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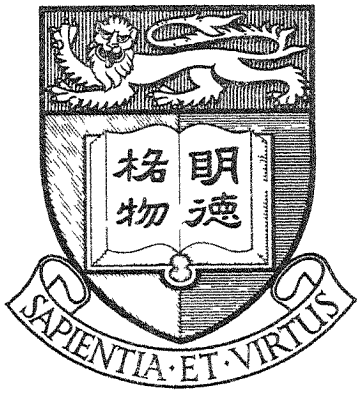

BILL OF RIGHTS

BULLETIN

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THE BILL OF RIGHTS

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

THE EDITORS

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

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

SUBSCRIPTIONS

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INFORMATION ON DEVELOPMENTS

We would particularly appreciate information about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We also welcome comments and suggestions on the format and content of the *Bulletin*. We would like to thank Gerry McCoy, Phil Dykes, Charles Cook, the United States Consulate (as well as others) for providing us with information included in this issue of the *Bulletin*. This issue is based on (the necessarily incomplete) information available to the Editors as of 4 May 1994. We apologise for any errors or omissions.

CONTENTS

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

RIGHT TO A FAIR HEARING IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10)

PRESUMPTION OF INNOCENCE (ARTICLE 11(1))

TABLE OF STATUTES AND OTHER SOURCES CONSIDERED

TREATIES

HONG KONG CONSTITUTIONAL DOCUMENTS AND LEGISLATION

TABLE OF CASES NOTED

HONG KONG CASES

INTERNATIONAL LAW CASES

CUMULATIVE TABLE OF HONG KONG BILL OF RIGHTS CASES REPORTED TO DATE[1]

The Appeal Tribunal v de Kantzow (1991) 1 HKPLR 143, [1992] 1 HKLR 55 (CA)
Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 1 HKCLR 249, [1994] 1 AC 1, [1993] 3 WLR 242, [1993] 2 All ER 510
Attorney General v Lee Kwong-kut [1992] 2 HKCLR 76 (CA)
Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man (1993) 3 HKPLR 72, [1993] 2 HKCLR 186, [1993] AC 951, [1993] 3 WLR 329, [1993] 3 All ER 939 (PC)
Attorney General v Osman (1991) 1 HKPLR 59, [1992] 1 HKCLR 35 (HCt)
Commissioner of Inland Revenue v Lee Lai-ping (1993) 3 HKPLR 141
Duty Free Shoppers Hong Kong Ltd v Wong Kwok-pong (1991) 1 HKPLR 150
Re Eng Sui-hang and the United States of America (1991) 1 HKPLR 298
Re Hong Kong and Shanghai Banking Corporation (1991) 1 HKPLR 59, [1992] HKDCLR 37
Hong Kong Stationery Manufacturing Co Ltd v Worldwide Stationery Manufacturing Co Ltd (1991) 1 HKPLR 156
Ng Hung-yiu v United States of America [1992] 2 HKLR 383
Prime Computer (Hong Kong) Ltd v Sham Tak-leung (1991) 1 HKPLR 256, [1992] 1 HKLR 115
R v Alick Au Shui-yuen (1991) 1 HKPLR 71
R v Chan Chak-fan (1993) 3 HKPLR 456 (DCt)
R v Chan Chi-hung (1993) 3 HKPLR 243, [1993] 2 HKCLR 212
R v Chan Chuen-kam (1993) 3 HKPLR 215, [1993] 2 HKCLR 144
R v Chan Kwok-tung (1993) 3 HKPLR 201
R v Chan Sau-sum (1993) 3 HKPLR 308
R v Chan Wai-ming (No 1) (1991) 1 HKPLR 292
R v Chan Wai-ming [No 2] [1993] 1 HKCLR 51
R v Cheng Pui-kit (1991) 1 HKPLR 324
R v Charles Cheung Wai-bun [1993] 1 HKCLR 189 (HCt)
R v Chong Nok-pang (1991) 1 HKPLR 358
R v Deacon Chiu Te-ken (1993) 3 HKPLR483, [1993] 2 HKCLR 21
R v Deputy District Judge, ex parte Chow Po-bor (1993) 3 HKPLR 101 (HCt)
R v Director of Immigration, ex parte Wong King-lung (1993) 3 HKPLR 253
R v Egan (1993) 3 HKPLR 277, [1993] 1 HKCLR 284
R v Faisal (1993) 3 HKPLR 220
R v Fu Yan [1992] 2 HKCLR 59
R v William Hung [1992] 2 HKCLR 90 (HCt)
R v William Hung (1993) 3 HKPLR 328 (CA)
R v Lam Chau-on (1991) 1 HKPLR 271
R v Benny Lai Kwai-wa (1993) 3 HKPLR 435
R v Lai Kai-ming (1993) 3 HKPLR 58
R v Lam Kwok-keung (1993) 3 HKPLR 369
R v Lam Tak-ming (1991) 1 HKPLR 222
R v Lam Wan-kow; R v Yuen Chun-kong [1992] 1 HKCLR 272 (CA)
R v Lau Kwok-hung (No 1) (1991) 1 HKPLR 19

[1] Up to (1993) 3 HKPLR, Part 3, and [1993] 2 HKLR Part IV

R v Lau Kwok-hung [(No 2)] [1992] 2 HKCLR 241
R v Lau Kung-shing (1993) 3 HKPLR 286, [1993] HKDCLR 000
R v Lau Shiu-wah (1991) 1 HKPLR 202, [1992] HKDCLR 11 (DCt)
R v Lau Ting-man (1991) 1 HKPLR 249
R v Lee Kwong-kut (1991) 1 HKPLR 337
R v Leung Ping-lam (1991) 1 HKPLR 52
R v Li Tat (1993) 3 HKPLR 171, [1993] 2 HKCLR 203
R v Lo Wai-keung [1993] HKDCLR 47
R v Lum Wai-ming [1992] 2 HKCLR 221
R v Ma Man-ho (1991) 1 HKPLR 314
R v Man Wai-keung (No 2) [1992] 2 HKCLR 207
R v Mirchandani [1992] 2 HKCLR 174
R v Ng Kam-fuk [1993] HKDCLR 29
R v Ng Po-lam (1991) 1 HKPLR 25
R v Ng Yiu-fai [1992] 2 HKCLR 122
R v Securities and Futures Commission, ex parte Lee Kwok-hung (1993) 3 HKPLR 1 (HCt)
R v Securities and Futures Commission, ex parte Lee Kwok-hung (1993) 3 HKPLR 39, [1993] 2 HKCLR 51 (CA)
R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127; [1992] LRC (Const) 547 (CA)
R v Eddie Soh Chee-hong (1991) 1 HKPLR 83
R v Sze Yung-sang (1993) 3 HKPLR 211, [1993] 2 HKCLR 18
R v Tran Viet Van [1992] 2 HKCLR 184
R v Tse Kim-ho (1993) 3 HKPLR 298
R v Tsui Shek-law (1991) 1 HKPLR 346
R v Tung Chi-hung (1991) 1 HKPLR 282
R v Wan Kit-man [1992] 1 HKCLR 224 (HCt)
R v Wan Siu-kei (1993) 3 HKPLR 228
R v Wan Yin-man (1991) 1 HKPLR 360
R v Wong Cheung-bun [1992] 1 HKCLR 240 (HCt)
R v Wong Hiu-chor [1993] 1 HKCLR 107
R v Wong Yan-fuk (1993) 3 HKPLR 341
R v Wright, ex parte Lau Wing-wo (1993) 3 HKPLR 126
R v Yiu Chi-fung (1991) 1 HKPLR 167
Re Reid (1991) 1 HKPLR 275
Re Rich Sir Ltd (1991) 1 HKPLR 296
Re Sin Hoi [1992] 1 HKLR 408 (CA)
Re Suthipong Smittachartch and the United States of America [1993] 1 HKLR 93
Tam Hing-yee v Wu Tai-wai (1991) 1 HKPLR 1 (DCt)
Tam Hing-yee v Wu Tai-wai (1991) 1 HKPLR 261, [1992] 1 HKLR 185; [1992] LRC (Const) 596 (CA)

EDITORIAL

RECENT CASE LAW DEVELOPMENTS

A number of important cases covering a wide range of areas have been decided by the courts in the period since the publication of the last issue of the *Bulletin*.

The question whether the presumption of innocence guaranteed by article 11(1) applies to confiscation proceedings had been the subject of two earlier conflicting decisions of the High Court and the District Court on: *R v Ko Chi-yuen* and *R v Wong Ma-tai*. However, in *R v Ko Chi-yuen* (at p 19), the Court of Appeal resolved this conflict and held that, while article 11(1) may be applicable to post-conviction proceedings, it did not apply to confiscation proceedings because a person against whom a confiscation order was sought was not charged with any offence. Alternatively, even if article 11(1) applied, the permissive assumptions in s 4(2) and (3) of the Drugs Trafficking (Recovery of Proceeds) Ordinance could be justified.

In *R v Choi Kai-on* (at p 21), the Court of Appeal rejected an article 11(1) challenge against the presumption in s 19(2) of the Gambling Ordinance that any person found present in or leaving a gambling establishment is presumed to have been gambling there. It held that the presumption could be justified, taking into account the prevalence of the social evil of gambling and the difficulties of and the danger involved in proving actual gambling. In *R v Chan Chak-fan* (at p 24), which raises an interesting question of the boundaries of Hong Kong, the Court of Appeal found the evidentiary presumption in s 37K(1) of the Immigration Ordinance (that a person alleged to be an unauthorized entrant was presumed to be so, in the absence of evidence to the contrary, where there are reasonable grounds for believing (s)he is) was a justifiable interference with the presumption of innocence.

The controversial power of the ICAC to apply, by way of ex parte proceedings before a magistrate, for surrender of passport of a person under suspect came under challenge in *Re Nattrass* (at p 6). The court, however, found that the procedure did not involve the determination of a "criminal charge" and hence article 11 was not applicable, but the court partially upheld the challenge under article 8 and declared repealed some parts of s 17A of the Prevention of Bribery Ordinance for being inconsistent with the right to freedom of movement.

An important decision under article 10 was delivered in *R v Town Planning Board, ex parte Auburntown* (at p 9), which involved a challenge to the objection procedure before the Town Planning Board under s 6 of the Town Planning Ordinance. The unfairness of the procedure has long been acknowledged by the Government (see (1991-92) *Hong Kong Legislative Council Proceedings* at 957, and *Comprehensive Review of the Town Planning Ordinance: A Consultative Document* (Government Printer, 1991), para 3.8). In this case the applicant had acquired a site at Sai Kung with a view to develop it into a marine/residential estate, but while negotiations with the Government were still taking place, the site was zoned as green

belt by the Town Planning Board. The applicant's objection to the Town Planning Board failed and judicial review proceedings were brought. The essence of the complaint was that the Town Planning Board is judging its own cause when it hears an objection to a plan promulgated by itself, and hence the applicant has been denied a right to a fair hearing by a competent, independent and impartial tribunal as guaranteed by article 10 of the Bill of Rights. The court accepted the principles laid down in the international jurisprudence on the equivalent article in the ICCPR and the European Convention; Rhind J also approved an earlier District Court decision of the *Commissioner of Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141 which contains a detailed discussion of the European case law in this respect. The challenge, however, failed eventually on the ground that there was no determination of rights involved, as the promulgation of a draft development permission area plan was a legislative process rather than an adjudicative act. As we note in the editorial comment to this case, this decision will have great significance as it opens up the opportunity to challenge the administrative appeal system set out in many different ordinances.

Another important decision is *R v Yu Yem-kin* (at p 29), where the High Court had embarked on an elaborate discussion of when a warrantless search and seizure violates the right to privacy guaranteed by article 14 of the Bill of Rights. The court held that article 14 required that all interference by the state must be justified by reference to a test of reasonable necessity and be kept to the minimum level of intrusion. The court also discussed when the power to exclude evidence will be exercised under s 6 of the Bill of Rights Ordinance and its relationship to the similar discretionary power under common law.

Another case of interest is *R v Crawley* (at p 42), where Keith J dismissed a challenge against fixed penalty imposed on the owner of a vehicle for contravening certain traffic offences. The defendant argued that different treatment of the Crown as the owner of Government vehicles and the owners of other vehicles was discriminatory and inconsistent with the right to equality before the law under article 22 of the Bill of Rights. The international principles on discrimination, which had been accepted obiter in the earlier decision of *R v Man Wai-keung (No 2)* [1992] 2 HKCLR 207, were approved by the court in this case. It may perhaps be considered as settled law now that any departure from identical treatment will be discriminatory unless it can satisfy the requirements of rationality and proportionality, that is, that the difference in treatment pursues some legitimate objectives and that the difference in treatment is a rational and proportionate means to achieve those legitimate objectives.

PRACTICE DIRECTION ON THE REPORTING OF CHAMBERS PROCEEDINGS

In July 1992 the Chief Justice issued a Practice Direction which prohibited the reporting of any proceedings, including a judgment, in chambers without the authority of the master or the judge before whom the proceedings were conducted. In an earlier issue of the *Bulletin* (vol 1, no 4, at 44-46), we commented critically on this Practice Direction, arguing that it was incompatible with article 10 of the Bill of Rights, which expressly requires that "any judgement rendered in a criminal case or in a suit at law shall be made public except where

the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." The Bar Association, the Law Society, the *Hong Kong Law Journal* and the *New Gazette* have also expressed reservations about the Practice Direction.

In a later issue of the *Bulletin* (vol 2, no 2, at p 2), we reported that the Practice Direction was being reviewed by Mr Justice Godfrey, and that it appeared that the Practice Direction may be amended so that all judgments given in chambers will be publishable 14 days after their delivery, unless the parties concerned object to its publication. In such case the judge concerned will decide whether or not to release the judgment for publication. We understand that the Bar Association and the Law Society have been engaged in a series of exchange of correspondences with the judiciary on this issue, but it seems that no amendment to the Practice Direction has been made so far.

INTERNATIONAL DEVELOPMENTS

INTERNATIONAL JURISPRUDENCE

Human Rights Committee -- Decisions under the First Optional Protocol to the ICCPR

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

Committee against Torture

In Appendix C we reproduce a United Nations press release summarising a recent decision of the Committee against Torture considered under the individual complaints procedure contained in article 22 of the Convention.

Committee on the Elimination of Discrimination Against Women

We have reproduced at Appendix E the latest general recommendation adopted by the Committee on the Elimination of Discrimination Against Women. It deals with equality in the family and discusses articles 9, 15 and 16 of the Convention. Also included, at Appendix C, is the United Nations Declaration on the Elimination of Violence Against Women adopted by the General Assembly in December 1993. A Special Rapporteur on Violence against Women has recently been appointed pursuant to a decision of the United Nations Commission on Human Rights. She is Dr Radhika Coomaraswamy, of Sri Lanka.

HUMAN RIGHTS TREATY ACTION IN RELATION TO HONG KONG

International Covenant on Economic, Social and Cultural Rights

In the last issue we noted that the United Kingdom government had recently submitted reports in respect of Hong Kong under the International Covenant on Economic, Social and Cultural Rights. We reproduced the first of those reports (dealing with articles 10-12 of the Covenant),[1] but mistakenly omitted the second (dealing with articles 13-15 of the Covenant. The second report is reproduced in this issue at Appendix A. Both these reports will be considered by the Committee on Economic, Social and Cultural Rights at its session in November/December 1994.

International Convention on the Elimination of All Forms of Racial Discrimination

In the last issue of the *Bulletin* we also mistakenly noted that the 12th report in respect of Hong Kong under the Racial Discrimination Convention was awaiting consideration by the Committee on the Elimination of Racial Discrimination (CERD). In fact, it appears that the report was considered in August 1993 by the Committee, unbeknown to the general community in Hong Kong.[2] It is regrettable that the government took no steps to publicize the date of the hearing and that it has apparently gone to little trouble to inform the public of details of the hearing. As a result of the lack of publicity of the hearing, there was no input into the Committee's hearing by any Hong Kong groups. International supervision will lose much of its efficacy and effectiveness if the international monitoring body receives no input from Hong Kong non-governmental organizations, which can only submit material to international bodies when they know about the date of the hearing in the first place. As the government did know the date of the hearing, its failure to publicize this information in Hong Kong suggests that the government attaches only minimal importance to the participation of non-governmental organizations in international reporting under the Convention.

The Committee expressed concern about the absence of anti-discrimination legislation in most of the dependent territories (including Hong Kong) and recommended the incorporation of the Convention into the legislation of the territories. The Committee has also recently adopted a general recommendation addressed to States Parties to the Convention, recommending that they establish independent national human rights commissions or other appropriate bodies as a means of implementing their obligations under the Convention.

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[1] See *Bill of Rights Bulletin*, vol 2, no 4, Appendix C.

[2] See International Service for Human Rights, *Human Rights Monitor*, No 23, December 1993, p 4.

Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

Although the first report in respect of Hong Kong was due to be submitted to the United Nations in January 1994, as of the end of April, that had not been done. The Hong Kong government completed its work on the report in January, but the report is held up at the Foreign and Commonwealth Office in London. The United Kingdom government does not wish to submit the report in respect of Hong Kong until reports from other dependent territories are ready for submission. The United Kingdom and Hong Kong governments have also refused to make the report publicly available until it is submitted to the United Nations. There seems to be little justification for adopting such a position. Indeed, it runs counter to various recommendations of the treaty bodies. Its major effect will be to limit the time that the Hong Kong community has to consider the report, and that non-governmental organizations may well not have sufficient time to prepare material for the meeting of the Committee of Torture. This approach may prove an unfortunate precedent for the situation after 1997, when the Foreign Ministry in Beijing will be responsible for submitting reports in respect of Hong Kong.

Convention on the Rights of the Child

The Hong Kong government has previously announced that the Children's Convention will be extended to Hong Kong. However, that has not yet taken place.

Convention on the Elimination of All Forms of Discrimination Against Women

The Hong Kong government will shortly take a decision on whether to extend this Convention to Hong Kong. For the background, see our comments at *Bulletin*, vol 2, no 3, pp 3-6; vol 2, no 4, p 3.

AMNESTY INTERNATIONAL REPORT

In a report released on 21 April 1994 Amnesty International examined the operation of the Hong Kong Bill of Rights in the context of institutional protection of human rights in Hong Kong (*Hong Kong and Human Rights: Flaws in the System*). The report's recommendations included the establishment of an independent human rights commission, an independent legal aid agency, and changes to the normal rules governing costs for Bill of Rights cases.

CASES

JURISDICTION OF THE COURT AND REMEDY (BILL OF RIGHTS ORDINANCE, SECTION 6)

Dangerous Drugs Ordinance (Cap 134), s 52

See *R v Yu Yem-kin* (1994) HCt, Crim Case No 111 of 1993, 21 February 1994, Jerome Chan J, at p 29 below.

LIBERTY AND SECURITY OF THE PERSON (BILL OF RIGHTS, ARTICLE 5; ICCPR, ARTICLE 9)

Prevention of Bribery Ordinance (Cap 201), s 17A(1)

See *In re Nattrass* (1994) Mag, EMP No 2337/93, 5 January 1994, Mr I Carlson, at p 6 below.

Dangerous Drugs Ordinance (Cap 134), s 52

See *R v Yu Yem-kin* (1994) HCt, Crim Case No 111 of 1993, 21 February 1994, Jerome Chan J, at p 29 below.

Inherent jurisdiction of the Court of Appeal to grant bail pending appeal in refugees cases

See *Le Tu Phuong and Dinh T B Chinh v Director of Immigration* (1994) CA, Civ App No 164 of 1993, 1 February 1994, Litton JA, at p 47 below.

FREEDOM OF MOVEMENT (BILL OF RIGHTS, ARTICLE 8; ICCPR, ARTICLE 12)

Prevention of Bribery Ordinance (Cap 201), s 17A(1)

In re Nattrass (1994) Mag, EMP No 2337/93, 5 January 1994, Mr I Carlson

By an ex parte order made by a magistrate pursuant to s 17A(1) of the Prevention of Bribery Ordinance, the applicant, who was under investigation by the ICAC, was

ordered to surrender his passport to the Commissioner of the ICAC. In a subsequent inter parte hearing, the applicant was permitted to have his passport returned to him only under stringent conditions. His appeal against the inter partes order was partially successful in that he was allowed to have his passport back temporarily to enable him to go on a short business trip to Vancouver, on condition that he had to return the passport to the Commissioner on his return. The applicant complied with this order, and after returning, applied in these proceedings for an unconditional return of his passport. He argued that s 17A(1) of the Ordinance was inconsistent with arts 5(1), 5(3), 8, 10, 11 and 22 of the Bill of Rights, but accepted that the section can be saved by repealing the expressions "ex parte" and "alleged" in s 17A(1) of the Ordinance, and by reading in a requirement in s 17A(1) that any suspicion under that section has to be a "reasonable suspicion".

Section 17A(1) of the Prevention of Bribery Ordinance provides:

> "A magistrate may, on the application *ex parte* of the Commissioner, by written notice require a person who is the subject of an investigation in respect of an offence *alleged or suspected* to have been committed by him under this Ordinance to surrender to the Commissioner any travel document in his possession." (emphasis added)

Under s 17B, a person who has surrendered his travel document may apply at any time in writing to the Commissioner for its return. If the Commissioner grants the application on terms or refuses it, the holder of the travel document may appeal to a magistrate within 14 days. The magistrate enjoys wide powers either to refuse the application or allow its return subject to conditions. Anyone aggrieved by the decision of the magistrate may appeal to a High Court judge.

Held:

Right to liberty and security of the person (article 5)

1. The safeguards under article 5 of the Bill of Rights are largely procedural, laying down a requirement that any deprivation of liberty be in accordance with the law, the right to be brought before court promptly and the usual expectation of bail pending trial. Taking into account the safeguards set out in s 17B, s 17A does not offend any of the requirements of article 5.

Equality before the law (article 22)

2. Section 17A does not impinge in any way on the guarantee of equality of all persons before the law or the prohibition against discrimination contained in article 22.

Right to a fair hearing (article 10)

3. Section 17A is not concerned with the determination of a criminal charge or rights and obligations in a suit at law. It is concerned only with the question of whether a person under investigation should be deprived of his travel document and therefore of his ability to leave the jurisdiction for a limited period of time.

4. Ex parte determinations of guilt or innocence and of civil liability should never be countenanced. However, taking into account (a) that the procedure under s 17A is interlocutory in nature; (b) it is temporary in the sense that a suspect can very quickly come before the court to apply for it to be set aside; and (c) that the objective of the section as a whole is to prevent a suspect from fleeing before the investigation has been completed, the preliminary ex-parte procedure under s 17A(1) does not violate article 10 of the Bill of Rights.

   Commissioner of Inland Revenue v Lee Lai-ping (1993) 3 HKPLR 141, distinguished; *R v Ng Wai-hung* (1983) HCt, MP No 2155 of 1983 considered.

Presumption of innocence and procedural guarantees in criminal process (article 11)

5. Notwithstanding the ex parte procedure provided for by s 17A, the powers and procedures brought into play by s 17A do not offend any of the requirements of article 11 because s 17A does not involve any determination of a criminal charge within the meaning of article 11.

Freedom of movement (article 8)

6. While s 17A clearly infringes the right enshrined in article 8(2), the power is nevertheless justifiable provided it is not to be exercised on the basis of the very low threshold of a mere allegation of the commission of an offence by a suspect. The power is akin in many respects to the issuing of search warrants, which are granted ex parte on the basis of reasonable suspicion. In order to bring this section into conformity with article 8(2), the word "alleged" in s 17A(1) is excised and the suspicion referred to in the subsection should be interpreted as meaning "reasonable suspicion".

Per curiam

"Mr Wong's reply to this aspect and to whether I should delete the word 'alleged' in that in view of the fact that a magistrate has a discretion whether

or not to issue the Notice then as a matter of construction s 17A(1) survives intact. I do not accept that the existence of the safeguard of a judicial discretion is sufficient by itself. The provision under attack must pass a qualitative test in relation to the articles that it is said to offend." (at p 14)

Counsel: G J X McCoy and P Y Lo (instructed by Weir and Associates), for the applicant; S Wong (of the Attorney General's Chambers), for the respondent.

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

Town Planning Ordinance (Cap 131), ss 6 and 9

R v Town Planning Board, ex parte Auburntown Ltd (1994) HCt, MP No 222 of 1993, 18 April 1994, Rhind J

The applicant had acquired a site near Pak Sha Wan Peninsula, Sai Kung, in December 1988 for $5 million, with a view to developing it as a marina/residential complex. The various lots making up the site were held under a Block Crown Lease where the use was described as agricultural. The development proposal was first made by the applicant's predecessor in title in or about 1979. In various discussions between 1979 and 1985, the applicant's predecessor in title and the Government had reached some agreement in principle that the site could be developed as a marina/residential complex, subject to their being able to reach agreement over lease modifications and the level of premium. In 1985 the Government adopted the Ho Chung Outline Development Plan, showing that the major part of the site zoned as "residential and marina", and a minor part zoned "countryside conservation area". This plan, being a departmental plan only, had no statutory force, as the town planning legislation then in force extended only to existing urban areas and the new towns. Discussions with the government on the proposed plan were renewed after the applicant acquired the site in 1988, and the earlier agreement in principle had been confirmed by various government officers in 1990.

By an interim plan published in October 1990, the site was designated for "unspecified use", with the result that any development was temporarily frozen. In January 1991 the Town Planning Ordinance was amended with retrospective effect from 27 July 1990 empowering, for the first time, the Governor to designate any area of Hong Kong, regardless of whether it is urban or rural, as a "development permission area". Under s 3(1)(b), the Board may prepare a draft development

permission area plan in any part of Hong Kong duly designated by the Governor. On 14 March 1991, the Town Planning Board decided to re-zone the site from "unspecified use" to "green belt". A draft development permission area plan, which superseded the interim plan, was gazetted on 12 July 1991. According to the notes accompanying this draft plan, the erection of any house within the green belt required the permission of the Town Planning Board, which could grant the permission with or without conditions. The applicant's application for permission to erect houses on the site had been unsuccessful.

Section 6 of the Town Planning Ordinance provides that any person aggrieved by the draft plan may within a period of 2 months send to the Town Planning Board a written statement of objections. Upon receipt of such objection, the Board may, under s 6(6) of the Ordinance, give preliminary consideration to the objections in the absence of the objector. Should the Board refuse to accede to the objections at the preliminary hearing, the Board is required to consider the written statement of objections at a meeting at which the objector is given an opportunity to make oral representation. Under s 6(9) of the Ordinance, the Board may, after the full hearing, "reject the objection in whole or in part or may make amendments to the draft plan to meet such objection".

Pursuant to s 6(1) of the Town Planning Ordinance, the applicant lodged an objection to the green belt zoning of its site. The objection was first rejected at the preliminary hearing in the absence of the applicant, and then rejected again after a full hearing where the applicant was represented and made submissions.

The applicant challenged the rejection of its objections by the Town Planning Board by way of judicial review on two grounds. First, it argued that the Board acted ultra vires the powers conferred on it by the Town Planning Ordinance when the Board imposed restrictions on types of buildings such as houses and their plot ratios permitted under a draft development permission area plan. Secondly, it argued that the objection procedure set out in s 6(6) and (9) of the Ordinance, which enabled the Town Planning Board to be a judge in its own cause, violated the applicant's right to a fair hearing by an competent, independent and impartial tribunal guaranteed by article 10 of the Bill of Rights. The Crown argued, in relation to the Bill of Rights challenge, that the objection procedure under s 6 did not involve any determination of rights and obligations in a suit at law. The decision of the Board was subject to approval by the Governor in Council under ss 8 and 9 of the Ordinance. The preparation of draft development permission area plan, which was subsidiary legislation, was a legislative process and hence article 10 of the Bill of Rights had no application. The applicant replied that if preparing and promulgating the plan involved a legislative process, then it was inconsistent with the separate power of the Governor to make subsidiary legislation under s 14, or the express provision that the plan was advisory rather than mandatory under s 13. Nor did the preparation of the plan comply with s 34 of the Interpretation and General Clauses Ordinance (Cap 1), which

required the tabling of any subsidiary legislation before the Legislative Council.

