
- c) To participate in non-governmental organisations and associations concerned with the public and political life of the country”*

1) BORO Article 21

2) The Right to Vote and Stand for Election

- equality in laws governing elections to LegCo and District Organisations
- statistics on registered women electors
- proportion of women in representative institutions

3) **Women in ExCo**

- proportion of women in ExCo

4) **Women in Statutory Advisory Boards and Committees**

5) **Women in Public Offices**

- Government's policy in recruitment
- statistics on women in public offices

ARTICLE 8: EQUALITY IN POLITICAL AND PUBLIC LIFE AT THE INTERNATIONAL LEVEL

“States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations.”

1) **Females in Overseas Offices**

2) **Females at Department Head or Branch Secretary level**

3) **Females at Directorate Level**

ARTICLE 9: EQUALITY IN NATIONALITY LAWS

“1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

1) **Immigration Ordinance**

- Immigration Status of Women in Hong Kong (i.e. the Acquisition of Right of Abode, Right to Land or Unconditional Stay)
- Immigration Status of Minor Children in Hong Kong (i.e. the Acquisition of Right of Abode, Right to Land or Unconditional Stay)
- Eligibility Criteria for Passports/Travel Documents applicable to Women
- Eligibility Criteria for Passports/Travel Documents applicable to Minor Children

ARTICLE 10: EQUALITY IN EDUCATION

“States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

d) The same opportunities to benefit from scholarships and other study grants;

e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

f) The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely;

g) The same opportunities to participate actively in sports and physical education;

h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”

1) The Sex Discrimination Ordinance

2) Participation of Girls in School Education

- nine-year compulsory education
- equality in the school curriculum

3) The Further and Higher Education Sectors

- admission criteria

statistics on female students in tertiary education and the proportion of female students in different faculties

4) Vocational Training

- admission criteria
- statistics on female students attending vocational training courses and the proportion of female students in different courses

5) Elimination of Gender Role Stereotyping

- sex education on sex roles, the responsibilities of males and females and sex equality and to remove gender stereotypes
- textbook review

6) Scholarships and Study Grants/Loans

- criteria for award
- statistics on male/female students receiving Government grants/loans for tertiary studies

7) Women in the Provision of Education

- statistics on female teaching staff

ARTICLE 11: EQUALITY IN EMPLOYMENT AND LABOUR RIGHTS

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

a) The right to work as an inalienable right of all human beings;

b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

a) *To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy of maternity leave and discrimination in dismissals on the basis of marital status,*

b) *To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances*

c) *To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;*

d) *To provide special protection to women during pregnancy in types of work proved to be harmful to them.*

3. *Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary "*

1) Legislation against Discrimination in Employment Field

a) *Equal Employment Rights and Opportunities*

- The Sex Discrimination Ordinance section 11

b) *Qualifying Bodies and Vocational Training*

- The Sex Discrimination Ordinance sections 17 and 18

c) *Discrimination based on Marital Status and Pregnancy*

- The Sex Discrimination Ordinance sections 7 and 8
- The Employment Ordinance section 15

d) *Sexual Harassment*

- The Sex Discrimination Ordinance section 23

e) *Code of Practice on Employment*

- including elaboration on "equal pay for work of equal value"

f) *Maternity Leave and Maternity Leave Pay*

- The Employment Ordinance Part III

2) Women's Participation and Standing in the Economy

- proportion of women in the labour force, statistics on unemployment and underemployment

-
- statistics on women in managerial and professional positions as against those in clerical position
 - women in public offices is referred to under Article 8

3) Employment Services Provided to Women

4) Retraining Programmes

- Employees Retraining - Employment Retraining Scheme

5) Child-care Facilities

6) Working Conditions

- Occupational Safety and Health Bill
- The Factories and Industrial Undertakings Ordinance and subsidiary regulations

7) Protective Legislation

- The Employment Ordinance
- Factories and Industrial Undertakings Regulations
- Construction Sites (Safety) Regulations
- Dutiable Commodities (Liquor) Regulations

ARTICLE 12: EQUALITY IN ACCESS TO HEALTH FACILITIES

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to healthcare service, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of the article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

1) The Sex Discrimination Ordinance section 28

2) Government Strategy and Targets

3) Access to Care

- Provision of service by the Hospital Authority
- Provision of Service by the Department of Health

-
- Woman Health Centres, Maternal and Child Health Centres
 - 4) Health Education
 - promotion of women's health done by the Department of Health
 - education programmes and sexuality campaigns of the Family Planning Association
 - Health Care and Promotion Fund to promote healthy lifestyle

5) Family Planning

- services provided by the subvented sectors e.g. the Family Planning Association
- services by the public and private sectors

ARTICLE 13: WOMEN IN ECONOMIC, SOCIAL AND CULTURAL LIFE

“States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular;

- a) *The right to family benefits;*
- b) *The right to bank loans, mortgages and other forms of financial credit;*
- c) *The right to participate in recreational activities, sports and all aspects of cultural life.”*

1) Family Benefits

- social security
- tax allowance

2) Loan, Mortgages and Credit

- the Sex Discrimination Ordinance section 28.2(c)

3) Recreation, Sport and Cultural Life

- funding
- promotion work to encourage women's participation in sport and fitness activities and to ensure that sex-role stereotyping in sports is eliminated
- the Sex Discrimination Ordinance section 37

ARTICLE 14: RURAL WOMEN

“1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the

economic survival of their families, including working in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- a) To participate in the elaboration and implementation of development planning at all levels;*
- b) To have access to adequate health care facilities, including information, counselling and services in family planning;*
- c) To benefit directly from social security programmes;*
- d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;*
- e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;*
- f) To participate in all community activities;*
- g) To have access to agriculture credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reforms as well as in land resettlement schemes;*
- h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”*

In view of the small area of Hong Kong, it is not practicable to distinguish women in the rural areas from those who live in urban areas. Most parts of Hong Kong are served with electricity, water and sanitation services. Goods, services and facilities for women are provided for women in all parts of the territory.

ARTICLE 15: EQUALITY IN LEGAL AND CIVIL MATTERS

“1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equality in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."

1) Women's Legal Status

- BORO Articles 10,11,13,22
- women's rights to make contracts in their own name
- women's rights to administer property (The Sex Discrimination Ordinance section 29)
- treatment of women in court: similar damage awards and sentence in similarly comparable circumstances, testimony being given equal weight?
- the provision of legal aid to women
- appointment to the judiciary, service on juries

2) The Small House Policy

3) Succession of Landed Properties in the New Territories

- the New Territories Land (Exemption) Ordinance

4) Movement and Domicile

- BORO Article 8
- women's legal rights of freedom of movement and to choose her residence

ARTICLE 16: EQUALITY IN FAMILY LAW

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality men and women:

- a) The same right to enter into marriage;*
- b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
- c) The same rights and responsibilities during marriage and its dissolution;*
- d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be paramount;*
- e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*

f) *The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*

g) *The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;*

h) *The same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

2. *The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."*

1) BORO Article 19

2) Legislation regarding marriage, maintenance and property rights

- Marriage Ordinance
- Marriage Reform Ordinance
- Separation and Maintenance Orders Ordinance
- Matrimonial Proceedings and Property Ordinance
- Matrimonial Causes Ordinance
- Marriage and Children (Miscellaneous Amendments) Bill 1997
- Guardianship of Minors Ordinance

3) Legislation regarding guardianship, wardship and adoption of children

- Guardianship of Minors Ordinance
- Adoption Ordinance
- Child Abduction and Custody Bill

APPENDIX D

FINAL REPORT BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Introduction

1. The Committee considered the United Kingdom's Supplementary Report in respect of Hong Kong under the Covenant on 23 October 1996. In its Concluding Observations (CCPR/C/79/Add. 69 of 8 November 1996), the Committee requested the Government of the United Kingdom to submit a further report on the human rights situation in the territory of Hong Kong up to 30 June 1997.

