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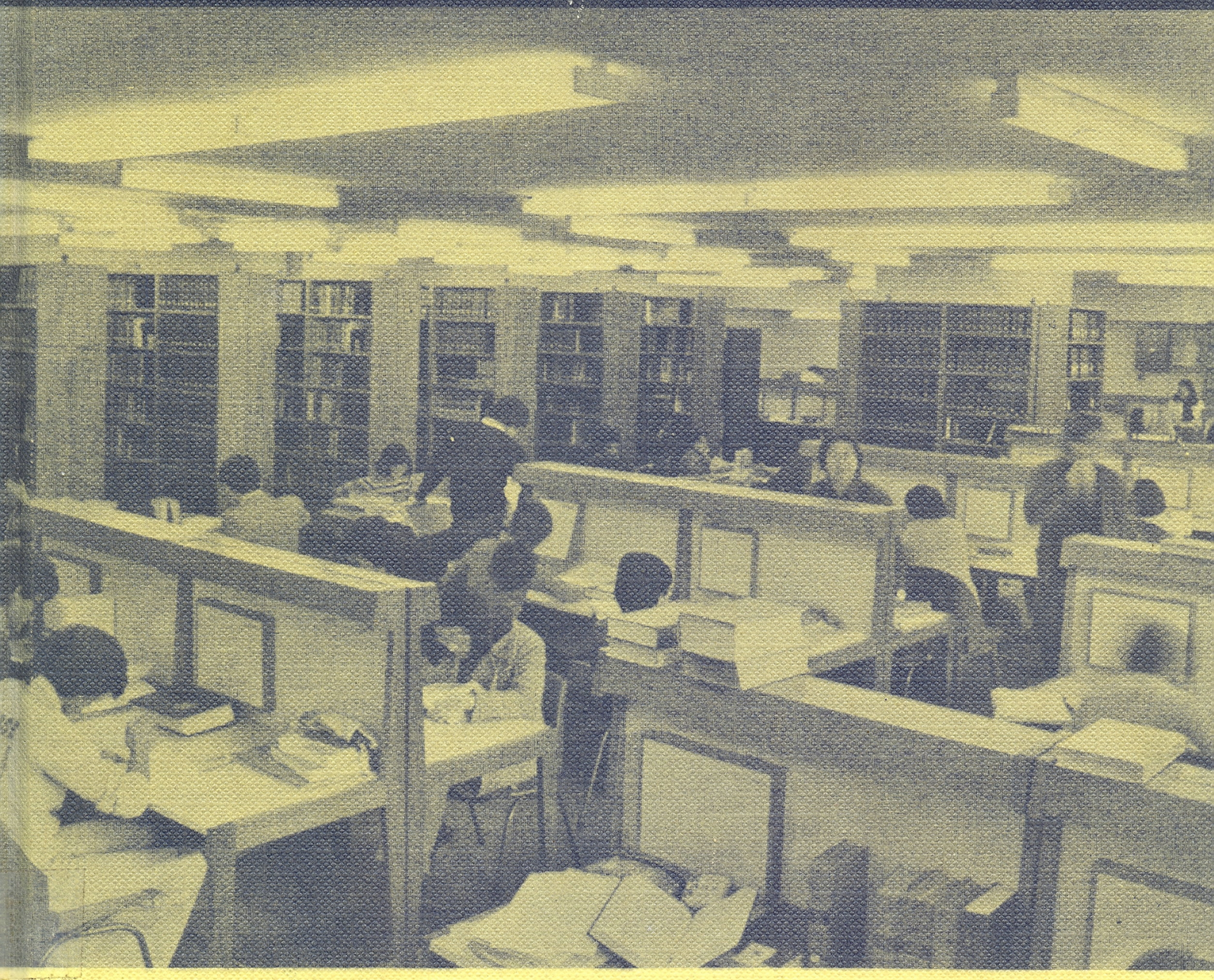

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1975

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JUSTITIA

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FOREWORD

I have had the honour of being one of the Advisers of the Editorial Board of JUSTITIA for some years. Although I have not contributed any article to this very worthwhile publication, I have read every issue with great interest. I cannot help but be impressed by the thoroughness exhibited by the student contributors in their research into numerous areas of the law, which remain unfamiliar jungles to me. Indeed, no one could doubt the academic achievements of the graduates of the Department of Law.

During the past 2 years, many law graduates have joined the professional ranks as barristers and solicitors, and I have had professional contact with quite a few of them. I am convinced that locally trained lawyers are at least as good as those trained in England or other parts of the Commonwealth.

A few years ago, as the Guest of Honour at the Second Annual Ball of the Law Association, the learned Chief Justice of Hong Kong made a personal appeal to the law under-graduates to become barristers. Since then, no less than 9 local law graduates have been admitted by the learned Chief Justice to the local Bar, two of whom I had the pleasure of moving. At present, there are 4 others serving their pupillage in Hong Kong.

The aspiration of the locally trained barristers, born and educated in Hong Kong, is to make their practice a success and in so doing serve their own community in Hong Kong. There is no other place in which they could practise as barristers if they should fail to make their practice here a success. I therefore heartily support the view expressed by Mr. Charles Ching, Q.C., the Chairman of Bar Association, in his recent Annual Statement 1975/1976, that they are entitled to protection from overseas barristers who do not consider Hong Kong their permanent home. It is my earnest hope that such protection will soon be forthcoming by way of an amendment to the Legal Practitioners Ordinance.

Mr. Martin C.M. Lee

EDITORIAL

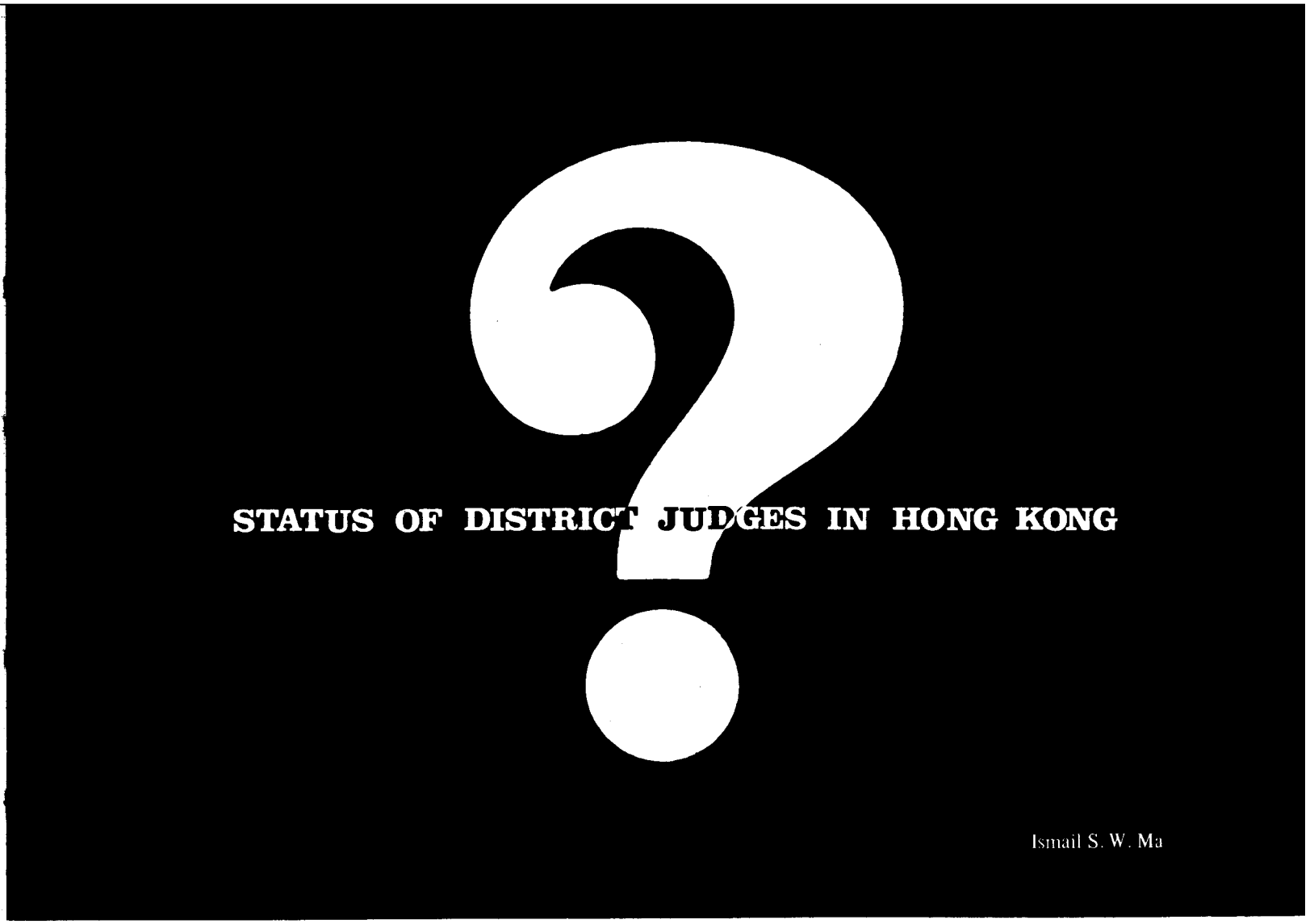
The study of law involves, perhaps, the heaviest curriculum in the University of Hong Kong. It consists of tightly-packed courses concerning almost every branch of the law, with innumerable principles and cases. The Law Library is always full of students working very hard from day till night. A law student not only aims at getting a degree but also usually intends entry into the legal profession. He will not complain of the heavy work-load, knowing full well that a good academic foundation is indispensable in the challenging profession he has chosen.

Readers will find the academic standard attained reflected in the articles published here. The purpose of Justitia is to provide a forum in which current legal topics can be discussed. Law is not a dead subject. It is closely related to our everyday life and Justitia aspires to stimulate the discussion of legal problems in Hong Kong.

The law relating to hire-purchase practices and the use of credit cards are examined in this review in the light of recent trend towards consumer protection in Hong Kong. An attempt to analyse the status of District Judges in Hong Kong tends to show it as an anomaly affecting the proper functioning of the machinery of justice. There is an article on triad membership which would be of interest to the general public while another, describing "nervous shock" cases, discusses an area of law rarely visited in Hong Kong. The workings of the Criminal Injuries and Law-enforcement Compensation Scheme merits consideration as an important mechanism for providing compensation to victims of violent crimes. There is also a case commentary on race relations pointing to the principles employed by judges in the interpretation of statutes.

Justitia is especially pleased to be able to publish an interview with the Hon. Attorney General, Mr. J.W.D. Hobley. We take this opportunity to thank him for his kindness in providing us with up-to-date information and comments on legal developments of great public interest in Hong Kong.

We must also thank our patron, Professor D.M.E. Evans, and our advisers, Mr. Justice T.L. Yang, Mr. Martin C.M. Lee and Mr. R.A.V. Ribeiro, for their kind assistance and encouraging comments during the preparation.



Ismail S. W. Ma

INTRODUCTION

Respect for the law is one of the principles which have come to be regarded as essential to the effective and equitable operation of popular government. The law will be respected as long as it is interpreted and applied within the structure of justice as accepted by the majority of society. But the law, in its procedural as well as its substantive aspects, is essentially made and administered by men whose views and interpretations are buffeted by the winds of change through the years, so that it has become "a truism that the quality of justice depends more on the quality of the men who administer the law than on the content of the law they administer."[1]

Judicial activity, observed by Roscoe Pound in one of his lectures, is really a creative element in law. Accordingly, if man's great interest on earth is justice, as Daniel Webster put it, then perhaps a more immediate interest is the securing of the most highly qualified individuals to administer justice impartially with a minimum of chicanery and obfuscation. If follows logically that judges must be assumed to possess an optimum degree of independence and relative freedom from prejudicial pressures from forces both inside and outside a government.[2] The aim of this paper is to examine the constitutional position of District Judges[3] in Hong Kong in the light of the above statements.

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[1] Evans Haynes, *The Selection and Tenure of Judges* (National Conference of Judical Councils, 1944), p.5

[2] Henry J. Abraham, The Judicial Process, p.3

[3] 'District Judge' means a judge of the District Court, Interpretation and General Clauses Ordinance, Cap. 1

District Judges – Public Officers And Public Servants

Public officer and public servant mean "any person holding an office of emolument under the crown in right of the government of Hong Kong, whether such office be permanent or temporary."[4] The question thus arises is whether or not District Judges are holding an office of emolument under the Crown in right of the Government of Hong Kong. The answer is obviously yes because District Judges' remuneration is charged upon the general revenue of the Colony and appears in every year's *Appropriation Ordinance* under the heading "Judiciary."[5]

In *R.* v. *Dr. Burnell*[6] it was said that:–

> "every man is a publick officer who hath any duty concerning the publick and he is not less a publick officer where his authority is confined to narrow limits, because 'tis the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority."

District Judges' duty is to administer justice according to the law which undoubtedly concerns the public. Therefore under this formulation District Judges are public servants.

There are also some ordinances the provisions of which suggest that District Judges are public servants. For example:

Pensions Ordinance, Cap. 89

> "Unless otherwise provided under this Ordinance .... no pensions .... shall be granted under this Ordinance to any officer holding a pensionable office except on his retirement from the public service in one of the following cases:–
>
> (a) In the case of a judge .....
>
> (b) In the case of an officer other than a judge .... "

Although a judge is defined as including only "the Chief Justice, the Senior Puisne Judge, a Puisne Judge and a Commissioner of the Supreme Court"[7], District Judges still come under subsection (b). In this way District Judges are considered officers in the public service.

Appropriation Ordinance, 15/1974

The preamble states:–

> "An ordinance to apply a sum .... to the Public Service for the financial year ...." and section 2 says
> ".... the sum so charged may be expanded in the manner expressed in the Schedule."

The Judiciary is under Vote 44 in the Schedule. This further shows that the Judiciary is considered to be within the Public Service of Hong Kong.

All these obviously point to one conclusion – that District Judges can be properly called public officers and public servants.

District Judges – Civil Servants

Hood Philips, when discussing civil servants, suggested that

> "Generally he is appointed by or on behalf of the Crown to perform public duties which are ascribable to the crown; usually, but not necessarily, he is paid by the Crown out of the Consolidated Fund or out of money voted by Parliament."[8]

But Professor de Smith excluded judicial officers in his definition of civil servants, which he described as

> "Crown servants (other than the holder of a political or judicial office or a member of the armed forces) appointed directly or indirectly by

---

[4]Interpretation and General Clauses Ordinance, Cap. 1 Its preamble states "... to define terms and expressions used in law ...", it is therefore relied upon in this paper which attempts to examine the law.

[5]e.g. Appropriation Ord. 15/1974. Judiciary is under Number of Vote 44 and the amount of vote is 20,680,000.

[6](1698) Carth. 478 ,

[7]Interpretation and General Clauses Ordinance, Cap. 1

[8]Hood Phillips, *Constitutional and Administrative Law*, p. 294

> the Crown, and paid wholly out of funds provided by Parliament and employed in a Department of Government."[9]

This shows that an uniform definition of a civil servant is lacking among the text-writers.[10]

In Hong Kong, the terms "civil servant" and "civil service" are not generally used in either laws or public documents. Instead "public servant" and "public service" are often employed.

It is submitted that the complicated and difficult definitions given by most text-writers should be dispensed with because the terms "civil servant" and "civil service" are only convenient expressions and in common use relating to civil employment under the crown.[11] Under this simple formulation, District Judges are obviously within the civil service and are therefore civil servants.

District Judges – Crown Servants

A great stir was caused in England in 1931 when the Commissioner of Inland Revenue reduced the salaries of the judges of the Supreme Court purporting to act under the authority of an Order in Council made under the National Economy Act 1931. The Act provided that, as an answer to the economic crisis, the remuneration "of persons in His Majesty's Service" might be reduced. It was widely thought that the Inland Revenue was not justified in making the deductions, as judges are not properly regarded as servants of the Crown.[12] This incidence was settled soon afterwards by the Inland Revenue restoring the cuts in deference to public opinion but whether judges can be properly regarded as Crown servants still causes much debates.

Holdsworth[13] suggested that the test whether or not a person is a person in His Majesty's service does not depend upon the question whether or not the person is paid by the Crown, nor does it depend upon the question whether the person is appointed and can be dismissed by the Crown. He argued that judges are not properly called "servants of the Crown" because they are not subject to the order of the Crown as to the manner in which they shall discharge their duties. He said,

> "The expression 'persons in His Majesty's service' and 'offices in the service of His Majesty' are very wide .... therefore some limitation must be put upon .... This limitation is, I suggest, contained in the implications of the word 'service'. That word seems to imply that the persons and officers indicated are persons who, by virtue of their offices, stand in relation to the Crown, which is analogous to the relation of servants to their master."[14]

Another similar but different test can be found in R.F.V. Heuston's *Lives of the Lord Chancellor* 1885-1940. He contended that the term 'service' connoted the existence of some measure of control in or subservience to the person served.

> "Service is nonetheless service because it is spelt with a capital letter."[15]

A minimum test of the right of control, Heuston suggested, was the existence of a power to terminate the services rendered, which, since the Act of Settlement, did not exist as between the Crown and the judges.

The validity of Holdsworth's test, i.e. master and servant relationship test, was approved by the Judicil Committee of the Prioy Council by a majority of four to one when a Mr. Donald Jason Ranarweera brought his appeal before their Lordships.[16] But in addition, a further point was added by their Lordships:

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[9] S. A. de Smith, *Constitutional and Administrative Law*, p. 188

[10] See also N. E. Mostoe's definition, in his *Law and Organization of the British Civil Service*, p. 26

[11] *per* Lord Goddard, *Inland Revenue Commissioner* v. *Hambrook* (1956) 1 All ER 807

[12] Hood Phillips, *Constitutional and Administrative Law*, p. 337

[13] (1931) 48 LQR 25

[14] *Ibid.*, p. 25-26

[15] At p. 518

[16] *Ranaweera* v. *Ramachandran* [1970] A.C. 962

> "It is true that the crown in Ceylon cannot give members of the Board instructions as to how they are to do their work. What is also important is that .... it is the essence of the Board's function that its members remain independent and impartial, and this does not accord with any conception of them as 'servants of the crown'." [17]

However, Lord Diplock in *Ranaweera* v. *Ramachandran* held a different view, and to quote from his dissenting judgment:

> "These reasons [given by the majority on master and servant relationship test] [18] would be conclusive .... if one were considering whether there existed between him and some other person the legal relationship of master and servant in private law. But the Constitution of Ceylon is concerned not with private law but with public law in which the compound expression "Servant of the Crown" has become a term of art descriptive of persons by whom the functions of government of a state are carried out."
>
> "The Constitution of Ceylon takes the form of a constitutional monarchy modelled upon that of the United Kingdom. Under such a constitution all functions of central government of the State: legislative, executive and judicial are carried out in the name of the reigning monarch. In such expressions as 'servants of the Crown' or 'members of Her Majesty's Service' the 'Crown' and 'Her Majesty' are used not in the personal but in a metaphorical sense to connot the central government of the State." [19]

It is submitted that Lord Diplock's view is the correct interpretation of the terms "Crown Servants" and "member of Her Majesty's Service." The characteristics of the relationship of master and servant at common law, namely, that Her Majesty can give instructions as to the manner in which the servant of the Crown performs its work, only exists between Her Majesty as a natural person and her personal staff. Thus Hodsworth's test may be rejected.

As to Heuston's argument, it is undeniable that there exists a right of control by the Crown as far as District Judges are concerned – District Judges hold their office at the pleasure of the Crown, their general conduct are subject to the Colonial Regulations and Regulations of the Hong Kong Government and they may be required by the Governor in Council to have an early retirement after attaining the age of 45. [20] So Heuston would have given an affirmative answer if asked the question whether District Judges are Crown Servants.

Now the further point mentioned by their Lordships in *Ranaweera* v. *Ramachandran*. It is submitted that it is one thing that judges have to remain independent and impartial, it is quite another to ask whether judges are Crown Servants. To say that judges have to remain independent and impartial therefore they are not Crown servants is actually not an answer to the problem in question, but rather it suggests a presupposition. It is therefore humbly submitted that this point of their Lordships is unsatisfactory and unconvincing and may be neglected.

Under Lord Diplock's formulation 'Crown Servant' is a term of art descriptive of persons by whom the functions of government of a state are carried out. District Judges' duty is to administer justice according to the law, which is a classic constitutional function of the central government. Thus District Judges may be properly regarded as Crown servants.

To what extent are District Judges different from other public officers, public servants, civil servants and Crown servants

Despite the fact that District Judges are

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[17] *Ibid* at p. 971

[18] Added by the writer

[19] *Ibid*, p. 972-973

[20] For detail elaboration of these points, see later discussion.

public servants,[21] they stand in an entirely different position from that of an ordinary public servant in various aspects. Thus it is thought worthwhile to assess to what extent are District Judges different from other public servants.

1. Appointment

Under s.6(1) of the *Public Services Commission Ordinance,*[22] the Commission of Public Services is given the power to advise the Governor regarding the "filling of such vacancies in the public service as may be prescribed": but s.6(2) excludes the application of s.6(1) to any judicial officer, which has been defined[23] to mean a Judge, District Judge, Magistrate etc. Thus District Judges are a special class of public servants whose appointment needs no advice from the Public Services Commission.

In fact, District Judges are appointed by the Governor by instrument under the Public Seal[24], and the usual practice is "for judges to be appointed by the Governor in accordance with instructions received from the Sovereign through the Secretary of State."[25] Usually the Chief Justice consults the Attorney General and the Registrar General with a view to promote a serving legal officer or magistrate and makes a recommendation to the Governor. This goes to the Secretary of State along with the Governor's own views. The Secretary either approves the appointment or proposes a candidate of his own,[26] the field of candidates is drawn from the whole Overseas judicial and legal service.[27]

2. Retiring Age

s.8(1) of the *Pensions Ordinance*[28] provides that–

> "The normal age of retirement of an officer, other than a judge, holding a pensionable office, shall be on attaining the age of 55 years; provided that (a) the Governor may approve any such officers continued service after attaining such age."

No definition is given in this Ordinance of what is a judge, therefore one has to refer to[29] the definition given in the *Interpretation and General Clauses Ordinance*[30], where a judge is interpreted to include "the Chief Justice, the Senior Puisne Judge, a Puisne Judge and a Commissioner of the Supreme Court." It appears therefore the retiring age for District Judges is the same as an ordinary public servant, that is, 55.

This finding is not unsupported by public recognition. The 1969/70 Annual Statement of the Hong Kong Bar Association also mentioned that ". . . . . the retiring age in the District Court is 55 . . . . ."[31]

Apart from the age of retirement another point worth mentioning is that District Judges may be required by the Governor to retire from the service at any time after he attains the age of 45 years, subject to the approval of the Secretary of State.[32] However, further consideration of this point is deferred until later discussion.

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[21] District Judges are hereinafter referred to as public servants, and the long phrase of public officers, public servants, civil servants and Crown servants is avoided for the sake of simplicity.

[22] Cap. 93, Laws of Hong Kong

[23] *Ibid*, s.2

[24] s.4(2), District Court Ordinance, Cap. 336

[25] Roberts-wray *Commonwealth and Colonial Law*, p. 482

[26] John Rear, *The Law of the Constitution*, in Keith Hopleins' *Hong Kong – The Industrial Colony*, p. 394

[27] Hood Phillips, *Constitutional and Administrative Law*, p. 757

[28] Cap. 89, Laws of Hong Kong

[29] The preamble of the Interpretation and General Clauses Ordinance states "To consolidate and amend the law relating to the construction, application and interpretation of laws . . . . . to define terms and expressions used in laws . . . . ."

S.2 provides that "Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance or instrument, the provisions of this Ordinance shall apply . . . . . to any other Ordinance in force . . . . ."

[30] Cap. 1, Laws of Hong Kong

[31] at p. 28

[32] s.8(2) Pensions Ordinance: see also R. 68 of the Colonial Regulations

3. Remuneration

District Judges' salaries are charged upon the general revenues of the colony under the heading "Judiciary", which appears in every year's *Appropriation Ordinance.*[33] So again they are treated similarly as other public servants in the colony in this respect.

4. Tenure of office – holding at Crown's pleasure

It is generally accepted that public servants hold their office at the pleasure of the Crown,[34] but it is also universally approved that public policy requires that judges should be guaranteed by law a reasonable measure of security of tenure – by protecting them from interference and at the same time providing a method whereby a judge may be dismissed for "adequate" reasons. It is these two somewhat conflicting principles that bring out the question one has to answer.

In the famous case *Terrell* v. *Secretary of State for the Colonies*[35] Lord Goddard suggested that "the condition under which judges of those courts [in colonial courts][36] are to hold their office must depend upon the terms on which the Crown or Parliament establish them."[37] The Act of Settlement which provides that judges are to hold their office during good behaviour does not apply automatically to Judges of Colonial Courts who therefore – subject to the Colonial Regulations or any local statute – hold their office at the pleasure of the Crown. It is thus necessary to look at "the terms on which the Crown establish them" in order to find out the conditions under which District Judges hold their office.

By Article XIV of the *Letters Patent* the Governor may constitute and appoint such Judges, Justices of the Peace and other public officers as may be lawfully appointed; all of whom shall, unless otherwise provided by law, hold their offices during "our pleasure". And under Article XVI the Governor may, subject to Secretary of State's instructions, upon sufficient cause to him appearing, dismiss or suspend from the exercise of his office any person holding any public office within the Colony, subject to the provisions of Article XVIV – which only applies to a Judge of the Supreme Court.

On the other hand under the *Guide to Disciplinary Procedure,*[38] all government officers are governed by the *Colonial Regulations* and *Regulations of the Hong Kong Government.*[39] No formal definition of a Government officer is given there, but it is submitted that that is a term of general application which means any person appointed and employed by the Hong Kong Government, thus obviously including District Judges. Also under Group B of Regulation 12, Judicial Officers are stated clearly within the categories of officers which are subject to disciplinary procedure. Again it is submitted that Judicial Officers include District Judges – government officers exercising judicial functions. Thus District Judges are governed by the *Colonial Regulations* and *Regulations of the Hong Kong Government.*

Regulation 17 of the *Colonial Regulations* provides that "Appointment to public offices are by authority of Her Majesty and such offices are held during Her Majesty's pleasure." Regulation 302 of the *Regulations of the Hong Kong Government*[40] also provides for the same thing.

In addition, The Governor in Council may, under the *Pensions Ordinance* require a District Judge to retire from the service of the Colony at any time after he attains the age 45 years, subject to the approval of the Secretary of State. This clause in the *Pensions Ord.*[41] clearly pro-

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[33] See footnote 5

[34] Article XVI Letters Patent: see also R. 17, 56 of the Colonial Regulations

[35] (1953) WLR 331

[36] added by the writer

[37] *Ibid.*, at p. 336

[38] Issued by the Establishment Branch, Hong Kong (1964)

[39] see Regulation 1

[40] Volume II, Establishment Regulations

[41] s.8(2), 8(3) See also s.6(2) Public Services Commission Ord. (Cap. 93) and R. 68 Colonial Regulations

ceeds on the assumption that District Judges hold their offices at the Crown's pleasure.

After looking at all "the terms on which the Crown establish them", one finds that District Judges in Hong Kong hold offices at the pleasure of the Crown, subject only to a procedural safeguard in case of dismissal.[42]

5. Conduct and Discipline

Under Article XVI of the *Letters Patent*, the Governor has the power to take such disciplinary actions as may seem to him appropriate against "any person holding any public office within the Colony" – which includes a District Judge.

At the same time, the *Guide to Disciplinary Procedure* states clearly that all Government officers, including of course District Judges, are subject to the Colonial Regulations[43] and Regulations of the Hong Kong Government[44] Thus the discipline and removal of Government servants covered by these Regulations[45] apply to District Judges. However, there is a procedural modification – a Judicial Commission shall be appointed by the Chief Justice to hear a case concerning District Judges which "normally consisting of one or more Judges of the Supreme Court or High Court."[46] Decision arrived at is subject to the approval of the Secretary of State. In the case of misconduct not serious enough to warrant dismissal the Governor's power to fine, reduce in rank or otherwise punish a District Judge is the same as for any other government servant[47] and the Secretary of State may approve, vary or remit the punishment.[48]

6. Crown vicariously liable for torts committed by District Judges?

In the case of torts committed by the Crown's agent or servant the Crown will be held liable under s.4(1) of the *Crown Proceedings Ordinance* (subject to certain qualification)[49]

But District Judges will not render the Crown liable for torts committed while discharging or purporting to discharge their judicial functions which exceeds the limits of their immunity.[50] s.4(5) of the aforesaid Ordinance provides:

> "No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connexion with the execution of judicial process."

Instead a right of action will lie against a District Judge for any tortious act done outside his jurisdiction.

7. Judicial Immunity

It has long been accepted that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him, no matter that the judge was under some gross error or ignorance or was actuated by envy, hatred and malice, and all uncharitableness.[51] The reason is given by Lord Tenterden C.J. in *Garnett* v. *Ferrand*[52]

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[42] Regulation 60 (XVI), Colonial Regulations

[43] R. 1 "This part of this Regulations applies to public officers serving in ..... Hong Kong."

[44] G.R. 2 "Government Regulations apply to all Government servants except in so far as –
(a) contrary intention appears in Government Regulations
(b) alternative provision is made for particular Government servants in an Ordinance .....
(c) a Government Regulation is inconsistent with the terms of an Ordinance or ..... which applies to particular Government servants
(d) a particular Government servant is excluded by the terms of his employment from the operation of a Government Regulation"
It is submitted that District Judges do not fall within any of these exceptions.

[45] e.g. Regulations 55 to 68, Colonial Regulations

[46] Regulation 6e (XVI), *ibid.*

[47] Regulation 60, *ibid.*

[48] Regulation 57, *ibid.*

[49] See s.4 (1) proviso, s.8 and s.34, Cap. 300

[50] If torts are committed within their jurisdictions, there will be no liability (see Judicial Immunity)

[51] *per* Lord Denning *Sirros* v. *Moore* (1974) WLR459, 467.

[52] (1827) 6 B. & C. 611

> "This freedom from action ..... is given by the law to the judges not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgement, as all who are to administer justice ought to be."

However, a difference exists between inferior court and superior court judges. A judge of inferior court is only immune from liability when he is exercising a jurisdiction which belongs to him. It does not exist when he goes outside his jurisdiction.[53] But in the case of a judge of superior court, even though he has gone outside his juridiction he is not liable, so long as he is acting judically. [54]

The District Court in Hong Kong is an inferior court, for it possesses limited criminal and civil jurisdiction.[55] Therefore District Judges are only exempted from civil or criminal liability for things done or said while acting within their jurisdiction.

In *Sirros* v. *Moore* Lord Denning said obiter that

> "As a matter of principle the judges of superior courts have no greater claim to immunity than the judges of lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgement' it applies to every judge, whatever his rank".

His view is also supported by Ormrod L.J. It is submitted that the reasoning is sound and perfect. However, to what extent this affects the local District Judges is still an open question.[56]

8. Contempt of Court

For the benefit of the administration of justice, District Judges are given a power [57] to punish any person who wilfully insults a judge or a witness or any officer of the court during his sitting or who wilfully interrupts the proceedings of the Court or otherwise misbehaves in court.

But District Judges have no general immunity from criticism of their judicial conduct,[58] provided it is made in good faith and does not impute improper motive. It must be genuine criticism and not malicious[59] or an attempt to impair the administration of justice. When criticism steps beyond the proper bounds the courts have power to punish the offender for contempt. Reports of judicial proceedings are also governed by special rules.[60]

A sum of District Judges' status

To sum up, District Judges differentiate themselves from an ordinary public servant in the following ways:

1. Their appointment and promotion need no advice from the Public Services Commission.
2. In case of dismissal there is a judicial procedure provided.
3. No vicarious liability attaches to the Crown for any tort committed while purporting to exercise their judicial functions.
4. Immunity from suit for words spoken or acts done while exercising their judicial functions within their jurisdiction.

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[53] *Marshalsea Case* (1613) 10 Co. Rep. 686

[54] *Hamond* v. *Howell* (1674) 1 Mod. 119: *Fray* v.*Blackburn* (1863) 3 B. & S. 576

[55] District Court Ordinance Cap. 336 Part IV and Part V. esp. s. 32 and s. 74

[56] *Sirros* v. *Moore* is a Court of Appeal decision, the Full Court of Hong Kong decided in *Chan Kai Lap* [1969] HKLR 463 that Court of Appeal decision is not binding on local courts.

[57] District Court Ordinance Cap. 336 s. 20

[58] "Justice must not be a cloistured virtue, she must be allowed to suffer from the scrutiny and respectful, even the outspoken, comments of ordinary men"
Ambard v. *Att-Gen.sfor Trinided and Tobago* (1936) A.C. 322 at 335

[59] Salmond L.J. said that "No criticism of a Judge, however vigorous, can amount to contempt of court providing it keeps within the limits of courtesy and good faith."

[60] See Judicial Proceeding (Regulations of Reports) Ordinance, Cap. 287.

5. A power to punish for contempt.
6. Their conduct in particular case cannot be questioned in legislative meeting – an English parliamentary custom which is generally observed in the Colony.
7. On vacation from the office of a District Judge, he shall not practise as a barrister in Hong Kong without the consent of the Secretary of State.[61]

But in other circumstances they appear to be the same as ordinary public servants:

1. They hold their offices at the pleasure of the Crown.
2. They have to retire at the age of 55; and they may be required to retire at any time after attaining the age of 45 years, subject to the approval of the Secretary of State.
3. They are subject to the same discipline as other public servants.
4. Their remuneration is charged under the general revenues of the Colony.
5. They will be liable for any corrupt act under the *Prevention of Bribery Ordinance.*[62]

This shows how anomalous a position the District Judges are being placed and this special status of theirs can never be found elsewhere in any other class of public servants or any other types of professionals.

Reasons for District Judges' special status

By long English usage the expression "the judges" means the superior court judges and it has been said by one of the leading English text-writers[63] that "it is these judges who are the centre of interest when we think of 'the courts', the development of the law and the administration of justice." The position is the same facing the question of the independence of the Judiciary – both in England and in Hong Kong. District Judges, as inferior court judges, are therefore not centre of interest, so, unlike Judges of the Supreme Court, they are not guaranteed by law of an optimum degree of independence.

Furthermore, Hong Kong, being a Crown Colony, is within Her Majesty's dominions and is therefore under the sovereignty of the Crown. The Government of Hong Kong is, strictly speaking, Her Majesty's Government. "The power to constitute and appoint such Judges, Justice of Peace and other public officers as may be lawfully appointed"[64] was granted to the Governor by Letters Patent. Appointees thus appointed by the Governor in right of the Hong Kong Government are government officers; and their terms and conditions of employment are regulated by the Colonial Regulations and Regulations of the Hong Kong Government, Government circulars and Departmental Standing Orders.[65] This accounts for the reason why District Judges are in many ways similar to other public servants – for they are treatel as Government officers in the service of the Government of Hong Kong exercising a judicial function. This is so for the sake of easy and uniform administration for the local government.

On the other hand, there exists a deep-rooted constitutional principle that judges must be assured of an optimum degree of independence and the terms of security of tenure and salary, protection from possible interference etc. for the proper administration of justice. This principle only in certain degree affects the local judiciary and it does not prevail in full force in Hong Kong because it conflicts with the traditional colonial administrative pattern.

So in addition to the first reason, the inconsistency and contradiction between the principle of judicial independence and the preservation of uniformity in the Colonial administration perpetuate a somewhat anomalous status for the District Judges in Hong Kong.

To what extent does this affects the independence of the local Judiciary

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[61]This condition appears in the Letter of Appointment of a District Judge.

[62]Cap. 201, s.3

[63]Jackson, in *The Machinery of Justice in England*

[64]Article XIV, Letters Patent

[65]See Guide to Disciplinary Procedure

To the question how the independence of the Judiciary can be preserved, a fourfold answer has been suggested by Roberts-wray,[66] which is:

a. an appropriate machinery for appointment,
b. security of tenure of office, so that they cannot be dismissed except for good reasons,
c. suitable terms of service,
d. general acceptance of and respect for judicial independence – that the Judiciary can rest assured that it is not likely to be challenged and has not continually to be fought for.

It is submitted that the same should be adapted in order to assess how the independence of the local Judiciary is affected.

1. Appointment

In respect of appointment of District Judges, control is obviously in the hands of the Secretary of State and there is a close relationship between the Judiciary and the Executive. But criticism cannot reasonably be levelled against the Secretary of States' influence in the appointment of District Judges. As Professor de Smith[67] has suggested, it is arguable that the principle of distrusting the Executive may be carried too far and that it would be wrong for the Government to be denied any effective voice in judicial appointments. It is submitted that there can be no sensible objection to this as long as there is no political motives involved in the appointment of District Judges – an ideal which is generally observed.

2. Tenure of Office

District Judges hold their offices at the Crown's pleasure, and may be dismissed or suspended upon "sufficient" cause. The long-worshipped magic formula that judges hold their offices during good behaviour has no legal effect on District Judges – for Article XVIA of the Letters Patent covers only Judges of the Supreme Court. The only legal security for District Judges is the procedural safeguard in their dismissal. Furthermore District Judges may be required by the Governor in Coluncil to retire at any time after attaining the age of 45.