Sections 8, 9, 13 and 14 of the Town Planning Ordinance provide:

"**8. Submission of considered draft plan to Governor in Council**

After consideration of all objections, the Board shall submit the draft plan, with or without amendments, to the Governor in Council for approval, and shall submit therewith --

(a) a schedule of the objections (if any) made under section 6 and not withdrawn;

(b) a schedule of the amendments (if any) made by the Board with a view to meeting such objections.

9. Powers of Governor in Council upon submission

(1) Upon submission of a draft plan the Governor in Council may --

(a) approve it;
(b) refuse to approve it;
(c) refer it to the Board for further consideration and amendment.

(2) The Governor in Council may approve a draft plan notwithstanding that any requirements of this Ordinance applicable thereto have not been complied with.

(3) A draft plan approved as aforesaid is hereinafter referred to as an 'approved plan'.

(4) The Governor in Council may by notification in the Gazette correct any omission from or error in any approved plan.

(5) On such approval being given the approved plan shall be printed and exhibited for public inspection at such place as the Board may consider suitable and the fact of such approval and exhibition shall be notified in the Gazette.

(6) The Board shall supply a copy of any approved plan to any person on payment of such fee as the Board may determine.

13. Approved plans to serve as standards

Approved plans shall be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them.

14. Power to make regulations

The Governor in Council may make regulations for the purpose of facilitating the work of the Board and generally for the purpose of carrying the provisions of this Ordinance into effect."

Section 34(1) and (2) of the Interpretation and General Clauses Ordinance provide:

"(1) All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of the subsidiary legislation.

(2) Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution."

Held (dismissing the application):

Ultra vires

1. Adopting a purposive approach, s 3(1)(b) is clear and unambiguous, and confers the power on the Board to specify types of building in draft development permission area plans. Accordingly, the Board had not acted ultra vires in gazetting the draft development permission area plan specifying types of building within the green belt.

Objection procedure as legislative process

2. A development permission area plan is an "instrument" within the meaning of "subsidiary legislation" as defined by s 3 of the Interpretation and General Clauses Ordinance.

3. While there is no reason why a draft development permission area plan is not tabled before the Legislative Council, such omission would not be fatal to an approved plan's qualifying as subsidiary legislation, since the tabling contemplated by s 34 of the Interpretation and General Clauses Ordinance is not mandatory but directory only.

4. It may be unusual for the same piece of legislation to grant an implied power to the Governor in Council to make subsidiary legislation under s 9 and at the same time, to contain an express power to make subsidiary legislation under s 14, but this is what the legislature intended in this context.

5. The isolated instance of s 13 of the Town Planning Ordinance treating plans as advisory goes nowhere near outweighing the other instances where the plans are undoubtedly mandatory.

6. Accordingly, the approved plans under the Town Planning Ordinance are subordinate legislation, and the various steps along the way from promulgating draft plans under s 3 up until the Governor in Council approving a plan under s 9 are all part of a legislative process.

Right to a fair and public hearing by a competent, independent and impartial tribunal

7. In interpreting the Bill of Rights, a generous and purposive approach is to be adopted, giving full recognition to the aims and purposes of the International Covenant on Civil and Political Rights. One of the consequences of adopting this entirely new jurisprudential approach is that the terms and concepts in the Bill of Rights can have an autonomous meaning, that is, terms used in the international treaty do not necessarily have to bear the same meaning as in the domestic law, but should be understood in an international sense.

R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127, followed.

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

Commissioner of Inland Revenue v Lee Lai-ping (1993) 3 HKPLR 141, approved.

9. Despite the various limitations on the applicant's rights to develop the site as it would like, such as the restrictions of a contractual nature in the Crown lease, and those of a statutory nature in the Building Ordinance or the Town Planning Ordinance, the applicant has suffered a loss of rights, proprietary in

nature, as the result of the Board's zoning the site to green belt. The right to develop one's land can be regarded as part of the wider civil right to engage in private commercial activity. Regardless of how the applicant's rights to develop the site might be classified under Hong Kong domestic law, by virtue of the international norms which now operate, the applicant enjoys autonomous development rights in respect of the site within the meaning of "civil rights and obligations" under article 10.

10. The hearing before the Town Planning Board under s 6 of the Ordinance is not fair, as the Board cannot be perceived to be independent and impartial, bearing in mind the composition of the Board and the fact that not only did the Board promulgate the draft plan in the first place, but also that the Board will, in the absence of the objector, already have rejected the objection once at the preliminary consideration stage under s 6(3).

11. The type of "determination" contemplated by article 10 is one which, in relation to a dispute of a serious nature concerning civil rights, is decisive for the exercise or enjoyment of those rights. A finding by the Board under s 6(9) of the Town Planning Ordinance in relation to an objection is not "decisive" for those rights, since the Board can be overridden by the Governor in Council under s 9(2).

12. The Board's hearing of an objection under s 6(6) and (9) of the Ordinance is part of a legislative process; the Board is not engaged in an adjudicative process. The compulsory requirement under s 6(9) to reach a decision in respect of disputes arising from objections is a necessary, but not sufficient, condition to qualify a tribunal as making a "determination".

13. Had the crucial ingredient of a "determination" not been lacking, s 6(6) and (9) would fall foul of article 10 of the Bill of Rights.

Counsel: A Neoh QC, A Ismail and J Chan (instructed by Bernard Wong & Co), for the applicant; P Dykes and P Vatel (of the Attorney General's Chambers), for the respondent.

Editorial comment

This is the first High Court case challenging the administrative appeal system in Hong Kong which has resulted in a judgment. Although the challenge eventually failed on a technical point that there was no "determination", the court has accepted the international jurisprudence on the meaning of "rights and obligations in a suit at law" and "competent, independent and impartial tribunal". Of particular significance is the conclusion that the concept of "rights and obligations in a suit at law" is an autonomous concept bearing the same meaning as the notion of "civil rights and obligations" in article 6 of the European Convention on Human

Rights. In determining whether a right or obligation in a suit at law is in issue, the court is not bound by classification of the "right" under ordinary domestic law. In this particular case, notwithstanding that the applicant's "right to development" was subject to contractual restrictions in the Crown lease and statutory restrictions by virtue of the Building Ordinance and the Town Planning Ordinance, the court found that the applicant enjoyed an "autonomous development right in respect of the site within the meaning of article 10". It may also be noted that the equivalent concept of "civil rights and obligations" under the European Convention covers a wide range of activities, and has recently been held to cover certain aspects of tax matters: see *Editions Periscope v France* (1992) 14 EHRR 597.

Having examined the objection procedure set out in s 6 of the Town Planning Ordinance and the composition of the Town Planning Board, the court came to the conclusion that they failed to satisfy the requirement of a fair hearing by a competent, independent and impartial tribunal enshrined in article 10 of the Bill of Rights. Rhind J expressly stated that, were it not for a lack of the crucial element of a "determination", the court would have held s 6(6) and (9) of the Town Planning Ordinance repealed on the ground of inconsistency with the Bill of Rights.

In other words, this decision throws open the gate for challenging other administrative appeal procedures, for example, the Appeal Tribunal under the Buildings Ordinance may well fall foul of the requirements of article 10. Section 43 of the Buildings Ordinance provides that one of its members "shall be nominated" by the Building Authority, whose decision is the subject matter for determination before the Appeal Tribunal. This may explain the introduction of the Buildings (Amendment) Bill 1994, which repeals the entire Part governing appeals and replaces it by a new Part VI (See p 52 below). The appeal system under the Television Ordinance may be another candidate for potential challenge. The impact of article 10 is well summarised by the European Court of Human Rights in *Albert and Le Compte v Belgium* (1983) 5 EHRR 533:

> "Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1) or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)"

The court found against the applicant on the ground that the objection procedure was part of legislative process and hence there was no "determination" of any rights and obligations in a suit at law. Rhind J held that the preparation of the draft development permission area plan was an act of subordinate legislation. This finding highlights the fine and difficult distinction between legislative acts and adjudicative acts, the latter but not the former attracting the scrutiny of article 10. For example, is drawing up a code of conduct or internal guidelines pursuant to statutory power an exercise of statutory power or a legislative act? The finding also casts doubt on the constitutional relationship between the Legislative Council and those empowered to make delegated legislation.

Subordinate legislation, being an exercise of delegated legislative power, is subject to supervisory control by the Legislative Council. Such control is exercised through s 34 of the Interpretation and General Clauses Ordinance, requiring the tabling of every piece of subordinate legislation and enabling the Legislative Council to amend any such subordinate legislation within 28 days of tabling. The arrangement, as noted by Professor Peter Wesley-Smith, is to protect against incompetent or ill-intentioned law-making by bureaucratic delegates (P Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman, 1993), at pp 166-167). Professor de Smith took the view that "the effect of breach of a duty to lay a statutory instrument before Parliament is doubtful, but this may well be held to render the instrument inoperative." (S A de Smith and R Brazier, *Constitutional and Administrative Law* (London: Penguin, 6th ed 1989), p 351) In contrast, a similar provision in the Australian Acts Interpretation Act expressly provides that if the subordinate legislation is not laid before each house of the parliament within the time specified, they are to be void and of no effect. (s 48, Acts Interpretation Act; see D C Pearce, *Delegated Legislation in Australia and New Zealand* (Adelaide: Butterworths, 1977), at p 31, para 77). This seems to accord with the intention of requiring the tabling of subordinate legislation. If Rhind J were right that s 34 is only directory, how is the Legislative Council to exercise its supervisory power over subordinate legislation, and how could the power to amend or disallow be exercised? Does it mean that the executive government would be able to by-pass the principal legislature in enacting certain controversial or unpopular regulations? Would the purpose of s 34 be defeated if it is only directory? It is accepted that much subordinate legislation is of a technical nature; yet on many occasions subordinate legislation affects the public far more significantly than primary legislation: see, for example, the various regulations made under the Factories and Industrial Undertakings Ordinance.

Control of Obscene and Indecent Articles Ordinance (Cap 390)

R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd 91994) HCt, MP No 1245 of 1993, 20 January 1994, Mayo J[3]

The facts of this case were summarised in *Bill of Rights Bulletin*, vol 2, no 4, at p 17. The first applicant was charged with an offence of publishing an indecent article without the statutory warning, contrary to section 24 of the Obscene and Indecent Articles Ordinance. The article concerned was a photo showing the bare breasts of Madonna. The picture appeared as one of four illustrations in a Chinese article in an issue of Ming Pao Weekly Magazine. The photo, without the accompanying Chinese text, had been submitted to the Obscene Articles Tribunal and received an interim classification of Class II. The applicants were not aware of the interim classification,

[3] The applicants have lodged an appeal against this decision, the hearing of which is set down for 15-17 October 1994.

which had been published in two newspapers pursuant to s 19 of the Ordinance. As a result, the applicants had not applied for a full hearing within 5 days of the interim classification taking effect and this classification became final. The applicants applied for judicial review of the classifications, arguing, inter alia, that the Tribunal had no jurisdiction to classify a photo which by itself did not constitute an "article" within the meaning of the Ordinance, and that the classification procedure as laid down in the Ordinance was inconsistent with articles 10 and 16 of the Bill of Rights.

The court dismissed the application. It distinguished an earlier decision of the Court of Appeal in *R v Obscene Articles Tribunal, ex parte Freeman Holdings Ltd* (1993) CA, Civ App No 150 of 1993 and found that the photograph alone formed an article for the purpose of the Ordinance, and that no notice of the interim classification had to be served on the applicants, who were not parties to the proceedings within the meaning of reg 7(2) of the Obscene and Indecent Articles Rules. On the right to a fair hearing, the court held:

1. The initial classification process is an informal procedure to enable interested parties to have some idea whether any particular article or material was likely to fall foul of the Ordinance. No untoward consequences flow simply from the making of any classification. Any untoward consequence will ensue only if criminal proceedings are instituted, but in that event the defendant will have the benefit of all the safeguards built into the criminal process. Besides, the defendant may also invoke s 17 independently of any criminal proceedings to ask for a review by the Tribunal. Accordingly, there is no objection to the informal procedure whereby a classification can be obtained without the necessity of serving other interested parties.

2. The initial classification process does not involve a determination of rights and obligations in a suit at law. The application for classification is only a step taken by the appropriate authority to seek guidance as to whether further action is appropriate. It does not determine conclusively any issues between the defendants and the prosecuting authority; any such dispute would be resolved by a magistrate subsequently if a criminal prosecution is instituted.

Counsel: A Neoh QC and J Chan (instructed by Johnson Stokes & Master), for the applicant; S H Kwok and W Wong (of the Attorney General's Chambers), for the respondent.

RIGHT TO A FAIR HEARING IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10)

Prevention of Bribery Ordinance (Cap 201), s 17A(1)

See *In re Nattrass* (1994) Mag, EMP No 2337/93, 5 January 1994, Mr I Carlson, at page 6 above.

European Convention on Human Rights, article 6(1)

Bendenoun v France, European Court of Human Rights, Judgment of 24 February 1994, Series A, No 284

The applicant complained that he had not had a fair trial in the administrative courts in respect of the tax surcharges that had been imposed on him. The French Government argued that the proceedings in issue did not relate to a "criminal charge" as the tax surcharges imposed on the applicant bore all the hallmarks of an administrative penalty. It pointed out that the penalties were described as "tax penalties" and not "criminal penalties"; that the nature and degree of severity of the penalties suggested that they were not a criminal penalty; that the enforcement was carried out by the Revenue under the supervision of the administrative courts and not by a criminal court; that the supplementary tax assessment was directly proportionate to the tax originally evaded; that it was not an alternative to custodial penalty; that the surcharges remained payable by the heirs upon the death of the taxpayer; and that criminal law of aiding and abetting did not apply to tax surcharges.

On the substantive issue, the applicant complained that he had been denied access to the relevant files of the tax authorities and as a result, had prevented him from identifying exculpating facts and in particular, from having the anonymous informer who had given rise to the proceedings called as a witness and examined.

Held (finding no violation of article 6):

1. While the court did not underestimate the importance of the factors raised by the Government, these factors were outweighed by other considerations, namely, (a) the offences covered all citizens in their capacity as taxpayers and not a given group with a particular status; (b) the tax surcharges were intended not as pecuniary compensation for damage but essentially as a punishment to deter re-offenders; (c) they were imposed under a general rule whose purpose was both deterrent and punitive; and (d) the surcharges were very substantial in the instant case, and failure to pay rendered the taxpayer liable to be committed to prison by the criminal courts. Accordingly, the charge in issue was "criminal" within the meaning of article 6 of the European Convention.

2. The documents whose production the applicant complained that he had been denied access were not among those relied on by the tax authorities. Even in such circumstances the concept of a fair hearing may entail an obligation on the tax authorities to agree to supply the litigant with certain documents from

the file on him or even with the file in its entirety. However, it is necessary, at the very least, that the person concerned should have given, even if only briefly, specific reasons for his request.

3. The applicant had not put forward any precise argument to support his request. Besides, he had been aware of the existence and content of most of the documents and had access to the complete file during the criminal investigation. Hence, there was no infringement of the rights of the defence or of equality of arms.

Editorial comment

The approach of the court in determining whether the proceedings in issue is "criminal" is in sharp contrast to the approach adopted by the local courts in some cases: see, for example, *R v Ko Chi-yuen*, immediately following, and *R v Crawley*, at p 42 below.

PRESUMPTION OF INNOCENCE (BILL OF RIGHTS, ARTICLE 11(1); ICCPR, ARTICLE 14(1)

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

R v Ko Chi-yuen (1994) CA, Crim App No 298 of 1993, 22 March 1994, Penlington, Nazareth & Bokhary JJA

This case involved an application for leave to appeal against sentence imposed in default of compliance with a confiscation order. The first instance hearing was noted in *Bill of Rights Bulletin*, vol 2, no 2, p 25. The applicant was convicted of two drug offences and was sentenced to 17 years' imprisonment. The trial judge also made a confiscation order pursuant to the Drug Trafficking (Recovery of Proceeds) Ordinance in the amount of about $8.4 million, and fixed three years as the prison term which the appellant was to serve if any of that amount was not duly paid or recovered. In applying for leave to appeal against the three years' imprisonment term, the applicant challenged the assumptions contained in s 4(2) and (3) of the Ordinance relating to the assessment of the defendant's benefits of drug trafficking, on the ground that they were inconsistent with article 11(1) of the Bill of Rights.

Section 4(2) and 3 of the Ordinance provides:

> "2. The High Court or the District Court, as the case may be, may, for the purpose of determining whether the defendant has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug

trafficking, make the following assumptions, except to the extent that the defendant shows that any of the assumptions are incorrect in his case.

3. Those assumptions are --

(a) that any property appearing to the court --

(i) to have been held by him at any time since his conviction; or
(ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him, was

received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him or another;

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him or another; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a payment or reward, he received the property free of any other interests in it."

Held (dismissing the application for leave to appeal against sentence):

1. Article 11(1) of the Bill of Rights does not apply to confiscation proceedings. While the presumption of innocence is capable of extending beyond conviction, such as extending to reverse onus provisions which render a person convicted of one thing liable to be punished as if he had been guilty of something more than, a person against whom a confiscation order is sought is not charged with benefiting from drug trafficking. The prison term in default is fixed, not to punish him for benefitting from drug trafficking, but to enforce the court's order for payment.

R v Wong Yan-fuk (1993) 3 HKPLR 341, distinguished.

2. Even if article 11(1) does extend to confiscation proceedings, s 4(2) and (3) of the Ordinance would be justifiable. They contain permissive assumptions only. The court would only make these assumptions when it is rational and realistic to do so in the context of the facts duly established, and giving the power to the courts to make these assumptions is proportionate to the grave danger to society of leaving drug traffickers rich and to that extent powerful even when behind bars.

Counsel: J Dunn (instructed by John Massie & Co), for the applicant; M C Blanchflower (of the Attorney General's Chambers), for the respondent.

Gambling Ordinance (Cap 148), s 19

R v Choi Kai-on (1994) CA, Mag App No 316 of 1992, 24 February 1994, Silke VP, Penlington JA and Ryan J

The appellant was convicted of an offence of gambling in a gambling establishment contrary to s 6 of the Gambling Ordinance. It was not in dispute that he was present in a gambling establishment at the material time. In his appeal against both conviction and sentence, the appellant challenged s 19(1) of the Gambling Ordinance -- which presumed any person found in a gambling establishment to be gambling there -- on the ground that it was inconsistent with article 11(1) of the Bill of Rights. It was argued that the presumption was not rational, as it covered every person in any part of the entire premises, such as washrooms or kitchens of a restaurant or waiters and patrons who had nothing to do with gambling. The appellant further argued that the social evil of gambling was similar to smuggling, and s 18A and 35A of the Import and Export Ordinance imposed only an evidential burden. Therefore, as contended by the appellant, the presumption did not satisfy the proportionality test, as it would be possible to achieve the same objective of combating illegal gambling by providing for an evidential, as opposed to legal, burden of proof on the applicant.

Section 19(2) of the Gambling Ordinance provides:

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

"Gambling establishment" is defined in s 2 of the Gambling Ordinance as follows:

> "'gambling establishment' includes any premises or place, whether or not the public or a section of the public is entitled or permitted to have access thereto, opened, kept or used, whether on one occasion or more than one occasion, for the purposes of or in connection with unlawful gambling or an unlawful lottery."

Held (dismissing the appeal against conviction but allowing the appeal against sentence):

1. Any legal presumption which, once raised by proven facts, required to be

displaced by an accused person, has to satisfy the two tests of rationality and proportionality. There must be a logical connection between the facts relied on and the conclusion which is to be presumed. The presumption must also be looked at to see if it goes no further than is necessary in infringing the rights now encapsulated in the Bill of Rights, having regard to the evil that is aimed at and the difficulty the Crown would have in combating it without the aid of the presumption.

R v Sin Yau-ming (1991) 1 HKPLR 88; [1992] 1 HKCLR 127, followed.

2. While the term "establishment" is widely defined, it would depend on the facts of each case to see if the premises or place in which the accused is found is such that the presumption is rational and therefore lawful. In this particular case there is a clear rational connection between the appellant's presence in the room and a presumption that he was taking part in the gambling.

3. Given all the difficulties and dangers involved in obtaining direct evidence of actual gambling, and considering that gambling is a major social problem in Hong Kong, the presumption in s 19(2) of the Ordinance is a interference which is proportional to the objective of the legislation. In applying the proportionality test the court should not engage in a comparative exercise; it is not for the court to redraft the legislation.

4. Given that the appeal has been hanging over the appellant for an abnormal length of time since 1991 through no fault of his own, nor of the court, appeal against sentence is allowed in such very unusual circumstances and the appellant is to be immediately released.

Counsel: M Poll (instructed by the Legal Aid Department), for the applicant; S R Bailey (of the Attorney General's Chambers), for the respondent.

Editorial comment

The way the rationality test is applied in this case is curious. Penlington JA seems to suggest that whether the presumption in s 19(2) of the Ordinance will satisfy the rationality test depends on the circumstances in which the presumption is invoked. He said:

> "[Gambling establishment] is a wide definition but much will depend in each case on what the Crown seeks to show was the extent of the 'establishment'. Here it was simply a room in which admittedly unlawful gambling was going on. There is a clear rational connection between the appellant's presence in the room and a presumption that he was taking part in the gambling. If, however, a court was asked to infer by reliance on Section 19(2) that a person found, as Mr Poll suggests, in the kitchen of

> a restaurant or in another room, separate from where gambling was going on, we would not accept that there is the rational connection which is necessary for the presumption to be lawful. Each case must be looked at to see if the premises or place in which the accused is found is such that the presumption is rational and therefore lawful. That of course does not mean that the presumption must be seen to flow inescapably from the facts as found. As Mr Bailey pointed out, there will always be a possibility that a person found in circumstances such as here was not gambling but such a possibility does not make the presumption irrational." (at p 6)

With respect, it seems unsatisfactory for the legality of a presumption to vary from case to case. It would seem preferable that s 19(2) of the Ordinance is either consistent with the Bill of Rights and should be upheld, or inconsistent with the Bill of Rights and should be considered repealed. The effect of Penlington JA's decision would be that the presumption is rational in some circumstances but irrational in others, depending on how it is invoked. It would also lead to a curious result that s 19(2) is repealed in some circumstances but not in others, and introduce unnecessary uncertainty into the law, as no one can safely rely upon the presumption. One can appreciated that the court is anxious not to extend the presumption to persons found in different parts of the premises which may not have anything to do with illegal gambling, but a better way to achieve this seems to restrict the meaning of "gambling establishment" so that the presumption cannot be invoked in the first place. For example, if the kitchen of a restaurant or other rooms of a restaurant separate from where the gambling is taken place were not considered to be a gambling establishment for the purpose of the Ordinance, the primary facts required to invoke the presumption would not have been established.

The court seems to have confused the question of whether the presumption can be invoked in the first place, and the question of who would be caught by the presumption if it is invoked. As to the latter question, the right approach is to ask whether in the general run of things the presumption under s 19(2) of the Ordinance is rational or not. As Litton JA pointed out in a different context in *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) 3 HKPLR 39 at 53, the court should not look at the worse-case scenario and consider "who might conceivably be caught in the extremities of the net". It is true that it is not necessary to show that the presumption must inescapably flow from the facts as found. If so, there is no need for the presumption. Therefore the court is right to conclude that the fact that there is a possibility that a person present in the gambling establishment is not gambling per se does not render presumption irrational. But this is a separate question from whether the presumption can be invoked in the first place.

Prevention of Bribery Ordinance (Cap 201), s 17A(1)

> See *In re Nattrass* (1994) Mag, EMP No 2337/93, 5 January 1994, Mr I Carlson, at p 6 above. The court held that s 17A(1) of the Prevention of Bribery Ordinance was not inconsistent with article 11 because an order by a magistrate for the surrender of

travel document under s 17A(1) did not involve a determination of any criminal charge. The court expressly left open the question whether the guarantee of presumption of innocence may apply before a person is charged:

> "Mr Wong says that [article 11] does not engage until a person is charged with an offence and that in the circumstances envisaged by s 17A the individual concerned has not been charged. He is only under investigation. I can see the force of that submission because it's plain that the article as a whole is intended to operate in the context of the trial process a such. Having said that, the presumption of innocence is a principle which subsists outside the trial process and it is not something which springs to life only when a person is charged. I am content to leave open the point whether article 11 only comes into play after charge . . .." (at p 9)

Immigration Ordinance (Cap 115), s 37K(1)

R v Chan Chak-fan (1994) CA, Crim App No 328 of 1993; R v Lai Yiu-pui (1994) CA, Crim App No 336 of 1993, 17 March 1994, Yang CJ, Macdougall VP and Bokhary JA

These two appeals were heard one immediately after the other. In both appeals the appellants were convicted of the offence of being a crew member of a ship which entered Hong Kong with an unauthorized entrant on board. It was argued, in both appeals, that when the unauthorized entrants embarked, the boat was already in Hong Kong, albeit in the part of Deep Bay which Hong Kong police refrained from patrolling. As a result, the requirement that a person "enter[] Hong Kong" in the offence charged had not been established. The court held that the boundaries of Hong Kong extend northwards so as to include the whole of Deep Bay up to the high water mark along that bay's northern shore, north and inland of which mark begins China. Accordingly, any boat in Deep Bay was already within Hong Kong territorial waters. However, the court rejected, on evidence, that the boat was lying at any Deep Bay port when the unauthorized entrants went on board. In both cases the court found that the boats set sail from China and entered Deep Bay, and had hence entered Hong Kong. The appellants in the first appeal further argued that they were in possession of "Sea-going Boat Person Certificates" issued by the Security Bureau of Baoan County in Guangdong Province, and were hence not unauthorized entrants within the meaning of s 37A of the Immigration Ordinance and para 2(1)(aa) of the Immigration (Unauthorized Entrants) Order, which declared that "all persons who leave, or seek to leave, the People's Republic Of China when not in possession of documents issued in that country permitting them to do so in accordance with its law" to be "unauthorized entrants". The court rejected this argument on the basis that the certificate did not constitute permits to leave China in accordance with its law for the purpose of para 2(1)(aa) of the Immigration (Unauthorized Entrants) Order.

The court further held that, had the boat had already been in Hong Kong by the time any unauthorized entrant embarked, the appeal court has both statutory and inherent jurisdiction to substitute the offence of which the appellants had been convicted with by a conviction of assisting the passage of an unauthorized entrant within Hong Kong, contrary to s 37D(1)(a) of the Immigration Ordinance. This substituted offence carried the same penalty as an offence of being a crew member of a ship which entered Hong Kong with unauthorized entrants on board under s 37C(1)(a) of the Immigration Ordinance. This substitution was permissible because a s 37C(1)(a) offence necessarily alleges also a s 37D(1)(a) offence. While consent from the Attorney General is required for the prosecution of both offences, consent given for a prosecution under s 37C(1)(a) suffices for a conviction under s 37D(1)(a). Regarding sentence, the court held that there was no obvious reason why, in cases like this, substituted convictions should attract lighter sentences than the ones imposed for the original convictions.

The appellant in the second appeal further argued that he was not an unauthorized entrant, and challenged s 37K(1) of the Immigration Ordinance for being inconsistent with article 11 of the Bill of Rights.

Section 37K(1) of the Ordinance provides:

> "If in any proceedings under this Part a person is alleged to be, and there are reasonable grounds for believing that such a person may be an unauthorized entrant, that person shall be presumed to be such in the absence of evidence to the contrary."

Held (dismissing both appeals):

> The proper construction of s 37K(1) is that a person is only presumed to be an unauthorized entrant if it appears more likely than not that he is one. The burden of proving that it appears more than not that the person is an unauthorized entrant lies on the prosecution. So construed, the departure from the normal principle that it remains the responsibility of the prosecution to prove the guilt of the accused to the required standards is within acceptable bounds as a measured response to the serious, prevalent and difficult problem presented by the activities of smuggling human cargo into Hong Kong.

Counsel: P Dykes (instructed by the Director of Legal Aid), for the appellants in both appeals; M Thomas QC (on fiat) and M A Crabtree (of the Attorney General's Chambers), for the respondent.

Fixed Penalty (Traffic Contravention) Ordinance (Cap 237), s 14(1)

See *R v Crawley* (1994) HCt, Mag App No 909 of 1993, 3 February 1994, Keith J, at p 42 below.