2. This report is submitted in response to that request. It deals first with the Committee's concern with the continued application of the Covenant in Hong Kong after the transfer of sovereignty and in particular with continued reporting under the Covenant in respect of Hong Kong. It then updates the Supplementary Report on other aspects of the protection of human rights in Hong Kong.

Continued application of the covenants

3. The Committee has, on a number of occasions and most recently in its Concluding Observations on the Supplementary Report, made clear that the reporting procedures under article 40 of the Covenant will remain in force after 30 June 1997 and, accordingly, that it expects to continue to receive and review reports submitted in relation to the Hong Kong Special Administrative Region (the HKSAR) after that date. It has expressed its readiness to co-operate fully in working out the necessary modalities.

4. The United Kingdom Government has advised the Chinese Government through the Sino-British Joint Liaison Group (the JLG) of the Committee's views. The United Kingdom Government believes that the best course, for reasons going wider than the particular question of the HKSAR, will be for China to become a party to both of the Covenants, that is to say, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The United Kingdom Government has taken every opportunity, including through its partners in the European Union and through other countries, to urge that course on the Chinese Government. It has also continued to raise the subject (and in particular the need for continued reporting in respect of the HKSAR after 30 June 1997) with the Chinese side in the JLG and through other diplomatic channels.

5. In this connection, the United Kingdom Government has urged the Chinese Government to be flexible in considering how to ensure that reports in respect of the HKSAR are submitted in the period before China becomes a party to the Covenants. Both the Human Rights Committee (as mentioned above) and the Committee on Economic, Social and Cultural Rights have indicated that they are willing to be flexible over the modalities of

reporting after 30 June 1997 and are ready to receive reports in respect of Hong Kong either from the People's Republic of China, or if that is preferred, direct from the HKSAR

6 In February 1997, the Chinese Government made various public statements that they were actively considering becoming a party to the two Covenants and, in a related development, it has been reported that, on 7 April 1997, the Chinese President, Mr Jiang Zemin, told the visiting French Defence Minister in Peking that China would sign the International Covenant on Economic, Social and Cultural Rights before the end of the year. A statement to the same effect was made, also in April 1997, in the proceedings of the United Nations Commission on Human Rights by a member of the Chinese delegation to the Commission. The United Kingdom Government will continue to use all opportunities and channels to pursue with the Chinese Government the need for a positive response on the issue. These channels will include the JLG meetings which will continue at least until 1 January 2000 in accordance with Annex II to the Joint Declaration.

7. In a statement made on 20 December 1996, the United Kingdom Foreign and Commonwealth Secretary pledged that the United Kingdom Government would take steps to promote future implementation of the Joint Declaration. In conformity with this pledge, the United Kingdom Government undertook to submit reports on Hong Kong to the United Kingdom Parliament at six-monthly intervals. These reports, which will form part of the United Kingdom Government's efforts to step up monitoring and reporting on developments in Hong Kong before and after the handover, will focus on the work of the Sino-British Joint Liaison Group, with special reference to the implementation of the Joint Declaration, and in particular to the protection of human rights and the implementation of the Covenants in Hong Kong. The reports will be public documents and will be readily available to interested parties, including United Nations treaty monitoring bodies. The first will cover the period January to June 1997.

Provisional Legislature

8. As the Committee is aware, China has stated that the current Legislative Council, elected in September 1995, will be replaced by a Provisional Legislature from 1 July 1997. The 60 members of the Provisional Legislature were selected in December 1996 by a Selection Committee composed of 400 permanent residents of Hong Kong.

9. The United Kingdom Government has never accepted that there was any need for a Provisional Legislature. It has called upon the Chinese Government to return to unambiguous implementation of the Joint Declaration, and to ensure that the HKSAR Government takes steps as soon as possible after the handover to replace the Provisional Legislature with a substantive legislature constituted by genuine elections.

10. The Chinese Government and the Chief Executive (Designate) have undertaken that the Provisional Legislature will be replaced by a properly elected Legislative Council of the HKSAR by 30 June 1998. They have also given the assurance that anyone who meets the relevant statutory qualifications can stand for the election.

The Chinese proposals on the Bill of Rights Ordinance, the Societies Ordinance and the Public Order Ordinance

11 Paragraphs 36 to 40 of the Supplementary Report noted that the now defunct Preliminary Working Committee had advised the Preparatory Committee for the HKSAR - both these bodies were established by the Chinese Government - that, in its view, three provisions of the Bill of Rights Ordinance (the BORO) had the effect of giving the BORO a status above all other laws (including, after 1997, the Basic Law) and should be repealed after 30 June 1997. The Preliminary Working Committee had also advised the Preparatory Committee that provisions in six Ordinances which had been amended to ensure that they were consistent with the BORO were, as a result of the amendments, inconsistent with the Basic Law and should be restored to their original form. The Societies Ordinance and the Public Order Ordinance were two of those six Ordinances.

12. Having considered the Preliminary Working Committee's views, the Preparatory Committee recommended to the Chinese Government on 1 February 1997 that the three provisions of the BORO referred to by the Preliminary Working Committee should be repealed and that certain of the amendments made to the Societies Ordinance and the Public Order Ordinance, in 1992 and 1995 respectively, to ensure consistency with the BORO should not be adopted as laws of the future Special Administrative Region. On 23 February 1997, despite repeated protests from the United Kingdom Government and the Hong Kong Government, the Standing Committee of the National People's Congress of China endorsed these recommendations.

13. *As regards the proposed repeal of the relevant provisions of the BORO*, it may be helpful to the Committee to explain briefly the issues involved. The provisions in question are sections 2(3), 3 and 4.

(a) Section 2(3)

This reads as follows:

"(3) In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters."

This provision, as its terms clearly indicate, merely identifies one of the factors to be taken into account in the interpretation and application of the Ordinance in which it occurs. In identifying that particular factor as a factor which should be so taken into account, it does no more than express a general principle of the common law relating to the interpretation of statutes that have been enacted for the purpose of implementing treaties.

The relevant treaty in this particular case is, of course, the Covenant. In relation to any suggestion that section 2(3) could somehow be at variance with the Basic Law, it will be remembered that article 39 of the Basic Law itself specifically provides for the continued application of the Covenant to Hong Kong after 30 June 1997.

(b) Section 3

This reads as follows

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

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

Again, this section merely reflects a general rule of the common law in the field of statutory interpretation, namely, the rule which governs the effect of a later statute upon earlier statutes. This rule is that, where a statute impinges on an earlier statute which is still in force, the earlier statute must thereafter, wherever possible, be construed consistency with the later one; but where there is an inconsistency which makes such a construction impossible, the earlier statute must thereafter be regarded as having been repealed, to the extent of the inconsistency, by the later one. It is simply this rule which section 3 repeats specifically in relation to the effect of the BORO on earlier legislation.