Earlier discussion also reveals that the general conduct of District Judges are guided and controlled by the Colonial Regulations and Regulations of the Hong Kong Government. However, it should be noted that such control only extends to their general conduct but not to the performance of their judicial functions, so no objection can reasonably be raised.

But the fact that District Judges' tenure of office is insecure and they are not adequately protected from possible interference is self-evident. It may be argued that District Judges are in practice holding their offices during good behaviour and it is highly unlikely that they will be dismissed or required to have an early retirement so that discussion on this matter is little more than academic. But it is submitted that the real question is whether a District Judge "can", not "will", be dismissed at pleasure legally and the definite affirmative answer one has to give has great significance.

3. Terms of Service

District Judges have reasonably high salary and an adequate pension, because of the heavy responsibility of their offices and also to compensate for their lifelong limitations on the additional sources of income available to them.

On vacation from their offices District Judges cannot practise as a barrister in the colony without the prior consent of the Secretary of State. But despite these suitable terms of service the condition of service is not safeguarded. District Judges' remuneration is charged in the annual Government estimates and thereby not removed from the arena of debate on annual estimates. Thus disadvantageous alteration of a District Judge's remuneration or other terms of service is not prohibited during his

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[66] See *Changing Law in Developing Countries* (Ed. Anderson) p.63

[67] Broadcast talk, Nov. 6, 1958 (Roberts-wray, *Commonwealth and Colonial Law*, p. 479)

tenure of office. So there is a possibility – though one may say it is highly unlikely to occur – of legislative review of a judge's salary [68] or his terms of service.

4. Public Support

The independence of the judiciary depends very largely upon the support of public opinion, without which it must inevitably be in a grave danger. Public opinion is given a lead by the conventional rule observed by the U.K. Parliament that, unless discussion is based on a substantive motion, drawn in proper terms, reflection must not be cast in debate upon the conduct of Judges, either individually or generally; this rule is also observed locally. But the local judiciary has recently been much criticized – in its 1969/70 Annual Statement, the Hong Kong Bar Association expressed the view that appointment from District Judges to Commissioners of the Supreme Court and acting Puisne Judges created a real incentive to promotion within the local judiciary for there is a marked difference in terms of prestige, salary, pension and retiring age. [69] And the 1970/71 Annual Statement stated more clearly that the lure of promotion may infringe on the independence of mind, decision and judgement characteristic of a judicial officer.[70]

Thus this shows that in addition to the absence of formal legal guarantees as to the security of District Judges' tenure of office and terms of service, the present system of promotion within the local Judiciary is another factor that cast much suspicion on the independence of the local Judiciary.

It may be argued that the independence of the Judiciary is preserved by constitutional practice rather than by rules of strict law. As Professor de Smith has suggested

> "The good sense of ministers, legislators and the judges themselves, professional tradition and the force of public opinion are surer safeguards than any formal legal guarantee" [71]

Yet nobody can deny that the existence of formal guarantees moulds and conditions the habits of thought and conduct. What really matter is the confidence and respect which the public has and are seen to have in the independence of the Judiciary. Thus formal legal guarantees are important and necessary.

Recommendation

It is of great importance that justice be dispensed even-handedly in the courts and that the general public feel confidence in the integrity and impartiality of the Judiciary.[72] Thus formal legal guarantees as to the security and autonomy within the Judiciary are expected.

Furthermore, it is submitted that no difference should exist between the District Judges and Judges of the Supreme Court – in terms of the retiring age, tenure of office and judicial immunity. For all the world there is no reasonable reason to neglect judges of inferior court when thinking of the courts and the administration of Justice, for they are undoubtedly performing the very same function as other Supreme Court judges.

As a first step, the law might well be amended to provide that District Judges shall be removable only for misbehaviour or incapacity – which can be done by widening the application of Articel XVIA of the Letters Patent to include District Judges.

The Judiciary must not only be independent, but must be seen and felt to be independent.

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[68] See R. 182 Colonial Regulations
"The Governor shall give such directions to his officers as shall ensure that the Annual Estimates of the revenue and expenditure of the Colony shall be submitted to by the government to the Legislative, as to allow reasonable time for *their consideration and approval* before the beginning of the year to which the Estimates relate."

[69] At p. 28 Hong Kong Bar Association Annual Statement, 1969/70.

[70] At p. 5, Hong Kong Bar Association Annual Statement, 1970/71

[71] 16 M.L.R. 502, *"Tenure of Office of Colonial Judges"*

[72] S. A. de Smith, *Constitutional and Administrative Law*, p. 365

..... **because I'm black**

THE COLOURED ENGLISHMAN: DOCKERS' LABOUR CLUB v. RACE RELATIONS BOARD

Alexa C. W. Cheung

"Inside the Dockers' Labour Club, the afternoon drinkers tried to absorb their sudden notoriety along with their 14-pints. The news that the House of Lords had finally come down on their side in allowing them to refuse admission to a coloured man brought little cheer."[1]

Dockers' Labour Club v. Race Relations Board – the name that flashes on the front page of every newspaper in London on October 17, 1974, the day after the House of Lords announced its unanimous decision.

The colour bar case began in 1970, when a Mr. Tony Sherrington, a coloured man, arrived at the Dockers' Labour Club, a working men's club, with his English wife to play bingo. He believed he had every right to do this as he was a member of a nearby club, and had paid a fee for which he became an associate member of the Dockers' Club[2]. Mr. Sherrington ordered drinks for himself and his friends, but the secretary of the club quietly told him to leave because the Club practised a colour bar. This incident occurred after the passing of the Race Relations Act 1968.[3] Mr. Sherrington reported this case to the Race Relations Board[4]. Since then, the case seasawed through the courts.

The Race Relations Board brought action against the Club claiming a declaration that they had acted unlawfully in refusing goods, facilities and services to Mr. Sherrington on the ground of his colour, contrary to s.2(1) of the Race Relations Act 1968, as well as an injunction and damages. Judge Sir William Morris at the Manchester County Court gave judgment for the Board, and the Court of Appeal[5] affirmed his decision. The Club appealed to the House of Lords, claiming that they were not providing goods and facilities to the public or a section of

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[1] 20 October 1974 – The Observer.

[2] All Members of any of the clubs, about 4,000 in number, were affiliated to the Club and Institute Union. They have the right, subject to a possible power of exclusion to enter any club in the scheme and enjoy all the rights of the members of that club on condition that they produce their associate cards, which make them associate members of all other clubs in the Union.

[3] The Race Relations Act 1968 repeals sections 1 – 4 of the Race Relations Act 1965. As Mr. Callaghan, then the Home Secretary, said in the Commons, this new act is to make fresh provisions, wider in scope than the 1965 Act on discrimination on racial grounds.

[4] The Race Relations Board, first established by the 1965 Act, was reconstituted by the 1968 Act. The Board has the duty to seek and investigate complaints of racial discrimination, to resolve them by conciliation, and if necessary, to seek remedies in the courts by asking for an injunction and damages. At the present moment, it has a chairman and eleven members.

[5] (1974) Q.B.503

the public. The Law Lords, Lord Reid, Lord Diplock, Lord Simon of Glaisdale, Viscount Dilhorne, and Lord Kilbrandon, unanimously[6] held that associates of a genuine club are not a section of the public as to be caught by the 1968 Act. They referred to three cases[7], out of which only one – *Race Relations Board* v. *Charter*[8] – was concerned with the construction of the phrase "the public or a section of the public" in s.2(1) of the Act[9]:

> "It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him of any of them or to provide with goods, facilities or services of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public."

In *R.R.B.* v. *Charter*, the refusal of an application for membership from an Indian on the ground of his colour by a social club was held by the House of Lords as legitimate. There, the five Lords – Lord Reid, Morris of Borth-y-Gest, Hodson, Simon of Glaisdale, and Cross of Chelsea all agreed that what was in issue was whether the club, in providing services to its members, could be regarded as providing services to a section of the public under s.2(1) of the Act. All except Lord Morris of Borth-y-Gest shared the view that "the legislature thought all discrimination on racial grounds deplorable, but thought it unwise or impracticable to apply any legal sanctions in situation of a purely private character"[10]. As such, the words "the public or a section of the public" are words of limitation[11], the legislature could not have meant to include the domestic household or private relationships among people[12]. Thus, whether clubs are private or public depends, not on the impersonal characteristics its members share in common[13], but on whether the club has a genuine process of screening and personal selection[14] over admissions.

The test of personal selection, not the basis of which members of a club are admitted, not as part of the public but as private individuals, is now applied by the House in *Dockers' Labour Club* v. *R.R.B.*[15] with the effect that not only members but also associate members not personally selected by the club itself, are outside the ambit of s.2(1). "Selection at second hand is sufficient"[16]. The enormous number of 1,000,000 associate members is not important.

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[6] Lord Kilbrandon, however, said he arrived at the conclusion "with regret", while Lord Simon of Glaisdale talked about a forensic misinterpretation of the statute.

[7] The three cases referred to are: *Heydon's Case.* (1584) 3 Co. Rep. 7a, *Prenn* v. *Simmonds* (1971) 1 W.L.R. 1381; and *R.R.B.* v. *Charter.*

[8] (1973) A.C.868

[9] So far, only four cases on the interpretation of the 1968 Act have gone up to the House of Lords. They are *Ealing L.B.C.* v. *Race Relations Board* (1972) A.C. 342; *R.R.B.* v. *Charter* (1973) A.C. 868; *R.R.B.* v. *Applin* (1974) 2 W.L.R. 541 and the present case, *Dockers' Labour Club* v. *R.R.B.*

[10] Per Lord Reid

[11] Lord Morris of Borth-y-Gest, however, believes these words are words of further description, not of limitation. All the Lords in *Dockers' Labour Club* preferred the other view.

[12] Private relationships are also excluded because it was contended that the true antithesis of public is private. Thus, though members of a private club are also members of the public, their relationship between each other and vis-a-vis the club is to be determined by another test. See note 14.

[13] All the members of the majority in this decision expressed their puzzlement at the distinction drawn by Lord Denning (when this case went up to the Court of Appeal, where the three judges, Lord Denning, Stephen L.J. and Negaw L.J. unanimously decided that the club constituted a section of the public) between the personal and impersonal characteristics of a group to tell a private club apart from a public one. Lord Denning prayed in aid the analogy of charity cases, and based his conclusion on the ground that the members of the club concerned shared one common impersonal characteristic – that they are all conservatives, would render them a "section of the public."

[14] The majority decision in this case is based on the test of personal selection. This means that if there is genuine screening so that only members who will be acceptable to other members of the club and whom the club can trust are admitted, then the club is a private club.

[15] (1974) 3. W.L.R. 533.

[16] *Ibid., per* Lord Reid p. 536

It is singularly unfortunate that all the Lords in *Dockers' Case* applied the test laid down in *Charter* without any consideration as to the possible consequences such a decision would have on the race relations scene.[17] Had the Lords awaken to the need that in interpreting the Race Relations Act they should face up to the principle that racial discrimination in all its manifestations should be outlawed, and that the spirit rather than the ambiguous letter of the present law should be given effect, they could easily have found ways to circumvent and distinguish their earlier decision in *Charters,,* even if they did not want to overrule it[18]. The Court of Appeal had shown them how the former approach could be resorted to that associates of the Union, not being personally selected by the Dockers' Club, and forming a very large body, constituted a "section of the public" within s.2(1) of the Act, and since the club is concerned with the provision of goods and services to a section of the public, it therefore has unlawfully discriminated. Lord Reid, however, held that second hand selection is enough. Lord Diplock believed it would be enough if the associates were selected by others whose judgment the Club is prepared to trust[19]. Viscount Dilhorne simply assumed that "some members of other clubs belonging to the Union" are similar in status to members of the Dockers' Club[20]. Lord Kilbrandon too, hardly gave reasons for saying "the goods and services which the appellants provide, they provide privately to their members, their guests, the guest of their members and associate members"[21]. Lord Simon, instead, was too obsessed with his attack on "forensic situation"[22] the courts may create when interpreting a statute.

ASSOCIATE MEMBERS

It would have been easy for the House to declare that the 1,000,000 associates are a section of the public for the purposes of the Act. Only Lord Reid gave some detailed justifications for not so doing. To say that "the law should intrude with regard to guests and temporary members or associates and avoid interference with regard to members themselves"[23] is perhaps a little too artificial. Yet, even Lord Reid himself contended that a club can go outside the private sphere when, for instance, a golf club admits members of the public or some section of it at particular times in payment of a green fee.[24] Why should not the associates be categorized as that section of the public which, on the production of their associate cards, were to be admitted unless their characters are so obviously objectionable as to make, say, a restaurant manager chase out a customer? Just as an artificial line can be drawn between a private and a public club, so should there be a similarly artificial distinction between genuine members of the club and quasi members like associates and guests, not personally selected by the club and forming such a large number![25]

NUMBERS

Should numbers count? The Court of Appeal believed that the large number of associates is an important factor for consideration. Viscount Dilhorne, however, was of the opinion that the large number of associates is immaterial since the Club is only concerned with the provision of goods, facilities or services to "those associates who sought admission and who could

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[17] The Race Relations Board believes, and quite rightly so, that this is a deplorable situation. The storm of disgust from the public can perhaps be epitomised by a letter from Professor Thakur to the Editor of the *Times*: Does this mean that the white community wants the benefit of the coloured people's work but does not want their company after work?

[18] Perhaps it is not too rash to suggest that it is not quite feasible to find the Lords overruling the decision in *Charter* since three Law Lords who sat in *Dockers' Case* also sat in *Charter's Case.*

[19] The Club to which Mr. Sherrington is a full member also has a selection process. Thus, the argument is that as long as there is selection, it does not matter who did the selection. This obviously is an extension of the rule laid down in *Charter.*

[20] (1974) 3 W.L.R. 533 at 539 *per* Lord Reid.

[21] *per* Lord Reid *ibid.* p. 544

[22] *per* Lord Reid *ibid.* p. 543

[23] *per* Lord Reid *ibid.* p. 537

[24] *ibid.* p. 536

[25] Judge Nicklin at the Birmingham County Court in 1971 found it easy to hold that guests brought by members of a club to a club party are a section of the public.

comply with the prescribed conditions"[26]. By limiting the number to a minimum in this manner, Viscount Dilhorne found it easy to say that members of other clubs belonging to the Union are not a section of the public. Lord Reid believed numbers should not count. It would be theoretical that all the 1,000,000 associates would show up at the same time. In reality, only a few would present themselves at the Dockers' Club everyday. With the greatest respect to the learned lords, this argument is built on a fallacy, its credibility resting on a confusion of the technicalities of the concepts of offer and acceptance in the law of contract and the precise realities of the science of mathematics. s.2(1) of the Act cannot be interpreted in the light of contractual offer and acceptance rules. It is related to the law of contract only in so far as it stipulates that one who invites the public or a section of the public to use the goods and services he provides has no right to reject an offer made by the public or a section thereof on racial grounds[27]. It is the author's opinion that numbers are immaterial in that so long as members (whether they be many or few) of the public or a section thereof comes forth with the offer, albeit they come on different days and in different combinations, their status as members of a section of the public changes not. Though only a few may seek the club's facilities each night, the total number of the associates remains undiminished and the relationships between the absentee associates and the club should remain unchanged[28]. Thus, the question for the court is not how many of them turn up each night, but their exact status vis-a-vis the club. This, however, brings the court back to the primary question – are the associates a section of the public?

RACE RELATIONS BOARD V. APPLIN AND ANOTHER

For a further illustration of the fallacy of the arguments of Lord Reid, Lord Diplock and Viscount Dilhorne, it is best to digress here into an earlier case – *Race Relations Board* v. *Applin & Another*[29] when the House held that the children under the care of the local authorities are a section of the public, and those few who were accepted into foster parents' home each period during which they were treated as members of the family remain, nevertheless, a section of the public[30]. This case was not cited by the Lords in *Dockers' Labour Club*, when it could, in fact, provide a method by which the House can escape the rule in *Charter*. Lord Reid said in *Applin*[31] that the domestic family, by taking in orphans, had expanded and thus the relationship between the foster parents and the orphans is not personal and domestic any longer. This should not affect the relationship between the foster parents and their own children. Similarly, by having associate arrangements with the Club Institute Union, the club, it can be argued, has attained a public flavour as regards its associates, though its relationship with its own members remains untampered.

A close analysis of Lord Reid's reasonings in the two cases: *Race Relations Board* v. *Applin & Another, Race Relations Board* v. *Charter* reveals numerous discrepancies. In *Charter*, Lord Reid made an illustration which bears resemblance to the facts of the *Applin* case. Lord Reid argued that if, in the absence of a nursery school,

> "a woman let it be known among her neighbours that she was willing to take a few children into her house for some hours each day, and then refused to take the child of a coloured neighbour, she is not discriminating under the 1968 Act."

In *Applin*, however, Lord Reid preferred to say that though the foster parents took in the children and treated them as members of their family, this did not mean that such children be-

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[26](1974) 3 W.L.R. 533 at 538

[27]The confusion is further perpetuated when Lord Diplock said that not only was the Club not committing a breach of the Race Relations Act, it also was not committing a breach of contractual duty.

[28]Lord Reid's argument can be completely discredited by bearing in mind the fact that a member of the club, though absent on a particular night, is still a member of the club in every sense of the phrase.

[29](1974) 2 W.L.R. 541

[30]Lord Reid even said that the small number of children accepted each time does not prevent the children from being a section of the public since they all add up to a large number cumulatively. It is the total number of children taken in that is material. In *Dockers' Labour Club* v. *Race Relations Board*, the same Lord Reid took different views – that the total number of associates is irrelevant.

[31](1974) 2 W.L.R. 541 at 545-6.

come members of the host's family. They still remain a section of the public. That they are treated like a member of the family does not alter the transient nature of their stay, nor does it render them a real part of the family. In *Dockers' Labour Club*, Lord Reid found little difficulty in forgetting *Applin*, and simply held that the associates are not a section of the public. By applying *Applin* as an analogy, can the court not say that an associate is essentially different from a member? The former has to produce a card, and his admission is still subject to the Club's power of exclusion. It is poetic justice to see one dignified judge in the highest court of appeal of the United Kingdom switching grounds from one case to another, each time without one single recapitulation of contradictory pieces he had once written down in his previous judgments[32].

THE PERSONAL SELECTING TEST

One of the reasons for ruling that the orphans taken in by the foster parents in *Applin* is a section of the public is that they were never personally selected by the parents. Indeed, in every one of the House of Lords cases that turned on an interpretation of "the public or a section of the public" in s.2(1) of the Act, the test of personal selection applied to[33] determine whether members of a club are a section of the public[34] or a private association of individuals.

All the members of the majority in *Charter*[35] appeared to have been more interested in the privacy of domestic life and indeed considered the fact that various sections of the 1968 Act suggested that it was not the intention of Parliament to interfere with people's domestic lives. The majority were convinced that it was not the intention of Parliament to render the existence and activities of clubs or associations illegal[36]. Thus, as long as the committee of a club or any other clubs with which it has reciprocal arrangements, there is a personal element between the club and its members. This is a private relationship, into which the law does not intend to intrude. In human relationships and friendship, the law has no say.

With the greatest deference to the Lords, the author finds this test totally inappropriate – a test calculated, perhaps unwittingly, to multiply social divisiveness and cripple racial integration. In short, it feeds the "rivers of blood" that will rip across the whole country, a catastrophy Mr. Callaghan wished to avoid.

Every individual, every institution, every organization and every school exercises an element of selection in its acceptance of a person, a member or a student. s.2(2) of the Act[37] says that a headmaster who selects his students can not discriminate on the grounds of race, colour, or ethnic or national origins.

Every employer having more than ten employees can discriminate on any other but the above grounds. Why, then, should a club be such an inviolable symbol of personal liberty that it is in a different predicament? Lord Simon, who also upheld the colour bar of Dockers' Club, doubted whether personal selection is the "touchstone of all circumstances".

The Race Relations Act should not be regarded as a curtailment of personal freedom of action – so the argument goes. This is an illusory argument. To a large extent, partial restriction of personal freedom is what the Act seeks to achieve[38].

If personal selection is not the appropriate

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[32] In *Applin*, Lord Reid made no mention of his little illustration made in *Charter*. In *Dockers' Labour Club*, Lord Reid refused to mention *Applin's case* altogether!

[33] This is the test devised in *Charter*, applied in *Applin*, further perpetuated and expanded in *Dockers' Club.*

[34] See note 14

[35] Lord Reid, Lord Hodson, Lord Simon of Glaisdale and Lord Cross of Chelsea.

[36] Lord Cross of Chelsea even pointed to his qualms about the extra-ordinary consequences which the acceptance of the Race Relations Board (that the rejection of a member on racial grounds is illegal) would entail with regard to clubs the membership of which was confined to racial groups. To him, the fact that there might be in existence Scottish, Welsh, Irish, Indian or Pakistani clubs formed to promote social intercourse or cultural activities, could only mean that Parliament did not intend to make the activities of any of these unlawful.

[37] That facilities for education, instruction or training is an example of the facilities and services mentioned in s.2(2).

[38] *R.R.B.* v. *Charter*
(1973) A.C. 868 *per* Lord Morris, who shared similar view.

test, how, then, can the court draw a line between private and public clubs, if a line is to be drawn at all?[39]

"A club may be defined as a society of persons associated together for social intercourse, for the promotion of politics, sport, art, science or literature, or for any purpose except the acquisition of gain. The association must be private and have some permanence".[40] Thus, any club, whether it has a rigid or a loose selection process, has an element of privacy within it, in that not every man in the street may be allowed in the club premises or attend its meetings or functions as of right. On the other hand, that these clubs have as their hallmark the essence of privacy should not mean that they can escape sanctions levied by the Race Relations Act, unless the Act is to be made a mockery of[41]. As Lord Simon himself agreed in *Charter*, the Act as a whole is meant to exercise an educative function. Is an Englishman educated on the virtues of racial equality and human dignity when even the highest court in the realm says he can jest about "the taffy niggers" over a glass of beer in a club?

Lord Morris of Borth-y-Gest in his dissenting judgment in *Charter* argued that members of a club should be considered a section of the public:

> "If they are not a section of the public, What are they?"[42]

It is the author's submission that this is the right approach. The words "members of the public" in s.2(1) at once limits the application of that section. The "public", on a literal inter pretation, means the public at large, and sections thereof are not included. Thus, the words "or a section of the public" modifies this limitation.[43]

An act must be read as a whole[44]. Sections 2-5 of the Act marks out the areas where discrimination is illegal. Sections 7-11 set out the exceptions. This would give the inference that clubs not expressed as an exceptions are to be included in s.2(1). It was on this deduction that Lord Morris based his reasons.

Not one single Lord in his judgment in *Dockers' Labour Club* mentioned Lord Morris. Nobody toyed with the slightest idea of declaring *Charter* wrongly decided. Lord Kilbrandon did say he arrived at his decision with regret, but it was a decision without hesitation[45].

THE PRUPOSE AND EFFECTIVENESS OF LEGISLATION

Racism, a very emotive subject, is very difficult to be legislated against, since it is more psychological than concrete. Many firmly vow that any attempt by the legislature at manufacturing a set of rules must be a failure[46] as people can always find loopholes in the law to discriminate[47]. This, with respect, is a misconception. If the sole function of the law is to deter and to punish or simply to "regulate matters capable of regulation"[48], then perhaps it is right to say that human beings cannot be forced by law to love their neighbours, and hence it is no business of the law to regulate race relations. The law, however, also has the social

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[39] Lord Kilbrandon in *Dockers' Labour Club*, also said that it is especially hurting for a man, not knowing of the colour bar of a club of which he is an associate, presents himself and is turned out.

[40] Halsbury Laws of England. 4th Edition. Vol. 5 p. 252

[41] The aim of the Act, as revealed in the speech of Mr. Callaghan, then the Home Secretary of the United Kingdom, is to reduce friction and discontent that could be created by racial discrimination.

[42] (1973) A.C. 868 at 892

[43] For instance, students of a school may not be the public; but nevertheless a section of the public.

[44] See *Beswick* v. *Beswick* (1968) A.C. 58

[45] (1974) 3 W.L.R. 533 at 543

[46] This is the argument adopted by the anti-legislation members of the Commons and Lords when the bill was going through Parliament. One very good example is offered by Mr. Smith during debates in the committee stage of the bill in the Commons (Hansard 1968): "One of the worse ways of emphasising the difference between people is to discriminate between them in the law of the law of the Land. This bill discriminates in the minority's favour".

[47] One such loophole, stressed by Mr. Paul B. Rose during the debates in committee stage of the bill in the Commons (Hansard 1968) is that if clubs are not included, then people can form a book club to publish offensive literature and circulate amongst themselves, thus circumventing s.6 of the 1965 Race Relations Act.

[48] This is quoted directly from a statement made by a senior puisne judge of the Hong Kong Supreme Court during a private interview. The judge based his argument along Enoch Powell's line – that legislating against racial discrimination is "sheer madness". He contended that the law's function is "never to educate".

and educative function of ensuring the realisation and attainment of certain human ends in society [49].

Louis Claiborne, author of a 20,000-word report published by the Minority Group in London in 1974, argued that:

> "Not only has the law shown itself capable of effectively controlling overtly discriminatory conduct in most aspects of public life, but it can, overtime, substantially affect attitudes .... It follows that merely declaring discrimination on the grounds of race or colour illegal is not enough .... to be effective as a teacher and deterrent, the law must be known to work .... the anti-discrimination law, if written generously and administered forcefully and inventively, can do far more than is often supposed."

The majority of people in society would tend to obey the law for the sake of obedience, be the law concerned for good or ill, and only a few are bent on breaking the law irrespective of its moral or social utility. That the law exists means people must not discriminate. [50] That being the case, it is the majority that the law should seek to appeal to – to change people's attitudes and behaviour, thus leading ultimately to the acceptance of the principle that racial discrimination is "an unjustified prejudice" [51]. Perhaps, a contention that the existence of such a law is at least an appeasement and comfort to the minority would at once provoke strong counter-arguments from jurisprudencial writers [52], but it cannot be denied that a law on race relations means the discriminated can now openly seek legal remedies. [53] Racism exists in the United Kingdom [54]. It is futile pretending it does not. It will only encourage discontent and disillusion among the minority. They will probably answer this with violence and destruction [55].

After *Race Relations Board* v. *Charter*, the Race Relations Board called for the Act to be amended to bring all but small private clubs under control. The decision by the Lords in *Dockers' Labour Club* v. *Race Relations Board* which the Board described as "deplorable", should strengthen pressure on Mr. Jenkins, the Home Secretary, to change the law. The Home Office is now undertaking an investigation into the Act. Labelled as a "major setback in racial integration" [56], the unanimous decision in *Dockers' Club* fully exposes the twin defects of the legislation and the unventiveness of the English judiciary. All attention is now focused on the words "the public or a section of the public" – a constitutional infirmity according to Lord Kilbrandon. Can this include clubs, and if so, what kinds of clubs? Should the Act be given a narrow legalistic interpretation or should the courts adopt a liberal, teleological and policy-oriented approach? The House of Lords has chosen the former, the Court of Appeal prefers the latter.

It can well be argued that the Lords' decision in *Dockers' Labour Club* v. *R.R.B.* is contrary to the spirit of the Act. The distinction between facilities offered privately and those offered to the public or a section of the public is

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[49] J. Raz, "On the Functions of Law" (Oxford Essays in Jurisprudence ed. A.W.B. Simpson, Second Series, 1973), p. 280

[50] Harry Street's "Freedom, the Individual and the Law" 2nd ed. pp. 289-294 expresses similar views. The idea here is that the existence of the law at least shows the country's recognition of race problems.

[51] "Four Statements on the Questions of Race" *UNESCO*.

[52] That the law should never be used to appease is one of the strong arguments of a judge of the Hong Kong Supreme Court when the author asked for his view of the purposes of legislation against racial discrimination.

[53] Court proceedings, however, can only be taken by the Race Relations Board.

[54] The first Racial Relations Act in 1965 was the result of many years' pressure for effective laws against racial discrimination by people like Fenner (now Lord) Brockway and others. The 1967 PEP report "Racial Discrimination in Britain" revealed extensive evidence of discrimination in housing, employment and other areas. The Street Report examined the working of anti-discrimination legislation in the U.S.A. and Canada. it also argued that racial discrimination in the above areas could be dealt with by laws.

[55] "The Race Question in Modern Science" *UNESCO*

[56] A statement issued by the Race Relations Board can perhaps illustrate this contention: "Working men's clubs are in many communities an essential part of social life from which, the law now conclusively settled by the House of Lords, immigrants and their children can now be completely excluded. Where a coloured person succeeds in achieving membership of one club and take steps to become an associate member of other clubs, he can now, to quote Lord Kilbrandon's judgement, "suffer a wounding rejection for no reason derogatory of his character or personality from clubs operating a colour bar".

one of fact and degree. It would be remarkable if Parliament intended that facilities offered to over a million people should be regarded in this context as offered privately, when the people in the associate category are selected by the committee of their original club over which no other club has control subsequently. It is already being said that the Law Lords reached their view reluctantly because they had no choice. Yet the House was overruling a trial judge and three Court of Appeal judges, all of whom found it possible to decide that the racial discrimination was unlawful.

The House of Lords has now ruled against the Race Relations Board in three out of four cases which have come to it on the interpretation of the 1968 Act.[57] The utopia of social integration, the author believes, requires not only an amendment of s.2 [58] of the Act to repeal the House of Lords decision, but also a general broadening of the judges' method of interpretation of legislation[59].

AMENDMENT

The exact ambit of the words "the public or a section of the public" in s.2 of the bill (now the 1968 Act) sailed, unquestioned, through its various stages in both the Commons and the Lords. In the Commons, only Mr. Paul Rose and Mr. Hugh Jenkins[60] discussed the problem of clubs. In the Lords, Lord Strabolgi questioned whether clubs were included in s.2, to which the Lord Chancellor answered that "*bona fidé* clubs are excluded". Parliament obviously was of the opinion that the law should not interfere with private associations.

The words of limitation: "the public or a section of the public" can be totally deleted from s.2 (1). This would include clubs – and even domestic households. This, however, is too drastic, as it sweeps away in one stroke an Englishman's most treasured freedom: an Englishman's home is his castle. Thus, it is the author's contention that s.2 (3) and s.2 (4) be added:

> All Clubs shall be deemed to be providing facilities for sections of the public.
>
> No Clubs shall base their membership on distinction of colour, race or ethnic or national origins, provided that a club formed for the furtherance of specific cultural or religious ends may confine its membership to persons having some direct affinity with such ends.

These two subsections are a partial restriction of the freedom of association. It is no argument to say that the Act should not interfere with personal freedom, because that exactly is what the Act aims at. In the modern society of conflicts, there must be a compromise somewhere. The rights the Act takes away are inconsistent with the general human rights of freedom and equality. An Englishman not allowed to bring his Japanese friend into a racist club for a drink is just as unfree as another who cannot form a racist club himself!

All clubs draw their membership from the public or parts of it. It is not denied that they have an essence of privacy[61]. Yet, an element of privacy also exists in the field of housing and employment. If the manager of a firm having more than ten employees cannot discriminate in his choice of employees on racial grounds, why should those who work with coloured men during the day refuse to drink with them at night? If such personal rights of choice on racial lines is denied to a landlord,[62] why should it be given to a club? If the law can interfere to say that people driving in cars must wear safety belts, why should not the law rule that a cricket club cannot refuse admission to a Pakistani? If

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[57]The four cases are *Ealing* v. *R.R.B.*, *R.R.B.* v. *Charter*, *R.R.B.* v. *Applin* and *Dockers' Labour Club* v. *R.R.B.*, of which only in the third case did the House give judgment for the Board.

[58]s.2, of course, is not the only area in the 1968 Act where amendment is necessary, but it is with this particular section that this paper is concerned.

[59]*Judicial Interpretation of Statutes* Post.

[60]Mr. Jenkins recognised that the legislation has not specifically provided against clubs, but he hoped that behaviour would be influenced and no racist club would exist.

[61]*Ante*

[62]Race Relations Act 1968 s.5

interference for the driver's personal safety is justifiable, why should interference for psychological and social healthiness be condemned? It is high time some sense is injected into the very "soft" laws on race relations. If the law is to contribute importantly to achieving racial justice in Britain, it must take itself seriously.[63]

S.2 (4) has the effect of saying that all clubs cannot discriminate on the grounds of race, colour or ethnic or national origins. This does not prohibit clubs from discriminating on other grounds. [64]

The proviso in s.2 (4) needs some explanation. The Oxford Dictionary defines "culture" as:

> "the training and refinement of mind, tastes and manner, the intellectual side of civilization"

As such, it is distinguishable from race which is defined thus:

> "pertaining to races and nations"

There is no reason why clubs cannot be formed to propagate and perpetuate specific culture or religious aspirations. There is every reason that a group of Englishmen may feel the necessity of an "English Club". So long as it is not formed because all its members detest the blacks and only like Englishmen – it has every right to exist and to be able to choose only those who have affinity with their English traditions and ways of life. Thus, they will have no right to reject a coloured man who is born and bred in England and is in every sense (except his skin colour) an Englishman. Similarly, an Englishman who believes that Allah is the god and Mohammed his prophet has as much reason as an emigrant Pakistani Moslem in Manchester for joining the Moslem Club. The reason for adding the priviso is easily discernable. While the author believes that there is no reason for making excuses and exceptions in relation to the desire of some minority or even majority ethnic groups to "hold unto their own and water down the purpose and effect of the legislation"[65], the author is convinced that there is nothing wrong in the idea of different cultural or religious groups furthering their own aspirations and interests. The proviso serves to remind the court that though the demarcations of culture and religion may sometimes map onto those of race and ethnic origins, so long as a club rejects a member, not "because you are an Indian" but because "you do not know anything about the Welsh culture" and does so honestly, the club is not discriminating under s.2 of the Act.

There may be another type of clubs membership of which is by invitation. The relationship between the club and its members seems more private here as to warrant such clubs not to be included in s.2 presumably because those not invited, albeit because of their colour, will not suffer a "wounding rejection"[66] as did Mr. Sherrington in *Dockers' Club.* This is illusive logic. The aim of the Act is to eliminate all overt acts of discrimination in the short run, and to realize racial harmony is its long term policy. To allow such clubs to exist is, again, to disguise and yet encourage racial discrimination and, one is tempted to ask – is the relationship between the members and such a club so very private?

JUDICIAL INTERPRETATION OF STATUTES

It was an unimaginative and semantic approach the House of Lords used in *Dockers' Labour Club* and in *Charter.* The sole question, it seemed, was a literal interpretation of the words "the public or a section of the public". A spark of individuality did glimmer in Lord Kilbrandon's judgment – that the decision he arrived at was harsh to Mr. Sherrington[67] – but it was a dying spark in the sterile wilderness that is the 'reactionary and decadent' English judiciary.

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[63] Louis Claiborne's Report, 1974, published by the Minority Group in London.

[64] Lord Morris in *Charter* argued that all discrimination except that on racial grounds is allowed.

[65] *per* Lord Morris, *R.R.B.* v. *Charter* (1973) AC. 868

[66] *per* Lord Kilbrandon: *Dockers' Labour Club* v. *R.R.B.* (1974) 3 W.L.R. 533 at 544

[67] *per* Lord Kilbrandon: *Dockers' Labour Club* v. *Race Relations Board* (1974) 3 W.L.R. 533, at 544

A. Reports of Parliamentary Debates

Should there not be a clear, more adequate and more comprehensive system of judicial interpretation of statutes that enables the courts to avoid "forensic misinterpretations"?[68] In *Ealing* v. *Race Relations Board*[69], Lord Kilbrandon argued in favour of a contextual and policy oriented approach to statutory interpretation, especially as regards "statutes designed to remedy social grievances". Lord Simon of Glaisdale advocated that

> "parliamentary proceedings or other preparatory material might be made available to aid judicial interpretation of statutes in the really clinching cases at least with the sanctions of cost against misuse"[70]

The acceptability of this proposal was, however, left open[71]. In *Dockers' Labour Club*, this subject was brought up again. Again, Lord Simon made no move to look at Parliamentary debates.

The words "the public or a section of the public" being words of limitation, what falls to be construed is whether clubs are included. The Lords found nothing inside the act itself to aid them in their construction. As it was inconceivable that the problem of clubs were never discussed. Lord Simon believed parliamentary debates might help the court as an external aid[72] to the contruction of an ambiguous section according to the true intention of parliament.

Some continental and American courts do refer to reports of parliamentary debates. English courts, however, have cautiously guarded against this. The reason can best be seen in Lord Wright's judgment in *Assam Railways & Trading Company* v. *IRC:*[73]

> "..... the intention of the legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate".

and parliamentary debates are not legitimate because:

> "Neither the validity nor the interpretation of a statute passed by parliament can be allowed to depend upon what members ..... choose to say in parliamentary debates. The Court takes the word of Parliament itself, formally enacted in the statute, as expressing the intention of Parliament".[74]

It is the author's opinion that the admissibility of parliamentary debates, though sometimes useful[75], is open to abuse and waste. To take Lord Simon's advocation again – when is a case really "clinching" enough to allow the court such freedom? And when so, what court has the right to enjoy this freedom?