Criminal Procedure Ordinance (Cap 221), s 63

See *R v Wong Wai* (1994) Mag, FLC No 192/94, 24 January 1994, Mr D I Thomas, at p 26 below.

Presumption of innocence and direction to jury

See R v Leung Kit-chun (1994) CA, Crim App No 291 of 1993, 1 February 1994, Yang CJ, Macdougall VP and Bokhary JA, at p 46 below.

RIGHT TO CALL AND EXAMINE WITNESSES (ARTICLE 11(2)(e), BILL OF RIGHTS; ARTICLE 14(3)(e), ICCPR)

Criminal Procedure Ordinance (Cap 221), s 63

R v Wong Wai (1994) Mag, FLC No 192/94, 24 January 1994, Mr D I Thomas

In this case the defendant disputed that the criminal record produced by the prosecution related to him. He pleaded guilty to a charge of remaining in Hong Kong without lawful authority, contrary to s 38(1)(b) of the Immigration Ordinance, Cap 115. The prosecutor produced a record of previous conviction in the name of one Hung Kong-lung, whom the prosecutor alleged was the defendant. The record showed that Hung Kong-lung had been convicted for robbery in 1987 and sentenced to 18 months' imprisonment. The defendant denied that this record related to him. The prosecution then invoked s 63 of the Criminal Procedure Ordinance and submitted, inter alia, a certificate by an authorized police officer certifying that the copies of finger-print impressions of the defendant and Hung Kong-lung were those of the same person. The defendant challenged s 63 of the Ordinance for being inconsistent with the presumption of innocence and his right to call and examine witness, since there were no enlargements of the compared finger-prints and no statement or explanation of the various points of comparison.

The material part of s 63 of the Criminal Procedure Ordinance provides:

"(1) In any criminal proceedings a previous conviction against any person

may be proved in the manner prescribed in this section in addition to any other method of proving such conviction.

(2) There shall be produced to the court or magistrate the following --

(a) a certificate in Form 6 in the First Schedule signed by a police officer authorized in that behalf by the Commissioner of Police certifying the particulars of any previous convictions extracted from the criminal records kept by him, and certifying that copies of the finger-prints exhibited to the certificate are copies of the finger-prints appearing from such records;

(b) a certificate in Form 7 in the First Schedule signed by the police officer present at the taking of the finger-prints from the person before the court or magistrate in exercise of the powers conferred by section 59 of the Police Force Ordinance (Cap. 232), or by order of the court or magistrate under this section, certifying that the finger-prints exhibited to the certificate are those of such person;

(c) a certificate in Form 8 in the First Schedule signed by a police officer authorized in that behalf by the Commissioner of Police certifying that the copies of the finger-prints exhibited to Form 6 and the finger-prints exhibited to Form 7 are those of the same person.

(3) Any certificate issued under this section and purporting to be signed by a police officer shall until the contrary is proved be deemed to have been signed by such police officer and shall be evidence of the facts stated therein."

Held:

1. Where previous convictions were challenged, it was not sufficient for a police officer merely to state in a certificate that the finger-print impressions of one person were identical to those of another.

2. Section 63 of the Ordinance deprived the defendant of an opportunity to challenge the disputed evidence of the prosecution by way of examining the police officer who had certified that the defendant's finger-prints were those of the person who had been previously convicted.

3. Section 63 of the Ordinance was inconsistent with articles 11(1) and (2)(e) of the Bill of Rights and was repealed. As the prosecution had failed to prove

that the disputed criminal record related to the defendant, the defendant was to be treated as a person of good character.

Counsel: P Fok (instructed by the Duty Lawyer Scheme), for the defendant; P Hung (of the Senior Court Prosecutor's Office), for the Crown.

RIGHT TO FREE ASSISTANCE OF AN INTERPRETER (BILL OF RIGHTS, ARTICLE 11(2)(f); ICCPR, ARTICLE 14(3)(f)

Constitution of Mauritius, s 10(2)(f)

Kunnath v State [1993] 1 WLR 1315, [1993] 4 All ER 30 (PC)

The defendant had been convicted of various drug offences including the offence of drug trafficking and had been sentenced to death at the conclusion of the trial. The proceedings were conducted in English, of which the defendant, who came from Kerala in India, had little knowledge, his native language being Malayalam. The defendant was legally represented and an interpreter was present throughout the proceedings. However, the interpreter, who translated only on the instructions of the judge, translated only the charge and amendment to the defendant, and the defendant's statement to the court. None of the prosecution evidence was translated. An appeal to the Court of Appeal was dismissed and the defendant appealed to the Privy Council.

Section 10(2)(f) of the Constitution of Mauritius provides that "Every person charged with a criminal offence . . .(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence."

The Privy Council allowed the appeal, stating (WLR at 1319, All ER at 35):

> "It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant . . . [T]he basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him . . . A defendant who has not understood the conduct of proceedings against him cannot, in the absence of express consent, be said to have had a fair trial." (citations omitted)

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

Dangerous Drugs Ordinance (Cap 134), s 52

R v Yu Yem-kin (1994) HCt, Crim Case No 111 of 1993, 21 February 1994, Jerome Chan J

The applicant was among a group of people suspected to be involved in certain drug offences. Relying on the powers conferred on them by s 52 of the Dangerous Drugs Ordinance (Cap 134), a team of police officers broke into an office premises on two different occasions and conducted searches there. The premises had been kept under surveillance for some time and appeared to have been abandoned at the time of the searches. The applicant applied to exclude the evidence obtained by the police as a result of these searches on two grounds, namely:

(a) s 52 contravened--

> (i) article 5, because the right to security of person included a right to be secure against unreasonable search or seizure similar to that conferred by s 8 of the Canadian Charter;
> (ii) article 14, because the power under s 52 can be invoked on mere suspicion, which is too low a standard to justify an intrusion of privacy, and because s 52(1)(e) is objectionable for failing to provide for a prerequisite of a warrant prior to the execution of the powers therein, and
> (iii) article 22 of the Bill of Rights, because s 52 was discriminatory against suspects of dangerous drugs offences as a class as it conferred unusual and exceptional powers on the authorities in dealings against them; and

(b) the statutory power was exercised in an unreasonable and unfair manner and evidence obtained as a result ought to be excluded for contravening the Bill of Rights or in the exercise of the court's residual power in its inherent jurisdiction to ensure a fair trial.

The material part of s 52(1)(e) of the Dangerous Drugs Ordinance provides:

> "52 (1) For the purposes of this Ordinance, any police officer and any member of the Customs and Excise Service may -
>
> (e) enter and search any place or premises if he has reason to suspect that there is therein an article liable to seizure..."

Section 8 of the Canadian Charter provides:

> "Everyone has the right to be secure against unreasonable search or seizure."

Article 8 of the European Convention on Human Rights 1950 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law **and** is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Held (dismissing the application):

1. "Reason to suspect" in s 52(1)(e) must be construed to mean a "reasonable reason" by an objective standard and not just any subjective suspicion of the officer, however unreasonable it may be objectively.

Liberty and security of the person (article 5)

2. Article 5 of the Bill of Rights is intended to cover, and covers only, physical interference with the liberty or person of the citizen. It was never intended to apply to the search of premises or seizure of properties of the individual, as distinct from arrest and detention of the individual's person.

Equality before the law (article 22)

3. Section 52 is no different from the numerous statutory provisions stipulating different penalties of varying degrees of severity based on a consideration of a multitude of factors including the seriousness of the offence and the harm done to the society. It is concerned with the nature of criminal activity independent of the status or any personal attribute of the offender envisaged in article 22.

Right to privacy (article 14)

4. The right to privacy includes a right to be secure against intrusion by search and seizure of individual's property. Accordingly, article 14 confers on an individual the right to be free from arbitrary or unlawful interference in the form of search or seizure.

5. In the interpretation of domestic constitutions the courts ought to give effect not only to the fundamental "universal" spirit embodied in the international

covenants upon which the constitution is modelled, but also give due weight to the deliberate modifications and departures in the constitution from such international covenants. The function of the court is to give effect to its own constitution and not to give effect to any part of international covenants that has not been incorporated into its own constitution.

6. In the context of article 14 of the Bill of Rights, the court must give effect to the deliberate omission by the draftsman and the legislature from article 14 of any reference to the international standard specifically described in article 8 of the European Convention on Human rights, namely, the reference to "in accordance with the law", when they adopted the Bill of Rights.

7. The phrase "unlawful interference" referred to in article 14 is a reference to interference that is not permitted by the statutes and common law of Hong Kong and not of any universal or international concept of unlawfulness.

8. For the purpose of article 14, the concept of justice embodied in the notion of "lawfulness" of a statute is an illustration of a balancing exercise requiring all interference by the state of an individual be justified by reasonable necessity and be kept to the minimum measure of intrusion. This concept of justice is well enshrined in the common law rules governing the power of search and seizure. There is no real difference of substance between this concept of justice under the common law and the international standard as described in article 8 of the European Convention.

9. The concept of legislative supremacy apart, the common law as augmented by the rules of equity is by definition reasonable, fair and just, and would undoubtedly live up to any universal concept of justice.

Arbitrary interference

10. There is nothing arbitrary per se about a statutory power which can only be exercised upon the existence of a reasonable suspicion on the part of the person entrusted with such power.

Warrantless search

11. The absence of an authorizing body that is totally independent of the agency exercising the power of search and seizure would not necessarily render s 52(1)(e) an arbitrary or unlawful interference with the right to privacy. The power of warrantless search and seizure can be justified in combatting drug offences in some, but not all, circumstances.

12. The power of warrantless search and seizure in s 52(1)(e) can only be justified if it satisfies the test of reasonable necessity and minimum intrusion, that is, its unreasonably wide ambit must be appropriately trimmed down to within limits of necessity and reason.

13. Section 52(1)(e) does not satisfy the test of reasonable necessity and minimum intrusion and therefore violates article 14 of the Bill of Rights as (a) the need for an application for a warrant would not adversely disadvantage the investigation and gathering of evidence by the police; and (b) there is no requirement in the statute that a warrantless search and seizure is only to be permissible if it would not be reasonably practicable to obtain one. Therefore, s 52(1)(e) is repealed by s 3(2) of the Hong Kong Bill of Rights Ordinance insofar as it purports to confer a power of warrantless search on "any police officer".

Remedy: exclusion of evidence

14. All evidence that is relevant is admissible, though the court has a general discretion to exclude unlawfully obtained evidence. The exclusion of evidence obtained by an executive act carried out in violation of human rights is not a remedy that must necessarily flow in all circumstances from such an unlawful act.

R v Lam Chi-ming [1991] 2 HKLR 191, distinguished.

15. Apart from declaring the repeal of the infringing statute, the court has a statutory discretion under s 6(1) of the Hong Kong Bill of Rights Ordinance to do justice as the circumstances of the case required, bound only by the limits of its jurisdiction.

16. Common law is a creature of the courts that evolves with time and changing conditions. The only difference s 6(1) of the Hong Kong Bill of Rights Ordinance has brought to the common law is that, as it is now emancipated from legislative supremacy in matters involving human rights, it should evolve in a direction that would give effect to such rights as guaranteed by the Bill of Rights. In this context there is no real distinction between the statutory discretion to exclude evidence under s 6(1) and the common law discretion.

17. The evidence should not be excluded in this case because:

(a) the lack of a warrant was a mere technical infringement of the accused's right to privacy. Had there been an application for a warrant, it was totally inconceivable that such an application would have been refused;

(b) no unfairness or injustice had been caused to the accused simply because the police had failed to conduct the search in the presence of an available independent witness on the first search, and of the accused himself on the second search that was conducted after his arrest. There was no evidence that the police had breached any internal rules or standing orders in this respect. Nor was there any indication that the authenticity of the exhibits so seized would be challenged;

(c) there was no evidence that the accused would suffer any prejudice as a result of the absence or destruction of contemporaneous record of the detail particulars of the search and seizure. The complaint is based on the deprivation of a chance to enhance the defence if there had been police impropriety or unreliability. There is no suggestion that the exhibits obtained are unreliable and thus prejudicial. Relevant and probative evidence should not per se be excluded simply because the defence has been deprived of a possible opportunity to challenge the credibility of such evidence on the assumption that the witness is not telling the truth or could be wrong without the existence of some circumstances justifying the possibility of such an assumption. The court should take into account the particular circumstances of the case and the likelihood of such evidence being in fact tainted in any way, as well as whether affording the defence the opportunity of which it has allegedly been deprived would make a difference to the quality of the evidence in question.

Per curiam:

"It is perhaps necessary to apply some form of 'universal concept of justice' in understanding the broad fundamental spirit behind each human right. But I doubted that any reference to a 'universal concept of justice' can be helpful in the interpretation of the extent, and in particular the qualifications, a particular constitution places on such rights. This is also true in the interpretation of 'unlawful interference' under Article 14. I do not believe the draftsman or the Legislative Council had in mind any universal concept of justice when they drafted and brought the article into being. Is there a universal standard of lawfulness for interference with the right to privacy? I do not believe even the Canadian and Americans are unanimously agreed on any universally applicable standard on the extent the state should be permitted to encroach[] on such right." (at p 15)

Counsel: Hallay (of the Attorney General's Chambers), for the Crown; D Marash (instructed by Anthony Kwan & Co), for the applicant.

Editorial comment

A peculiar feature of this case is its discussion of the relationship between the Bill of Rights and other international human rights instruments without any reference to a single case under the international human rights treaties. Had this been done, and had the court not confused the International Covenant on Civil and Political Rights 1966 (ICCPR) with the European Convention on Human Rights 1950, some of its observations, which are inconsistent with the established international case law, may not have been made.

The conclusion that the expression "unlawful interference" in article 14 of the Bill of Rights refers to interference not permitted by the statutes and common law of Hong Kong rather than any universal or international concept of "unlawfulness" is based on a confusion between the European Convention and the ICCPR. The court said:

> "The court must give effect to the deliberate omission by the draftsman and the legislature from our Article 14 [of] any reference to the international standard specifically described in Article 8 of the international covenant when they adopted such a human right in our Bill of Rights. The reference was to 'unlawful' interference. If the intention was to give effect to the international standard embodied in the international covenant, one would have expected that a drastically different article would appear in our Bill of Rights. Notwithstanding s 2(3) of Cap 383, the omission is deliberate and must be taken to be for the obvious reason that those qualifications specifically described in Article 8 of the international covenant were not intended to be included in our Bill." (at p 16)

The "international covenant" referred to by the court is the "Covenants [sic] For the Protection of Human Rights and Fundamental Freedoms 1950", the text of article 8 of which, as set out by the court, puts it beyond doubt that the "international covenant" is in fact a reference to the European Convention on Human Rights. The difference in language between article 8 of the European Convention and article 14 of the Bill of Rights is significant, as argued by the court, because the provision in the European Convention is structured differently and contains no reference to "arbitrary interference". However, article 14 of teh Bill of Rights is identical to article 17 of the *ICCPR*, since it was the ICCPR, not the European Convention, that was the model for the Bill of Rights, and which is incorporated as part of Hong Kong law by article VII(3) of the Letters Patent. Section 2(3) of the Bill of Rights Ordinance states clearly that the purpose of the Bill of Rights is to provide for the incorporation into Hong Kong law the ICCPR as applied to Hong Kong, not the European Convention. Thus, the argument that the court must give effect to any deliberate omission in incorporating the European Convention notwithstanding s 2(3) of the Bill of Rights Ordinance is clearly erroneous.

The same error was made when the court attempted to support its conclusion by reference to the different wording of s 8 of the Canadian Charter and article 8 of the European

Convention (at p 15). Apart from the fact the Canadian Charter is not intended to be a domestication of the European Convention, the argument that "there is no reference to 'in accordance with the law' in s 8 of the Charter" overlooks the existence of s 1 of the Charter, which provides that the rights and freedoms guaranteed by the Charter are subject to such reasonable limits "prescribed by law" as can be demonstrably justified in a free and democratic society.

The court then, without any analysis of the rich body of case law on article 8 of the European Convention, said:

> "It is plain from the context of Article 8 of the international covenant that the 'law' referred to therein must be a reference to the domestic law of the country. Or else, there would not be the need to add the rider that follows immediately to provide for the standard required of such 'law' that would justify the interference on the ground of necessity. It is thus plain from article 8 of the international covenant, which is strengthened by a consideration of s.8 of the Canadian Charter, that there is no recognition or acceptance of any set of international law for justifying the interference." (at p 15)

Insofar as the European Convention is concerned, this view is clearly contradictory to the large body of case law on the meaning of "in accordance with the law" in article 8: see, for example, *Malone v United Kingdom* (1984) 7 EHRR 14, at 40, para 67. The protection by the Bill of Rights will be largely illusory if any right and freedom protected can be encroached by domestic law. On the other hand, it is accepted that whether the meaning of "unlawful" in article 14 of the Bill of Rights goes beyond domestic law and embodies the notion of universal concept of justice is uncertain and subject to dispute, especially in light of the reference to "arbitrariness", which seems to be a broader notion: see *Bulletin*, vol 2, no 2, p 43-44. A recent decision of the Human Rights Committee seems to accept that the notion of arbitrariness embodies the requirement of reasonableness and proportionality, which is what the universal concept of justice is about, thereby rendering it unnecessary to have a broad notion of "lawfulness": see *Toonen v Australia*, at p 36 below.

The court also attacked the notion of "universal concept of justice", drawing on differences in concepts of morality and human values between varying cultures and civilisations. The court may have been making too much out of the notion of "universal concept of justice". After all, this concept of "universal concept of justice" seems to embody the notions of rationality and proportionality (as interpreted by the Court of Appeal in *R v Sin Yau-ming*), which the court eventually seems to have accepted, albeit via the common law concept of justice. Indeed, the court found that "the concept of legislative supremacy apart, common law as augmented by rules of equity is by definition reasonable, fair and just, and undoubtedly lives up to any universal concept of justice." (at p 17)

This type of belief in the supremacy and sufficiency of the common law, is fairly typical among common law lawyers who are unfamiliar with international law. It is well captured,

and well criticized, by a leading Australian judge: see M Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16(2) *University of New South Wales Law Journal* 363. Of course, the notion of respect for human rights is no stranger to the common law, and most of the international human rights concepts have their parallels, and sometimes their origin, in the common law system. However, the advantage of a universal concept of justice is that it is outward looking; it requires judges and lawyers to look beyond the common law, and reminds them that the domestic human rights law should develop alongside the internationally accepted standards, an aspect which will no doubt become more important as we move beyond 1997.

Having rejected this concept of universal concept of justice and having found that "unlawful interference" refers only to interference not permitted by domestic law, the court nonetheless held, via a concept of justice in the common law, that article 14 requires all interference by the state of an individual be justified by reasonable necessity and be kept to the minimum measure of intrusion. The court then proceeded to examine on the basis of the test of reasonable necessity and minimum intrusion whether s 52(1)(e) constituted an arbitrary interference with the right of privacy. The acceptance of the test of reasonable necessity and minimum intrusion is to be welcome, though the court would have found that, had it examined the international jurisprudence in greater details, that these requirements seem to be exactly what the international jurisprudence has said of what the notion of "arbitrariness" means. Having said that, this decision will remain an important case in setting down the framework for testing the constitutionality of any power of search and seizure.

Toonen v Australia, Human Rights Committee, Communication No 488/1992, Decision of 31 March 1994, CCPR/C/50/D/488/1992

The author complained that ss 122(a) and (c) and 123 of the Tasmanian Criminal Code, which criminalized various forms of homosexual activities between consenting adult homosexual men in private, violated his right to privacy guaranteed by article 17 of the ICCPR. He further argued that these provisions were contrary to articles 2(1) and 26 of the ICCPR, as the Tasmanian Criminal Code did not outlaw any form of homosexual activity between consenting homosexual women in private. Accordingly, he had been discriminated against on the basis of his sex or sexual orientation, the latter of which fell within the meaning of "other status" in articles 2(1) and 26 of the ICCPR.

Held (finding a violation of article 17 of the ICCPR):

1. Although the legislative provisions challenged by the author had not been enforced by the judicial authorities of Tasmania for a number of years, the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected the author and continued to affect him personally. Therefore, he could be

deemed to be a victim within the meaning of article 1 of the Optional Protocol.

2. The concept of privacy covers adult consensual sexual activity in private. There is an interference with the author's privacy by ss 122(1), (c) and 123 of the Tasmanian Criminal Code, even if these provisions have not been enforced for a decade. Their continued existence continuously and directly interfere with the author's privacy.

3. The interference with one's privacy must not be arbitrary. The concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the circumstances. The requirement of reasonableness is that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

4. Criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS. Indeed, they run counter to the implementation of effective health education programmes in respect of HIV/AIDS prevention as they tend to drive underground many of the people at the risk of infection. Besides, no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

5. For the purpose of article 17 of the ICCPR, moral issues are not exclusively a matter of domestic concern, for otherwise the door to withdraw from the Committee's scrutiny a potentially large number of statutes interfering with privacy would be wide open. The fact that the challenged provisions have not been enforced for a number of years implied that they are not deemed essential to the protection of morals in Tasmania. The provisions do not satisfy the "reasonableness" test and hence constitute an arbitrary interference with the author's right to privacy under article 17.

6. The reference to "sex" in articles 2(1) and 26 of the ICCPR covers "sexual orientation". It is thus unnecessary to decide whether sexual orientation also falls within the meaning of "other status".

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

Control of Obscene and Indecent Articles Ordinance (Cap 390)

See *R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd* (1994) HCt, MP No 1245 of 1993, 20 January 1994, Mayo J, at p 16 above. After referring to the proportionality test in balancing the right to freedom of expression and public interest in protecting public moral, the court stated:

> "I have no doubt that if thought is given to the safeguards built into the Legislation and the mischief which it is intended should be addressed, it is not possible to come to the conclusion that there has been any unnecessary restriction of the freedom referred to in article 16 [of the Bill of Rights]." (at p 20)

Bar's Code of Conduct, para 101

In re a Barrister (1994) Disciplinary Tribunal

In this case disciplinary proceedings have been instituted against a member of the Bar for an offence of personal advertising, contrary to paragraph 101 of the Bar's Code of Conduct. The defendant barrister argued that he had a right to a fair and public hearing under article 10 of the Bill of Rights. Without conceding that the Bill of Rights applied to the proceedings in question, the Disciplinary Tribunal acceded to his request and hence the proceedings are being conducted in public. The defendant barrister further argued that paragraph 101 of the Bar's Code of Conduct is inconsistent with article 16 of the Bill of Rights. The hearing has not yet been concluded.

The relevant part of paragraph 101 of the Bar's Code of Conduct provides:

> "A barrister may not do, or cause or allow to be done on his behalf, anything with the primary motive of personal advertisement or anything likely to lead to the reasonable inference that it was so motivated."

Counsel: L Lok QC (instructed by C Y Kwan & Co), for the Hong Kong Bar Association; Defendant barrister in person.

Editorial comment

An interesting case in the context of advertising by professional bodies is the very recent decision of the European Court of Human Rights in *Casado Coca v Spain*, which we have summarised below:

Casado Coca v Spain, European Court of Human Rights, Judgment of 24 February 1994, Series A, No 285

The applicant, a member of the Barcelona Bar, published in several issues of local newspapers his name, occupation, business address and telephone number, contrary to article 31 of the Statute of the Spanish Bar. As a result, disciplinary sanctions in the form of two reprimands and two warnings were imposed on him. The applicant complained before the European Court of Human Rights that the disciplinary sanctions imposed on him had violated his right to freedom of expression under article 10 of the European Convention on Human Rights. The Spanish Government disputed the applicability of article 10, and argued that if article 10 was applicable, the interference was nonetheless justifiable.

The material part of article 31 of the Statute of the Spanish Bar provides:

> "Members of the Bar are not allowed to
>
> (a) announce or circulate information about their services directly or through advertising media,... or express opinions free of charge in professional journals or other publications or media without permission from the Bar Council;"

Held (finding no violation of article 10):

Scope of freedom of expression

1. Article 10 guarantees freedom of expression to everyone, irrespective of whether the aim of expression is profit-making or not. It does not apply solely to certain types of information or ideas or forms of expression, but also encompasses artistic expression, information of a commercial nature, and even light music and commercials transmitted by cable.

2. In the instant case the impugned notices were clearly published with the aim of advertising, but they provided persons requiring legal assistance with information that was of definite use and likely to facilitate their access to justice. Accordingly, article 10 was applicable.

Public authorities

3. The Barcelona Bar Council, which was a public law corporation under Spanish law, was a "public authority". Its status was further buttressed by its purpose of serving the public interest through furtherance of free, adequate legal assistance combined with public supervision of the practice of the profession and of compliance with professional ethics. Further, the penalties imposed were upheld by the competent courts and Constitutional Court, all of which were state institutions. Accordingly, there had been an interference with the applicant's right by a public authority.

Legitimate aims

4. The interference was prescribed by law and pursued a legitimate aim, taking into account the special nature of the legal profession. The Court had no reason to doubt that the Bar rules complained of were designed to protect the interests of the public while ensuring respect for members of the Bar.

Necessary in a democratic society

5. While advertising provides citizens with a means of discovering the characteristics of services and goods offered to them, it may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, even the publication of objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions, although in such cases any restriction must be closely scrutinized by the courts.

6. Restrictions on the conduct of the members of the Bar were based on their central position in the administration of justice as intermediaries between the public and the courts. As the rules governing professional advertising varied from one country to another according to cultural tradition without any universal pattern among members states, the national authorities were in a better position to determine how, at a given time, the right balance can be struck between the various interests involved, namely, the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices.

7. At the material time, the penalty was not unreasonable and had not been disproportionate to the aim pursued. Accordingly, there was no violation of article 10.

RIGHT OF PEACEFUL ASSEMBLY (BILL OF RIGHTS, ARTICLE 17; ICCPR, ARTICLE 21)

Public Order Ordinance (Cap 245), ss 7, 13, 18

R v To Kwan-hang and Tsoi Yiu-cheong (1994) CA, Mag App No 945 of 1993

The appellants were convicted of an offence of unlawful assembly contrary to s 18 of the Public Order Ordinance: *R v Chan Sau-sum* (1993) 3 HKPLR 308. It was alleged that they rushed a police cordon outside the New China News Agency on 5 June 1992. The defendants argued that the police action of setting up a cordon was unlawful in the first place and that s 18 was inconsistent with articles 16 and 17 of the Bill of Rights. On review of their conviction, the defendants further challenged ss 7 and 13 of the Ordinance for being inconsistent with articles 16 and 17 of the Bill of Rights. On 22 March 1993, the High Court referred the appeal to the Court of Appeal, which will hear the appeal on 24-26 August 1993.

Counsel: M Lee QC, H L Wong and J Chan (instructed by Chui and Lau), for the appellants; S Bailey and A Luk (of the Attorney General's Chambers), for the respondent.

EQUAL RIGHT AND OPPORTUNITY TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS AND TO VOTE AND TO BE ELECTED AT GENUINE PERIODIC ELECTIONS (BILL OF RIGHTS, ARTICLE 21; ICCPR, ARTICLE 26)

Re Lee Miu-ling (1994) HCt, Legal Aid Appeal No 474/93, 12 April 94

The applicant had applied for legal aid to bring an action challenging the functional constituency system on the ground that this system of election, which gives members of the respective functional constituencies an additional vote to return a member to the Legislative Council, alongside their right to vote at the geographical election by universal franchise, is a violation of art 21 of the Bill of Rights. The application was rejected by the Legal Aid Department on the grounds that the application lacked merits, that it was unreasonable to grant legal aid in the particular circumstances of the case, and that only a trivial advantage would be gained from the proposed proceedings. It was said that the applicant was affiliated to a political group and that her application was to enable her to challenge the functional constituency system with public funds, thus saving other members from committing financial sacrifice to pursue their political aims. The proposed proceedings were in essence a class/representative action and it was contrary to the fundamental principle of legal aid, which was to assist private individuals to pursue actions which will lead to some benefit whether monetary or otherwise for the applicant.

The applicant appealed against this decision. The hearing of the appeal was adjourned eight times, and eventually a Master allowed the appeal and directed that legal aid be granted.