(c) Section 4

This reads as follows:

"4. All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong."

This provision, too, merely expresses a general rule of the common law in the field of statutory interpretation: in this case, the rule governing the relationship between domestic legislation and any applicable obligation of international law. The rule is that domestic legislation shall, so far as such a construction is possible, be construed so as to permit compliance with any such obligation. Where such a construction is not possible, then, in the common law, the provisions of the domestic legislation must take precedence.

It will be seen that the rules expressed in section 4 and in the other provisions in question do not give, and do not purport to give, the BORO a status superior to that of other Ordinances. Neither the BORO nor any other Hong Kong Ordinance has, or can have, any overriding effect in relation to future legislation: nor is either the BORO or any other Hong Kong Ordinance "entrenched". What are in effect entrenched, however - but independently of section 4 or any other provision of the BORO - are the substantive rights guaranteed by the Covenant. At present, and up to 1 July 1997, they are entrenched by Article VII(5) (originally Article VII(3)) of the Hong Kong Letters Patent: see paragraph 29 of the "Core Document" for Hong Kong (HRI/CORE/1/Add.62). After that date they will be entrenched by article 39, read together with articles 8 and 11, of the Basic Law.

14. Accordingly, and whatever view the Committee may take about the proposal (which the United Kingdom Government and the Hong Kong Government have made clear that they, for their part, regard as unnecessary and unjustifiable) to repeal the provisions of the BORO that are in question, it will be seen that those provisions in fact do no more than make explicit what are in any event, and will remain, the relevant rules of the common law.

As such, and irrespective of whether the provisions are repealed, these rules will continue to be the ones that will be observed by the courts of the HKSAR in any case where they are applicable.

15. *As regards the amendments to the Societies Ordinance and the Public Order Ordinance* that are not to be adopted as laws of the HKSAR, the Chief Executive (Designate) of the HKSAR decided in April 1997 that legislation to replace these amendments should be put before the Provisional Legislature for consideration before 1 July 1997 with a view to its being formally enacted on that date. However, in the light of strong views that had been expressed on this matter, in Hong Kong and elsewhere, he embodied his proposals in a public consultation paper. In this consultation process, which ended on 30 April 1997, there was again wide criticism of certain aspects of the proposals, and these were then modified further in a number of respects in draft bills which were submitted to the Provisional Legislature on 17 May 1997

16. The most significant features of the proposals, as they were put to the Provisional Legislature in those bills, were the following:

- (a) societies will be required to seek registration rather than simply to notify the authorities of their establishment;
- (b) "political bodies" will be prohibited from establishing ties with, or receiving funds from, "foreign political organisations"; in the Chief Executive (Designate)'s original proposals this prohibition would have extended to the receipt of funds from individual foreign persons;
- (c) those organising demonstrations must in effect seek police permission: but, in a departure from the Chief Executive (Designate)'s original proposals, the Commissioner of Police will retain the discretion to accept shorter notice than is specified in the Public Order Ordinance where he is reasonably satisfied that earlier notice could not have been given and permission will ordinarily be assumed if the police have not expressly objected; and
- (d) "national security" will be one of the grounds on which societies can be refused registration or permission for a demonstration can be refused: but, in amplification of the original proposal, "national security" will be clearly defined as relating to the "safeguarding of the territorial integrity and independence" of the People's Republic of China.

17. The draft bills are currently before the Provisional Legislature and are expected to be enacted, substantially as introduced, on 1 July 1997. The United Kingdom Government welcomes the fact that the people of Hong Kong were consulted on this important matter and also welcomes the modifications that have been made to the original proposals to meet some of the concerns which were then expressed. But it remains troubled by elements, even in the modified proposals, which still do not fully meet those concerns and which represent a step backwards from the position established by the amendments enacted by the Hong Kong Legislative Council. Those amendments were made specifically for the purpose, and with the effect, of ensuring that both the Societies Ordinance and the Public Order Ordinance achieved the proper balance, as required by the Covenant, between respect for the rights and freedoms concerned and the relevant considerations of public order, etc that are recognised by the Covenant. The Ordinances as so amended are therefore entirely

consistent both with the Covenant and, it follows, with the Basic law. The United Kingdom Government accordingly sees no justification for undoing or replacing the original amendments.

Court of Final Appeal

Preparation

18. The Hong Kong Government is finalising the practical arguments necessary to ensure that the Court of Final Appeal can start work from 1 July 1997. These include.

- premises: these were completed in early June 1997; and
- Court of Final Appeal Rules; a Working Group comprising representatives of the legal profession, the Administration and the Judiciary is revising the draft Rules prepared by the Judiciary. The Working Group has met eleven times and substantial progress has been made.

Transitional arrangements

19. As a precautionary measure to deal with any cases that might be outstanding immediately before 1 July 1997, the Hong Kong Court of Final Appeal Ordinance (Cap 484) provided that any appeal to the Privy Council for which either the Privy Council or the Hong Kong Court of Appeal has granted conditional, final or special leave but which has not been finally disposed of by the Privy Council on or before 30 June 1997 shall thereafter proceed in the Court of Final Appeal. In practice, however, there are no appeals, or applications for leave to appeal, from the courts of Hong Kong currently pending before the Privy Council.

Ethnic Minorities

20. Paragraphs 44 and 45 of the Supplementary Report set out the position in respect of the "ethnic minorities" as it stood at the date of that Report. Since then, however, and in the light of further representations made by members of the ethnic minorities and by others on their behalf, the United Kingdom Government has effected an important change in the legal position in order to meet their concerns. These were, essentially, that since members of the ethnic minorities would have the right of abode in Hong Kong but would not ordinarily be entitled to Chinese nationality, and since they would have British nationality but would not have the right of abode in the United Kingdom, they would be without "full rights" in any country. Accordingly, the United Kingdom Government announced, on 4 February 1997, its intention to introduce legislation which would grant to members of the ethnic minorities the right to register as full British citizens and thereby acquire the right of abode in the United Kingdom. This legislation completed its passage through the United Kingdom Parliament on 13 March 1997 and came into force, as the British Nationality (Hong Kong) Act 1997, on 19 March 1997. Its principal features are as follows:-

- It requires successful applicants to have been solely British nationals immediately before 4 February 1997, the date when the decision was announced. Accordingly, a person who makes himself solely a British national by voluntarily renouncing another nationality on or after that date

will not qualify

- It requires applicants to be ordinarily resident in Hong Kong
- It confers the right to be registered only on persons who were themselves solely British nationals before 4 February 1997: spouses and children have no special status and must qualify in their own right. But children born on or after 4 February 1997 who are otherwise qualified (i.e. who became, on birth, solely British nationals ordinarily resident in Hong Kong) are eligible to be registered. So also are other persons who become so qualified on or after that date (otherwise than by the voluntary renunciation of another nationality.)
- It provides for the registration of persons as British citizens to take place as from 1 July 1997.