Granted that the above two questions are satisfactorily answered, how, then, can a court decide which argument put forth by different legislators and members during the debates represents the true intention of parliament? To quote Lord Kilbrandon:

> "..... an individual legislator may indicate his assent on an assumption that the legislation means so and so, and the courts may have no way of knowing how far this assumption is shared by his colleagues".[76]

That the courts will look to the Hansard as an aid may encourage legislators and members to yell out at their widest discretion their many views in hope of being accepted by the court. This creates chaos. It is detrimental to parliamentary debates, wastes the time of the court,

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[68] *per* Lord Simon of Glaisdale, *ibid.* at 543

[69] (1972) A.C. 342 This case turned on whether the words "national origins" in s.1(1) of the Race Relations Act 1968 include nationality.

[70] (1973) A.C. 868 at 900 Lord Simmon first put forward this suggestion in *Prenn* v. *Simmonds* (1972) 1 W.L.R. 1102, 1119

[71] Lord Simon only raised this as a possibility in the House.

[72] External aids like dictionaries and reports of committees are admissible, but parliamentary debates are rigidly ruled out.

[73] (1935) A.C. 445

[74] *per* Latham C.J. High Court of Australia, in the *Uniform Tax Case* (1942) 65 C.L.R., 373, quoting as his authority Lindley J. in *Lyons & Sons* v. *Wilkins.*

[75] In *Dockers' Club*, parliamentary debates will not be useful as those discussing clubs did so on the assumption that *bona fide* clubs are not included.

[76] *per* Lord Kilbrandon, *Ealing* v. *R.R.B.* (1972) A.C. 342 at 368

and increases the costs for the parties involved. It is not unusual that reports, departmental papers and executive minutes are involved in the debates. Are these to be exempted from scrutiny by the courts? If not, where should the line be drawn?

The author, however, fails to see how parliamentary supremacy and privilege can be the reason underlying the inadmissibility of parliamentary debates. The Hansard as an aid to interpretation is different in essence and substance from the Hansard as a source for the court to discover if there is any irregularity during the passing of an act. *Edinburgh & Dalkeith Railway Company* v. *Wauchope*[77] is an authority for saying that the Court has no right to inquire into parliamentary proceedings, because of the supremacy of parliament.

> "Parliament and the courts have long recognised their individual roles and spheres of action. The former by use of the sub-judice rule, the latter by taking care to exclude evidence which might amount to an infringement of Parliamentary Privilege"?[78]

Reading the Hansard as an external aid to interpretation is not, in anyway, an intrusion into parliamentary privilege.

B. Constitutional Convention

A better remedy lies, perhaps, in another of Lord Simon's suggestion:

> "Where the promotor of a bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances, and expresses an opinion, it might well be made a constitutional convention that such a contingency should ordinarily be the subject matter of specific statutory enactment – unless, indeed, it were too obvious to need expression".[79]

The initator of a bill knows what a bill aims at. He is the best source from which the court can extract ideas as to specific operations of an act. It would not be a great help to the court if it has to scan the pages of debates on irrelevant issues in the Hansard to extricate the relevant words of the initator. Thus, that the initator's comments be enacted in the act itself gives the court clues as to the act's specific operation under certain circumstances. This is especially useful when nowhere in the act, including its long and short titles,[80] preambles (if any)[81], can the court find any clues as to parliament's intention.

It would be a great help if such a constitutional convention can be made. However, though conventions can be "created", it requires an element of agreement, even if tacit, among all the parties concerned, that this will be adhered to, particularly so since conventions, strictly, have no force of law [82].

Before consent on the need for such is arrived at, the court, perhaps, can contribute its part. It cannot tell parliament what to do [83], but the Lord Chanceller can certainly issue a Practice Direction[84] to all courts of the realm, including the Privy Council, that whenever an explanatory memorandum from a minister is attached to the bill, the courts should have no hesitation in employing that as an aid of construction, unless the act itself specifically and unequivocally contradicts the memorandum. This approach, at least, is more policy-oriented.

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[77](1842) 8 Cl. & F. 710

[78]*British Railways Board* v. *Pickin & Another* (1974) 2 W.L.R. 208

[79]*Dockers' Labour Club* v. *R.R.B.* (1974) 3 W.L.R. 533, at 543

[80]These are now generally used by the court as aids.

[81]Modern acts seldom have preambles.

[82]Dicey: *The Law of the Constitution.*

[83]This would be an intrusion into the legislative sphere which the courts have always guarded against.

[84]One such example is the 1966 Directions to the House of Lords, giving it authority to overrule its former decisions. Although this statement is not made in the context of a decision, it has been put to practice by the House in *British Railways* v. *Herrington* (1972) 2 W.L.R. 537. Lord Simon in *Knuller* v. *DPP* (1973) A.C. 435, at 485 described it as a convention. If so, it is a convention that has binding force on the courts.

INTERVIEW:

THE HONOURABLE THE ATTORNEY GENERAL MR. J.W.D. HOBLEY, Q.C., J.P.

Mr. J.W.D. Hobley became the Attorney General of Hong Kong in 1973. In this interview, he expressed his opinions on the Small Claims Tribunal, the Crown prosecution, the new Court of Appeal, consumer legislation and the development of the law in Hong Kong.

Q. *It is said that the Small Claims Tribunal has been set up for the small man who cannot afford to go to the courts to enforce small claims. But isn't it likely that the tribunal may well be used more often against the small man than for him since the legislation seems to invite large companies and Government itself to utilise its machinery as a debt collection agency?*

A. The setting up of the Small Claims Tribunal represents a very significant step-forward. The proceedings will be conducted in what is referred to as an inquisitional manner. The ordinary formal rules of the Court will not apply so that people can present their cases in their own way. So far as evidence is concerned, the only one test will be the basic one of relevancy.

The tribunal will have exclusive jurisdiction to hear claims under $3,000 in contract and in tort, i.e., you must bring your action to the Small Claims Tribunal if the claim is within its jurisdiction. It is then obvious that it may be used in the nature of things against the small man. Although the tribunal is certainly not designed for that purpose, we must accept that it can be used against ordinary people. This is unavoidable because of the exclusive jurisdiction. Statistically, probably the Government and the businessmen will be plaintiffs more often than ordinary people. This is again inevitable and we should not be frightened because of it. Thus, in practice, the tribunal may well be used more often against the small man than for him. I must stress that the tribunal is not designed to be used against ordinary people. It is actually designed for ordinary people and I am quite confident that it will be so used.

Q. *Will the enforcement of debts be the commonest claim in the tribunal?*

A. It will be the commonest claim because the tribunal has a jurisdiction in contract. The tribunal will also be commonly used for claims based on negligence. Moreover, we have a lot of support from the Consumer Council. We know as lawyers that there are many claims which people simply do not bother to bring, partly because of fear of the formality of the present judicial system, partly because of the misconception that you can't go to the District Court without a lawyer. Having the support of such an organization as the Consumer Council, we will see justice being done in that people will be more ready to enforce their rights.

Q. *The Consumer Council had announced that they might assign officers from the Council to represent the ordinary people at the tribunal. What kind of officers are they?*

A. Certainly the officers will not be lawyers because lawyers are not allowed in the tribunal. I can't speak for the Consumer Council as to what sort of people they will use. I don't think it will matter too much who actually appears; the whole idea is to give the ordinary people the confidence to present their own cases.

Q. *Although legal representation is not allowed at the tribunal, large companies will be able to employ increasingly experienced semi-professionals to represent them. Will this unfairly jeopardise the parties' parity in the presentation of their cases?*

A. This is a good question and we are conscious of this problem. I acknowledge that the large organizations will continue to make use of their expertise and legal advisers and, so far as they do, it must put them at an advantage over the small man who has no prior legal consultation. This is a fact which we cannot deny. But to answer your question, such situation will not unfairly jeopardise the parties. If we get the right man as the adjudicator, I don't think any amount of expertise in presentation will make all that difference. The adjudicator will be a mediator in the real sense. He will be trying hard to draw out the case from the 'less fortunate', if we may use such term, and make an assessment. Actually the District Judges at present do try to help the unrepresented party to some extent. What's wrong with the District Court is that it is still basically a lawyers' court and so we have moved away and established this tribunal. The expertise and advantages possessed by large companies will be very substantially balanced by the way the adjudicator will carry out his task.

Q. *Does it mean that it depends greatly on individual adjudicator? Is there any criteria for the selection?*

A. Yes, a great deal depends on him. There will be no criteria as such for the selection. However, he will have to be legally qualified. He will be a member of the judiciary. His employment will be subject to the recently established Judicial Services Commission. I think he should be a man of understanding and of a reasonably forceful character because he has to project his image very much into the proceedings.

Q. *Is it possible to extend the legal aid scheme to cover legal advice for the small man before he goes to the tribunal?*

A. Not at the present moment. It's still a long long way in Hong Kong before legal advice is provided at the costs of the Government. We are now only able to provide legal aid in actual court proceedings and even the availability of legal aid in civil cases is very limited. There is so much room for improvement in the legal aid field that I see little likelihood of the setting up of a legal advice scheme. The right direction to move will be to extend legal aid in civil cases.

Q. *It has been suggested that Government should re-assess its policy of employing full-time Crown Counsel exclusively handling certain aspects of legal work. What is your opinion of the present arrangement?*

A. This is a big question and it's hard to give an adequate answer. My opinion is that the present arrangement is the one best suited to local circumstances. The idea to have a change has been raised before and the costs factor has been looked at closely. It is beyond question that it's more economical for the Government to employ, on the standard civil servants' rates of pay, full-time prosecutors than to give out prosecution work to barristers in private practice. The costs factor is a very important one because it is the Government's duty to spend public money in the best

possible ways. We do in fact regularly brief a number of prosecutions out to the Hong Kong Bar pursuant to a long-rooted understanding between the Attorney General and the private sector and in response to the suggestion that it will be good for the administration of justice as a whole that not all prosecutions are carried out by Government servants. We do not have a monopoly in prosecutions and do use the Bar, especially when we are under pressure of work. Yet there are some difficulties in having members of the Hong Kong Bar to do prosecution work because suitable barristers are very busy.

Q. *Would you think it desirable for prosecution work to be given to barristers in private practice?*

A. It is desirable on a small scale. The Hong Kong Bar at present is large enough for Hong Kong needs but it's certainly not over-large. In the Legal Department we have an average number of 25 Crown Counsel working on prosecutions. If all prosecution work were given to the private sector, there will not be enough man-power to cope with it. I think it is generally accepted in the Government that the present system is right for Hong Kong.

Q. *With the graduation of the law students from the University, there will be a growth in strength of the Hong Kong Bar. Will the situation then change?*

A. I don't think so. It will require a big change in Government policy to cut the number of Crown Counsel and brief out more to the private sector. The financial argument is still very strong. What I hope is that more law graduates will join the civil service in the Legal Department.

Q. *It is said that in the criminal field there is something like a contest between the Attorney General's Chambers and barristers in private practice. Do you agree that we should have 'all-rounded barristers' who do both prosecution and defence work?*

A. I accept this point. It is along this line that we have the understanding of briefing out some prosecution work to the private sector.

Q. *Is it true that the Legal Department mostly handles criminal cases?*

A. It is certainly not true to refer to the Department as a bunch of prosecutors. While there are some areas of law we do not touch, e.g. divorce, we do have a broad spectrum of legal work here. The civil advisory section of the Department is as big as the prosecution section. There is also a law-drafting section busily drafting new laws. We take up articled clerks here because we are satisfied that we can provide them with proper legal training equivalent to what they will get in the private sector.

Q. *Do you feel that the proposed modification of the structure of our courts will bring about any substantive, as opposed to merely formal, changes?*

A. The new Supreme Court Ordinance is a formal change in the sense that it is purely structural. It certainly will not involve changes in the substantive law. The establishment of the permanent Court of Appeal will be significant. I think the status of the present Full Court is not very easily understood by ordinary people and it is better to establish a separate appellate court. The only change in the law, which is not the object of the exercise but the result of it, is that applications for mandamus, certiorari, prohibition and habeas corpus, which go to the Full Court now, will go to the High Court in future, in effect providing an appeal in those areas. The new Ordinance is mainly a modernisation of the present Ordinance. Although both the Bar Association and the Law Society have made suggestions for certain other changes, they will be considered later because the important thing is to get the Court of Appeal established first.

Q. *Is it true that the Supreme Court Judges will sit interchangably in both the High Court and the Court of Appeal?*

A. Only to a very limited extent. The Court of Appeal consists of the Chief Justice and the Justices of Appeal. There will be flexibility by virtue of the Chief Justice's power to appoint High Court Judges to the Court of Appeal temprarily and allow Justices of Appeal to sit in the High Court where administrative convenience requires. What we have established is a permanent Court of Appeal with permanent Judges spending most of their time in that Court. There is sufficient appellate work for full-time Justices of Appeal. Judges moving up and down should be very much an exception though it is perfectly sensible in terms of flexibility.

Q. *The Full Court has asserted its right to reverse its previous decision. Will the future Court of Appeal do the same?*

A. I'll be very surprised if they change this rule, though of course they are perfectly entitled to do so. The appeal to the Privy Council is a rarity and the Full Court, the Court of Appeal in future, is the final court of Hong Kong for practical purposes. It will be very surprising if the Court of Appeal decides that it is bound by its own decisions.

Q. *Is there at present any intention to introduce legislation on consumer protection, particularly concerning hire-purchase, like that existent in England?*

A. We do keep the hire-purchase law under constant review. No evidence has been produced by anybody to the Government which leads us to believe that there is a real need in Hong Kong for the sort of hire-purchase legislation which the United Kingdom has. It is pointless to enact a law merely for the sake of it. If there is indication that there is a need to legislate in this area, the law will be put through very quickly. It is true that there is a general trend towards legislating consumer protection laws, though this has to be done slowly. Hong Kong is very different from England in trading practice. We have to move very carefully in these areas. It will be easy to swallow up U.K. legislation but whether it has any practical application is the crucial point. Otherwise we may put on the statute book laws which are unrelated to reality and therefore unenforceable. Incidentally, an extension of the work of the Consumer Council may be one of the answers to the problems in Hong Kong.

Q. *In what other areas of the law in Hong Kong would you like to see changes made?*

A. I happen to be a strong believer in the fusion of the legal profession. I am quite convinced that for Hong Kong fusion is the right answer, though I don't think I can achieve it. The separate division between barristers and solicitors is quite unnecessary and a fused profession does not mean the end of specialisation. I find it difficult in talking to ordinary people to defend the present system. One thing is that the present system does increase the costs of litigation.

The other area in which I should like to see change is the introduction of a compensation scheme, at a fairly low level, by the Government for traffic accidents victims regardless of fault. The matter is now under discussion and is certainly a valuable idea, better than nothing, to relieve the immediate needs of the suffering families. The local branch of 'Justice' is also looking at this problem and this is an area we ought to move, provided we can find the way to do it without using too much public funds.

We should also carry on the reform of our company law which has been started. It is important, considering the way Hong Kong develops as a commercial and financial centre, that the law governing companies should be up-to-date.

We have a law reform section in the Legal Department which watches the changes in England and some other Commonwealth countries and picks up anything which is significant and relevant to Hong Kong.

CREDIT CARDS IN HONG KONG

The legal aspects of credit card transactions have not yet come before English courts and many prospective problems await judicial solution."

Crowther Report on Consumer Credit
Cmnd 4596

INTRODUCTION

The use of cash in our daily life may soon become unstylish with the introduction and rapid development of the credit card system. Despite widespread acceptance of 'this new sophisticated payment and credit system overseas, it is only in its rudimentary stage in Hong Kong and no statistics are yet available.[1]

Everyone Benefits

If each party under a credit card plan observes his obligations, the system is 100% efficient.

The credit card holder (hereinafter called "the holder") enjoys immediate credit and the convenience of paying his expenses once a month against a monthly itemised statement. Not only does it serve as a status symbol[2], the card also relieves its holder the trouble and danger of carrying large sums of cash.

Besides gaining more potential customers, *the credit card honouring merchant* (hereinafter called "the merchant") also saves himself the trouble of operating his own credit system for customers.

The credit card issuer (hereinafter called "the issuer") benefits by discounting bills of account from the merchant[3] and collecting entrance and membership fees.

Our Credit Card Boom Coming

In addition to the wealthy group, the emergence of a new middle class of salaried em-

[1] Based on information supplied by the 6 leading credit card companies in Hong Kong, it is roughly estimated that holders of locally issued cards constitute only 1% of the Colony's population in 1974.

[2] An applicant's credit rating and reputation are thoroughly investigated before a credit card is issued to him.

[3] The discount rate varies from 3% to 7% depending on the type of business and company involved.

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ployees in the colony which is assured of job security and a steady rising monthly income of over $2,000 constitutes a large and ready group of potential cardholders. With the advantages earlier mentioned and efforts made by the business community in promoting the idea, Hong Kong is likely to witness a credit card boom in the near future.

Purpose of this Dissertation

While standing at the threshold of our new consumer era, Hong Kong has yet virtually no specific statute or principle of law directly applicable to credit card transactions and case law on the topic is also remarkably scarce. [4] The following attempts to discover some of the major legal aspects of this credit instrument, the legal nature of such transactions, and the consequential rights, liabilities and interrelationship between the parties. The position will be examined with the help of American precedents and analogies of similar transactions in the light of prevailing common law principles and statutes and local business practice.[5] The Consumer Credit Act 1974, the first United Kingdom statute to deal with credit cards will be examined in connection with local situation, followed by a valuation of the applicability and necessity of adopting such legislation here.

OPERATIONAL ASPECTS

A credit card may better be described by reference to how it works than defined. There are different types of scheme which can be classified according to their purposes, number of parties involved in the transaction and the form of repayment by the holder.

A. Types

The Bipartite scheme which involves two parties, namely, the issuer (who is also the supplier of goods or services) and the holder (who is the customer) is in reality simply a variant of a monthly open account designed as a convenient method of payment by customers.[6]

In a Tripartite scheme, the issuer opens a credit for the holder who can then obtain goods or services from the merchant. The issuer who pays the merchant for the said goods or services will be reimbursed by the holders. This more complex system is chosen to elicit the major problems in relation to credit cards.[7]

Some plans may involve a fourth party which is usually a bank financing the issuer.[8]

B. Provisions Common in Various Contracts.

(a) *Issuer-Holder Contract (Written)*

In the contract entered between the issuer and the holder, the following terms[9] are usually embodied:–

(i) the holder is entitled to facilities of the credit card scheme at the issuer's discretion, (ii) the card remains the property of the issuer, (iii) the holder is responsible for "all amounts charged by use of" or "all purchases made with" the credit card [10] until notice of its loss is given to the issuer [11], (iv) the holder agrees not to raise against the issuer any defence he may have against the merchant, (v) terms concerning the use of the card and modes of repayment.

(b) *Issuer-Merchant Contract (Written)*

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[4] Possible reasons: (i) Common for parties to settle out of court. (ii) Amount in dispute usually too small for taking legal actions and are borne by issuers as running expenses.

[5] The following discussion is confined to credit cards as a medium of exchange replacing cash in consumer transactions. For the instalment or "credit" aspect see "New Cash or New Credit" 69 Mich. L. Rev. 1033; Crowther Report on Consumer Credit (Cmnd 4596). "Credit cards: Some Legal Problems" by W. J. Chappenden 48. A. L. J. 312 – 315. At the time of the writing of this dissertation, the method of payment by instalments with interest has not been introduced.

[6] In Hong Kong, issuers of such cards are usually big hotels, restaurants and supermarkets.

[7] In the following discussion unless otherwise stated, the term "credit card" refers to three-party credit cards Examples of Tripartite credit card plans are those operated by Carte Blanche-Inter-Grace Enterprise Ltd., Asia (H.K.) Ltd, Diners Club (H.K.) Ltd. Most of the problems are also applicable to the Bipartite system.

[8] In these plans, we must refer to the Issuer-bank Contract in determining the manner those two parties have apportioned the rights and duties that belong solely to the issuer in the three-party arrangement. e.g. Nippon Shinpan Int. Ltd. credit card system.

[9] Such terms are found on the application form or on the credit card and in the accompanying literature sent with it to the successful applicant.

[10] The possible interpretations and legal implications of these clauses will be examined later in the paper.

[11] Liability-until-notice clauses are discussed under *Risk of Loss.*

Terms commonly found in the agreement made between the issuer and the merchant are:– (i) the merchant agrees to display the issuer's emblem prominently and honour credit cards properly presented and observe good trade practices, (ii) the merchant promises to obtain prior authorisation from issuer before honouring any card for amounts exceeding a certain limit, (iii) the merchant will settle disputes directly with holders but not to make direct cash refunds to them, (iv) the merchant agrees to sell and the issuer to buy all the sales slips arising from their credit card transactions at a discount, (v) the issuer reserves the rights to refuse credit on certain grounds and to charge back an item on certain grounds.[12]

(c) *Contract of Sale Between the Merchant and the Holder.*

There is no written contract governing their relationship. Implied terms as to quality and fitness laid down in ss. 15, 16, 17 of the Sale of Goods Ordinance apply.[13]

ANALOGIES

In an economic and legal sense the tripartite credit card arrangement is a hybrid of various commercial transactions.[14] In this part features of the credit card transaction are compared and contrasted with commercial letters of credit and credit factoring transactions to bring out the economic realities, the associated problems, and different possible approaches in solving legal problems arising from a credit card transaction.[15]

(a) *Irrevocable Letter of Credit.*

Like credit cards, the purpose of this commercial letter of credit is to substitute, in a contract of sale, the credit of a recognised financially responsible institution for the credit of a buyer of unknown or doubtful credit standing. Three contracts are necessary to accomplish the purpose.

Despite their striking similarities, there are important differences between the two types of transaction. (i) While the letter of credit itself is the contract between the letter writer and the seller, the credit card by itself only represents the agreement between the issuer and the holder.[16] (ii) Documents required in a letter of credit usually give the letter writer title to or security interest in the goods sold while the sales slips in a credit card transaction does not. The issuer is protected from the buyer's default in the former but not in the latter. (iii) Though the card-issuer undertakes to purchase all sales slips or accounts created through the use of the card, there are situations in which the issuer will have recourse to the merchant.[17] Whereas the parties' obligations under the three contracts in a letter of credit transaction are independent[18], whether the same is true to the parties in a credit card transaction is doubtful. (iv) The holder has no guarantee as to the quality, which may be specified by a buyer under a letter of credit transaction.

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[12] e.g. An indemnity clause stating that "If a cardholder refuses payment of an account because of complaint against you (merchant) you agree to reimburse us the full amount of such dispute." e.g. in cases of non-delivery; breach of warranty or fraudulent misrepresentation.

[13] It has been suggested that no contract at all exists between the holder and merchant. For arguments see Credit Cards: Some Legal Problems by W. J. Chappenden 48 A. L. J. 307. Nevertheless, such is reality, i.e. despite the absence of a written contract, there is actually a contract of sale between the parties with a different method of payment arranged by some other prior agreements.

[14] Credit cards have been regarded as negotiable instruments: *Wanamaker* v. *Megary*, 25 Pa. Dist. 778 (C.P. 1915); tokens of credit arrangements: *Gulf Ref. Co.* v. *Plotnick* 24 Pa. D. & C. 147 (C.P. 1934); contracts under the Consumer Credit Act 1974; Uniform Commercial Code transactions; assignments: *Gulf Ref. Co.* v. *Williams Roofing Co.* 208 Ark. 362, 186 SW 2d 790 (1945); commercial letters of credit; and compared with credit factoring.

[15] For a detailed discussion see "The Law Relating to Commercial Letters of Credit" 3rd ed. (1963) by A. G. Davis p. 12 to p. 95.

[16] It has been suggested that the credit card itself is a commercial letter of credit. This view seems to have ignored the existence of the merchant contract.

[17] For examples see footnote 12.

[18] e.g. Performance of the sales contract by the seller is not a condition precedent to the obligation of the letter writer to pay the seller on receipt of specified documents.

(b) *Factoring of Accounts Receivable*

The credit card issuer closely resembles a modern factor in his service to the member merchant under a credit card scheme. The factor purchases outright the accounts receivable of his client (seller) without recourse to the seller should the buyer defaults on his payments. He notifies the buyer that he has acquired the account of the seller and collects it directly from the buyer.

Nevertheless, there is one important difference between the two transactions – there is no privity of contract between the factor and the buyer of merchandise, but there is a holder agreement in a credit card transaction under which the holder agrees to repay the issuer for charges incurred through use of the card.

As seen from the above, we can by no means say that either the law of letter of credit or that of factoring of accounts receivable should automatically apply to credit cards. The peculiar combination of rights the credit card issuer has under the two independent contracts creates a conceptual difficulty as to whether he should be regarded as an assignee in ascertaining his legal rights and liabilities.

RIGHTS AND LIABILITIES OF THE PARTIES

A. Holder's Rights to Assert Defences and Counterclaims

The holder's rights to assert defences and counterclaims depend on whether the issuer's right to claim against the holder is derived from the holder directly (as in a letter of credit transaction) or from the merchant as in the case of an assignment (like in the factoring of accounts situation). The adoption of one of these approaches (hereinafter referred to as the "Direct Obligation" and "Assignment" Theory) instead of the other will alter substantially the legal position of the parties. As neither theory has been sanctioned by the courts, it is necessary to consider both.

(a) *The Assignment Theory*

The adoption of the assignment theory would mean that the issuer is in the position of an assignee who takes "subject to equities".[19] In general, an assignee can obtain no better right than that held by the assignor[20]. Defence or counterclaim arising out of the sale itself before or after[21] notice of the assignment is given to the holder will be available against the issuer[22]. Nevertheless, this may be excluded by express provisions to the contrary in the holder contract.[23]

Besides some American decisions[24], the "assignment" theory is also supported by the apparent arrangements of the transaction and by the language in merchant contracts which refers to an undertaking by the merchant to assign and sell sales slips to the issuer.

Nevertheless, those American decisions must be considered in the light of remarkable negligence by merchants accepting the card. Moreover, the cardholder has not at any stage of the transaction undertaken to pay the merchant nor do the three parties contemplate such payment as apparent from their contracts.[25]

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[19] See Law Amendment and Reform (Consolidation) Ordinance s.9.

[20] Thus, the issuer has no right against the holder if the merchant fails to perform the contract of sale, or if there is a failure of consideration e.g. a justified return of the goods, if the contract is void for mistake. He takes subject to the right of the holder to set the contract aside if it is voidable for misrepresentation i.e. his right is subject to the same condition as that of the merchant.

[21] See *Govt. of Newfoundland* v. *Newfoundland Ry.* (1888) 13 A.C. 199

[22] See *Stoddard* v. *Union Trust Ltd.* (1912) IK.B. 181. It is submitted that had the defendants simply relied on the fraud of the assignor as a defence to the action brought by the assignee they would have succeeded. See Treitel – 'The Law of Contract' 3rd Ed. p.313

[23] Such clause as "The existence of any claim or dispute between the holder and supplier shall not relieve the holder from the obligation to settle all accounts (with the issuer) upon the rendering of the monthly statement" is commonly embodied in holder contracts.

[24] *Gulf Refining Co.* v. *Williams Reofing Co.* (1945) 208 Ark. 362,186 S.W. 2d. 790; *Union Oil Co. of California* v. *Lull* (1960) 220 Ore. 412, 349 'P. 2d. 243; *Diner's Club* v. *Whited* (1964) Cir. No. A 10872 L.A. Supreme Ct.

[25] In fact, one representative quotation from a sales slip reads "charges recorded hereon were incurred by me. I promise to pay this amount to (the issuer) only"

(b) *The Direct Obligation Theory*

Under the "Direct Obligation" Theory, the issuer's rights are not derived from the merchant. The holder's defences against the merchant are then irrelevant as far as the issuer is concerned[26]. Once the credit card sale has taken place and provided that the merchant has observed certain requirements[27] before honouring the card, the issuer is obliged to reimburse him for all credits extended notwithstanding the holder's non-payment (this being the main attraction to the merchant). The holder is also obliged to reimburse the issuer notwithstanding any complaints he has against the merchant. Thus, theoretically at least, the issuer suffers no hardship in reimbursing the merchant without recourse. But then, the holder will only have his remedies if there is any against the merchant.

(c) *Policy Considerations*

Admittedly, the issuer is in a better position to secure redress from the merchant and making the issuer liable for improper services and defective merchandise would no doubt improve the lot of individual consumers. It goes without saying that those for the consumer would support the assignment theory. However, the following practical considerations peculiar to this transaction cannot be ignored.

Card-honouring merchants dealing in millions of products and services utlise widely varying sales techniques, and disperse nationally and internationally in jurisdictions having different legal and business standards. It is unrealistic for an issuer to monitor trade practices of them all and develop expertise in all such areas.

To protect himself from unscrupulous customers abusing their rights to assert defences and counterclaims against him, the issuer may insist on an arrangement of charging back to the merchant whenever a holder refuses to pay up. This shatters the legitimate expectations of the merchants, destroys the purpose[28] of the whole scheme, and may finally lead to the elimination of this service to consumers. Furthermore, while the running of a credit card system depends on the high efficiency and economic processing of its transactions, the cost of handling a disputed item multiplies with additional manual processing.

In Hong Kong (at least at present)[29] credit cards are treated merely as a medium of exchange in lieu of cash and on principle therefore, the holder should not be in any better position than an ordinary customer who pays in cash.

(d) *Position in Practice*

In Hong Kong in practice, the consumer's position is not as bad as it seems to be. Under the merchant contract, there is usually a provision stating that where there is "any claim or complaint arising out of services charged at your (merchant's) establishment and if the holder should refuse to pay because of it you (merchant) will reimburse .... (issuer) .... for the amount involved." The issuers exercise this right generously and delete the disputed item from the monthly statement or refund to the holder the appropriate amount after such holder has returned the merchandise or made a price adjustment with the merchant. Also, card honouring merchants usually observe good trade practices here.

Nevertheless, under Hong Kong law where freedom of contract and Direct Obligation Theory prevail[30], in the absence of statutory protections, holders cannot assert against the issuer any defences or counterclaims they would have had if ssued by the merchant.

B. Merchant's Rights Against the Holder

Can the merchant claim payment from the

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[26] As apparent from several local merchant and holder contracts, the issuer is even entitled to collect money from the holder though he has not yet reimbursed the merchant. e.g. where the issuer undertakes to reimburse the merchant only once a month, it is likely that there's an item on the monthly statement sent to holders which the issuer has not yet paid the merchant.

[27] e.g. (i) checking whether the card is expired and/or listed on the cancellation bulletin, (ii) ensuring that the sales slip is legible and signed by the cardholder, (iii) to obtain prior authorisation from the issuer when the sales amount exceeds the credit limit.

[28] The consumer would have the merchandise and an asserted defence of unknown validity to the obligation to pay the issuer. For the merchant he has only a sales slip with little effective recourse.

[29] See footnote 5.

[30] Under some American jurisdictions a term would not be binding if it is held to be unreasonable. e.g. *Los Angeles Inv. Co.* v. *Home Sav. Bank*, 180 Cal. 601, 182 Pac. 293 (1919). There is no such equivalent here.

holder in case the issuer refuses to pay or becomes insolvent or quits with the money collected from holders?[31] This problem, which also presents itself in letter of credit transactions, has not yet been solved.[32]

The answer depends on whether in honouring the credit card, the merchant has by implication agreed to hold the issuer liable in place of the holder or whether the issuer's liability is by way of guarantee or indemnity, leaving the holder liable on the issuer's default[33].

Most writers seem to prefer the latter view, however, it is submitted that the answer should depend on the terms of the contract between the parties. It is arguable that the usual term on merchant contracts – " (the issuer) .... agrees to purchase and you (merchant) agree to sell and assign to us (issuer) all valid charges incurred by use of the credit card", and the phrase "I (holder) promise to pay this amount to (issuer) only" which is commonly found on sales slips, plus the fact that the merchant is not allowed to make refunds to the holder, are at least some support to the first view[34].

C. Issuer's Liability for Erroneously Listing a Credit Card in a Cancellation Bulletin

There are two conflicting American decisions on this point. In *Southeast Bankcard Association* v. *Woodruff*[35] the court held that there was a cause of action for libel whereas in *Jennings* v. *American Express Co.*[36] the court applying Florida law held to the contrary without discussing the matter.

Under our system, a plaintiff suing in libel which is actionable per se has to establish three things:

(1) the words are defamatory (2) they refer to the plaintiff (3) they are published.

Most cancellation bulletins distributed to merchants contain the words "Please do not honour or accept the cards listed above and notify us immediately"[37]. Are these words capable of a defamatory meaning? As the credit card system is functionally very similar to the cheque system[38], a look at how libel cases concerning wrongful dishonour of cheques were decided may be helpful.

Actions for libel are brought on the paying bank's answer on or attached to the cheque. "If such an answer or report conveys an imputation that the drawer of a cheque has no account or funds to meet it, the publication would usually be defamatory."[39] Some examples are "not sufficient" [40] "Reason assigned –[41] not stated" "Refer to drawer"[42]

Modern decisions as those in *Tuner* v. *M.G.M.*[43], *Morris* v. *Sanders Universal Products*[44], *Slim* v. *Daily Telegraph*[45] depart from

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[31] There is always the possibility of people setting up a credit card company for fraudulent purposes. e.g. they attract as many merchant members and cardholders as possible with a low discount rate and membership fee, then they quit with money obtained from holders without reimbursing the merchants.

[32] See Davis, "The Law Relating to Commercial Letters of Credit" (3rd Ed) p. 48

[33] Instalment Credit – Aubrey L. Diamond p.89; Credit cards in Australia: Some Predictable Legal Problems – (1972) 3 Lawasia P. 116, 117 – K.M. Sharma; Credit cards: Some legal problems – 48 A.L.J. P. 307 – W.J. Chappenden.

[34] Cf. *Vivacqua Irmaos S.A.* v. *Hickerson* (1939), 190 So. 657 discussed on Pg. 54-55 in Davis' book.

[35] (1971) 124 GA APP. 478, 184 SE 2d 191.

[36] (1964 CA 5 FLA) 338 F2d 22.

[37] Some even states that such card should be held for a reward while others may contain a disclaimer stating that no inference as to credit rating is to be drawn from the listing of an individual's card number or name in the bulletin.

[38] E.g. both systems only work if the card or cheque is honoured in each case.

[39] Gatley on Libel and Slander 7th Ed. (1974) Chap. 2. p. 30

[40] In *Davidson* v. *Barclays Bank Ltd.* (1940) 1 All E.R. 316 such words were held to be libellous.

[41] *Frost* v. *London J.S. Bank* (1906) 22 T.L.R. 760 (C.A.) the court applying the strict interpretation of *Henty's case* held such words were not capable of a defamatory meaning.

[42] Notwithstanding other decisions to the contrary, *Szek* v. *Lloyds Bank* The Times, Jan. 15, 1908; *Pyke* v. *Hibernian Bank* (1950) 1. I.R. 195 (2 out of 4 judges in the Supreme Court); *Tayson* v. *Midland Bank* (1968) 1 Lloyd's Rep. 409 (C.A.); held that these words were capable of a defamatory meaning. It is also submitted to be so in Gatley on Libel and Slander. Chap. 21 P. 31

[43] Per Lord Porter (1950) 1 All E.R. at p. 454. "If the judge comes to the conclusion that a reasonable jury would be justified in finding that the words complained of had a libellous tendency, he must leave it to them even though the words might also bear an innocent interpretation.

[44] (1954) 1 W.L.R. 67 (C.A.)

[45] See (1968) 2 Q.B. p. 187 per Salmon L.J.

the strict interpretation of *Capital and Counties Bank* v. *Henty*[46] and favour a more flexible view in determining whether the words are capable of a defamatory meaning. In the light of the above, if the words complained of in a cancellation bulletin are of several meanings, some defamatory and some innocent, the case should be left to the jury[47].

It is easy to establish that the words refer to the plaintiff as the holder's name and card number are printed on the bulletin. The third requirement is satisfied by the distribution of such bulletins to merchants.

Although libel is actionable per se, usually if the plaintiff is neither a trader nor a professional, and cannot prove particulars of damages actually suffered, he can only recover nominal damages.

RISK OF LOSS

Who will suffer when purchases are made by an imposter who has stolen or found someone else's credit cards? What effect has the liability-until-notic provision[48] purporting to make the cardholder liable for all purchases made with it until the issuer receives written notice of the loss or theft which is commonly found in holder agreements?

A. Solicited Cards

Usually the provision is incorporated into the holder agreement by the applicant's signature[49], in this case he will be bound by it whether he has seen it or not. The question whether such provision is to be interpreted as imposing liability upon the holder has not yet come before any British Court. A look at some American precedents may be helpful.

There are two lines of American authorities. In *Union Oil Co.* v. *Lull*[50] it was held that (i) the merchant's negligence would bar the issuer from relying on such clause, (ii) the issuer must prove that the merchant is not careless. The court also relied on the analogy that a provision in bank passbooks purporting to exempt the bank from liability for making payments to an imposter does not protect the bank from its own negligence or bad faith. According to this decision, the issuer cannot rely on a liability-until-notice clause under certain circumstances.

It is submitted that had the same case been decided under British law and presuming that the assignment theory prevailed, it might be unnecessary to rely on the interpretation of the clause to relieve the holder. One may argue that the contract between the merchant and the holder is at least voidable if not void[51]. Thus there may perhaps be no right for the merchant to assign in the first place.

Texaco Inc. v. *Goldstein* [52]and *Uni-Serv. Corp.* v. *Vitiello*[53] however, support the literal construction of such clauses.