EQUALITY BEFORE THE LAW (BILL OF RIGHTS, ARTICLE 22; ICCPR, ARTICLE 26)

Fixed Penalty (Traffic Contravention) Ordinance (Cap 237), s 14(1)

R v Crawley (1994) HCt, Mag App No 909 of 1993, 3 February 1994, Keith J

The appellant disputed liability for a fixed penalty for causing unnecessary obstruction of the road, contrary to s 4 of the Fixed Penalty (Traffic Contravention) Ordinance. He alleged that he was not present in the vehicle at the material time, and was found liable only as the registered owner of a vehicle, pursuant to s 14(1) of the Ordinance. He was found liable by a magistrate after a hearing. On appeal, he argued that (a) his vehicle had not caused any obstruction as the road was blocked by other vehicles; and (b) s 14(1) of the Ordinance was inconsistent with article 10 of the Bill of Rights because the Crown was given preferential and discriminatory treatment by the Ordinance; unlike the owners of other motor vehicles, the Crown was not liable to pay the fixed penalty in respect of contravention of the Ordinance; and (c) s 14(1) of the Ordinance did not admit a construction consistent with article 11(1) of the Bill of Rights because registered owners of motor vehicles were made liable to pay the fixed penalty irrespective of whether they were responsible for the contravention which gave rise to the fixed penalty. The court found that the application under article 10 was wholly misconceived, but was prepared, in this respect, to consider the application on the basis of article 22.

Sections 14(1) and (2) of the Ordinance provide:

> "(1) Subject to section 3(2), the person liable for the fixed penalty... shall be the registered owner for the time being of the motor vehicle when the contravention is committed.
>
> (2) In any proceedings for recovery of the fixed penalty, it shall be no defence (a) that the contravention was committed without the knowledge or consent of the registered owner, or (b) that at the time the contravention was committed the motor vehicle was driven by or was in charge of a person other than the registered owner."

Under s 3(2), where a contravention is committed in respect of a motor vehicles owned by the Crown, the person liable for the fixed penalty shall be the driver of the motor vehicle at the time the contravention is committed.

Held (dismissing the appeal):

1. An obstruction will be caused if there is an unreasonable use of the road by the person stopping or parking his vehicle. It is an unreasonable use of the road if a vehicle's stationary presence on the road (albeit along with other vehicles) prevents yet other vehicles from using that stretch of the road.

   Gill v Carson and Nield [1917] 2 KB 674 and *Nagy v Weston* [1965] 1 WLR 280, followed.

2. The application under article 10 is wholly misconceived as the discrimination complained of has nothing to do with equality before the courts and tribunal.

Equality before the law (article 22)

3. A departure from identical treatment will constitute discriminatory treatment unless it can satisfied that (a) sensible and fair-minded people would recognize a genuine need for some difference in treatment; (b) the difference embodied in the particular departure selected to meet that need is itself rational; and (c) such departure is proportionate to such need.

   R v Man Wai-keung (No 2) [1992] 2 HKCLR 207, followed.

4. Any difference in treatment between vehicles owned by the Crown and other vehicles is rational and proportionate to the needs which justify it. Section 14(1) of the Ordinance represents an attempt to obviate the need to prove who the person driving or in charge of the vehicle at the material time, proof of which could be time-consuming, expensive and sometimes impossible. In contrast, with respect to vehicles owned by the Crown, it is a simple matter to identify who was responsible for a particular vehicle at a given time. Besides, the absence of an exception for vehicles owned by the Crown would result in the Crown having to pay the fixed penalty to itself, and then recover the sums from the driver concerned, which would be administratively inefficient, expensive and offer no benefit to the community.

5. Had s 14(1) been found to be inconsistent with article 22 of the Bill of Rights, the effect would be the repeal of s 3(2) and the opening words of s 14(1) of the Ordinance. While this would remove the preferential and discriminatory treatment of vehicles owned by the Crown, it would not affect the position of the appellant, who would remain liable to pay the fixed penalty as the registered owner of the vehicle at the time of contravention.

Presumption of innocence (article 11(1))

6. Article 11 of the Bill of Rights does not prevent any Ordinance providing for the imposition of a financial penalty upon a person who did not personally commit the contravention for which the penalty is being imposed. Furthermore, a registered owner may be able to recover summarily as a civil debt under s 24 of the Ordinance the sum paid from the person who commits the contravention.

7. Article 11 has no application because the appellant was not charged with a criminal offence. A contravention of s 4 of the Ordinance is not a criminal offence. In contrast with the Fixed Penalty (Criminal Proceedings) Ordinance, (a) the present Ordinance does not refer to criminal proceedings in its title; (b) the purpose of the present Ordinance is said to be to provide for a fixed penalty to be paid for "various contravention of the law" as opposed to "various offences"; (c) the present Ordinance does not in any of its provisions use language consistent with concepts such as guilt or conviction; (d) contravention of the present Ordinance will only lead to fixed and additional penalties provided for in the Ordinance; and (e) enforcement of orders for the payment under the present Ordinance is enforced by distress and sale of the defendant's goods and chattels, rather than by imprisonment.

Counsel: S H Bailey (of the Attorney General's Chambers) for the respondent; the appellant in person.

Editorial comment

This is the first local case which accepts, in the context of equality before the law under article 22 of the Bill of Rights, the international principle of discrimination as summarised by the Court of Appeal in *R v Man Wai-keung (No 2)* [1992] 2 HKCLR 207, which was eventually decided on the basis of article 10 alone. A differentiation in treatment will not be discriminatory if it can satisfy the tests of rationality and proportionality, that is, the differentiation in treatment bears a rational relationship to the attainment of some legitimate objectives justifying the difference in treatment, and that the difference is proportionate to the attainment of such objectives. In this respect the court's decision that the difference in treatment between vehicles owned by the Crown and other vehicles is both rational and proportionate to the need which justifies it is sound.

However, the dicta that follow are of interest. The court suggested that had there been a contravention of article 22, the effect would be to remove the privilege of the Crown rather than to improve the position of the individual. While this statement is probably unnecessary and unfortunate, it does highlight an inherent problem in an action based on non-discrimination. The principle of discrimination guarantees in general equal treatment, but it does not guarantee a particular kind of treatment. A striking example is *Abdulaziz, Cabales*

and Balkandali v United Kingdom (1985) 7 EHRR 471. The European Court of Human Rights found that the British immigration law allowing male, but not female, residents to bring into England their spouses discriminated against the applicants in their enjoyment of family life. In order to comply with the judgment, the British government amended its immigration law by taking away the right of male residents to bring into England their spouses, rather to confer the same right to female residents!

The reasons of the court for concluding that fixed penalty proceedings under s 14(1) of the Ordinance are not "criminal" proceedings and hence article 11(1) has no application are unconvincing. Most of the factors relied upon by the court are matters of form or language rather than of substance, and the court's approach of comparing the Ordinance with another ordinance is at best irrelevant. In *Öztürk v Germany* (1984) 6 EHRR 409, the European Court of Human Rights held that minor traffic offences could fall within the meaning of "criminal offence" for the purpose of article 6(3) of the European Convention on Human Rights. Whether regulatory or administrative offences are "criminal" depends on (a) the classification of the offence in the domestic legal system; (b) the nature of the offence; and (c) the nature and degree of severity of the penalty that the person concerned risked incurring. Of these the last two factors are of greater weight. None of these factors were considered by the court in this case, although its ultimate conclusion may still be supported had the proper test been applied. See also *Bendenoun v France*, at p 18 above.

Prevention of Bribery Ordinance (Cap 201), s 17A(1)

> See *In re Nattrass* (1994) Mag, EMP No 2337/93, 5 January 1994, Mr I Carlson, at p 6 above.

Dangerous Drugs Ordinance (Cap 134), s 52

> See *R v Yu Yem-kin* (1994) HCt, Crim Case No 111 of 1993, 21 February 1994, Jerome Chan J, at p 29 above.

Burghartz v Switzerland, European Court of Human Rights, Judgment of 22 February 1994, Series A, No 280B; Times, 8 April 1994

> The applicant complained that he had not been permitted by the Swiss authorities to put his own surname in front of his wife's, which had been taken as the family name. Under Swiss law, married women who had chosen their husband's surname as their family name may put their own surname in front of the family surname. The applicant argued that the Swiss authorities had acted contrary to article 14, guaranteeing equality of treatment, taken together with article 8, which guarantees the right to family life.

Held (finding a violation of article 14 taken together with article 8):

1. Very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention, which has to be interpreted in the light of present-day conditions, especially the importance of the principle of non-discrimination.

2. The difference in treatment between the spouses lacks an objective and reasonable justification. No distinction was to be derived from the spouses' choice of one of their surnames as the family name in preference to the other. Accordingly, there is a violation of article 14 taken together with article 8 of the Convention.

OTHER CASES RAISING HUMAN RIGHTS ISSUES

Presumption of innocence

R v Leung Kit-chun (1994) CA, Crim App No 291 of 1993, 1 February 1994, Yang CJ, Macdougall VP and Bokhary JA

The applicant was convicted of having in her possession a dangerous drug for the purpose of unlawful trafficking therein. At the material time she was in a taxi with her boyfriend. The taxi was stopped by the police and after body search, she was found to be in possession of the dangerous drug described in the indictment. In response to a cautioned statement she admitted that the drug belonged to her and had nothing to do with her boyfriend. At the trial she elected to give evidence, and testified that the drug belonged to her boyfriend, who gave her the drug and who, upon noticing the approach of the police, coerced her into admitting that the drug were hers. In the summing up the judge said:

> "On the other hand, you have seen the accused and observed her when she was giving evidence before you. You are in a very good position to assess her credibility, whether she was telling lies or the truth before you, and whether she is capable of inventing and telling lies. Of course, there's every motive for her to lie to you, and it's also in her advantage to lie to you. You'll have to bear in mind, in assessing her credibility and reliability, that what she told the woman constable in exhibit P7 was completely unchallenged and uncontradicted."

In her application for leave to appeal against conviction, the applicant argued that, inter alia, the direction in the summing up undermined the presumption of innocence and struck at the notion of a fair trial.

Held (allowing the appeal, quashing the conviction and sentence, and ordering a re-trial):

1. It was not appropriate to give a *Broadhurst* direction to the jury in the circumstances.

2. The effect of the judge's direction was that the evidence of the applicant had to be scrutinized with particular care for no reason other than that she was the accused. This had the effect of depriving her of the benefit of the presumption of innocence.

2. While the evidence of an accused person is subject to the same tests which are generally applicable to witnesses in a criminal trial, to direct a jury that the evidence of the accused should be subject to close scrutiny because of his or her interest in the outcome of the case is to strike at the notion of a fair trial for an accused person. Such direction inevitably disadvantages the evidence of the accused when it is in conflict with the evidence of the Crown.

Counsel: G J X McCoy and S Chiu (instructed by Bobby Tse & Co), for the applicant; C Newall (of the Attorney General's Chambers), for the respondent.

Liberty and security of the person

Le Tu Phuong and Dinh T B Chinh v Director of Immigration (1994) CA, Civ App No 164 of 1993, 1 February 1994, Litton JA

The applicants, Vietnamese boat people, had been detained by the Immigration authorities since their arrival in Hong Kong in August 1990. They were subsequently interviewed by an immigration officer under the screening procedure adopted for Vietnamese asylum-seekers. In due course they were screened out as economic migrants. This decision was affirmed by the Refugee Status Review Board on 10 April 1992. The applicants then applied for judicial review, arguing, inter alia, that the screening procedure had been unfair as the immigration officer had not read back to them the notes of the interviews, which they alleged to be inaccurate, and that they had been deprived of an opportunity to be heard before the Board. In September 1993 Liu J quashed the decisions of the immigration officer and of the Board and ordered that, should an appeal be lodged, his order be stayed until the final disposal of the appeal. An appeal by the Attorney General on behalf of the Director of Immigration and the of the Board was lodged (and subsequently allowed).

In the meantime, the applicants applied for bail pending appeal. A Catholic voluntary organization was willing and able to offer accommodation to the applicants. Two Hong Kong residents were willing to stand surety for the applicants attendance at

court and for their good behaviour in the meanwhile. The application was refused by the Superintendent of the Detention Centre on policy grounds. The applicants then applied to the Court of Appeal invoking its inherent jurisdiction to grant bail pending appeal.

Held (dismissing the application for want of jurisdiction):

1. The inherent jurisdiction of the Court of Appeal is at least as wide as the inherent jurisdiction of the High Court.

2. The jurisdiction of the Court of Appeal to grant bail comes from two sources. First, where the court is concerned with an appeal against any refusal or grant of bail by the High Court, the court has jurisdiction under s 13(2)(a) of the Supreme Court Ordinance. Secondly, where an application is made direct to the Court of Appeal, that is, not an appeal against a refusal of bail by a lower court, the jurisdiction lies in the inherent jurisdiction of the court.

3. The court has an inherent jurisdiction to prevent the abuse of its process, to do justice between the parties and to secure a fair and just determination of the real matters in controversy. The present application does not fall into any of this categories. The applicants had all along been in lawful detention. The legality of the applicant's detention is not remotely in issue on the appeal. What is sought in the application is not the preservation of the status quo, but a change in the status quo: that, for a short period the applicants should enjoy such limited liberty as might be afforded to them as guests of the Catholic organization, only to return to the detention centre, whatever the outcome of the appeal. The court has no jurisdiction to grant bail in these circumstances.

4. Even if the court had the power to grant bail, it would not be proper to exercise the discretion in this case, taking into account the legislative framework which empowers the Superintendent to permit a detainee to be absent from the Detention Centre on such terms as he may specify, and that the Government is free to enter into any arrangement with voluntary organizations to partially take over the responsibility of looking after the detainees.

Counsel: M Darwyne (instructed by Pam Baker & Co), for the applicants; W Marshall QC and T Law (of the Attorney General's Chambers) for the respondent.

Editorial comment

Is this a case on civil liberty? Litton JA expressed reservations on this question. He said:

> "Much has been said in the course of argument about civil liberty and freedom of the individual. It must be remembered that these concepts have no meaning without the rule of law. The inevitable fact facing the Le family is this: they are former residents of Vietnam; they arrived in Hong Kong without travel documents and have at all times been in lawful detention under the statutory scheme for the treatment of Vietnamese migrants. If the applicants fail in the appeal, they will remain in detention pending their repatriation to Vietnam. If they succeed in the appeal, the decisions of the immigration office and of the Board will be quashed pursuant to Liu J's judgment, and they will be examined again under s 4(1)(a) as to their status. They will in the meanwhile remain in detention, together with thousands of others in a similar situation, awaiting screening. The only thing different about the applicants is that they, unlike the others, would have spent an additional few months in detention, enmeshed in the judicial process. What is sought in this application is not the preservation of the status quo, but a change in the status quo: that, for the span of less than 3 months, they should enjoy such limited liberty as might be afforded to them as guests of the Catholic Diocese, only to return to the detention centre, whatever the outcome of the appeal. It is therefore difficult to see this case as one involving civil liberty, except in a very limited sense. This is to be contrasted with the case of a person charged with a criminal offence who is granted bail pending the hearing: his status, prior to the criminal charge, is that of a free person. Bail in his case is indeed an issue of civil liberty." (at pp 5-6)

With respect, this is an exceedingly formalistic view of civil liberty. Whatever be the reason, the loss of liberty is always real. English common law has always jealously guarded against deprivation of liberty, whatever form it may take. It would be a sad day if important issues of civil liberty were to turn on the niceties of one's technical legal status. Litton JA is right in a technical sense that the applicants, having been screened as illegal immigrants, have no "right" to liberty in the sense that they are not permitted to move freely throughout Hong Kong in the first place. On the other hand, they have succeeded in getting a fresh screening. There is at least a possibility that they will be accorded the status of refugees in the fresh screening. Were they screened in as refugees, they would be able to live in an open camp pending resettlement. The appeal process has delayed the re-screening proceedings, and hence denied them *an opportunity* of being released a few months earlier. It may be a remote possibility, but the possibility exists, and when it comes to civil liberty, perhaps even a remote possibility should not be lightly discarded. In this respect it may be noted that the European Court of Human Rights has warned against adopting a restrictive view on the meaning of civil liberty. In *Weeks v United Kingdom* (1987) 10 EHRR 293, the applicant, who had been given an indeterminate life sentence and was released on licence after ten years of imprisonment, had been recalled to prison. The British Government argued that he had not been deprived of his liberty because, under English law, he did not regain his liberty when released on licence; therefore, there was no violation of article 5 of the European Convention of Human Rights. The European Court resolutely rejected such technical arguments:

> "The freedom enjoyed by a life prisoner, such as Mr Weeks, released on licence is thus more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen. Nevertheless, the restrictions to which Mr Weeks' freedom outside prison was subject under the law are not sufficient to prevent its being qualified as a state of 'liberty' for the purposes of Article 5. Hence, when recalling Mr Weeks to prison in 1977, the Home Secretary was ordering his removal from an actual state of liberty, albeit one enjoyed in law as a privilege and not as of right, to a state of custody." (para 40)

These observations, though made in the context of article 5 of the European Convention, apply with equal cogency here. What the court is concerned is the actual state of liberty, rather than the technical legal status of that "liberty", and in the *Weeks* case, even a prisoner serving life imprisonment is found to have the "right" to liberty.

NEW LEGISLATION AND PENDING BILLS

Public Order (Amendment) Bill 1994, Hong Kong Government Gazette, Legal Supp No 3, C437, 15 April 1994

This Bill was introduced into the Legislative Council on 20 April 1994. It proposes to relax the present control on public meetings and processions under Part III of the principal Ordinance. It repeals the requirement of applying to the Commissioner of Police for licence for organizing public procession, and replaces it with a notification system similar to that required for public meetings. Notification must be given a week in advance, although the Commissioner may accept shorter notice if he is satisfied that earlier notice could not reasonably have been given. Prior notice is not required for public meetings of less than 50 people (as opposed to 30 under the present law) in public places or 500 people (as opposed to 300) in private premises, or for public processions of less than 30 people (as opposed to 20). The information needed to be included in the notice and the grounds for prohibition are set out in the Bill.

The Commissioner may prohibit the holding of public meetings or public processions if he reasonably considers such prohibition to be necessary in the interests of public safety or public order, but prohibition is only to be used as a last resort. Notice of prohibition shall state the grounds for the prohibition, and there is a time limit beyond which the Commissioner cannot prohibit the holding of public meetings and public procession (48 hours before the event if 7 days' notice is given, and 24 hours if shorter notice of 72 hours or more is accepted by the Commissioner).

The Commissioner is also empowered to impose conditions in the interest of public safety and public order in respect of any public meeting or public procession, but with respect to public meetings held in designated public area, he may only impose conditions relating to the time at which such public meetings may be held. Any person named in a notice of prohibition or to whom a notice of prohibition may be given may appeal to the Governor against any prohibition or conditions imposed by the Commissioner, and the Governor may on appeal confirm, reverse or vary the appealed prohibition or conditions. The Governor may also, where he reasonably believes that it is necessary for the protection of security, public order or public health, by order declare any area or place to be a closed area.

On the whole the Bill will liberalise the present stringent controls on public meetings and public procession. It may still be queried whether a week's advance notice is too long and may stifle spontaneous meetings or procession. Given modern technological advances, it seems the length of the notice could be shortened. A related problem is that while a time limit is imposed beyond which the police cannot prohibit a public

meeting or public procession, there is no requirement that the police must respond within a reasonable period, or at all, to the notice of public meetings or public processions. In other words, even where a month's notice has been given, the police can sit on it and prohibit the public meeting shortly before 48 hours prior to the proposed meeting. Without a requirement that the police must act within a reasonable time, no one can be certain whether the proposed public meeting or public procession will be prohibited until after the expiry of the time limit for prohibition. The practical difficulty lies in the proposed s 17A(d), which prohibits any publicity of any public meeting and public procession which is prohibited. Section 17A(d) seems unnecessary and may cause great difficulties to the organizers of public meetings and public processions.

The idea of a right to appeal against the decision of the Commissioner is to be welcomed. However, if the appeal system is to earn any credibility, it seems an independent body rather than the Governor should be the appeal authority. Besides, it is of great importance to ensure that any appeal must be dealt with swiftly, as timing is of singular importance in many public meetings and public procession.

The proposed s 33(6), giving a police officer the power to stop and search any person in a public place in order to ascertain whether the person has in his possession any offensive weapon, seems to be unnecessary, as the police already possess the general power of stop and search under s 54 of the Police Force Ordinance.

Finally, the proposed s 49 empowering a member of Her Majesty's forces acting in the course of his duty or a police officer to require identification in certain circumstances is both unnecessary and dangerous. It is unnecessary as the police already possess the general power to require inspection of identity documents under s 17 of the Immigration Ordinance. To give this power, which can be a serious invasion of one's privacy, to a member of the armed force may be a dangerous precedent in the context of 1997.

Buildings (Amendment) Bill 1994, Hong Kong Government Gazette, 8 April 1994, Legal Supp No 3, C383

This Bill proposes to repeal the earlier Part VI of the Buildings Ordinance and replace it with a new Part VI dealing with the composition of the Appeal Tribunal and the appeal procedure. It provides that any person aggrieved by any decision made by the Building Authority may appeal to the Appeal Tribunal. The Appeal Tribunal shall consist of a Chairman and not less than 2 members from the Appeal Tribunal Panel. Members of the Appeal Tribunal Panel are to be appointed by the Governor. The Chairman of the Appeal Tribunal must be a person who is qualified for appointment as a District Judge, and the majority of the Appeal Tribunal shall be persons other than public officers. The Appeal Tribunal may hold a preliminary hearing to

determine whether good cause has been shown for holding a full hearing. It may dismiss the appeal if no good cause has been shown for holding a full hearing, but it must hold a full hearing if otherwise. There are also specific provisions dealing with evidence and representation. An appellant may be represented by a person, other than counsel and solicitor, approved by the Chairman. In determining the appeal, the Appeal Tribunal has full power to make any order confirming, varying or reversing the decision that is appealed against or substituting any other decisions or orders as it thinks fit as well as any order relating to costs.

This Bill is a good illustration of how the Bill of Rights can affect policy-making. The Bill seems to have been drafted with article 10 of the Bill of Rights in mind. Indeed, there have been a few unsuccessful attempts to challenge the composition of or the appeal procedure before the Appeal Tribunal: see, for example, *de Kanztow v Appeal Tribunal* (*Bulletin*, vol 1, no 2, p 15) and *Building Authority v Business Rights Ltd* (*Bulletin*, vol 2, no 4, pp 14-17). The recent decision of *R v Town Planning Board, ex parte Auburntown* (at p 9 above) shows clearly that our administrative appeal system will now be measured against the international standards of a fair hearing by a competent, independent and impartial tribunal. In this sense the Bill is timely and welcome.

On the whole, the proposed procedure satisfies the requirements of the Bill of Rights, save possibly in two respects. First, the proposed s 48(4) expressly provides that where a public officer is a Chairman or a member of the Appeal Tribunal, he shall, as regards the performance of his functions as such, "act in his personal capacity only and not be subject to any direction to which he might be subject in his capacity as a public officer". While this provision is intended to guarantee the independence and impartiality of the Tribunal, it may be difficult to persuade an objective bystander to believe that by such a provision a public officer on the Tribunal will assume a role and function totally divorced from his usual duties and role as a public officer. A better alternative may be to provide that no public officer shall be the Chairman. If a public officer is to be a member of the Tribunal, he should be a non-voting member, though it may be better that no public officer is a member of the Tribunal. If necessary, the government can always express its views by giving evidence before the Appeal Tribunal.

A second comment relates to the power to summarily dismiss an appeal. While the requirement of a fair hearing does not exclude a hearing in the absence of the applicant, it remains to be seen how the expression of "no good cause for holding a full hearing" is to be interpreted and applied in future.

Access to Information Bill 1994

This Bill, proposed by legislators Simon Ip, Christine Loh and Jimmy McGregor, is one of a number of private member's bills which are still awaiting the approval of the Governor before they can be considered by the Legislative Council. The Bill sets out the right of access to government information, followed by elaborate provisions setting out the circumstances in which withholding information can be justified. It also proposes an Information Commissioner who is empowered to deal with any complaint against denial of the right of access to information. The Bill is modelled on the Sri Lankan and Australian legislation.

Equal Opportunities Bill 1994 and Human Rights and Equal Opportunities Commission Bill 1994

These two bills, also private member's bills, were published in late March by independent legislator Ms Anna Wu Hung-yuk for public consultation. The first, the Equal Opportunities Bill, makes it unlawful to discriminate in defined areas on grounds of sex, marital status, pregnancy, race, disability, sexuality, political or religious conviction, age or spent conviction. The areas covered include work, education, accommodation, and the provision of goods and services. The Bill will bind public and private persons.

The second bill, the Human Rights and Equal Opportunities Commission Bill, establishes a Human Rights and Equal Opportunities Commission and an Equal Opportunities Tribunal. The function of the Commission includes receiving and conciliating complaints of violations of the Equal Opportunities Bill and the Bill of Rights Ordinance. If the efforts at conciliation fail, the Commission may forward the complaints to the Equal Opportunities Tribunal for adjudication. The Commission will also be responsible for promoting the Equal Opportunity Bill and the Bill of Rights Ordinance as well as general human rights education, and conducting relevant research and other inquiries.

Ms Wu plans to seek to have the Bills gazetted in June 1994. The consent of the Governor is required for the Human Rights and Equal Opportunities Commission Bill to be considered by the Legislative Council; the Governor, despite having an open mind on the issue, has not indicated he will consent to the introduction of the Bills. Further details will appear in the next issue.

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APPENDIX A

SECOND PERIODIC REPORT IN RESPECT OF HONG KONG CONCERNING ARTICLES 13-15 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS SUBMITTED PURSUANT TO ARTICLE 16 OF THE COVENANT (1993)

GENERAL

Population: 5,674,000 (1991 estimate)

Area: 1075 sq km (approx.)

ARTICLE 13: RIGHT TO EDUCATION

Paragraph 1

1. The statutory framework and administrative structure within which education in Hong Kong is conducted, and current policy objectives in the field of education, are in no way inconsistent with the principles and aims set out in this article. There is no discrimination on grounds of race, religion or language regarding access to educational facilities.

Paragraph 2(a)

2. Free primary education was introduced in all Government and aided primary schools (with the exception of a very small number of schools mainly for English-speaking children), in 1971. Free primary education continues to be available for every child in the primary school age group. Primary education normally commences at the age of six years.

3. While primary education is not "compulsory" as such, where it appears to the Director of Education that a parent of a child is withholding a child from attending primary school without any reasonable excuse, the Director may serve upon a parent an attendance order requiring him to cause the child to attend regularly as a pupil of the primary school named in the attendance order. While these powers do not in a strict legal sense constitute compulsory attendance, they are nevertheless intended substantially to achieve the same effect.

Paragraph 2(b)

4. Secondary education is available to all on completion of the primary course. Free junior secondary education is provided for all primary leavers from standard primary schools. This is a three-year course in Government schools and schools in receipt of aid and other forms of financial assistance from the Government. Technical and pre-vocational schools are included in this provision.

5. A child in the relevant age group may be made the subject of an attendance order. Thus, a course of nine years free education is available to all.

6. As regards the senior secondary level, it has, since 1978, been a policy aim to provide subsidized (but not entirely free) secondary 4 places for 60 per cent of the fifteen-year-old population in 1981, rising to more than 70% by 1986, and to 85% ultimately. Progress towards these targets has been substantial. It is anticipated that provision will reach 85% target will be achieved in 1983. Technical education at this level is also available in the eight Technical Institutes run by the Vocational Training Council. The provision of sixth form places in Government and aided schools is in accordance with a policy objective, established in 1987, for providing subsidized secondary 6 places for one-third of the pupils entering subsidized Secondary 6 places, with progression to Secondary 7 in schools operating a two-year sixth-form course.

Paragraph 2(c)

7. Admission to institutions of higher education financed by the Government is on merit. A systematic expansion programme is being implemented to increase the number of student places. At present first year places are available in these tertiary institutions for up to 88% of the applicants fulfilling minimum entrance requirements.