21. It is estimated that some 8000 persons, mostly of South Asian origin, will benefit from this legislation. The majority of them are expected to continue living in Hong Kong.

Right of Abode in Hong Kong

22. A large measure of agreement has now been reached between the United Kingdom and Chinese Governments in the JLG on the substance of the arrangements after 30 June 1997 for the right of abode in Hong Kong. These arrangements can be summarised as follows;

- (a) *Chinese citizens* will have the right of abode if;
 - (i) they were born in Hong Kong to a parent who had the right of abode or unconditional stay in Hong Kong at the time of their birth or any time thereafter;
 - (ii) they have at any time, whether before or after 1 July 1997, ordinarily resided in Hong Kong continuously for not less than 7 years;
 - (iii) they were born outside Hong Kong to a parent who is a Chinese citizen born in Hong Kong or having ordinarily resided in Hong Kong continuously for not less than seven years and also had the right of abode in Hong Kong at the time of their birth.
- (b) *Persons who are not Chinese citizens* will have the right of abode if they have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than 7 years and have taken Hong Kong as their place of permanent residence, whether before or after the establishment of the HKSAR. Persons born in Hong Kong who are not Chinese citizens and who are under 21 years of age will qualify for the right of abode if one parent had the right of abode in Hong Kong at or since the time of their birth. For the purposes of these arrangements -
 - (i) the 7-year period of continuous ordinary residence must be immediately before the date on which the persons concerned apply for the right of abode;
 - (ii) the persons concerned will be required to make a declaration to

demonstrate that they have taken Hong Kong as their place of permanent residence. The criteria used in determining whether persons have taken Hong Kong as their place of permanent residence include, for example, whether they have a habitual residence in Hong Kong, whether their principal family members (spouse and minor children) are in Hong Kong, whether they are able to support themselves without assistance from public funds; and whether they have any outstanding tax liabilities or such other grounds as may be relevant to the declaration,

(iii) persons making the declaration will have to provide the required information to the Immigration Department for assessment;

(iv) any persons who are not Chinese citizens and who acquire the right of abode but are subsequently absent from Hong Kong for a continuous period of more than 36 months will lose their right of abode. However, they will be given the right to land, enabling them to enter Hong Kong freely and to live, study or work in Hong Kong without any restrictions. After they have completed 7 years' residence in Hong Kong, they can re-acquire the right of abode if they are able to satisfy the above requirements;

(v) persons who are temporarily overseas for study or work, etc will not be considered as absent from Hong Kong for the purpose of counting the period of absence.

(c) *Any other persons who, before the establishment of the HKSAR, had the right of abode only in Hong Kong will qualify for right of abode. They will be required to make a declaration to this effect.*

23. With regard to *returning emigrants* (that is, ethnic Chinese Hong Kong residents who have emigrated and hold foreign passports), the following arrangements will apply:

(i) The Standing Committee of China's National People's Congress passed, on 15 May 1996, an "Interpretation of Chinese Nationality Law when applied in the HKSAR". Under this "Interpretation", all Hong Kong residents of Chinese descent who were born in mainland China or Hong Kong, and others who fulfil the criteria for Chinese nationality laid down in the Chinese Nationality Law, are Chinese citizens. Those who have settled abroad and acquired a foreign nationality will have the option to declare change of nationality to the HKSAR Immigration Department after 30 June 1997. Those who make such a declaration will be treated as foreign nationals, and will enjoy consular protection while in Hong Kong or China. Those who choose not to make such a declaration will be treated as Chinese citizens, irrespective of the travel document they use to enter Hong Kong, but they may use their foreign passports for travelling abroad.

(ii) Returning emigrants who choose to remain in Hong Kong as Chinese citizens will retain the right of abode in Hong Kong even if they are absent for long periods.

(iii) Those who choose to be treated as foreign nationals will retain the right of abode if:

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- they are settled, or have returned to settle, in Hong Kong before 1 July 1997, or
 - they return to settle, in Hong Kong no more than 18 months after 30 June 1997, or
 - on the date they return to settle in Hong Kong, they have not lived outside Hong Kong for the immediately preceding continuous period of three years

(iv) Any returning emigrants who lose the right of abode will be given the right to land, enabling them to enter Hong Kong freely and to live, study or work in Hong Kong without any restrictions. After they have completed years' residence in Hong Kong, they can re-acquire the right of abode if they are able to satisfy the requirements for persons who are not Chinese Citizens.

Ease of Travel (Visa-free access)

24. Paragraph 49 of the supplementary Report referred to the hope of the United Kingdom and Hong Kong Governments that other countries would follow the United Kingdom's example in offering visa-free entry to visitors holding HKSAR passports. So far, the following countries (in addition to the United Kingdom) have announced their intention to grant such visa-free entry:

Singapore

Western Samoa

Canada

Namibia

Philippines

San Marino

Benin

Trinidad and Tobago

Maldives

Thailand

Sri Lanka

Mauritius

Northern Mariana Islands (Saipan)

Ghana

Republic of Korea

Turkey

South Africa

Kiribati

Freedom of expression

25 Paragraphs 213-247 of the Fourth Periodic Report and paragraphs 51-57 of the Supplementary Report described the situation, as it obtained at the dates of those Reports, with respect to the protection of freedom of expression and related matters such as protection from interference with a person's privacy. In particular, they described and explained the Hong Kong Government's ongoing review of laws that might infringe the right to freedom of expression. In the course of that review, the Hong Kong Government has examined 53 provisions in 27 Ordinances, of which 38 have been amended or repealed and 11 left unaltered as they are considered compatible with the BORO. Of the remaining four, two were to be dealt with by the Crimes (Amendment) Bill (see paragraph 27 below) but were among provisions of that Bill that were not passed by the Legislative Council. The two remaining ones have been the subject of public consultation. The issues will need further consideration before any legislative amendment can be proceeded with.

26 Among the measures introduced in respect of freedom of expression was the Official Secrets Ordinance, which was enacted on 4 June 1997. This localises the UK Official Secrets Act as applied in Hong Kong. Among other things, it satisfies the requirement of Article 23 of the Basic Law that the HKSAR should enact laws to prohibit, inter alia, the theft of state secrets.

27. Among the bills that completed their passage through the Legislative Council is another measure which will be of interest to the Committee, namely, a bill to amend Parts I and II of the Crimes Ordinance. The bill - which passed on 24 June - modified the existing provision on sedition to reflect the common law and removed treasonable offences. The amendments are consistent with the Joint Declaration, the BORO and the Covenant. Despite this, the Chief Executive designate has made clear that he sees legislation on treason and sedition to be a matter for the first Legislative Council of the SAR. The amendments may therefore be replaced after 1 July, but would have to be consistent with the Covenant as applied to Hong Kong.

Privacy and the Law

28. Paragraphs 54-56 of the Supplementary Report made reference to a consultation paper on privacy (more precisely, on the regulation of surveillance and of the interception of communications) issued to the public in April 1996 by the Law Reform Commission's Privacy Sub-Committee. In mid-December 1996, after the completion of this public consultation, the Commission published its report "Privacy: Regulating the Interception of Communication". That report concluded that section 33 of the Telecommunication Ordinance and section 13 of the Post Office Ordinance provided insufficient protection against unlawful or arbitrary interference with an individual's right to

privacy. In the Commission's view, both the Covenant and the Basic Law required - and the Commission so proposed - that legislation should be put in place to regulate the interception of communications. In particular, the Commission recommended that a judicial warrant system should be introduced in this field. These warrants would, the Commission envisaged, replace the executive warrants currently issued under the Telecommunication Ordinance and the Post Office Ordinance.