Presumably, before the enactment of legislations dealing specifically with credit cards, Hong Kong courts will apply the general principles in relation to riskallocation clauses. The court will see if they are incorporated into the contract and construe them strictly against the party who relies on them. Generally speaking, if the meaning of the words are clear and such clause is conspicuously printed on the card or its accompanying literature, the party relying on it is likely to succeed.

This may cause hardship on the holder as some time may lapse before he discovers the loss of the card during which an imposter may have

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[46] (1881) 7 A.C. 741

[47] See *Cassidy* v. *Daily Mirror Newspaper Ltd.* (1929) 2 K.B. 331, 339-340, per Scrutton L.J.

[48] e.g. "If, due to loss, or any other reason, the card is used by other persons, the cardholder shall remain responsible for all purchases charged through the said use until due notification is received by us (issuer)."

[49] *L'Estrange* v. *Graucob* (1934) 2 K.B. 394

[50] 349 P. 2d 243 (Ore. 1960) see also *Gulf Refining Co.* v. *Williams Roofing Co.* 208 Ark. 362, 186 S.W. 2d 790 (1945)

[51] *Ingram* v. *Little* (1961) 1 Q.B. 31, *Cundy* v. *Lindsay* (1878) 3 A.C. 459; *Phillips* v. *Brooks, Ltd.* (1919) 2 K.B. 243; *Lewis* v. *Avery* (1972) [1971] 3 All E,

[52] 39 Misc. 2d 552, 241 N.Y.S. 2d 495 (1963)

[53] 53 Misc. 2d 396, 278 N.Y.S. 2d 969 (N.Y. City Civ. Ct. 1967)

already incurred for him a crippling bill. Moreover, under some credit card plans the holder's liability continues for a period of time after notifying the issuer.

Limitation of the cardholder's liability for loss through unauthorised purchases to a certain amount[54], insurance covering such loss[55], the requiring of the issuer's prior authorisation for sales above the holder's credit limit[56] and the using of scientific devices for identifying genuine cardholders[57], in addition to the ordinary clerical procedures[58] required in honouring the card, are some practical solutions to minimize loss due to unauthorised purchases. All these should be considered by the legislature in drafting legislation on credit cards.

B. Unsolicited Cards

Although in Hong Kong there are not yet any precedent of mass mailing of unsolicited cards, problems arising from them should not be overlooked.

The sending of the card to an individual by the issuer is only an offer to contract according to the terms printed on the card. The mere possession of an unsolicited card by a person without using it does not amount to acceptance. He will not be bound by its terms[59] nor be responsible for the consequences of the card's loss or theft before or after it has reached the individual.

However, where acceptance is constituted by using the card[60] and not by signing and returning to the issuer any written acceptance so that terms may be incorporated by signature[61], the liability-until-notice clause will only be incorporated into the contract if reasonable notice[62] of its existence is given to the holder. The court has to decide on this point first before proceeding to interpret the clause.

CRIMINAL LIABILITY FOR UNAUTHORISED USE OF CREDIT CARDS

An imposter who uses another person's credit card representing himself to be the genuine holder may be charged under the Theft Ordinance s. 17 (1) for obtaining property by deception.[63]

Under s. 18 (1)[64] of the same Ordinance an imposter may be charged for obtaining pecuniary advantage from the issuer, namely, of evasion of a debt or charge for which he makes himself liable or is or may become liable (s. 18 (2) (a)), by deception when he makes a false representation to the supplier or issuer-supplier that he is the valid holder of and the named person in a credit card. In the unreported Hong Kong case of *R.* v. *Lai Wai Cheun*[65] the defendant was successfully convicted under this section.

A holder who continues to use a credit card after notice of its revocation or withdrawal

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[54] e.g. The American Express International Inc. limits its cardholder's liability to U.S. $50

[55] E.g. The Nippon Shinpan International Ltd. insures for its cardholders the amount of 1,000,000 for a nominal premium of only 200.

[56] This serves to detect sudden extravagant spending by a genuine holder or imposter so as to minimize bad debt losses and loss due to unauthorised purchase. It also enables the issuer to contact the holder or have the card confiscated in good time.

[57] E.g. a signature card, a card bearing the holder's full colour portrait, electronic or mechanical confirmation etc.

[58] See footnote 27.

[59] *Felthouse* v. *Bindley* (1862) 11 C.B.N.S. 869. An offeror may not arbitrarily impose contractual liability upon an offeree merely by proclaiming that silence shall be deemed consent.

[60] *Texaco Inc.* v. *Goldstein* 39 Misc. 2d 552, 241 N.Y.S. 2d 495 (1963) Cf. *Weatherby* v. *Banham* (1832) 5 C. & P. 228 where it was held that if A offers to supply goods to B by sending them to him, B can accept the offer by simply using the goods without communicating acceptance.

[61] *L'Estrange* v. *Graucob* (1934) 2 K.B. 394

[62] There is reasonable notice only if (i) the document on which it is present is contractual in nature. *Chapelton* v. *Barry* U.D.C. (1940) 1 K.B. 532; (ii) the issuer has taken reasonable steps to bring the provisions to the notice of the holder. *Parker* v. *S.E. Ry.* (1877) 2 C.P.D. 416. (iii) notice of the clause is given before or at the time of contract. Olley v. Marlborough Court (1944) 1. K.B. 532

[63] Theft Ord. Cap. 210 s.17(1): "Any person who by any deception ..... dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall be guilty of an offence ....."

[64] s.18(1) Theft Ord. "Any person who by deception dishonestly obtains for himself any pecuniary advantage shall be guilty of an offence."

[65] Case No. W3439/74.

will be subjected to proceedings under s. 17 (2) and s. 18 (1) just as an imposter for unauthorized purchases?[66] In *R.* v. *Kovacs*[67] the appellant's bank informed her that her account was overdrawn and requested the return of the cheque book and cheque card (having similar functions to credit cards) which she did not but continued to use it. The appellant was charged and convicted under the English equivalent of s. 18 (1).

Though there are no British or Hong Kong precedents yet, it appears that an imposter with an intention to defraud will be guilty of forgery under s. 72 (1) Crimes Ordinance Cap. 200 if he signs the name of the card holder on the sales slip evidencing a purchase.[68]

Where a fraudulent third party signs the intended holder's name on the blank sign place of an unsolicited credit card which is lost through the post or subsequently by the intended holder, produces it and purports to be the owner of the card knowing it to be forged and with intent to defraud, he may be charged under . 74 (1) of the Crimes Ordinance.[69]

It is submitted, the existing law is adequate to provide criminal sanction against unauthorized purchases.

THE CONSUMER CREDIT ACT 1974

Some of the major problems relating to credit cards discussed earlier are dealt with in the Consumer Credit Act 1974 enacted on 31st July, 1974 in Britain. Except where otherwise mentioned in schedule 3, the provisions of the Act came into force on its passing.[70]

Our tripartite credit card transaction comes within the definition of a regulated consumer credit agreement,[71] a restricted-use credit[72], a debtor-creditor-supplier agreement[73] and a credit token agreement [74] in the Act.

Part III of the Act imposes a new licensing system on those who, by way of business, grant consumer credit[75]. Under s. 21, a licence is required in order to carry on a consumer credit business. This system of protection can be an effective method to eliminate or minimize the possibility of fraud and insolvency of new, below standard credit card issuers, and also other grievances to the consumer. The quality and activities of credit card issuing companies will be under government control and supervision, consumers will thus be protected from the dangers of fraud, insolvency of new below standard credit card companies and other grievances. As these problems are by no means

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[66] In most holder agreements there is usually such a term: "The privileges and rights of the card may be revoked at any time at the discretion of the Issuer ..... use of the card after notice of its revocation is fraudulent and subjects the user to legal proceedings."

[67] (1974) 1 W.L.R. 370, C.A.

[68] s. 72(1) Crimes Ord. Cap. 200: "Forgery of any document, if committed with intent to defraud shall be an offence and punishable upon indictment ....."

[69] s. 74(1) Crimes Ord.: "Any person who utters any forged document, ... shall be guilty of an offence ..... (2) A person utters a forged document, ... who knowing the same to be forged, and with either of the interest necessary to constitute the offence of forging the said document, ... uses, ... tenders in payment or in exchange, ... the said forged instrument."

[70] The main provisions of the Act come into operation on days to be appointed by commencement orders. s.192, Sch.3).

[71] s.8: (1) A personal credit agreement is an agreement between an individual ("the debtor") ..... and any other person (the creditor") ..... by which the creditor provides the debtor with credit of any amount (2) A consumer credit agreement is a personal credit agreement ..... credit not exceeding 5,000 pounds (3) A consumer credit agreement is a regulated agreement withing the meaning of this act if ..... not ..... (an "exempt agreement") specified in ..... s.16".

[72] s.11(1) (b): "A restricted-use credit agreement is a regulated consumer credit agreement – (b) to finance a transaction between the debtor and a person (the "supplier") other than the creditor."

[73] s.12 (b): "being a restricted use credit agreement ..... and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier."

[74] s.14 (1) (a) (b): "a credit token is a card ..... given to an individual by a person carrying on a consumer credit business who undertakes – (a) that on the production of it ..... he will supply cash, goods and services ..... on credit, or (b) that where, on the production of it to a third party ..... the third partysupplies cash goods and services ..... he will pay the third party for them ..... in return for payment to him by the individual.

[75] A licence is required to carry on a consumer credit business (s.21) A licence may limit the activities it covers (s.23). A standard licence (one issued to a trading or financial entity) authorises the licensee to carry on business only under the name specified in the licence and may not be granted unless the applicant satisfies that he is a fit person (ss.24, 25). See esp. s.25(2). Regulations may be made regulating the conduct of the licensee's business (s.26). In certain circumstances a licence when not a licensee is an offence (s.39(1)). A regulated agreement, if made when the creditor or owner was unlicensed is enforceable against the debtor only where the Director so orders.

confined to Britain, it would also be desirable to adopt similar law in Hong Kong.

By s. 75 (1) where a debtor under a debtor-creditor-supplier agreement has a claim against the supplier for misrepresentation or breach of contract, he has a like claim against the creditor who will be jointly and severally liable. The creditor will have a statutory indemnity against the supplier under s. 75 (2) subject to any agreement between them. Its rationale seems to base on the "close-connection" theory stated by Crowther in his report on Consumer Credit.[76] However, in view of the local circumstances[77] and the large amount of low dollar amount transactions common in Hong Kong, the operation of such business here may only be marginally profitable so that the imposing of further liabilities on the issuer may well extinguish this infant consumer service from local consumers.

S. 84 (1) limits the liability of a debtor for misuse of a credit token to £ 30. His liability lasts during the period beginning when the token ceases to be in the possession of any authorized person and ending when the token is recovered or notice is given that the token has been lost, stolen etc. under s. 84 (3). By s. 84 (4) notice is not required unless the credit token agreement contains in the prescribed form the name, address and telephone number of the person to whom notice is to be given. This section improves the position of the individual consumer and makes allocation of risk on them more reasonable.

While only a minority of local credit card companies provide a limit to the holder's liability loss due to unauthorized purchase, some even hold the card-holder liable for a period of two weeks after reporting loss or theft. In view of the consumer's weak position under private law making, legislature should step in to remedy the situation.

S. 51 makes it an offence to send someone an unsolicited credit token. This section together with s. 66 which stipulates that the debtor is not liable under a credit token agreement for use made of the credit token by any person unless the debtor had previously accepted it, or the use of it constituted an acceptance by him, dispose of a lot of problems arising from mass mailing of unsolicited cards.[78]

S. 171 (4) even places the onus on the creditor enforcing a credit token agreement to prove that the token was lawfully supplied to and accepted by the debtor.

While the objectives of the Consumer Credit Act 1974[79] i.e. uniformity, simplicity and protection for the consumer are no doubt desirable, the effect of its all-embracing[80] and drastic approach is still uncertain.[81] Nevertheless, it is submitted that as far as the sections relevant to credit cards are concerned there is no reason why Hong Kong should not look to them as a guideline. The legislature would best proceed by making a thorough and careful analysis of the unique facts involved in the operation of the credit card system, inquiring into the adequacy of the existing law and see whether a change is desirable. Then it should devise a unique solution to the benefit of the consumers and commerce alike. It is not desirable to start by borrowing concepts designed to deal with other transactions.

CONCLUSION

Some of the pros and cons of the modern credit card system have been brought forth in this article. Immediately following the introduction and an examination of the operational aspects of the system, the transaction is compared to two other similar commercial transactions, namely, irrevocable letter of credit and factoring of accounts receivable to bring out its unique features.

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[76] Crowther Report on Consumer Credit Cmnd 4596. A creditor will not be subject to defences unless he is involved to a significant degree in controlling the sales transaction.
This concept forms the theoretical basis for article 2.407 of the National Consumer Act.

[77] See Policy Considerations under "Rights and Liabilities of the Parties".

[78] See Unsolicited Cards under "Risk of Loss"

[79] Crowther Report, Cmnd 4596

[80] "Understanding the Consumer Credit Act 1974" by F.A.R. Bennion, 118 S.L.J. 742.

[81] "Consumer Credit – Some Thoughts on the Crowther Report" by Peter Schofield. Journal of Business Law (1972) p.91-102.

Two approaches were employed in considering the holder's ability to assert defences and counterclaims against the issuer i.e. "Assignment Theory" and "Direct Obligation Theory" in connection with local situation. The latter which fits in better with the realities of the transaction is preferred to the former. Problems arising from the issuer's failure to reimburse the merchant and his potential liability in libel for erroneously listing a card in a cancellation bulletin were also considered. Liability of the holder for unauthorized purchases was considered under the heading "Risk of Loss". The existing law in Hong Kong is adequate to provide criminal sanction against unauthorized purchases.

The relevant sections of Consumer Credit Act 1974 were considered in relation to local circumstances bringing out the feasibility of the legislature's intervention to remedy some defects of the system. Suggestions were made as to how legislature should approach the problem.

At present, there is practically no government control over the operation of credit card business in Hong Kong. In anticipation of the inevitable expansion of this business and its associated problems, the legislature should prepare means to accommodate the conflicting interests of the parties involved to prevent abuse and to derive the maximum benefit from this new dramatic innovation.*

* Difficulties and problems related to the transaction are by no means confined to those mentioned above. There are problems like invasion of privacy, miscalculations of accounts, conflict of laws etc which are beyond the scope of the present discussion.

Hire Purchase Agreement No......

A Hire Purchase Agreement made this .....day of.....19 .

between C.K. FINANCE LTD. and .....

Connaught Centre
HONG KONG of .....

.....

.....

(hereinafter called the Owner of the one part) (hereinafter called the Hirer of the other part)

WHEREBY IT IS AGREED AS FOLLOWS:—

1. The Owner will let and the hirer will take on hire the motor vehicle more particularly described in the Schedule hereto (hereinafter referred to as the vehicle which expression shall also include any accessories replacements renewals or additions thereto).

2. On signing the Agreement the Hirer shall pay to the Owner the amount of the initial payment (which shall become the property of the Owner absolutely) specified in the schedule hereto in consideration of the option to purchase herein contained and thereafter shall pay the rentals set out in the said schedule so long as the hiring shall continue, such payments to be made to the Owner at Connaught Centre, Hong Kong, but should the Hirer make any payments to the Owner by post, they shall be at the risk of the Hirer and shall only be credited to the Hirer as and when received by the Owner. In default of punctual payment (but without prejudice to the Owner's rights hereunder) the Hirer shall pay interest on any overdue hire rentals or other payments at the rate of 2% per calendar month provided always that any sums received hereunder may be appropriated by the Owner in reimbursement of any payments made by it under paras. 3 and 5 hereof.

3. The hirer will license and keep licensed and when necessary renew the licence of the said vehicle in the hirer's own name and pay all duties fees fines registration and other charges in respect thereof and deliver to the Owner the licence certificate and shall keep the vehicle in the hirer's possession and provide for its safe and proper keeping and will permit any persons authorised by the Owner from time to time to have access thereto for inspecting the said vehicle and will not sell lend or deal with or create or allow to be acquired any pledge or lien upon it and will not use or suffer it to be used contrary to law or to be removed from Hong Kong and will be responsible at the hirer's own expense for the custody of and for keeping it in good order and repair and making good all damage thereto however caused and will indemnify the Owner against all loss damage claims and expenses and in the event of damage loss or destruction continue to pay the rent specified in this Agreement and will not assign the vehicle or the benefit of this Agreement. The hirer will also repay to the Owner forthwith on demand all expenses costs or charges incurred in ascertaining the whereabouts of the Hirer or the vehicle or in recovering or endeavouring to recover possession of the vehicle from the Hirer or any other person firm or company. If the hirer fails to keep the vehicle licensed or to pay any duties fees fines registration or other charges when due the Owner in addition and without prejudice to any of its rights hereunder shall be at liberty to license the vehicle and to pay any duties fees fines registration or other charges and the hirer agrees that any expenses and charges incurred by the Owner thereby shall be added to the total amount payable under the Agreement and until paid shall be subject to interest at the overdue rental rate of 2% per calendar month.

4. In the event of the vehicle suffering any damage the hirer shall forthwith and before incurring any expense in connection with the repair thereof notify the owner who shall be entitled to repair it or have the same repaired by a person selected by the Owner at the expense of the hirer provided always that the hirer shall not have or be deemed to have any authority to pledge the credit of the Owner for repairs or create a lien upon the vehicle in respect of any repairs.

5. The hirer will forthwith insure and keep insured the said vehicle and when necessary renew the insurance thereon for the entire period of the hire for its full value under a comprehensive policy approved by the owner with

against any loss or damage arising from any cause whatsoever and against all risks required to be insured against according to law and will punctually pay all premiums and will deliver to the Owner the receipt for each such payment and also deliver the policy or policies of insurance duly endorsed with a memorandum of agreement in a form acceptable to the Owner and the insurers whereby the interest in the same shall be conveyed to the Owner insofar as the Owner may be affected by any claim thereunder. If the hirer fails to keep the vehicle insured with the Insurance Company herein nominated or to pay any premium when due the Owner in addition and without prejudice to any of its rights hereunder shall be at liberty to effect the insurance and to pay any premium thereon and the hirer agrees that any expenses and charges incurred by the Owner thereby shall be added to the total amount payable under the agreement and until paid shall be subject to interest at the overdue instalment rate of 2% per calendar month.

6. The hirer shall not do any act or thing which may invalidate the insurance on the vehicle and it is expressly agreed the hirer shall not use or suffer the vehicle to be used by a learner driver or for the purpose of instruction unless the prior approval of the insurers has been signified by an endorsement in a form approved by the Owner.

7. On any default in the punctual payment of rent or of any other sum payable under the Agreement (whether demanded or not) or on any breach of any of these conditions or if the hirer commits any act which may be or become an act of bankruptcy or (being a company) enters into any liquidation or dies or if a distress is levied or threatened to be levied upon the said motor vehicle or upon the hirer's premises or effects or if the hirer allows a judgment to remain unsatisfied then it shall be lawful for the Owner (but without prejudice to the Owner's claim for arrears of hire or damages for breach of agreement and without discharging any liability of the hirer to the Owner) to forthwith terminate the hiring and the Owner's consent to the hirer's possession of the said vehicle shall be deemed to be withdrawn and the hirer shall forthwith at the hirer's expense deliver up the said vehicle to the Owner and the Owner and its servants or agents shall be entitled without any notice to enter upon any premises where the said vehicle may be and seize and take possession thereof and to recover all charges costs and expenses incurred in connection therewith.

8. The hirer may on giving seven days notice in writing to the Owner determine the hiring and shall thereupon at the hirer's risk and expense return the said vehicle to the Owner and deliver it at such place as the Owner may prescribe and assign and endorse the Insurance Policy to the Owner or its assignee and do all such things as may be necessary to vest the licence in the name of any person nominated by the Owner.

9. If the hiring be determined by the Hirer under paragraph 8 hereof or if the Owner terminates the hiring or repossesses the vehicle under paragraph 7 hereof the Hirer shall pay to the Owner all overdue rentals and all sums expended in repossession of the vehicle, the estimated cost of putting the said motor vehicle into good repair and by way of compensation for depreciation the difference between the total sum which would have been paid had this agreement run its full period and had the hirer performed his obligations hereunder completely (less a discount for the unearned hire charges) less all instalments of rent paid to the date of repossession and the sum at which the vehicle shall be sold by the Owner subsequent to repossession.

10. If the hirer pays all sums due or payable under this Agreement including the initial payment made upon the signing of this Agreement for the option to purchase and the monthly payments by way of rent for the hiring and has strictly performed and observed all the conditions of this Agreement the hiring shall come to an end and the said vehicle shall become the property of the hirer and the Owner will assign and make over all its right and interest in the same to the hirer but until all such payments as aforesaid have been made and the said conditions have been performed the said vehicle shall remain the absolute property of the Owner, and the hirer shall not have any right or interest in the same other than that of hirer under this Agreement. In particular and without prejudice to the foregoing, the hirer shall not represent or hold himself out as or do or suffer anything whereby he may be reputed to be the Owner of the vehicle and any implied consent of the Owner is also hereby expressly excluded.

11. No warranty whatsoever is given by the Owner as to the age state or quality of the vehicle or as to fitness for any purpose and any implied warranties and conditions are also hereby expressly excluded.

12. This Agreement is personal to the hirer and the rights and/or obligations of the hirer shall not be assignable or chargeable by him.

13. In the case of joint hirers each and every hirer shall be severally as well as jointly liable to the Owner for the performance of all the terms and conditions of the Agreement.

HIRE PURCHASE:

THE LAW AND THE PRACTICE IN HONG KONG

John Y. M. Liu

1. Introduction

HIRE PURCHASE AGREEMENT – "It is printed, having been prepared for one party to the transaction by lawyers instructed by that party. It is presented to the consumer in circumstances in which it would be unusual if he even read it, extraordinary if he could understand all its implications if he did, and unthinkable that he should take independent legal advice on it. Yet, having signed it, he is bound by it." [1]

In view of the above quotation, this dissertation endeavours to examine the usual provisions in hire-purchase agreements, reveal their implications and test their applicability to the local circumstances. It commences with a general description followed by a conceptual analysis of the notion of hire-purchase. On the one hand, it draws attention to the chaotic legal relationship among various interests created by the harsh terms of the agreement and on the other hand, it brings out the keenness of the courts to challenge the doctrine of *lassiz faire* in order to secure a balance between the unequal bargaining powers. The court's role is somehow restricted by the rigid rule of law. Finally, it concludes with a suggestion that legislation is the only possible means by which problems can be solved.

2. *General Outline*

Nature

It was once thought that the distinction between a hire-purchase agreement and a conditional sale agreement was not significant at all. *Helby v. Matthews*,[2] however, showed that the legal consequences of the two kinds of transactions were completely different so long as the Factors Act 1889 was concerned[3]. A hire-purchase agreement is a contract which creates a bailment and also gives an option to buy[4]. The finance company irrevocably contracts to sell the goods to the hirer, but the hirer has no obligation to buy the goods if he does not wish to do so. By contrast a conditional sale agreement imposes an obligation on the owner to sell as well as one on the purchaser to buy.

Usual parties involved

In a hire-purchase transaction, 3 parties will usually be involved, namely, the finance company, the dealer and the hirer. The hirer pays a visit to the dealer's place; inspects the

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[1] A. L. Diamond. *Instalment Credit* at p. 5

[2] (1895) A. C. 471. In that case, the Court held that the hirer who had an option either to return the piano or to become its owner by payment in full, had not "agreed to buy goods" within the meaning of s. 9 of the Factors Act 1889 so as to constitute an exception to the *nemo dat* rule.

[3] The same section was enacted in s. 10 of the Factors Ordinance (Cap. 48) in Hong Kong. With a small variation, it also appears in s. 27(2) of the Sale of Goods Ordinance (Cap. 26).

[4] per Goddard J. in *Karflex v. Poole* (1933) 2 K.B. 251 at p. 264

goods, and after being satisfied with them, signs a form of offer[5] to take the goods on hire-purchase. The dealer then submits the hirer's offer to the finance company, and if the offer is accepted, the goods are sold to the finance company, who, in turn let them to the hirer on hire-purchase terms[6].

The Law governing hire purchase transactions in Hong Kong

In the absence of local hire purchase enactments, such transactions are governed by common law principles[7]. Owing to their hybrid nature, the Courts, when dealing with them, have adopted a somewhat zig-zag path between the elements of bailment and that of sale, laying emphasis sometimes on one, and sometimes on the other[8], otherwise ordinary contract principles will apply.

3. *The Agreement*

Formal requirements

At common law there is no formal requirements. A hire-purchase agreement may be made either orally[9] or in writing which may be under seal. In practice, agreements are usually made in standard forms prepared by finance companies.

Time of conclusion of contract

The offer is constituted by the hirer signing a proposal form which is supplied by the dealer after negotiations, offering to take the goods on hire-purchase, while the acceptance is manifested by the actual execution of the hire-purchase agreement by the finance company. The delivery of a hire-purchase agreement together with the goods denotes the conclusion of the contract and the contract will stand only subject to other vitiating factors[10].

For better consumer protection, a consumer movement leader pointed out the necessity of introducing new legislation in order to balance the inequality between bargaining powers in hire-purchase transactions. He suggested, *inter alia*, the introduction of a "cooling-off period" to give the hirer time to decide finally whether he wishes to go on with the agreement or not albeit he is already bound by the contract at common law. In fact, this practice has been adopted in England for nearly 10 years[11].

4. *The Option to Purchase*

It has been mentioned that a hire-purchase agreement is radically different from a conditional sale agreement in that the former can avoid passing of property under s. 27(2) of the Sale of Goods Ordinance and s. 9 of the Factors Ordinance[12] while the latter cannot.

And it is this which enables the Court to draw a line between the two and hold that the former falls out of the ambit of the legislative exceptions to the *nemo dat* rule while the latter is caught within its boundary[13].

Thus, almost invariably, a clause will be inserted into a hire-purchase agreement granting the hirer an option to purchase the chattel hired on expiration of the hiring period. In practice,

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[5]The standard forms prepared by the finance company.

[6]This is the most common form of transaction practised in Hong Kong and is called "direct collection". This dissertation will proceed on the assumption that this form is being used. However, there may be transactions which are financed by the dealer himself as well as some in which there are direct contacts between the hirer and the finance company.

[7]By virtue of s.4 of the Application of English Law Ordinance (Cap. 88), the various Hire Purchase Acts and the recently enacted Consumer Credit Act 1974 are all inapplicable in Hong Kong.

[8]Compare the difference between the implied term of fitness for required purpose set down in *Astley Industrial Trust v. Grimley* (1963) 1 W. L. R. 584 concerning hire-purchase and the similar implied term in s. 16 (a) of the Sale of Goods Ordinance.

[9]*Re Fowler, ex parte Brooks* (1883) 23 Ch. D 261

[10]i.e. mistake, misrepresentation, breach, etc.

[11]Sections 11 to 15 of the Hire-Purchase Act, 1965, now sections 67 to 73 of the Consumer Credit Act 1974. See the discussion of these sections by Lawson in *Consumer Credit Act 1974* (1974) N.L.J. 945, 965. Briefly, the hirer is given a period for reflection which concludes at the end of the 5th day following the day on which he received the second copy of the agreement or notice. The right of cancellation must be exercised by the prospective hirer by serving a "notice of cancellation" on stipulated persons. The provisions also govern the resulting consequences.

[12]See footnote 2

[13]*Helby v. Matthews* (1895) A. C. 471.
For differences between a conditional sale agreement and a hire-purchase agreement, see Ziegel *Hire-Purchase Agreements: A plea for Greater Realism* (1960) 104 S.J. 996.

there is usually no separate provision governing the mode of exercising the option – property will be vested automatically in the hirer by the end of the said period as long as he has complied with all the conditions stipulated in the agreement.

In *Encyclopaedia of Forms and Precedents* two methods of drafting a hire-purchase agreement are discussed[14]. One is to give the hirer a right to terminate the agreement before it has run its full course. Another is to give the hirer no right of voluntary termination but to stipulate that the hiring is for a fixed period and at a fixed rent and that the hirer has to pay an additional sum if he wishes to purchase the chattel hired.

Although in Hong Kong there is no hire purchase legislation which requires the inclusion of a clause giving the hirer a right to terminate during the hiring period[15], such a clause is often added as a kind of safeguard by the finance companies[16].

Problems arise when the power of voluntary termination is exercisable only on very harsh terms[17] while the sum payable on the exercise of the option on completion of the period is nominal[18].

Although in one type of agreement, it is headed "Hire-Purchase Agreement", it seems that it is only an agreement of conditional sale. There, the usual terms concerning the option and the automatic vesting of property upon due performance of the contract are present. Nevertheless, the clause giving the hirer the right to terminate upon giving notice is absent. This means that although the word "option" is used, it actually gives no alternative to the hirer. In the words of Lord Herschell, "The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there were a breach of contract by the party to make the payments the transaction necessarily resulted in a sale."[19]

5. *Assignment*

Because of the hybrid nature of hire-purchase transactions, a hirer has two interests which he may assign, namely, the benefit of the hiring and the option to purchase, provided the "prohibition of assignment" clause is absent; although in any case, rights classified as personal cannot be assigned by the hirer. Finance companies often include a clause to the effect that rights arising under the contract are personal and therefore not assignable nor chargeable by the hirer which may apparently have the effect of rendering the interests inalienable. It is submitted that it will probably not have this effect in practice because the owner is more interested in recovering the money invested than the identity of the person who is going to pay. It is further submitted that the Court will probably look behind the clause to ascertain the true nature of the interest purporting to be divested[20].

It was held in *United Dominions Trust (Commercial) v. Parkway Motors*[21] that the hirer had no assignable rights under such a clause. The same clause was re-examined in *Wickham Holdings, Ltd. v. Brooke House Motors, Ltd.*[22].

The *United Dominions Trust* case was disapproved but the Lord Justices did not discuss whether the clause rendered the hirer's interest

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[14] Volume 10 at p. 359-360.

[15] Examples can be found in the Consumer Credit Act 1974 in United Kingdom.

[16] At common law, the hirer has no implied right to terminate the agreement or his liabilities thereunder by returning the goods before the end of the period of hiring. See *Wright v. Melville (1828)* 3 C & P 542.

[17] It may be argued that since the right to terminate is so illusory that there is no true option which can be exercised.

[18] *Commonwealth Furniture Supply Co. v. Waterman* (1915) 18 W.A.L.R. 26, 26 Digest 661. Where it was held that an agreement was that of a sale – the sum payable on exercising the option was 1s. 6d.

[19] *Helby v. Matthews* supra at p. 478

[20] Compare the Court's approach to an acknowledgement clause in *Lowe v. Lombank* (1960) 1 All E.R. 611.

[21] (1955) 2 All E.R. 557

[22] (1967) 1 All E.R. 117.

inalienable. They held that the finance company was only entitled to the balance of the hire-purchase price which was its true loss.[23]

Although an assignment in itself is a breach, it only gives the owner a right to terminate the contract under the usual provisions in the local hire-purchase forms [24]. Before termination, the assignee will then acquire the right of the hirer though under a terminable contract [25].

As between the owner and an assignee in an unlawful assignment by the hirer, there is no privity of contract. It follows that an exemption clause, a provision in the original contract, will not readily avail the owner [26]. But since in such a case, the owner cannot reasonably contemplate that the assignee should come into possession of the goods, they will not owe a duty of care to the assignee and they will still be absolved [27].

Novation and waiver

Unless there is a novation of the hire-purchase agreement which involves all 3 parties, namely, the finance company, the hirer and the assignee, no valid assignment can be made[28].

It is submitted that it is possible to establish a waiver on the part of the owner, that is, the finance company, if it continues to accept payment in full knowledge of the unlawful assignment though there is no novation of the agreement[29]. The owner will not thereby acquire an unnecessary power to terminate the contract for a breach it has affirmed.

But if the owner does not know about the assignment, it will not be considered to have affirmed the assignment despite the fact that it receives payment. This is because in saying that it affirms the contract it must know its full rights[30].

Such a case will seldom happen because the finance company is only interested in recovering the money invested, repossession of the hired goods being the last resort. It will be entitled to terminate the contract if there is a default in payment as this is in itself a fresh breach.

6. *Assignor and Assignee*

The "prohibition of assignment" clause will not render the transaction void[31] and the assignee can recover from the hirer all sums paid under the assignment as having been paid for a

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[23] Cf. Case note on *Wickham Holdings, Ltd.* v. *Brooke House Motors, Ltd.*by A.L. Diamond in 30 M.L.R. 322. He suggested that damages awarded should be a monetary equivalent of the true loss of the owner, i.e. the unpaid balance of the hire-purchase price in the instant case.

[24] *Reliance Car Facilities, Ltd. v. Roding Motors* (1952) 1 AllE.R. 1355. The agreement there contained a similarly worded clause. The Court held that a breach did not *ipso facto* determine the hiring. To effect termination, the finance company must communicate a declaration of termination to the hirer or do an unequivocal act amounting to such a declaration manifesting intention to terminate the agreement.
North Central Wagon and Finance Co. Ltd. v. Graham(1950) 2 K.B. 7 was distinguished by Lord Hodson at p. 851 that the agreement in question had not actually been terminated but merely that there was a right to terminate and a right to the immediate possession of the motor car which had been sold.

[25] None of the local hire-purchase agreements provides for automatic termination upon certain events happening which may jeopardise the owner's right. This is perhaps due to the inclusion of breach of due payment into this kind of clauses. It is understandable that it will cause a lot of inconvenience if agreements are automatically terminated on the hirer failing to make punctual payment.
It is submitted, therefore, that it is advisable for the finance company to break the clause into two, one gives a right to terminate upon failure of payment, one provides for ipso facto determination when certain events happen.

[26] *Scruttons, Ltd. v. Midland Silicones, Ltd.* (1962) A.C. 446.

[27] *Donoghue v. Stevenson* (1932) A.C. 562. *Bourhill v. Young* (1943) A.C. 92.

[28] In practice, a novation will hardly be agreed upon by the finance company because the very fact that the hired goods have changed hands may be a vital cause of depreciation. Examples can be found in motor vehicles and other expensive items.

[29] There is no direct authority on the point. Perhaps an analogy can be drawn between the present case and one concerning a lease. See *S.M. Churn v. Choy Tsz Fun* (1953-55) D.C.L.R. 21 at p. 25.
"The breach of a covenant in a lease, or of one set up by act of law, against subletting is, as regards that sub-letting, a continuing breach and where a lessor, with full knowledge that a breach of covenant of this description has been committed, waives the forfeiture by acceptance of rent accruing due after it, that amounts not only to waiver to the past breach, but to a licence to continue the breach in future."

[30] *Suisse Atlantique case* (1967) 1 A.C. 361 per Lord Upjohn at p. 426D.

[31] That was suggested in a dictum by Danckwerts L.J. in *Spellman v. Spellman* (1961) 2 All E.R. 498 at 501 A-B.

consideration which has totally failed.

7. *Intervening Rights of Third Parties*

Apart from the danger that the hirer may dispose of the interest in the goods[32] by voluntary assignment or outright sale, the owner may also face other adverse claims arising from advertent or even inadvertent acts of the hirer.

Fixtures

(1) General law.

The general rule under the common law is that *quicquid plantatur solo, solo cedit*, notwithstanding the lack of consent from the owner[33]. Whether a chattel when attached to land can be considered fixtures depends on the intention of the parties and the circumstances of the case[34]

After a chattel has been considered to be a fixture, it is necessary to distinguish further between landlords' fixtures and tenants' fixtures[35]. Briefly, landlords' fixtures are those which the tenant is not entitled to remove and tenants' fixtures are those that can be severed by the tenant subject to some conditions.

If the tenant holds the goods under a hire-purchase agreement and the agreement expressly provides that the owner will have a right to sever the goods in the occurrence of certain events, the owner will have the right to sever concurrently with the hirer.

Though the fixtures are removable, their chattel character is suspended until the process of severance takes place and they remain part of the leasehold[36].

Until the owner has exercised its right to enter the premises and repossess the goods under the agreement, it has no more than an equitable interest over the fixtures[37]. The nature of this equitable interest is doubtful and it is regarded as *sui generis* by Guest and Lever[38].

In determining priority between conflicting claims over the fixtures, one claimant of which is the owner, the normal common law rule governing priority depending on notice, nature of the interest – whether it be legal or equitable, and time of the creation of the interest will apply[39].

However, there is an important qualification on the use of the common law rule as regards a legal mortgage. Though first in time, if the mortgagee has expressly or impliedly authorised removal of the fixtures subsequently affixed then the owner can remove them[40]. The effect of this rule is reduced by two limitations. First, it has been held that the implied authority can be rebutted by provisions to the contrary in the mortgage deed.[41] Secondly, the right of severance is lost when the mortgagee takes possession.[42]

(2) Registrable?

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[32] The finance company guards against such danger by providing that the commission of any of these acts will entitle them to terminate the contract.

[33] *Hobson v. Gorringe* (1897) 1 Ch. 182 at 193.
per Smith L.J. In each of these instances it will be seen that the circumstance to show intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention.

[34] Compare: *Lyon & Co. v. London City and Midland Bank* (1903) 2 K.B. 135. Chairs fastened to the floor did not cease to be chattels. *Vaudeville Electric Cinema, Ltd. v. Muriset* (1923) 2 Ch. 74. Plush tip-up seats in blocks of 4 or eight attached to the floor between the seats by iron standards with iron feet and 3 other items passed under the mortgage as fixtures.