8. In December 1991, full-time enrolments were 9,789 at the Hong Kong University, 9,071 at the Chinese University of Hong Kong, 10,752 at the Hong Kong Polytechnic, 7,403 at the City Polytechnic of Hong Kong, 3,470 at the Hong Kong Baptist College, 1,310 at the Lingnan College and 691 at the Hong Kong University of Science and Technology. First year tertiary places, at a total of 15,520 full time equivalent, are provided for 18% of the 17-20 year age group. This figure is expected to increase to 20,040 by 1994-95 representing 25% of the relevant age group.

9. Financial assistance to needy students at these institutions is available in the form of scholarships, bursaries and loans.

Paragraph 2(d)

10. To cater for persons who have not received primary education, or whose primary education has been curtailed, the Adult Education Section of the Education Department makes available a number of retrieval courses, including Chinese literacy classes and Chinese general subjects classes, of such a kind as to afford full opportunity to such persons to further their basic education. Similar courses are also provided by voluntary bodies in receipt of financial assistance from the Government. Courses at a more advanced level are also provided (eg those of the Evening School of Higher Chinese Studies). In addition, a number of private schools operate Chinese literacy classes.

Paragraph 2(e)

11. As indicated in the comments above on article 13, paragraph 2(a), (b) and (c), the development of a system of schools at all levels is actively pursued. A variety of opportunities exist, both within Hong Kong and made available by institutions overseas, for teachers to pursue professional studies. Teaching staff employed by the Government participate in such improvements of conditions of service as affect the Civil service generally. Salary scales of teaching staff employed in schools in receipt of a recurrent subsidy from the Government and administered under the relevant Codes of Aid applicable to such schools, are subject to improvement, *pari passu*, with those of teaching staff employed in the Civil Service. Conditions of service of teachers in private schools are matters of private contract between employer and employee.

Paragraph 3

12. The Education Ordinance, which constitutes the legal framework within which schools are established and conducted in Hong Kong, makes provision for the registration of private schools, subject to statutory requirements regarding the suitability and safety of premises to be used for school purposes, and the suitability of persons to be approved and registered as managers or employed as teachers. Private schools registered under the Education Ordinance offer a wide variety of courses at kindergarten, primary, secondary and post-secondary levels. There is no restriction on the liberty of parents or legal guardians to utilise the facilities provided by private schools.

Paragraph 4

13. As regards the liberty of individuals to establish and direct educational institutions, the Education Ordinance places no restrictions on such liberty other than such as may arise from a legitimate concern that individuals applying to be approved or registered as managers of schools are, in general, fit and proper persons to be entrusted with the responsibilities involved.

ARTICLE 14: PRINCIPLE OF COMPULSORY EDUCATION, FREE OF CHARGE FOR ALL

14. As regards primary education, the comments above on article 13, paragraph 2(a) are relevant. The provisions of the Education Ordinance relating to the power of the Director of Education to order attendance at primary or secondary school, cover children undergoing both primary and junior-secondary education.

15. Education at the primary and junior-secondary levels in the public sector is free. At the senior-secondary level, it is heavily subsidised and only a small standard fee is charged. A fee remission scheme is in operation in the public sector, to ensure that no pupil allocated a place in this sector is debarred from taking it up because of lack of financial resources.

ARTICLE 15: RIGHT TO TAKE PART IN CULTURAL LIFE AND TO ENJOY THE BENEFITS OF SCIENTIFIC PROGRESS AND THE PROTECTION OF THE INTERESTS OF AUTHORS

A. Right to Take Part in Cultural Life (paragraph 1(a))

16. It is general policy to encourage the free participation of people in all aspects of cultural life, including creation and performance, subject only to measures intended to prevent the dissemination of material deemed likely to corrupt the morals of society. The copyright of works of creative artists is protected.

17. Over the last decade, the Government and the municipal councils have played a more active role in the arts, with the aims of promoting artistic excellence and making the arts more accessible to the general population.

18. In order to make the arts more accessible, numerous measures have been taken by both the Government and the municipal councils. For its part, the Government has concentrated on the development aspects of cultural promotion. To this end, it:

(a) established the Council for the Performing Arts in 1982 to advise on the promotion of the arts and the disbursement of funds for this purpose;

(b) established the Academy for Performing Arts in 1984 to provide professional training to diploma and higher diploma level in both Western and Chinese forms of dance, drama and music. The Academy will become a degree-awarding body in the near future;

(c) takes measures to record and conserve important aspects of Hong Kong's cultural heritage, including both archaeological sites and the built environment, through the work of the Antiquities and Monuments Office.

19. Funded from property taxes and central taxation, the municipal councils:

(a) have constructed purpose-designed performance venues throughout the territory. Venues opened in recent years include the Hong Kong Coliseum in 1981, seating 12,000; the Cultural Centre in 1989, with a grand theatre, concert hall and studio theatre; and several large district centres (namely, the Ko Shan Theatre in 1983, the Ngau Chi Wan Civic Centre in 1987, the Sheung Wan Civic Centre in 1988 and the Sai Wan Ho Civic Centre in 1990). In addition, the Academy for Performing Arts also has a theatre, concert hall and studio theatre. These venues are available to private groups, as well as for programmes presented by the operators. There are also about 150 private venues;

(b) present subsidised programmes of music, dance, and drama by local and overseas performers throughout the year. In addition, special festivals are held focusing on Asian and international arts, on film and children's arts;

(c) operate museums focusing on various aspects of cultural heritage, including history, art and folk history. In addition, exhibitions of various kinds are staged in municipal and other venues, including the Hong Kong Arts Centre and private venues;

(d) provide ancillary facilities such as a specialist arts library, rehearsal and practice space, arts studios, and a Visual Arts Centre scheduled to open in 1992

which will provide local artists with well-equipped workshops for their creative work in sculpture, ceramics and print-making; and

(e) operate more than 50 public libraries throughout the territory, providing both reference and free loan facilities.

20. The mass media have no defined role in the promotion of culture as they are free to determine their own programming. However, various radio and television stations do show cultural programmes, and the public radio station operates a fine music channel.

B. Right to Enjoy the Benefits of Scientific Progress and its Applications (paragraph 1(b))

21. The Hong Kong Government has taken a number of measures to promote the development of science, the application of scientific progress for the benefits of the community and the diffusion of information on scientific progress.

22. Science subjects are taught at primary and secondary schools and post-secondary educational institutions. Besides obtaining funding from benefactors and private companies, various institutions of higher education receive financial support from the government for conducting scientific research. The Hong Kong University of Science and Technology, newly opened far classes in October 1991, is specially committed to promoting technological applications in Hong Kong and the Asia-Pacific Region.

23. The Government provides facilities and services to facilitate technological upgrading in industries in Hong Kong. These include industrial estates which cater for high-technology industries; services to help industry to improve productivity; promotion of technology transfer through inward investment; establishment of a Hong Kong Industrial Technology Centre; and support for industrial research through an Applied Research and Development Scheme.

24. Both the Hong Kong Space Museum and the Hong Kong Science Museum played an important part in the diffusion of scientific information to the public. The former, which formed the first phase of the Hong Kong Cultural Centre, was opened in October 1981. It provides the public with an exceptional entertainment venue in which knowledge of the universe, space exploration and related sciences are presented through sky shows, Omnimax film shows, exhibitions, lectures in astronomy and telescopic observations. A 20-million exhibit renewal programme was completed in July 1991.

25. The Hong Kong Science Museum was opened in April 1991. The 550 exhibits of the Museum, the majority of the "hands-on" type cover five major areas, namely, Orientation, Science Arcade, Life Sciences, Technology and a Children's Zone. The Technology area is further subdivided into Computer and Robotics, Energy, Communication, Construction, Transportation, Food Science, and Home Technology. Its 20-meter high energy machine is the largest of its kind in the world. Together with the wide range of science activities like lectures, science film shows, fun-science activities, visits from professional groups, schools and other underprivileged groups, the Museum is a place for people of all walks of life to experience and discover the mystery of science and technology.

26. The Hong Kong Government is aware of the need to prevent the use of scientific and technical progress for purposes which are contrary to the enjoyment of human rights. The Bill of Rights Ordinance enacted in June 1991 provides, inter alia, that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or

punishment, in particular, no one shall be subjected without his free consent to medical or scientific experimentation. The Law Reform Commission is currently examining the law relating to information privacy. A consultation document on data protection will be released for public comment in early 1993.

C. Protection of the Interests of Authors (paragraph 1(c))

27. In recognising the right of everyone in Hong Kong to benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author, the United Kingdom has extended the application in Hong Kong of the main international treaties on intellectual property rights, namely, the revised Paris Conventions for the Protection of Industrial Property 1883-1967, the revised Berne Conventions for the protection of literary and artistic works 1886-1948, the revised Universal Copyright Conventions and Protocols 1952-1971, and the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms.

28. Hong Kong has a comprehensive legal framework in protecting intellectual property rights. They are:

(a) In relation to scientific production, the Registration of Patents Ordinance provides for the registration in Hong Kong of United Kingdom patents for inventions granted under the Patents Acts 1949-1971 and of European patents designating the United Kingdom under the Convention on the Grant of European Patents 1973 . Anyone who has registered a patent in Hong Kong can take legal action on infringement of his patent.

(b) Trade marks identifying the goods which carry them can be registered in Hong Kong under the Trade Marks Ordinance. With effect from 2 March 1992, the registration will be expanded to services: vide the Trade Marks (Amendment) Ordinance 1991. Unregistered trade marks can also be protected under the common law.

(c) The expression of an author's literary and artistic creativity is protected by copyright. The United Kingdom Copyright Act 1956 (as amended), the United Kingdom Copyright (Computers Software) Amendment Act 1983, both of which apply to Hong Kong, together with the Hong Kong Copyright Ordinance are the basic legal sources of copyright protection and enforcement in Hong Kong.

29. Proposals are being formulated for new legislation to protect the layout design of integrated circuits.

30. Furthermore, the Hong Kong Government recognises the impact of the rapid development in technology on the present intellectual property rights regime in Hong Kong. A Patent Steering Committee was appointed to review the patent system in Hong Kong while the Law Reform Commission of Hong Kong is in the process of making law reform recommendations to the Hong Kong Government on the law relating to copyright.

31. Apart from making laws, the Hong Kong Government has established the Intellectual Property Department in 1990 as part of its commitment to ensuring Hong Kong's regime for the protection and promotion of intellectual property rights is commensurate with the provisions of the Covenant. The Hong Kong Government's intellectual property rights policies are executed by the Department.

32. On the enforcement side, the Customs and Excise Department of the Hong Kong Government is responsible for enforcing the criminal aspects of intellectual property rights. It investigates complaints alleging infringement of trade marks and copyright. The Department has extensive powers of search and seizure, and collaborates with overseas enforcement authorities and owners of trade marks and copyright in a concerted effort to combat infringement of intellectual property rights. The Department has received many commendations for its works from both public and private institutions, both locally and overseas.

33. The court is the normal forum for dispute settlement in relation to intellectual property rights. In the area of copyright, there is also a quasi-judicial body known as the Performing Right Tribunal which decides disputes between copyright collecting societies and prospective copyrights users of copyright works. Appeal on a point of law can be made from the Tribunal to the High Court in Hong Kong.

APPENDIX B

HUMAN RIGHTS COMMITTEE RELEASES RESULTS OF EXAMINATIONS OF 17 INDIVIDUAL CASES ALLEGING VIOLATIONS OF CIVIL AND POLITICAL RIGHTS[1]

GENEVA, 24 February (UN Information Service) -- The Human Rights Committee concluded examination during its forty-ninth session last November of communications from 17 individuals alleging that their basic human rights guaranteed under the International Covenant on Civil and Political Rights had been violated.

The Committee found that four of the seven complaints it considered admissible revealed violations of articles of the Covenant dealing with subjection to torture, cruel, inhuman or degrading treatment or punishment, arbitrary detention, liberty and security of the person, and freedom of movement, among others. The Committee called on the States parties concerned Jamaica, Zaire, Equatorial Guinea and Canada -- to provide the authors of the complaints with remedy. Regarding two complaints against Jamaica and one against the Netherlands, the Committee concluded that no violations of the Convention had occurred.

Eight other complaints -- against the Governments of Trinidad and Tobago, the Netherlands, Canada and Finland -- were judged inadmissible.

The Committee examined the communications under the terms of the Optional Protocol to the Covenant. Individuals complaining of rights violations may invoke the Protocol and seize the Committee once they have exhausted all domestic remedies. Of the 124 States which have acceded to or ratified the Covenant, 74 have accepted the Committee's competence to deal with such communications. Only complaints emanating from those countries may be considered.

The views adopted by the Committee, as well as the decisions on admissibility, are summarized below. The full texts are available upon request from the Communications Section, Centre for Human Rights, United Nations Office at Geneva, or from the New York Office of the Centre at United Nations Headquarters.

Views Adopted

In Maurice Thomas v. Jamaica (Communication No. 321/1988), the author claimed that in July 1988, he had been subjected to degrading treatment while awaiting execution, that he had been severely beaten and wounded with a bayonet by soldiers conducting a search of his cellblock and then left without any medical attention. Also, the prison authorities had violated the provision of the Covenant under which all persons deprived of their liberty shall be treated with humanity and respect for their inherent dignity.

The Committee, noting that the State party had confined itself to issues of admissibility, considered that the claims of the author remained uncontested. Therefore, those claims had been substantiated and the facts before the Committee amounted to degrading treatment and a violation of Articles 7 and 10 of the Convention. It was of the view that Mr. Thomas was entitled to an effective remedy, including compensation. The

[1] UN Press release HR/CT/314 (25 February 1994)

State party was under an obligation to investigate the allegations made by the author with a view to instituting as appropriate criminal or other procedures against those found responsible and to take such other measures as may be necessary to prevent similar violations from occurring in the future.

In Dennis Douglas, Errol Gentles and Lorenzo Kerr v. Jamaica (Communication No. 352/1989), the authors claimed to be victims of a violation of their right to be equal before the courts. Among other things, all three of them were represented by the same junior counsel, and they were allocated insufficient time to prepare a meaningful defence. Moreover, their defence had been prejudiced by the State party's failure to provide them with the prosecution statements at a sufficiently early stage before the trial, or at all. In addition, it had failed to make legal aid available to them to pursue a constitutional motion before the Supreme Court.

The Committee noted with regret the absence of cooperation from the State party, which had not made any submission on the substance of the matters under consideration. As to the authors' claims, it noted that if the authors or counsel had felt that they were improperly prepared, it would have been incumbent upon them to request an adjournment of the trial. Moreover, the Committee could not conclude, on the basis of the available material, that the authors' representatives were unable to adequately represent them. The State party had provided the authors with the necessary legal prerequisites for an appeal of the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. Under Jamaican law, recourse to the Constitutional Court was not, as such, a part of the criminal appeal process. Therefore, the Committee was of the view that the facts did not disclose any violation of the Covenant.

In the case of Isidore Kanana Tshiongo a Minanga v. Zaire (Communication No. 336/1989), the author claimed to be a victim of arbitrary detention and acts of torture. In particular, he noted that he was at no time notified of the reasons for which he had been apprehended.

The Committee noted with great concern the total absence of cooperation on the part of the State party, both in respect of admissibility and the substance of the allegations. It considered the uncontested claims to have been substantiated by Mr. Kanana and justified the conclusion that his detention was arbitrary and contrary to article 9 of the Covenant. The Committee also expressed grave concern about the circumstances of his apprehension and the apparent lack of judicial accountability of the Zairean Defence Forces.

The Committee concluded that the author had substantiated his claim that he was subjected to torture and cruel and inhuman treatment, in violation of Article 7, and that he was not treated with respect for the inherent dignity of his person, in violation of Article 10. It was of the view, therefore, that Mr. Kanana was entitled to an effective remedy, including appropriate compensation for the treatment suffered. The State party should investigate the events complained of and bring those held responsible to justice. It further was obliged to take effective measures to ensure that such occurrences ceased and that similar violations did not occur in the future.

Concerning the case of Glenmore Compass v. Jamaica (Communication No. 375/1989), the author claimed that he was denied a fair trial and that several irregularities occurred in its course. Among other things, the trial judge had failed to exercise his discretion to prohibit a dock identification by witnesses who had not previously identified the author, and he had failed to direct the jury properly. The author also contended that his rights were violated since he was not able to cross-examine a prosecution witness.

The Committee noted that the prosecution witness was unable to give evidence during the trial because he had left Jamaica. Article 14 of the Convention protected the equality of arms between the prosecution and defence in the examination of witnesses, but it did not prevent the defence from not exercising its entitlement to cross-examine a prosecution witness during the trial hearing. In any event, the witness had been examined by the defence under the same conditions as by the prosecution at the preliminary hearing.

The Committee was of the view that the facts before it did not disclose a violation of any of the provisions of the Covenant.

In C.H.J. Calvalcanti Araujo-Jongen v. the Netherlands (Communication No. 418/1990), the author contended that she was the victim of discrimination because of the denial of certain unemployment benefits which were granted to married men, but not to married women.

The Committee observed that, although a State was not required under the Covenant to adopt social security legislation, if it did, such legislation had to comply with Article 26 of the Covenant, which prohibits any form of discrimination and calls for equal protection before the law. The Committee noted that the deficiency in the domestic law had been corrected in 1991. It found that the requirement of being unemployed at the time of application for benefits was reasonable and objective, in view of the purposes of the legislation in question. It therefore concluded that the facts before it did not reveal a violation of Article 26 of the Covenant.

In Angel N. Olo Bahamonde v. Equatorial Guinea (Communication No. 468/1991), the author complained that he and other individuals who did not share the views or adhered to the ruling party of the President, or who did not at least belong to his clan, were subjected to varying degrees of discrimination, intimidation and persecution. In particular, the author claimed to have been a victim of systematic persecution and threats by a number of high Government officials because of his outspoken views on the regime in place. He asserted that his arrest in 1987 was arbitrary, that no charges were served on him throughout the period of detention, and that he was not brought before a judge. Furthermore, he had been prevented from travelling freely within the country and from leaving it at his own free will.

The Committee noted that the State party had not contested the claim that the author had been arbitrarily arrested and detained and had merely indicated that he could have availed himself of judicial remedies. As to the author's being subjected to harassment, intimidation and threats by prominent politicians on a number of occasions, the Committee observed that the State party had dismissed the claim in general terms, without addressing his well substantiated allegations. It concluded that the State party had failed to ensure his right to security of person, in violation of Article 9. The confiscation of his passport on two occasions, as well as his right to leave the country of his own free will, amounted to a violation of Article 12.

Regarding the author's contention that the President controlled the judiciary, the Committee considered that a situation where the functions and competencies of the judiciary and the executive were not clearly distinguishable was incompatible with the notion of an independent and impartial tribunal within the meaning of Article 14. The Committee concluded that the author had been discriminated against because of his political opinions and his open criticism of the Government, in violation of article 26. In view of the above, the State party was under an obligation to provide Mr. Olo Bahamonde with an appropriate remedy. The Committee urged the State party to guarantee the security of his person, to return confiscated property to him or to grant him appropriate compensation, and that the discrimination to which he had been subjected be remedied without delay.

In the case of Charles Chitat Ng v. Canada (Communication No. 469/1991), the author, who had been convicted in 1985 of an attempted store theft and shooting in Alberta, was extradited to the United States in 1991 to stand trial in California on 19 criminal counts. If convicted, he could face the death penalty. The author claimed that the decision to extradite him violated six articles of the Convention, in particular that the manner of execution constituted cruel and inhuman treatment or punishment, that the conditions on death row were cruel, inhuman and degrading, and that the judicial procedures did not meet basic requirements of justice, with racial bias influencing the imposition of the death penalty.

The Committee noted that the Covenant did not prohibit the imposition of the death penalty for the most serious crimes. In this regard, Mr. Ng was extradited to stand trial on 19 criminal charges, including kidnapping and 12 counts of murder. If sentenced to death, that sentence would be in respect of very serious crimes. While the author claimed that his right to a fair trial would not be guaranteed because of racial bias, these claims had been advanced in respect of purely hypothetical events. Nothing in the file supported the contention that the author's trial would not meet the requirements under the Covenant. Moreover, the Committee observed that Mr. Ng was extradited to the United States after extensive proceedings in the Canadian courts, which reviewed all the charges and evidence available against him. In the light of the above, the Committee concluded that Mr. Ng was not a victim of a violation by Canada of Article 6 on the right to life.

The Committee concluded, however, that execution by gas asphyxiation, should the death penalty be imposed, would not meet the test of "least possible physical and mental suffering" and constituted cruel and inhuman treatment. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death would be executed in a way that amounted to a violation of Article 7, failed to comply with its obligations under the Covenant by extraditing him without having sought and received assurances that he would not be executed. It requested the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appealed to the State party to ensure that a similar situation did not arise in the future.

Decisions on Admissibility

In R.M. v. Trinidad and Tobago (Communication No. 384/1989), the author contended that he had been denied the right to a fair trial because of the court's evaluation of the evidence, in particular the testimony of the main prosecution witness, the alleged inadequacy of the judge's instructions to the jury, and insufficient time to prepare a defence. The Committee found the communication inadmissible, because it could not conclude that the conduct of the trial or the judge's instructions had been clearly arbitrary or amounted to a denial of justice, or that the trial judge had manifestly violated his obligation to impartiality. Also, the author had failed to substantiate his claim that the time available for consultation with his attorney prevented them from adequately conducting the defence.

Concerning A.R.U. v. the Netherlands (Communication No. 509/1992), the author contended that military service in the Netherlands, within the framework of the North Atlantic Treaty Organization (NATO) defence strategy, which is based on the threat of use of nuclear weapons, violated Articles 6 and 7, on the right to life and on not being subjected to torture or to cruel and inhuman treatment, respectively. In addition, he had been denied fair treatment before the Supreme Court in connection with a request for conscientious objection, and the Court had prevented him from protesting the participation by the defence forces in a conspiracy to commit a crime against peace. The Committee observed that the author could not claim to be a victim of the violation of Articles 6 and 7

by mere reference to the requirement to do military service. Also, the author had failed to substantiate, for purposes of admissibility, his claim that he was a victim of violations of other articles of the Covenant.

With regard to P.J.N. v. the Netherlands (Communication No. 510/1992), the author complained that his trial suffered from procedural irregularities, including that the evidence of the main witness against him was unlawfully obtained and should have been disallowed, that the investigating officers had committed perjury, and that he was not allowed to put certain questions to witnesses during the appeal proceedings. The Committee observed that the author's allegations related primarily to the evaluation of facts and evidence by the courts. In this regard, the Committee had no evidence that the courts'decisions were manifestly arbitrary or amounted to a denial of justice. In addition, the author had not substantiated his claim that the refusal of the Court of Appeal to hear certain expert witnesses and to allow certain questions was arbitrary and could constitute a violation of the Covenant.

In J.S. v. the Netherlands (Communication No. 522/1992), the author alleged a violation of Article 14, on equality before the courts and tribunals because, among other things, the Court of Appeal used as evidence against him that part of his statement which could not be said to reflect its tenor. The Committee noted that the author's claims related in essence to the evaluation of facts and evidence by the Court of Appeal and that there was nothing in the proceedings to indicate that they were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge had manifestly violated his obligation of impartiality.

In E.C.W. v. the Netherlands (Communication 524/1992), the author had participated in sit-down demonstrations on a road leading to a military base to protest the preparation for the deployment of cruise missiles on the base.

He was arrested and charged with obstructing the free flow of taffic on a public road. The Supreme Court had rejected his appeals, stating that the absence of legal means to protest the deployment of the missiles had not been shown. The author claimed that he had no choice but to protest by all possible means against the deployment of such weapons, as they violated public international law, as well as Articles 6 and 7 of the Covenant. The Committee found the communication inadmissible because the procedure laid down in the Optional Protocol was not designed for conducting public debate over matters of public policy. In addition, it considered that the author's conviction for obstructing traffic on a public road could not be seen as raising issues under the Covenant.

As to H.T.B. v. Canada (Communication No. 534/1993), the author was convicted and sentenced to 25 years of imprisonment without parole for the first degree murder of his wife. He claimed that the failure by the Court of Appeal for Ontario, and subsequently by the Supreme Court of Canada, to consider the evidence of insanity by refusing to hear any argument that referred to that evidence resulted in the deprivation of his liberty without recognition of the procedures established by law. The Committee considered that neither the facts of the case nor the author's allegations raised issues under Article 9 of the Covenant, relating to the right to liberty and security of person. Furthermore, it had no evidence that the trial proceedings were manifestly arbitrary or amounted to a denial of justice.

In K.L.J. v. Finland (Communication No. 544/1993), the author's complaint concerned alleged irregularities in a project involving the planning and construction of a private road. He asserted that the entire procedure had caused him considerable "mental anguish" throughout the years, and that the judicial proceedings had been biased and unfair throughout. The Committee noted that the author's claims related essentially to an alleged

violation of his right to property, a right which was not protected by the Covenant. Thus, the Committee was not competent to consider such allegations. As to the claim of the alleged arbitrary and biased nature of the decisions, the Committee had no indication that the evaluation of the evidence by the court was arbitrary or that it was not impartial. It also found that the author had not substantiated his allegations concerning discriminatory treatment.

As to R.E.d.B. v. the Netherlands (Communication No. 548/1993), the author, who was mentally ill, was without a legal guardian from 26 June 1973 until 15 December 1987, when one was appointed. He claimed that since he had no legal representative during that period, he was not capable of filing an application for certain social security benefits and that therefore, special circumstances existed to grant such benefits retroactively. Denial to do so amounted to a violation of Article 16, as it constituted discrimination against those who were unable to protect their own interests. The Committee noted that State authorities considered that the author's parents could have applied on his behalf, and that he had not substantiated, for the purposes of admissibility, that he was denied a retroactive benefit on any of the grounds covered by Article 26.

Covenant and Optional Protocol

The 53-article International Covenant on Civil and Political Rights, which entered into force in 1976, proclaims such rights as the right to self-determination, to life, liberty and security of the person, to freedom of thought, conscience and religion and to equality before the law. It prohibits: arbitrary deprivation of life; torture, cruel or degrading treatment or punishment; slavery and forced labour; war propaganda; and advocacy of racial or religious hatred. Communications are examined in closed meetings.

Thus far, 74 of the 124 States which have acceded to or ratified the Covenant have accepted the competence of the Committee to deal with individual complaints . . ."

APPENDIX C

COMMITTEE AGAINST TORTURE ADOPTS DECISION ON COMMUNICATION[2]

GENEVA, 1 March (UN Information Service) -- The Committee against Torture, at its eleventh session last November, adopted a final decision on a complaint in which the author alleged that he and six other persons were maltreated by a police inspector in Austria.

In the case of Qani Halimi-Nedzibi v. Austria (Communication No. 8/1991), the author was convicted in 1990 of having been in charge of an international drug-trafficking organization which allegedly operated from Austria. He stated that following his arrest in 1988, he and six named witnesses were maltreated, beaten and tortured by a police inspector who was in charge of the criminal investigation. They were allegedly coerced into making incriminating statements. The author claimed that the failure of the Austrian authorities to investigate his allegations of torture and the refusal of the courts of first and second instance to exclude as evidence against him statements allegedly made as a result of torture, constituted a violation of articles 12 and 15 of the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.

The Committee, on the basis of the information before it, could not conclude that the allegations of ill-treatment had been sustained. In the circumstances, it found no violation of article 15.

In connection with the other charge, the Committee noted that the author had made his allegations before the investigating judge on 5 December 1988.

Although the investigating judge had questioned the police officers about the allegations on 16 February 1989, no investigation took place until 5 March 1990, when criminal proceedings against the police officers were instituted.

The Committee considered that a delay of 15 months before an investigation of allegations of torture was initiated was unreasonably long and not in compliance with the requirement of article 12.

The Committee was of the view, therefore, that the facts before it disclosed a violation of that article and requested the State party to ensure that similar violations did not occur in the future.

The case was considered under article 22 of the Convention. Under that article, individuals who claim to be victims of a violation by a State party of any provision of the Convention and who have exhausted all available domestic remedies, may submit written communications to the Committee.

As at 1 March, 35 of the 80 States which have acceded to or ratified the Convention, have accepted the competence of the Committee to deal with individual complaints by making a declaration under article 22."

