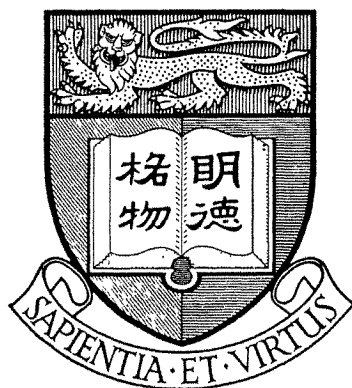


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I N H O N G K O N G

Problems & Prospects

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POLICE POWERS IN HONG KONG

PROBLEMS AND PROSPECTS

Faculty of Law
The University of Hong Kong

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Introduction

RAYMOND WACKS

The Law Reform Commission of Hong Kong in April 1986 first appointed a sub-committee to examine the question of codifying the law in respect of police powers of arrest and detention and the rights and duties of arrested and detained persons. It was not part of its terms of reference to consider amendments to the prevailing law; indeed it concluded that it would be futile to codify what was an unsatisfactory legal framework.¹ In the event, on 28 November 1988 the Attorney-General and the Chief Justice referred the broader question of police powers to the Commission, which in December 1988 appointed a new sub-committee under the chairmanship of Mr Justice Penlington.²

¹ *Preliminary Report of the Sub-committee on Arrest and Detention*, Law Reform Commission of Hong Kong, (1987) Chairman: Mr Justice Fuad.

²Its terms of reference: "To examine the existing law and practice governing the powers and duties of police and other public officers and of private citizens relating to: (a) stopping, requesting proof of identity of and searching persons; (b) entry, search and seizure; (c) arrest and detention; (d) questioning and treatment of persons held in police custody; (e) the release of a suspect on bail by the police and other non-judicial public officers, before charge; (f) the disposition of seized property; To examine the rights and duties of a person stopped, questioned, detained, searched, arrested, cautioned, interrogated or charged by a police officer, a public officer or a private citizen; To make recommendations thereon and in particular to make recommendations as to whether all or any of the provisions contained in Parts I to VI, section 78 and Part XI of the Police and Criminal Evidence Act 1984 and the Codes of Practice thereunder, should be adopted in Hong Kong, with or without modification; To produce a draft code relating to these matters."

Its report³ was presented to the Commission in March 1992 which considered it between April and June 1992. The final recommendations of the Commission (which differed in certain respects from those of the sub-committee) were published in its report of August 1992.⁴

The genesis of PACE

The incoherence of police powers in Britain was long recognised as a truism. The law was a patchwork of common law principles, Home Office circulars, local police standing orders, and the "Judges' Rules". The principal object⁵ of the Philips Committee⁶, established in 1977, was to consider the extent which the powers of the police could be codified, or at any rate, consolidated in statutory form. The Philips Report identified numerous anomalies and

³*Report of the Sub-committee on Arrest*, The Law Reform Commission of Hong Kong, 11 March 1992.

⁴*Report on Arrest [Topic 25]*, Law Reform Commission of Hong Kong, August 1992.

⁵A catalyst for its creation was the notorious *Maxwell Confait* case which revealed abuses of police powers of detention, examined in the *Report of an Inquiry by The Hon Sir Henry Fisher into the Circumstances Leading to the Trial of Three Persons Arising out of the Death of Maxwell Confait and the Fire at 27 Doggett Road London SE6*, London, HMSO HC 90. The confessions of the convicted accused were found by the inquiry to have been unfairly obtained; the Report recommended the strengthening of the caution given to suspects.

⁶The Royal Commission on Criminal Procedure, Cmnd 8092, Chairman : Sir Cyril Philips.

inconsistencies in the law regulating police powers which not only rendered its application confused and, to some extent unfair, but impeded the police in the proper execution of their responsibilities. At the heart of its philosophy is the notion that the law ought to strike a balance between police powers and the rights of the individual: "law and order" and "civil liberties". The Report generated considerable interest and debate, with an especially detailed and protracted discussion in the House of Lords.⁷ The Police and Criminal Evidence Act 1984 embodies many of the proposals contained in the Report.⁸ The extent to which it has succeeded in its objectives is, not surprisingly, moot.⁹

⁷See L. Leigh, "Some Observations on the Parliamentary History of the Police and Criminal Evidence Act 1984" in C. Harlow (ed), *Public Law and Politics* (London, Sweet & Maxwell, 1986).

⁸It is, however, not unlikely that amendments to PACE may result from the recommendations of the latest Royal Commission on Criminal Procedure (Chairman: Lord Runciman) which, following the quashing of the convictions of "the Birmingham six" was recently established "to examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources".

⁹ See, for example, R. Reiner and L. Leigh, "Police Power" in Chambers and MacCrudden (eds), *Individual Rights in the UK since 1945* (Oxford: Oxford University Press/The Law Society, 1992); McConville, Sanders and Leng, *The Case for the Prosecution* (London, Routledge, 1991).

The Royal Hong Kong Police

The rapid establishment of a police force in Hong Kong was a consequence to social conditions in the early days of the colony which appear to have necessitated its creation:

The first immigrants were free from the restraints of village life and like everyone else, their main concern was to make as much money as they could in the shortest possible time. Most of them were male, so the restraints of family life were also absent, and brothels, gambling dens and opium dens proliferated ... There was undoubtedly a large criminal element who were attracted by the opportunity of pursuing their nefarious activities beyond the reach of the Chinese authorities.¹⁰

The Police Force Ordinance of 1844 established a police force for Hong Kong on 1 May of that year. In keeping with colonial tradition, the force was large and exercised a paramilitary role.¹¹ It continues to be large; its expansion, particularly over the last twenty years, has been little short of extraordinary, indeed with its current establishment of

¹⁰ C. Crisswell and M. Watson, *The Royal Hong Kong Police (1841-1945)* (Hong Kong, Macmillan, 1982) 6, quoted in Peter Morrow, "Police Powers and Individual Liberty" in Raymond Wacks (ed.), *Civil Liberties in Hong Kong* (Hong Kong, Oxford University Press, 1988) 244.

¹¹ See A. Clayton and D. Killingray, *Khaki and Blue: Military and Police in British Colonial Africa*, 2nd ed (London, Harper and Row, 1984); C. Jeffries, *The Colonial Police* (London, Max Parrish, 1952), quoted in Harold Traver and Mark S. Gaylord (eds.) "The Royal Hong Kong Police" in Harold Traver and Jon Vagg (eds.) *Crime and Justice in Hong Kong* (Hong Kong, Oxford University Press, 1991) 99. On the question of the militarisation of the police in respect of public order see Waddington, *The Strong Arm of the Law* (Oxford, Oxford University Press, 1991), Jefferson, *The Case Against Paramilitary Policing* (Milton Keynes, Open University Press, 1990).

some 27,000 officers for a population of about 5.8 million, "the Hong Kong police force qualifies both in absolute numbers and proportionately to the size of the population as one of the largest in the world."¹²

Whether the police still exercise a paramilitary function is less clear, though officers are occasionally required to do so on Hong Kong's borders and in the detention centres for Vietnamese asylum seekers.¹³ It has also been suggested that, especially in a society which lacks democratic accountability, the police force is "an instrument of and controlled by the government":

This differs from the position in England where members of the police force are not instruments of the government. The head of the Police Force, the Commissioner of Police, is subject to the orders and control of the Governor, and the government retains the right to dismiss any police officer. The Governor and the Legislative Council control the constitution and size of the police... This is acceptable in a country with a democratic legislature (which) has the power to guard the liberties of its people against ... unfair and oppressive police powers. In a non-democratic society like Hong Kong, such control has the potential to be used to protect vested interests by the application of unfair and oppressive powers which flout the personal freedoms of members of society.¹⁴

¹² Traver and Vagg (1991) 99. See generally K. Sinclair, *Asia's Finest: An Illustrated Account of the Royal Hong Kong Police* (Hong Kong, Unicorn, 1983).

¹³The 1967 riots tested the police and, almost certainly as a consequence of their efforts during this unsettling period, were accorded their Royal cachet on 17 April 1969), See J. Cooper, *Colony in Conflict: The Hong Kong Disturbances, May 1967-January 1968* (Hong Kong, Swindon Book Co., 1970). Disturbances in the camps for Vietnamese asylum seekers have in recent years produced numerous difficulties for the police.

¹⁴ Morrow (1988) 245.

The rapid expansion of the force has been matched by a substantial increase in police expenditure. So, for example, in 1956/7 the annual expenditure of the police force was \$58.2 million. In 1989/90 it stood at \$1,051.02 million. The per capita dollar expenditure rose in the same period from \$22.3 to \$182.2.¹⁵ Whether this expansion has had any impact on crime is debatable, though in respect of reported crime the answer would appear to be in the negative. The rate of serious crime increased from 65.13 per 100,000 of the population in 1956/7 to 147.06 in 1989/90. In the same period the detection rate declined from 55 to 47 per cent:

To put it another way, in terms of constant 1972/3 dollars, each detected crime in 1956/7 cost \$4,913 but by 1989/90, this had increased to \$25,964... we are left with the fact that even heroic expenditures of money and manpower have failed to reduce crime.¹⁶

The relations between the police and the community have passed through several phases in recent years, with regular efforts being made to improve the force's "image" and its efficacy in crime prevention. Most recently, since the creation of the Crime Prevention Bureau in 1977 and its expansion into its present form in 1983, the matter has become an important aspect of police work.¹⁷

Complaints against police officers have, since 1974,

¹⁵ Traver and Vagg (1991) 102.

¹⁶ Traver and Vagg (1991) 102.

¹⁷ The Fight Crime Campaign is a manifestation of this role.

fallen under the jurisdiction of the Complaints Against Police Officers (CAPO) which has seen inevitable fluctuations in the number of complaints it receives from members of the public. The figures show an annual increase in the first decade of its operation, followed by a brief decline, a peak in 1986 (4,532), and a subsequent levelling off (3,152 in 1991):

The rather dramatic increase in complaints is interpreted, probably correctly, by the police not as representing a deterioration in the conduct of the police, but rather as an indication of the public's increased confidence in the methods of investigation of complaints.¹⁸

Policing Hong Kong

Though Hong Kong does not face the "creeping crisis of confidence in the police"¹⁹ that has been identified in Britain, the growing incidence of crimes of violence, organised crime, and, most recently, large-scale theft and smuggling of motor vehicles to China, have placed additional pressure on the resources of the police. Despite the Basic Law's provision that responsibility for public order shall remain in the hands of the the SAR government after the imminent resumption of Chinese sovereignty, fears have been expressed about the role of mainland law enforcement

¹⁸Traver and Vagg (1991) 107.

¹⁹R.Reiner, "Policing a Postmodern Society" (1992) 55 MLR 761, 777-8.

authorities, particularly in the light of Articles 18 and 23 of the Basic Law. The former declares, inter alia, that where "turmoil ... endangers national unity or security and is beyond the control of the government ... the Central People's Government may issue an order applying the relevant national laws" in the SAR. Article 23 requires the SAR government to enact laws to prohibit "any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets... and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies". Provisions such as these have generated concern about human rights,²⁰ especially if, as seems probable, Hong Kong's colonial Bill of Rights²¹ does not survive the transition.

With these, and other, questions in mind, the Faculty of Law held a symposium on 3 April 1993. Our principal

²⁰For an uncharitably gloomy view see David Clark, "Sedition and Article 23" in P Wesley-Smith, *Hong Kong's Basic Law: Problems and Prospects* (Hong Kong, University of Hong Kong, Faculty of Law, 1990) 31.

²¹See Byrnes "And Some Have Bills of Rights Thrust Upon Them: Hong Kong's International Bill of Rights" in Alston (ed) *International Human Rights Law in Comparative Perspective* (forthcoming). Essential for up to date developments is Byrnes and Chan (eds), *Bill of Rights Bulletin* published quarterly by the Faculty of Law of the University of Hong Kong. See too Chan and Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Perspective* (Hong Kong, Butterworths 1992) 1; Byrnes and Edwards (eds) *Hong Kong's Bill of Rights: The First Year* (forthcoming); Raymond Wacks, "Empire's Law: Hong Kong's Colonial Bill of Rights" *Tydskrif vir die Suid-Afrikaanse Reg* (forthcoming).

objective was to discuss the proposals of the Law Reform Commission that most of the sections of PACE and the Codes of Conduct be adopted *mutatis mutandis* in Hong Kong. It was, I think, the first public forum devoted to this important subject, and it was therefore most encouraging that it attracted so large an audience, especially of police officers.

I am indebted to the contributors both for their participation in the symposium and their expedition in producing their papers for inclusion in this volume. My thanks are also due to our departmental staff for their assistance in the organisation of the event and in the production - at high speed²² - of this little book which I hope will provoke wider debate of a matter that is of critical concern to us all.

21 April 1993

²²Too high? Responsibility for inconsistencies, infelicities, and other editorial oddities must be laid at my door. My only plea in mitigation is that I have just been informed that the Legislative Council is imminently to debate the Law Reform Commission's Report. I thought that the papers that follow might be of immediate use to councillors and members of the public.

Legalistic and Service Styles of Policing

Can they co-exist?

ARNON A. BAR-ON

In his classical study of the police, Wilson identified three main styles of policing that arise from the three basic functions of the police:¹

| <i>Style</i> | <i>Function</i> |
|--------------|-------------------|
| Legalistic | Law Enforcement |
| Watchman | Order Maintenance |
| Service | Public Service |

The legalistic style operates on the assumption that there is only one standard of community conduct - the law. In carrying it out, the police say, in effect, "Do so (or we do so) because that is the law". This usually means either making an arrest or summoning offenders for prosecution, or gathering information for potential arrests and summons. The watchman style is predicated on a perception which regards the function of the police as maintaining order rather than regulating conduct. The law (and its implied threat of action) is primarily regarded as a means, not as an end. Here the police say, in effect, "Do so before I have to invoke the law".

¹ J. Q. Wilson, *Varieties of Police Behavior* (Cambridge, Mass., Harvard University Press, 1968).

The service style, on the other hand, is free of the law. It emphasizes helping the community to improve its quality of life. The police ask, "How can we be of assistance?" and endeavour to resolve people's problems and, where necessary, provide protection.²

To be sure, these styles are not at all points mutually exclusive. The watchman style does not deny the need for the legalistic style; nor does the legalistic style ignore the need for the service style. Indeed, all police forces work on a balance of styles. But each approach advances claims of primacy for its respective standpoint which are sufficiently strenuously cultivated to set them apart and establish a predominant style of policing. Moreover, as implied by their descriptions, each approach requires of its incumbents a different mindset for its implementation.

Many factors influence the particular balance of policing styles of a particular police force. Among these, one of the most critical is the way legislators perceive the role of the police and the consequent provision (or denial) of power they provide them. It is against this background that this paper examines one of the important implications of the Law Reform

² This and subsequent parts of the introduction draw heavily on I. K. McKenzie and G. P. Gallagher, *Behind the Uniform: Policing in Britain and America* (Hemel Hempstead, Hertfordshire: Harvester Wheatsheaf, 1989), Chapter 7.

Commission of Hong Kong's recommendation to introduce elements of England and Wales' Police and Criminal Evidence Act 1984 (PACE) to Hong Kong³, namely its consequences for the style of policing of the Hong Kong police.

The main intention of PACE is to strike a balance between the powers of the police, on the one hand, and the protection of suspects of crime, on the other. This is reflective of our social values which do not tolerate a high level of government involvement in people's lives, and the consequent expectation that police over-enthusiasm needs to be curbed. The means by which PACE seeks to achieve this objective is by enhancing the legalistic style of policing. This is accomplished by replacing a number of the currently non-legal controls over the police by legal controls, and, in particular, by incorporating considerations of due process into the on-the-job performance of police duties by, for example, increasing the procedural aspects of the investigation, arrest, and charge of suspects of crime.

In this paper, I concentrate on the possible repercussions this wider legalistic style of policing hold for the police's service function. As previously indicated, these styles are not

³ The Law Reform Commission of Hong Kong, *Report on Arrest* (Topic 25) (Hong Kong, Government Printer, August 1992).

mutually exclusive. They do, however, have a strong potential to clash because each requires a different set of skills and, perhaps more importantly, is based on a different view of the world.

In order better to understand these differences, the following section compares the two styles by using social work to explicate critical elements of the service style. Social work is chosen for this purpose because it is widely regarded as *the* service model in our society, and can therefore serve as an ideal (though not the only) model for the service style of the police. The legalistic style, on the other hand, is represented by "the police" in general on the understanding that despite ample empirical evidence that as much as 80 to 90 per cent of police time is spent on non-criminal activities⁴, most police officers consider their work in terms of law enforcement.⁵

The framework draws on elements of occupational culture and structure which have been shown to influence

⁴ M. Punch and T. Naylor, 'The Police: A Social Service', *New Society* (17 May, 1973, pp. 358-361); D. J. Bell, 'Policewomen - Myths and Reality', *Journal of Police Science and Administration* (10, 1982, pp. 112-20).

⁵ T. A. Johnson, G. E. Misner and L. P. Brown, *The Police and Society: An Environment for collaboration of Confrontation* (Englewood Cliffs, NJ, Prentice Hall, 1981).

inter-occupational relations.⁶ The former deal with how occupations relate to the world, and entail both ideological and organizational dimensions. Structural elements consist of the functions of occupations and the demographic characteristics of their incumbents. Following a review of the more critical of these elements, I conclude with various suggestions which have been raised to further police-social work collaboration and which may shed some light on the extent to which the legalistic and service styles of the police may co-exist.