29. In late February 1997, the Hong Kong Government itself published its Consultation Paper on the Interception of Communications Bill, Setting out proposals based on the Commission's Report and seeking the public's views on them. There is a need for further work on the details of the Bill in the light of the consultation process, and this will have to be taken forward by the HKSAR Government.

Comprehensive Anti-Discrimination Legislation

30. As explained in the Supplementary Report, the Hong Kong Government fully supports the principle of equal opportunities and is committed to the elimination of all forms of discrimination.

31. The BORO does indeed already prohibit discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. But while the BORO binds the Government and public authorities, it does not regulate relations between private persons. In particular, it does not protect one person from being discriminated against (as described above) by another person. This is because it has been considered that the protection of the rights of one person against infringement by another is best achieved through specific legislation, i.e. legislation aimed at a specific and established abuse. In the particular field of protection against discrimination, the enactment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance in 1995 are instances of specific legislation introduced where a need for such legislation, and widespread community support for it, had been shown to exist.

32. As noted in the Supplementary Report, anti-discrimination legislation is a new area of law in Hong Kong which has far-reaching implications for the community as a whole. The Hong Kong Government accordingly maintains its view that a step-by-step approach - allowing both the Government and the community thoroughly to assess the Impact of such legislation in the light of experience - offers the most suitable way forward.

33. It is against this background that the Hong Kong Government has now conducted four discrete studies of discrimination - on the ground of family status, on the ground of sexual orientation, on the ground of age (in the context of employment) and on the ground of race - to identify the extent of problems in these areas and the options for addressing them.

34. As stated in paragraph 19 of the Supplementary Report, the studies on family status and sexual orientation were completed early in 1996. The results have now been evaluated and the necessary consequential action put in train. Most respondents were in favour of legislation to eliminate discrimination on the ground of family status. Draft legislation for that purpose was therefore introduced in the Legislative Council in April 1997 and was passed by the Council on 24 June. It has now been enacted as the Family Status

Discrimination Ordinance Divergent views were received on legislating against discrimination on the ground of sexual orientation. However, there was unanimous support for the use of educational means to address the issue and in June 1996, in the light of those views, the Hong Kong Government decided that equal opportunities for sexual minorities should be promoted by administrative measures

35. The study on age discrimination, which the Supplementary Report indicated was still in progress when that Report was submitted, was completed in August 1996. Of the 68 submissions received, 25 supported the option of legislation, 11 supported the option of public education and 16 supported a combination of public education and legislation. In October 1996, the Hong Kong Government announced that in the light of such divergent views, it would be prudent and appropriate to deal with the subject through a sustained programme of publicity, public education and self-regulation. The programme, which commenced early in 1997, includes, among other things, a series of Announcements in the Public Interest (APIs) broadcast on television and radio and the publication of practical guidelines for employers. The first series of APIs, which were broadcast on television in March 1997, called on employers to consider ability, not age, when recruiting staff or considering them for promotion or other career development opportunities. A second series, focusing on employment opportunities for younger persons, is now under consideration. The practical guidelines will incorporate comments received from employers, employees and other interested parties. They will advise employers how they might eliminate age discrimination in a wide range of employment situations, including recruitment, advertising, employment agency services, selection, promotion, training, redundancy, and retirement. Further ideas under consideration include information leaflets and other types of publication targeted at selected sectors of the community.

36. As regards racial discrimination, the study was publicly launched in February 1997, when the Hong Kong Government put out a consultation paper seeking the views of the public on the issue. The consultation ended on 30 April. Some 250 submissions were received. About 80% expressed the view that legislation against racial discrimination was unnecessary or undesirable, at least at present. They considered that racial discrimination was not prevalent in Hong Kong and that, if legislation were enacted, it could lead to vexatious litigation and hence engender resentment by the majority population against the ethnic minorities. In the light of these findings, the Hong Kong Government took the view that it should not proceed with legislation. Instead, this issue should be addressed administratively, through such measures as enhanced public education with a special emphasis on racial questions.

37. Paragraph 19 of the Supplementary Report referred the intention of some members of the Legislative Council to introduce "members' bills" on various aspects of discrimination. One such bill - passed on 11 June - amended the Sex Discrimination Ordinance and the Disability Discrimination Ordinance in various respects: it empowered the Courts to order re-employment for persons dismissed from employment on grounds of sex or disability; it removed the monetary ceiling on damages in proceedings in relation to employment matters; it included an express provision empowering the EOC to bring judicial review proceedings; and it provided that the time taken by the EOC in attempting to bring about conciliation would not count towards the limitation period for bringing proceedings.

Work of the Equal Opportunities Commission

38. As explained in paragraph 22 of the Supplementary Report, the Equal Opportunities Commission (EOC) was formally established on 20 May 1996. It commenced operation on 20 September 1996. One of its statutory functions is to keep under review the working of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance and to submit to the Governor of Hong Kong such proposals for amending the two Ordinances as it may consider necessary. The Commission is the primary executive body for the implementation of the two Ordinances. It handles complaints lodged under them and encourages conciliation between the parties in dispute. Where complaints cannot be resolved, the Commission may provide legal or other forms of assistance to those aggrieved.

39. In the course of its first year, the Commission has developed codes of practice to help employers and employees understand the new laws and how these affect their day-to-day working relationships. The codes are written in plain, non-legalistic language and were formulated after extensive consultation. After having been endorsed by the Legislative Council, they came into effect on 20 December 1996. The Commission organizes seminars to promote the codes, which have been widely distributed to major employers' and employees' organizations, women's groups and disability groups.

40. As at 19 June 1997 the Commission had received 2952 enquiries and 188 complaints relating to the two Ordinances. It has also continued its work of public education on equal opportunities and has commissioned various training modules and launched a Funding Programme for community organizations to promote equal opportunities. The training modules include seminars for human resources managers, seminars for educational establishments and joint seminars with the Hong Kong Hospital Authority. The modules provide an opportunity for participants to ask questions relating to the Sex Discrimination Ordinance and the Disability Discrimination Ordinance and to exchange views on how to comply with the codes of practice and on other measures to ensure equal opportunities at the work place.

Investigation of complaints against the Police

41. The position with respect to complaints against the police as at the date when the Supplementary Report was submitted was described in paragraphs 11 and 12 of that Report. Since then, the following developments have taken place.