[35] See Megarry and Wade. *Law of Real Property.* 3rd ed. p. 718-721.

[36] In Hong Kong, all land with the exception of St. John's Cathedral is leasehold property.

[37] Re *Morrison, Jones and Taylor, Ltd.* (1914) 1 Ch. 50.

[38] Guest and Lever. *Hire-Purchase, Equipment Leases and Fixtures* (1963) 27 Conveyancer (N.S.) 30. at p. 33. The interest created by the reservation of a right of entry in a hire or hire-purchase agreement is of indefinite duration and can be terminated at any time by seizure of the chattel hired. It can therefore exist only in equity and it would probably be better to regard it as *sui generis.*

[39] See Megarry and Wade. *Law of Real Property* 3rd ed. at p. 118-128, p. 722-723.

[40] *Gough v. Wood & Co.* (1894) 1 Q.B. 713 at 720.
per Lindley L.J. This implied authority .... ought to be regarded as authorizing the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired.

[41] *Ellis v. Glover and Hobson, Ltd.* (1908) 1 K.B. 388.

[42] *Hobson v. Gorringe* supra.

After the enactment of the Land Registration Ordinance[43], it seems that the common law rule governing priority will only apply in those circumstances when all the conflicting interests have not been registered[44].

Since in every hire-purchase transaction, there is invariably a written agreement and since the subject matter of the agreement – though a chattel at first, has become a fixture after affixation and becomes part of the realty, it is submitted that the agreement should be registrable anytime after the affixation of the hired goods[45] under s. 2(1) of the Land Registration Ordinance, the requirements under the subsection having been fulfilled, namely, an instrument in writing which affects certain premises in the Colony.[46]

If a hire-purchase agreement can be so registered, priority will be determined according to the respective dates of registration under s. 3(1) subject to minor modifications in s.5. Thus, the interest of an owner whose goods have become fixtures may be preserved and will not be avoided as against a subsequent *bona fide* purchaser or mortgagee for valuable consideration of the premises which comprise the fixtures under s. 3(2) of the Land Registration Ordinance. As the effect of the Land Registration Ordinance upon unwritten equities is still unclear, it may or may not have priority against subsequent registered interests[47] [48].

Distress for rent

Another supervening event which will jeopardise the right of the finance company in the hired goods is the distress for rent by the hirer's landlord when the hirer is in arrears of rent. It is for the protection of their interest that the finance company inserts a clause in the local agreement forms, *inter alia*, that if a distress is levied or threatened to be levied, then it shall be lawful for the finance company to forthwith terminate the hiring. But again, as in other cases, it only gives the finance company a right to terminate the hiring, the contract is not *ipso facto* terminated[49].

The crucial section, section 87, of the Landlord and Tenant (Consolidation) Ordinance provides that a bailiff shall seize the movable property found in or upon the house or premises mentioned in the warrant, and in the apparent possession of the person from whom the rent is claimed (hereinafter called the debtor), or such part thereof as may, in the bailiff's judgment, be sufficient to cover the amount of the rent, together with the costs of the distress.

The section was examined in *Lam Wai Fong v. Ho Yin Sheung*[50]. Huggins D.J. cited four authorities and concluded that the decisions all turned upon the question whether the goods were in the apparent possession of the tenant and if they were so, they were distrainable.

The point whether an order that distrained goods should be released on proof of ownership was left open but it was clear that s. 95 did not qualify the right to distrain under s. 87.

In *Irene Loong v. American Engineering Corp. Fed. Inc.*[51] Huggins D.J. held *obiter* that

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[43] Laws of Hong Kong (Cap. 128)

[44] In fact, this will very rarely happen.

[45] When the hired chattel becomes a fixture, an equitable interest arises by virtue of the right conferred by the agreement to enter and sever the affixed goods. *Re Morrison, Jones and Taylor, Ltd.* (1914) 1 Ch. 50.

[46] In practice, there will be no problem if the goods will definitely become affixed (e.g. a lift under hire-purchase) because the time of affixation is easily ascertainable but when the hired goods may or may not become fixtures, then time of affixation is unascertainable so that the practice is not satisfactory at all. It is submitted that legislation is necessary to clarify this situation.

[47] See Thomson, *The Land Registration Ordinance of Hong Kong, Historical and Legal Aspects.* (1974) 4 HKLJ. 242. at 266. note 5, where a discussion of priority relating to non-registrable equities is given.

[48] See also Willoughby. *Real Property Law* in *Law Lectures For Practitioners.* 1974 at p. 93.
It is submitted that it will be ridiculous to say that it is an unwritten equity because it appears in writing in the hire-purchase agreement.

[49] The situation in Hong Kong is governed by Part III of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7).

[50] (1958) D.C.L.R. 247.

[51] (1959) D.C.L.R. 192.

once the goods were considered to be in the apparent possession of the tenant within the meaning of s. 87, the terms of the hire-purchase agreement were immaterial. The owner may claim the release of a restrained article or wrongful distress under sections 93 and 95 respectively. But to rely on s. 95, the claimant must prove that the bailiff acted unreasonably in including the hired goods in the distraint. There is a presumption that moveables are in the possession of the tenant of premises, and since in hire-purchase transactions involving moveables, there is little, if any, indication of ownership on the face of them, it is submitted that finance company can hardly rely on this section.

It was explained in *Penta Continental Land Investment Co. v. Chung Kwok Restaurant Co.*[52] why s. 93 was usually not invoked. It is the practice of the bailiff's office to advise the claimants not to make an application under s. 93 themselves but to leave it to the bailiff to apply for a summons under s. 95. The case itself held that ownership was immaterial and property in the apparent possession of the tenant was distrainable[53]

Under s. 97, the owner may claim for compensation, but the order of the Court awarding or refusing compensation shall bar any action in respect of injury caused by the distress. It is submitted this section only bars an action against the bailiff but not against the hirer for breach of contract.

Execution by judgment creditor

A judgment in order for the payment of money may be enforced, *inter alia*, by a writ of *fieri facias* under Rule 1 (1) (a) of Order 45.[54]

This creates a danger to the interest of the finance company in the hired goods as they may be seized by the bailiff.

To guard against this danger of interference with their rights, the local finance company inserts a clause to the effect that if the hirer shall have any execution or distress levied, then it shall be lawful for the owner to forthwith terminate the hiring. This gives the owner a right to terminate the contract and a right of immediate possession to maintain an action of detinue or conversion against the bailiff.

However, the bailiff and the purchaser is protected from being liable to the owner by s. 7(3) – a similar provision as s. 15 of the Bankruptcy and Deeds of Arrangement Act, 1913.

In *Curtis v. Maloney*[55], it was held that an action against the purchaser for the return of goods failed as he had a good title as against the former owner.

The true purpose of the provision was explained in *Singh v. Kunyan Insurance Co.*[56]. It barred remedies against the bailiff (or a person acting under his authority) and the purchaser, but the owner may nevertheless have a remedy against the execution creditor.

Lien

In a hire-purchase agreement, it is often provided that the hirer is obliged to keep the goods in good order and repair and condition. Therefore, when services are rendered in repairing the goods – an act fulfilling the above obligation, the repairer will be entitled to a special lien over the goods until his account has been met [57]. However, the rule has to be read subject to

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[52](1967) D.C.L.R. 22.

[53]The phrase "apparent possession" was explained by Linsell J. in *Athena Studia* 26 HKLR 39. ". . . . . the bailiff reasonably supposes on the evidence of his eyes to be in the possession of the tenant."

[54]Rules of the Supreme Court. (Cap. 4) Subsidiary Legislation.

[55](1950) 2 All E.R. 982.

[56](1954) A.C. 287.

[57]A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied.
Hammonds v. Barclay (1802) 2 East 227 at 235.
Liens can be categorized into two types, namely, general and special. General liens are restricted to bankers, factors, insurance brokers and stockbrokers. Special liens may arise by usage or by statute. Among those which arise by usage are innkeepers, common carriers, warehouseman and artificers. For the present purpose, discussion of the effect of lien upon hire-purchase goods is confined to repairer's lien because it is most commonly encountered in everyday life.

another rule that a lien cannot be created without the owner's consent[58] and clearly an owner will always object to creating a lien in favour of the repairer.

In view of such restriction upon the creation of a lien the Court tends to imply an authority on the part of the hirer to part with possession of the goods and hence become competent to create a lien[59]. To counteract this effect, a clause is introduced in hire purchase agreements to negative even implied authority to pledge the owner's credit for the repair of goods.

However, in *Albermarle Supply Co. v. Hind & Co.* [60], the Court held that the creation of a lien could not be restricted by a contractual limitation not known to the repairer.

The matter was reconsidered in an Australian case, *Fisher v. Automobile Finance Co. of Australia, Ltd.*[61]. In that case, the High Court of Australia held that the *Albermarle* case was restricted to its own facts and that if the hirer's authority to part with possession for the purpose of reparation was expressly excluded, a lien could not arise.

It is argued that the two cases are distinguishable for in the *Albermarle* case, the hirer had ostensible authority to part with possession of goods, only the creation of a lien was prohibited whereas in the *Fisher* case, the hirer had no authority to part with possession for the purpose of reparation in the outset – he had to deliver the vehicle to the finance company's nominee for reparation. There is no reason to doubt the correctness of both cases, the true test as laid down in *Hiscon's* case was whether the hirer had authority to part with possession of the goods in order to have repairs carried out and not whether a lien could be created.[62].

The scope of the decision of *Albemarle's* case is, however, a matter of controversy.

In *Tappenden v. Artus*[63] Diplock L.J. explained the case as one where the owner was estopped from denying that he had conferred on his bailee authority to give up possession of the vehicles to the artificer on the ordinary terms and was thus subject to the ordinary remedy of lien. Indeed, on the facts of the case and in the words of Scrutton L.J., "if a man is put in a position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation, of which they are ignorant of the apparent authority"[64]

It is quite arguable, therefore, that the effect of the *Albemarle* case is restricted to its own facts as opposed to the wide application as suggested by Goode that the decision would have been the same even without the owner's acquiescence in the particular arrangements made by the hirer for repair of the goods.

A typical example in the local forms reads, "In the event of the vehicle suffering any damage the hirer shall forthwith and before incurring any expense in connection with the repair thereof notify the owner who shall be entitled to repair it or have the same repaired by a person selected by the owner ....".

There is no mandatory obligation on the part of the hirer to deliver the damaged car to the owner or a person selected by him. They are only entitled to have the car repaired.

It seems that the local finance companies cannot rely on the authority of the *Fisher's* case and the Court may well decide in favour of the lien claimant since it is generally accepted that the greater equities lie with the artificer[65].

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[58] *Hiscon* v. *Greenword* (1802) 4 Esp. 174. Where it was held that the artificer will obtain a lien on the goods only if the hirer had actual or ostensible authority to part with the possession of the goods in order to have repairs carried out.

[59] *Green* v. *All Motors Ltd.* (1917) 1 K.B. 625
Keene v. *Thomas* (1905) 1 K.B. 136
Tappenden v. *Artus* (1964) 2 Q.B. 187

[60] (1928) 1 K.B. 307.

[61] (1928) 41 C.L.R. 167.

[62] See Goode. *Hire Purchase Law and Practice* p. 698-699.

[63] (1964) 2 Q.B. 185.

[64] *Albemarle's* Case supra. at p. 319.

[65] See Goode and Ziegel. *Hire-Purchase and Conditional Sale (A Comparative Survey of Commonwealth and American Law)* p. 181

The above argument only applies to a situation where the repairer knows of the existence of a hire-purchase agreement. The implied authority can be negatived if the repairer has actual notice of the terms prohibiting the creation of a lien.

The artificer will rarely be able to claim against the owner if he is ignorant of the hire-purchase agreement, for in that case no question of implied authority arises. Unless the owner holds out the hirer as the owner, the repairer cannot claim a lien against the owner because to let another come into possession of hired goods can seldom give rise to an estoppel.[66]

Bankruptcy

The property in the hired goods rests with the owner during the currency of the contract so that what vests in the trustee in bankruptcy of the hirer is only the rights and liabilities of the hirer under the contract, including the option to purchase.[67]

In order to avoid this, the owner is entitled to terminate the contract upon the hirer committing an act which may be or become an act of bankruptcy under the agreement. But since the agreement does not end automatically but only ends when the owner exercises its right to terminate the contract, it follows that the trustee will still be able to step into the shoes of the hirer so far as his rights and liabilities under the contract is concerned.

In addition to the above-mentioned clause, it is also stipulated "the hirer . . . will not assign the goods or the benefit of this agreement", therefore, it seems that the commission of an act of bankruptcy is likewise governed by this clause. It is submitted that this clause should only be construed to cover "voluntary assignments" and should not be extended to bankruptcy and other assignments by the operation of law.

Being qualified by the owner's right of termination upon the hirer's committing an act of bankruptcy, the contract will scarcely confer any benefit on the trustee in bankruptcy.

The true hazard which the owner will encounter in the bankruptcy of the hirer is contained in section 43 (3) of the Bankruptcy Ordinance by which the hired goods may be tampered with.[68] Under that section, the trustee is allowed to seize and divide amongst creditors all goods being at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt[69], in his trade or business, by the consent and permission of the true owner[70], under such circumstances that he is the reputed owner thereof . . .[71]

The owner can get round the reputed ownership rule by actual possession[72] or *bona fide* demand of the goods although there is no actual possession[73] before an available act of bankruptcy[74]. If the owner is caught by the reputed ownership clause, it can still prove in bankruptcy[75].

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[66] *Bunton v. Baugham* (1834) 6 C & P. 674 at p. 675.
"If you trust your goods into a man's possession and he makes a bargain about them without your authority, you are not bound by that bargain and may reclaim the goods."

[67] s. 43(1), Bankruptcy Ordinance (Cap. 6).

[68] Contrary to s. 43(1), this section enables the trustee to deal with the "goods" themselves.
The object of the section was explained in *Re Fox, Council v. The Trustee* (1948) 1 Ch. 407 at p. 414.
"If goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But, if no such credit has been given, then the maxim applies, *cessante ratione cessat ipsa lex.*"

[69] Re *Gatehouse* (1871) 24 L.T. 334 where it was held that possession by servant was enough.
Hoggard v. Mackenzie (1858) 25 Beau. 393 where it was held that possession by agent was enough.

[70] The consent must be given to both the possession and the reputation of ownership.
See *Smith v. Hudson* (1865) 34 L.J.Q.B. 145 at p. 151 per Blackburn J.

[71] *Re Couston* (1873) 8 Ch. App. 520 at 528 where it was held that it was a question of fact whether the circumstances are such as to create a reputation of ownership.

[72] *Ex. p. National Guardian Co.* (1878) 10 Ch. D. 408.

[73] *Ex. p. Ward (1872)* L.R. 8 Ch. 144.

[74] See Crowther Report. Cmnd. 4596. para. 5.7.82. The Committee endorsed the recommendation by the Blagden Committee on Bankruptcy Law Amendment (Cmnd. 222 para. 110) that the reputed ownership clause should be repealed.

[75] *Re Button* (1907) 2 K.B. 180.

Liquidation

Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator, or the provisional liquidator, as the case may be, shall take into his custody or under his control, all the property and things in action to which the company is or appears to be entitled [76].

Since the property rests with the owner, what may be passed on to the custody of the liquidator is only the benefit of the contract including the option to purchase. Under the provision of the local forms, the owner has a right to terminate the contract in the case of winding-up of the hirer company, therefore, the contract in the custody of the liquidator is only a terminable one which is of very little benefit to the assets of the winding-up company.

Another difference between the bankruptcy of an individual hirer and the winding-up of a hirer company lies in the operation of the "reputed ownership clause". To the owner's delight, the clause does not apply to a company [77].

Death of the hirer

The hire-purchase agreement being an executory contract, the personal representatives of a deceased hirer can generally pay up the outstanding amount under the agreement and thus obtain the ownership of the goods.

Using an analogous argument as in the case of bankruptcy of a hirer, it is submitted that the "prohibition of assignment" clause will not restrict a devolution on death which is an assignment by the operation of law.

Since the hired goods have to be delivered to the beneficiary under the will and the hirer is invariably prohibited from parting with possession of the goods, it will still be open to the owner to terminate the contract.

Apart from the above clause, death of the hirer alone will already entitle the owner to determine the contract so the personal representatives will only be able to acquire a terminable interest.

8. *The Minimum Payment Clause – A Penalty Clause*

To safeguard their rights under a premature termination of the hire-purchase agreement, the finance companies usually insert what is often a "minimum payment" clause into the contract.

The clause provides that when the contract is terminated as provided by the agreement before a stated proportion of the hire purchase price has been made, the hirer will have to pay the owner the difference between that stated fraction and the sums already paid.

The justification for the inclusion of such a clause in the agreement is that the payment is a compensation to the owner for the "depreciation" that the goods have suffered while in the hirer's hands. A moment's reflection will enable one to realize the fallacy of the reasoning behind this. It presupposes that even immediately after the conclusion of the contract, the goods will have depreciated by one-half of the hire-purchase price.

Moreover, it leaves out of its consideration the vital factor in assessing depreciation, namely, nature of the goods. The clause will have no substance if in a resale, the owner is able to get a sum equal or greater than the balance of the hire-purchase price. In such a case, no question of compensation can arise and if the hirer is obliged to pay the "compensation" under the clause, the owner will be making a gain in fact. It is submitted that the realised value of the repossessed goods must be taken into account in drafting a "minimum payment" clause.

At common law, the hirer has no right to a rebate or discount if he made an early total payment.[78] In calculating the balance, reference is always made to the difference between the paid rent and the full hire-purchase price. This method of calculation will undoubtedly benefit the owner as it will be receiving a lump sum well in advance in a premature termination of the

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[76] s. 197 Companies Ordinance (Cap. 32).

[77] *Gorringe v. Inwell India Rubber and Gutta Percha Works* (1886) 34 Ch. D. 128.

[78] *The Protector Endowment Loan and Annuity Co. v. Grice* (1880) 5 Q.B.D. 592.

contract which it would otherwise have received by instalments. To be fair to the hirer, discount should be allowed for this accelerated payment[79].

It is submitted that this point should be taken into consideration in drafting new legislation.

Under the agreement, the liability of the hirer to pay compensation is the same whether the agreement be terminated by the owner on the occurrence of certain events or by the hirer in exercising his contractual rights.

At common law, there is in fact a vital distinction between the two types of cases: this lies in the application of the rule against penalty clause. A clause will be disregarded by the Court and the plaintiff cannot recover more than his actual loss if it provides for "a payment of money stipulated as *in terrorem* of the offending party."[80] This allows the Court to strike out such clauses when there is a breach by the hirer which entitles the owner to terminate the contract[81].

It follows that in the case of a repudiating breach, the damages will be assessed according to *Yeoman Credit Co. v. Waragowski*[82].

In a case of non-repudiating breach, the owner can only sue in respect of breaches committed before determination, i.e. arrears of rent and interest on arrears together with damages for any specific breach such as failure to keep in repair for the simple reason that "there are no breaches thereafter"[83].

In *Financings Ltd. v. Baldock*[84], *Waragowski's* case was distinguished as a case of repudiating breach, thus recognizing the distinction between a repudiating and a non-repudiating breach. It is hard to see how the notion of a repudiating breach can be applied to a hire-purchase agreement as there is no binding obligation to purchase as in a contract of sale.

Lord Denning himself admitted the unsatisfactoriness of the importation of the notion of "repudiating" breach into hire-purchase transactions.

"In the case itself where it was held that there was no repudiation the damages were limited to the unpaid instalments with interest but in a "repudiation" case, the damages were calculated on the basis that the hirer had bound himself by a firm contract to purchase and had repudiated it. No regard seems to have been paid to the fact that the hirer had the right to terminate the hiring at any time and thus bring to an end his obligation to pay any more instalments."[85]

Unluckily, the Court in *Baldock's* case assumed that in exercising the right to terminate the contract, the hirer will incur no further liability, neglecting altogether the existence of the minimum payment clause.

It is hard to justify the distinction between these two lines of cases, perhaps it is the result of judicial reaction against the harsh consequences to the contract-breaker which may be produced by contractual provisions for termination on minor breaches.

It has been held that when the agreement is terminated on grounds other than the hirer's breach, such as bankruptcy, etc., the rule of penalties does not apply.[86] Although doubt has been cast on the correctness of *Hall's* case by

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[79] In North America and Australia where legislation has been enacted to cope with this problem, a formula based on "rule of 78" is adopted. Argument for this formula in contrast to the constant ratio formula is that since the principal sum diminishes progressively as equal instalments are made, the interest which calculation bases on the principal sum should also diminish progressively. See Ziegel *The Rebate Question* (1961) 105 S.J. 394.

Briefly, the working of the formula is as follows:–
Normally, the rent-period is in terms of 12, 24 or 36 months. The common denominator adopted is therefore the sum of 1 + 2 + 3 . . . + 12 = 78. Take for instance that the rent period is 12 months, the interest attributed to the first month is 12/78, the second month is 11/78 and so on until the last month where it is 1/78.

[80] *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.* (1915) A.C. 79 at p. 86.

[81] *Cooden Engineering Co. Ltd. v. Standford* (1953) 1 Q.B. 86 *Lombank Ltd. v. Exell* (1963) 3 W.L.R. 700 *Anglo Auto Finance Co. Ltd. v. James* (1963) 1 W.L.R. 1042

[82] (1961) 1 W.L.R. 1124.

[83] *Financings Ltd. v. Baldock* (1963) 1 All E.R. 443. at p. 445 E.

[84] Ibid.

[85] Ibid. at p. 477.

[86] *Associated Distributors Ltd. v. Hall* (1938) 2 K.B. 83
per Slesser L.J. at p. 88. It was held that no question of penalty could arise where there was no breach.

Lord Denning and Lord Devlin in *Bridge v. Campbell Discount Co. Ltd.*[87], it does not serve to clear up the situation because besides the fact that their lordships were equally divided in their views, what they said were necessarily *obiter* and *Hall's* case remains good law.[88]

Such is the law relating to minimum payment clause and it is in no way satisfactory. As a result a responsible hirer who admits his financial difficulties and duly exercises a proper contractual right is worse off than an indifferent hirer who commits a non-repudiating breach by not paying rentals and does nothing. Although it does help in certain respects, it is submitted that penalty *simpliciter* is not a good solution towards this complicated problem and in the absence of legislation governing the situation, this legal anomaly will continue and unbecoming consequences suggested above will ensue.

One revolutionary suggestion by Ziegel[89] is to drop the whole notion of hire-purchase and convert the transaction into a chattel mortgage so that the depreciation clause will be eliminated altogether.

He also suggested a modification of the judgment of the *Waragowski* case, that is, upon termination of the contract under the provisions of the agreement, the owner will be entitled to recover the actual deficiency in the hire-purchase price, less the realized value of the repossessed goods, less an equitable rebate on account of the unearned portion of the finance charges.[90] This practice is adopted by a leading finance company in town.

The third alternative is the one adopted by England under the Hire Purchase Acts – now the Consumer Credit Act 1974.[91] Under the Act, in a non-default termination reference has still in be made if there is such a clause which provides for a smaller sum but there is a ceiling of a maximum of one half of the total hire purchase price to such payment by the hirer, and if it can be proved that the loss sustained by the owner is less than one half of the total price or what the clause prescribes, the court may make an order for the payment of the lesser sum *in lieu* of the amount stated above.[92]

Admittedly, no one of the above three suggestions can cover every situation that may arise, variations in the market and nature of the goods will render application of a precise method inappropriate. However, it is submitted that if legislative intervention is felt to be desireable, as the preceding paragraphs show, local legislation should model upon the English Acts in solving this legal anomaly since they serve reasonably well to apportion the loss due to a non-default termination of the agreement.

9. *Exemption Clause*

The most disgusting clause a hirer finds in the contract is the exemption clause. This kind of clause is strictly construed by the courts because of their prejudicial nature towards the hirer.[93]

Nearly every local hire-purchase agreement form starts with the name and address of the finance company and it is then referred to as the owner. No doubt, it constitutes an express term of the agreement. The exemption clause then provides, "No warranty whatsoever is given by the Owner as to the age, state, or quality of the goods or as to fitness for any purpose and *any implied warranties and conditions* are hereby expressly excluded." In dealing with a similar provision, the court in *Karflex, Ltd. v. Poole* held that a clause excluding implied conditions did not suffice to negative what amounted to an

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[87](1962) A.C. 600. per Lord Denning at p. 631
per Lord Devlin at p. 644. per Lord Radcliffe at p. 625-626.
per Lord Morris at p. 614.

[88]*Granor Finance v. Liquidator of Eastore* (1974) 12 C.L. para. 62. It was held that the law of penalty and liquidated damages did not apply to a termination of contract due to the liquidation of the hirer.

[89]*The Minimum Payment Clause Muddle* (1964) C.L.J. 108 at p. 127-128.

[90]See *Yeoman Credit, Ltd. v. Maclean* (1962) 1 W.L.R. 131 *Overstone, Ltd. v. Shipway* (1962) 1 All E.R. 52 But see the criticism of this method of assessment in para. 548 of the *Final Report of the Committee on Consumer Protection.* Cmnd 1781.

[91]Sections 99 and 100 of the Consumer Credit Act 1974.

[92]There is still a difference between the default and non-default termination in which case the rules against penalties will still apply to the former situation.

Appendix No. 4, Clause 11
Appendix No. 5, Clause 8;

[93]*Biddle v. Bond* (1865) 6 B & S 225 at p. 232.

express contractual term which is, in the instant case, the description of the finance company as owner of the goods hired[94].

Incidental to this section, it must be mentioned that the element of sale in hire-purchase prevents the application of the common law rule that a bailee cannot deny the bailor's title.[95] It is this element of sale that entitles the hirer to assume that title is vested in the owner.

On breach of such a condition, it is open to the hirer to seek one of the following three remedies:–

1. To sue in quasi-contract for the recovery of all sums paid under the agreement as having been paid on a consideration which has wholly failed.[96]
2. To affirm the agreement, treat the breach of condition as a breach of warranty and claim damages.
3. To treat the agreement as discharged for breach of the condition of title and claim damages.

Apart from the condition of title, whether there are any implied conditions, warranties or stipulations relating to the hire-purchase transaction must depend on the circumstances of each case.[97]

Nevertheless, it is clear that in hire-purchase, there is an implied stipulation that the vehicle hired corresponds with the description of the vehicle contracted to be hired. It is a "fundamental" term the breach of which will give the hirer a right to terminate the contract and it cannot be excluded by clauses of exclusion or exception, however widely phrased.[98]

Lord Upjohn qualified the statement made above by saying that it was only a strong presumption that such clauses would not apply to a breach of fundamental term but it was rebuttable.[99]

It was held in *Grimley's* case that there was no breach of this fundamental term because the hired vehicle was capable of self-propulsion and it was capable of receiving and tipping and carrying loads under very adverse conditions for five weeks but Pearson L.J. was prepared to hold that if there was a breach of this term, the exemption would be unavailable.[100]

The clause in the case read, "... any warranty as to *description*, repair, quality or fitness for any purpose is hereby excluded." Warranty as to description was expressly excluded and yet the presumption was considered not to be displaced. Being so, it seems it is very difficult, if not impossible, to rebut that presumption.

It is submitted that the exemption clause in the local forms will hardly achieve the purpose of covering the fundamental term of corresponding with description as the term is not even specifically referred to in the agreement. It is further submitted that it will be a lot more difficult for one to convince the Court that the weaker clause excluding implied warranties and conditions in the local form is capable of earning the purpose of excluding the fundamental term of corresponding with description which a stronger-worded clause has failed to do.

Another implied stipulation is that the vehicle must be as fit for the purpose for which it is hired as reasonable skill and care can make it.[101]

This term is regarded as a warranty which only entitles the hirer to claim damages but not a right to terminate the contract. Furthermore, it may be excluded by "appropriate" clauses of exclusion or exemption. In *Grimley's* case, the warranty of fitness for the purpose was held to be sufficiently excluded by the exemption clause which read, "... any warranty as to description, repair, quality for fitness for any purpose is

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[94] Further support can be found in *Andrews Brothers v. Singer Co. Ltd.* (1934) 1 K.B. 17.

[95] *Karflex, Ltd. v. Poole* (1933) 2 K.B. 251
Warman v. Southern Counties Car Finance Corp. (1949) 1 All E.R. 711
Rowland v. Divall (1923) 2 K.B. 500

[96] Ibid.

[97] *Astley Industrial Trust Ltd. v. Grimley* (1963) 1 W.L.R. 584 per Upjohn L.J. at p. 597.

[98] Ibid.

[99] *Suisse Atlantique Societe' d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen. Centrale* (1967) 1 A.C. 361 at p. 427.

[100] *Grimley's* case supra at p. 595.

[101] *Grimley's* case supra at p. 590, 598. Contrast with s. 16 (a) of the Sale of Goods Ordinance (Cap. 26).

hereby excluded." It is submitted that the typical local clause, which reads "No warranty whatsoever is given by the owner as to the age, state or quality of the vehicle or as to *fitness for any purpose* and any implied warranties and conditions are also hereby expressly excluded," is stronger in meaning, and *a fortiori* can exclude liabilities for breach of this warranty.

The status of this warranty was rendered unclear by *Franworth Finance Facilities v. Attryde*[102]. The Court of Appeal held that it was an implied condition that the machine should correspond with the description and that it should be reasonably fit for the purpose for which it was hired, *Grimley's* case was cited as authority. Since it was stated in *Grimley's* case that it was only a warranty, it is better to treat the term as one of warranty.

Although it was held *obiter* in *Suisse Atlantique* that whether a breach could be excluded by an exemption clause was wholly a matter of construction of the clause, recent cases[103] evince the gradual survival of the substantive doctrine of "Fundamental Breach", and if the substantive doctrine is accepted, no clause however well drafted will be able to cover a fundamental breach.

Statutory intervention[104]

Section 4 of the Misrepresentation Ordinance[105] wipes out the effect of a provision which purports to exclude liability for misrepresentation. If the clause employed to exclude liability is couched in such general terms that it embraces the exclusion of liability for misrepresentation, it may be excluded altogether under section 4.

Delivery note

Finance companies sometimes seek protection from an acknowledgement note apart from the usual exemption clause. The Court of Appeal proved to them that this kind of note affords no avail in *Lowe v. Lombank Ltd.*[106]. They may work as an estoppel but to rely on them, the finance company must show: (i) that it is clear and unambiguous; (ii) that the plaintiff (the hirer) meant it to be acted on by the defendants i.e. at any rate, so conducted himself that a reasonable man in the position of the defendant would take the representation to be true and believed that it was meant that he should act on it; (iii) that the defendants in fact believed it to be true and were induced by such belief to act on it[107]. In the instant case, the Court held that no estoppel arose applying the above principles.

When the hirer has examined the goods and signed the delivery note, it will serve to exempt the owner from being liable for patent defects but it will remain liable for latent defects.[108]

It would seem that acknowledgement notes served no purpose and true shielding should be sought from the exemption clause[109].

10. *The Dealer and the Hirer*

While an action against the owner for

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[102](1970) 2 All E.R. 774.

[103](1) *Farnworth Finance Facilities Ltd.* v. *Attryde* (1970) 2 All E.R. 774. Fundamental breach in supplying an unroadworthy motor-cycle.
(2) *Eastman Chemical* v. *N.M.T.* (1972) 2 Ll's L.R. 25. Destruction of the subject matter brought the contract to an end together with the clause.
(3) *Guarantee Trust of Jersey* v. *Gardner* (1973) 117 S.J. 564. Breach of an implied term of fitness rendered the exception clause unavailable.
(4) *United Fresh Meat Co.* v. *Charterhouse Cold Storage Ltd.* (1974) 2 Ll's R. 286.
Negligence in keeping the meat was a fundamental breach which entitled the innocent party to bring an end to the contract together with the exemption clause.

[104]Contrast the position in U.K. under the Supply of Goods (Implied Terms) Act 1973 whereby exclusions of ss. 13, 14, 15 of the Sale of Goods Act 1893 are void if the sale is within the protection of the Act.

[105]Laws of Hong Kong (Cap. 284).

[106]*Lowe* v. *Lombank, Ltd.* (1960) 1 All E.R. 611.
The case was one which fell within the Hire Purchase Act and it was held that the finance company could not rely on the acknowledgement clause to evade the provisions of s. 8(2) and (3) of the Act. Since the Hire Purchase Act does not apply in Hong Kong, it was not a good authority as to the local circumstances but the part relating to estoppel did lend support to the present argument.

[107]Ibid p. 616.

[108]Ibid p. 616.

[109]*See Benjamin on Sale of Goods* para: 935.

breach of contract may be barred by a well drafted exemption clause, the hirer can sometimes turn to the dealer for redress if the Court is willing to find a collateral contract between the hirer and the dealer though there is generally no contractual relationship between them at common law.

To establish a collateral contract, the hirer must show the presence of consideration – entering into a hire-purchase agreement as well as *animus contrahendi.*[110]

The above requirements being satisfied, a collateral contract was found in *Andrews v. Hopkinson.*[111]

Damages for breach of the warranty entitled the hirer to the difference in value of the car as warranted and its value as delivered and also to damages for his personal injuries which were a direct and natural consequence of the breach.

Loss incurred by the hirer, which included, *inter alia,*compensation paid to the owner for the early termination of the agreement because of the unroadworthiness of the hired car was recoverable from the dealer because it resulted naturally from the dealer's breach of warranty.[112]

In *Herschtal v. Stewart & Ardern Ltd.*[113], it was held that as the motor dealers were supplying a motor vehicle to their customer for his own use, the very close proximity between them imposed a duty on the dealers to take reasonable care to see that the article which they were delivering was not in a condition which would cause grave danger, knowing that the customer was going immediately to put it on the road. So, it will be possible for the hirer to initiate an action in tort against the dealer if he fails to make necessary examination of the vehicle. But to sue in negligence, the customer has to prove the presence of a duty owed to him by the dealer, breach of the duty and that he suffers damage as a result of the breach. Assessment of damages will also be different from that of a breach of a collateral contract.

11. *Conclusion*

Hire-purchase, as a form of consumer credit, helps to accelerate the circulation of goods and improve the living standard of the citizens but even the best of means may be abused. This is so in the case of hire-purchase when a hirer engages himself in excess of his maximum economic capacity. Although the practice is not so common, as in other developed societies, its impact on the life of the citizens in Hong Kong cannot be denied.

The oscillation between rule of construction and the doctrine of fundamental breach in dealing with exemption clauses, the dilemma in which a hirer is put under the "prohibition of assignment" clause, the "minimum payment" clause and the owner being prejudiced by the rule concerning fixtures, are all results of *ad hoc*, piecemeal attempts by courts to do justice. Accordingly, nothing short of legislation can cope with these problems.

Arbitrary adoption of legislation working particularly well in other parts of the world is not advisable. Regard must be had to the local circumstances and in order to enact legislation which is simple, understandable and applicable, research of the fullest kind which probes into every aspect of hire-purchase must be conducted[114].

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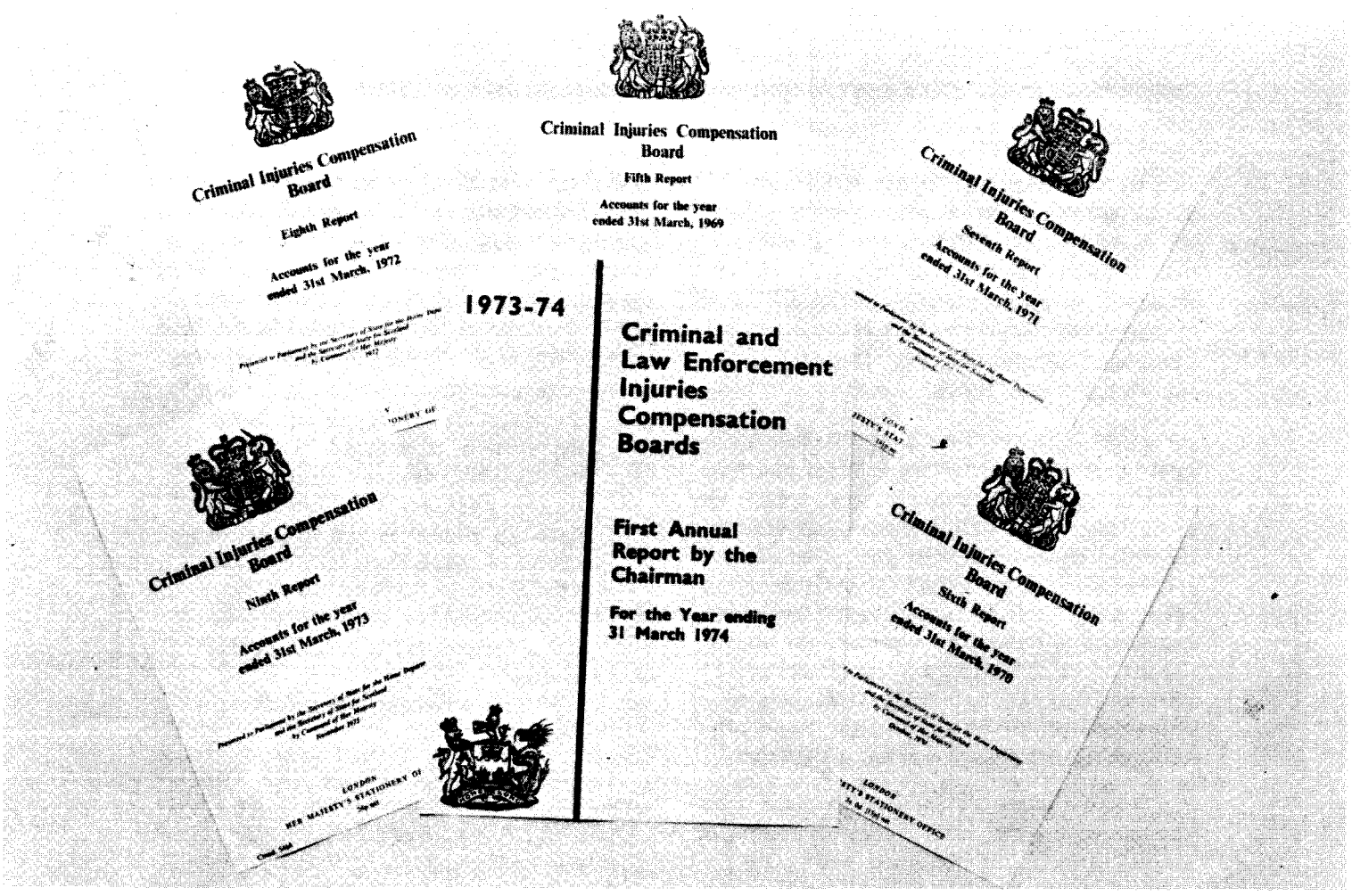
[110] per Lord Moulton in *Heilbut, Symons & Co. v. Buckleton* (1913) A.C. 30 at p. 47.