⁶. J. Huntington, *Social Work and General Medical Practice: Collaboration or Conflict?* (London: George Allen & Unwin, 1981).

CULTURAL AND STRUCTURAL DIFFERENCES BETWEEN
THE POLICE AND SOCIAL WORK

Mission

| Police | Social Work |
|---|---|
| A "commonweal organization", the Prime beneficiaries of which are society at large. | A "service organization", the prime beneficiaries of which are individuals. |

The prime duty of commonweal organizations is owed to the community as a whole. Service organizations, on the other hand, give greater weight to the worth of individual parts. This is not to say that the police are unconcerned about individual plight, but only that 'offences are committed not just against individuals but (first and foremost) against the state'⁷.

An important outcome of this distinction is that drawing a line between public and private affairs has become an essential component of both occupations. The police are most comfortable in the public arena, regarding private matters as appropriately settled by the parties concerned.⁸

⁷ R. Morgan, Rod, "Policing By Consent": Legitimizing the Doctrine', in R. Morgan and D. J. Smith (eds.), *Coming to Terms with Policing* (London: Routledge, 1989), p. 217.

⁸ C. D. Shearing, *Dial-A-Cop: A Study of Police Mobilization* (Toronto: University of Toronto, Center of Criminology, 1984), p. 100.

"I can't understand why we should be expected to sort out their problems", one police officer put it.⁹ In contrast, social workers take the reverse stance, as witnessed, for example, by the small number who enter community work. Another, closely related difference is that whereas social workers are deeply concerned about individual rights, the police are more likely to feel that such rights interfere with their jobs¹⁰.

Function and objective

| Police | Social Work |
|---|---|
| To meet society's need for stability by maintaining social order. | To meet society's need for stability by meeting people's unmet needs. |

The varying degrees to which people's needs can be satisfied, and the range of criteria by which satisfaction can be assessed, make social work's objective less amenable to definition than the police's "order" with its implied "completeness". Social workers can therefore accept

⁹ J. Hanmer and S. Saunders (1988), 'Domestic Doesn't Mean It's Not a Crime', *Community Care* (736, 3 November, 1988), p.19.

¹⁰ A. Graton, 'Mutual Perceptions Between Police and Probation Officers: A Research Note', *British Journal of Social Work* (10, 1980, pp. 87-89).

fluctuations in behaviour which the police cannot.¹¹ Indeed, many social workers are likely to interpret disorder as a coping mechanism (and hence as a basically positive phenomenon), in contrast to the police who interpret it as "a challenge to authority ... (which) is itself a form of criminal behavior"¹².

Social ideology

| Police | Social Work |
|---|---|
| Believe in 'the inherent rottenness of many people', ¹³ and hence that social coherence is founded on force and constraints. | Assume people are fundamentally good, and hence that society coheres by a general agreement of values, which outweighs differences of individual weakness and interest. |

¹¹ S. Holdaway, 'Police and Social Work Relations - Problems and Possibilities', *British Journal of Social Work*, (16:2, 1986, pp. 137-160).

¹² J. Fink and L. G. Sealy, *The Community and the Police - Conflict or Cooperation* (N.Y.: John Wiley & Sons, 1974), p. 17.

¹³ E. M. Colbach and C. D. Fosterling, *Police Social Work* (Springfield Illinois: Charles C. Thomas, 1976), p. 133.

Viewing "people in general (as) ... greedy, lustful, (and) immoral"¹⁴, the police work on the premise that "you can't just act on the word of (people)"¹⁵, and therefore that they should be treated "with appropriate disdain and toughness"¹⁶. Social workers, on the other hand, are a priori empathetic towards people, which from the police perspective is a recipe to be conned.¹⁷

Closely related to these different perspectives on trust, police officers and social workers also hold differing perspectives on the human capacity for change. The former, who are charged with the maintenance of, and are evaluated by their ability to uphold, the status quo, often believe that

¹⁴. P. K. Manning, *Police Work* (Mass.: MIT Press, 1977), p.26.

¹⁵. J. Hanmer and S. Saunders (note 9), 1988, p. 18.

¹⁶. E. M. Colbach and C. D. Fosterling (note 13), p. 133.

¹⁷. R. D. Finney, 'A Police View of Social Workers', *Police*, 16, 1972, pp. 59-63). In the Cleveland hearings, for example, in which a large number of parents were accused of child sexual abuse, the idea that the pediatrician might have misdiagnosed the situation had never occurred to the Social Services Department director. Moreover, she considered it would have been wrong to cast doubts on her opinion (*Community Care*, 680, October 1, 1987, p. 2).

people are unable to change.¹⁸ Or put another way, they are generally conservative both in their politics and in their moral nature.¹⁹ In contrast, social workers tend to be liberal in outlook. Charged with the need to, and evaluated by their ability to, alter human relations which constrict vulnerable groups, they believe that major changes are required to the existing social order if people are to be properly cared for²⁰.

General strategy

| Police | Social Work |
|--|---|
| Social control (assisted by having the prerogative to use force where others are forbidden). | Personal assistance aimed at helping people help themselves |

Defining their arena primarily in terms of law and order - where infringement is the catalyst for intervention - extraneous, social control has become for the police an end in itself. One manifestation of this is the police's continuous attempt "to stay on top of things". Another is that alternative interventions which a police officer might otherwise consider

¹⁸ S. A. Holmes, 'A Detroit Model of Police-Social Work Cooperation', *Social Casework*, (63:4, 1982, pp. 220-226).

¹⁹ J. Fink and L. G. Sealy (note 12), p. 4.

²⁰ T. Bamford, *The Future of Social Work* (London: Macmillan, 1990).

are subject to its achievement. Thus, as one police officer noted, "(By helping people) I prevent complaints from other people in the community".²¹ It is not the help per se which constitutes the rationale of intervention. Social workers, on the other hand, aim at intrinsic control, as manifested in the slogan "Helping People Help Themselves". People are believed to best motivate themselves and are therefore supposed to manage their own destiny. Extraneous control, if considered at all, is to be a means of last resort.

Intervention

General orientation

| Police | Social Work |
|--|--|
| A criminological, punitive ideology which advocates the separation of the individual from normal social intercourse. | A rehabilitative, socio-psychological ideology which postulates the restoration of the individual to normal interaction. ²² |

²¹ G. Horstmann, 'Working Relationships Between the Police and Other Agencies: A Study in the Netherlands and Great Britain', *Police Studies* (8:1, 1985, pp. 27-50), p. 38).

²² W. B. Miller, 'Inter-Institutional Conflict as a Major Impediment to Delinquency Prevention', *Human Organization* (18, 1958, pp. 20-23) quoted in Finney (note 17), p. 62.

With differing intervention orientations, each occupation regards the other as obstructing its work. At a minimum, social workers' insistence on treatment is regarded by the police as "a hindrance which made it a work of art getting some young offenders in court"²³, while the police's "natural" push to bring juveniles to court²⁴, is viewed by social workers as shattering their ministrations. At worse, social workers are accused by the police of being "the ally of the anti-social young hooligan in his battle with authority"²⁵ (thereby not only contributing to a rising crime rate, but conspiring against the police²⁶). To this charge social workers retort that reality demonstrates that existing police measures neither control nor reduce crime, so that it is they who are left in the end to tackle the police's failures.

²³ Austin Heywood, Deputy Chief Constable of West Yorkshire, quoted by T. Thomas, *The Police and Social Workers* (London: Gower, 1986), p. 95.

²⁴ H. Parker, M. Casburn, and D. Turnbull, *Receiving Juvenile Justice* (Oxford, Basil Blackwell, 1981).

²⁵ T. Judge, 'The Social Worker's Duty as a Citizen', *Social Work Today* (7:8, July 8, 1976), pp. 230-31.

²⁶ T. Thomas, 'Let the Force Be With You', *Community Care*, (652, March 19, 1987), pp. 16-17.

Time frame

| Police | Social Work |
|---|--|
| Short-term, grounded in the here-and-now. | Medium and long-term, grounded in the past, present, and future. |

Most of the situations faced by the police require immediate attention. They are situations in which "something-ought-not-to-be-happening-and-about-which-something-ought-to-be-done-NOW".²⁷ Social workers, on the other hand, can work to a slower time-frame. The two occupations consequently require different types of information, different types of solutions, and different modes of intervention.

Data inputs

The police are often involved during the occurrence of an incident or arrive shortly after it has ended; social workers are usually involved only later on. Members of each occupation are therefore likely to see different sides of life and hence arrive at different assessments of "the same" situation. In particular, the police are likely to see people in states of

27. E. Bittner, 'Florence Nightingale in Pursuit of Willie Sutton: A Theory of Police', in H. Jacob (ed.), *The Potential for Reform of Criminal Justice* (Beverly Hills, Ca.: Sage, 1974).

agitation, whereas social workers are likely to find them more relaxed.

Data requirements

Members of the two occupations not only see different states of life, but structurally require different types of information. The police, who mainly engage in one-off, here-and-now complaints, have neither the time nor the need to seek causation beyond the immediate motive. Each call is answered in its immediate context.²⁸ One result of this is that the police have developed as a decision-making aid a simplistic assessment model whereby society is cleanly divided into the good and the bad.²⁹ "Right is right and wrong is wrong"³⁰. People and situations fall into one category or the other.

Social workers, by contrast, who organizationally have more time on their hands, have been able to develop an holistic outlook. This places the client in his or her wider biographical and environmental space, and takes account of a

²⁸ E. M. Colbach and C. D. Fosterling (note 13), p. 126.

²⁹ J. Hanmer and S. Saunders (note 9).

³⁰ Uniformed constable, quoted in R. Reiner, *The Blue-coated Worker: A Sociological Study of Police Unionism* (Cambridge, Cambridge University Press, 1978) p. 162.

broader range of variables than those usually considered by the police.³¹

Solutions

The corollary of the two occupations' time-determined assessment requirements is different time-determined solutions. For the police, solutions must be speedy. "There is no time left to just sit back and think about what the appropriate way of dealing with a case might be".³² Police officer therefore tend to come up with one-answer solutions and condemn social workers for complicating their work by "introduc(ing) a lot of grays into the situation"³³. "Bemused police sergeants", Kilby and Constable noted, "wonder why ... straightforward matters appear to be so complicated to

³¹ A closely related issue is the nature of data outputs the two occupations are expected to produce. For the police, data must be exact because it may be have to be produced as evidence. For social workers this degree of precision is rarely required. Social work data is therefore often criticized by the police for not 'mean(ing) anything in a criminal court' (Detective Inspector Les Vasey, coordinator of West Yorkshire's domestic violence and child abuse units, quoted in K. Sone, 'The Lion Lies Down With the Lamb', *Community Care* (830, September 6, 1990), p. 15.

³² G. Horstmann, (note 21), p. 32.

³³ S. Holdaway (note 11), p. 144.

"experts" who are prepared to wait ... for a second opinion ... and confirm the obvious?"³⁴.

In social work, on the other hand, time is seen as an asset rather than a constraint. The process of deciding what to do is at least equally, if not more important, to doing what has been decided. Social workers therefore accuse the police of going in "with the blue light flashing", causing irrevocable harm to their clients.

Modes of intervention

As a derivative of their different solutions, the police and social workers also differ in their styles of intervention. Deprived of the leisure of time, the police's stock-in-trade are physical force, authoritative comment, and direct advice. This also follows from many of their situational positions which do not permit them any alternative. For example, how else but by authoritative means can one communicate even the simplest message to someone so delirious that they cannot even comprehend it?³⁵

³⁴ R. Kilby and T. Constable, (1975), 'The Police and Social Workers', in J. Brown and G. Howes (eds.), *The Police and the Community* (Westmead: Saxon House), p. 52.

³⁵ C.B. Klockars, *The Idea of Police*, (Beverly-Hills: Sage, 1985), pp. 46-47.

For social workers such authoritarianism is anathema. The idea of imposing one's views on another is "presumptuously dictatorial"³⁶ or "paternalistic", in the sense of interfering with another's freedom of choice³⁷). Rather, they "take as an article of faith that the process of arriving at consensus is ultimately more important than the outcome arrived at"³⁸, and are therefore unwilling to impose "their right" on others.³⁹

³⁶ R. Morris, 'Strategies for Innovation in Service Delivery', in W. C. Richan (ed.), *Human Services and Social Work Responsibilities* (Washington D.C.: National Association of Social Workers, 1969).

³⁷ E. Sainsbury, 'Participation and Paternalism', in S. Shardlow (ed.), *The Values of Change in Social Work* (London: Tavistock/Routledge, 1989).

³⁸ R. C. Chandler, 'The Problem of Moral Reasoning in Public Administration: The Case for a Code of Ethics', *Public Administration Review*, (43, 1983), p. 33.

³⁹ A good example of these different styles of interventions is social work discourse. Whereas task oriented agents, such as the police, "declare", "protest", and "demand", social workers "ask", "prompt", and "facilitate" (P. Halmos, *The Personal and the Political: Social Work and Political Action* (London: Hutchinson, 1978). One consequence of this is that the police expect authoritative decisions from supervisors and, by extension, decisiveness from others, whereas social workers expect consultation.

Depth of involvement

Good human relations and strong ties with clients are the stock-in-trade of social workers. Indeed, they are probably more closely evaluated by their ability to form such relations than by any other single criterion. The police, in contrast, have no need to invest in reciprocal relations. Most episodes of service are quickly over, and the probability that a problem will recur is usually of little personal concern to the officers as they are likely to be otherwise deployed should a call-back take place.⁴⁰

Confidentiality

While confidentiality is important to both occupations, the police usually have the job of exposing evidence, much of which may eventually be open to public purview, whereas social workers tend to be more protective of the information at their disposal. In particular they fear that sharing information might betray their trust and be used against their

⁴⁰ N. Fielding, C. Kemp and C. Norris, 'Constraints on the Practice of Community Policing', in R. Morgan and D.J. Smith (eds.), *Coming to Terms with Policing* (London: Routledge, 1989), pp. 55-58.

clients⁴¹ (though similar arguments have also been raised by the police who fear that untimely or precipitous social work intervention could compromise vital testimonies or material productions.⁴²). It would appear, however, that in practice this difference is largely theoretical.⁴³ As one police officer reported, "If I stop trading information, I cannot do the job"⁴⁴, and similar considerations have been documented in social work⁴⁵.

Final arbiters of conflict

| Police | Social Work |
|------------------|---|
| Often the court. | Mainly the individual practitioner's professional judgment or the employer. |

⁴¹ V. A. Kowalewski, 'Police and Social Service Agencies: Breaking the Barriers', *The Police Chief* (42, 175, pp. 259-262).

⁴² L. Waterhouse and J. Carnie, 'Research Note: Social Work and Police Response to Child Sexual Abuse in Scotland', *British Journal of Social Work*, (21:4, 1991, pp. 373-379).

⁴³ H. Treger, *The Police Social Work Team* (Springfield, Ill.: Charles C. Thomas, 1975), p. 85.

⁴⁴ G. Horstmann (note 21), p. 45.

⁴⁵ C. Hallett and O. Stevenson, *Child Abuse: Aspect of Interprofessional Co-operation* (London: Allen & Unwin, 1980), p. 100.

The police tend to disassociate themselves from value judgments. Many decisions are left to safe and certain written procedures (as, for example, PACE) or to extraneous (judicial) institutions. In social work this rare. Most decisions are orally made in-house, with principles hotly disputed. Put another way, the police more often make use of their "professional selves" while social workers make more use of their "personal selves".⁴⁶

Gender

| | |
|-----------------|-------------------|
| Police | Social Work |
| Male dominated. | Female dominated. |

Of all the factors which distinguish social work from the police, gender is probably the most important because either predispositionally or at some time during their work or training members of each occupation adopt characteristics which are mainly associated with their dominant gender composition. Thus, for example, social workers describe

⁴⁶. One important consequence of this is that the police believe that social workers should refrain from taking sides on such issues as to whether punishment might be harmful to rehabilitation. This is a matter that should be left to the court.

themselves in terms of such words as counselling, helping, forgiving, friendly, sympathetic, and tolerant, whereas police officers believe they are resourceful, adventurous, aggressive, confident, down-to-earth, and opinionated.⁴⁷ Moreover, each group openly rejects the other's characteristics and holds them in contempt, thereby severely limiting their opportunities for collaboration.⁴⁸

Education

Police

Higher education is an exception.

Social Work

Higher education is the norm.

Social workers generally depreciate others who without the benefit of socio-psychological training are active in the area of guiding human behaviour⁴⁹. The police, on the other hand, are

⁴⁷ G. C. Parkinson, 'Cooperation Between Police and Social Workers: Hidden Issues?', *Social Work*, (25:1, 1980, pp. 12-18).

⁴⁸ A. Sampson *et. al.*, *Gender Issues Inter-Agency Relations: Police, Probation and Social Services*, in P. Abbott and C. Wallace (eds.), *Gender, Power and Sexuality* (London: Macmillan, 1991).

⁴⁹ C. Moore and J. Brown, *Community Versus Crime* (London: Bedford Square Press, 1981), p. 62.

suspicious of higher education.⁵⁰ "Theories are alright but they don't work in practice".⁵¹ Moreover, where social work in particular is concerned, there is a feeling among the police that all kinds of untrained people are able to do it, and especially they (the police) who believe that they possess the knowledge about human nature⁵². As one police officer put it, "(Social workers) just go along and talk - we do that - anyone can talk - what's so special about that?"⁵³

⁵⁰. Higher education within the police is still largely reserved for officers, and it likely that many officers who obtain higher education primarily do so because it is becoming essential for moving up into administration, and not because they are committed to the value of education per se (Finney, note 17). Indeed, one commentator has gone so far as to suggest that for the police 'intellectuality is as suspect as other non-conformity' (B. Whitaker, B., *The Police in Society*, London: Sinclair Brown, 1982), p. 246).