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[2] UN Press release HR/3938 (2 March 1994)

APPENDIX D

DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN

Adopted by the United Nations General Assembly on 20 December 1993, GA Res 48/104

The General Assembly,

Recognizing the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human persons,

Noting that those rights and principles are enshrined in international instruments, including the Universal Declaration of Human Rights,[3] the International Covenant on Civil and Political Rights,[4] the International Covenant on Economic, Social and Cultural Rights,[5] the Convention on the Elimination of All Forms of Discrimination against Women,[6] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[7]

Recognizing that the effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women and that the Declaration on the Elimination of Violence against Women, annexed to the present resolution, will strengthen and complement that process,

Concerned that violence against women is an obstacle to the achievement of equality, development and peace, as recognized in the Nairobi Forward-looking Strategies for the Advancement of Women,[8] which recommend a set of measures to combat violence against women, and to the full implementation of the Convention on the Elimination of All Forms of Discrimination against Women,

Affirming that violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, and concerned about the long-standing failure to protect and promote those rights and freedoms in relation to violence against women,

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[3] Resolution 217 A (III).

[4] Resolution 2200 A (XXI), annex.

[5] Resolution 2200 A (XXI), annex.

[6] Resolution 34/180, annex.

[7] Resolution 39/46, annex.

[8] *Report of the World Conference to review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985* (United Nations publication, Sales No. E.85.IV.10), chap. I, sect. A.

Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of their full advancement, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men,

Concerned that some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence,

Recalling Economic and Social Council resolution 1990/15 of 24 May 1990, in the annex to which it was recognized that violence against women in the family and society was pervasive and cut across lines of income, class and culture, and had to be matched by urgent and effective steps to eliminate its incidence,

Recalling also Economic and Social Council resolution 1991/18 of 30 May 1991, in which the Council recommended the development of a framework for an international instrument that would address explicitly the issue of violence against women,

Welcoming the role that women's movements have played in drawing increasing attention to the nature, severity and magnitude of the problem of violence against women,

Alarmed that women's opportunities to achieve legal, social, political and economic equality in society are limited, *inter alia*, by continuing and endemic violence,

Convinced that in the light of the above there is a need for a clear and comprehensive definition of violence against women, a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms, a commitment by States in respect of their responsibilities, and a commitment by the international community at large towards the elimination of violence against women,

Solemnly proclaims the following Declaration on the Elimination of Violence against Women and urges that every effort be made so that it becomes generally known and respected:

Article 1

For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related

violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 3

Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*:

(a) The right to life;[9]
(b) The right to equality;[10]
(c) The right to liberty and security of person;[11]
(d) The right to equal protection under the law;[12]
(e) The right to be free from all forms of discrimination;[13]
(f) The right to the highest standard attainable of physical and mental health;[14]
(g) The right to just and favourable conditions of work;[15]
(h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.[16]

Article 4

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[9] Universal Declaration of Human Rights, article 3; and International Covenant on Civil and Political Rights, article 6.

[10] International Covenant on Civil and Political Rights, article 26.

[11] Universal Declaration of Human Rights, article 3; and International Covenant on Civil and Political Rights, article 9.

[12] International Covenant on Civil and Political Rights, article 26.

[13] International Covenant on Civil and Political Rights, article 26.

[14] International Covenant on Economic, Social and Cultural Rights, article 12.

[15] Universal Declaration of Human Rights, article 23; and International Covenant on Economic, Social and Cultural Rights, articles 6 and 7.

[16] Universal Declaration of Human Rights, article 5; International Covenant on Civil and Political Rights, article 7; and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

(a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;

(b) Refrain from engaging in violence against women;

(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;

(e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for this purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with this subject;

(f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of gender insensitive laws, enforcement practices or other interventions;

(g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;

(h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;

(i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;

(j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;

(k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;

(l) Adopt measures directed to the elimination of violence against women who are especially vulnerable to violence;

(m) Include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration;

(n) Encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration;

(o) Recognize the important role of the women's movement and non-governmental organizations world wide in raising awareness and alleviating the problem of violence against women;

(p) Facilitate and enhance the work of the women's movement and non-governmental organizations and cooperate with them at local, national and regional levels;

(q) Encourage intergovernmental regional organizations of which they are members to include the elimination of violence against women in their programmes, as appropriate.

Article 5

The organs and specialized agencies of the United Nations system should, within their respective fields of competence, contribute to the recognition and realization of the rights and the principles set forth in the present Declaration, and to this end should, *inter alia*:

(a) Foster international and regional cooperation with a view to defining regional strategies for combating violence, exchanging experiences and financing programmes relating to the elimination of violence against women;

(b) Promote meetings and seminars with the aim of creating and raising awareness among all persons the issue of the elimination of violence against women;

(c) Foster coordination and exchange within the United Nations system between human rights treaty bodies to address the matter effectively;

(d) Include in analyses prepared by organizations and bodies of the United Nations system of social trends and problems, such as the periodic reports on the world social situation, examination of trends in violence against women;

(e) Encourage coordination between organizations and bodies of the United Nations system to incorporate the issue of violence against women into ongoing

programmes, especially with reference to groups of women particularly vulnerable to violence;

(f) Promote the formulation of guidelines or manuals relating to violence against women, taking into account the measures mentioned herein;

(g) Consider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments;

(h) Cooperate with non-governmental organizations in addressing violence against women.

Article 6

Nothing in the present Declaration shall affect any provision that is more conducive to the elimination of violence against women that may be contained in the legislation of a State or in any international convention, treaty or other instrument in force in a State.

APPENDIX E

GENERAL RECOMMENDATION NO. 21 (THIRTEENTH SESSION)[17]

EQUALITY IN MARRIAGE AND FAMILY RELATIONS

1. The Convention on the Elimination of All Forms of Discrimination against Women ("the Convention") (General Assembly resolution 34/180, annex) affirms the equality of human rights for women and men in society and in the family. The Convention has an important place among international treaties concerned with human rights.

2. Other convention and declarations also confer great significance on the family and woman's status within it. These include the Universal Declaration on Human Rights (General Assembly resolution 21/A (III), annex), the Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex), the Convention on the Nationality of Married Women (General Assembly resolution 1040 (XI), annex), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (General Assembly resolution 1763 A (XVII), annex) and the subsequent Recommendation thereon (General Assembly resolution 2018 (XX), annex) and the Nairobi Forward-looking Strategies for the Advancement of Women.[18]

3. The Convention recalls the inalienable rights of women which are already embodied in the above conventions and declarations, but it goes further by recognizing the importance that culture and traditions have in shaping the thinking and behaviour of men and women and which play a significant part in restricting the exercise of basic rights by women.

4. The year 1994 has been designated by the General Assembly in its resolution 44/82 as the International Year of the Family. The Committee wishes to take the opportunity to stress the significance of compliance with women's basic rights within the family as one of the measures which will support and encourage the national celebrations that will take place.

Background

Having chosen in this way to mark the International Year of the Family, the Committee wishes to analyse three articles in the Convention that have special significance for the status of women in the family:

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[17] As contained in UN Doc E/CN.6/1991/CRP.1, Annex I

[18] See *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985* (United Nations publication, Sales No. E.85.IV.10), chap. I, sect. A.

ARTICLE 9

1. States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States parties shall grant women equal rights with men with respect to the nationality of their children.

Comment

Nationality is critical to full participation in society. In general, States confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness. Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence. Nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality.

ARTICLE 15

1. States parties shall accord to women equality with men before the law.

2. States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Comment

a. When a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman's ability to provide for herself and her dependents.

b. A woman's right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the Courts. In others, her status as a witness or her evidence is accorded less respect or weight than that of a man. Such laws or customs limit the woman's right effectively to pursue or retain her equal share of property and diminish her standing as an independent, responsible and valued

member of her community. When countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependents.

c. Domicile is a concept in common law countries referring to the country in which a person intends to reside and to whose jurisdiction she will submit. Domicile is originally acquired by a child through its parents, but in adulthood, denotes the country in which a person normally resides and in which she intends to reside permanently. As in the case of nationality, the examination of States parties' reports demonstrates that a woman will not always be permitted at law to choose her own domicile. Domicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status. Any restrictions on a woman's right to choose a domicile on the same basis as a man may limit her access to the Courts in the country in which she lives or prevent her from entering and leaving a country freely and in her own right.

d. Migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.

ARTICLE 16

1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Comment

Public and private life

Historically, human activity in public and private life has been viewed differently and regulated accordingly. In all societies women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior.

As such activities are invaluable for the survival of society, there can be no justification for applying different and discriminatory laws or customs to them. Reports of States parties disclose that there are still countries where de jure equality does not exist. Women are thereby prevented from having equal access to resources and from enjoying equality of status in the family and society. Even where de jure equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated.

Various forms of family

The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.

Polygamous marriages

States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents, that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.

Article 16 (1) (a) and (b)

While most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention.

A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries which, based on custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others, women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on a woman's youth or consanguinity

with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.

Article 16 (1) (c)

a. An examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status as head of household and primary decision maker and therefore contravene the provisions of the Convention.

b. Moreover, generally a de facto union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.

Article 16 (1) (d) and (f)

As provided in article 5 (b), most States recognize the shared responsibility of parents for the care, protection and maintenance of children. The principle that "the best interests of the child shall be the paramount consideration", has been included in the Convention on the Rights of the Child and seems now to be universally accepted. However, in practice, some countries do not observe the principle of granting the parents of children equal status particularly when they are not married. The children of such unions do not always enjoy the same status as those born in wedlock and where the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children.

The shared rights and responsibilities enunciated in the Convention should be enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws, both parents regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children.

Article 16 (1) (e)

The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.

Some reports disclose coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilization. Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government. In order to make an informed

decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in article 10 (h) of the Convention.

There is general agreement that where there are freely available appropriate measures for the voluntary regulation of fertility, the health, development and well-being of all members of the family improves. Moreover, such services improve the general quality of life and health of the population, and the voluntary regulation of population growth helps preserve the environment and achieve sustainable economic and social development.

Article 16 (1) (g)

A stable family is one which is based on principles of equity, justice and individual fulfilment for each member. Each partner must therefore have the right to choose a profession or employment that is best suited to his or her abilities, qualifications and aspirations, as provided in article 11 (a) and (c). Moreover, each partner should have the right to choose his or her name thereby preserving individuality, identity in the community and distinguishing that person from other members of society. When by law or custom a woman is obliged to change her name on marriage or at its dissolution, she is denied these rights.

Article 16 (1) (h)

The rights provided in this article overlap with and complement those in article 15 (2) in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property.

Article 15 (1) guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.

In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed.

In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.

All of these rights should be guaranteed regardless of a woman's marital status.

Marital property

There are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.

Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.

In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight.

In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.

Inheritance

Reports of States parties should include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women as provided in the Convention and in Economic and Social Council resolution 884 (XXXIV) D, in which the Council recommends that States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession, has not been generally implemented.

There are many countries where the law and practice concerning inheritance and property results in serious discrimination against women. As a result of this uneven treatment, these women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.

Article 16 (2)

The 1993 Vienna Declaration urges States parties to repeal existing laws and regulations and to remove customs and practices which discriminate against and cause harm to the girl child. Article 16 (2) and the provisions in the Convention on the Rights of the Child (General Assembly resolution 44/25) preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority. In the context of the Convention on the Rights of the Child, "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is

attained earlier". Notwithstanding this definition, and bearing in mind the provisions of the Vienna Declaration, the Committee considers that the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.

This not only affects women personally but also limits the development of their skills and independence and reduces access to employment, thereby detrimentally affecting their families and communities.Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, these provisions should be abolished. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman's right freely to choose her partner.

States parties should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.

Recommendations

Violence against women

In considering the place of women in family life, the Committee wishes to stress that the provisions of General Recommendation No. 19 concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. States parties are urged to comply with this general recommendation to ensure that in both public and family life, women will be free of the gender-based violence that so seriously impedes their rights and freedoms as individuals.

Reservations

The Committee has noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, especially when a reservation has also been entered to Article 2, claiming that compliance may conflict with a commonly held vision of the family, based inter alia, on cultural or religious beliefs or on the country's economic or political status.

Many of these countries hold a belief in the patriarchal structure of a family which places a father, husband or son in a favourable position. In some countries where fundamentalist or other extremist views, or economic hardships have encouraged a return to old values and traditions, women's place in the family has deteriorated sharply. In others, where it has been recognized that a modern society depends for its economic advance and for the general good of the community on involving all adults equally, regardless of gender, these taboos and reactionary or extremist ideas have progressively been discouraged.

Consistent with articles 2, 3 and 24 in particular, the Committee requires that all States parties gradually progress to a stage where by their resolute discouragement of

notions of the inequality of women in the home, each country will withdraw its reservation, in particular to articles 9, 15 and 16 of the Convention.

States parties should resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom, and progress to the stage where reservations, particularly to article 16, will be withdrawn.

The Committee noted, on the basis of its examination of initial and subsequent periodic reports, that in some States parties to the Convention who had ratified or acceded without reservation, certain laws, especially those dealing with family, do not actually conform to the provisions of the Convention.

Their laws still contain many measures which discriminate against women based on norms, customs and socio-cultural prejudices. These States, because of their specific situation regarding these articles, make it difficult for the Committee to evaluate and understand the status of women.

The Committee, in particular on the basis of articles 1 and 2 of the Convention, requests that those States parties make the necessary efforts to examine the de facto situation relating to the issues and to introduce the required measures in their national legislations still containing provisions discriminatory to women.

Reports

Assisted by the comments in this General Recommendation, in their reports States parties should:

(i) Indicate the stage that has been reached in the country's progress to removal of all reservations to the Convention but in particular reservations to article 16.

(ii) Set out whether their laws comply with the principles of articles 9, 15 and 16 and where by reason of religious or private law or custom, compliance with the law or with the Convention is impeded.

Legislation

States parties should where necessary to comply with the Convention and in particular, in order to comply with articles 9, 15 and 16, enact and enforce legislation.

Encouraging compliance with the Convention

Assisted by the comments in this General Recommendation, and as required by articles 2, 3 and 24, States parties should introduce measures directed at encouraging full compliance with the principles of the Convention, particularly where religious or private law or custom conflict with those principles.

APPENDIX F

UNITED STATES DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS 1994

HONG KONG

Hong Kong, a small, densely populated British dependency, is a free society with legally protected rights but without a broad democratic base.Its constitutional arrangements are defined by the Letters Patent and Royal Instructions. Executive powers are vested in a British Crown-appointed Governor who holds extensive authority. The judiciary is an independent body adhering to English common law with certain variations. Fundamental rights ultimately rest on oversight by the British Parliament. In practice, however, Hong Kong largely controls its own internal affairs.

A well-organized civilian police force maintains public order and respects the human rights of the populace.

Hong Kong's free market economy is among the world's most important shipping, marketing, and finance centers. It serves as an investment center for trade with China and as a communication and transportation hub for Asia. Annual per capita gross domestic product increased by 5.5 percent in 1993 to a projected $18,948.

The Bill of Rights, passed in June 1991, continued to make an impact on legislative process and criminal law. Hong Kong political leaders and human rights groups have criticized the Government for not conforming Hong Kong laws to the Bill of Rights. The Legislative Council is expected to consider measures aimed at further reconciliation during the 1993-94 session. The principal human rights problem is the inability of citizens to change their government. China strongly criticized and opposed the Governor's 1992 proposed measures to broaden the political franchise before the colony reverts to China in 1997. In ongoing political talks, the United Kingdom (U.K.) and China have not reached agreement on these proposals. Discrimination and violence against women are continuing human rights concerns.

RESPECT FOR HUMAN RIGHTS

Section 1 Respect for the Integrity of the Person, Including Freedom from:

a. Political and Other Extrajudicial Killing

There were no instances of deaths in police custody or as a result of using force in restraining unarmed persons during arrest.

b. Disappearance

There were no reports of any disappearance.

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

Torture and other extreme forms of abuse are forbidden by law and subject to punishment. Individual acts of police brutality occurred. From January to July 1993, 996

allegations of police assault were lodged. The total number of complaints against the police during this period numbered about 2,000. As of July, 34 cases were substantiated, none of which resulted in death. End of year figures were not available. Disciplinary action can range from criminal proceedings to dismissal or warnings. Complaints are investigated by an internal police unit, subject to outside review. The authorities continued to reject calls from some legislators that investigations should be conducted by an independent body.

d. Arbitrary Arrest, Detention, or Exile

British legal protections and common law traditions govern the process of arrest and detention and ensure substantial and effective legal protections against arbitrary arrest or detention. Exile is not practiced.

e. Denial of Fair Public Trial

Hong Kong's judicial and legal systems are organized according to principles of British constitutional law and legal precedent and feature, inter alia, an independent judiciary and trial by jury. The right to a fair public trial is guaranteed and respected in practice.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

The right of privacy is generally respected and provided for by law. The Independent Commission Against Corruption (ICAC) is vested with powers which are normally exercised only by a judicial officer. Amendments to ordinances governing ICAC deprived it of its independent authority to issue arrest or search warrants (it must now go to the courts), but it still operates on the assumption that any excessive, unexplainable assets held by civil servants are considered ill-gotten until proven otherwise.

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

There is a tradition of free speech and press as practiced in Great Britain. However, the admission by China's Ministry of Public Security that it has been gathering information on Hong Kong residents who are "against the Chinese Government" has had some chilling effect on free speech. Numerous views and opinions, including those independent or critical of the British and Hong Kong Governments, are aired in the mass media, in public forums, and by political groups. International media organizations operate freely in Hong Kong. Although rarely imposed, several ordinances permit restrictions of the press.

Journalists report that self-censorship is on the increase as Hong Kong-based media organizations which are expanding their commercial ties in China, seek to avoid giving offense to the Chinese Government. Following Chinese objections to a Hong Kong government proposal to "corporatize" the government-owned Radio Television Hong Kong (RTHK), there have been no further efforts by the Hong Kong Government to do so. The Government continues to refuse to consider freedom of information legislation proposed by Hong Kong civil liberties groups.

b. Freedom of Peaceful Assembly and Association

These freedoms are practiced without significant hindrance, although the amended Societies Ordinance requires officeholders to notify the Police Commissioner (who is the

Registrar of Societies) of the formation of a society. The Ordinance permits the Registrar to refuse to register an organization that is found to be "incompatible with peace, welfare, or good order" or is affiliated with a political organization abroad. There were no instances of this provision being applied arbitrarily in 1993.

c. Freedom of Religion

Government policy and general practice ensure freedom of religion.

d. Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation

Travel documents are obtainable freely and easily, subject to neither arbitrary nor discriminatory practices. There is freedom of movement within Hong Kong.

By 1991 more than 200,000 Vietnamese had arrived in Hong Kong seeking refugee status. Hong Kong has never refused to accept, or pushed off, Vietnamese boat people. Prior to June 1988, they were automatically accorded refugee status. Thereafter, they were screened to determine their status and were held in prison-like detention centers awaiting resettlement in other countries or repatriation to Vietnam. As of November 1993, only 67 Vietnamese had arrived Hong Kong since agreement was reached in late 1991 by the U.K. and Vietnam The agreement provided for the immediate screening of new arrivals, mandatory repatriation to Vietnam of those whom the authorities determined not to be refugees, and the decision by the U.N. High Commissioner for Refugees (UNHCR) to cease providing a reintegration subsistence allowance to new arrivals.

A trial of 13 Vietnamese accused of murdering 24 fellow detainees, who burned to death in a February 1992 riot when their hut was barricaded and set afire, is expected to continue until mid-1994. In addition to the 13 defendants, 2 key defense witnesses were prevented from returning to Vietnam--despite volunteering to return home--until they have testified in the case. Gang violence continues to be a problem in the camps, and women are often raped. On September 1, the UNHCR began cutting nonessential services in the detention centers. The move, which eliminated adult education, community and recreational activities in the camps, and cut back employment opportunities and some medical facilities, was criticized by some nongovernmental human rights organizations.

The Hong Kong Government has said it hopes to have all initial screening of Vietnamese asylum seekers completed by January 1994. Reintegration assistance programs inside Vietnam funded by the European community, the Hong Kong Government, and the United States provided an incentive for those not eligible for third country resettlement to return to Vietnam. In order to spur voluntary repatriation of those not recognized as refugees, the Government slashed the assistance package available to those returning home by a third, effective November 1. Anyone who volunteered before that time could still receive the full amount. Those who have not completed the screening process by the deadline will have 90 days to make a decision for voluntary repatriation before benefits are cut. Of those found ineligible for resettlement or not yet screened, more than 10,000 persons had voluntarily returned to Vietnam by year's end and more than 34,000 since the agreement on the Comprehensive Plan of Action in 1989.

On May 12, 1992, the Hong Kong government reached agreement with Vietnamese authorities on an Orderly Return Program (ORP) for screened-out nonrefugees in Hong Kong detention centers. Under the program, people are randomly chosen from among the nonrefugee camp population and are moved to a separate location several days before the

flight's scheduled departure. Hong Kong government security officers then escort all those being mandatorily returned on to the plane and accompany the flight to Vietnam. Security officials have used limited force in the past when some nonrefugees resisted repatriation. To date the Government has returned 730 persons aboard 14 ORP flights.

The Government maintained its policy of deporting illegal Chinese immigrants to China, except in rare instances in which a person qualified as a refugee within the meaning of the U.N. Protocol on the Status of Refugees. In 1992 an average of 130 illegal immigrants, mostly young men, were arrested every day and returned to China. Over 2,400 ethnic Vietnamese living in China fled to Hong Kong during 1992. Called Ex-China Vietnamese Illegal Immigrants (EVCIIS) by the Government, they were not recognized as refugees by UNHCR or local authorities and were returned to China. Following China's expulsion of Han Dongfang, a Chinese labor organizer, when he returned to China in August, the Hong Kong Government has repeatedly renewed Han's permission to remain in the colony while he has continued efforts to obtain Chinese permission to return to his homeland.

Section 3 Respect for Political Rights: The Right of Citizens to Change Their Government

While Hong Kong is a free society, with most individual freedoms and rights protected by law and custom, citizens of the territory do not have the right to change their government. The Governor is appointed by and serves at the pleasure of the Crown. He is advised on policy by an executive council which he appoints.

Legislation is enacted and funds are provided by the Legislative Council which also debates policy and questions the administration. Although the legislature has virtually no power to initiate legislation, it has become more assertive since the September 1991 direct elections for some seats. The Governor has ultimate control of the administration of Hong Kong but, by convention, he rarely exercises his full powers. In practice, decisions reached through consensus. Political parties and independent candidates are free to contest seats in free and fair elections. Representative government employing universal franchise, however, does not exist. Only 18 of 60 legislators were elected by universal suffrage. Of the rest, 21 were either appointed by the Governor or are themselves government officials. Another 21 were elected by functional groupings, such as lawyers, industrialists, teachers, laborers, and accountants. Functional constituencies disproportionately represent the economic and professional elites and, moreover, violate the concept of one person-one vote, since voters in functional constituencies may vote both in a functional and a geographic constituency.

In his first policy address in October 1992, the Governor introduced several proposals intended to make the 1995 legislature more democratic. As originally proposed, the measures would give all eligible voters in the working population of 2.7 million a second vote in one of 30 functional constituencies. Furthermore, the election committee, which would elect 10 legislators, would draw all or most of its members from the local district boards, which the Governor proposed to be entirely directly elected, rather than one-third appointed, as is the case now. Even these measures, however, would not result in a fully representative, democratically elected government.

The Chinese Government, claiming it had not been consulted on these proposals, denounced them and warned that any changes which did not "converge" with the Basic Law, Hong Kong's post-1997 constitution, would be revoked when China resumes its exercise of sovereignty in 1997. Since April 1993, Chinese and British negotiators have been discussing the procedures for the 1995 Legislative Council elections, although

progress has been negligible. However, both the British and Chinese Governments earlier agreed that the number of legislators to be elected by universal suffrage in 1995 will increase to 20.

Section 4 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights

Although the Government to date has interposed no official barriers to the formation of local human rights groups, some human rights monitors believe that provisions of the Societies Ordinance provide the legal means whereby a future government could do so. The Government has consistently cooperated with international and nongovernmental organizations on human rights issues. The UNHCR and nongovernmental human rights organizations have full access to Hong Kong's camps for Vietnamese boat people.

Section 5 Discrimination Based on Race, Sex, Religion, Disability, Language, or Social Status

The Chinese language has equal status with English in many government operations. The Government is continuing efforts to place Hong Kong Chinese in senior positions. In September the Government announced the appointment of several locally born Hong Kong civil servants (mostly Chinese, but one locally born Indian) to key positions. For the first time a Hong Kong Chinese was appointed to the top civil service position. Overall, however, progress remains slow in replacing expatriates serving in other policy-related positions. Expatriates remain in key positions in the legal and police departments as well as the judiciary.

Complicating the Government's localization efforts have been expatriate government workers on local contracts who threaten legal action against the Government if they are not allowed to convert to regular civil service status. The Government's decision to allow long-resident expatriates with appropriate job qualifications to convert has drawn charges from local civil servant organizations that the Government has reneged on its localization policy. As of September, the Government's decision to allow expatriates to convert remained in effect although some members of the Legislative Council threatened to overturn it in the 1993-94 legislative session.

Women

Violence and discrimination against women remain significant problems. The only legislation to protect the rights of battered women is the 1987 Domestic Violence Ordinance, which enables a woman to seek a 3-month injunction against her husband. This may be extended to 6 months. In addition, domestic violence may be prosecuted as common assault under existing criminal statutes. The Government enforces these laws and prosecutes violators. Nevertheless, women's action groups continue to press for better legal and government provisions for battered wives. They call for public housing to house women as soon as they leave their violent husbands. Harmony House, a private voluntary agency, and the Social Welfare Department operate two homes which offer refuge to a small number of women. Harmony House also has conducted training programs for police personnel on how to deal with domestic violence. Many instances of domestic violence, however, are not reported, owing partly to cultural factors which frown on exposing family crises to the public eye but also to a lack of well-publicized information about the assistance and resources available.

Women face discrimination in areas of employment, salary, welfare, and promotion. While a number of women hold senior appointive government positions, only two were elected to the legislature.

Children

The Government supports child welfare programs including custody, protection, day care, foster care, shelters, and small group homes. Assistance is also provided to families. Child abuse and exploitation are not widespread problems in Hong Kong. The Government remains committed to the human rights and welfare of children.

People with Disabilities

Organizations and individuals representing the interests of the disabled claim that discrimination against the physically and mentally disabled exists in employment, education, and the provision of some state services. Access to public buildings and transportation remain problems for the physically impaired. Advocate groups have urged the Government to do more to encourage greater public tolerance of the mentally disabled. Harassment of and discrimination against families with mentally disabled children, for example, have occurred in some housing projects. There also has been criticism that mentally disabled children are not allowed opportunities to "mainstream" into public school programs. The Government is generally receptive and sympathetic to these concerns; it encourages greater employment for the disabled and seeks improved access to public facilities for those physically impaired. However, there is as yet no law mandating accessibility provisions for disabled persons.

Section 6 Worker Rights

a. The Right of Association

The right of association and the right of workers to establish and join organizations of their own choosing are guaranteed under local law. Trade unions must be registered under the Trade Unions Ordinance. The basic precondition for registration is a minimum of seven persons who serve in the same occupation. The Government does not discourage or impede the formation of unions. During 1992, 11 new unions were registered. However, only about 525,000 workers (or 18.5 percent) out of a total labor force of 2.84 million belong to one of the 522 registered unions, most of which belong to one of three major trade union federations.

Work stoppages and strikes are permitted. However, there are some restrictions on this right for civil servants. Even though the Employment Ordinance recognizes the right to strike, in practice most workers must sign employment contracts which typically state that walking off the job is a breach of contract and can lead to summary dismissal. The Employment Ordinance also permits firms to discharge or deduct wages from staff who are absent on account of a labor dispute.

Hong Kong labor unions may form federations, confederations, and affiliate with international bodies. Any affiliation with foreign labor unions requires the consent of the Government. All such requests have been granted. As a dependent territory of the U. K., Hong Kong is not a member in its own right of the International Labor Organization (ILO). The U.K. makes declarations on behalf of Hong Kong concerning the latter's obligations regarding the various ILO conventions.