(a) The introduction of improvements arising from the comparative study of overseas police complaints systems and the independent review of the Complaints Against Police Office (CAPO) procedure which were referred to in paragraphs 12(a) and 12(c) of the Supplementary Report. These improvements include-

- time limits within which CAPO must handle complaints: for example, CAPO should aim to complete the investigation of non-criminal complaints within four months,
- the addition of 14 investigators to the existing CAPO teams to enhance their investigation capability and the creation of an additional team of 10 investigators dedicated to the investigation of serious complaints;

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- the creation of a special monitoring panel by the Independent Policy Council (IPCC) to monitor closely CAPO's investigation of serious cases.
 - expanding membership of the IPCC (in order to ease the workload of IPCC Members) by appointing an additional Vice-Chairman and three additional members,
 - tightening police procedures: for example, requiring a duty officer at a police station to ask suspects - in the absence of investigating officers - whether they have any complaints against the police and to report any such complaints to CAPO;
 - increasing the transparency of the existing system by giving complainants more details of investigation results and making available additional information on CAPO procedures at all police stations, and
 - reaching out to the community by stepping up publicity and conducting periodic attitude surveys to gauge public perception of the existing system

(b) The introduction of legislation to make the IPCC a statutory body. On 10 July 1996, as foreshadowed in paragraph 12(d) of the Supplementary Report, the Hong Kong Government introduced a bill for this purpose into the Legislative Council. At the Council's sitting on 23 June 1997, Members moved major amendments which would fundamentally change the main principles of the Bill. The Hong Kong Government therefore withdrew the Bill.

(c) The adoption of various measures to improve public awareness of the right to complain. Information leaflets and publicity posters on the existing police complaints system have been redesigned and made available at all police stations and district offices. To improve CAPO's public enquiry service, an interactive telephone enquiry system, with pre-recorded messages on matters relating to ways of lodging complaints, investigation procedures, etc., has been installed in the report rooms of CAPO's regional offices. It is understood that the IPCC will launch a major publicity campaign to enhance public awareness of this right. Among other things, the IPCC and the Police will publicize their work through press conferences, radio and television. It is also understood that the IPCC and the Police will more actively brief community representatives on the police complaints system and will pay careful attention to their views.

Vietnamese Migrants and Refugees

42. As at 18 June 1997, there were still about 1,950 Vietnamese migrants in the territory, of whom about 1,100 were illegal immigrants who arrived in Hong Kong after 15 June 1995 and were not covered under the Comprehensive Plan of Action, and about 850 were migrants who arrived before that date. The number of refugees was 1,600. It remains the objective to close all detention centres as soon as possible. It is understood that the repatriation of economic migrants will continue after 30 June 1997 in co-operation with the Vietnamese Government. The UNHCR continues - and, it is understood, will continue - to seek resettlement countries for the refugees.

APPENDIX E

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

GENERAL RECOMMENDATION NO 23 (1997) (ARTICLES 7 AND 8)*

ARTICLE 7 (POLITICAL AND PUBLIC LIFE)

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

BACKGROUND

1. The Convention on the Elimination of All Forms of Discrimination against Women places special importance on the participation of women in the public life of their countries. The preamble to the Convention states in part:

"Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity".

2. The Convention further reiterates in its preamble the importance of women's participation in decision-making as follows:

"Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of

* This document is based on the draft as adopted and reproduced in UN Doc CEDAW/C/1997/II/5 and was obtained from the website of the United Nations Division for the Advancement of Women: <http://www.un.org/daw>.

women on equal terms with men in all fields"

3 Moreover, in article 1 of the Convention, the term "discrimination against women" is interpreted to mean.

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

4. Other conventions, declarations and international analyses place great importance on the participation of women in public life and have set a framework of international standards of equality. These include the Universal Declaration of Human Rights,¹ the International Covenant on Civil and Political Rights,² the Convention on the Political Rights of Women,³ the Vienna Declaration,⁴ paragraph 13 of the Beijing Declaration and Platform for Action,⁵ general recommendations 5 and 8 under the Convention,⁶ general comment 25 adopted by the Human Rights Committee,⁷ the recommendation adopted by the Council of the European Union on balanced participation of women and men in the decision-making process⁸ and the European Commission's "How to Create a Gender Balance in Political Decision-making".⁹

5. Article 7 obliges States parties to take all appropriate measures to eliminate discrimination against women in political and public life and to ensure that they enjoy equality with men in political and public life. The obligation specified in article 7 extends to all areas of public and political life and is not limited to those areas specified in subparagraphs (a), (b) and (c). The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and

¹ General Assembly resolution 217 A (III).

² General Assembly resolution 2200 A (XXI), annex.

³ General Assembly resolution 640 (VII).

⁴ Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

⁵ Report of the Fourth World Conference on Women, Beijing, 4- 15 September 1995 (A/CONF.177/20 and Add.1), chap. I, resolution 1, annex I.

⁶ See Official Records of the General Assembly, Forty-third Session, Supplement No. 38 (A/43/38), chap. V.

⁷ CCPR/C/21/Rev.1/Add.7, 27 August 1996.

⁸ 96/694/EC, Brussels, 2 December 1996.

⁹ European Commission document V/1206/96-EN (March 1996).

the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life.

6. The Convention envisages that, to be effective, this equality must be achieved within the framework of a political system in which each citizen enjoys the right to vote and be elected at genuine periodic elections held on the basis of universal suffrage and by secret ballot, in such a way as to guarantee the free expression of the will of the electorate, as provided for under international human rights instruments, such as article 21 of the Universal Declaration of Human Rights and article 25 of the International Covenant on Civil and Political Rights.

7. The Convention's emphasis on the importance of equality of opportunity and of participation in public life and decision-making has led the Committee to review article 7 and to suggest to States parties that in reviewing their laws and policies and in reporting under the Convention, they should take into account the comments and recommendations set out below.

COMMENTS

8. Public and private spheres of human activity have always been considered distinct, and have been regulated accordingly. Invariably, women have been assigned to the private or domestic sphere, associated with reproduction and the raising of children, and in all societies these activities have been treated as inferior. By contrast, public life, which is respected and honoured, extends to a broad range of activity outside the private and domestic sphere. Men historically have both dominated public life and exercised the power to confine and subordinate women within the private sphere.

9. Despite women's central role in sustaining the family and society and their contribution to development, they have been excluded from political life and the decision-making process, which nonetheless determine the pattern of their daily lives and the future of societies. Particularly in times of crisis, this exclusion has silenced women's voices and rendered invisible their contribution and experiences.

10. In all nations, the most significant factors inhibiting women's ability to participate in public life have been the cultural framework of values and religious beliefs, the lack of services and men's failure to share the tasks associated with the organization of the household and with the care and raising of children. In all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life.

11. Relieving women of some of the burdens of domestic work would allow them to engage more fully in the life of their communities. Women's economic dependence on men often prevents them from making important political decisions and from participating actively in public life. Their double burden of work and their economic dependence, coupled with the long or inflexible hours of both public and political work, prevent women from being more active.

12. Stereotyping, including that perpetrated by the media, confines women in political life to issues such as the environment, children and health, and excludes them from responsibility for finance, budgetary control and conflict resolution. The low involvement of women in the professions from which politicians are recruited can create another obstacle. In countries where women leaders do assume power this can be the result of the influence of their fathers, husbands or male relatives rather than electoral success in their own right.

POLITICAL SYSTEMS

13. The principle of equality of women and men has been affirmed in the constitutions and laws of most countries and in all international instruments. Nonetheless, in the last 50 years, women have not achieved equality, and their inequality has been reinforced by their low level of participation in public and political life. Policies developed and decisions made by men alone reflect only part of human experience and potential. The just and effective organization of society demands the inclusion and participation of all its members.