⁵¹ Police officer, quoted in Holdaway, note 11. A typical example of this approach is a book on the police in which a chapter which appraises various applications of the social sciences to police work ends with the heading 'A Return to Reality' (R. S. Clark, *Police and the Community: An Analytic Perspective* (N.Y.: New Viewpoints, 1979), pp. 28-50).

⁵² N. Grindrod quoted in E. B. Schafer, 'The Police and Social Work', in E. B. Schafer, *Community Policing* (London: Croom Helm, 1980), pp. 58-9. S. Holdaway (note 11) suggests that this point of view is probably even more strongly held today than in the past now that the police themselves receive some training in the social sciences.

⁵³. E. B. Schafer, 'The Police and Social Work', in E. B. Schafer, *Community Policing* (London: Croom Helm, 1980), p. 64.

ANALYSIS

As the foregoing comparison of basic characteristics of social work and the police illustrates, there are fundamental incompatibilities between the service and the legalistic/order maintenance styles of policing, although it must be stressed that the use of social work as an ideal model for the service function of the police might not be the most appropriate. Police officers, after all, are not social workers, and it is for this very reason that the two occupations are institutionally separated.

This qualification having been made, it is nevertheless a fact that there is tension between the service and other functions of the police which the social work analogy helps to explain. This is no more evident than in the occupational slang of the police. For example, Blagg et. al. report that such classical police service activities as juvenile liaison are often disparagingly referred to as "Playschool" policing, the "Toy Squad" or the "Teeny Sweeny"⁵⁴, while other forms of service provisions may even go by the coarser titles of "rubbish" or "shit" work⁵⁵. The institutional manifestation of this is

⁵⁴ Blagg et. al., 'Inter-Agency Cooperation: Rhetoric and Reality' in T. Hope and M. Shaw (eds.), *Communities and Crime Reduction* (London: HMSO, 1988).

⁵⁵ T. Thomas, note 23, p. 71.

that much of this work has been "feminized" in that it is largely relegated to women police officers⁵⁶ and goes largely unrewarded. As one police officer put it, "'handling mental'" was not regarded as a good pinch⁵⁷, while another noted that "My community work is work that I can do or not ... If I'm busy with my police work, then I leave (it)"⁵⁸.

In the light of this situation, commentators have arrived at three different conclusions: (1) absolve the police of its public service function; (2) transform the police into a social service; or (3) increase the cooperation between the police and other social service agencies, such as social work.

(1) Absolving the police of its public service function.

This proposal is jointly arrived at by three different schools of thought. One identifies the roots of the problem in the public-private arenas-of-intervention distinction between the police and social work (mentioned above), and suggests that the police are reluctant to enter the private (that is, the service) domain because of the emotional overload which it

⁵⁶ A. Sampson, note 48.

⁵⁷ L. A. Teplin (1984), 'Managing Disorder: Police Handling of the Mentally Ill', in L. A. Teplin (ed.), *Mental Health and Criminal Justice* (London: Sage, 1984), p. 165.

⁵⁸ G. Horstmann, note 21, p. 35.

often entails. Relieving the police of their service function is thus seen as a means of releasing the police force of unnecessary aggravation. Thus, Conte, Berliner and Nolan, for example, report that police officers felt a sense of relief when social workers were available to assist them to deal with heavy emotionally laden situations.⁵⁹

The second school of thought looks to the benefit to the service users or perhaps to the issue of efficiency. "If the bulk of calls (to the police) are not related to formal law enforcement", it argues, "should they not be handled by other more appropriate service networks?"⁶⁰ Likewise, Thomas, who analyzed police-social work relations, suggests that "in many ways (the two occupations) have a natural affinity ... to relieve each other of work more properly dealt with by their opposite numbers".⁶¹

Yet by far the most popular reason to absolve the police from public service is to enable police officers to devote their time to "real policing", that is, to pursuing criminal related

^{59.} J. R. Conte, L. Berliner and D. Nolan, 'Police and Social Worker Cooperation: A Key in Child Sexual Assault Cases', *FBI Law Enforcement Bulletin* (49:3, 1980, pp. 7-10).

^{60.} K. H. Briar, 'Emergency Calls to Police: Implications for Social Work Intervention', *Social Services Review*, (59:4, 1985), p. 594.

^{61.} T. Thomas, note 26, p. 17.

activities. According to this stance the "goodwill that the police are alleged to earn from this service is offset by bad will attributable to a poorer job of crime control."⁶²

(2) *Transforming the police into a social service.*

Advocates of this position take the exact opposite stand. The public image of the police (and ultimately their effectiveness), they argue, depends primarily not on their crime fighting activities but on how well they advise, assist, and befriend the public.⁶³ Hence what is required is to further develop the police's service function, not restrict it. Police officers who are called to police in the name of crime may otherwise soon

⁶² R. A. Myren, 'The Role of the Police', unpublished paper prepared for the President's Commission on Law Enforcement and Administration of Justice, 1967, quoted in T. A. Johnson, G. E. Misner and L. P. Brown (note 5), p. 45.

⁶³ M. Weatheritt, *Innovations in Policing* (London: Croom Helm, 1986).

come to see their service function as "bullshit" or mere "PR" and consequently come to resent it and do a poor job.⁶⁴

The main thrust of this school is to increase the sensitivity and understanding of the police toward social problems, and to introduce officers to a more diverse intervention repertoire, with particular attention to interpersonal helping skills. At its most extreme, this line of thought leads to turning the police into a social service, for example, modifying police stations into community centres which offer a broad range of social services⁶⁵.

(3) Increasing police/social services collaboration.

The third proposal attaches to the social integration school of thought which, almost by definition, focuses on the congruencies of various institutions rather than on their incongruencies. Hence, whereas the former proposals aim at eliminating the tensions among the police's functions, and try to achieve this from within the police, this suggestion more

⁶⁴ C. B. Klockars, note 35, p. 54.

aims to manage the tension by building on elements which the police may have in common with other organizations, and in so doing assist the human services delivery system as a whole. The primary means which it is suggested to achieve this objective is to train the police and social workers together in order to help each party to better understand and accept the other's philosophies and to bring them to the point where they are emotionally freer to use the other's expertise.⁶⁵

A closer glance at each of these three proposals suggests, however, that neither is very feasible, and consequently that the tensions within the police around their service function are likely to remain. First, absolving the police of their service function is clearly impractical for at least three basic reasons:

⁶⁵ The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (Washington, D.C.: The United States Government Printing Office, 1967), p. 162.

⁶⁶ M. Stephens, 'Problems of Police-Social Work Interaction: Some American Lessons', *The Howard Journal of Criminal Justice* (27:2, 1988, pp. 81-91); K. Slon (note 30); E. Schafer (note 52).

- (a) There is a community-wide expectation that the police should help solve problems of communal living, and although many police officers may not see themselves in this light it is doubtful if they can do anything about it.
- (b) The police are the only 24-hour, all-round mobile service and, partly as a result, are easier to locate than other social services.⁶⁷
- (c) The police will continue to respond to any incident in which they believe an injury might occur.

In a similar vein, turning the police into a social service is also impractical. Not only would this require a radical resocialization of the police and doing away with the social services which they would replace, but a new police force would have to be established to replace the law enforcement and order maintenance functions that would then be left unattended.

⁶⁷ As one police officer remarked, "They (the public) do not know who else to go to, and I am the one they come to" (G. Horstmann, note 21, p. 32).

Finally, while it is undeniable that it is possible to identify abstract elements which unite the police and the social services, it should be clear from the differences between these institutions that their practical ability to work together is extremely limited. Hence it would be more fruitful not to seek spurious unities between these institutions but to recognize their differences, and agree with Detective Inspector Sylvia Aston, West Midland's liaison and police advisor on rape, domestic violence and child abuse, that their strength lies in their different knowledge and perspective.⁶⁸

Conclusion

The recognition of the service function of the police alongside its law enforcement and order maintenance functions has been closely paralleled by debates concerning both their relationship with social work⁶⁹ and two competing views of their

⁶⁸ Quoted by D. Mitchell, 'A New Dawn?', *Community Care* (876, August 15, 1991).

⁶⁹ A. R. Roberts, 'Training Police Social Workers: A Neglected Area of Social Work Education', *Journal of Education for Social Work* (14:2, 1978, pp. 98-103).

professionalism. The first is akin to specialization, and the second is akin to generic practice, where the incumbent's speciality is the ability to cope with any and every eventuality (a specialist jack-of-trades).⁷⁰ The advent of PACE, with its stress on powers of arrest, other "real policing" images, and incorporation of due process considerations into everyday practice, pushes the police towards the specialization model and away from generic practice, and is therefore likely to thrust them even more into seeing service provision as a burden rather than a duty. It would appear, however, that in some organizations different functions, with incompatible goals and modes of intervention, can coexist and even complement each other. This clearly marks the dual service and legalistic functions of the police, though how to make them more congruent with each other is still uncertain.

70. R. Reiner, note 30, pp. 204-5.

Police, Professional Privilege and the Bill of Rights

LEE AITKEN

As one commentator recently noted, section 8 of the Canadian Charter which proscribes "unreasonable search and seizure" has no exact counterpart in the Hong Kong Bill of Rights Ordinance.¹ Does this mean that there is no security against improper search or seizure of documents? In some of the recent cases, discussed below, section 14 of the Ordinance has been invoked by applicants seeking to limit an investigator's activities. Article 14, as material, provides:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, ... or correspondence, ...
- (2) Everyone has the right to the protection of the law against such interference or attacks".

It could, however, be said that Article 14 which seeks to protect privacy, family, home and correspondence could be invoked to prohibit unreasonable search and seizure. As will be shown, the current trend of authority would suggest that Article 14 will be circumscribed in its application and may only be relevant in matters which may be accurately characterised as "private". Will a search under warrant attract Article 14 protection?

¹ Way, "The Impact of the Charter on the Administration of Criminal Justice in Canada: Rhetoric or Revolution?" in Chan and Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (1993) p.358.

When we turn to the existing provisions in the Police and Criminal Evidence Act (PACE) we find little attention directed specifically to legal professional privilege. Documents which attract such privilege fall within the category of excluded material but would appear to attract no special protection.

The Law Reform Commission Report on Arrest² noted simply that "privileged documents ... "are absolutely protected. There is no procedure for gaining access to these or for seizing them and if found during a search such material must be left alone." The practical problem, of course, is how any dispute between the investigators and the solicitor asserting the privilege is to be resolved "on the spot". For example, what if the solicitor insists that the documents to be taken are privileged and the police deny that they are protected? PACE does not seem to provide an easy practical solution to this dilemma. The most recent Hong Kong decision, *In re a Firm*,³ demonstrates, as might be expected that investigators normally conduct themselves with complete propriety, whatever the strict legal position. But the rights of the solicitor should not depend upon the goodwill and fair-mindedness of the investigator; rather, the issues involved in the search of a professional office should be clearly defined by statute or agreement beforehand between the likely protagonists. This

² Topic 25, paragraph 4.37(a).

³ [1990] 2 H.K.L.R. 146.

short paper suggests the institution of just such a scheme of prior arrangement.

What then is the position with respect to professional privilege claimed by solicitors and others under the Bill of Rights Ordinance, the Police and Criminal Evidence proposals, or the general law? It would seem that the proposed statutory protection is fragile and it will be suggested that a simple practical step would be to introduce a standard set of guidelines, agreed between the police and the Law Society, to obviate the possibility of a solicitor being arrested for obstruction in failing to comply with the terms of a warrant while asserting privilege on a client's behalf.

Why is the problem important?

The problem is likely to be of increasing practical concern as 1997 approaches. We read daily in the newspapers of alleged misconduct on the part of unadmitted solicitors' clerks, and of problems of touting which go with them. We are told, for example, that there are many firms of criminal solicitors in the hands of clerks who systematically engage in touting for criminal business. It has also been asserted that young members of the profession, perhaps newly called to the Bar, may be subject to improper inducements in order to obtain work. Similarly, it appears likely that there will be an upsurge in commercial crime as criminals attempt

to siphon off funds before the change of government; a solicitor provides an obvious and apparently legal conduit for the movement of large amounts of money out of the territory. These phenomena suggest that there will be an increasing need for the police and other investigators to conduct searches on solicitors' offices in order both to gather evidence of criminal conduct by clients, and also to investigate possible breaches of the law by solicitors themselves.

What is the existing position in practice?

Before examining the position from a purely legal viewpoint, it is useful to look at the practical perspective. Perhaps surprisingly, there appear to be no existing guidelines formally agreed by the police, the ICAC or the Commercial Crimes Bureau and the Law Society to control the way in which a search of a solicitor's office should be conducted. Inquiries of all three bodies disclosed that no formal standing orders or other written instructions exist. When interviewed, senior investigators of the ICAC did stress that such a search would always be conducted in a commonsense way but such an approach leaves much to the discretion and wisdom of the investigators concerned and should not, perhaps, be relied on to the exclusion of more concrete legislative controls. It was also suggested that much would depend upon the standing of the firm

concerned; in particular, undertakings which might be accepted from large and reputable operations might not be so willingly accepted from smaller firms. The lack of regulations in the form of Standing Orders or otherwise is a matter for concern because it leaves a large amount of discretion in the hands of the investigator.

Yet, being involved in a search of solicitors' offices is fraught with legal peril for both sides, and especially the legal practitioner. In *Crowley v Murphy*, a leading Australian decision on the availability to the police of a conducting a "negative search" of a solicitor's offices, an eminent Queen's Counsel was almost arrested for obstruction of the police.

Privilege: the basic position

Legal professional privilege has, of course, an ancient pedigree. In *Greenough v Gaskell*⁴ Lord Brougham L.C. said: "if the privilege did not exist at all, everyone would be thrown upon his legal resources; deprived of all professional assistance, a man would not be able to consult any skilful person, or would only dare tell his counsellor half his case." That rationale has not, of course, prevented critics of the privilege from seeking to abolish or limit it, most usually on the Benthamite ground that its existence impeded the investigation of offences and lacked any reasoned moral

⁴ (1833) 1 My. and K. 98, 103.

basis.

Most recently, in *Smith v Director of the Serious Fraud Office*⁵ Lord Mustill examined the operation of the privilege against self-incrimination in detail. As his Lordship there noted, the term "right to silence" does not "denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute."

The basis of the privilege

It is always well to remember the basis of the privilege. First and foremost, it is the *client's* privilege and only he can waive it. The ability to claim privilege depends upon the *status* of the party who holds the document. In the case of a solicitor, he will usually be holding the document as a *bailee for reward* or, occasionally, as a *gratuitous bailee*. In either case, an obligation lies upon him as bailee either in contract, or equity, to preserve the confidentiality of information imparted to him by the client. The client would be able to protect that confidentiality by injunction, or by bringing an action for breach of contract.

As a practical matter, however, once the information is in the hands of the investigators its confidential nature is lost forever. For this reason, those civil cases which

⁵ [1992] 3 All E.R. 456, 464 - 465.

examine the sort of relief available to a party who accidentally discloses confidential documents are of little use in a criminal context.

Time for taking legal advice

At present, the execution of the warrant does not allow any time within which the person upon whom it is served may obtain legal advice. In particular, it would appear that the solicitor will be technically guilty of obstruction if he attempts to obtain legal advice about complying with the warrant *before* he agrees to permit the search to be carried out. Should this be the position? We may here draw an analogy with the execution of *Anton Piller* orders which upon pain of liability for contempt of court require the person to whom the order is addressed "forthwith" to reveal the existence of documents and other material described in the order.

In *Bhimji v Chatwani*⁶ Scott J. (as he then was) commented that such an order did not deprive the recipient of an opportunity to take legal advice before deciding whether to comply with it or not. The learned judge concluded that the order required access to be granted "as soon as [the defendants] had a reasonable opportunity of

⁶ [1991] 1 W.L.R. 989, 1000.

obtaining legal advice".⁷

The fraud or illegality proviso

It is clear that if the client, solicitor, or other bailee is allegedly involved in the illegality himself then no question of legal professional privilege attaches.⁸ The question of "illegality" removing the privilege raises complex legal and ethical problems. For example, a client may seek advice whether a proposed course of action will involve any criminality. In rendering advice on that question, the solicitor himself may become part of a criminal conspiracy.

A recent Australian case illustrates the possible dangers. In *Forsyth v Rodda*⁹ an Australian Queen's Counsel was charged and tried for an alleged criminal conspiracy to defraud the revenue of the Commonwealth. His involvement in the offence was alleged to arise from advice which he gave on the deductibility of certain items of income in a tax-effective scheme. He was, after a trial, acquitted but was earlier unsuccessful in stymieing

⁷ For a discussion of this and other aspects of *Anton Piller* practice, see Wilkinson, "Recent developments affecting Anton Piller Orders" (1993) 23 HKLJ 79, 101 and Dockray and Laddie, "Piller Problems" (1990) 106 LQR 601.