[111] (1957) 1 Q.B. 229.

[112] *Yeoman Credit, Ltd. v. Odgers* (1962) 1 All E.R. 789.

[113] (1940) 1 K.B. 155.

[114] The trend is to rationalize chattel mortgage, hire-purchase and loan with security transactions. The gradual decline of the vigour of hire-purchase is evidenced by the newly enacted Consumer Credit Act 1974. The Act fulfills the desire of Crowther Report and destroys the artificial and outmoded lender credit/vendor credit dichotomy enabling the legal treatment of monetary liabilities in a credit transaction to be coalesced into a single, unified structure based on the notion of a loan.



THE CRIMINAL INJURIES AND LAW-ENFORCEMENT COMPENSATION SCHEME IN HONG KONG

Renu Daryanani

On the 23rd May 1973, Mr. Hobley, the then Acting Attorney-General, announced at a meeting of the Legislative Council the introduction of The Criminal and Law-Enforcement Injuries Compensation Scheme, which took immediate effect. The Scheme provides for compensating victims of crimes of violence and victims of law-enforcement officers using weapons in the execution of their duty. The Scheme is seen as the natural extension of social security in Hongkong. Thus it remedies a situation where the social provisions in the colony have been described to be "conspicuous by their almost total absence."[1] The Scheme is basically modelled on the Criminal Injuries Compensation Scheme of The United Kingdom, but there are some essential modifications.

The Position before the Scheme.

Before the Scheme was introduced, there were two other main avenues of action available to the victim. Firstly, he could bring a civil action against the criminal. However there was no guarantee of success along this line. This does not mean that the law of Hongkong does not appreciate the idea of compensating the victim.[2] Indeed, section 85 of the Interpretation and general Clauses Ordinance[3] provides a saving provision:

"The imposition of a penalty or fine

See the Report of the Working Party on Social Security, 1966.

[2] This idea is not a new one. Ancient Mosiac law provided for it by a none too literal interpretation of the dictum "An eye for an eye, a tooth for a tooth."

[3] Cap. 1 of the Laws of Hongkong.

> by or under any Ordinance shall not relieve any person from liability to answer in damages to a person injured."

However the criminal was often in prison or untraceable. Still more often he was without means. Thus the victim would find himself left with only a bill of costs for the action.

The other main course opened to the victim was to make use of section 95 of the same Ordinance, and bring the case before the Governor-in-Council through the Attorney-General. The section states that this course is opened to: "Any persons injured in the execution of a moral or legal duty to assist in the prevention of or resistance to crime or any offence, or to the dependants of a person so injured who dies as a result of such injury." However, such cases were usually long-drawn, and as such, this channel was not made use of too often either.

There were also many charitable institutions who would make awards to victims of crime.[4] Around this time, there was too the formation of the Hundred Club,[5] a body dealing especially with such cases. This Club makes an immediate on-the-spot award in cash to the family of anyone injured or killed as a result of a criminal act. Its actions are not however limited to this scope. It also makes awards for other public-spirited actions. However, the Hundred Club obviously cannot compensate all persons but merely the more serious cases, as it is a purely charitable organization. It is submitted that all the remedies described in this section could not together compensate for a system of state social security, which would have as a primary feature the element of systematic and compulsory awards.

THE INTRODUCTION OF THE SCHEME.

At that time, the emphasis in criminal justice was primarily on penal reform and rehabilitation of the offender. The Government was involved with the concept that because the criminal act was born within society, "the correction had to be made within society to overcome the problem."[6] It was becoming apparent that the interests of the victim were being almost totally ignored. The situation could be aptly summed up by a statement in the 1964 White Paper of the British Scheme:

> "The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasizes the reformative aspects of punishment. Indeed in the public mind, the interests of the offender may not infrequently seem to be placed before those of his victims.
>
> This is certainly not the correct emphasis." [7]

The people were not satisfied with this situation. With the introduction of the FIGHT VIOLENT CRIME CAMPAIGN, the necessity for a valid and simple scheme to compensate victims was further realised. It was essential to recognise that the public could not be expected to participate unless the community was prepared to accept some responsibility for the victim and his family. Increasing crime rates brought matters to a head and as a result, the Criminal and Law-Enforcement Injuries Compensation Scheme was set up. The Scheme is administered by two bodies: the Criminal Injuries Compensation Board and the Law-Enforcement Injuries Compensation Board, under the supervision of the Social Welfare Department[8]. It should be noted that when Mr. Hobley announced the introduction of the Scheme, he also stated:

> "..... It is not intended to do away with the existing provision for the award of compensation." [9]

It is clear that, with so many courses open to the victim, there can be an overlap concerning their work. This would especially seem to be so where the work of the Scheme and Section 95 co-

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[4] One illustration: The Joint Rotary Clubs of Hongkong and Kowloon presented a cheque to the widow of Sergt. Tse Yun Cheung, when he was killed on 28th March, 1973, while attempting to prevent a bank robbery.

[5] This club is formed along the lines of its American Counterpart. The money is donated by businessmen.

[6] T.G. Garner, J.P., Commissioner of Prisons at a talk on 26th January 1973.

[7] "Penal Practice in a Changing Society", Cmnd. 645:1959, quoted in "Compensation for Victims of Crimes of Violence," Cmnd. 2323:1964, para 2.

[8] See Para. 1 of the Scheme, as the document is entitled which enshrines the rules of the Boards' conduct.

[9] See the Hongkong Legislative Council: Official Report of Proceedings – 23rd May, 1973; Pg. 810. This was emphasized by the Legislative Council when the case of Madame Pak Kam-dip was put before them in April 1974.

incide. However, no real difficulty is caused because in effect, Section 95 is now only used under pressure. Further, when made use of, compensation awarded under section 95 will now be calculated on the same basis as damages under the scheme[10]. In view of the slowness of the procedure under section 95, applicants are thus encouraged to apply for compensation under the scheme.

SOME GENERAL CHARACTERISTICS OF THE SCHEME.

Paragraphs 5 and 15.

The Scheme states that the personal injury of the victim must have been sustained in Hongkong on or after the 23rd of May, 1973. An offence committed abroad may be of a type punishable in Hongkong, but the offence is not transferred to Hongkong, and the claim accordingly fails. Further the provision that the personal injury must be sustained on or after the introduction of the scheme is practical because otherwise, claims fictional and ten-year-old might be put forward and waste much time. Such cases however, have a remedy under Section 95 of the Interpretation and General Clauses Ordinance, which deals amply with regard to awards in respect of injuries sustained just before the Scheme came into being.

The Scheme applies only to Personal Injuries.

It is a main characteristic that the Scheme applies only to "personal injuries.[11]" The personal injury is usually a physical injury, but may be consequential shock or some other psychological result attributable to a crime of violence or to a threat of violence, if medically diagnosable. It has been suggested that the claimant who suffers such a shock may receive an award only if he was a witness to the event; not if he was subsequently told of it[12]. It is understandable that the Boards are cautious in dealing with non-physical injuries because of the risk of fictitious claims. Further, unlike the common law heads of damage, no damages are available for loss of expectation of life.

Personal injuries may arise from a great variety of offences, including crimes against property, as well as the person. However, the Scheme does not cater for any other type of loss. This might perhaps be considered restrictive, as one of the most common offences in Hongkong is robbery. The victim of a robbery cannot recover his material losses through the present Scheme. Neither is shock directly attributable to the loss of possessions within the scope of the Scheme. On the whole, though, this is understandable. The Scheme, being one of the first of its kind in the Colony, might still be considered to be at an experimental stage, and it is perhaps best to limit it to a certain area to begin with. Further it is not as if the aggrieved person is remediless. Section 73 (1) of the Criminal Procedure Ordinance[13] states that where a person is convicted of an offence, the court may, in addition to passing sentence, order the person so convicted to pay to any aggrieved person such compensation for the loss of or damage to property[14]. The remedy does depend on the offender being brought to trial and convicted.

In the case of a sexual offence, pregnancy is considered to be covered by the Scheme[15]. However, while compensation will be payable for loss of earnings caused by pregnancy, compensation will not be payable for the maintenance of a child born as a result of a sexual offence. The Boards are not foster-parents to such a child. By analogy thus venereal disease should also be considered a personal injury of a kind. The boards will however scrutinise such cases with particular care to determine whether there was any responsibility on the part of the victim, who might unwittingly have been provocative. It is considered inappropriate to apply the same rules when assessing the suffering in such cases as in other cases involving only physical injuries because there is a greater chance that complications might develop, especially nervous shock. Consideration is therefore given to the age, occupation and social background of the victim, and how the incident has affected her[16].

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[10] This was decided by the Legislative Council on 26th November, 1974, when Madam Tse Shum Shui-mui applied for compensation under Section 95.

[11] Paras. 5 and 15 of the Scheme.

[12] See Alec Samuels: "Criminal Injuries Compensation Board;" [1973] Crim. L.R. 418 at pg. 421.

[13] Cap. 221 of the Laws of Hongkong.

[14] See also the Magistrates Ordinance; Cap 227: S.98, which grants similar powers to Magistrates.

[15] See the First Annual Report of the Criminal and Law-Enforcement Injuries Compensation Boards for the year ending 31 March 1974: "Victims of Sexual Offences"; para. 36.

[16] Para. 9 of the Scheme.

The Ex Gratia Nature of Compensation Awarded.

The Scheme states that the Criminal and Law-Enforcement Injuries Compensation Boards will entertain applications for ex gratia compensation[17], that is, compensation as a matter of grace, favour or indulgence. Government philosophy, as expounded in the 1964 White Paper of the British Scheme, seems to be that:

"Compensation will be paid ex gratia. The Government do not accept that the state is liable for injuries caused to people by the acts of others. The public does however feel a sense of responsibility for and sympathy with the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation on behalf of the community[18]".

Is it not strange that whilst the public should feel a sense of responsibility for the victim, the Government does not? The ex gratia nature of the Scheme manifests a failure to admit formally on the Government's part its liability to victims when there would be no justification for the Scheme unless that liability were one that ought to be shouldered. Does not the very fact that compensation ex gratia contradict the purpose for the existence of the Scheme – that is, a right to compensation has been established? This ex gratia characteristic would seem to place the Scheme more on the footing of a charitable operation. The Scheme states that it is non-contributory. But this is no justification for ex gratia payments because it is suggested that the money the Boards give out is merely money paid forth as taxes. Should not compensation be demanded ex debito, as a matter of right?

Most of these questions are merely of a technical value. The Scheme, regarded as part of a welfare system, works well enough as it is. The philosophy of the boards may be summed up as under the British Scheme: ".... for though the payments are paid ex gratia, we are instructed and compelled to make payments to all who come within the ambit of the Scheme."[19]

Reporting to the Police.

The circumstances of the injury sustained must have been the subject of criminal proceedings or reported to the police by the victim without unreasonable delay before he may be eligible to apply for compensation under the Scheme[20]. This proposition is seen as being the mainstay against the presentation of fraudulent claims, and an aid in ensuring enforcement of the criminal law. If an application is made before satisfying this requirement, the applicant will be asked to make a report to the police first. If however an unreasonable amount of time has lapsed since the commission of the crime, and still no report has been made to the police, an application to the Boards may be dismissed because of the suspicious circumstances of the case. Further all the known relevant circumstances must be reported, and if the victim knowingly or wilfully omits any relevant circumstances, or gives false information, the condition has not been fulfilled. The Boards do not consider it in the public interest that awards should be made where no assistance is given by the applicant to the administration of justice. Waiver of this requirement will only be made in the most exceptional circumstances. A belief that the police would not be able to take effective action will not usually justify waiver. But extreme pain, or fear of loss of employment, or fear of reprisal or a belief that the matter has been reported by a third person: these things if established should be given due weight in determining whether to waive. Ignorance that a crime has been committed may justify a waiver. This requirement does not however create much difficulty because usually, as a matter of practice, it is the police who refer applicants to the Boards when they report crimes[21], as the Scheme is not well known of as yet[22].

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[17] Paras 5 and 15 of the Scheme.

[18] Cmnd. 2323, para. 8.

"Criminal Injuries Compensation Board: First Report: Accounts for the year ended March 31, 1965", Cmnd. 2782, para 5 (Britain).

[19] Paras. 6(c) and 16(b) of the Scheme.

[20] For a summary of the working of this clause under the British Scheme, and the circumstances where it might be waived, see its Ninth Annual Report:

[21] About 80% of their cases are not referred to the Boards by Police Community Relations Officers.

[22] For other conditions to be satisfied by the victims before he can be eligible for compensation under the Boards, see paras. 6 and 16 of the Scheme. See also para. 33 of the First Annual Report of the Hongkong Scheme.

THE SCOPE OF THE CRIMINAL INJURIES COMPENSATION BOARD.

Paragraph 5 (a).

The Criminal Injuries Compensation Board awards compensation firstly where the personal injury is sustained directly attributable to and arising out of a crime of violence (including arson and poisoning). In law, there is no strict definition of the term "crime." It may be defined as a positive or negative act in violation of the law[23]. An attempt to define a "crime" at once encounters difficulty. When the Legislative Council enacts that a particular act shall become a crime, or that an act which is now criminal shall cease to be so, the act does not change in nature in any respect other than that of legal classification. Many have considered the availability of the element of punishment to be a practical test in deciding whether an act is a "crime" [24].

Just as there is no strict definition for the term "crime", there is no strict definition for the phrase "crime of violence." It could be defined as a crime which results in possible or actual injuries to another party[25] . "Violence" is commonly defined as the unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury[26]. The aim of the Board thus is clearly to award compensation in criminal offences "involving the use of force." [27]. Theoretically then, a crime not involving the use of force would not be covered under the Board here [28]. It is probably because of this fallacy that two common exceptions were put within the Scheme – arson and poisoning, where though the end result of the acts might be violent, the means of producing them need not necessarily be so [29].

The Board will thus award compensation if satisfied that the victim's injury was due to a crime of violence. This is so even though the assailent was never traced, or was not charged, or was charged with a different offence or was acquitted. A good test for the Board to apply would presumably be: Has the alleged offender been convicted or could he have been convicted? [30]. This test creates certain problems which will be dealt with later on .

Paragraph 5 (b)

The Criminal Injuries Compensation Board

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[23] Black's Law Dictionary.

[24] See Kenny, Outlines of Criminal Law (15th ed.), Chap. 1 at pg. 16.

[25] This definition was put forward by the Working Party set up to advise on the adequacy of law in relation to crimes of violence committed by young persons, in January, 1965. The Working Party drew up a list of specific offences which they held to be "crimes of violence" for their working purpose. This list consisted of the following offences:

a. Murder and Manslaughter.
b. Attempted murder.
c. Rape.
d. Assault (including wounding)
e. Kidnapping.
f. Criminal intimidation.
g. Robbery with firearms.
h. Larceny (with some form of violence).
i. Demanding with menaces.
j. Malicious injuries to properties.
k. Possession of arms and ammunition.
l. Offences against public order.
m. Escape from custody and rescue.

It is submitted that aside from the offence ennumbered h. the list still constitutes a valid description of the term "crime of violence" today.

[26] Black's Law Dictionary.

[27] This phrase was used in the 1964 White Paper of the British Scheme: Cmnd. 2323, para. 14. It was indeed to reflect more closely this intention of the Scheme that the term "criminal offence" (originally incorporated into that Scheme) was changed to a "crime of violence." See the Fifth Annual Report of the British Scheme: 1969, Cmnd. 4179 p. 27.

[28] It has been calculated that during the first year of the working of the Hongkong Scheme, 62% of the offences involved were against persons; the remaining 38% were mainly robberies. These figures are put forward in a statistical study undertaken by the Research and Evaluation Unit of the Social Welfare Dept., in July, 1974 of 113 cases which had been completely dealt with by the Boards. These figures are re-printed in the First Annual Report of the Hongkong Scheme: See Para. 30.

[29] Undoubtedly, there can be other borderline cases: e.g. would the Scheme cover the offence described by s.32(1) of the Offences Against the Persons Ordinance (Cap. 212) of endangering the safety of any person travelling or being upon a railway, merely by putting a stone across the railway? Such an act might not theoretically amount to an act of violence. The British Scheme decided that a similar offence was covered by the term "Crime of Violence"; See its Fifth Annual Report para. 6 (1). It is likely that it would probably be covered in Hongkong too.

[30] Ante: Footnote (12) at Pg. 420.

also awards compensation where personal injury is sustained directly attributable to and arising out of an arrest or attempted arrest of an offender or suspected offender. However the law on these areas is neither short, simple nor clear. Section 101 (2) of the Criminal Procedure Ordinance[31] states that a citizen may arrest any person whom he may reasonably suspect of being guilty of an "arrestable offence." An arrestable offence is defined to mean any offence for which the sentence is fixed by law to be imprisonment for a term exceeding twelve months and any attempt to commit such an offence[32]. The ordinary citizen in the street is hardly likely to know what offences are punishable by imprisonment exceeding twelve months; nor is he likely to know what acts constitute an attempt to commit such an arrestable offence.

The police powers of arrest are similarly ambiguously wide. The principal provision for these powers is section 50 (1) of the Police Force Ordinance[33], which states: "It shall be lawful for any police officer to apprehend any person who may be charged with or whom he may reasonably suspect of being guilty of any offence ....." It is suggested that this section has been badly drafted. The words "who may be charged with" seem meaningless. From a legal view, no one is guilty of an offence until proven guilty. Therefore, the words seem to imply that a police officer can only arrest a convicted person. This seems a superfluous provision. Further, the test of reasonable suspicion on the part of the police officer is a subjective one, and the suspicion might not in fact rest upon any valid basis.

As a result of these provisions, no party can be sure that his action of arrest is legal[34]. This creates difficulty where a person is injured while effecting what is really a false arrest. Some may argue that it is sufficient that the person injured was engaged in the execution of his duty in the work of law enforcement, albeit no offence was in fact committed. However this would be stretching the provisions too far. It is submitted that only when a person is acting under suspicion which is reasonable, is his act justifiable, entitling him to compensation under the Board.[35]

It has been decided in Britain in *Reg.* v. *Criminal Injuries Compensation Board, ex parte Lawton*[36], that a lawful arrest continues after a suspected offender has been taken into custody "because nothing was done to determine that custody[37]." Thus anyone attempting to arrest an escapee and who suffers injury in the process is attempting to arrest an offender, and therefore covered by the Scheme. The Criminal Injuries Compensation Board in Hongkong has not only accepted this principle but seems to have taken it a step further – injuries resulting from crimes of violence caused by such an escaped prisoner are covered by the Board, apparently whether or not the applicant was engaged in attempting to arrest the escapee[38].

Paragraph 5 (c).

The Board also awards compensation where injury is sustained directly attributable to and arising out of the prevention or attempted prevention of an offence. The law concerning this area is likewise unclear; especially with regard to the question of what constitutes an offence. This brings us back to the problem of what a crime is[39]. The provision makes it uncertain who exactly is covered by the Board. It is submitted that anyone who is engaged in preventing what is in effect not an offence should not be compensated unless he too had reasonable grounds for his suspicion. This is merely a device to ensure that acts of law enforcement do not get out of order.

This was so held of the British Scheme in *Reg.* v. *Criminal Injuries Compensation Board, ex parte Ince*[40], where it was decided that if a police constable sustained personal injury in the attempted prevention of an offence, and he was acting on information which gave him reasonable cause for believing that an offence was imminent

[31] Cap. 221 of the Laws of Hongkong.

[32] Ibid., s.2.

[33] Cap. 232.

[34] See Rear: The Power of Arrest in Hongkong (1971) HKLJ 142.

[35] Note the use of the word "reasonably" in both s.101 (2) of the Criminal Procedure Ordinance and s.50 (1) of the Police Force Ordinance.

[36] [1972] 1 WLR 1589.

[37] Ibid., at pg. 1592 per Lord Widgery C.J.

[38] See para. 31 of the First Annual Report of the Hongkong Scheme.

[39] See Black's Law Dictionary: the definition of the term "offence."

[40] [1973] 1 WLR 1334.

or taking place, it did not then matter that there was in fact no such offence. The Board in Hongkong should adopt this ratio, and by analogy extend it to cover all persons.

Paragraph 5 (d).

Compensation is also awarded where an injury is sustained directly attributable to and arising out of the giving of help to any police officer or other person who is engaged in arresting or attempting to arrest an offender or suspected offender, or preventing or attempting to prevent an offence. This provision was inserted to encourage public participation in the fight against crime. However, it is apparently not necessary that the applicant should be taking part in the arrest and injuries accidentally sustained by a bystander in the course of an arrest are covered by the Board. This was decided in the British Scheme in *Reg.* v. *Criminal Injuries Compensation Board ex parte Schofield*[41], where the applicant, about to enter a multiple store, was knocked down and injured either by a suspected thief running from the store or by the store detective in pursuit. The Divisional Court of the Queen's Bench held that a similar clause in the British Scheme in its ordinary meaning was not limited to an applicant who himself made or attempted an arrest; neither was it by implication restricted to such a person. "There is no limitation to cover only the intended victim"[42]. The argument of Bridge J., the dissenting judge in the case, that the words in the clause were clear enough and there was no need to extend them without the approval of Parliament seems feasible too[43]. It appears thus that the courts in Britain seem to favour a broader interpretation of the Scheme. The Hongkong Board has presumably followed this English decision, and hence, the bystander enjoys a privileged position. It seems only fair.

SOME UNSATISFACTORY AREAS ON PARAGRAPH 5 OF THE SCHEME (DEALING WITH THE SCOPE OF THE CRIMINAL INJURIES COMPENSATION BOARD.)

The use of the term "Crime of Violence."

Much criticism has arisen concerning this phrase because the term "crime of violence" is considered too narrow and exclusionary. There are too many criminal offences which do not involve an exercise of force, yet which result in personal injury, especially nervous shock. There seems to be no reason why crimes of violence should have been singled out by the Scheme, except that perhaps on the whole, they tend to arouse more sympathy with the public. It is suggested that the term "criminal injury"[44] is more suitable for such a Scheme as it would cover a wider area of deserving cases. The term 'criminal injury' should cover anyone who is injured as a result of a criminal offence[45]. The scope of the Board is thus limited, to the detriment of many inncoent victims.[46]

The test to decide whether a victim is covered by the Board.

The test proposed above – to see whether the alleged offender has been convicted or whether he can be convicted – results theoretically in a highly legalistic approach to the question whether an applicant is within the scope of the Scheme: for to satisfy the test, he must prove criminal intent on the part of the offender. If the offender acted intentionally or recklessly, then very probably the offence will be made out; but not otherwise[47]. Although it is very much doubted whether the Board actually uses this test, looking at the section from the legal view, this problem is very real. A proviso in Paragraph 5 states that, in considering whether an act is a criminal act, any immunity at law of an offender attributable to his youth or insanity or other

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[41] [1971] 1 WLR 926.

[42] *Ibid.*, at pg. 929 per Lord Parker C.J.

[43] *Ibid.*, at pg. 931.

[44] This term is employed in the Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968: s.11 (1).

[45] See Miers: Compensation for Victims of Crimes of Violence: The Northern Ireland Model [1969] Crim. L.R. 576, at pg. 579.

[46] See D. Williams: Compensating Victims of Crimes of Violence: Another Look at the Scheme; Sol. J.117:658 at pg. 660.

[47] The Fifth Annual Report of the British Scheme, Cmnd. 4179 gives an illustration. See Para. 6 (3) – a railway ticket conductor, knocked over and injured by a crowd of passengers from a football special, did not receive an award because, there being no evidence of criminal intent, the Board was not satisfied that the injury was attributable to a criminal offence.

condition will be left out of account. This proviso seems to require further the necessity of proving criminal intent on the part of the offender. This requirement seems to override the real intention of the proviso. It is submitted that this test, which prima facie seems to apply to the Board, is of too high a degree for the ordinary victim. As long as a victim can show that his injuries resulted from a crime of violence, that should be sufficient legally.

The Phrase "Directly Attributable to."

Another unsatisfactory area in this paragraph is the use of the phrase "directly attributable to". This suggests that the injury must be directly attributable to (for example) a crime of violence both in the sense that the criminal act was a crime of violence, and that the injury was a direct consequence of it. It is here submitted that to say that the injury must be directly attributable to a crime of violence may be too narrow a way of expressing causation, which should be left to ordinary legal principles, that is, it must be "caused" by a crime of violence. The courts in England too seem to consider this phrase too restrictive. In the course of the Lord Chief Justice's judgement in *Reg.* v. *Criminal Injuries Compensation Board, ex parte Schofield*[48], he said that the words "directly attributable to" were intended in lay terms to refer to a *causa causans,* i.e., the last link in the chain of causation, as opposed to a *causa sine qua non,* i.e., a cause without which the effect in question could not have happened. In *Reg.* v *Criminal Injuries Compensation Board, ex parte Ince*, Lord Parker C.J. further held[49] that the words directly attributable to" did not mean attributable solely to the offence. "It means attributable in whole or in part." The British Scheme has adopted these views, which thus widen the scope of the Board[50].

The problems this phrase introduce do not however, have much effect on the practical working of the Criminal Injuries Compensation Board in Hongkong, despite its difficulties from the legal point of view. The Secretary of the Board stated in an interview: "The phrase 'directly attributable to' does not mean much." Members of the Board give the term a generous interpretation because if the phrase were strictly enforced, many worthy cases could not be considered within the scope of the Board[51]. Thus the First Annual Report of the Criminal and Law-Enforcement Injuries Compensation Boards states: "The Scheme is designed to provide compensation to victims who are injured, disabled or killed as a direct or indirect result of a crime of violence ....."[52].

The Phrase "and arising out of."

Paragraph 5 of the Scheme states that the injury must not only be "directly attributable to" a crime of violence, but it must also be "arising out of" it. This phrase is not inserted in the British Scheme, and the fact that it does exist in the Hongkong Scheme is significent. The words "and arising out of" refer to the origin of the cause of the injury[53]. The injury must originate from the crime of violence as well as be directly attributable to it. The insertion of this phrase imposes a higher requirement of proof to be fulfilled by a victim, which it would be difficult for him to do, and would thus seem to make the scope of the Hongkong Board narrower than the British one. However, as a matter of practice, just as the phrase "directly attributable to" is not given much value, the same applies to this phrase "and arising out of." It should not be forgotten though, that the phrase exists, and could create difficulties at any time.

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[48] Ante: Footnote (41) at pg. 930.

[49] Ante: Footnote (40) at pg. 1341.

[50] See the Eighth Annual Report of the British Scheme, Cmnd. 5127, para. 7, and also its Ninth Annual Report, 1973.

[51] In one recent Hongkong case, there was a robbery in Shatin, which an old man witnessed. He was frightened and started to run. He fell and was injured. The Board awarded compensation to him although this injury could prima facie be classified as a superficially indirect result of the offence.

[52] See para. 1.

[53] Black's Law Dictionary.

TWO EXCEPTIONAL CASES WITHIN THE CRIMINAL INJURIES COMPENSATION BOARD.

The social justice introduced by the Scheme is however marred by two situations where, at present, no award can be made under the Board.

Paragraph 7 of the Scheme.

Where the victim and the offender were living together at the time as members of the same family, no compensation will be payable. The reason for excluding such offences has been stated to be to avoid the difficulty in establishing the facts, and ensuring that the compensation does not benefit the offender[54]. This does however seem a harsh rule, especially with regard to the position concerning children; and these reasons unjustifiable especially as, if the case has resulted in criminal proceedings, the facts will already have been established. Further the Board could exercise its power given by Paragraph 13 to make special arrangements for the administration of the award so as to ensure that the offender did not benefit from it.

In *Reg.* v. *Criminal Injuries Compensation Board, ex Parte Staten*[55], Lord Widgery C.J. held that the phrase "Living together as members of the same family" ought to be given its "ordinary, straightforward, normal meaning"[56]. This is a question of fact in each case. Usually the term "family" refers to immediate blood relations[57]. Lodgers of the same flat are clearly excluded from this term because theirs is a contractual relationship.

For the purposes of the Scheme, the common law wife is on the same footing as the lawful wife[58]. It is cohabitation which is the disabling factor. In the above case, where the wife applied for an order of certiorari to quash a decision of the British Board where she was denied compensation in respect of injuries received by her because they were inflicted by her husband, the court held that there was no possible justification for saying that the Board had erred in law. It appears that even the courts are unable to do anything about this provision. If, however, the spouses were not living together, it is likely that they would be eligible for compensation under the Scheme[59]. It is a curious and unjustified anomaly that the separated wife should have more protection than the cohabitating wife, because it is probably the cohabitating wife who is the more likely candidate for injuries to be inflicted by her husband.

Paragraph 8 of the Scheme.

Traffic offences too are excluded from the board, except where there has been a deliberate attempt to run the victim down because then the injuries may be directly attributable to a crime of violence.[60] However such cases are extremely few[61]. While motor vehicles insurance in Hongkong is compulsory in the form of insurance against third parties risks[62], there are many cases where insurers evade claims by means of some exempting clause in the policy. Thus it is a great pity that such cases are not covered by the Scheme. This is the more so because it would also be difficult for such a traffic accident victim to bring an action against the offender, because he would have to prove negligence to get damages.

Such offences are also excluded under the British Scheme, but this is because of the existence of the Motor Insurance Bureau, which deals with such cases. In Hongkong, there is no such bureau working on the same scale as the Criminal Injuries Compensation Board. However, since

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[54] See the 1964 White Paper of the British Scheme, Cmnd 2323, para. 17.

[55] [1972] 1 WLR 569.

[56] *Ibid.*, at pg. 571.

[57] Bromley's Family Law at pg. 1.

[58] Para. 7 of the Scheme.

[59] If the association between a man and woman who are living together is judged to be a casual one, or if it is judged to have terminated before the incident which gave rise to the injury, then the applicant may receive an award. See, for example the Seventh Annual Report of the British Scheme, Cmnd. 4812, Para. 10.

[60] In one Hongkong case, the victim was compensated when she was struck by a stolen car driven by bank robbers, because then the motor vehicle was integral to the crime committed.

[61] In the first year of its working, only two such cases were put before the Scheme. See para. 35 of its First Annual Report.

[62] See s.4 of the Motor Vehicles Insurance (Third Party Risks) Ordinance: Cap 272.

1972, the Government has been attempting to formulate a Traffic Accidents Compensation Scheme for the Colony, to deal with such cases as mentioned above. It is to be hoped that this Scheme will come into existence soon, and that it will be based on a "no fault liability" system.

THE SCOPE OF THE LAW-ENFORCEMENT INJURIES COMPENSATION BOARD.

The Law-Enforcement Injuries Compensation Board operates along similar lines as the Criminal Injuries Compensation Board[63]. Its scope is however, much more limited. It will make an award of compensation where personal injury is inflicted by a law-enforcement officer using a weapon in the execution of his duty in connection with an arrest or attempted arrest of an offender or suspected offender; the prevention or attempted prevention of an offence and the giving of help to any police officer or other person engaged in such activities.[64] Paragraph 15 of the Scheme states that a law-enforcement officer is taken to mean any police officer or other public officer on duty. A police officer is defined in the Police Force Ordinance[65] to include any member of the police force. A public officer is defined in the Interpretation and General Clauses Ordinance[66] to mean any person holding an office of employment under the Crown in right of the Government of Hongkong, whether such office be permanent or temporary. Thus civil servants are clearly included within the term[67]. Paragraph 15 also states that the injury may be inflicted negligently or otherwise. This provision results in almost a strict liability of the actions of the law-enforcement officer.

To be eligible under this board, the injury must have been inflicted by the law-enforcement officer using a weapon in the course of his duty and such cases are rare[68]. Of course, where criminals are injured in the course of a crime in such a situation, no compensation will be available to them under the Scheme. It would be vastly unjust and morally unsatisfactory if it were otherwise. A weapon may be taken to mean an instrument of offensive or defensive combat; something to fight with[69]. The truncheon and the gun are undoubtedly the officially recognised weapons of the law-enforcement officer to fight crime, but what of the case where a totally unconventional weapon is used: for example, a flick knife the officer has just removed from an offender. It is submitted that whatever the weapon used by the officer, as long as his act is in the execution of his duty in connection with the fight against crime, the innocent victim may claim compensation under the Law-Enforcement Injuries Compensation Board.

WORKMEN'S COMPENSATION CASES.

The two Boards have also decided to award compensation in another situation – that is, in *prima facie* cases eligible for Workmen's Compensation[70], where if in any employment, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the provisions of the Workmen's Compensation Ordinance[71], subject to certain exceptions. However, it is only when such cases come within the scope of the Criminal and Law-Enforcement Injuries Compensation Scheme

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[63] Note however that the exceptional cases concerning where the victim and the offender are members of the same family, and concerning traffic accident victims, are not stated to apply to the Law-Enforcement Injuries Compensation Board.

[64] Para. 15 of the Scheme.

[65] Cap. 232, s.2.

[66] Cap. 1, s.3.

[67] Para. 31 of the First Annual Report of the Hongkong Scheme states that the Scheme also covers claims from civil servants.

[68] During the first year of the working of the Board, only two such claims were put forward. See *Ibid.*, Para. 4.

[69] See Lord Denning's judgement in *R.* v. *C.I.C.B.*, ex parte Ince. Ante: Footnote (40)

[70] This was decided by the two Boards at their second general meeting on 17th December, 1973, and approved by the Secretary for Social Security.

[71] Cap. 282.

that they are eligible. The claimants must be victims of crimes of violence. This practice must be regarded in the light of Paragraph 28 of the Scheme, which states that dual compensation is not obtainable from the Boards. This practice may be considered unjustifiable as such cases are usually adequately compensated under the Workmen's Compansation Ordinance, which awards compensation on a higher scale than the Boards do[72]. However the climate of opinion seems to be changing. It has been stated: "It is not greedy for victims to apply for grants from the Scheme in addition to compensation from other sources." [73].

In such Workmen's Compensation cases, it has been decided that the compensation awarded by the Boards will be 50% of the assessed award due to the applicant under their Scheme, plus a deficiency award if the Workmen's Compensation subsequently claimed and awarded is less than the balance [74]. If Workmen's Compensation were not awarded, then the Boards would pay the balance of the compensation to the victim. If after a full award has been made, a claim is then made for Workmen's Compensation, the situation will be dealt with further by paragraph 28, under which each applicant undertakes to repay the Boards any damages settlement or compensation which he may subsequently obtain in respect of his injuries.

SOME DISCRETIONARY POWERS OF THE TWO BOARDS [75].

Paragraphs 12 and 21 of the Scheme.

The Boards can reduce the amount of compensation or reject an application altogether if, having regard to the conduct of the victim, both beforehand and after the events giving rise to the claim, his character and way of life, it is considered inappropriate that he should be granted the full award. The Boards are not concerned to make moral judgement upon the behaviour of the victim so much as to ascertain whether the victim was foolhardy or negligent or reckless of his own safety. This provision is seen as a safeguard against the abuse of public money.

The word "conduct" here refers to something which is reprehensible or provocative; something which can fairly be described as bad conduct or misconduct[76]. The assailant may have merely been acting in self-defence. There is no limitation upon the sort of conduct that may be taken into consideration, but the Boards will not think in terms of contributory negligence, when acting under these provisions[77]. The general rule is that no award is made to a victim who is injured in the course of committing a serious crime. Thus where a victim voluntarily enters into a fight, no compensation will be awarded. If however, in the course of the fight, the offender changes its character in a manner which the applicant could not reasonably have foreseen, a reduced award will be made [78].

The victim must also satisfy the Boards that his injuries are not attributable to his previous bad character and way of life. Thus a victim whose record shows that he is a man of violence and has himself been guilty of serious crimes of violence, will not receive an award. If however, a man has given up his criminal ways and has for a substantial period of time tried to earn an honest living, his previous bad character will be disregarded[79]. It should be noted that it is not considered appropriate that compensation be awarded for injuries received in an assault for which no satisfactory explanation exculpating the victim is given[80].