To date, Hong Kong has implemented provisions applying 29 conventions in full and 18 other with modifications.

In the Basic Law, China undertook to continue to adhere to these conventions after 1997.

b. The Right to Organize and Bargain Collectively

The right to organize and bargain collectively is guaranteed by law. Hong Kong laws pertaining to collective bargaining cover mainly the shipping, textile, public transport, public utility, and carpentry trades, and the catering, construction, public service, and teaching professions. Wages are determined by market factors. While collective bargaining does take place, it is not widely practiced, and in general there are no mechanisms specifically to encourage it. Unions generally are not powerful enough to force management to engage in collective bargaining. The Government does not encourage it, since the Government itself does not engage in collective bargaining with civil servants' unions but merely "consults" with them. Free conciliation services are afforded by the Labor Relations Division of the Department of Labor (DOL) to employers and employees involved in disputes dealing with arrears of wages, wages in lieu of notice, severance pay, and breaches of contractual employment terms. The DOL is charged with finding a mutually acceptable settlement, although it does not have the authority to impose a solution. The DOL is not required by law to allow unions to represent employees in these proceedings. Instead, union representation depends upon the mutual consent of both the employee and the employer.
Workers are protected against antiunion discrimination under Hong Kong legislation. Employees who allege such discrimination have the right to have their cases heard by the DOL's Labor Relations Division. Employers who attempt to prevent or deter an employee from joining a labor union, or who terminate an employee for joining a labor union, are liable to a fine of approximately $650. However, the employers are not required to reinstate the employee or to compensate him.

The International Confederation of Free Trade Unions (ICFTU) is highly critical of the inadequacy of Hong Kong's labor legislation, with its failure to protect the right to strike, and provisions allowing dismissals and disciplinary action against trade unionists going on strike. The ICFTU cites as an example the 17-day strike by the Flight Attendant's Union at Cathay Pacific at the beginning of 1993, in which striking workers were threatened with disciplinary action and dismissal. Individual labor claims are also adjudicated by the Labor Tribunal, a part of the judicial branch, which is supposed to provide quick and inexpensive machinery for resolving certain types of disputes. The Tribunal complements the conciliation service provided by the Labor Relations Division. Union leaders complain, however, that the Tribunal takes too long--an average of 133 days--to hear workers' cases.

There are no export processing zones in Hong Kong.

c. Prohibition of Forced or Compulsory Labor

Existing labor legislation prohibits forced labor, and it is not practiced.

d. Minimum Age for Employment of Children

The Employment of Children Regulations prohibit the employment of children under age 15 in any industrial establishment. Children aged 13 and 14 may be employed in certain nonindustrial establishments, subject to conditions aimed at ensuring a minimum of 9 years' education and protecting their safety, health, and welfare. During 1992, 9

campaigns against the employment of children covered about 26,100 establishments and found 18 children working in violation of the law, according to the annual report of the Commissioner for Labor. A number of these cases were successfully prosecuted and fines of around $200 were levied.

e. Acceptable Conditions of Work

There is no minimum wage except for foreign domestic workers.

Aside from a small number of trades and industries where a uniform wage structure exists, wage levels are customarily fixed by individual agreement between employer and employee and are determined by supply and demand. In view of continued tightness in Hong Kong's labor market (unemployment averaged about 2.1 percent for 1993), wage increases were given to most workers, particularly those in the construction industry and service sectors. Many employees also receive a year-end bonus of a month's pay or more. Some employers in the manufacturing sector provide workers with various kinds of allowances, free medical treatment, and free or subsidized transport.

There are no legal restrictions on hours of work for men. The Women and Young Persons (Industry) Regulations under the Employment Ordinance control hours and conditions of work for women and young people aged between 15 and 17. Work hours are limited to 8 per day and 48 per week between 6 a.m. and 11 p.m. (between 7 a.m. and 7 p.m. only for women, however, this provision is very loosely enforced) for persons age 16 or over. Overtime is restricted to 2 hours per day and 200 days per year for women and is prohibited for all persons under 18 in industrial establishments. The regulations also prohibit women and young persons from working underground or, with the exception of males aged 16 and 17, in dangerous trades. The Labor Inspectorate conducts workplace inspections to ensure compliance with these regulations. During 1992 it carried out 198,748 inspections of approximately 190,000 establishments in industrial and nonindustrial sectors, which resulted in 3,624 prosecutions of employers and a wide range of fines depending on the seriousness of the violation. The employment of under aged workers is generally not a serious problem.

The DOL Factory Inspectorate sets basic occupational safety and health standards, provides education and publicity, and follows up with enforcement and inspection in accordance with the Factories and Industrial Undertakings Ordinance and subsidiary regulations. The Inspectorate pays particular attention to safety in high-risk areas of factories and construction sites, with routine visits to factories and construction sites. During 1992 inspectors visited 63,135 factories and 15,229 construction sites and issued 2,811 summons. As part of a complementary effort, the DOL Occupational Health Division investigates claims of occupational diseases and injuries at work, conducts environmental testing in the workplace, and provides medical examinations to employees in occupations that involve the handling of hazardous materials. The small number of inspectors--about 200--and the inability of workers to elect their own safety representatives weaken the enforcement of safety and health standards at the workplace.

There is no specific legal provision allowing workers to remove themselves from dangerous work situations without jeopardy to continued employment.

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THE BILL OF RIGHTS

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

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Andrew Byrnes and **Johannes Chan** are members of the Department of Law of the University of Hong Kong. Both teach and write in the area of human rights law **Johannes Chan** has written two books (in Chinese) on human rights in Hong Kong and published on international human rights topics as well as on the *Hong Kong Bill of Rights* **Andrew Byrnes** has published articles on international human rights law and on human rights in Hong Kong and served as a consultant to the Attorney General's Chambers of the Hong Kong Government during the drafting of the *Bill of Rights* **Steve Bailey** is Senior Assistant Crown Prosecutor with the Attorney General's Chambers, Hong Kong He has acted as the Government's principal advocate in criminal law cases in which *Bill of Rights* issues have been raised. **Editorial comments** are the sole responsibility of the editors (Andrew Byrnes and Johannes Chan) and should not be taken to represent the views of the University, the Faculty of Law or any other person

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INFORMATION ON DEVELOPMENTS

We would particularly appreciate information about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We also welcome comments and suggestions on the format and content of the *Bulletin*. We would like to thank John Bleach, Gerry McCoy, Peter Rhodes, Sabrina See, David Murphy, Phil Dykes, and Judges Jackson and Lugar-Mawson (as well as others) for providing us with information included in this issue of the *Bulletin*. This issue is based on (the necessarily incomplete) information available to the Editors as of the end of October 1994. We apologise for any errors or omissions.

CONTENTS

TABLE OF STATUTES AND OTHER SOURCES CONSIDERED

TREATIES

HONG KONG CONSTITUTIONAL DOCUMENTS AND LEGISLATION[1]

[1] Including Bills

[2] See also references under the corresponding articles of the *International Covenant on Civil and Political Rights.*

TABLE OF CASES

HONG KONG CASES

CASES PENDING BEFORE THE PRIVY COUNCIL OR IN WHICH SPECIAL LEAVE TO APPEAL HAS BEEN OR IS TO BE SOUGHT

R v Chan Chi-hung (1993) 3 HKPLR 243 (petition for special leave awaiting a hearing)

CASES FROM OTHER JURISDICTIONS

EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS

NATIONAL CASES

PRIVY COUNCIL

NEW ZEALAND

CUMULATIVE TABLE OF HONG KONG BILL OF RIGHTS CASES REPORTED TO DATE[1]

The Appeal Tribunal v de Kantzow (1991) 1 HKPLR 143, [1992] 1 HKLR 55 (CA)
Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 1 HKCLR 249, [1994] 1 AC 1, [1993] 3 WLR 242, [1993] 2 All ER 510
Attorney General v Lee Kwong-kut (1992) 2 HKPLR 94; [1992] 2 HKCLR 76 (CA)
Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man (1993) 3 HKPLR 72, [1993] 2 HKCLR 186, [1993] AC 951, [1993] 3 WLR 329, [1993] 3 All ER 939 (PC)
Attorney General v Osman (1991) 1 HKPLR 59, [1992] 1 HKCLR 35 (HCt)
Building Authority v Business Rights Ltd (1993) 3 HKPLR 609 (DCt)
Building Authority v Business Rights Ltd (1994) 4 HKPLR 43 (CA)
Commissioner of Inland Revenue v Lee Lai-ping (1993) 3 HKPLR 141
Duty Free Shoppers Hong Kong Ltd v Wong Kwok-pong (1991) 1 HKPLR 150
Re Eng Sui-hang and the United States of America (1991) 1 HKPLR 298
Re Hong Kong and Shanghai Banking Corporation (1991) 1 HKPLR 59, [1992] HKDCLR 37
Hong Kong Stationery Manufacturing Co Ltd v Worldwide Stationery Manufacturing Co Ltd (1991) 1 HKPLR 156
Re Le Tu Phuong (1994) 4 HKPLR 159 (CA)
Re Nattrass (1994) 4 HKPLR 234
Re Ng Hung-yiu and United States of America (1992) 2 HKPLR 209; [1992] 2 HKLR 383
Prime Computer (Hong Kong) Ltd v Sham Tak-leung (1991) 1 HKPLR 256, [1992] 1 HKLR 115
R v Alick Au Shui-yuen (1991) 1 HKPLR 71
R v Allen, ex parte Ronald Tse Chu-fai (1992) 2 HKPLR 266; [1993] 2 HKLR 453 (HCt)
R v Allen, ex parte Ronald Tse Chu-fai (1992) 2 HKPLR 282 (CA)
R v Benny Lai Kwai-wa (1993) 3 HKPLR 435
R v Chan Chak-fan (1993) 3 HKPLR 456 (DCt)
R v Chan Chak-fan; R v Lai Yiu-pui (1994) 4 HKPLR 115 (CA)
R v Chan Chi-hung (1993) 3 HKPLR 243, [1993] 2 HKCLR 212
R v Chan Chuen-kam (1993) 3 HKPLR 215, [1993] 1 HKC 241, [1993] 2 HKCLR 144
R v Chan Kein-wing (1993) 3 HKPLR 598, [1994] 1 HKCLR 41
R v Chan Kwok-tung (1993) 3 HKPLR 201
R v Chan Sau-sum (1993) 3 HKPLR 308
R v Chan Wai-ming (No 1) (1991) 1 HKPLR 292
R v Chan Wai-ming (No 2) (1992) 2 HKPLR 231; [1993] 1 HKCLR 51
R v Charles Cheung Wai-bun (1992) 2 HKPLR 1232; [1993] 1 HKCLR 189 (HCt)
R v Cheng Pui-kit (1991) 1 HKPLR 324
R v Deacon Chiu Te-ken (1992) 2 HKPLR 245
R v Deacon Chiu Te-ken (1993) 3 HKPLR 483, [1993] 2 HKCLR 21
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R v Chong Nok-pang (1991) 1 HKPLR 358
R v Crawley (1994) 4 HKPLR 62
R v Deputy District Judge, ex parte Chow Po-bor (1993) 3 HKPLR 101 (HCt)

[1] Up to (1994) 4 HKPLR, Part 1 (including vol 2 cases in press), and [1994] 1 HKLR Parts 1 & 2.

R v Director of Immigration, ex parte Li Jin-fei and others; R v Director of Immigration, ex parte Yan Chen Chang-mei and others; R v Director of Immigration, ex parte Pan Ze-yan and others (1993) 3 HKPLR 565 (CA)
R v Director of Immigration, ex parte Wong King-lung (1993) 3 HKPLR 253, [1993] 1 HKC 461
R v Eddie Soh Chee-hong (1991) 1 HKPLR 83
R v Egan (1993) 3 HKPLR 277, [1993] 1 HKCLR 284
R v Faisal (1993) 3 HKPLR 220
R v Flickinger (1993) 3 HKPLR 677
R v Fong Fu-ching (1993) 3 HKPLR 761
R v Fu Yan (1992) 2 HKPLR 109; [1992] 2 HKCLR 59
R v Hong Kong Polytechnic, ex parte Jenny Chua Yee-yen (1992) 2 HKPLR 334
R v Hui Kwok-fai (1993) 3 HKPLR 752
R v Ko Chi-yuen (1992) 2 HKPLR 310 (HCt)
R v Ko Chi-yuen (1994) 4 HKPLR 152 (CA)
R v Kwok Hing-man (1994) 4 HKPLR 186
R v Lai Kai-ming (1993) 3 HKPLR 58
R v Lai Yiu-pui (1993) 3 HKPLR 782 (DCt)
R v Lam Chau-on (1991) 1 HKPLR 271
R v Lam Kwok-keung (1993) 3 HKPLR 369
R v Lam Shun (1992) 2 HKPLR 14
R v Lam Tak-ming (1991) 1 HKPLR 222
R v Lam Wan-kow; R v Yuen Chun-kong (1992) 2 HKPLR 26; [1992] 1 HKCLR 272 (CA)
R v Lau Kung-shing (1993) 3 HKPLR 286, [1993] HKDCLR 57
R v Lau Kwok-hung (No 1) (1991) 1 HKPLR 19
R v Lau Kwok-hung (No 2) (1992) 2 HKPLR 261; [1992] 2 HKCLR 241
R v Lau Shiu-wah (1991) 1 HKPLR 202, [1992] HKDCLR 11 (DCt)
R v Lau Ting-fan (1992) 2 HKPLR 1
R v Lau Ting-man (1991) 1 HKPLR 249
R v Lee Kwong-kut (1991) 1 HKPLR 337
R v Lee Kwong-ming (1992) 2 HKPLR 91
R v Leung Ping-lam (1991) 1 HKPLR 52
R v Li Kwok-wa; R v Chiu Chi-kwong (1992) 2 HKPLR 11
R v Li Tat (1993) 3 HKPLR 171, [1993] 2 HKCLR 203
R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Limited (1994) 4 HKPLR 168
R v Lo Chak-man (1992) 2 HKPLR 220
R v Lo Hon-hin (1993) 3 HKPLR 622
R v Lo Wai-keung [1993] HKDCLR 47
R v Lum Wai-ming (1992) 2 HKPLR 182; [1992] 2 HKCLR 221
R v Ma Man-ho (1991) 1 HKPLR 314
R v Man Wai-keung (No 2) (1992) 2 HKPLR 164; [1992] 2 HKCLR 207
R v Mirchandani (1992) 2 HKPLR 196; [1992] 2 HKCLR 174
R v Ng Kam-fuk [1993] HKDCLR 29
R v Ng Po-lam (1991) 1 HKPLR 25
R v Ng Yiu-fai (1992) 2 HKPLR 158; [1992] 2 HKCLR 122
R v Securities and Futures Commission, ex parte Lee Kwok-hung (1993) 3 HKPLR 1 (HCt)
R v Securities and Futures Commission, ex parte Lee Kwok-hung (1993) 3 HKPLR 39, [1993] 2 HKCLR 51 (CA)
R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127; [1992] LRC (Const) 547 (CA)
R v Sze Yung-sang (1993) 3 HKPLR 211, [1993] 2 HKCLR 18
R v Tai Yiu-wah (1994) 4 HKPLR 56
R v Town Planning Board, ex parte Auburntown Ltd (1994) 4 HKPLR 194
R v Tran Viet Van (1992) 2 HKPLR 237; [1992] 2 HKCLR 184
R v Tse Kim-ho (1993) 3 HKPLR 298
R v Tsui Shek-law (1991) 1 HKPLR 346

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R v Wan Siu-kei (1993) 3 HKPLR 228
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R v William Hung (1993) 3 HKPLR 328, [1994] 1 HKCLR 47 (CA)
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R v Wong Chiu-yuen (1992) 2 HKPLR 323
R v Wong Hiu-chor (1992) 2 HKPLR 288; [1993] 1 HKCLR 107
R v Wong Lai-shing (1993) 3 HKPLR 766
R v Wong Sau-chuen (1994) 4 HKPLR 129
R v Wong Wai (1994) 4 HKPLR 245
R v Wong Yan-fuk (1993) 3 HKPLR 341
R v Wright, ex parte Lau Wing-wo (1993) 3 HKPLR 126
R v Yiu Chi-fung (1991) 1 HKPLR 167
R v Yu Yem-kin (1994) 4 HKPLR 75
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Re Sin Hoi (1992) 2 HKPLR 18; [1992] 1 HKLR 408 (CA)
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R v Director of Immigration, ex parte Chan Heung-mui (1993) 3 HKPLR 533
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R v Director of Immigration, ex parte Ho Ming-sai [1993] 2 HKLR 29 (HCt)
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R v Director of Immigration, ex parte Le Tu Phuong (1993) 3 HKPLR 641, [1993] 2 HKLR 303 (HCt)
R v Director of Immigration, ex parte Li Jin-fei (1993) 3 HKPLR 552, [1993] 2 HKLR 256 (HCt)
R v Director of Immigration, ex parte Li Jin-fei (1993) 3 HKPLR 565 (CA)
R v Director of Immigration, ex parte So Kam-cheung (1993) 3 HKPLR 587
R v Hui Lan-chak (1993) 3 HKPLR 184; [1993] 2 HKCLR 230 (CA)
R v Obscene Articles Tribunal, ex parte Freeman Holdings Ltd (1993) 3 HKPLR 604, [1993] 1 HKC 300 (CA)
R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd (1994) 4 HKPLR 5
R v Governor, ex parte Reid (1994) 4 HKPLR 18
R v Leung Kit-chun (1994) 4 HKPLR 38

EDITORIAL

CASE LAW DEVELOPMENTS

It has been some time since the appearance of the last issue of the Bulletin and we apologise for that delay. The period has been a busy one for the Bill of Rights and there have been a number of important issues decided by the courts -- particular in the area of administrative law, and a number of new laws passed and bills introduced concerning human rights matters

There have been several important decisions of the Court of Appeal on Bill of Rights issues. An important decision is *R v Kwok Hing-man* (at page 8 below), where the Court of Appeal granted leave to appeal out of time and allowed an appeal against conviction for an offence of being found in possession of property reasonably suspected of being stolen or unlawfully obtained, contrary to s 30 of the Summary Offences Ordinance (which has been repealed by the Bill of Rights) The conviction was entered after 8 June 1991, but before the Court of Appeal held that s 30 of the Summary Offences Ordinance was inconsistent with article 11(1) of the Bill of Rights in *Attorney General v Lee Kwong-kut*. This case was brought as a test case, and the Court of Appeal confirmed that it would allow an appeal out of time against a conviction of a non-existent offence. As we note in the Editorial comment, we have reached a stage at which the problem of retrospective repeal has to be revisited.

Another important development is the much awaited first decision of the Court of Appeal on the constitutionality of strict liability offences, an issue which has had a couple of false starts in the higher courts. In *R v Wang Shi-hung* (at page 28 below), the Court of Appeal held that strict liability offences are not inconsistent with the Bill of Rights simply because they impose strict liability. The court held that, while such offences may be inconsistent with the Bill of Rights, they would generally not be so if the conclusion that an offence imposes strict liability is reached after analysing the offence in the light of the criteria laid down in *Gammon*. The court reads into the provisions in question a defence of honest and reasonable belief, but it is not clear whether this is necessary to ensure the validity of the provision or whether such a defence is to be read in in all similar cases.

The notorious problem of whether a defendant is entitled to the lesser penalty when the offence for which he has been convicted has been amended and replaced at the time of his sentence by two new offences carrying different maximum penalties, came before the Court of Appeal again in *R v Tai Yiu-wah* (page 36 below). There are two different lines of Court of Appeal authority on this issue, one focusing on a formal comparison of the wording of the new and old offences, the other focusing on the substantive facts proved or admitted at the trial, to determine whether the defendant would be entitled to the benefit. It may be noted that the unsuccessful appellant in an earlier case has now petitioned the Privy Council for special leave for appeal.

There have also been a couple of cases involving missing witnesses or missing evidence. In *R v Yeung Chi-chiu* (page 23 below), the High Court ordered a stay of prosecution when one of the key prosecution witnesses disappeared. In *R v Chiu Kam-tu* (page 20 below), the High Court also ordered a stay of prosecution when the prosecution failed to produce in court the drug alleged to be possessed by the defendants.

Another important decision from the Court of Appeal is *R v To Kwan-hang* (page 40 below), where the Court of Appeal held that the right of peaceful assembly guaranteed by article 17 of the Bill of Rights has no application to an unlawful assembly as defined by s 18 of the Public Order Ordinance. As we note, the dividing line between a riotous assembly and one which is so provocative that it may attract hostile counter-demonstration is sometimes difficult to draw.

On the civil side, the most significant area of development is whether hearings before various disciplinary tribunals and statutory appeal bodies constitute a fair and public hearing by a competent, independent and impartial tribunals within the meaning of article 10 of the Bill of Rights. In *R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Ltd* (at page 12 below), the High Court held that the Registered Lift Contractors' Disciplinary Board was not an independent and impartial tribunal because it was chaired by the Director of Electrical and Mechanical Services who was also the complainant. It did not make any difference that the complaint was presented by a Crown Counsel of the Legal Department and that the hearing was chaired by a representative of the Director of Electrical and Mechanical Services who was not involved with the complaint. On the other hand, the mere fact that all members of the Disciplinary Board had to be recommended by the Director for appointment to the Board was not inconsistent with the guarantee of an independent and impartial tribunal contained in article 10. The last point was confirmed by the Court of Appeal in *Building Authority v Business Rights Ltd* (page 14 below), namely, the specified composition of the Building Appeal Tribunal, some of whose members were appointed by the Building Authority, cannot be said to have infringed article 10 because the specified composition was intended to ensure a balanced view and to ensure that at least one person on the tribunal is familiar with the administration of building controls under the statutory scheme in Hong Kong. However, the court does criticize the practice of involving a District Court judge in granting closure order when the judge has very little discretion to refuse the granting of the same. The Court of Appeal also took the view that by the time the matter came to the District Court for a closure order, there would be no "rights" left for determination and hence article 10 was not engaged. On a related issue Rhind J held in *R v Town Planning Board, ex parte Auburntown Ltd* (1994) 4 HKPLR 194 (*Bill of Rights Bulletin*, v 3 n 1, p 9) the promulgation of interim development area plan was a legislative act and did not involve any determination of rights and obligations in a suit at law. However, had it been otherwise, he would have held that the hearing before the Town Planning Board would not satisfy the requirement of a fair and public hearing before a competent, independent and impartial tribunal. This case is now pending appeal.

Election law has also been the subject of challenge under the Bill of Rights for the first time. In *R v Apollonia Liu, ex parte Lau San-ching* (at p 40 below), the well-known dissident who had been imprisoned in China for ten years for counter-revolutionary crimes, challenged the decision of the returning officer to exclude him from standing in the District Board elections. He was declared ineligible to be a candidate as he did not satisfy the requirement in s 18(2) of the Electoral Provision Ordinance that he have been ordinarily resident in Hong Kong for the ten years immediately before

the date of his nomination. Unfortunately, both the High Court and the Court of Appeal decided not to decide whether the s 18(2) requirement constituted an unreasonable restriction of the right to be elected within the meaning of article 21 of the Bill of Rights The application for judicial review was dismissed on the ground that the proper procedure for challenging the decision of the returning officer was by way of election petition after the election, and not by judicial review before the election.

Of equal interest is the decision in *L v C* (at page 49 below). In this case the High Court found the provision in the Affiliation Proceedings Ordinance which imposed a time limit of one year for the mother of an illegitimate child to apply for maintenance from the putative father, was inconsistent with the guarantee of equality before the law under article 22 of the Bill of Rights. This is the first time the Bill of Rights has been applied to family law. While the decision may appear to be per incuriam (because it involves an inter-citizen dispute), we are of the view that this is the proper approach.

AMENDMENT OF THE LETTERS PATENT

As part of the amendments to the Letters Patent resulting from the passage of the Governor's electoral reforms earlier this year, article VII of the Letters Patent has been amended and renumbered. Article VII(3) of the Letters Patent -- which incorporates the ICCPR as applied to Hong Kong into the Letters Patent -- was renumbered as article VII(5) The rather clumsy result of this renumbering is that the controlling standard for laws passed between 8 June 1991 and 30 June 1994 is "article VII(3)" of the Letters Patent, while the controlling standard for laws passed on or after 1 July 1994 is "article VII(5)" of the Letters Patent -- despite the fact that the provisions are identical in wording. The confusion that may result seems unnecessary and unfortunate.[1]

[1] The Legal Department has recently adopted a new drafting practice also likely to result in confusion for cross-references in subsidiary legislation to other provisions of such legislation. This involves referring to the provisions of subsidiary legislation as "sections" rather than "regulations" or "rules". Thus, in *R v Apollonia Liu, ex parte Lau San-ching* (page 45 below) the court considered the issue of whether "section 9(2)" of the Boundary and Election Commission (Electoral Procedures)(Geographical Constituencies) Regulations (previously "regulation 9(7)") was ultra vires "section 7" of the Boundary and Election Commission Ordinance. This change in style, criticised by the Court of Appeal in *Lau San-ching*, is not conducive to clarity and perhaps some thought could be given to returning either to the old style or, if that is defective, to another style which does not create apparently needless confusion.

OTHER DEVELOPMENTS

Equal opportunities legislation[2]

In early July 1994 the Hon Ms Anna Wu Hung-yuk introduced into the Legislative Council her Equal Opportunities Bill The Equal Opportunities Bill 1994 would make it unlawful to discriminate on the grounds of sex, marital status, pregnancy, family responsibility, sexuality, race, political or religious conviction, trade union membership or activities, or spent conviction The Bill would cover discrimination on these grounds in the area of work, provision of goods, services and facilities, accommodation, conferral of qualifications, and the administration of government laws and programmes The Bill makes explicit reference to a number of international treaties applicable to Hong Kong and other international standards A copy of the explanatory memorandum to the Bill appears as Appendix D (at page 65 below)

The Equal Opportunities Bill was drafted as part of a package, of which Wu's proposed Human Rights and Equal Opportunities Bill formed the second part That Bill proposed the establishment of a Human Rights and Equal Opportunities Commission which would have had responsibility for administering the Equal Opportunities Bill and for receiving complaints of human rights violations, as well as conducting research, promulgating standards and promoting human rights education.

However, the Governor refused to give his consent to the introduction of the Bill into the Legislative Council. His consent was necessary because the Bill was a private member's Bill with financial implications. In view of the fact that the administration has recently introduced a bill which would establish an Equal Opportunities Commission, which would perform some, but by no means all, of the functions Wu's proposed commission would have performed, the government's refusal to allow the Legislative Council to debate the merits of the Wu proposals seems curiously inconsistent with the Governor's oft-repeated commitments to taking the views of the Legislative Council seriously

Undeterred by the fact that there was already a Bill covering sex discrimination before the Legislative Council, the administration introduced its own Sex Discrimination Bill into the Council at the end of October Based on the United Kingdom's Sex Discrimination Act 1975 as opposed to the more recent Australian models (on which the Wu Bills draw), it covers much of the same ground as the Equal Opportunities Bill, though it uses a slightly different terminology and structure The major differences between the two Bills are that the administration's bill is limited to sex discrimination and it contains many exemptions and deferrals, and includes a proposed Equal Opportunities Commission.

The Equal Opportunities Bill was referred to a Bills Committee at the end of July and the Bill has begun to be examined in detail. The House Committee of the Legislative Council

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[2] In the interests of full disclosure it should be mentioned that one of the editors (AB) has been closely involved in the drafting of the Bills prepared by Ms Wu.

decided to refer the administration's bill to the same Bills Committee, which decided on 4 November 1994 to take Wu's Bill as the framework for its consideration and to consider the administration's bill in that context The administration has announced its intention to introduce disability discrimination legislation some time in early 1995 In view of the fact that there is no UK model that can be used as a basis for its draft, it seems likely that any legislation would draw on existing models (including the Australian ones which form the basis of Wu's Bill) One wonders whether it would not be a more productive use of public resources and legislative time if the administration concentrated not so much on bringing out a bill of its own, but in examining the Equal Opportunities Bill to consider whether its disability discrimination provisions are appropriate Unfortunately, the approach of the administration to date suggests that it is quite likely that we will see a repeat of the manner in which the government has introduced its sex discrimination legislation

INTERNATIONAL DEVELOPMENTS CONCERNING HONG KONG

General comment on the rights of minorities adopted by the Human Rights Committee

At its 50th session, held in April 1994, the Human Rights Committee adopted *General comment No 23(50)*, which deals with the rights of person belonging to minorities guaranteed under article 27 of the International Covenant on Civil and Political Rights (in identical terms to article 23 of the Bill of Rights). The text of the *General comment* appears at Appendix A (page 59 below) The Committee adopted a further *General comment*, on reservations to the Covenant, at its 52nd session, in October/November 1994 The text of that *General comment* will be included in the next issue of the *Bulletin*.