⁸ Per Sears J. in *Messrs Ip and Willis* [1990] 1 H.K.L.R. at 158 citing *R v. Cox and Railton* (1884) 14 Q.B.D. 153; *O'Rourke v Darbishire* [1920] A.C. 581; *Butler v Board of Trade* [1971] 1 Ch. 680.

⁹ (1987) 72 A.L.R. 49; (1989) 87 A.L.R. 699.

prosecution on the ground that it revealed no offence.

Differing views have been expressed about the propriety of rendering such advice and the ethical risks run by the adviser. Mr Justice McHugh¹⁰ advised extra-curially that the solicitor or accountant may best avoid such risks by taking a number of steps including:

- (1) making a thorough investigation of the applicable law;
- (2) if in doubt, discouraging the client from proceeding, or, making it plain to the client that the advice is not intended as an encouragement to any course of conduct;
- (3) assessing whether the object of the advice, even if not prohibited by law, may be regarded as dishonest by community standards;
- (4) ascertaining the facts if there is any reason to believe that the client is concealing them;
- (5) insisting that the client *not* depart from the course proposed, taking steps to check that the advice has been followed, and that any improvisations of the client are disowned;
- (6) making extensive contemporaneous written records;
- (7) avoiding participatory conduct which may indicate a common design; and
- (8) obtaining, if possible, a declaration from the court as to the legality of the conduct.

¹⁰ McHugh, "Jeopardy of Lawyers and Accountants in Acting on Commercial Transactions" (1989) 5 Aust. Bar Review 1.

This approach has been virulently criticised by several commentators. For example, Alan Myers Q.C. has asked rhetorically¹¹: "And what is wrong with testing the boundaries of the law? No doubt the person who goes over it (that is, the boundary) may be punished. But is not everyone entitled to find out where the boundary is?"

A logical difficulty with the "illegality" exception?

Secondly, it may be difficult to demonstrate that any illegality is in fact involved. The case law recognises the logical conundrum in claiming that the document conceals a fraud or illegality in order to remove the privilege when the very fact of such fraud or illegality may only be revealed when the document is disclosed.

What degree of proof must be met in order to remove the cloak of privilege. In *Bullivant v Attorney-General for Victoria*¹² Lord Halsbury, speaking for the Privy Council in a case concerning the taking of foreign evidence on commission, spoke of proof of "some definite charge either by way of allegation or affidavit or what not". As a general matter, the dictum of Pincus J. in *Baker v Evans*¹³ should

¹¹ Myers, "Tax Advice: the Lawyer's Ethical Responsibility" (1990) 19 A.T.R. 80.

¹² [1901] A.C. 196, 201.

¹³ (1987) 77 A.L.R. 565, 576.

be borne in mind: "there is, in general, no legal obligation on citizens suspected of crime to assist the police to assemble incriminating evidence".

Recent Hong Kong authority

Two recent Hong Kong decisions have examined the way in which the privilege confines a statutory right to search. The first decision of Sears J. in *Re an Application of Messrs Ip and Willis*¹⁴ appears impeccable but the subsequent views of the Court of Appeal in *Re an Application by a Firm of Solicitors*¹⁵ occasion more concern, with respect, since they impose few restrictions on arbitrary actions or decision-making.

In *Ip and Willis* Sears J. noted that a warrant issued under section 10B of the ICAC Ordinance may only be issued by a Justice of the Peace acting *judicially*. Furthermore, the warrant should refer to a particular offence and authorise seizure in relation to that offence. It would appear that, provided the warrant follows the words of the statute which empowers its issue, it will be a sufficient warrant.¹⁶ When issuing the warrant, the

¹⁴ [1990] 1 H.K.L.R. 154.

¹⁵ [1990] 2 H.K.L.R. 146.

¹⁶ *R v. IRC; Ex parte Rossminster* [1980] A.C. 952 cited in *Re an Application* at 155.

Justice of the Peace is not to act as a mere "rubber stamp"; he should ensure "that a finding of reasonable grounds is supported by credible facts and circumstances".¹⁷ In *Ip and Willis*¹⁸ Sears J. noted that "the magistrate is an important safeguard for the prevention of abuse, for example, from unwarranted interference by a government department into a citizen's private life ...". Furthermore, in executing the warrant, the police must act in good faith and not for any ulterior purpose e.g. to punish the person upon whose premises the warrant is executed. Any such search must be carried out fairly and strictly in accordance with the terms of the warrant.

In short, the learned judge's decision emphasises that provided the procedural safeguards are followed and the warrant is properly executed, there will be little cause to complain that any arbitrary or improper conduct has occurred. It would seem to follow that such procedure would comply with the Bill of Rights requirements and would not be open to attack for infringement of them.

Unfortunately, the same cannot be said of the disquieting decision of the Court of Appeal in *Re an Application*. The case is a difficult one since it raised the problems of illegality on the part of the solicitors themselves which are discussed briefly above. A warrant was issued pursuant to section 17 of the Bribery and

¹⁷ Per Lockhart J. in *Crowley v Murphy* at 515.

¹⁸ *Id.* 158.

Corruption Ordinance (Cap. 201) authorising a search where the Commissioner has "reasonable cause to believe" that a relevant offence may have been committed. Under section 17(2), a search of the premises of barristers or solicitors may only be permitted if there is reason to believe that the solicitors themselves are involved in the commission of an offence. When privilege was asserted and the solicitors sought to test the warrant commonsense prevailed. The solicitors were given time to apply to the court for judicial review of the warrant. But it would appear from the judgment of the Court of Appeal that such an approach, which depended upon the goodwill of the investigator, need not have been taken. As a matter of statutory construction, the investigator need not have granted time for a review.

Hunter J.A. noted that "if an undesirable element of lottery is to be avoided, which is implicit in any requirement that the draftsman of the warrant who is ignorant of the procedures and practices in the particular solicitor's office has to get it right 'blind', it seems to us that *there is everything to commend either a two-stage inquiry or the introduction of alternative processes now provided for by the Drug Trafficking Offences Act 1986*". (emphasis supplied). The court also endorsed the view of the House of Lords expressed by Lord Griffiths in *Ex parte Francis and Francis* on the construction of section 10 of PACE that "the issue of an immediate search warrant of a solicitor's office

would be justified in comparatively rare occasions and *generally confined to cases in which the solicitor was suspected of complicity in the crime*".¹⁹ Unfortunately, the suspicion itself which establishes the "reasonable cause to believe" may, it appears, be satisfied prima facie by the Commissioner's receiving "complaints" and deciding to act upon them²⁰ - this initial stage is also unable to be scrutinised because of the "publicity" provisions in the ICAC Ordinance.²¹

The judgment strongly suggests two things: first, if possible, a "two-step" inquiry should be pursued when objection on ground of privilege is taken by the solicitor to allow an appropriate application to the court. Secondly, it would be desirable if a legislative scheme were introduced comparable to that which controls seizure of evidence related to drug-trafficking in England at which objection may be taken upon grounds of privilege.

Unfortunately, at present in the absence of any such legislation the matter of whether any opportunity is allowed for objection to be taken on the basis of privilege is largely in the hands of the investigators themselves. Hunter J.A.

¹⁹ [1989] A.C. at 386.

²⁰ *In re a Firm* [1990] 2 H.K.L.R. at 155 per Hunter J.A. describing the Commissioner's duty under section 12 of the Ordinance.

²¹ *Ibid.* See sections 30 and 30A of the Ordinance.

concluded²²:

The detailed search has to be carried out by persons very familiar with the case and with the totality of the information then in the Commissioner's possession. The only practicable safeguards are *their integrity, and the fact that they must have reasonable cause to believe that any particular document evidences crime. In the first instance it may be impossible to consider every document individually, and suspicious files may have to be removed as a whole.* But each must then be fully and carefully examined and only those documents retained which pass the reasonable cause test. These factors plus the searchers' knowledge that their choices may thereafter be scrutinised by the court, constitute the best safeguards that can be devised. (emphasis supplied)

A search for material evidencing the solicitor's own possible criminality raises particularly troublesome issues. Hunter J.A. appears to approve a "negative" search procedure i.e. the possible examination of all files to *exclude* them from the bounds of inquiry, and is content to rely upon the good conduct of the investigators. Such confidence may at present be fully justified but in less benign hands the powers conferred by section 17 are capable of arbitrary and oppressive use.

The Police and Criminal Evidence Act

PACE has little to say about legal professional privilege; despite some argument to the contrary, it seems generally to be assumed that the privilege is preserved in the same form which it enjoys at common law and is subject to the

²² *Id.* 156 - 157.

same limitations e.g. with respect to illegality by the legal adviser. Section 10 excludes from material liable to search "excluded material" which is defined to include material the subject of legal professional privilege. As noted above, the problem with PACE is that it does not appear to lay down any procedure which may be applied if there is any dispute between the parties which category of documents applies.

*R v. Central Criminal Court; Ex parte Francis and Francis*²³ (discussed above) illustrates the difficulties which can arise where it is said that illegality is involved and PACE applies. There, investigators sought access to documents held by a solicitor who conducted a conveyancing practice; it was said that the documents involved in the sale and purchase of land showed the way in which "money-laundering" had been carried out. It was argued that documents were privileged in the hands of solicitors unless it could be demonstrated that the solicitor himself was involved in the criminality.

This view was rejected by a majority of the House of Lords, despite the ambiguous language of section 10(2) of PACE on the ground that such reasoning would be wholly contrary to the existing common law authority on the illegality exception. As already noted, however, the House of Lords discountenanced the notion of an "immediate" search, without opportunity for the solicitor to approach the court, except in rare cases where the solicitor himself was

²³ [1989] A.C. 346.

implicated in the criminal conduct.

The Bill of Rights cases

A number of decisions have examined the operation of Article 14. In *Re Reiner Jacobi*²⁴ Cheung J. upheld the validity of a production and search order which had been issued pursuant to the Drug Trafficking Ordinance. The learned judge relied upon the decision of the Supreme Court of Canada in *Hunter v Southam Inc*²⁵ for his conclusion that the search warrant could be issued:

- (a) in advance of the search;
- (b) by a person capable of acting judicially who is not involved in the investigation itself; and
- (c) after it has been established by oath that reasonable and probable grounds exist to believe that an offence has been committed and that evidence relevant to it is to be found in the place to be searched.

It is important to note that the Drug Trafficking Ordinance specifically excludes from the ambit of documents which might be searched items which include "items subject to legal privilege". Although certain other provisions of the Drug Trafficking Ordinance are at present under attack before the Privy Council for allegedly infringing the Bill of Rights Ordinance, it seems that the search

²⁴ M.P. 975 of 1991 Unreported.

²⁵ (1984) 11 D.L.R. (4th) 641.

provisions would be protected because, like PACE, they specifically exclude documents which are the proper subject of a claim of legal professional privilege from the ambit of any search. Once again, however, as with PACE, there is no procedure in place should there be any dispute between the parties whether or not the documents sought to be seized are privileged.

More recently, in *R v. Securities and Futures Commission; Ex parte Lee*²⁶, the Court of Appeal upheld the validity of certain provisions of the Securities and Futures Commission Ordinance which requires the applicant to attend for an interview to assist in the investigation of alleged breaches of the Ordinance. The way in which the Court of Appeal interpreted the various provisions of the impugned Ordinance, and its relationship with the Bill of Rights Ordinance, suggest that any argument on privilege which invokes section 14 will have a narrow operation.

Article 14 and "business" premises

At first instance, following his earlier view in *Tse Chi Fai, Ronald*²⁷ Jones J. held that the issue of privacy refers to "his personal and private affairs and does not extend to the realm of business transactions". Furthermore, even if "privacy does extend to an individual's business affairs,

²⁶ Court of Appeal 19 February 1993 Unreported.

²⁷ Jones J. unreported 20 November 1992.

that expectation of privacy is minimal".²⁸ If followed that provided that a reasonable suspicion of misconduct existed the applicant could be summoned to assist the investigator.

In the Court of Appeal, Litton J.A. took a wider view of the protection which was conferred by Article 14. The learned judge observed:

Whilst the juxtaposition of the words "privacy, family, home" tends to suggest that "privacy" is restricted to privacy in personal affairs, I am not convinced that a distinction between personal and business affairs is in the context of Article 14 valid. Assume that an individual purchases shares in a publicly listed company, as many individuals do. Most people would say that this is a personal matter. Assume that the same individual is a director of the listed company in which the share purchase is made: Is this a 'business transaction'? Where does one draw the line?"²⁹

Clearly, Litton J.A. would, in appropriate circumstances, hold that the protection provided by the Bill of Rights Ordinance may extend to "public" matters. The gist of his decision on this point seems to require that there be some "private" element involved in the activity before the section can be invoked. It is difficult to see what "private" element will exist with respect to ordinary commercial dealings evidenced by documents retained by a solicitor in the course of his profession; it would seem to follow that any section 14 protection sought to assist a claim of privilege will have only a narrow effect.

²⁸ Jones J. unreported. Transcript p. 32.

²⁹ Transcript p. 12.

The use of guidelines

Litton J.A. in *Lee Kwok Hung* did stress the importance of avoiding "arbitrary or unlawful interference".³⁰ It is here, I think, that the present law might be considerably improved. In *Reiner Jacobi* there was nothing arbitrary about the procedure since the issuing of the warrant was controlled by a judicial officer who had to reach an informed decision on the basis of sworn evidence put before him.

The Canadian experience under the Charter demonstrates that one way of avoiding any problem with "arbitrary" or "unlawful" conduct on the part of investigators is to prescribe *in advance* a set procedure to be followed in the event of dispute about privilege. Although earlier Canadian cases on Article 8 grappled with the problems of privilege, the enactment of section 441 of the Criminal Code in 1985 would appear to have removed difficulties which then existed concerning privilege.

Section 441 sets out a detailed code which must be followed by investigators in the event that there is any dispute between the parties. In short, the disputed documents may be searched for and seized by the police who must, upon objection, seal them up and deliver them to the court to which application must subsequently be made for access. All the steps in the matter are on a strict time limit which requires the solicitor to make out a case for

³⁰ Transcript p. 12.

privilege in short order.

In *R v Blost*³¹ the Court upheld the efficacy of the section 441 procedure which removed any question of Charter infringement so long as it was assiduously followed.

Whatever the strict legal position, whether under PACE or the Bill of Rights Ordinance, many of the potential difficulties involved in the execution of a warrant or other compulsory process where legal professional privilege may be in issue would be avoided by the agreeing of Guidelines between the investigators and the Law Society.

An example of the sort of Guidelines which could be adopted are those agreed between the Australian Taxation Office and the relevant Law Societies in Australia.

General conclusions

The present state of the Hong Kong law with respect to the recognition of legal professional privilege asserted by a legal adviser in the face of a warrant is unsatisfactory to all parties. The solicitor will be unsure of his liabilities to his client; if he fails to assert a privilege which the client could claim, the solicitor will be liable for breach of contract. On the other hand, if he attempts to prevent the execution of the warrant he may be liable to arrest for obstruction. The police, on the other hand, will be concerned to ensure that

³¹ (1988) 48 D.L.R. (4th) 69.

they act within the law in executing the warrant and could draw some comfort from the decision in *In re a Firm* that the court will uphold their power to do so provided that they act in accordance with its precise terms.

The likely impact of PACE on the present *de facto* position, if introduced in its present proposed form, will be quite limited. By definition, documents which are the subject of privilege will be excluded from the terms of a warrant issued under it but there is no convenient mechanism in the legislation to permit disputes about the nature of the documents and their privileged nature to be easily resolved.

The Bill of Rights Ordinance, itself, does not appear likely to extend the protection already available with respect to privilege since the current jurisprudence has taken a restricted view of Article 14 which is the most likely foundation for the protection of privileged documents from unwarranted search and seizure. If the present trend, which is to focus principally on the *private* nature of the activity, is maintained by the courts then section 14 will have little to say on the topic of privileged searches.

It is submitted that a better practical approach would be for the Law Society on behalf of its members, and the relevant investigators, to discuss and lay down guidelines to control the way in which a search of material for which privilege is claimed should be conducted. Such guidelines might provide for the sealing and safe-keeping of

documents over which privilege is claimed and impose time-limits within which an approach to a court must be made by the solicitor to vindicate the privilege asserted. If models are required, the provisions in the Canadian Criminal Code and the Australian Taxation Office Code of Conduct are available. Both work well in practice and the Canadian rules, as noted, have the added benefit of removing a priori any suggestion that the Charter of Rights is being infringed by the search on arbitrary or unlawful grounds.

Although it may well be possible at present for the court to rely upon the "goodwill and discretion" of the police in the execution of a warrant, it is surely more appropriate that possible future arguments about privilege be controlled by an agreed Code of Conduct rather than the uncertain scruples of the investigators themselves.

Street-level Justice Police Discretion and the Rule of Law

MARK S. GAYLORD AND HAROLD TRAVER

No society is, or should be, governed strictly by law. Rigid adherence to an unbending code may lead to order, but it can never achieve justice. The absence of law, on the other hand, results in tyranny. Fortunately, nations need not face such a bleak choice. Healthy societies, evolving in response to the changing needs of their citizens, proceed along a middle path in which official discretion tempers the law.

This paper examines police discretion, or the authority to decide whether or not to make an arrest when there is legal justification to do so. First, we examine the changing legal criteria for arrest in Hong Kong. Secondly, we describe the interpretive processes involved in assessing whether legal grounds for arrest exist. Thirdly, we look at the organizational context of police discretion. Fourthly, we examine a number of situational variables that influence police discretion. Finally, we discuss police discretion in relation to the future Hong Kong Special Administrative Region (SAR).