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[72] *Ibid.*, Sections 6, 9 and 10.

[73] See the Hongkong Standard: Few Victims of Crime Aware of Compensation, 25th July,s1973.

[74] Para. 41 of the First Annual Report of the Hongkong Scheme.

[75] See also Paras. 11 and 20 of the Scheme.

[76] Black's Law Dictionary.

[77] This was decided by the British Board in *Reg.* v. *Criminal Injuries Compensation Board, ex parte Ince.* See Ante: Footnote (40) at pg. 1342.

[78] For Example if the applicant was unarmed and the assailant used a weapon or disproportionate violence. See para. 11 of the Fourth Annual Report of the British Scheme, Cmnd. 3814.

[79] See Para. 5 (4) of the Sixth Annual Report of the British Scheme, Cmnd. 4494.

[80] A set of preliminary rules to adopt is set out in the Ninth Annual Report of the British Scheme.

Paragraphs 14 and 17 of the Scheme.

The Boards may, in their discretion, conversely increase the total compensation payable in respect of a claim by up to 100% in cases concerning deserving public spirited victims who participate in the fight against crime, to encourage such activity.

Paragraphs 13 and 22 of the Scheme.

The Boards also have a discretion to make special arrangements for the administration of any money awarded as compensation. They could require the execution of a voluntary settlement or pay the money to the Public Trustee under a trust deed, especially where the applicant is a minor. This provision ensures that the danger of frittering away the compensation awarded is brought home to the applicant[81]. This practice however is not often used, the awards made often being too small to merit such special arrangements.

The Abuse of Such Discretionary Powers.

The Criminal and Law-Enforcement Injuries Compensation Boards thus are armed with a very wide range of discretionary powers to ensure a smooth working and to deal with deserving and underserving cases accordingly. However, the implementation of these powers, which imply a freedom to act, are dependent to a large degree on Board members' subjective interpretation of facts. It is clear that there should be adequate safeguards against the abuse of these discretionary powers; for otherwise the whole concept of the working of the scheme would be contrary to the rule of law.

The "rule of law" is an ambiguous expression[82]. It is generally taken to refer to the preclusion of arbitrary action on the part of the crown or members of the Government. The powers exercised by officials must have a legitimate foundation, and should conform to certain minimum standards of justice, both substantive and procedural[83]. While a fear of the abuse of such discretionary powers as exercised by the Board members may be real theoretically, there is little possibility of it being realised. It is submitted that adequate safeguards against such abuse are provided by the various paragraphs of the Scheme, which the Board members are bound to adopt. The rule of law is thus observed. Should Board members refuse to exercise their powers in a just and equitable manner, the aggrieved applicant may bring disciplinary proceedings against them.

THE PROCEDURE BEFORE THE BOARDS.

The Two-member Board.

The initial decision as to whether an application should be allowed or rejected will be taken without a hearing by two members of the boards, working together on a roster basis[84]. Each applicant has a right to appear before the Boards, but this option is seldom exercised. Before the Board members consider an application, a member of the Boards' staff will seek any further information that is required concerning the application[85]. The major feature of this procedure is that it is carried out in the vast majority of cases *entirely* through paper work, with minimal involvement of the applicant. The Board members base their decision on reports prepared by the staff, and the applicant is merely informed of the appropriate Board's decision.

The Three-member Board.

Any applicant who is dissatisfied with a decision of the two-member board will be entitled to apply for a hearing before three other members of the Boards[86]. Strictly, there is no appeal at any stage of the process: merely a rehearing *de novo* of the case by three other members who are in no way bound by the decision of the two members, and may vary the original award in any way whatsoever[87]. In this respect, the Boards follow the British approach, which was decided in *Reg.* v. *Criminal Injuries*

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[81] See para. 8 of its Sixth Annual Report, Cmnd. 4494.

[82] See O. Hood Phillips: Constitutional and Administrative Law at pg. 31.

[83] See also S.A. de Smith: Constitutional and Administrative Law at pg. 39.

[84] Para. 25 of the Scheme states that the initial decision will be taken by one member of the Boards following the British Scheme. However, a decision to scrutinize applications by two-member boards was made by the two Boards at their first general meeting on 3rd July, 1973. Step are now being taken to amend Para. 25, so that it is in accord with the actual basis of the Scheme.

[85] Para. 24 of the Scheme.

[86] *Ibid.*, Para. 25. See also Para. 38 of The First Annual Report of the Hongkong Scheme.

[87] See Hirschel: The Criminal Injuries Compensation Board, [1973] Current Legal Problems 40, at pg. 59.

Compensation Board, ex parte Lain[88] It must be noted that the hearing is often referred to as an appeal. This is technically incorrect because of the different rules of procedure applicable in a rehearing. The whole case is gone into as if no previous hearing has taken place. Fresh evidence and new heads of claim are thus admissible. Such are not admissible in an appeal.

Notice of the rehearing must normally be given one month after the date on which notice has been given of the decision against which the "appeal" is being lodged[89]. The Chairman of the Boards will then sift through the case and only grant the hearing if he considers the decision worth "appealing" against. In this way, extravagant and irrelevant hearings are avoided. The hearing is held in private[90]. Many have advocated that it should be in public in order that everyone might know how it works. However, as the question of compensation is a private matter between the applicant and the Boards, and as no major public issues are involved in a hearing, it saves time and costs if the hearing is held in private. Such a situation is also to the advantage of the claimants, who, having already suffered from an act of violence, may as such shun the publicity which would otherwise be afforded if the hearing were held in public. This might discourage claimants from applying. The desirability of a public hearing has thus given way to practicality.

At the hearing, it will be for the applicant to make out his case[91]. He and any member of the Board's staff are able to call and examine witnesses. The ability of the Boards to deal with cases so quickly is attributed to the fact that it is not bound by any of the formal rules of procedure[92]. One result of this is that witnesses cannot be subpoenaed. The likely candidate for a subpoena would be the offender, and grave doubts have been expressed over the desirability of compelling the presence of an offender at what may appear to him to be a second trial. The fact that an offender who has been prosecuted was acquitted will not necessarily bar the applicant's claim, for the standard of evidence required for conviction in a criminal court, that of proof "beyond reasonable doubt," is higher than the "balance of probabilities" required by the Boards for an applicant to make out his claim[93]. The Boards will reach their decision solely in the light of the evidence available at the hearing[94].

Legal representation before the Boards is now allowed at the hearing[95]. However this provision has never been made use of, perhaps because any such representation must be at the cost and expense of the claimant himself. Under the British Scheme, legal aid is now available to the applicant, but the scope of the Legal Aid Ordinance[96] in Hongkong does not cater for such a situation. There is however a danger that legal representation, now that it is provided for, might frustrate the object of an informal hearing, which has been seen to work well. Little benefit would be obtained from endowing hearings with full legal trappings, as it would merely serve to slow down the working of the Boards, and increase costs, especially since damages under the Scheme are fixed, and not calculated on a common law basis.

THE ADMINISTRATIVE POSITION OF THE BOARDS.

The Boards are thus specialized courts of a more informal nature for the purpose of determining justiciable issues arising in connection with the work of a government department. Their procedure at any rate bears all the characteristics of a quasi-judicial procedure, and the Boards,

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[88] (1967) 2 Q.B. 864.

[89] See para. 38 of the First Annual Report of the Hongkong Scheme.

[90] Para. 27 of the Scheme.

[91] Ibid., Para. 26.

[92] Para. 27 of the Scheme states too that the procedure at a hearing will be as informal as is consistent with a proper determination of the application.

[93] The Hongkong Scheme follows the British position. See para. 11 of the Eighth Annual Report of the British Scheme, Cmnd. 5127.

[94] Para. 26 of the Scheme.

[95] This is the result of a recent amendment introduced on 18th december, 1974. Ibid., para. 26.

[96] Cap. 91, S.5.

when determining applications in accordance with that procedure are clearly performing de facto quasi-judicial functions. Hence they can technically be described as inferior tribunals.

The reasons why the Legislative Council conferred powers of adjudication on the Scheme as a tribunal rather than on the ordinary courts may be stated positively as showing the greater suitability of a tribunal for such work. A tribunal can operate on a cheaper scale, with flexibility, informality and easy access to the parties. The parties could further rely on the expert knowledge of the Board members, and above all, on the speed of the measures designed by the tribunal for its work. Rapid payment of compensation is thus an essential feature of the Scheme. During the first year of the working of the Boards, 78% of the cases were settled within two months[97]. Prompt payment of compensation does much to remove the financial burden of the victim. It also makes the victim feel that his misfortunes have not gone unnoticed.

As tribunals, the Boards have imposed on them the rules of natural justice, which are minimum standards of fair decision-making required by the common law. The main provision of natural justice is "audi alteram partem." It means that nobody shall be penalized by a decision unless he has been given a fair opportunity to answer the case against him, and to put his own case. It is a matter of public policy and "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done[98]." If one is to try to achieve justice, one needs a proper form of judicial hearing; hence, the present procedures of the Boards. The duty to "act judicially" in accordance with natural justice may be inferred from the impact of a decision on individual interests, although the decision is analytically administrative[99]. The recent provision allowing legal representation before the Boards may be seen as a further extension of this principle.

The general working of the Scheme is kept under review by the government, and the Boards may suggest amendments to questions of policy or procedure in the light of experience[100]. Board members exchange views and discuss such matters at general meetings, thus co-ordinating the working of the Scheme. Suggested amendments are passed to the Secretary for Social Welfare, who puts them before the Colonial Secretary for approval. The Scheme is thus administratively amended.

THE COMPENSATION AWARDED.

The payment of compensation under the Scheme, after the decision concerning the amount is made by the Boards, is the responsibility of the Director of Social Welfare. The money paid forward is from money voted by the Legislative Council[101]. The Scheme operates on a non-contributory basis. It also operates on a non-means basis[102]. This is only fair. The Boards are authorized to distribute money in a fiduciary capacity, and the Scheme defines and limits the authority of the Boards to make any payments out to anyone.

Compensation under the Criminal Injuries Compensation Board.

The money paid under this Board is not paid on a common law basis as under the British Scheme, but in accordance to the Emergency Relief Fund Schedule[103]. When one considers the Emergency Relief Funds Schedule, it is only too obvious that the compensation payable under it is not as large a scale as under the common law.[104] The Scheme aims merely to deal with

[97] See para. 18 of the First Annual Report of the Hongkong Scheme.

[98] *R.* v. *Sussex J J, ex Parte McCarthy* [1924] 1 K.B. 256 at 259 per Lord Heward C.J.

[99] *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180.

[100] See Para 3 of the First Annual Report of the Hongkong Scheme.

[101] Para. 2 of the Scheme.

[102] *Ibid.*, para. 10.

[103] *Ibid.*, Note that this Schedule has recently been revised. Also previously it was named the Community Relief Trust Fund.

[104] The average payment for a non-fatal case paid by the Criminal Injuries Compensation Board is about $2,280. If a man received head injuries during a crime of violence which resulted in paralysis, under the Emergency Relief Fund Schedule, he would receive a maximum of $11,900, subject to whatever increases the Board members might make in their discretion. If damages were awarded on a common law basis, they could amount to $108,000, as in the case of *Wu Chun-keung* v. *Hui Man-kin and another*. See [1973] 3 HKLJ 340. This is however not always so.

the immediate needs of the victim. This is on the whole understandable because the Scheme does operate prima facie on a non-contributory basis. It must be noted too that the Board's procedure costs an applicant little or nothing; that he is put to practically no trouble and that he will know of the decision on his case within a relatively short time. As a matter of practice, a good proportion of the claimants are grateful in the circumstances to receive anything at all. One advantage of the Emergency Relief Fund Schedule is that it does result in uniformity concerning the amount of awards.

Compensation under the Law-Enforcement Injuries Compensation Board.

The money paid under the Law-Enforcement Injuries Compensation Board is assessed on the basis of either common law damages or in accordance with the Emergency Relief Fund Schedule, whichever is the greater [105]. This different basis is perhaps a result of the desire to modify public reaction against police actions. However, because of the two different methods of calculating compensation, the assessment of the award becomes unnecessarily complicated. Also the compensation awarded might still be less than that a court of law would award. This is because there will be no element included in the award comparable to exemplary or punitive damages [106].

Where the victim has died in consequence of his injuries, no compensation will be payable for the benefit of his estate, but the Boards will be able to entertain claims from his spouse or dependants. Compensation will, for this purpose, be payable to any person entitled to claim under the Fatal Accidents Ordinance [107], and subject to the same principles as under the provisions of that Ordinance [108]. In the Fatal Accidents Ordinance, a "dependant" is defined as "wife, husband, parent, child or any person who is or is the issue of a brother, sister, uncle or aunt." [109]. The Scheme states that any person dependant on the victim who falls outside this definition of the immediate family members, will be eligible to apply for compensation under the Criminal Injuries Compensation Board, which will probably be less. This provision shows once again the cautious application of the Scheme, since there are many persons who derive support from or are sustained by the victim, but who fall outside the definition of the term "dependant" in the Fatal Accidents Ordinance. It is submitted that the definition of the term "dependant" should be extended to cover the real person who is sustained by the victim to extend the scope of the scheme. Of course, such an applicant must be able to prove his dependance on the victim.

The Recovery of Compensation Awarded.

Since the victim seldom brings a civil action against the offender himself, one way in which the Boards' powers could be extended for the benefit of the funds made available would be to give them the power to bring proceedings in their own name or in the name of the claimant against wrongdoers for the recovery of compensation. It might be argued that even if such a power were granted, only a very small percentage of the wrongdoers might be worth suing [110]. However, for the sake of making some recovery, the powers and rights of the Boards could usefully be extended to allow for this possibility. As it is, punishment of the wrongdoer, operating outside the notion of punitive restitution, can only achieve an awareness on the part of the criminal that he has wronged the state: he will be dulled to the wrong he has done to some individual. Hence it is a principle of elementary justice that he should be made to pay compensation for the victim's injuries.

Where however, such a victim has brought

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[105] Para. 17 of the Scheme.

[106] Ibid., para. 18 (b). For the assessment of compensation where the victim is alive, see para. 18 (a).

[107] Cap. 22.

[108] Para. 19 of the Scheme.

[109] Cap. 22, s.2.

[110] The British Scheme has calculated that an average of less than three percent of the wrongdoers were worth suing.

an action in respect of injuries for which he is claiming compensation, and has obtained judgment for a sum and received the money due under the judgment or otherwise, no award will be made by the Boards. Future payments made under any judgment or settlement to the victim too will be covered by an undertaking on the part of the victim to repay the Boards any compensation they are awarded [111]. Compensation will be reduced by any sum which the victim has received in respect of his injuries. The concept of dual compensation is not recognised by the Boards [112]. However, payments made to the applicant under a contract of insurance or charitable payments or awards for gallantry will not be taken into account [113].

THE LIABILITY OF THE TWO BOARDS.

The Criminal and Law-Enforcement Injuries Compensation Scheme was set up by being announced in the Legislative Council. It is not formulated on a statutory basis. This is rather a novel development in constitutional practice: to govern by public statement of intention made by the executive Government instead of by legislation. The Scheme was introduced informally in this way because of the *urgent desire at the time for it to come into being quickly.* Further, a non-statutory Scheme can be more flexible [114]. It might be argued that there would be an advantage in a statute-based system in that the ambit of the system could be more readily ascertained. However, the provisions in the Scheme as it exists provides clearly all the necessary terms of reference. No great advantage would be gained if the Scheme were made statutory. The fact that it was set up by the Government does not render its actions any the less lawful.

The fact that the Scheme was set up merely by being announced in the Legislative Council means that changes can be introduced in the same manner without any of the difficulties which accompany amendments to legislation. Thus the Boards are responsible to the Legislative Council alone. The Executive could alter its instructions to the Boards in any way it chose [115], and the courts would have no jurisdiction to call in question the Government's power to do so.

Paragraph 4 of the Scheme states too that the Boards will be entirely responsible for deciding what compensation should be paid in individual cases, and the decision of the Boards will be final. Lord Parker C.J. has stated: "A determination of the Board gives rise to no enforceable rights, but only gives the applicant an opportunity to receive the bounty of the Crown[116]." It was however decided in *Reg.* v. *Criminal Injuries Compensation Board, ex Parte Lain*, that this does not however mean that there is no right of appeal to the courts from a decision of the Board. The jurisdiction of the courts is supervisory, as opposed to the appellate jurisdiction enjoyed by a superior court over an inferior one, and this supervisory jurisdiction of the courts is exercised by way of the writ of certiorari. The Hongkong Scheme has adopted this position too [117]. Certiorari applies against all bodies of persons of a public, as opposed to a private or domestic character [118], having power to determine matters affecting subjects and a duty to act judicially [119]. Certiorari is issued not only to bodies set up by statute, but to bodies whose authority is derived from the prerogative. This is because it cannot be suggested that such bodies had unlawfully usurped jurisdiction. They act

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[111] See para. 28 of the Scheme.

[112] Workmen's Compensation cases are clearly an exception to this rule.

[113] Note that applicants eligible under the Fatal Accidents Ordinance do not have to account either for any benefit, pension or gratuity which is paid as a result of death. See s. 9 of that Ordinance.

[114] The British Scheme too was set up on a non-statutory basis, i.e. on an experimental basis so that it could be modified later. See Parl. Deb., H.C., Vol. 694, Col. 1129. After nearly ten years' working, the Home Secretary announced in the House of Commons on 17th April, 1973, the establishment of a Working Party of officials to carry out a review of the Scheme in the light of its operation to frame proposals for placing it on a statutory footing.

[115] Ante: Footnote 87 at P. 46.

[116] Ante: Footnote 88 at P. 880.

[117] See para 32 of the First Annual Report of the Hongkong Scheme.

[118] The two Boards in Hongkong are recognized by the Legislative Council. This confers on them a public or official character.

[119] *Rex.* v. *Electricity Commissioners, ex parte London Electricity Joint Committee* (1920) Ltd. [1924] 1 K.B. 171 at 204-5 *per* Lord Atkin.

within lawful jurisdiction, albeit from executive authority[120]. Further the tribunal need not be one whose determinations give rise to any legally enforceable rights or liability[121]. Thus the ex gratia nature of the Scheme, which confers virtually unfettered discretion on the tribunal, is not relevant to the scope of judicial review. If the procedure of the Boards lacked any feature of a judicial proceeding, then a wide discretionary power exercisable on policy ground[122] may have inclined to hold that the act or decision impugned was "purely administrative" and thus not reviewable by certiorari[123]. However, such is not the case with the Scheme in Hongkong, because the Boards do operate on a quasi-judicial basis.

This supervisory jurisdiction of the courts is in fact provided for under Order 53 of the Rules of the Supreme Court, which further provides that applications for an order of certiorari should be brought within six months of the decision of the administrative board against which an order is being lodged[124]. Judicial review by means of certiorari, however, may be invoked only in limited circumstances. Certiorari will issue to quash a decision of the Boards only on the grounds of excess or want of jurisdiction; for the breach of the rules of natural justice or for an error of law on the face of the record. Further, the writ of certiorari, a "prerogative" order, is a discretionary remedy of the courts. Save in very exceptional circumstances, a person cannot demand them as of right when he has made out a case of unlawful action or omission. Locus standi to bring an application for certiorari is limited usually to "persons aggreived". Thus this remedy is not widespread.

On the whole then, the Boards are completely responsible for the determination of claims, under the guidance of the Legislative Council with regard to matters of policy. Dissatisfied applicants may apply for an order of certiorari. However, the scope of this remedy is very limited. The Boards are thus able to operate very flexibly. Certiorari has not yet been sought to quash a decision of the Boards in Hongkong. It is clear that in Britain, whenever certiorari is applied for, the courts tend to take a wider interpretation of their Scheme, slowly trying to control it[125]. It remains to be seen whether the Hongkong courts will so act in such a manner. Some people have argued for a definite system of appeal to the courts. However, this would thwart the objective of the Scheme – to operate informally and efficiently.

SOME SUGGESTED AMENDMENTS TO THE SCHEME.

As the Law-Enforcement Injuries Compensation Board deals with a very limited scope of cases, and in practice, it operates together with the Criminal Injuries Compensation Board as if administratively grouped under a single Board, it might be tidier to see the two boards merged into one. Further, it is proposed that the Boards should adhere to the doctrine of binding precedent, to decide cases in accordance to the existing rules. Two-member Boards should be bound by the decisions of three-member Boards, but not by the decision of fellow two-member Boards. Thus certainty and precision would be gained regarding decisions of the Boards. Flexibility too would be achieved by the possibility of decisions being overuled and distinguished.

The Criminal and Law-Enforcement Injuries Compensation Scheme awards compensation at present to the victim, or if he has died, to his spouse or dependants[126]. Would it not be more fair if persons who have incurred expenses as a result of the victim's injury or death could also be reimbursed, even though in a limited fashion from the compensation awarded to the victim. There is no reason why "good Samaritans" should be left with a raw part of the deal[127]. These and the various dissatisfactory

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[120] See *Reg.* v. *Criminal Injuries Compensation Board, ex parte Lain.* Ante: Footnote (88).

[121] *Rex.* v. *Boycott, ex parte Keasely* [1939] 2 KB 651 at pg. 669.

[122] As distinct from a limited or judicial discreation: *R.* v. *Manchester Legal Aid Committee, ex parte Brand* (R.A.) & Co. [1952] 2 Q.B. 413.

[123] Certionari was ostensibly refused on these grounds in *Venicoff's* case [1920] 3 KB 72.

[124] Rules of the Supreme Court, Order 53, r.2.

[125] See *Schofield's* case; Ante: Footnote (41) and *Ince's* case; Ante Footnote (40) among other cases.

[126] Paras. 5 and 15 of the Scheme.

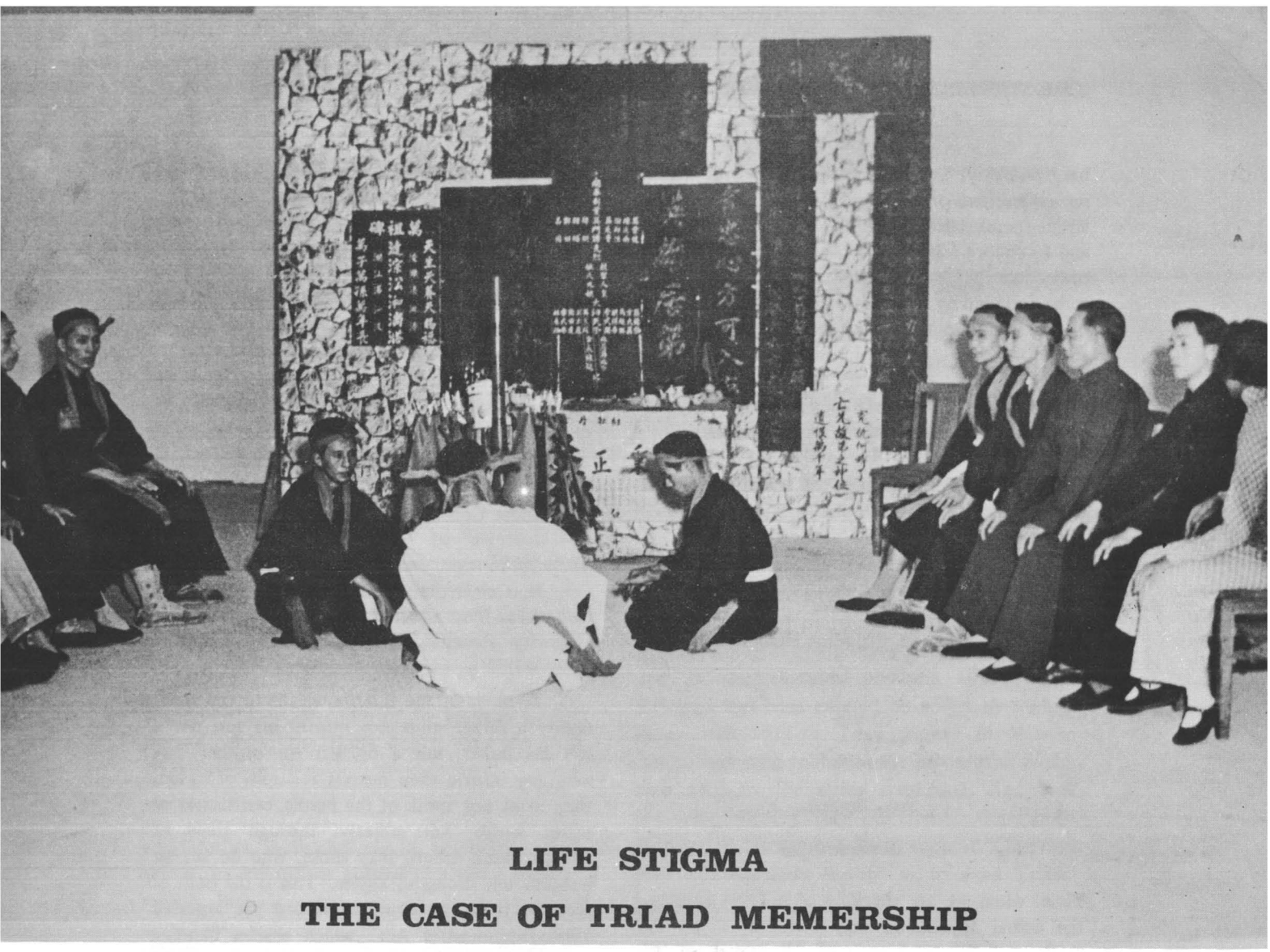
[127] This has been provided for in s.4 (1) c of the Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968.

paragraphs which have been discussed above, could be amended or adopted to the benefit of the Scheme.

THE VALUE OF SUCH A SCHEME.

As the Scheme has been operating only for a short time, it is as yet difficult to ascertain its precise value. The extent to which the existence of the Scheme is still unknown to the public is undoubtedly a problem. The Scheme requires more publicity. Television is today easily the most effor it. In its first year the Scheme only managed to reach 10.5% of the people actually eligible for compensation[128] . However, as the British Scheme, after an operation of ten years, has as yet only managed to attract 17% of the total people eligible, this is not really too bad a beginning. No one can fail to feel deeply what a worthwhile part is played in the full administration of justice by this power to award compensation. It is to be hoped that more people will come forward to benefit under this Scheme.

[128]Only 282 out of the 2665 eligible victims applied for compensation to the boards.



LIFE STIGMA

THE CASE OF TRIAD MEMERSHIP

Ngan On Tak

INTRODUCTION

The term "Triad Society" is frequently employed to denote two quite different things. As a generic term, it embraces all Chinese secret societies of similar nature. In its more narrow sense it refers to a 'particular' Chinese secret society. However, due to the disintegration of the formal triad structure, 'Triad Society' is more frequently used as a generic term. This usage was adopted by legislation under the Societies Ordinance that it is an offence to be a member of *a* Triad Society.

I. History and Organization[1]

There were many secret political organizations in ancient China. Stanton traced the forerunners of Triad Society to the chaotic period between the Western and Eastern Han Dynasties (A.D. 21-25). Suffice to say that Triad Society

[1] William Stanton's 'Triad Society' (Hong Kong 1900), gives a full and orthodox account of the traditional Triad Society. Schlegel's 'The Hung Leaque' (1866 Bataria), contains an authoritative account of triad ritual and nomenclature. Morgan's 'Triad Society in Hong Kong', (Hong Kong 1960) is of particular local interest. For Malayan triads, see Comber's Chinese secret societies in Malaya, (N.Y. 1959). And Blythe's The Impact of Chinese Secret Societies in Malaya, (O.U.P. 1960). Triad Society is probably a corruption of Shum Hop Hui (Three United Society) or more probably, Shum Dim Hui (Three Dots Society). The 'trinity' referred to are Heaven, earth, and man. Another commonly used name is Hung Mun (The Deluge, or Righteous Leaque). Layman usually refers them as Hak She Hui.

has, probably, a long historical link with other secret political organizations. In fact, its avowed aim is (or was) to overthrow Ch'ing (Manchurian) and to restore Ming (Han). And according to their own somewhat mythological account, it was said to be founded by five monks of Shao-lin Monastry in Fukien, who were relentlessly persecuted by Emperor Kanshi, after winning a battle for the Emperor. They were later known among the Triads as the Five Patriarches and the thirty-six oaths bequeathed by them is of greatest authority among Triads.

The following diagram will serve to indicate the organization of the society:

Triad Society
|
Five Lodges

Kwungtong, Kwungsi, including Hong Kong under second Lodge
|
Group
|
Branch
|
Sub- Branch
|
Sections

Thus, when we are speaking of a Triad Society, the actual appellation may turn out to be 'A' section of 'B' sub-branch of 'D' Branch of 'E' group of the Second Lodge. Or, more usual than not, it is a splinter group from old society without recognition, and continues to adopt the Triad nomenclature. More still, it could just be a newly formed group without any connection with the society whatsoever, but adopting their nomenclature.

The four basic ranks commonly found in Hong Kong, in order of seniority are:

White Paper Fan, code number 415 – ritual teacher, usually chosen among the more educated, responsible for accounts and plannings.

Red Pole, code number 426 – disciplinary officer, and leader of fighting team, since much depends on violence, is now often headman of the society.

Grass Sandal, code number 432 – a rather junior office-bearer, engaged as messenger, negotiator and agent.

Ordinary Member, code number 49.

II. Some General Considerations

(i) *Oaths*

It is clear that the ultimate sanction lies on the oaths. The administering of oaths without authority alone is an offence[2]. The following oaths would be of particular interest:[3]

Fifth 'Of the internal affairs of the Hung family a father must not inform his son nor a son his father, nor a brother his brother, nor may any inform their nearest relations of it; and they must not speak of the books, certificates or secret words, nor secretly, through greed of money, teach others; may those, who do so, die beneath ten thousand knives.' This is the oath of secrecy. It is interesting to record the repealed Unalwful Societies Act[4] which besides banding certain political societies, went on to provide, "and also every other Society now established, or hereafter to be established, the Members whereof shall, according to the Rules thereof, or to any Provision or Agreement for that purpose, be required or admitted take any Oath or Engagement, which shall be an unlawful Oath or Engagement within the Intent and Meaning of (Unlawful Oaths Act)." Bosanquet J.'s Case

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[2]Oaths and Declarations Ordinance, Sect. 9(1) "No person shall administer or receive an oath, affidavit or affirmation relating to any matter or thing in respect of which that person have no jurisdiction by some enactment. (a) Any person who wilfully contravenes sub. sect. (1) shall be guilty of an offence and shall be liable on conviction to a fine of one thousand dollars."

[3]William Stanton's rendering. Set out full, with the Chinese version in the appendix to his book, 'The Triad Society' Supra Cited.

[4]1799 (39 Geo. 3C.79) The whole act was repealed by Criminal Law Act, 1967 Section 13 Schedule 4, part I, as an obsolete offence.

against such confederacy, though expounded two centuries ago, is still compelling, ". . . One of the obvious consequences of such confederacies being to deprive the state of the benefit of the testimony of those who are engaged in these – a state of thing injurious to individuals, subversive of public order, and striking at the very existence of the state, by withdrawing the allegiance of the subject from the laws of the land to the secret tribunals of unlawful societies, constraining the conscience of oaths, and seeking to obtain their objects, whatever they might be, by popular intimidation."[5]

Eighteenth: 'If any be arrested by mandarin soldiers, they must regard it as a misfortune from heaven on themselves, and not turn round and incriminate their brethen of the Hung family; nor may they, to pay off old grudges, wrongly incriminate their brethen. If any carelessly incriminate their brethen or disregard the proper spirit of the patriotic bonds, formed within the Hung doors, may them be annihiliated by thunder from all points.'

Twenty-first: 'If, whether in the provinces or in foreign places, an official letter arrives, or any officer pursues to arrest a brother, inform him at once, for his escape is most important. May those, who refuse to give such information, die beneath ten thousand knives.' These two, clearly, amount to interference with the machinery of justice.

(ii) *A suggested Classification of Triad Societies*

Dialect groups: This is most common among overseas Chinese. Fok Yee Hing consisted mainly of Hoklo and Yee On mainly of Chiu Chau. Many fights were occasioned by such groups in Malaya, that they provoked such a remark: 'In Hong Kong riots are unknown chiefly because the mass of the inhabitants are Cantonese. Limit the immigration of Chinese to the Straits from one province in China and peace would be the result.'[6]

Guilds: Fok Yee Hing, in fact, was registered as Fok Yee Hing Industrial and Commercial General Association. Ghee Hin (or in Cantonese Yee Hing) of Singapore consisted mainly of Chinese herbalists.

Political Groups: The most powerful and the first purely Hong Kong Traid Society is Wo Group which was established by Dr. Sun for the political cause of overthrowing Manchurian rule. In Singapore, a Commission's report confirmed that in the elections of June 1957, undue influence had been exerted on voters by triads.[7] From 1909-1911 a Triad society in Malacca carried out gang robberies the proceeds of which were sent to China for revolution. And even though ideologically different, Communist guerrilas in Malaya had Triad support. Chairman Mao was ingenious enough as to exalt Triads' revolutionary tradition.[8]

Benevolent Organisations: Mutual help among brethen is obligatory by the oaths. Wo group did operate some Death Gratuity Associations. Mutual help, is however, more prominant among overseas Chinese. So in a memorial to the Governor and legislature, the office-bearers of Gheehin, Penang, besides disclaiming any Triad tint, went on to account the charities they had endowed: land given to

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[5] *R.v. Dixon and another* 6 C. & P. 602

[6] Vaughan, The Manners and Customs of the Chinese of Straits Settlement, 1879.

[7] Report by Commission of Inquiry into Corrupt, Illegal, or Undesirable Practices at Elections.

[8] "The members of the secret societies (in Hunan) have all joined the peasant associations in which they can openly and legally play the hero and vent their grievances, so that there is no further need for the secret 'mountains', 'lodge', 'shrine', and 'river' forms of organization. In killing the pigs and sheep of the local bullies and bad gentry and imposing heavy levies and fines, they have adequate outlets for their feelings against those who oppressed them." Selected Works (1964), Peking. This quotation has been used in propaganda during the Malayan Communist Uprising.

Government for a pauper hospital, land set aside for cultivation by the poor; and they always provided coffins for the poor. A stone commerating the gift of land is still to be found in Penang General Hospital. It is certainly of great interest to note that a great benefactor of this University, Mr. Loke Yew, was a leader of Ghee Hin in Larut[9].

Communal Groups: It is quite an exception to find members other than Chinese in Hong Kong, though in a few youth gangs which adopted some triad rituals are some Eurasians, Portuguese and Indians. In Malaya, as early as 1867 there were two Malayan Triad Societies, which participated in a riot.[10] But they were better regarded as subsidiaries of Chinese societies. There were however, some like Layang-Layang, which invented a Malayan version of Triad rituals. Their initiates stood with a copy of Koran on heads while swearing the oaths, after which they drank water.

Sports and Cultural Association: Ching Nin Kwok Ki Sh'e was formerly a Kung-fu association of local coolies of Government Hospitals in Western District, Hong Kong. A Malayan Triad Society assumed the name of Darul Ma'amur Football Club. There were also musical clubs and cultural societies in Malaya, which turned into Triad Societies.

Association on the basis of Clan is not common though there are a few in Malaya. The further classiciation into religious and criminal groups will seem redundant, for they are common to all.

III. The Laws Governing Triads

Ordinance 1 of 1845, three years after the establishment of the Colony, expressly declared Triad society and other secret socieities unlawful. Under Ordinance 12 of 1846 the punishment was branding under left arm and deportation. But it was not applicable to other secret societies. It was further restricted to active participants in some unlawful acts arising from the association. Members joined under influence of terror or through ignorance of the design of the society were expressly exempted.

From thence on, Governor in Council has been empowered to declare a society unlawful if its activities are prejudicial to public peace or welfare. Presently the law is to be found in Societies Ordinance. Sub-section 2 of section 18 expressly declared every Triad society to be unlawful and by sub-section 3 every society which adopts triad rituals is deemed to be a Triad society.[11] Section 19 and sub-section 2 of section 20 made it an offence to be an office-bearer and member, respectively.[12]

In French and Dutch possessions in South-East Asia, the settlements were divided into districts, each under a Chinese headman who invariably was also headman of Triad society, responsible for the order of his district and the movement of the Chinese in it.

The history in Malaya and Singapore, formerly the Straits Settlement, is a more varied one. Deportation had been an effective weapon. But, not unlike Hong Kong, there is the problem that China is unwilling to accept any deportees. There was also the problem of the member being a citizen. Under 1933 Restrictive Residence Enactment of Malaya, such persons could be confined in some more remote district of the Federation. But this seems inapplicable to a small area like Hong Kong. In Hong Kong, however, there was the detention under Emergency (Dentention Ordinance) Regulations 1956. But this was an emergency measure. In Singapore under the Banishment (Amendment) Ordinance,

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[9] Blythe, The Impact of Chinese Secret Societies in Malaya, OUP, 1969, p. 260.

[10] White Flag Society "23. The object of the Society at the time of its establishment was religious one, viz., to attend and assist at the religious ceremonies of its members, such as marriages, funerals, circumcissions etc., and its rules contained nothing bad or injurious to the public. Of late years the religious matters have been neglected . . . ." "25. This Society is composed of Malays and Klings, and during the latter riots took place with the Ghee Hins . . . ." "26. The Red Flag is another Society of Malays and Klings, and was established about eight years ago for religious purposes, but like the White Flag, it has lost its religious character, and adopted the same bad practice." Report of the Commissioners appointed under riots at Penang cited in Chinese Secret Societies in Malaya, by L.F. Comber, New York, 1959.