14. No political system has conferred on women both the right to and the benefit of full and equal participation. While democratic systems have improved women's opportunities for involvement in political life, the many economic, social and cultural barriers they continue to face have seriously limited their participation. Even historically stable democracies have failed to integrate fully and equally the opinions and interests of the female half of the population. Societies in which women are excluded from public life and decision-making cannot be described as democratic. The concept of democracy will have real and dynamic meaning and lasting effect only when political decision-making is shared by women and men and takes equal account of the interests of both. The examination of States parties' reports shows that where there is full and equal participation of women in public life and decision-making, the implementation of their rights and compliance with the Convention improves.

TEMPORARY SPECIAL MEASURES

15. While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented, including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies. The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life. In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be

led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens.

SUMMARY

16. The critical issue, emphasized in the Beijing Platform for Action,⁵ is the gap between the de jure and de facto, or the right as against the reality of women's participation in politics and public life generally. Research demonstrates that if women's participation reaches 30 to 35 per cent (generally termed a "critical mass"), there is a real impact on political style and the content of decisions, and political life is revitalized.

17. In order to achieve broad representation in public life, women must have full equality in the exercise of political and economic power; they must be fully and equally involved in decision-making at all levels, both nationally and internationally, so that they may make their contribution to the goals of equality, development and the achievement of peace. A gender perspective is critical if these goals are to be met and if true democracy is to be assured. For these reasons, it is essential to involve women in public life to take advantage of their contribution, to assure their interests are protected and to fulfil the guarantee that the enjoyment of human rights is for all people regardless of gender. Women's full participation is essential not only for their empowerment but also for the advancement of society as a whole.

THE RIGHT TO VOTE AND TO BE ELECTED (ARTICLE 7, PARA. (A))

18. The Convention obliges States parties in constitutions or legislation to take appropriate steps to ensure that women, on the basis of equality with men, enjoy the right to vote in all elections and referendums, and to be elected. These rights must be enjoyed both de jure and de facto. 19. The examination of the reports of States parties demonstrates that, while almost all have adopted constitutional or other legal provisions that grant to both women and men the equal right to vote in all elections and public referendums, in many nations women continue to experience difficulties in exercising this right.

20. Factors which impede these rights include the following:

(a) Women frequently have less access than men to information about candidates and about party political platforms and voting procedures, information which Governments and political parties have failed to provide. Other important factors that inhibit women's full and equal exercise of their right to vote include their illiteracy, their lack of knowledge and understanding of political systems or about the impact that political initiatives and policies will have upon their lives. Failure to understand the rights, responsibilities and opportunities for change conferred by franchise also means that women are not always registered to vote;

(b) Women's double burden of work, as well as financial constraints, will limit women's time or opportunity to follow electoral campaigns and to have

the full freedom to exercise their vote.

(c) In many nations, traditions and social and cultural stereotypes discourage women from exercising their right to vote. Many men influence or control the votes of women by persuasion or direct action, including voting on their behalf. Any such practices should be prevented;²

(d) Other factors that in some countries inhibit women's involvement in the public or political lives of their communities include restrictions on their freedom of movement or right to participate, prevailing negative attitudes towards women's political participation, or a lack of confidence in and support for female candidates by the electorate. In addition, some women consider involvement in politics to be distasteful and avoid participation in political campaigns.

21. These factors at least partially explain the paradox that women, who represent half of all electorates, do not wield their political power or form blocs which would promote their interests or change government, or eliminate discriminatory policies.

22. The system of balloting, the distribution of seats in Parliament, the choice of district, all have a significant impact on the proportion of women elected to Parliament. Political parties must embrace the principles of equal opportunity and democracy and endeavour to balance the number of male and female candidates.

23. The enjoyment of the right to vote by women should not be subject to restrictions or conditions that do not apply to men or that have a disproportionate impact on women. For example, limiting the right to vote to persons who have a specified level of education, who possess a minimum property qualification or who are literate is not only unreasonable, it may violate the universal guarantee of human rights. It is also likely to have a disproportionate impact on women, thereby contravening the provisions of the Convention.

THE RIGHT TO PARTICIPATE IN FORMULATION OF GOVERNMENT POLICY (ARTICLE 7, PARA. (B))

24. The participation of women in government at the policy level continues to be low in general. Although significant progress has been made and in some countries equality has been achieved, in many countries women's participation has actually been reduced.

25. Article 7 (b) also requires States parties to ensure that women have the right to participate fully in and be represented in public policy formulation in all sectors and at all levels. This would facilitate the mainstreaming of gender issues and contribute a gender perspective to public policy-making.

26. States parties have a responsibility, where it is within their control, both to appoint women to senior decision-making roles and, as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women's views and interests.

27. States parties have a further obligation to ensure that barriers to women's full participation in the formulation of government policy are identified and overcome. These barriers include complacency when token women are appointed, and traditional and

customary attitudes that discourage women's participation. When women are not broadly represented in the senior levels of government or are inadequately or not consulted at all, government policy will not be comprehensive and effective.

28. While States parties generally hold the power to appoint women to senior cabinet and administrative positions, political parties also have a responsibility to ensure that women are included in party lists and nominated for election in areas where they have a likelihood of electoral success. States parties should also endeavour to ensure that women are appointed to government advisory bodies on an equal basis with men and that these bodies take into account, as appropriate, the views of representative women's groups. It is the Government's fundamental responsibility to encourage these initiatives to lead and guide public opinion and change attitudes that discriminate against women or discourage women's involvement in political and public life.

29. Measures that have been adopted by a number of States parties in order to ensure equal participation by women in senior cabinet and administrative positions and as members of government advisory bodies include: adoption of a rule whereby, when potential appointees are equally qualified, preference will be given to a woman nominee; the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body; a quota for women members of cabinet and for appointment to public office, and consultation with women's organizations to ensure that qualified women are nominated for membership in public bodies and offices and the development and maintenance of registers of such women in order to facilitate the nomination of women for appointment to public bodies and posts. Where members are appointed to advisory bodies upon the nomination of private organizations, States parties should encourage these organizations to nominate qualified and suitable women for membership in these bodies.

THE RIGHT TO HOLD PUBLIC OFFICE AND TO PERFORM ALL PUBLIC FUNCTIONS (ARTICLE 7, PARA. (B))

30. The examination of the reports of States parties demonstrates that women are excluded from top-ranking positions in cabinets, the civil service and in public administration, in the judiciary and in justice systems. Women are rarely appointed to these senior or influential positions and while their numbers may in some States be increasing at the lower levels and in posts usually associated with the home or the family, they form only a tiny minority in decision-making positions concerned with economic policy or development, political affairs, defence, peacemaking missions, conflict resolution or constitutional interpretation and determination.

31. Examination of the reports of States parties also demonstrates that in certain cases the law excludes women from exercising royal powers, from serving as judges in religious or traditional tribunals vested with jurisdiction on behalf of the State or from full participation in the military. These provisions discriminate against women, deny to society the advantages of their involvement and skills in these areas of the life of their communities and contravene the principles of the Convention. The right to participate in non-governmental and public and political organizations (article 7, para. (c))

32 An examination of the reports of States parties demonstrates that, on the few occasions when information concerning political parties is provided, women are under-represented or concentrated in less influential roles than men. As political parties are an important vehicle in decision-making roles, Governments should encourage political parties to examine the extent to which women are full and equal participants in their activities and, where this is not the case, should identify the reasons for this. Political parties should be encouraged to adopt effective measures, including the provision of information, financial and other resources, to overcome obstacles to women's full participation and representation and ensure that women have an equal opportunity in practice to serve as party officials and to be nominated as candidates for election.