Powers of arrest

Public concern about the Hong Kong police generally relates to the statutory powers they have been given to carry out their duties. Of these powers, the single most important is

the power to make an arrest, which can be defined as the legal authority to take a person into physical custody. At common law all persons, not just the police, have certain powers of arrest. In Hong Kong the power of the citizen to arrest suspects is defined by s101 of the Criminal Procedure Ordinance (Cap. 221) which provides that an individual may arrest "any person whom he reasonably suspects of being guilty of an arrestable offence."

In addition to citizens' powers of arrest, broad powers have been given the police under s50 of the Police Force Ordinance (Cap. 232). Depending on the circumstances, the police may arrest a suspect either with or without a warrant. For a variety of reasons, arrest warrants may be applied for and obtained under s9 and s72 of the Magistrate's Ordinance (Cap. 272) by the investigating officer or the prosecution. The most important use of arrest warrants involves situations where the police have reasonable suspicion that a particular person has committed an offence but do not know the suspect's whereabouts or have reason to believe that the person will not surrender to the police voluntarily. Arrest warrants are also issued when persons fail to appear before the court after having been issued a summons or after having been released on bail. Once a warrant has been issued any police officer can arrest the individual named in the warrant. There is no requirement that the arresting officer have reasonable suspicion that the individual has in fact committed an

offence under the law.

The police may also arrest a suspect without a warrant. Until it was amended by the Police Force (Amendment) Ordinance (57 of 1992) in June, 1992, s50(1) of the Police Force Ordinance granted police statutory authority to arrest any person for any offence. All that was necessary under s50(1) was that circumstances or conditions existed that caused an arresting officer to have reasonable suspicion that an offence had been committed or was about to be committed. As it now stands, the amended version of s50(1) places limits on police powers of arrest. Under the current law, a police officer has the statutory power to arrest any person whom he reasonably believes will be charged with, or reasonably suspects is guilty of:

- (a) any offence for which the penalty is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to prison; or
- (b) any offence, if it appears to the police officer that service of a summons is impracticable.

Possible reasons precluding the issuance of a summons are: (1) the police officer does not know or cannot easily obtain the suspect's name; (2) the police officer has reasonable grounds for doubting that the suspect has provided him with his or her real name; or (3) the suspect has failed to give a bona fide address at which a summons could be

presented s50 (Cap. 232).

A police officer may arrest a person under s50(1) without a warrant and regardless of whether or not the officer has observed an offence committed s50(1)(a). Moreover, the police are provided with statutory authority to arrest any person for whom there is reasonable suspicion that the subject is liable for deportation from Hong Kong. The most important change is that, unless service of a summons is impracticable, a police officer can no longer arrest persons for offences that carry only a fine, or for which a sentence of imprisonment only comes into effect on a second or subsequent conviction.

It is worth noting that, even if an officer acts "unreasonably" in making an arrest, a conviction can still result provided there has been no miscarriage of justice. This stands in contrast to the United States where the court will exclude evidence where there is a suspicion that it has been improperly obtained.

Adoption of the Law Reform Commission's recent recommendations on powers of arrest would produce few significant changes (Law Reform Commission of Hong Kong, 1992). In addition to clarifying the law, the proposals would extend the powers of arrest to offences and situations not now covered under the law. In particular, the Law Reform Commission's proposals would substitute the concept "arrestable offence" for section 50(1a), which empowers the police to arrest anyone

reasonably suspected of committing "any offence for which the sentence is fixed by law or which a person may (on first conviction of that offence) be sentenced to imprisonment." As the Law Reform Commission's report notes, this would have the advantage of introducing "consistency and clarity" into the law of arrest. The concept of arrestable offence is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1): "an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term exceeding 12 months, and an attempt to commit any such offence." Arrestable offences cover such common acts as theft (snatching), theft (pickpocketing), theft from vehicle, criminal damage, burglary, rape and indecent assault. The concept of arrestable offence is also an integral part of such offences as loitering. In regard to the latter, s160(1) of the Crimes Ordinance (Cap. 200) states that "a person who loiters in a public place or in the common parts of any building with the intent to commit an arrestable offence commits an offence and is liable to a fine of \$10,000 and to imprisonment for 6 months." Restricting arrest powers to those offences for which imprisonment exceeds 12 months obviously represents a restriction of arrest powers. Yet the proposals retain the power of arrest without a warrant for virtually all types of serious criminal offences.

Adoption of s25 of the English Police and Criminal

Evidence Act 1984 (hereafter referred to as PACE) would extend the power of arrest to non-arrestable offences in certain situations. These situations include those in which a police officer has reasonable grounds for believing that an arrest is necessary to prevent a person from (1) causing bodily harm to himself or any other person, (2) suffering bodily injury, (3) causing loss or damage to property, (4) committing an offence against public decency, or (5) causing an unlawful obstruction of the highway. In addition, an arrest may be made when an officer has reasonable grounds for believing such apprehension is necessary to protect a child or other vulnerable persons from the suspect. The adoption of the PACE provisions would, under certain circumstances, expand arrest powers to any summary offence. In short, the police would still retain considerable powers of arrest.

In addition to powers of arrest, there are a number of statutory provisions that provide the police with the power to stop, search and detain persons. These provisions are contained in a number of Hong Kong ordinances including the Public Order Ordinance (Cap. 245, s33), the Dangerous Drugs Ordinance (Cap. 134, s52(1)), the Firearms and Ammunition Ordinance (Cap. 238, s41 and s42) and, of course, the Police Force Ordinance (Cap. 232, s54). The powers to stop and search are discussed elsewhere in this volume (see the paper by Gary Heilbronn). Nevertheless, one such power worth noting here is the police power to stop and check Hong Kong

residents' identity cards.

Under section 17 of the Immigration Ordinance (Cap. 115) any officer can stop any person and ask for proof of identity. Two databases, EPONICS (Enhanced Police Operational Nominal Index Computer) and ICIS (Immigration Central Index System), are used by the police for this purpose. With EPONICS the police have access to information about prior criminal convictions, outstanding warrants, missing persons reports and persons thought to be violent. It appears to be standard practice to carry out an EPONICS check every time a person is stopped for an ID check. Such checks seriously weaken the requirement for reasonable suspicion. In fact, as the Law Reform Commission's report notes, section 17 of the Immigration Ordinance, in conjunction with other stop and search powers, permits the police to justify, *ex post facto* if necessary, virtually *any* stop and search. The Law Reform Commission has no real solution to this problem. The police, of course, argue that random ID checks are necessary and should therefore be retained.

Interpreting reasonable suspicion

Given the legal requirement of "reasonable suspicion" before an arrest is made and given the vague nature of what constitutes reasonable suspicion in real-life situations, police discretion is central in determining who is arrested.

However, we are not dealing merely with the legal requirements of reasonable suspicion; in most instances discretion occurs after sufficient reasonable suspicion exists to legally support an arrest. In other words, most instances of discretion are those in which the police officer has reasonable suspicion to justify an arrest but for various reasons chooses not to do so (Sanders, 1983).

Because reasonable suspicion is a concept requiring interpretation both of the law and the meaning of the situation, it is inherently vague. That is, there is almost always more than one way of defining reasonable suspicion, and each case turns on how the officer regards the situation. Therefore, it is important to understand how interpretations are made.

For the most part, police rely on their common sense understanding of the world (Sanders, 1977). To explain fully why they had reasonable suspicion to make an arrest, they depend on others interpreting the same kinds of circumstances essentially as they themselves do. This process is best described by Harvey Sacks (1972) as "procedure by incongruity." When police observe elements that do not fit, as for example, a person wearing a coat on a warm day, it is a cause for suspicion. Common sense reasoning suggests to the policeman that any person wearing a coat on a warm day does so to hide something, such as a gun or stolen goods. The incongruity between the weather and coat would constitute a reasonable

suspicion. The establishment of reasonable suspicion for an arrest is based largely on experiences of police; and what can be seen as a "good reason" to stop a person and make an arrest broadens with experience. As a result, some arrests may be seen by members of the public as arbitrary or discriminatory when in fact they are based on a set of common sense assumptions about the world. As assumptions vary, so too does the sense of reasonable suspicion.

As officers become more experienced, they tend to see more readily the subtle clues that serve as reasonable suspicion to stop persons and search them for evidence of crime. Nevertheless, clues, subtle or not, leading to a sense of reasonable suspicion must be interpreted with reference to what the courts deem it to be.

The organizational context of police discretion

What a given police officer will do in an arrest situation would seem to be mediated more by the law and the nature of the situation than by the police organization. Yet in some ways organization touches everything police officers do, and, while there is some independence in police work because of the dispersed nature of supervision, the organization can determine how a police officer will define a situation in which he finds himself. Thus it needs to be asked why certain police forces have one form of

organization while others differ (Sanders, 1983).

In addition to looking at how departments are organized for gathering and using information, we can assess them in terms of their so-called "styles" of policing. The style of a police organization not only affects how discretion is used, but is also a reflection of local political and social institutions. James Q. Wilson (1968) has described three major styles of police organizations: (1) watchman, (2) legalistic, and (3) service. This section describes each style and then looks at their consequences for police discretion.

Watchman style

The watchman style organization described by Wilson exists in cities with heavy political patronage, corruption and minimal response to community needs. Pay is low even for the higher ranks. There is little expectation for officers to do other than show up for duty, and there are few rewards for good performance. Advancement is a function of having the right connections. As a result, the existence of corruption is rationalized by the low pay and poor chances for advancement.

The watchman style characterizes many colonial forces. In such organizations the police have little reason to identify with, or to care about, the local community. Promotion is generally based on race rather than merit. In

Hong Kong's first years as a British colony, consideration was given to establishing a civilian police agency modelled on London's Metropolitan Police Force. However, this idea was abandoned in favour of an armed force similar to that of the Royal Irish Constabulary. The authorities adopted a recruitment policy, unique among British colonies, drawing the majority of the rank-and-file from overseas and staffing the higher ranks entirely with British officers (Miners, 1990). The resulting force was more expensive to recruit and maintain, as well as less effective in dealing with the local population, but it could be trusted to uphold British rule and to protect European lives and property in the face of a possibly hostile indigenous population. Not surprisingly, most histories of the Hong Kong police describe problems of low morale, high staff turnover, distrust by the local population and corruption (Sinclair, 1983; Crisswell and Watson, 1982).

In the watchman style, force little is expected of the members. Supervision is minimal and discretion is widespread. Aside from major crimes, the orientation is toward maintaining order, and the police tend to handle matters informally rather than by invoking arrest powers. Where corruption is high, as it often is in watchman style forces, efforts are directed primarily to secure bribes or to garner a share of illegal earnings from gambling, prostitution, illegal drugs and other crimes receiving the benefit of police protection. Thus discretion is used in

corrupt watchman departments as much for shakedowns and bribes as for law enforcement.

According to Lethbridge (1985) and Vagg (1991), throughout most of Hong Kong's history as a British colony, police corruption was the major if not the sole aspect of policing worth discussing. Until the early 1970s, the police quite openly walked into restaurants, bars and brothels to collect "tea money." It has only been since the establishment in 1974 of the Independent Commission Against Corruption (ICAC) that the Royal Hong Kong Police Force has been able to shake itself free from watchman style origins.

Legalistic style

This type of organization exists as a reaction to corrupt and inefficient watchman style police departments. The move from watchman to legalistic style generally occurs when reform administrations take over from entrenched political machines and a patronage system is replaced by one based on training, education and merit. Although Hong Kong has never had a "reform administration" in this sense, the government has become increasingly interventionist in recent years. Over the past 20 years, the Hong Kong police force has adopted a more legalistic style.

In legalistic departments, control is maintained over individual officers' behaviour to the extent that virtually

every matter is treated as a law enforcement problem, no matter how commonplace. For every call on which a patrol officer is dispatched, he must file a report explaining his actions, particularly in situations subject to corruption.

In addition to strict supervisory control in legalistic departments, greater opportunities exist for advancement and incentives are offered to obtain the type of police work the department values. By creating new administrative positions and broadening line positions, there is increased vertical and horizontal mobility within the department. The new positions carry with them far better pay and incentives for good performance. Since performance is measured by a set of unambiguous criteria, officers know the prerequisites for career advancement. As might be imagined, in such a department an individual officer is given little discretion. If headquarters dispatches a call, there is a departmental record of it. If an arrest is possible and the officer did not make one, the officer's supervisor will demand to know the reason. Since there is a heavy "paper trail" in reports and dispatch logs that follow officers, they have little leeway in deciding whether or not to make arrests: in most cases no choice at all. Since there are incentives for arrests, the strict regulations and control give the organization, rather than the individual police officer, nearly total control.

Legalistic departments, while relatively narrow and severe in the margin afforded individual officers, are by far

the most equitable. As Wilson notes, in discretionary situations there is a trade-off between the leniency of watchman organizations and the equality of legalistic organizations. In arrest decisions, watchman officers are far more likely to let a recalcitrant off with just a warning, but their patterns of actual arrests tend to discriminate against minorities and the poor. The legalistic style, on the other hand, does not discriminate: everyone receives the same unbending decision.

Service style

The third style of policing described by Wilson attempts to combine the efficiency of the legalistic style and the broad informal discretion of the watchman style. Organizationally, the service style reflects the dispersed precincts of the watchman organization; however, the purpose of decentralization is to maintain a sense of community orientation among police and not the partisan political dispersion of watchman-type forces. The service in these departments is defined according to what the community sees as its major crime problems rather than in terms of priorities set by the department or the law. Since performance is not measured solely on the basis of law enforcement activities but rather on how appropriately a situation is handled by an officer, there is no effort to maximize the number of arrests except in those areas of

community concern (Sanders, 1983). An officer's discretion in service organizations is tied to the nature of the community. The character of most communities with service style forces makes discretion relatively simple in that there is a common understanding of what is appropriate under a given set of circumstances. On the one hand, this allows officers a good deal of discretion. A correct course of action is decided on the basis of an understanding of community mores. On the other hand, this limits choices to precisely those mores. To a great extent, discretion rests with what the citizens want done, either directly in a specific situation or in terms of more general police policies. In this context, discretion thus refers more to being attuned to community values than to decisions made on the basis of individual police values.

Situational elements of police discretion

This section examines the major situational variables that affect an arrest. It should be remembered, however, that the typical encounter between a police officer and a citizen does not result in an arrest, and most discretion is the decision not to make an arrest even when there is legal justification to do so.

Seriousness of the crime

The most important variable in whether or not a police

officer will make an arrest is the seriousness of the crime. Major offences such as homicide and robbery virtually always result in an arrest regardless of other variables involved (Black, 1971; La Fave, 1965). All other variables are less accurate as predictors of arrests than the seriousness of the crime. What is considered to be a serious crime varies, but once a given offence is defined as a serious crime, arrest is generally automatic. Thus there is a strong relationship between the course of action taken by the police and the characterization of an offence. If an arrest is made, the offence is considered serious, and a serious offence warrants an arrest. In other words, the offence justifies the arrest, and the arrest points to the seriousness of the offence (Garfinkel, 1967).

Previous record

In general, a suspect with a previous record is more likely to be arrested than one who does not. In the past, however, as noted by Piliavin and Briar (1964), most police patrol officers did not have a suspected offender's record on hand when deciding to make an arrest. While such a record might have helped to determine whether or not an arrest should be made, it was generally not readily available and therefore insignificant as a variable.

Modern information technology has changed this situation. The Hong Kong force has established an

Information Technology Branch to coordinate and implement an expanding number of information systems. The most important of these, from the standpoint of the present discussion, is EPONICS, mentioned above. EPONICS is designed to supply data pertaining to suspects' criminal records. When combined with an effective mobile radio network, EPONICS permits the police to access such information in a matter of minutes.

What effect such information has in determining whether to make an arrest in Hong Kong is unknown. What is certain, however, is that the Law Reform Commission was sufficiently concerned about possible abuses to recommend that knowledge of previous criminal convictions should not be automatically available to a police officer conducting a random ID check. Nevertheless, the Commission recommends that when a "stop and search" is conducted, the police should have access to data contained in EPONICS. Yet even this recommendation is linked to an adoption of PACE provisions restricting stop and search to instances where there is reasonable suspicion that a suspect is in possession of stolen or prohibited articles. Under the Police Force Ordinance, the police may currently stop any person in any street or public place who "acts in a suspicious manner" and demand proof of identity.

In many cases, there can be a trade-off between previous records and arrests. Sometimes offenders with previous records will act as informants for the police and

this may even lead to an inverse relationship between arrest and previous record. Those with previous records have the most information to offer and so are in the best position to make a deal with officers for their freedom (Skolnick, 1966).

Demeanour

Of all the situational factors, demeanour has been the most widely studied. In one of the earliest such studies, Piliavan and Briar (1964) found that demeanour was directly linked to the arrest of juveniles. To the extent that juveniles who had committed petty crimes were cooperative with the police they were not arrested; those who were uncooperative were taken into custody. However, in later studies of demeanour and arrests, the relationship was found to be relatively weak even though the assessment of an individual's demeanour, the so-called "attitude test," was used by the police in making determinations in arrest situations.

Police discretion, crime control and due process

Police are expected to handle crime matters within the framework of criminal law and procedure. Yet among those who study the police, there is widespread agreement that officers are dismayed by the number of putative criminals who escape conviction because of legal and procedural

constraints. Jerome Skolnick (1975:6) suggests that this apprehension stems from a conflict between one set of forces stressing initiative and efficiency and another stressing the "Rule of Law":

The police in democratic society are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rules and regulations. By contrast, the rule of law emphasizes the rights of individual citizens and constraints upon the initiative of legal officials. The tension between the operational consequences of ideas of order, efficiency, and initiative, on the one hand, and legality, on the other, constitutes the principal problem of police as a democratic legal organization.