[11] ss. 2 reads, 'Every Triad Society, whether or not such society is a registered society or an exempted society and whether or not such society is a local society, shall be deemed to be an unlawful society.' Sub. sect. 3 'Every society which uses any triad ritual or which adopts or make use of any Triad title or nomenclature shall be deemed to be a Triad Society.'

[12] s. 19 'Any office-bearer or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any unlawful society shall be liable on conviction on indictment to a fine of 5,000 dollars and to imprisonment for 5 years.' Sub-sect. 2, sect. 20 'Any person who is or acts as a member of a Triad society or professes or claims to be a member of a Triad Society . . . . shall be guilt of an offence and shall be liable on conviction on indictment.'

1960, British subjects were also liable to be deported and the Governor was empowered to deprive a Singaporian of his citizenship. In Hong Kong such power is to be found in Immigration Ordinance, but they are of general application.

Registration: Under the Ordinance XIX of 1869 of Straits Settlements all societies were required to register and Triad societies were registered as Dangerous Societies. They were liable to compensate any damages resulting from their gang fights and riots. It was not until 1890's Societies Ordinance, which was based on Hong Kong's model, did Triad society being declared unlawful and adoption of Triad cults forbidden.

Other special measures: Under an act for the Better Preservation of the Peace, 1865, legal cover was given to the practice of swearing in the headman of the secret socieites at the times of riots as special constables. This proved to be effective. Under section 75 of Criminal Procedure Code of Malaya, persons could be bound over if they are likely to commit a breach of peace. Under the Act for Prevention of Crime 1959, the identity cards of members of secret socieites were to be marked with a large black cross. Should they be convicted of any offence during the registration, they were liable to double penalty and whipping. But provision was made for appeal to Minister against registration and for removal of name after a period of good behaviour. Corporal punishment used to be an effective weapon both here and in Malaya, but it is unlikely that it would be brought back, for it is considered too inhumane for any civilized community.

IV. Judicial Notice and Life Stigma

Nowhere in the Socieites Ordinance is Triad society defined. Though in section 2(1) of the Ordinance, Triad ritual has been defined as 'any ritual and any part of any such ritual'. This ultimately has to depend on what a Triad society is. Thus it is clear that much will depend on expert evidence, and if the practice is notorious enough, on judicial notice. Section 39 expressly allowed magistrates to refer to published literature in this field.[13] Blair-Kerr J. (as he then was), gave his opinion on this section thus: "Clearly such publications stand on a different footing from textbooks on technical subjects. To take as an example a textbook on Medical Jurisprudence: An expert witness may be asked whether he agrees with a particular passage in such a book; and, upon his doing so, that passage becomes part of the evidence of the witness. On the other hand a book on Triad Societies which the Magistrates considers to be of authority on the subject may be referred to by him for the purpose of evidence, whether Counsel has referred to the book or not, and whether or not an expert witness is called to testify."[14] Here, there could be no doubt that Blair-Kerr J. was referring to judicial notice.

As to expert evidence, the situation could be quite unsatisfactory, especially in bottom-line cases. In *Lui Chik-wah* (Cr. App. 202/75, Sup. Ct.) the appellant, when questioned by a police constable, admitted that he is a member of Tung Lun She and that the said Tung Lun She is a Triad Society. The prosecution, quite exceptionally, failed to call expert evidence to testify that the said Tung Lun She is a triad society. On appeal, McMullin J. held, "... I take the view that the Crown failed to prove beyond reasonable doubt that what the appellant had done, as admitted by him in his statement, did amount to being a member of a Triad Society notwithstanding that the appellant, if his statement is taken at face value, evidently thought it was such and that he had joined it." The learned judge thought that expert evidence or consultation with textbook is desirable in determining whether a society is a triad one or not, especially in such a case where the society involved is not well-known. It follows, one may venture to think, that in such a case, expert evidence would be the determinant of the whole case. But in such a delusive field the capricious element involved is quite obvious. It is quite different from scientific fields, where there is a consensus on acceptable qualifications of experts, and where the issues to be answered by experts are, in most cases, empiric.

Gould J. in *Chan Kwong-nin*, decided that triad membership is a continuing one, but he did

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[13] The book expressly named is Stanton's 'Triad Society', supra cited.

[14] *Tam Hon Ho* (1967) H.K. L.R. at 50.

not give reason for holding so, and while admitting there was no direct authority on this point, drew an analogy from common nuisance and held that the plea of autrefois convict is no defence.[15] Hogan C.J. in *Leung Hon-cho* said that the 'life stigma' was "The generally accepted view of triad ritual."[16] And Rigby J. (as he then was) in *Tam Hon-ho* said, "the invariable code is once a member always a member."[17] In the same case, Blair-Kerr J. quoted Morgan, "This question was discussed with leading triad officials in Hong Kong and all categorically stated that once a person has been initiated into the Hung Mun only death can release him from membership."[18] The judges seemed to have taken judicial notice of such triad practice. But judicial notice could be an unruly horse.

It is to be lamented that the court should stamp such a life stigma on the accused. Morgan, in writing triad's cults, gave the following warnings: "The mere fact that the society is a secret organization will always have suspicion that certain portions of the ritual may never be revealed to the uninitiated or committed to paper for possible discovery by the enemies of the society. The persecution of the triad society from its inception and the scattering of its earlier members throughout the vast area of China raise grave doubts that the original rules of the society can ever be uncovered. The vast membership and multiplicity of triad brothers, not only in China but in due course in every country in which Chinese settled, must invariably result in distortions and derivatives which will now be peculiar to that particular territory wherein the branch is situated."[19]

Thus the supposed rule may not be the true rule, and the rules of one locality or period may not be accepted elsewhere or at another time. For the court to reach such an important, and obviously unjust and dangerous, decision in such an uncertain field is surely to be regretted. Yet, the definition of Triad ritual has been extended to anything resembling, or any part of such, to ease the task for the prosecution.[20] Simplified ceremony is a current usage, a product of severe measure from the authority. And yet the legislature accepted such simplified ritual without questioning whether it is in accordance with accepted triad tradition. Could it not be that there are current practices by which one might dissociate from such stigma keeping in mind that initiation ceremony has been simplified? And should not the law take cognizance of such as well, if any, so as not to be highly prosecution-minded?

There seems to be three ways of showing dissociation:

(i) *Proving the extinction of the society:* The society is a secret one; its existence and activities may not be known to the public or even the police, and the office-bearers are unlikely to be willing to give testimony. There seems to be an insurmountable difficulty of producing acceptable evidence. Granted that a society is moribund as opposed to inert, the distinction itself is difficult to prove, there is always the chance that a splinter group or others may revive it. Is the accused to be liable as well? Given that it could be shown that a society is disbanded, that does not amount to the disbanding of *the* society. As pointed out above, the so-called society may turn out to be a branch only. The extinction of a branch need not amount to disbanding of the group nor the lodge, let alone *the* Triad Society. The draftman was, however, careful enough to use '*a*' instead of '*the*' Triad Society in the Ordinance.[21]

(ii) *Discharge and expulsion by the society:* There has been no decided case on this point. Nevertheless, in a case, a magistrate seemed to have accepted a discharge of a protege by his patron.[22] The police protested but could not point to any known triad rule to the contrary. When

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[15] (1957) H.K.L.R. 454

[16] (1967) H.K.L.R. 633 at 640.

[17] (1967) H.K.L.R. at 47.

[18] Morgan's 'Triad Society in Hong Kong', 1960. quoted in (1967) H.K.L.R. at 62.

[19] Morgan, 'Triad Society in Hong Kong', Introduction.

[20] s. 2(1) Society Ordinance.

[21] See s. 20(a) 'Any person who is or acts as a memberrof *a* triad society'.

[22] *Shum Ming Kit* C.B. 30306 of 1973 before Mr. Griffith.

asked by the magistrate whether this is a common practice, the witness replied that he could not say for others, but as to his own society, 14K, the second largest Triad Society here, this is the practice. His authority was based on the authority of a 'patron' over his 'protege'.[23] And in an interview with him, a White Paper Fan,[24] it was disclosed that the most usual practice of dissociation is by non-participation of the activities for a recognized time. Provided he does not transfer to another society and does not act against their interest, he is usually unmolested. However, in *Keung Kwok-fuk*[25] the appellant was charged with others for threatening a youth who had dissociated from Wo Shing Wo for sometimes. The court approved the observation of the magistrate, that "... in the conditions at present obtaining in Hong Kong the pressure to which youths who are inclined to be lawabiding are subject by those who are not so inclined can well be imagined." There is, also, a practice of expelling disloyal members whose conduct may not deserve punishment. Some societies may demand a sum for resignation. This is said to be an analogy of "cutting fodder" (割馬草) the sum payable when transferring to another society. The difficulty here is that the head may not be willing to act as a witness, and such practice may not be accepted by courts.

(iii) *By helping the authority:* This is certainly the most ideal and was accepted by Hogan C.J.[26] But as pointed out by Rigby J. that given the viciousness of the societies, "the personal risks inherent in such a cause of conduct is obvious".[27]

V. Should mere membership be an offence?

The picture as painted above seems to be a dim one for those seeking to prove discontinuation of membership. One way out is not to convict for mere membership.

Case for: Blair-Kerr J. stated the case thus: 'Since 1845 the object of all legislation against these societies has been not merely to keep them in check, but to break them and utterly eradicate this influence.' and that mere membership is expressly ordained as an offence. To hold otherwise would defeat the intent of the legislation.[28] Hogan C.J., based on policy ground, said, "So long as it exists as an entity it is of course a potential threat ... membership ... is not unlike a gun trapped to your hip, something which you may never need to use, but its mere presence and the potential threat implied by it may enable you to obtain advantage which you would not otherwise obtain."[29]

Case against: Counsel for the Crown argued in *Tam Hon-ho*[30] that since it was a secret society, it was difficult to prove the activity of a member. Therefore it was for the accused to prove that he is not an active member. Rigby J., dismissed the contention as contrary to 'the accepted principle of criminal jurisprudence.' and approved Briggs J.'s view that in addition to mere membership, 'the accused should have been involved in some Triad activities reasonably recently or has encouraged such activity. I mean something at least in the nature of the payment of dues to the Society, or attendance at ceremonies or meetings of the society.'[31] It is to be noted that Rigby's judgement was a dissenting one and Briggs J's judgement was subjected to severe criticism.[32] Recently Pickering J. held that, a sentence of imprisonment for a state of affairs over which the appellant had no

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[23] patron: (保家) protege: (學生)

[24] The witness Mr. Y, has been convicted by court as an office-bearer of 14K. He was probably treated as an expert for he produced his former conviction as an office-bearer when giving evidence for the defence. His post is considered as senior, especially 14K is a large organization.

[25] Cr. App. 474/72.

[26] *Leung Hon Cho* (1964) H.K.L.R. at 640.

[27] *Tam Hon-ho* (1967) H.K.L.R. at 42.

[28] *Yuen Chau* (1964) H.K.L.R. at 95.

[29] *Kam Moon* (1964) H.K.L.R. at 623.

[30] (1967) H.K.L.R. at 41, the Crown Counsel was Mr. Addison

[31] *Wong Hon Sang* Cr. Ap. 472/66

[32] Per Hogan C.J. ". . *Wong Hon Sang* case cannot be supported but that every case must depend on its one particular facts . . ." per Blair-Kerr J. '. . . I find myself quite unable to agree with the above quoted passage from (Wong's case)'

control and in respect of the same offence for which he had previously been bound over was wrong in principle.[33] This case did remove the danger of police harassment and corruption. The injustice of holding otherwise is obvious and there is little wonder that it should be welcomed.[34] It is submitted that Pickering J.'s decision would not defeat the intent of the legislation, for mere membership is still an offence, the only change is: that autrefois convict is a good defence to the charge of mere membership. Though the decision is to be applauded, one should not overlook that the 'life stigma' has been left intact, only that one has a defence to the subsequent charges of being a member.

There is an anomaly in Sect. 28 of the Ordinance. By sub-section 2 anyone in possession of documents relating to unlawful society is further presumed to be an office-bearer. This gives the prosecution a discretion to prosecute either under sub-section 1 for membership or under sub-section 2 for office-bearer, on the same facts.[35] This section is, however, of general application and is not restricted to triad societies.

VI. Problems in evidence and sentencing:

Owing to severe measures, rituals are simplified and there is a general lack of evidence. The complaint
governing triads is not different from Hong Kong, could well have been the case for local Force. 'Although some of the members were full initiates of the Triad Brotherhood, many were not, nor was there any form of ritual initation into the group which could be brought within Triad section of the Ordinance ... Though some of the societies had headquarters ... they are devoid of furniture or any distinguishing feature. Without some sort of documentary evidence it was practically impossible to prove that any agregation of individuals consituted a society within the meaning of the law.'[36] In Hong Kong the initiation ceremony was so simplified that it could be carried out in a cafe without attracting others.[37] A vicious chain action is now on stage. Severe measures on the police's part have led to simplification of rituals so as not to attract attention. The difficulty of obtaining admissible evidence is relieved, at least partly, by the extention of the meaning of 'triad ritual' to any part or anything resembling such. And this is to be ensued by allegations of police malpractice. The rituals have been so simplified that it is now quite rare to find triads caught red-handed in the midst of a ceremony. Consequently, self-admission and claiming before others as triads are, in practice, the usual ways that triads could be charged. But this had lead to allegations of police brutality in securing admission. And it is to be reminded that many of the so-called triads are teenagers, who could have joined under terror or in ignorance of their design. It is obviously unjust to stamp one with a life stigma for undergoing a so-called initiation ceremony which may be prompted by a momentary impulse or ignorance. And, indeed, most of the youth gangs are only quasi-triad societies. They may have nothing whatsoever to do with the triads, save adopting their rituals to enhance their status. It is also to be remembered that under the Ordinance 12 of 1846, members joined under terror, or in ignorance of their design were expressly exempted. And the recent trend towards juvenile offenders has been more of corrective than punitive nature. It would certainly call for a strong justification for imposing the life stigma on those who could have known nothing about triad history, rituals nor orgainization.

Owing to its secret nature, and the general lack of evidence, the judges have to depend on their own knowledge. Blair-Kerr J. lamented, '...

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[33] *Kwan Lam* Cr. Ap 339/74, Also *Tam Hon Ho* supra cited. H.K.L.R. 329, for Mr. Downey's Commentary.

[34] H.K.S. and S.C.M.P. May 31, 1974.

[35] Societies Ordinance S.28 (1) 'When any book ... of or relating to .. any society it shall be presumed that the person is a member ...' (2) "When any book ... of or relating to ... any society it shall be further presumed .. that such person assists in the management of such society'.

[36] Blythe, The impact of Chinese Secret Societies in Malaya. p 467. Supra cited.

[37] It is of some interest to record that tatto has been offered as evidence in Singapore. It was perhaps fortunate for the police that in early cases of this nature the accused pleaded guilty, for it might have been difficult to prove that a particular design was in fact used only by members of a certain society.

a matter for regret that sworn evidence is seldom called for the purpose of assisting the court in the matter of sentence.'[38] And although reference to published literature is allowed[39] the only reasonably recent one and of local interest is that of Morgan's, published in 1960.[40] Blair-Kerr J. in 1966 was able to say, '. . . it does not necessarily follow that the position regarding any particular triad society is exactly the same today as it was six years ago.'[41] The problem is aggravated by the admissibility of evidence. '. . . Being a secret society, activities may occur which are not known to the police, or, if known may not form the subject of evidence that can be produced in court.'[42] Indeed, most reported triad cases are appeal against sentences.[43] Mr. Blackwell, magistrate, once took into consideration, while sentencing, that triad activities in Tsuen Wan have reached 'epidemic proportion', and his decision has been acclaimed by public and the press. On appeal, Pickering J., remarked that Blackwell's decision represents a social and professional conscience. '. . . but let not such praiseworthy concern become an instrument for automatic heavy sentence.'[44] In *Kwan Lam's* case, 'The learned magistrate appears to have been influenced by the fact that the appellant had two previous convictions for violence, "and much violent crimes are now perpetuated by persons who are triad members." and this is at least a suggestion here that the appellant was being sentenced either for his past record or for general activities of triad members . . .'[45] This trend of sentencing is not in accord with modern trend. 'Imprisonment is increasingly coming to be regarded as a sentence to be imposed only where the other methods of treatment have failed or are considered inappropriate.'[46] This modern view casts some doubt on Blair-kerr's direction to the Magistrates in respect of sentencing. He said, 'obviously the Magistrate must consider the general state of law and order at the time . . . The size and power of the particular Triad Society of which the accused is a member or office-bearer . . .'[47] To conclude, 'Justice holds in her hands a scale, not a rubber stamp, and that the degree or quantum of punishment must be weighed in relation to circumstances which mitigate the offence.'[48]

VII. Some Proposals:

(i) *Do away the magic of 'triad' in the law:*

None would doubt the need to supress such secret society which, if 'criminally inclined it could wreck the peace and security of the Colony or, if politically inspired would obviously be aimed at wresting control from the Crown.'[49] However, one would doubt whether there is any justification for punishing triads more heavily.[50] Strip the political element from triads and we have only a criminal organization. Now the danger of Triads in causing any political unrest is no greater than any other secret society. Mr. Temple, formerly head of Anti-triad Bureau, defined triad as follows: "Criminal gangs . . . deliberately banded together through the use of the mysticism and fear generated from triad title . . . to hold together the otherwise common criminal aggregation."[50a] Blythe's description of present day triads in Singapore is equally apt for Hong Kong. 'The use of the term "secret societies" to describe the existing problem was, in some degree, misleading. Very few societies with full Triad ritual were functioning in Singapore . . . They were in effect criminals' protection societies. The members who for the most part were under 30 changed their allegiances frequently, and although most of the violent crimes were committed by triads, very

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38 *Tam Hon-ho* (1967) H.K.L.R. at 55

39 s. 39 Societies Ordinance.

40 'Triad Society in Hong Kong'

41 *Tam Hon-ho* (1967) H.K.L.R. at 55

42 *Leung Hon Cho* (1964) H.K.L.R. at 640

43 8 out of 9 up to 1974.

44 *Leung Hing Chung* Cr. Ap. 844/74

45 Cr. App. 339/74

46 'The sentence of the Court' Issued by Interdepartmental Committee on the Business of the Criminal Courts. cited by Rigby J. in *Tam Ho-ho* (1967) H.K.L.R. at 46

47 *Tam Hon-ho* (1967) H. K. L. R. at 60

48 cited by Rigby J. in *Tam Hon-ho's* case

49 Morgan, supra cited, at 83.

50 s. 20, non-triads $1,000 fine and on yr. imprisonment, triads $2,000 & 3 yrs.

50a Speech at Rotary Club, Kowloon, February 28, 1974.

few were organized by societies themselves. The majority were committed by individual thugs or gangs who expected to retain all or nearly all the proceeds ... and who look to their secret societies only for protection against prosecution and rival gangs ... the problem had become, therefore, one of crime in general and of the fear inspired by gangsterism in particular rather than an organised war by the secret societies against the Government." [51] But crime is not peculiar to triads. So Morgan was felt obliged to say, 'Prominence has not been given to the many murders, woundings, and gang fights attributed to Triad societies. Such incidents are bound to occur in any large community where criminal gangs other than triad ones operate, and will presumably continue to occur in Hong Kong.' [52] Gould J. decided, under the old section 15 [53] that societies adopting triad rituals were unlawful societies and not triad societies. In the light of this judgement most of the so-called triad societies would be unlawful only. 14k was formerly a KMT political organization and the initiates bowed to Dr. Sun's photograph rather than the five patriarchs. The problem in Gould J's decision was, 'Whether anything other than the ritual distinguish the Society in present day Hong Kong from other associations with similar criminal objects; even the ritual is said to be preserved only "in some degree". 'To get over this, societies adopting triad rituals are now deemed as triad societies and triad ritual extended to any part, or anything resembling such. [54] This is a sad change. It was agreed that triad society in the true sense is no longer in existence. There are only 'common criminal gangs.' Why not abolish the distinction between triad and secret societies? For this, after all, has an advantageous psychological effect. 'Triads' still suggests well-organized strong political groups. To quote Gould J. again, 'There does not, in fact, appear to be any substantial advantage gained by prescribing for members of a Triad society heavier penalties than those for membership of other unlawful socieities ... with criminal objects and activities.' [55]

(ii) *Amnesty:*

'I would strongly endorse the suggestion that some measure of amnesty should be introduced.' said Hogan C.J. In the same case, Rigby J. (dissenting), also welcomed such a proposal and gave the instances of Mau Mau Association of Kenya and the amnesty in conjunction with Firearm Act in U.K. So did Blair-Kerr J.[56] The reason why recommendation from such a strong bench should go unheeded is beyond comprehension. A desperate man with a life stigma is worse than a triad. Because, 'not only will this enable individuals to range themselves more readily on the side of law and order but it will remove that pressure to act in an anti-social manner which must tend to flow from a dangerous association which cannot be shed.'[57] If there should be any doubt about the utility and success of such amnesty, perhaps, the example of Malaya will serve to disperse it. In 1933 the resulted Tobat (public confession), was astonishing. More than 3,000 Tobats were made by the end of the year. In 1959, during a sixteen-day amnesty in Singapore, 818 availed themselves of this opportunity. '... the project had a good psychological effect and reduced public sympathy for those subsequently detained or placed under police supervision.'[58]

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[51] Blythe, supra cited, at 503

[52] Morgan, supra cited, at 91

[53] (1) '... which uses Triad ritual shall be deemed to be an unlawful society.'

[54] s. 18(3) Cap. 151

[55] *Lo Wai Ki* (1957) H.K.L.R. at 463

[56] In the leading case of *Tam Hon-ho* (1967) H.K.L.R. 28

[57] Per Hogan C.J. in *Tam Hon-ho* at 37

[58] Blythe, The impact of Chinese Secret Societies in Malaya, 1960 at 517

Conclusion: *A short note on the change of the triads and the root of the problem.*

The change from triads to quasi-triads is not difficult to discern. There was the break down of the central organization. Consequently the understanding among triads to respect each other's interest was also gone. Formerly the members were under the double pressure of the police and the society. And the head men were not unwilling to keep a link with members of Police Force by helping them in some cases. Now the link is no longer a strong one. The irony is therefore, with the decline of the central organization, more violent crimes are staged. They are now more of criminal gangs than subsersive political sects. The age group, especially among the leaders, is younger. And it could not be denied that the influence among the Chinese community is less profound than it used to be. In addition to the traditional crime pattern of triad involvement in the 'cices' of the community, viz., drugs, prostitution, gambling and protection, they are now more prone for 'violent' crimes like gang robbery.

The problem of triads is clearly not a purely, legal one, and one would doubt whether pure legal sanction would solve the problem. After the 1956 Riots, Police did manage to break up the established societies, but the vacuum is only to be filled by those adopting the old appellations. Blythe in describing the aftermath of suppression of old societies, said, '. . . the old suppressed societies did not attempt to reconstitute their organisations, but in their absence the lure of profitable exploitation of 'protection' of brothels, shops and hawkers, and of the promotion of gambling led to the formation of many smaller groups whose members had belonged to the old societies and were alive to the economic prospects.'[59] The lure of profit in drug traffic has led triads even into H.M.'s prison for drug-addicts, in Chi Ma Wan.'[60] So long as the lures are there so will the criminals, whether they adopt triad rituals or not.

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[59] Blythe, supra cited, at 243.

[60] In *Kung Chi-lung* & others Cr. Ap. 220/72 A society known as 'big four' was discovered. '. . . it was a kind of internal triad society found in Chi Ma Wan from members of four long established triad societies.'

Lilian P. Y. Mak

Photograph by courtesy of S.C.M.P. Ltd.

The award of damages for nervous shock claims is a means to grant protection to the interest of mental tranquillity. Unfortunately, the authorities are in a state of confusion. On the one hand, we see a scuffle by the courts to provide reparation for those injured as a result of negligence; on the other hand special criteria are explicitly stated to be relevant to the question of liability in order to prevent the flooding of litigation.

The following is essentially a discussion centred upon the legal enforcement of "foreseeability" with regard to nervous shock cases. Because of the inconsistent application of the "foresight" test, foreseeability furnishes an interesting topic for discussion.

The actual decisions in negligently inflicted nervous shock cases suggest that the material factors are simply designed to provide criteria for selecting a small number of cases for compensation out of the large potential total number. At the same time all these cases have proceeded in terms of the 'duty' or 'remoteness' concept and the notion of foreseeability. However, it is hard to avoid the conclusion that mere lip service is paid to the notion of foreseeability.

In an ordinary negligence action, the plaintiff has to establish the existence of a duty by the foresight test as laid down in *Donoghue v Stevenson*[1] and further that the damage suffered is in fact not too remote. Ever since *Re*

[1](1932) A.C. 562

Polemis[2], the courts have distinguished the question of duty and remoteness. The test for remoteness at that time was whether the damage was directly traceable to the defendant's act.

> "The presence or absence of reasonable anticipation of damage determines the legal quality of the act as innocent or negligent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequences of the act." [3]

When this rule applies to a nervous shock claim which was accompanied by physical injury; the plaintiff only had to show that physical injury was foreseeable; thereby the duty exists, and the shock, as direct consequence of the defendant's act, should be compensable. However, in cases where there was no risk of physical injury, the plaintiff was obliged to show a duty owed to himself based on foreseeability of nervous shock, i.e. that the particular injury was foreseeable. If this could not be shown, no duty could be established and the *Re Polemis* rule could not be depended upon. But in *Hambrook v Stokes Bros.*, Mrs. Hambrook was not the victim of the accident, yet Lord Atkin actually held that the defendant owed a duty to Mrs. Hambrook, the ordinary duty of the owner of a motor car to take care not to inflict physical injury to people using the highway.

> "No doubt, the particular injury was not contemplated by the defendant, but it is plain from *Re Polemis* that it is immaterial." [4]

Lord Atkin seemed to be talking of a very general duty owed to anyone walking along the road as Mrs. Hambrook only came upon the scene after the accident. How could the defendant ever foresee that damage would be done to a woman, who was not the actual victim, but was only someone at the further end of the road? This is a very unreasonable and unconvincing extension of the duty concept because it is very difficult to see how he found that a duty was owed. It is hard to avoid the conclusion that it is of little help to follow the general rule of liability in cases of negligently inflicted physical injury when we are actually looking at cases of nervous shock.

In 1961, the Privy Council in *Wagon Mound No.1*[5] rejected the *Re Polemis* rule and insisted that the 'essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.'[6] This has been accepted and followed by English courts. Therefore, we have the test of foreseeability for both 'duty' and 'remoteness'. Nevertheless, they are two different tests. Professor Friedman and Williams make the following distinction between duty of care and remoteness of damage as separate elements of action in negligence:

> "The test of whether a duty of care is owed operates on the basis of whether an ordinary reasonable man in the position of the defendant would have foreseen that some damages could result to another. On the other hand, the test for remoteness is whether an ordinary reasonable man in the position of the defendant would have foreseen that the particular sort of damage which has occurred would occur. Thus although both inquiries are notionally to be directed to the time before the accident or incident occurred, the question of foreseeability in connection with the duty of care is wide and more general than that directed towards remoteness."[7]

The courts, however, when dealing with nervous shock cases, could not always maintain this distinction with such clarity and indeed, no part

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[2](1921) 3 K.B. 560
[3](1921) 3 K.B. 560 at 574
[4](1925) 2 K.B. 141 at 157
[5](1961) A.C. 388
[6](1961) A.C. 388 at 426
[7]45 A.L.J. 119

of the law of negligence has served to obscure it more effectively than nervous shock.

Even before the *Wagon Mound No. 1,* some judges have expressed their views, in the context of claims for nervous shock, that foreseeability was relevant for both duty and remoteness. But judicial opinion has varied widely on the subject, one of the early authorities was *Bourhill v Young*. Lord Porter, invoking the duty method of limiting liability, observed that 'to establish a duty towards herself, the appellant must still show that the cyclist should reasonably have foreseen emotional injury to her as a result of his negligent driving.'[8] This was the test that was to prevail: nervous shock is recoverable if damage by shock is a foreseeable consequence of the negligent conduct.

This decision is followed by Singleton and Hodson L.J.J. in *King* v. *Philips*[9], where the plaintiff was denied compensation on the basis that there was no duty and consequently no negligence on part of defendant vis-a-vis the plaintiff. The emphasis on duty stands to be contrasted with the words of Denning L.J. who in the same case held that there was a duty owed by the taxi-driver to the mother, but the shock to her was 'too remote':

> "Every driver can and should foresee that if he drives negligently, he may injure somebody in the vicinity in some way or other, and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered. If he does by his negligence in fact cause injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness." [10]

Again, the test to be stressed upon was "foreseeability of injury by shock", though the judges differed in applying it to 'duty' or 'remoteness'. In a recent Canadian decision, *Marshall v Lionel Enterprises*[11], Haines J. chose to frame the current law in terms of duty rather than remoteness, but the test to be applied is again 'foreseeability of nervous shock' –

> "It would seem both logical and necessary that the test be foreseeability of nervous shock rather than just foreseeability of injury. While nervous shock may result in physical damage and while physical injury may often result in nervous shock, the two cannot be so closely linked as to be inseparable. Foreseeability of nervous shock may result from the same facts as does the foreseeability of physical injury or it may result from entirely different facts. In the present at least, I am convinced that foreseeability of the one type of injury cannot be automatically assumed from the foreseeability of the other. For this reason, the test must be the *foreseeability of nervous shock* itself."

These cases under review denote that the favourable test devised by the courts is the foreseeability of shock while the usual 'duty' and 'remoteness' concept has been obsured. In *Mt. Isa Mines Ltd. v Pusey*[12], we are given little indication by the High Court of its preference for either of these views. But the judges (Barwick C.J., Menzies and Walsh J.J.) seemed to abound with the language of remoteness. Barwick C.J. preferred to accept 'for the purpose of this case, that liability is all one question, depending solely on foreseeability [13].' Menzies J. in dealing with what he described as 'the minor premise' discussed it in terms of the 'kind of injury' which was reasonably foreseeable. Walsh and Windeyer J.J. expressly approved the words of Denning L.J. which was referred to in *Wagon Mound No.1*[14] '... whether the exemption for shock be based on want of duty, or on remoteness, there can be

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[8](1943) A.C. 92 at 119
[9](1953) 1 Q.B. 429
[10](1953) 1 Q.B. 429 at 440
[11](1972) 2 O.R. 117 at 185
[12](1971) 45 A.L.J.R. 88
[13](1971) 45 A.L.J.R. 88 at 90
[14](1961) A.C. 388

no doubt since *Bourhill v Young* that the test of liability for shock is foreseeability of injury by shock.' Walsh J. further added, 'Perhaps in nervous shock cases, duty and remoteness become one.'

The word 'foreseeability' then is ambiquous. To what extent is it justifiable to say that 'duty' and 'remoteness' become one in nervous shock cases? Judges have always expressed their disapproval of distinction between physical injury and nervous shock. In *King* v. *Philips,* Singleton L.J. noted 'I find it difficult to draw a distinction between physical injury and damage from shock.'[15] Denning L.J. further commented that to draw a distinction between the two would inevitably lead to the creation of two different duties and two different torts. It cannot be denied that a literal application of the ordinary concept of foreseeability as used in ordinary negligence cases generally would produce a more extensive liability for shock than the courts have so far been prepared to accept. There is, in fact, general agreement to the effect that limitations to liability for nervous shock have to be imposed, thus it is still necessary to apply the ordinary principles of negligence with such qualifications. Fear of excessive imaginative claims and hardship to obtain medical evidence as to the genuineness of the claims account for the tardiness of the courts in extending the area of liability. Over the decades, the courts have shown their trust towards modern medical science, and taken into cognizance of all the recognizable physical and psychiatric illness. Reports tendered by qualified medical doctors and specialists provide sufficient guarantee that a mental disturbance is both real and grave. Therefore hereinafter it is no longer necessary for the judges to employ such an ambiguity in the discussion of foreseeability as a governing criterion of liability. The attempts of the judges to make use of the concept of duty could only result in conflicting dicta, innumerable debates and much wasted efforts seeking to state what the law actually is. Perhaps the courts should start adopting more consistency in dealing with nervous shock cases so that a moderate degree of certainty could be attained. A possible solution is to apply the concept of duty and remoteness as in other cases of negligence, while the imposition of all other limitations will be enough to curtail excessive and unjustifiable claims. Unless and until the courts adopt certain consistency and clarity, we can never say what exactly is the conventional and conceptual approach of the courts.

There is another possible way to achieve certainty i.e. by legislation. Some measure of statutory reform of the law relating to liability for nervous shock has been introduced into New South Wales, the relevant provision is found in the *Law Reform (Miscellaneous Provisions) Act 1944*. The legislation achieves a degree of certainty which the prevailing common law criterion of foreseeability cannot hope to achieve. Section 4(1) of the Act provides:

> "the liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include for injury arising wholly or in part from mental or nervous shock sustained by
>
> (a) a parent or husband or wife of the person so killed, injured or put in peril; or
>
> (b) any other members of the family of the person so killed, injured or put in peril within the sight or hearing of such member of the family.

The general effect of this section is that the plaintiff can recover without the burden of establishing, as he must at common law, that the defendant ought reasonably to have foreseen the possibility of causing the plaintiff injury through shock. Concrete tests are substituted for the foreseeability test. Here the plaintiff only has to prove that there exists between him and the victim the special relationship defined by statute and also prove that 'but for' the accident he would not have suffered injury through shock.

Although the Act has been criticized for the distinction between persons in paragraph (a) and paragraph (b), the plaintiff under paragraph (b) who are "other members of the family" of the victim has to prove the accident occurred within his sight or hearing, whereas a "parent or

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[15](1953) 1 Q.B. 428 at 437

husband or wife" does not have to prove contemporaneous perception. Therefore, if they are merely told of the accident, their claim will still be upheld. And further, the Act only covers situations where someone is really killed, injured or put in peril and does not provide for cases where the plaintiff mistakenly thinks that the 'accident victim' has been injured. (as in *Dooley v Cammell Laird*) Nevertheless, it would be beneficial if legislation along the lines of the New South Wales statute were introduced by way of supplement to the common law, thereby providing greater certainty on occasions where at least there is a close and easily defined relationship between the plaintiff and the accident victim. For situations unprovided for by the statute, the plaintiff would still be able to pursue his claim at common law.

IS INJURY TO UNUSUALLY SUSCEPTIBLE PLAINTIFF FORESEEABLE?

Again, in physical injury cases, it is trite law that once a defendant can foresee physical injury to the plaintiff, the defendant also has to bear the loss to the plaintiff of injury resulting from unusual and unforeseeable weaknesses or defects peculiar to the plaintiff.[16] However, many problems arise when deliberating the responsibilities of a defendant who has negligently inflicted nervous shock in cases where the victim is emotionally unstable and therefore, more vulnerable than normal people. It is arguable whether the defendant could ever foresee the shock or trauma the victim has experienced as it is not impossible that the impact of accident causing the shock or trauma could be absorbed by normal people with total impunity or with considerably less damage done to them. To apply the 'egg-shell' rule to nervous shock cases would therefore be entirely contradictory to foreseeability. Does the defendant have to tailor his conduct to allow for persons who have unusual susceptibilities to shock? Judicial authorities left us with no clear guideline, it is only by way of implication that we see an emergence of favouritism on the part of courts towards hypersensitive plaintiffs. Today we find among ourselves large number of neurotics, psychopaths, and many others suffering from minor psychiatric illness. To say that 'one must take his victim as he finds him' would only make a defendant liable for unforeseeable consequence, which is not within the scope of reasonable anticipation. It is again desirable that in the near future the English Courts would state precisely what the situation is and whether the courts would take supersensitivity of the plaintiff into consideration when determining whether the foresight of the defendant is established. We have seen the Australian High Court expressing their opinion concerning the effect of abnormality or susceptibility to shock on the plaintiff's right to recover in *Mt. Isa Mines Ltd.* v *Pusey*[17]. Windeyer J. drew a distinction between a plaintiff who suffers shock because of his own abnormality and a plaintiff who suffers shock of unusual or rare type. Although the defendant was held liable to foresee injury by nervous shock in a general way; the particular form of nervous injury suffered by the plaintiff was a rare and unusually severe type. Mere foreseeability of plaintiff's injury by nervous shock in a general way was sufficient to sheet home liability to the defendant. The logical, if not inescapable result of this reasoning would seem to be that so long as the court is satisfied that it was reasonably foreseeable by a defendant that a 'normal' person in the position of the particular plaintiff would have suffered injury by nervous shock in a general kind of way, then the defendant is liable even if the particular illness suffered by the plaintiff is not commonly known. On the other hand, if a court determines that no normal person in the situation of the particular plaintiff could have been reasonably foreseen to suffer nervous shock, then no amount of super-sensitivity to shock will avail a plaintiff.

It certainly will be enlightening if English courts would take this line of opinion into consideration in answering the question of reasonable foresight when they come across plaintiffs who are unusually susceptible rather than depending on individual arbitrary decisions.

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[16] *Smith v Leech Brain & Co. Ltd.* (1962) 2 Q.B. 405

[17] 45 A.L.J.R. 88 at 96–97

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