33 Measures that have been adopted by some political parties include setting aside for women a certain minimum number or percentage of positions on their executive bodies, ensuring that there is a balance between the number of male and female candidates nominated for election, and ensuring that women are not consistently assigned to less favourable constituencies or to the least advantageous positions on a party list. States parties should ensure that such temporary special measures are specifically permitted under anti-discrimination legislation or other constitutional guarantees of equality.

34. Other organizations such as trade unions and political parties have an obligation to demonstrate their commitment to the principle of gender equality in their constitutions, in the application of those rules and in the composition of their memberships with gender-balanced representation on their executive boards so that these bodies may benefit from the full and equal participation of all sectors of society and from contributions made by both sexes. These organizations also provide a valuable training ground for women in political skills, participation and leadership, as do non-governmental organizations (NGOs).

ARTICLE 8 (INTERNATIONAL LEVEL)

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

COMMENTS

35. Under article 8, Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs. This requires that they be included in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences.

36. From an examination of the reports of States parties, it is evident that women are grossly under-represented in the diplomatic and foreign services of most Governments, and particularly at the highest ranks. Women tend to be assigned to embassies of lesser importance to the country's foreign relations and in some cases women are discriminated against in terms of their appointments by restrictions pertaining to their marital status. In other instances spousal and family benefits accorded to male diplomats are not available to women in parallel positions. Opportunities for women to engage in international work are

often denied because of assumptions about their domestic responsibilities, including that the care of family dependants will prevent them accepting appointment

37 Many permanent missions to the United Nations and to other international organizations have no women among their diplomats and very few at senior levels. The situation is similar at expert meetings and conferences that establish international and global goals, agendas and priorities. Organizations of the United Nations system and various economic, political and military structures at the regional level have become important international public employers, but here, too, women have remained a minority concentrated in lower-level positions.

38. There are few opportunities for women and men, on equal terms, to represent Governments at the international level and to participate in the work of international organizations. This is frequently the result of an absence of objective criteria and processes for appointment and promotion to relevant positions and official delegations.

39. The globalization of the contemporary world makes the inclusion of women and their participation in international organizations, on equal terms with men, increasingly important. The integration of a gender perspective and women's human rights into the agenda of all international bodies is a government imperative. Many crucial decisions on global issues, such as peacemaking and conflict resolution, military expenditure and nuclear disarmament, development and the environment, foreign aid and economic restructuring, are taken with limited participation of women. This is in stark contrast to their participation in these areas at the non-governmental level.

40. The inclusion of a critical mass of women in international negotiations, peacekeeping activities, all levels of preventive diplomacy, mediation, humanitarian assistance, social reconciliation, peace negotiations and the international criminal justice system will make a difference. In addressing armed or other conflicts, a gender perspective and analysis is necessary to understand their differing effects on women and men.¹⁰10/

RECOMMENDATIONS

ARTICLES 7 AND 8

41. States parties should ensure that their constitutions and legislation comply with the principles of the Convention, and in particular with articles 7 and 8.

42. States parties are under an obligation to take all appropriate measures, including the enactment of appropriate legislation that complies with their Constitution, to ensure that organizations such as political parties and trade unions, which may not be subject directly to

¹⁰ See para. 141 of the Platform for Action adopted by the Fourth World Conference on Women, held at Beijing from 4 to 15 September 1995 (A/CONF.177/20, chap. I, resolution 1, annex II). See also para. 134, which reads in part: "The equal access and full participation of women in power structures and their full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security."

obligations under the Convention, do not discriminate against women and respect the principles contained in articles 7 and 8

43 States parties should identify and implement temporary special measures to ensure the equal representation of women in all fields covered by articles 7 and 8

44 States parties should explain the reason for, and effect of, any reservations to articles 7 or 8 and indicate where the reservations reflect traditional, customary or stereotyped attitudes towards women's roles in society, as well as the steps being taken by the States parties to change those attitudes. States parties should keep the necessity for such reservations under close review and in their reports include a timetable for their removal

ARTICLE 7

45. Measures that should be identified, implemented and monitored for effectiveness include, under article 7, paragraph (a), those designed to:

- (a) Achieve a balance between women and men holding publicly elected positions;
- (b) Ensure that women understand their right to vote, the importance of this right and how to exercise it;
- (c) Ensure that barriers to equality are overcome, including those resulting from illiteracy, language, poverty and impediments to women's freedom of movement;
- (d) Assist women experiencing such disadvantages to exercise their right to vote and to be elected.

46. Under article 7, paragraph (b), such measures include those designed to ensure:

- (a) Equality of representation of women in the formulation of government policy;
- (b) Women's enjoyment in practice of the equal right to hold public office;
- (c) Recruiting processes directed at women that are open and subject to appeal.

47. Under article 7, paragraph (c), such measures include those designed to:

- (a) Ensure that effective legislation is enacted prohibiting discrimination against women;
- (b) Encourage non-governmental organizations and public and political associations to adopt strategies that encourage women's representation and participation in their work.

48. When reporting under article 7, States parties should:

- (a) Describe the legal provisions that give effect to the rights contained in

article 7,

- (b) Provide details of any restrictions to those rights, whether arising from legal provisions or from traditional, religious or cultural practices,
- (c) Describe the measures introduced and designed to overcome barriers to the exercise of those rights,
- (d) Include statistical data, disaggregated by sex, showing the percentage of women relative to men who enjoy those rights;
- (e) Describe the types of policy formulation, including that associated with development programmes, in which women participate and the level and extent of their participation;
- (f) Under article 7, paragraph (c), describe the extent to which women participate in non-governmental organizations in their countries, including in women's organizations;
- (g) Analyse the extent to which the State party ensures that those organizations are consulted and the impact of their advice on all levels of government policy formulation and implementation;
- (h) Provide information concerning, and analyse factors contributing to, the under-representation of women as members and officials of political parties, trade unions, employers organizations and professional associations.

ARTICLE 8

49. Measures which should be identified, implemented and monitored for effectiveness include those designed to ensure a better gender balance in membership of all United Nations bodies, including the Main Committees of the General Assembly, the Economic and Social Council and expert bodies, including treaty bodies, and in appointments to independent working groups or as country or special rapporteurs.

50. When reporting under article 8, States parties should:

- (a) Provide statistics, disaggregated by sex, showing the percentage of women in their foreign service or regularly engaged in international representation or in work on behalf of the State, including membership in government delegations to international conferences and nominations for peacekeeping or conflict resolution roles, and their seniority in the relevant sector;
- (b) Describe efforts to establish objective criteria and processes for appointment and promotion of women to relevant positions and official delegations;
- (c) Describe steps taken to disseminate widely information on the Government's international commitments affecting women and official documents issued by multilateral forums, in particular, to both governmental and non-governmental bodies responsible for the advancement of women;
- (d) Provide information concerning discrimination against women because of

their political activities, whether as individuals or as members of women's or other organizations

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