The tension noted by Skolnick has been discussed by Herbert Packer (1964, 1968) in terms of a conflict between what he called "crime control" and "due process" models. On the one hand, there are demands that police forces control crime in such a way that the maximum number of criminals are punished, thereby discouraging them and deterring others. This is the theme of the crime control model.

On the other hand, the United Kingdom's Royal Commission on Criminal Procedure in 1978 has made a number of recommendations that have, in effect, raised the due process standards of fairness, clarity and accountability in British police procedures. By so doing, the British government has enhanced the capacity of its citizens to

challenge police procedures on grounds that rights to privacy, liberty, dignity and equality have been evaded. This is the theme of the due process model.

Packer (1966:239) summarizes the important differences between the two models as follows:

The Crime Control model sees the efficient, expeditious and reliable screening and disposition of persons suspected of crime as the central value to be served by the criminal process. The Due Process model sees that function as limited by and subordinate to the maintenance of the dignity and autonomy of the individual. The Crime Control model is administrative and managerial; the Due Process model is adversarial and judicial. The Crime Control model may be analogized to an assembly line; the Due Process model to an obstacle course.

Police are expected to control crime but are hindered in their efforts by laws requiring respect for the rights of citizens. As a consequence they sometimes take it upon themselves to control crime by extra-legal means. For instance, a policeman may perform an unlawful search of a suspect's residence in order to make a lawful arrest. A policeman also may permit an individual to engage in crime without fear of arrest in exchange for information about the crimes of others. Or a policeman may use violence, protracted questioning or psychological pressure to extract a confession from a suspect (Marx, 1981). As elsewhere, police officers in Hong Kong are in a difficult position, for in order to do their work efficiently they must sometimes use

more power than the law seems to give them. They are responsible for maintaining order and enforcing the criminal law, but if they exceed their authority when dealing with certain suspected offenders they are subject to severe public criticism. They can safely exceed their legal authority only when dealing with those who lack power and are therefore relatively helpless. They must decide not only whether a certain act is in violation of the law but also whether it can be proved that the law has been violated. They must rigorously enforce the law, yet they must determine whether a particular violation of law should be handled by dismissal, warning or arrest. Police officers are not expected to arrest everyone known to have violated the law. The courts would find it impossible to function if officers brought all suspects to court, and officers would be in court so much of the time that the police force would have to be considerably enlarged. Consequently, police officers must themselves judge and informally settle more cases than they take to court. Unfortunately, the processes by which such settlements are made have not been formally defined.

In recent years, a number of observers have expressed concern over the discretion exercised by the police and there have been calls for the elimination, reduction or monitoring of this power. One basis of these requests is the common assumption that police agencies are supposed to be ministerial, acting in strict accord with legislative

provisions. Discretionary decision-making by police officers does not square with the notion that legislated punishments are supposed to be imposed certainly and uniformly on all who violate the law. Nevertheless, the adjustment principle is as much a part of the criminal law as is the deterrence or law enforcement principle. The controversy is thus about whether police officers exercise their discretion wisely and fairly, not about whether such discretion is unauthorized (Davis, 1969:15-21).

Respect for the law depends perhaps more on the behaviour of police officers than on that of other agents of the state. Law-abiding behaviour among citizens cannot be effectively reinforced if police officers are held in low esteem because of their conduct (Sutherland, Cressey and Luckenbill, 1992:350). Some would say that police discretion attracts scandal. As William McDonald (1973:124) observes, "it invites arbitrariness, favoritism, corruption, and injustice. Even when it is exercised evenhandedly, it can create the appearance of injustice." Nevertheless, police discretion will always be a factor, for no legislature, far removed from the street, can precisely and unequivocally stipulate in advance just what behaviour should have as its consequence an official arrest. Further, it is doubtful that even the current arrangement, in which police officers have substantial discretion, produces more injustice and invites more arbitrariness, favouritism and corruption than would a system in which arrests and

punishments were centrally administered (Marx, 1974).

The prevailing image of criminal justice in general and of law enforcement in particular is an erroneous one. The notion of a criminal justice "system" in which personnel of superior rank control the practices of lower ranks fails to describe reality. Rather than a criminal justice system centrally controlled in such a fashion that the low-level personnel of each agency are under the command of a senior official responsible to the government, there is merely a loose collection of agencies whose personnel often work at cross-purposes and in a spirit of competition rather than cooperation. And rather than a police system operating through a hierarchy of ranks, there is a collection of patrol officers who make discretionary decisions, often ignoring or evading the inspectors and superintendents who presumably control them (Bittner, 1970:52-62; Manning, 1976; Brown, 1981:96-100).

Power in a police force accrues to the personnel of lowest rank, the street-level officers. These men and women must ignore or handle without arrest a good deal of what others might regard as crime. To them the behaviour at issue, though it may literally violate the criminal law, may not really be "crime," given all contingencies operating at any given moment, such as relationships between participants, the motives, demeanour and preferences of the participants, and the amount of harm done (Bittner, 1967; Wilson, 1968:31-39; Black, 1980:65-84; Smith and

Klein, 1984). To insist that police make an arrest each and every time they witness crime is unreasonable. Considered from the standpoint of hierarchical organizations, such an insistence assumes that persons of high rank know what crime is, and that those of low rank do not. In practice, however, such an insistence is not made. Unless street-level officers exhibit evidence of corruption, their conduct is almost always deemed in compliance with laws and rules stipulating that they should not ignore crimes. This follows from the condition that such laws and rules are necessarily vague. Thus when a police officer ignores an act, that act, by definition, is not a crime and the officer has committed no offense (Daudistel and Sanders, 1974; Manning, 1977:139-201.)

After studying discretionary practices among Chicago police officers, Kenneth Culp Davis (1975:113) recommended that police administrators make rules regarding selective enforcement of statutes and that these rules be made public. These recommendations were based in part on his assumption that "the quality of enforcement policy will be improved because it will be made by top officers instead of by patrolmen." But there is no clear evidence that top-level police officers are any more knowledgeable about discretionary matters than are street-level officers. Neither is there good and sufficient evidence to support his assumption that such administrative rules will "reduce injustice by cutting out unnecessary discretion,

which is one of the prime sources of injustice" (1975:19). It is possible that in a criminal justice system comprising a hierarchy of command, many more persons would be punished than are now being punished. This, however, would not necessarily mean injustice was being reduced. It is possible that formulating departmental rules to be followed by all officers might help patrol officers carry out what Davis called "community desires," but this also would not necessarily lead to a diminution of injustice.

Police discretion, the Rule of Law and the Hong Kong SAR

At the end of the 19th century, Emile Durkheim developed one of the most influential theories of law creation (Chambliss, 1988). Durkheim postulated that the criminal law embodies the most deeply felt morality of a people. This morality is a reflection of the religious and customary values "found in all healthy consciences" (Durkheim, 1933:73). Yet it would be naive to assume that in *all* societies the criminal law reflects a widely shared moral consensus. Hong Kong is a case in point. The origin of law in Hong Kong is quite different from that suggested by Durkheim. Throughout the 19th century, British colonialism exported Western concepts of crime and criminal justice to much of its empire without regard for structural or cultural differences (Vagg and Traver, 1991). The historical record in Hong Kong offers many examples of how the law was

used to protect, first and foremost, the lives and property of European residents rather than of the Chinese. Little thought was given to how well Western legal concepts and procedures would be received by Hong Kong's indigenous population. Nor has little changed today. It remains to be seen if this Western transplant will be rejected by its host after 1997 or if the Hong Kong SAR government will work to develop a hybrid criminal justice system comprising elements both of Chinese and Western values.

The supremacy of the law, with its notions of judicial independence, due process and Rule of Law, may be a firmly entrenched feature in Western legal theory but it is a concept far from universal. Hong Kong's nearest neighbour and future sovereign is a good example. In contrast to Hong Kong, mainland China has been shaped by quite different historical forces and as a result finds itself caught between the acknowledged need for a stable and codified system of law and the principle that Chinese Communist Party leadership is supreme. Under this principle, it is likely that legality will be sacrificed whenever it is deemed to interfere with party dictates. Under such conditions, the law becomes merely an administrative tool wedded to the requirements of power. Ultimately the future course of legal development in Hong Kong will depend on how China reconciles the rule of party with the Rule of Law (Gaylord and Traver, 1993).

In democratic societies police discretion mediates law

and justice. On the other hand, in authoritarian nations such as China, police discretion is used to protect the interests of the state. It is an open question whether, after 1997, police discretion in Hong Kong will continue to serve the adjustment principle or, as it now does in mainland China, serve the interests of party and state.

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Police Powers to Stop, Search and Detain

Recent Developments and Some Anomalies

GARY N HEILBRONN

Police powers to stop, search and/or detain private individuals who are not even reasonably suspected of having committed an offence, represents the "fine line" between the individual's supposed freedom to move and act within a democratic society, on the one hand, and what is undoubtedly a valuable crime prevention and detection procedure (as well as being the first stage in many criminal prosecutions), on the other. In a more practical context, the zealous exercise of such powers is on the "cutting edge" of police public relations, and provides fertile ground for activity by the recently maligned Police Complaints Committee and CAPO.¹ Moreover, their very contentiousness and the often vague manner in which such powers have been provided for in legislation, allow a potential for problems - ranging from civil claims for damages against police alleging the torts of battery, false imprisonment, and possibly also for contravening the *Bill of Rights Ordinance* (BoR),² to disciplinary action,³ or even

¹ See for example, Editorial, 'Siding With CAPO' *South China Morning Post*, Monday 22 March 1993, page 16 columns 1-2.

² Section 6 of the *Bill of Rights Ordinance* [Cap 383, LHK]. Article 5(5), BoR provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". However, there seem to be little authority that for such contraventions, courts may grant remedies in addition to those already available.

criminal charges.⁴

The police in Hong Kong are traditionally regarded as owing a number of duties to the public.⁵ Most of these are set out in section 10 of the *Police Force Ordinance*⁶ and include in s10(a) and (b), the preservation of public peace, and preventing and detecting crimes and offences. Balanced against these duties are private rights to liberty and security of persons. These are of more recent recognition, and are expressed somewhat vaguely in Article 5(1), BoR, that "[e]veryone has the right of liberty and security of person" and more expressly in Article 8(1) and (3): "[e]veryone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement ... not ... subject to any restriction except those which are provided by law, are necessary to protect national security, public order (ordre public) public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized

³ See *Police (Discipline) Regulations* [subsidiary to Cap 232, LHK] which includes as a disciplinary offence, the unlawful or unnecessary exercise of authority.

⁴ Naturally, by section 37 of the *Police Force Ordinance*, police officers are not exempt from being proceeded against by the ordinary course of law.

⁵ Responsibility to the public is, in fact, indirect as s 4 of the ordinance makes the Commissioner of Police "subject to the orders and control of the Governor".

⁶ Cap 232 LHK. In Hong Kong, all police duties and powers must be found in Ordinances, as unlike in the United Kingdom where the many of the powers of police constables originally derived from the common law.

in this Bill of Rights".

Though there may be argument as to the precise application of the relevant provisions of the *Hong Kong Bill of Rights*, it is the tension between these two counteracting forces which must, however, underpin the practical decisions which are made in deciding just how far police officers may go in the due and proper exercise of their powers to stop, detain and search.

The nature and scope of stop and detention/search powers

In issue here are a number of difficulties which seem to arise in the exercise of what might be called police "stop and detain" powers, which are often the "first contact" which the police make with members of the public. The specific police powers to search and detain persons or seize property are not considered here, except in the context of the power to stop any ordinary citizens and question them, in the absence of any pre-existing grounds for lawful arrest. Nor are powers of detention and search which may arise out of, or as a consequence of a lawful arrest discussed here.

Virtual non-existence of common law power to detain

It has been recognized in a number of cases that apart from when the power of arrest is being lawfully exercised, there

is no general common law power to stop and detain and/or search. Certainly, even briefly detaining persons at 3.30am for the purpose of making enquiries over the radio, after the persons were stopped by police and had initially co-operated in answering routine enquiries, has been held to be an unlawful exercise of police authority (in the absence of statutory powers).⁷ Exceptionally however, the common law power to arrest for breach of the peace, does extend to detention without arrest, but such detention is only for the purposes of preventing a breach of the peace.⁸

The variety of stop and detention/search powers

In Hong Kong, there are dozens of ordinances under which powers to stop and detain and/or search persons or property (including its seizure), may be exercised by police or authorized officers,⁹ and at a couple of dozen, where

⁷ See *Bentley v Brudzinski* (1982) 75 Cr App R 227, where a person was charged with obstructing an officer in the course of his duty after a fight developed when he wanted to leave after a ten minute wait.

⁸ See *Albert v Lavín* [1982] A.C. 546, where an off-duty policeman grabbed the defendant who was "jumping the queue" for a bus, assaulted the officer as he did not believe that his detainer was a police officer and would arrest him if he did not desist. His defence of self-defence was rejected as it was held that there was likely to be a breach of the peace and the officer's behaviour was lawful.

⁹ These include significant and wide-ranging powers under provisions such as s6, *Copyright Ordinance* [Cap 39, LHK] and s21, *Import Export Ordinance* (Cap 60, LHK).

police officers are specifically authorized to exercise such powers,¹⁰ though not all ranks of officer are given this authority.¹¹

More significantly, there is often the need to meet some pre-condition before such powers are exercised, though these pre-conditions vary considerably. They range from requiring very little prior justification at all, through to the need for the person who has been detained to have already been arrested (though it seems somewhat redundant to authorize the detention of a person who has been arrested and is in custody). In extreme cases, a virtual "fishing expedition" is justified, as in s33(6) of the *Public Order Ordinance* [Cap 245, LHK] where "[a]ny police officer may stop and search any person in a public place" in order to ascertain whether or not that person has been guilty of an offence against this section (namely possession of an offensive weapon in a public place). In much the same vein, under s35 of the same ordinance, "police officers may take such steps and use such force as may be necessary to ensure compliance" with an order by the Governor for the detention of any vessel or aircraft or any person on board "in the interests of public order".

¹⁰ Naturally, not all of such provisions are listed here, though search of them is facilitated by use of the Legal Department's Bilingual Laws Information Service.

¹¹ In some cases, for example, s12, *Gas Safety Ordinance* [Cap 51, LHK] and s12, *Dangerous Goods Ordinance* [Cap 295, LHK], the officers authorized must be not below the rank of inspector in the Royal Hong Kong Police Force.

Somewhat less extreme, are those legislative provisions requiring no more than a possible, and sometimes tenuous connection with an offence, for example, merely if the person is arriving in or about to depart from Hong Kong: s41 (a)(i), *Firearms and Ammunition Ordinance* [Cap 238, LHK]; that the officer be satisfied that an inquiry is necessary and that the person may abscond if not detained: s34, *Immigration Ordinance* [Cap 115, LHK]; or in quite different circumstances, if the person is in need of care and protection, as in s34E, *Protection of Women and Juveniles Ordinance* [Cap 213, LHK]. From the sorts of examples which exist, it would seem that the safeguarding of some overriding "public interest" apparently quite separate from the mere prevention or detection of crime, is what justifies the potential infringements of liberty which occur.

Other ordinances rely upon the occurrence of something more closely related to crime, but still less than commission of an offence, for instance, a connection with custody of an article liable to seizure: for example, s12, *Acetylating Substances (Control) Ordinance* [Cap 145, LHK] and s153, *Crimes Ordinance* [Cap 200, LHK]; or merely being at premises where an article liable to seizure is found: for example, s52(1), *Dangerous Drugs Ordinance* [Cap 134, LHK], s12, *Weapons Ordinance* [Cap 217, LHK] and s41(a)(iii), *Firearms and Ammunition Ordinance* [Cap 238, LHK]. Analogous are provisions requiring that the detaining

officer believes there is some connection between the detained person or property and an offence, even if it is just providing evidence of its commission.¹²

At the other end of the spectrum, and, it would seem, obviously providing a more acceptable justification for sacrificing liberties, are those more strict provisions which allow powers of detention and search to be exercised **but only after arrest** of the person, such as under s34, *Immigration Ordinance* [Cap 115, LHK]; or his or her **being reasonably suspected of having committed an offence**: s16B, *Trade Descriptions Ordinance* [Cap 362, LHK] or breach of regulations: s36A, *Public Bus Service* [Cap 230, LHK] and s12, *Quarantine and Prevention of Disease Ordinance* [Cap 141, LHK]; or at least **having an association with an arrest or breach of a court order** as in s5, *Domestic Violence Ordinance* [Cap 189, LHK] (which is bolstered by the public interests in maintaining obedience to court orders and avoiding domestic violence and disharmony.

Clearly, some of the pre-conditions for exercising the "stop and detain" powers, which are embodied in these provisions are more controversial than others. However, it may be argued that apart from the final group which require an offence to have already been committed (or at least the

¹² Such as the s11, *Agricultural Products (Marketing) Ordinance* [Cap 277, LHK]; *Gas Safety Ordinance* [Cap 51, LHK]; s15, *Marine Stores Ordinance* [Cap 143, LHK]; s6, *Public Stores Ordinance* [Cap 144, LHK]; s4, *Sand Ordinance* [Cap 147, LHK] and various others.

existence of goods grounds for arresting a person for an offence), most seem to be founded on some particular and significant "public interest" such as protection of the community from dangerous items, national security, health, domestic/family harmony etc. A question then arises as to whether or not it is proper to exercise such powers either on grounds associated merely with the prevention and detection of unspecified offences of unascertained gravity, or, on grounds which are largely speculative as to the possibility of an offence being committed. If not, then a further question is: should such provisions should be construed narrowly by courts to limit, as far as possible, upsetting the delicate balance between the demands of crime detection and the rights and freedoms of the individual. These questions are particularly pertinent to the "stop and detain" powers found in certain provisions in the *Police Force Ordinance* [Cap 232, LHK].

"Stop and detain" powers under the Police Force Ordinance

A notable omission from the above discussion is section 54, *Police Force Ordinance* [Cap 232, LHK], which since its recent amendment, now appears to be the single most significant provision authorizing "stopping and detention" by police officers in Hong Kong.¹³ It should be noted that

¹³ Detention and search powers are also authorized under the amended s50(7), but these are exercised on the issue of a warrant by a "magistrate upon the oath of any person that

s17B of the *Immigration Ordinance* [Cap 115, LHK] which authorized the rather common occurrence of stopping persons to check their ID cards, but was, in practice, unofficially extended to enable the detention of the individual concerned while a radio check was being made, **need no longer be relied upon** to perform was clearly an extremely useful police crime-detection procedure. The former provision now appears to authorize police to detain persons for reasonable periods of time in any circumstances where they do no more than act in a suspicious manner; to check their ID's and make enquiries as to whether or not they are suspected of "having committed any offence at any time" [ss54(1)(b) and 54(2)(b)].

1992 changes: Significant changes in the relevant sections of the *Police Force Ordinance* [Cap 232, LHK] have been made by the *Police Force Amendment Ordinance 1992*,¹⁴ and though the primary aim appears to have been the reconciliation of the ordinance with relevant provisions of the *Bill of Rights Ordinance* [Cap 383, LHK], some uncertainties and difficulties of interpretation of the old

there is reasonable cause to suspect" that something of value to an investigation of any offence is in a particular place. The need for a warrant is an added safeguard in respect of a power resembling a number of others available under Hong Kong ordinances (see *above*) and in this sense less subject to concern in terms of its potential for infringement of recognized liberties, than are the s54 powers.

¹⁴ No.57 of 1992; coming into force on 26 June, 1992.

provision have also been removed.¹⁵ On the "down-side", however, questions may still be raised as to the extent of the powers given, the potential for their "abuse" especially in their actual implementation, and manner in which courts should interpret these powers, in the event that they are called upon to do so.

The new section 54 needs close examination - and perhaps fortunately, in some ways, it, like its predecessor, as yet lacks authoritative judicial interpretation.

Scope of application: In essence, s54 provides powers to stop, detain and search exercisable over persons "in any street or other public place":¹⁶ though they may also be "on board any vessel, or in any conveyance". These

¹⁵ Prior to its repeal, section 54 included the unusually worded powers to "stop and search and if necessary to arrest and detain for further enquiries". See discussion in Gary N Heilbronn, *Criminal Procedure in Hong Kong* (Longmans (Asia), 1991) 13. Also repealed was section 56 of the *Police Force Ordinance* [Cap 232, LHK] which provided a police officer with the rather remarkable power to stop and detain until due inquiry can be made, any person who, and any vehicle, horse or other animal or thing which he finds employed in removing the furniture of any house or lodging between the hours of 8pm and 6am, or whenever such officer has good grounds for believing that such removal is made for the purpose of evading the payment of rent."

¹⁶ Defined rather quaintly but not wholly unambiguously in s3, *Interpretation and General Clauses Ordinance* [Cap 1, LHK] to mean "(a) any public street or pier, or any public garden; and (b) any theatre, place of public entertainment of any kind, or any place of general resort, admission to which is obtained by payment or to which the public have or are permitted to have access."

alternative situations seem to extend these powers quite considerably: certainly not as far as into a private flat or office building, but possibly to persons living on boats, as well as those travelling in any car, bus, ferry, junk or "gin palace", and even aircraft etc.¹⁷ Indeed, it is quite arguable that this provision would apply to the floating restaurants at Aberdeen and elsewhere. However, the scope of the meaning given to "vessel" or "conveyance" in this section, would be somewhat limited to exclude private vessels etc by construing these words *ejusdem generis* with the words "street or other public place".¹⁸ Given the potential for inconsistent and varying interpretations of these words, it would seem more appropriate to regard them as extending no further than the doors of private apartments (or safety rails, pulpits and pushpits of privately-owned yachts or boats).¹⁹

¹⁷ See definition of "vessel" in s3, *Interpretation and General Clauses Ordinance* [Cap 1, LHK]. as "any ship or boat and any description of vessel used in navigation".

¹⁸ An analogy would be the limits placed on the construction in ss105 and 113, *Magistrates Ordinance* of the words "conviction, order, determination or other proceeding as aforesaid" governing the nature of Magistrate's orders from which appeals may be had. See Gary N Heilbronn, *Criminal Procedure in Hong Kong*, (Longmans (Asia), 1991) 193-4 and *Atkinson v United States Government & Ors* [1969] 3 All ER 1317,1332; [1971] AC 197 which was cited in *R v Taj Malook and Abdul Karim Naemshan*, HCt Mag App No 188 of 1988 and *A-G v Kwan Ngan-chung* CA CR App No 1158 of 1981.

¹⁹ Indeed, Article 14 of the *Bill of Rights* may underline the adherence to such limits by declaring that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy,

Different kinds of powers are exercisable depending on the circumstances, and a distinction may be made between two sets of circumstances: first, when a police officer "finds any person ... who acts in a suspicious manner"; and secondly, when a police officer "finds any person ... whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence".²⁰ While the 1992 amending ordinance may have made no change to the geographical limits on the exercise of these powers, there appears to have been a quite careful refinement of the other preconditions for their exercise, as previously there were quite some considerable difficulties of interpretation arising from the wording of section 54.

1. First leg of section 54: When the person in question is "acting in a suspicious manner" is there a need for the police officer to engage in any analysis, examination, evaluation or investigation of the situation, or need he or she do no more than *perceive* the suspicious acts? There are no qualifications expressed in s54, such as the need for any "belief" whether a "reasonable belief" or otherwise.

family, home or correspondence ...". Such interference would only be made lawful by clear words.

²⁰ One thing that both sets of circumstances have in common is that the "police officer must "find" the relevant person. There would seem to be no magic in this term, which could only be given its common sense meaning of "seeing" "perceiving" or "coming upon" such person.

However, for acts to qualify or be able to be described as "suspicious" some evaluation by the police officer *must* surely occur.

Subjective nature of test: The fact that the words "reasonable" or "reasonably" have not been associated with the evaluative process - when such a qualification is expressly used in so many other sections - leads to the probable conclusion that the legislature intended that a somewhat less onerous *subjective* rather than an *objective* test should be applied.²¹ Even so, in order to prove that the conduct was in fact regarded as "suspicious", some specific facts or matters need to be pointed to by the police officer concerned, at least to justify, prove or corroborate the fact that he or she did actually and honestly hold the relevant views. It is naturally inadequate for the officer simply to testify that he or she thought the detained person was "acting suspiciously" or "looked furtive" or "shifty". Thus, it is clearly desirable that particular aspects of the person's demeanour or actions be pointed to in order to support the officer's conclusion that the person was in fact acting suspiciously. Aside from overtly suspicious acts such as trying to open a series of motor vehicle doors, included

²¹ That is, what counts are the police officer's own views, whether they be reasonably held or not; or otherwise said, whether or not they match up with the beliefs which would have been held by the reasonable and competent police officer in the same circumstances.

in this category, could be attempts to avoid the notice of the police, or hiding one's face etc.

Extent of powers authorized: Given that the police officer is properly satisfied that a person is acting in a suspicious manner in the appropriate place, the powers that he or she may exercise are threefold:

1. Demand production of proof of identity for inspection by the police officer;
2. Detain the person for a reasonable period²² to make enquiries "whether or not the person is suspected of having committed any offence at any time"; and
3. Detain the person, "if the police officer considers it necessary" for the time reasonably required to search that person, but **only** for "anything that may present a danger to the police officer".

It would appear quite easy for a police officer to show that he or she *subjectively* considered it necessary (whatever that may mean)²³ to search a person for something presenting a danger to that police officer. It would appear to be sufficient for the officer to point to factors

²² What period is reasonable and implications of such terminology is discussed below in the context of s54(2) detention and search powers.

²³ It is probably regrettable that a new concept of apparent "necessity" is introduced here, when the much more familiar notion of "reasonable suspicion" might have been used, thereby avoiding confusion arising out of the use of these less familiar words.

establishing an honest conclusion that such a search was necessary, without it being reasonable. To take the matter to an extreme, even the fact that the officer suffered from paranoia would seem to be irrelevant.

Two other matters should be noted here. The enquiries may be made not just about the detained person's involvement in an offence under investigation, but "any offence at any time". A question may then arise as to the use to which that information is put by the police officer concerned. It may of course be of such significance that it contributes to the officer **either**

considering it necessary to search the person for anything that may present a danger to the police officer (as allowed for in s54(1)(c); or
having a *reasonable suspicion* that the person has, is about to, or intending to commit an offence, thereby justifying a more elaborate search (as provided for in s54(2)(c) and (d), and discussed below).

The potential for these initial powers in s54(1) being used as "building blocks" to justify more the exercise of more significant detention and search powers in s54(2) is one interesting, but possibly disquieting feature of the amended s54 of the *Police Force Ordinance* [Cap 232, LHK]. Additionally, the proper exercise of the search for something which may present a danger to the police officer, may of course reveal nothing of danger, but something else which contributes to the officer having a *reasonable*

suspicion that the person has, is about to, or intending to commit an offence - with all that that entails.²⁴

2. *Second leg of section 54:* Although the overall effect of s54(2) is to clarify these powers and introduce more *objectivity* into the police officer's evaluation process, the legislature has nonetheless dealt a "wild card" by allowing, in this second set of circumstances, the relevant powers to be exercised if the person is reasonably suspected of doing no more than *intending to commit any offence*.²⁵ Prior to the 1992 amendment, the test was more *subjective*, as the word "reasonably" has now been added to qualify the officer's suspicion. Thus, the suspicion of an intention to commit an offence must now, at least be reasonable. This is surely a necessary concession to fairness and natural justice, particularly in view of the exercise of police powers of detention etc over someone who is allegedly just thinking about or aiming to commit an offence. This is a little disquieting and as a matter of policy, one might ask if, at this time in Hong Kong's history, it is desirable to promote a role for any form of "thought police".

²⁴ Of course, any items found in the course of such a search, even if the search were eventually held to be unlawful, would be usually admissible as evidence against the person concerned (absent any trick, deception or oppression). See *R v Sang* [1980] AC 402 and *The Queen v Lee Yi-choi* Cr App No.131 of 1985. See Bruce & McCoy, *Criminal Evidence in Hong Kong* (Butterworths, 1991) 29-30.

²⁵ This option also existed under the previously unamended provisions.

Reasonable suspicion in the context of s54: As the decisions with respect to arrest show, the existence of a "reasonable suspicion" is a rather fluid concept. The police officer should be able to point to a number of indices, circumstances or events which gave rise to the suspicion, and then **also** convince the court that these were sufficient to be adjudged "reasonable" in the circumstances.

Aside from adopting a "case by case" common sense approach,²⁶ the courts have tried (probably ineffectually) to provide some guidelines to indicate *how* a police officer may go about ensuring that he or she does have a *reasonable suspicion*. This is by making all presently practicable enquiries from persons who are accessible and likely to be able to answer the questions, and making the arrest only if the officer can point to some proper grounds.²⁷ There would of course be cases in which attempting to follow such procedures would be impracticable,²⁸ though many would be blatant cases where strong evidence linking the person suspected to the

²⁶ As in *G v Chief Superintendent of Police Stroud* [1987] Crim LR 269 DCt.

²⁷ *Chan Sze-shing v AG* [1980] HKLR 550, where in the context of an ICAC investigation of police officers for accepting bribes, the Court of Appeal pointed out that circumstantial evidence giving rise to a mere possibility of guilt is not sufficient to establish a *reasonable suspicion*.

²⁸ Especially in the midst of an offence being committed, for example, a street fight.

offence would exist. Indeed, it is questionable just how useful this sort of test is, when it comes to the need to make immediate decisions merely to detain a person. By analogy with the law relating to arrest, having a *reasonable suspicion* of an offence having been committed, is at least a relatively familiar concept, but it is difficult to say how many inquiries would normally be needed, and just how much direct or circumstantial evidence has to be given, to make a reasonable police officer suspect that someone is "about to commit or intending to commit any offence"?²⁹ While there has been no change in s54's application to offences in the past, present or future, if anything, the fundamentally speculative and vague nature of a mere potential for offending (intention to offend), must impose a higher standard of proof on the police officer. Failure to impose such a high standard, would inevitably upset that delicate balance between the public interest in general crime prevention, and an individual's right to unhindered movement within Hong Kong.

Extent of powers authorized: Once a police officer does indeed reasonably suspect either that an offence has, is

²⁹ When an offence has been committed or is about to be committed, the circumstances are much clearer, and consequently, it is easier to have a reasonable suspicion as to a person's involvement. For example, after a stabbing, possession of a bloodstained pair of scissors is more significant than mere possession of a pair of scissors when no stabbing has occurred.

about to be, or is intended to be, committed, he or she may exercise powers somewhat similar to those exercised upon making an arrest:³⁰

1. Demand production of proof of identity for inspection;
2. Detain the person for a reasonable period while enquiries are made as to "whether or not the person is suspected of having committed any offence at any time" (similar to the power exercisable under s54(1)(a) discussed *above*).
3. Detain the person for a reasonable period of time to search the person for anything likely to be of value by itself or otherwise to the investigation of any offence that the person has committed, is reasonably suspected of having committed or of being about to commit or of intending to commit".

These search powers resemble those exercisable after the issue by a magistrate of a search warrant "upon oath" under s50(6) of the *Police Force Ordinance* [Cap 232, LHK], though here, no such "judicial overview" safeguards the exercise of these far-reaching search powers. Indeed, as mentioned in the course of discussing s54(1) powers, these detention and search powers may be exercised as a

³⁰ Under s50(6) of the ordinance, the person apprehended may be searched and subject to seizure of any of a variety of things which the police officer may reasonably suspect to be of value to the investigation of any offence the person is reasonably suspected of having committed.

consequence of the reliance on the s54(1) powers, which were initially exercised following an officer's *subjective* conclusion that the person has been acting in a suspicious manner (whatever that may mean). Though undoubtedly useful in some cases, the "building block" approach to exercising these powers, without any safeguards or restrictions, may in practice, make it too easy to justify the police - after finding someone acting suspiciously (in their *subjective* opinion) - resorting directly to the more copious search power under s54(2), with any item found being used to prove retrospectively that the initial and subsequent levels of search were justifiable. After all, *subjectively* considering it necessary to search a person for something presenting a danger to the police officer would appear to be quite easily satisfied (as discussed *above*).

What is a reasonable period of time? As noted in respect of s54(1)(b) powers, what may be a "reasonable period" must vary with the circumstances of each case and the gravity of the offence in question. However, there would seem to be no limits other than those that may be set by the courts. Indeed, enquiries as to whether a person has committed, or is intending to commit an offence, may go on indefinitely. It could hardly be the intention of the legislature that this should occur. However, at least in theory, the potential for lengthy preventive detention under these provisions would seem to exist. Thus, in order to ensure a consistent and

balanced approach to the interpretation of these words, especially where "intended" offences are concerned, it would seem appropriate that the detention period be construed as being limited to that necessary for usual radio enquiries to be made.³¹ To do otherwise, may tend open the floodgates to any periods of detention being potentially justifiable.

Conclusion

When the public interest which is being protected does not relate to some specific societal problem (such as safety, or national security), but merely to the prevention and detection of any kinds of offences at all, as seems to be the case with the usual and potential operation of s54 of the *Police Force Ordinance* [Cap 232, LHK] especially if the "building block" approach is condoned by the courts, there would appear to be considerable scope for upsetting the balance between the proper exercise of "detain and search" powers, and the freedom of movement enjoyed by Hong

³¹ Article 5(1) of the *Bill of Rights* which declares that "[n]o one shall be subjected to arbitrary arrest or detention" would provide a counterbalance to any attempts to justify more than a short period of detention by reliance on s54 of the *Police Force Ordinance* [Cap 232, LHK]. Article 5(3) requiring that a person "detained on a criminal charge ... be brought promptly before a judge ..." may, in appropriate cases, provide additional support for limiting these police powers, though detention based on an 'intended' offence - unlike one which has been committed - does not carry with any obligation to charge the person detained.

Kong people under the *Bill of Rights*.

Whether or not the legislature considered these implications of the amended s54, the only realistic method by which such a balance can be maintained, is through a consistent and careful construction of the relevant provisions by the Hong Kong courts, after having given due consideration to the serious implications of allowing too liberal an exercise of what are undoubtedly useful, but in some ways potentially limitless powers.

Police Powers in Hong Kong

A Police View

D.M. HODSON

The Hong Kong Police was established in 1844. The Force, which now comprises some 27,000 police officers and 5,500 civilian staff, is supported by approximately 6,000 part-time members of the Royal Hong Kong Auxiliary Police. The constitution and duties of the Police Force are prescribed in the Police Force Ordinance, Cap. 232. The criminal justice system in Hong Kong has many similarities with other common law jurisdictions. However, the Police Force has developed from a background and role somewhat different from the United Kingdom. The criminal law has also been drafted to deal with the specific needs of the local community which has its own distinct cultural and social features that result in very different criminal problems emerging.

The law and order situation in Hong Kong

The territory continues to enjoy one of the lowest crime rates in the world compared with other major cities, lower even than Tokyo and Singapore, with approximately 1,450 crimes per 100,000 of the population. On the other hand the rate in London is about 12,800 which is nearly nine times that of Hong Kong. Over the last 10 years reported crimes have been

in the region of 85,000 per annum with the detection rate hovering around 45%. Although the overall crime rate is relatively steady, the crime situation is prone to flashes of violence usually connected to armed robberies that can be brutal in the extreme, with the use of assault rifles and hand grenades. The territory, like most 20th century conurbations, has its share of organised crime groups. These groups are obsessed with the desire to make money and do not confine their activities to Hong Kong. Some of them operate internationally, exploiting Hong Kong's geographical position and its advanced financial and communications facilities, their most significant activity being drug trafficking, commercial crime such as credit card fraud and car thefts. Their sophistication is comparable to syndicates anywhere in the world.

Hong Kong's crime situation is, to a certain extent, influenced by the territory's proximity to the People's Republic of China. In tandem with the rapid economic growth in the southern provinces, violent and organised crime are increasing, with cross-border crime becoming a particular feature. Robberies in Hong Kong and Hong Kong-based criminals smuggling stolen luxury cars and consumer goods to China are just two examples which attract a good deal of publicity.

It is therefore important to bear in mind that from a cultural, social and criminal point of view, Hong Kong is

greatly influenced by its close geographical proximity to Southern China. Although our criminal justice system is based on English law and concepts, its implementation must be viewed in the local context.

What powers do the police need?

In the past, police were given wide powers to cover most situations with the expectation that they would use these powers appropriately. This view is now considered dated and would probably be considered arbitrary and therefore in conflict with the Bill of Rights. The amendments to the Police Force Ordinance in 1992 have addressed some of these concerns. Current thinking is that the various powers police have should be proportional to the problem that is being addressed. This approach is more logical but undoubtedly will result in more detailed legislation which should not cause insurmountable problems.

The crucial concept from a policeman's point of view is to distinguish clearly between the type of power that an individual officer is likely to use almost spontaneously and that which is used as part of premeditated planned action. The vast majority of policemen work in the streets on their own. They have to deal with practical problems as and when they arise. This may require quick thinking and drastic action on

their part. They cannot in many cases seek advice or assistance before they act. There is no time to check a manual to obtain details of a precedent. They must rely on their own understanding of their powers - their training, discipline and common sense are their only resource.

The powers commonly used by an individual must be straightforward, understandable concepts that can become second nature to him and be used as part of an almost instinctive response. No Draconian measures are required but, as a police constable is often expected to put his life on the line, quite literally, the least he should be able to expect in return from the criminal justice system is that his job be made as simple as possible.

When *premeditated* police action is contemplated the situation is somewhat different. The powers available in these circumstances should be rational and proportional to the problem being tackled. The authority for action which significantly impinges on a person's liberty or rights should generally be obtained from the judiciary. If rapid action is essential then either the judiciary must be much more accessible than is currently the case or police should be permitted to act in situations which call for urgent action. There would be no harm in detailing when police can act without prior judicial authority.

In these circumstances police powers need to be well

defined, but they should not be over bureaucratic. The emphasis should be on ensuring that there are sufficient checks and balances to avoid the abuse of power. The police are conscious of the need to find a balance between the desire for order and tranquillity, on the one hand, and an individual's freedom, on the other.

In Hong Kong's rapidly changing circumstances, it is not uncommon for unanticipated problems and emergencies to arise. The police have to be able to influence events so that these problems do not get out of hand. Unlike many countries, Hong Kong's statutes provide for few emergency powers to cope with unpredicted turmoil or disasters and it may therefore be necessary to fall back on powers to deal with some of the root causes in a more drastic manner than is usually the case. In his interim report on the Lan Kwai Fong disaster, Mr. Justice Bokhary rightly points out that as a preventive measure the police may have to resort to arrest action for such minor offences as common assault or even littering. This power of arrest, which currently derives from Section 50(1) of the Police Force Ordinance, Cap. 232, will of course not be available if recommendations, contained in the Law Reform Commission's Report on Arrest, are implemented. This would be but one example of the sorry consequences that could result if police powers are stripped, with no eye on the unexpected.

In Asia, particularly in recent years, the benefits of living in a relatively well-ordered and disciplined society are very apparent to those who have had the misfortune to endure the alternatives. Societies which have recognised the importance of these qualities and have adopted measures to introduce and maintain them, have flourished.

The Law Reform Commission of Hong Kong's Report on Arrest

The Law Reform Commission of Hong Kong produced its report on arrest in 1992 and the report is still under consideration by the administration. The report's recommendations are based on the United Kingdom's Police and Criminal Evidence Act (PACE) 1984 and its associated Codes of Practice, modified where necessary on account of circumstances peculiar to Hong Kong. Ostensibly PACE, which became law in the United Kingdom on 1 January 1986, was introduced to provide the police with the powers to investigate crime accompanied by appropriate safeguards to protect the rights of the suspect. The Act's introduction stemmed principally from the fact that, prior to PACE, the powers of various United Kingdom police forces were in many respects disparate, and there was increasing crime and racial tension in the country. An inquiry into the *Maxwell Confait* case also raised serious questions about the way in which the

police handled investigations. These factors are not present in Hong Kong which, unlike the United Kingdom, has enjoyed a comparatively low crime rate for many years with no indication that the situation is likely to change significantly in the foreseeable future. The United Kingdom experience is not therefore generally relevant to Hong Kong.

One is thus left to ask whether there is another mischief present in the Territory similar to those which were highlighted in the report of the Royal Commission on Criminal Procedure (the Philips Report) many of whose recommendations are reflected in PACE and the Codes of Practice.

- Is there growing anxiety about a continuing rise in the level of crime?
- Are there grounds for believing that if there were less ignorance and confusion about the way in which crime is investigated and prosecuted, that crime could be brought under better control?
- Is the job of the police being made unacceptably difficult by the constraints of criminal procedure?
- Is the use of powers of investigation by the police open to grave question?

- Are there serious doubts about the way police handle major investigations?
- Are there deep concerns about friction between minority groups and the police?
- Are our present powers full of anomalies, not conducive to police morale, inconsistent and based on no intelligible principle, and do they prevent the police from carrying out their essential duty of controlling crime?
- Would the implementation of the LRC recommendations result in greater fairness, clarity and accountability in procedures at police stations?

If the answer to most of these questions is genuinely in the affirmative, then perhaps the case for reform can be made out, always taking into consideration other questions such as policy and resources. If, on the other hand, the problems identified in the United Kingdom which gave rise to PACE's enactment are not present in Hong Kong or are not present to the degree that radical change is required, what is the rationale for a major change in the concept of police powers of arrest? Is it to satisfy public demand, is it to restore some

perceived imbalance between police powers and the rights of those arrested or is it merely to follow in the footsteps of the United Kingdom? The Law Reform Commission's report states that similar concerns to those which led to the establishment of the Royal Commission on Criminal Procedure in the United Kingdom have been manifested in Hong Kong but the report itself appears to be less than explicit as to what exactly these concerns are other than to refer in brief terms to the Fuad sub-committee's conclusion that inadequacies in the law were found to exist, and its recommendation that a thorough review of the whole area of law relating to the powers of police and other law enforcement officers be conducted.

Would it not be wiser to await the report of the Royal Commission on Criminal Justice - the Runciman Commission? The Law Reform Commission have chosen not to do so, albeit that the terms of reference of the Runciman Commission are directed at areas of law and police procedures directly in issue. We should also be mindful of the length of time it took in the United Kingdom fully to implement PACE. We need to avoid counter-productive haste.

Whilst PACE contains some useful features which should be welcomed by Hong Kong (such as the recommendations for improvements to police detention facilities), it contains also certain serious anomalies. For example a police constable, who has just witnessed a man

being punched in the face, would not, under the proposals, be able to arrest the assailant, as the offence is not "arrestable" as defined in the Interpretation and General Clauses Ordinance, Cap. 1 i.e. the offence does not attract a period of imprisonment in excess of 12 months. Yet the same constable could arrest the same man if he saw him break the windscreen of a parked car. This does not appear logical and would certainly be unacceptable from a police point of view. Incidentally the power of arrest currently adopted in Hong Kong is the standard originally proposed by the Philips Report in the United Kingdom in 1981.

Nevertheless, the Law Reform Commission has identified areas where our current law is inadequate. For example there must be clearly defined limits to police powers of detention. Vaguely worded laws that give unnecessarily ill defined powers are not needed and may, in any event, be inconsistent with the Bill of Rights. A good example of the type of power that is no longer appropriate is the repealed Section 54 of the Police Force Ordinance. That section gave the police the power to stop and search and, if necessary, detain for further enquiries, anyone who acted in a suspicious manner. There was no indication of the period for which he could be detained or the nature of the enquiries that could be undertaken. The new section 54 has dramatically reduced these powers.

The origins of the periods of detention available under PACE lie in considerations by the Royal Commission on Criminal Procedure and were set entirely in a United Kingdom context. There are numerous disparities between the United Kingdom and Hong Kong and it is over-simplistic to transplant concepts from one society to another without fully considering what adverse effects are likely to ensue. Whilst it is not possible to predict accurately every possible problem which the introduction of PACE into Hong Kong would have, reference to and cognisance of problems already experienced in the United Kingdom over the past 7 years is essential before any decisions are made.

According to the Law Reform Commission's report, the advent of PACE in the United Kingdom would seem to have been largely successful in creating a balance between realistic police powers and adequate protection for those subject to arrest or detention. The report concedes however that PACE's introduction has been criticised by senior English police officers who contend that it provides inadequate powers of investigation while at the same time placing great demands on limited police manpower by provisions such as those which impose a requirement to maintain meticulous custody records. Among those critics is the Chief Constable of Devon and Cornwall Constabulary, Mr. John S. Evans Q.P.M., LL.B, who outlined some of the negative effects of

PACE in his address to the Bar Conference in London on 26 September 1992. He described the English system as having swung too far towards the protection of the accused and that many are losing confidence in the criminal justice system. He said that the search for truth no longer appears to be an objective of the English system. In his view, the interpretation of PACE has become not a means of conferring reasonable and ordered rules upon a police enquiry, but a grossly bureaucratic and negative code working as often as not to conceal the truth and protect suspects from investigation. These are strong words and are in stark contrast to the assurance from the Law Reform Commission that PACE has been largely successful.

A particularly ominous aspect of PACE is the requirement meticulously to maintain custody records, with failure to do so rendering the detention unlawful and actionable as false imprisonment against those concerned, with civil claims for compensation being the ultimate result. An article written by a solicitor who has worked closely with United Kingdom police forces and which first appeared in the *New Law Journal* and was reproduced in the United Kingdom's *Police Review* on 8 May 1992, alleges that in his estimation 60% of the custody records he had examined were so seriously flawed as to give rise to claims against the police

force concerned for false imprisonment.¹ He stated that in 1991 London's Metropolitan Police Force alone faced an increase in claims of 40% over 1990. If this assertion is accurate and this aspect of PACE is adopted by Hong Kong, it is imperative that any procedural rules governing Custody Officers' obligations in respect of custody records are subordinate to the Ordinance itself. In other words the arrest and detention should not necessarily be invalidated by procedural errors. We must at all costs avoid the situation where the real issue at stake is not the guilt or innocence of an accused person but rather one where custody records becomes the primary concern, and a trial simply becomes a detailed examination of police procedures to identify an error that invalidates the process.

Withdrawing police by the hundreds from operational duties on the streets to perform indoor duties to deal with new bureaucratic procedures and to maintain detailed records would appear contrary to the concerns of our community which has been calling for more police on the streets to fight crime. The principal cause for concern that resulted in PACE was rising crime, racial tension and shaken confidence in the police. Since that initial concern, the crime rate in the UK has increased at three times the rate that it has in Hong Kong. The effect of PACE is very much undecided; some argue that

¹J.McKenzie, "PACE is a time bomb for forces" (1992) *Police Review*, 8 May.

the whole criminal justice system is in a state of crisis. Whatever the reason for the decay, observers note that while crime is rising sharply, the courts are empty. This is hardly an indicator of a system on the mend or one to be emulated.

The Way Forward

It is essential that Hong Kong's Bill of Rights be allowed fully to bed down and that police powers which are inconsistent with the terms of that Ordinance be rooted out. Powers which are construed to be arbitrary or excessive must be repealed or amended and limits placed on permissible periods of detention. Some steps in this direction have already been taken with enactment of amendments to the Police Force Ordinance, Cap. 232 and the review of the Public Order Ordinance, Cap. 245. Quasi-judicial functions such as the right of a Superintendent of Police to issue a gambling authorisation under section 23 of the Gambling Ordinance, Cap. 148 should be removed from the police and placed with the judiciary where they belong.

The admissibility of cautioned statements as evidence has been a long-standing problem for both the courts and the police, often necessitating time-consuming voir dieres, which appear to be little more than ritual presentations of evidence. However, new "rules and directions for the questioning of

suspects and the taking of statements" have very recently been introduced and familiarity with the new procedures is still being developed. These require time to be established and evaluated. Increased audio and video tape-recording of interviews with suspects inside police premises will undoubtedly help to allay suspicion of impropriety regarding cautioned statements. This is one of the recommendations contained in the Law Reform Commission's report and one of many welcomed by the police.

To be effective in tackling crime, the police must have the co-operation of the public in reporting crime, assisting police with their enquiries, and subsequently testifying in the courts. Consequently police procedures and those of the courts must be user friendly towards those who wish to assist the criminal justice system in its search for the truth. Considerable inroads towards this goal have been made but as yet there is still a reluctance on the part of many witnesses and victims of crime to assist the police or the judiciary. The police are conscious of these shortcomings and are considering introducing new procedures governing witness protection and witness reassurance. Suggestions under consideration include facilities to separate physically witnesses and suspects in police stations, and the increased use of one-way viewer systems when conducting identification parades thus obviating the need for a witness to confront physically a

suspect in the early stages of an investigation.

The Law Reform Commission's Report on Arrest is undoubtedly the most thought-provoking document on the subject produced in Hong Kong for many years, and in recognition of this, the police have established an advisory group, comprising senior police officers whose range of experience is extensive, to consider the many issues contained in the publication, and to assess, inter alia, the implications for operational efficiency, resources, training and retraining requirements. The latter is a major consideration.

Overall the effects of the recommendations, if implemented, will be significant and will dramatically affect the police powers of arrest and detention, stop and search of persons and the conduct of road checks, not to mention manpower requirements and a substantial increase in documentation. They will certainly reduce measures taken by the police as part of the current strategy to prevent crime.

PACE evolved in the United Kingdom over some 9 years, from 1977, when the Royal Commission on Criminal Procedure was established, to 1 January 1986 when PACE was enacted. Its historical chronology includes the submission of two Bills (with almost 1,000 amendments) to Parliament and some 14 months between the Act receiving Royal Assent and its actual introduction, presumably a preparatory period to allow for police training, creation of new

facilities etc. It is expected that if PACE is to be adopted in Hong Kong considerable debate within the legislature will be generated and the law draftsman will no doubt expend much effort in producing the final, acceptable version suitable for Hong Kong. In this context one has only to refer to the report on *Bail in Criminal Proceedings* produced by the Law Reform Commission of Hong Kong in December 1989. The draft bill creating amendments to the Criminal Procedure Ordinance, Cap. 221, with reference to court bail, was only recently submitted to the police for comment, three years after the Law Reform Commission's report was produced. The *Report on Arrest* is much more comprehensive, embracing many issues some of which are complex, and some contentious. It logically follows therefore that, if the report's proposals are to be implemented, a realistic time-frame is required, within which this can be accomplished.

This begs the question assuming the PACE proposals are to be adopted and that these will take some years to introduce, are we in Hong Kong not looking in the wrong direction? Instead of looking at the past and the questionable relevance of UK solutions to UK problems should we not be examining our problems, our present and our future. The Bill of Rights Ordinance has been part of our law since 8 June 1991, and it is certainly relevant to the powers and duties of police examined by the Law Reform Commission. Yet there

is little mention in the Report of the extent to which existing police powers are inconsistent with the Bill of Rights.

The future also raises a new set of issues unique to Hong Kong. Should we be introducing into Hong Kong legislation which was designed to cater for English problems? It needs also to be remembered that Hong Kong has a single police force whilst England and Wales have 43 separate forces and a population nine times that of the territory. Should we not be looking to purely Hong Kong solutions to the problem, if there be one, that take into account Hong Kong's future needs. The police must be progressive and prepared to respond to new challenges, the real problems and real issues that face us.

The community has come to expect a high level of law and order but, given the other uncertainties, they would be very intolerant of a deterioration in the law and order situation in return for some perceived marginal enhancement of civil liberties. To argue that police powers such as the power to demand proof of identity constitutes a serious violation of civil liberties seems to overstate the case and ignore the real threats. If we are to meet the challenges of the future, a more realistic assessment of the situation would seem essential.

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