Hearings before the United Nations Committee on Economic, Social and Cultural Rights

The reports of the United Kingdom in respect of Hong Kong dealing with articles 10-15 of the International Covenant on Economic, Social and Cultural Rights will be examined by the United Nations Committee on Economic, Social and Cultural Rights at its 11th session, to be held in Geneva in late November/early December 1994. The United Kingdom's reports will be considered on 23 and 24 November 1994; it is likely that a number of Hong Kong non-governmental organisations will make public representations to the Committee on the opening day of the session, 21 November 1994. The Constitutional Development Panel of the Legislative Council is also sending a delegation of two members to the Committee's session.

The Faculty of Law of the University of Hong Kong, in association with a number of local non-governmental organisations (in particular the non-governmental Hong Kong Human Rights Commission), held a seminar on the implementation of the International Covenant on Economic, Social and Cultural Rights in Hong Kong on 15 October 1994. The purpose of the seminar was to examine the situation in Hong Kong in the light of the government's reports to the United Nations, and experts in a number of areas presented critiques of the government's reports. Attending the seminar was a member of the Committee on Economic, Social and

Cultural Rights, Professor Virginia Bonoan-Dandan, Professor of Fine Arts at the University of the Philippines Professor Bonoan-Dandan presented a paper on the work of the Committee, and took the occasion of her visit to Hong Kong to receive briefings from a number of non-governmental organisations on the implementation of the Covenant in Hong Kong

Extension of the Convention on the Rights of the Child to Hong Kong

After a long period of anticipation, the United Nations Convention on the Rights of the Child has finally been extended to Hong Kong [3] The United Kingdom deposited its instrument extending the Convention with the United Nations in New York on 7 September 1994 The extension was not announced in Hong Kong until October, the time when the Convention was believed to enter into force for Hong Kong (30 days after deposit of an instrument of access or ratification) However, the United Nations Office of Legal Affairs has taken the view that extension was effective from the date of deposit, 7 September 1994 In either event, there seems to have been little justification of the United Kingdom and Hong Kong governments not to have announced the deposit of the instrument and to have released the text of the instrument and any reservations at that time

While the extension of the Convention to Hong Kong is to be welcomed, the event is marred by the reservations which the United Kingdom government (presumably partly at the behest of the Hong Kong government) has thought it appropriate to make In addition to the reservations made by the United Kingdom when it ratified the Convention in respect of its metropolitan territory, further reservations have been added These include reservation of the right not to apply article 32(b) of the Convention in so far as it might require the regulation of the hours and conditions of work of persons aged 15 and over in non-industrial establishments, to article 37(c) in so far as the separate accommodation of detained children and adults is concerned, a reservation in relation to children seeking asylum The United Kingdom has previously reserved its right to restrict the application of the Convention in relation to various areas of citizenship and nationality laws. (The full text of the reservations appears in Appendix B, at page 63 below)

Under the Convention the State party is required to submit its initial report within two years of entry into force of the Convention for the State party concerned In the case of Hong Kong, this will mean that the United Kingdom will be obliged to submit its report in respect of Hong Kong no later than 6 September 1996 However, the United Kingdom has adopted a practice of submitting reports in respect of Hong Kong only when reports from the other dependent territories have also been received. This means that, even if the Hong Kong report is prepared on time (or even well in advance of September 1996), the United Kingdom may not actually submit the report to the United Nations in time for the report to be reviewed before 1 July 1997. (The Hong Kong report under the Convention against Torture, due to be

[3] The text of the Convention is reproduced in A Byrnes and J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths Asia, 1993).

submitted in January 1994, was completed in draft by the Hong Kong authorities on time, but has still not -- 10 months later -- been submitted to the United Nations or released to the people of Hong Kong) In view of the proximity to the transfer of sovereignty of the deadline for submitting the report to 1997, we believe that a strong case can be made for submitting the Hong Kong report separately if necessary in order to ensure its consideration before 1 July 1997

Overdue reports

At present there are a number of reports due under United Nations human rights treaties in respect of Hong Kong which have not been submitted on time They include the report under the Convention against Torture (due January 1994), the third periodic report under the International Covenant on Civil and Political Rights (due August 1994), and the comprehensive report on the provisions of the International Covenant on Economic, Social and Cultural Rights. The government is understood to be working on the next report under the International Convention on the Elimination of All Forms of Racial Discrimination, once again without public consultation The last few reports have claimed that there is no racial discrimination in Hong Kong, a view that consultation with members of the community might have modified.

OTHER INTERNATIONAL DEVELOPMENTS

At a Judicial Colloquium organised by the Commonwealth Secretariat and held at Victoria Falls in Zimbabwe, a group of Commonwealth judges adopted the Victoria Falls Declaration on the Promotion of the Human Rights of Women. The Declaration deals with a number of aspects of the role of judges and lawyers in promoting the human rights of women; the text of the Declaration is reproduced at Appendix C.

CASES

APPLICATION OF THE BILL OF RIGHTS ORDINANCE

Bill of Rights – Application – Commencement date – Statutory provisions inconsistent with Bill of Rights repealed with effect from 8 June 1991 – Hong Kong Bill of Rights Ordinance (Cap 383), s 3(2)

***R v Kwok Hing-man* (1994) CA, Mag App of No 371 of 1994, Yang CJ, Penlington and Nazareth JJA, 9 June 1994, (1994) 4 HKPLR 186**

The applicant had been convicted by a magistrate on 5 September 1991 of the offence being found in possession of property reasonably suspected of being stolen or unlawfully obtained, contrary to s 30 of the Summary Offences Ordinance (Cap 228). This provision was subsequently held by both the Court of Appeal and the Privy Council to be inconsistent with the right to be presumed innocent until proved guilty according to law embodied in article 11(1) of the Bill of Rights Section 30 was therefore held, pursuant to s 3(2) of the Hong Kong Bill of Rights Ordinance (Cap 383), repealed with effect from the date of commencement of that Ordinance (8 June 1991)· (1992) 2 HKPLR 94 and (1993) 3 HKPLR 72

Following the decision of the Privy Council, the applicant sought leave to appeal against his conviction. His application for leave to appeal was some 2½ years out of time. The matter was referred to the Court of Appeal by Yang CJ. The applicant argued that he had been convicted of a non-existent offence, that the courts should not be seen to be supporting a continuing conviction of such an offence, and that therefore leave should be granted. The applicant also invited the court to make some suitable pronouncement to enable the convictions of 385 other persons convicted under this section since 8 June 1991 to be set aside and expunged, so that each person affected would not have to bring an individual application for leave to appeal

The Crown argued that leave should be refused, since what was involved was no more than the removal of a misconception of the prior state of the law upon which a conviction had been based The Crown also argued that there was a need for finality in criminal proceedings and that in this case there had been no intention to appeal within the time limit and the delay had not been adequately explained.

Held: (granting leave and setting aside the conviction):

While the need for finality in the criminal process was desirable, the issue here was not so much one of the criminal process itself but the direct result of the legislative scheme adopted under the Bill of Rights Ordinance. Where a person has been convicted of what can plainly be seen to have been unquestionably a

non-existent offence, it is difficult to see how his application for leave to appeal out of time could be refused in the absence of some special circumstances Accordingly, the application should be granted and the appeal allowed

R v Mitchell [1977] 1 WLR 753, followed

N Sarony QC and J Cheng (instructed by the Director of Legal Aid), for the applicant, S R Bailey (of the Attorney General's Chambers), for the Crown/respondent

Editorial comment

This decision testifies to the serious problem caused by the current interpretation of s 3(2) of the Bill of Rights Ordinance, a problem which commentators have pointed to previously, namely, any act done or any criminal conviction entered after 8 June 1991 pursuant to a statutory provision which has since then been declared inconsistent with the Bill of Rights will be null and void. (See *Bill of Rights Bulletin*, v 2, n 3, pp 1- 2) In this case 386 criminal convictions entered between 8 June 1991 and the date of the judgment of the Privy Council in *Attorney General v Lee Kwong-kut* have to be expunged Recently the Court of Appeal has, in *R v Chong Ah-choi* (see page 25 below), reversed an earlier decision of the District Court on s 17 of the Summary Offences Ordinance, and a similar problem of having to expunging criminal convictions entered between the operation date of the Bill of Rights and the date of the decision of the Court of Appeal is likely to arise The implications of retrospective repeal may be even more far-reaching in the civil context for example, if the statutory appeal procedure before the Town Planning Board is declared to be inconsistent with the Bill of Rights, would all decisions made by the Town Planning Board after 8 June 1991 be null and void? As has been pointed out, the problem will become more acute as time passes and we may now have reached a critical stage so that the Hong Kong courts or legislature should consider seriously whether prospective repeal is desirable and how one might go about achieving that

APPLICATION TO GOVERNMENT AND PUBLIC AUTHORITIES (HONG KONG BILL OF RIGHTS ORDINANCE, S 7(1))

Bill of Rights -- Application -- Public authorities -- Bar Association -- Whether restrictions in Bar Association's Code of Conduct involved the action of a public authority

Hong Kong Bar Association v Anthony Chua **(1994) Barristers Disciplinary Tribunal, A Hoo QC, S Westbrook, Shum Choi Sang, 15 September 1994**

See page 39 below.

EXCEPTIONS AND SAVINGS (HONG KONG BILL OF RIGHTS ORDINANCE, S 11)

Bill of Rights -- Application -- Immigration -- Whether Bill of Rights applies to decisions of Director of Immigration refusing to permit persons to remain indefinitely in Hong Kong -- Effect of provision providing that Ordinance does not affect immigration legislation governing entry into, stay in and departure from Hong Kong as regards persons without right to enter and remain in Hong Kong

***R v Director of Immigration, ex parte Hai Ho-tak; R v Director of Immigration, ex parte Wong Chung-hing and others* (1994) CA, Civ Apps Nos 64 and 145 of 1993, 8 April 1994, Nazareth, Mortimer and Godfrey JJA**

This case involved two appeals by illegal immigrants challenging removal orders made against them by the Director of Immigration as well as the Director's decisions to refuse to exercise his discretion to allow them to stay in Hong Kong on humanitarian grounds pursuant to s 13 of the Immigration Ordinance (Cap 115) In the first appeal the appellant was a minor child whose parents and three siblings had a right of abode in Hong Kong A removal order was made against him on 13 September 1991. He alleged he was born in Hong Kong, but the Director, and on appeal, the Immigration Tribunal, concluded he had failed to establish this claim He applied for leave to apply for judicial review of the removal order, arguing that the removal order constituted an infringement of his rights under articles 1, 14(1), 15(4), 20(1) and 22 of the Bill of Rights Rhind J refused the application on the ground that s 11 of the Bill of Rights Ordinance precluded the applicant from asserting such rights. This decision was challenged on appeal.

In the second case the appellants were the mother (who was an illegal immigrant from China), the father and four children, all of whom were Hong Kong residents. A removal order was made against the mother on 9 May 1991. On 3 December 1992 the Director of Immigration refused to exercise his discretion under s 13 of the Immigration Ordinance to allow her to stay on humanitarian grounds. The appellants applied for judicial review of the decision on the grounds that the Director's decision was inconsistent with the Bill of Rights and Wednesbury unreasonable. Jones J held, as a preliminary issue, that s 11 of the Bill of Rights Ordinance precluded both an illegal immigrant and her family members who were Hong Kong residents from challenging the Immigration Ordinance under the Bill of Rights and dismissed the application for judicial review insofar as it was based on the Bill of Rights (1993) 3 HKPLR 253.[4] The appellant challenged this decision on appeal.

Section 11 of the Bill of Rights Ordinance provides:

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[4] Jones J subsequently dismissed the remaining grounds of the application for judicial review: *R v So Kam-cheung* (1993) 3 HKPLR 587.

"**11. Immigration legislation**

As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation "

Held (dismissing the appeals):

1 The decision whether to exercise his discretion under s 13 of the Immigration Ordinance is for the Director of Immigration alone. Provided that he takes this decision fairly and according to law, the courts will not interfere by way of judicial review.

2. The court will interpret a statutory provision so as to avoid absurdity only if the provision is ambiguous or obscure. As section 11 is neither obscure nor ambiguous, there is no reason to give it other than its ordinary and literal meaning

3. The effect of s 11 is that, as regards any person not having the right to enter and remain in Hong Kong, the Bill of Rights Ordinance cannot be invoked so as to affect any immigration legislation governing his entry into, stay in or departure from Hong Kong, or the application of any such legislation. The provision is of general effect, so that all citizens, whether illegal immigrants or others such as their close family members, are prevented from invoking their rights in the Bill of Rights

4. If an illegal immigrant who does not have a right to enter and remain in Hong Kong could not himself invoke the provisions of the Ordinance relating to his rights as a member of the family, it cannot make sense to accord other members of the family the right to invoke those provisions in relation to their rights as members of the same family. Section 11 should not be construed so as to attribute a non-sensical intention to the legislature.

Per Godfrey JA

"However extreme the facts, there is no appeal, either to the Immigration Tribunal, or to the Court, against a decision of the Director of Immigration not to exercise the discretion, conferred on him by section 13 of the Immigration Ordinance, ~~Cap 115, to allow an illegal immigrant to remain here~~. I would venture to renew the plea I made in *R v Director of Immigration, ex parte Chan Heung-mui* (1993) 3 HKPLR 533, for amendment of the Immigration Ordinance so as to provide for, at least, a limited right of appeal in cases where it might appear that because of exceptional circumstnaces of a humanitarian nature, it would be unduly harsh or unjust to deport the appellant. So far, this plea seems to have fallen on deaf ears, which is disappointing."

G Watson (instructed by C K Tse & Co), for the appellant in Civ App No 64 of 1993.
Appellants in Civ App No 145 of 1993, in person.
W Marshall QC and M Datwani (of the Attorney General's Chambers), for the respondent.

RIGHT TO LIBERTY OF MOVEMENT (ARTICLE 8, BILL OF RIGHTS; ARTICLE 12, ICCPR)

See *In re Tin Sau-kwong*, at page 17 below.

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

Bill of Rights -- Right to a fair and public hearing before a competent, independent and impartial tribunal -- Independent and impartial tribunal -- Registered Lift Contractors' Disciplinary Board -- Whether composition consistent with article 10 of Bill of Rights

***R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Limited* (1994) HCt, MP No 3609 of 1993, Penlington JA (sitting as an additional High Court judge), 6 June 1994, (1994) 4 HKPLR 168**

As the result of an accident in which a member of the public was killed during maintenance of a lift by the applicant, a lift contractor, the applicant was charged with negligence by the Director of Electrical and Mechanical Services, pursuant to s 11G of the Lifts and Escalators (Safety) Ordinance (Cap 327). Such charges are heard by the Registered Lift Contractors Disciplinary Board, appointed pursuant to s 11E of the Ordinance. If the Board finds that a charge has been established, it may order that the name of the contractor be removed from the list of registered contractors, be fined up to $50,000, or that the contractor be reprimanded (s 11G(2)).

Section 11E of the Ordinance provides that the Board in a given case shall consist of 6 members, one of whom is to be the Director or his representative, who is to serve as chair of the board. The members of a board are chosen from a panel appointed by the Secretary for Planning, Environment and Lands, and no person may be appointed to the panel unless he has been recommended by the Director. A right of appeal lies to a judge of the High Court from a decision of a disciplinary board; on appeal the judge may confirm, reverse or vary the order of the board or may remit the matter to the board.

The applicant argued before the Board that the membership of the Director or his representative on the Board was inconsistent with the guarantee of an independent and impartial tribunal contained in article 10 of the Bill of Rights, since the Director was effectively the prosecutor of the charge. The Board rejected this argument. The applicant sought judicial review of this decision of the Board, applying for a declaration that ss 11E and/or 11G were inconsistent with the Bill of Rights and that the Board had been invalidly appointed and had no

jurisdiction to adjudicate upon the complaint The applicant also sought orders preventing the Board from proceeding with the hearing and preventing the Director from purporting to appoint a new Board to hear the complaint against the applicant. The respondent argued that, since there was an appeal to the High Court (which would hear the appeal de novo), the guarantee contained in article 10 was satisfied by the possibility of such a rehearing

Held:

1. So far as the guarantees of independence and impartiality contained in article 10 of the Bill of Rights are concerned, the test to be applied in considering whether a person should not sit in a judicial or quasi-judicial capacity when considering any particular matter is whether there is a real possibility that he might be biased.

   R v Gough [1993] AC 646, considered.

2. The general requirement that persons should not be appointed to a disciplinary board unless they have been recommended by the Director was not inconsistent with article 10 of the Bill of Rights.

3 Section 11E(2)(d), which provided that the Director or his representative shall be a member of a Disciplinary Board appointed under that section, was inconsistent with the requirement of independence and impartiality contained in article 10 of the Bill of Rights, since the Director was in effect and in terms the prosecutor or complainant. The fact that the Director did not intend to sit as chair of the Board himself did not alter the situation.

4. Accordingly, the Board was invalidly appointed and had no jurisdiction to hear the complaint against the applicant.

5. It was not appropriate to grant an order prohibiting the Director from appointing a new Board under s 11E to hear the complaint against the applicant. The only ground for doing so would be that the manner in which the other members of the Board are appointed was also contrary to the Bill of Rights, which was not the case. There is nothing improper in the members of the panel from which the Board is selected being appointed on the recommendation of the Director.

J Bleach (instructed by Wilkinson & Grist), for the applicant.
L Shine (of the Attorney General's Chambers), for the respondent.

Bill of Rights -- Right to a fair hearing by a competent, independent and impartial tribunal -- Demolition order -- Closure order -- Whether there is any "determination" of rights and obligations -- Whether composition of Appeal Tribunal consistent with article 10 of Bill of Rights, art 10 -- Whether oral hearing required by Bill of Rights

***Building Authority v Business Rights Limited* (1994) CA, Civ App No 212 of 1993, Power VP, Nazareth and Litton JJA, 19 May 1994, (1994) 4 HKPLR 43**

The appellant was the owner of a plot of land in Shek O village, on which his predecessor had erected a three-storey building without the approval of the respondent and in spite of a warning letter from the respondent on 7 November 1990. On 30 January 1991 the respondent made a demolition order which was not complied with As a result, the respondent sought a closure order pursuant to s 27 of the Buildings Ordinance (Cap 123) Notice of intention to apply for a closure order was served on the appellant on 21 November 1991. The appellant appealed unsuccessfully against this decision. However, as the result of the appeal was not announced until August 1992, the respondent issued, on 8 October 1992, a fresh notice of its intention to apply for a closure order. In February 1993 the Appeal Tribunal dismissed the appellant's appeal against this decision. Following this, the respondent applied to the District Court for a closure order. Upon being satisfied that s 27(2) of the Building Ordinance had been complied with, Judge Downey made a closure order and rejected the appellant's arguments that the court did not have the jurisdiction to make the order as s 27 was inconsistent with the Hong Kong Bill of Rights and had since 8 June 1991 been repealed (1993) 3 HKPLR 609. On appeal, the appellant argued that Judge Downey was wrong in law, maintaining that s 27 of the Buildings Ordinance was inconsistent with articles 10 and 14 of the Bill of Rights

Section 27(1) of the Buildings Ordinance provides:

"(1) Upon the application of--

(a) the Building Authority, where he is of the opinion that--

(i) any building is dangerous or liable to become dangerous, or

(ii) any building should be closed in order to enable any works, which he is empowered to carry out or cause to be carried out under this Part, to be carried out without danger to the occupiers or to the public; or

(b) the owner--

(i) where a notice has been served upon him by the Building Authority requiring closure of a building under section 26; or

(ii) where the Building Authority has supplied a certificate to him showing that a building should be closed in order to enable building

works to be carried out without danger to the occupiers or to the public,

the District Court shall on being satisfied that notice has been given in accordance with the provisions of subsection (2) make a Closure Order "

Held (dismissing the appeal):

Rights and obligations in a suit at law

1 Irrespective of whether the application for a closure order before the District Judge falls within the meaning of a "suit at law" under article 10 of the Bill of Rights, the appellant had no "rights" in any real sense to be protected He had neither the right to erect the building nor the right to occupy the building, as those acts were undoubtedly illegal What the Building Authority has been seeking to do is to end the illegality

Independent and impartial tribunal

2 The test of independence and impartiality of the tribunal is whether a tribunal appointed under s 43 of the Buildings Ordinance would be considered by a responsible and well-intentioned member of the public to be independent and impartial, that is, whether such a tribunal would be considered likely to be biased in hearing appeals

R v Gough [1993] AC 646, followed.

3. A body cannot be regarded as independent and impartial within the meaning of article 10 of the Bill of Rights where the body has taken part in the adjudication of a matter and also has a role in the determination of an appeal from that decision.

4. (Nazareth JA not deciding) Given the need for speedy decisions, the desirability of having as a member of the tribunal at least one person who is familiar with the administration of building controls under the statutory scheme in Hong Kong, and the fact that the specified composition of the tribunal was intended to ensure a balanced view, the composition of the Appeal Tribunal cannot be said to have infringed article 10 of the Bill of Rights.

"Determination" of rights and obligations

5. The making of a closure order is a judicial act, though the exercise of judicial function is very limited.

6. An application for a closure order comes at the final stage of law enforcement. By the time the matter reaches the District Court under s 27 of the Buildings Ordinance, there would be no "rights" left which could in any way be decisive of the ownership, use or enjoyment of property. Accordingly, article 10 of the Bill of Rights is not engaged when a District Judge makes a closure order under s 27(1)(a)(ii).

R v Town Planning Board, ex parte Auburntown Ltd (1994) 4 HKPLR 194, approved

Fair and public hearing

7 The tribunal may only refuse a hearing if no good cause has been shown It must be in the public interest that the tribunal be empowered to dismiss an appeal without an oral hearing when the appeal is wholly lacking in merit, or is frivolous and vexatious so that no good cause has been shown This does not constitute even a prima facie infringement of article 10 of the Bill of Rights

Privacy

8 Section 27(1)(a)(ii) sets out the legal procedure for the District Court to make a closure order on the Building Authority's application, and there is nothing inconsistent with the guarantee of privacy in article 14 of the Bill of Rights

Per Nazareth JA

"It is the Building Authority that decides whether a building is dangerous or whether it should be closed to enable works to be done Why then it is the District Court that should be required by law to issue the closure order is not clear It seems to me that the retention in the law of this provision should be re-examined "

D Fung QC and J Mok (instructed by Boase & Cohen), for the appellant, P Dykes and A Wu (Crown Solicitor), for the respondent

Town Planning Ordinance (Cap 131), ss 6, 7

Town planning -- Town Planning Board -- Whether article 10 applies -- Whether an independent and impartial tribunal -- Whether promulgation of Development Area Plan involves a "determination" of "rights and obligations in a suit at law"

***R v Town Planning Board, ex parte Auburntown Ltd* (1995) CA, Civ App No 88 of 1994, on appeal from (1994) 4 HKPLR 194**

This case was noted in an earlier issue of the *Bulletin* (v 3, no 1, pp 9-16). It involved, inter alia, a challenge to the appeal procedure before the Town Planning Board as prescribed under ss 6 and 7 of the Town Planning Ordinance (Cap 131) Rhind J held that article 10 of the Bill of Rights was not applicable because the promulgation of interim development area plan was a legislative and not administrative act Had it been otherwise he would have found that the Town Planning Board was not an independent and impartial tribunal within the meaning of article 10 of the Bill of Rights. The applicant has since then appealed to the Court of Appeal. The appeal is set down for 24-26 January 1995.

R v Town Planning Board, ex parte Kwan Kong Co Ltd **(1995) HCt, MP No 1675 of 1994**

This case raises issues similar to that of *R v Town Planning Board, ex parte Auburntown Ltd* The applicant complains that the Town Planning Board, in refusing to amend the Outline Zoning Plan which has the effect of depriving the applicant's rights as a registered owner over a particular site, has acted contrary to the rules of natural justice, and that the Town Planning Board, in hearing the applicant's objections to the Outline Zoning Plan, was not an independent and impartial tribunal Accordingly, the Applicant's right under article 10 of the Bill of Rights has been violated

Right to a fair hearing -- Right of access to court -- Whether exclusion of judicial review before election constitutes a denial of the right of access to court

***R v Apollonia Liu, ex parte Lau San-ching, R v Thomas Chow Tat-ming, ex parte Eric Chan Po-ming, R v Thomas Chow Tat-ming, ex parte Richard Fung Chan-ki* (1994) HCt, MP Nos 2302, 2263 and 2312 of 1994, Mayo J, 2 September 1994; (1994) CA, Civ App Nos 159, 160 and 161 of 1994, Nazareth, Litton and Godfrey JJA, 9 September 1994**

See page 45 below

Disciplinary proceedings -- Public hearing -- Mandatory prescription that disciplinary proceedings be conducted in camera -- Discretion to conduct public hearing -- Legal Practitioners Ordinance (Cap 159), s 35A(3) -- Bill of Rights, art 10

***Hong Kong Bar Association v Anthony Chua* (1994), Barristers Disciplinary Tribunal, A Hoo QC, S Westbrook, Shum Choi Sang, 15 September 1994**

See page 39 below.

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

Right of access to court -- Whether requirement that person apply first to ICAC Commissioner before applying to court violated right

***Re Tin Sau-kwong* (1994) Mag, Mr G Andrée-Wiltens**

Section 17A(1) of the Prevention of Bribery Ordinance (Cap 201) provides that a magistrate may, upon the "application ex parte" of the Commissioner of the ICAC, order a person who is "the subject of an investigation in respect of an offence alleged or suspected to have been committed by him" to surrender his or her travel documents to the Commissioner Section 17A(6B) provides that, where a notice ordering a person to surrender travel documents has been served on the person and the notice has been complied with, the notice "shall not thereafter be revoked or withdrawn." Section 17B provides that the person affected has a right to apply to the Commissioner for the return of his travel documents and the

Commissioner may accede to the request, decline in or agree to it subject to the person's agreeing to certain conditions Where the Commissioner refuses to return the travel documents or is prepared to do so only subject to conditions, the person affected may appeal to a magistrate pursuant to s 17B(5) The magistrate may order the return of the documents absolutely or upon conditions

The applicant was arrested by the ICAC and subsequently the ICAC obtained an order under s 17A of the Prevention of Bribery Ordinance ordering that he surrender his travel documents The applicant subsequently applied, pursuant to s 17B, to the Commissioner for the return of his passport, a request declined by the Commissioner The Commissioner shortly thereafter offered to return the applicant's passport if the applicant accepted certain conditions

The applicant thereupon applied to a magistrate for the unconditional return of his passport under s 17B(5) of the Ordinance He argued that ss 17A(1) and 17A(6B) had been repealed in part by the Bill of Rights Ordinance, since they were inconsistent with the right to liberty of movement, and the right of equality before the courts, guaranteed by articles 8 and 10 of the Bill of Rights respectively.

The applicant argued that requiring him first to apply to the Commissioner for the return of his travel documents rather then permitting him to apply directly to a court meant that his right to equality in the enjoyment of his right of access to court was infringed, particularly when compared with other ex parte procedures, under which an inter partes remedy could be sought immediately.

Held (dismissing the Bill of Rights challenge and ordering the return of the applicant's travel documents on conditions):

1. While s 17A clearly limits the enjoyment of the right to liberty of movement enshrined in article 8(2), the power is nevertheless justifiable, provided it is not to be exercised on the basis of the very low threshold of a mere allegation of the commission of an offence by a suspect. The power is akin in many respects to the issuing of search warrants, which are granted ex parte on the basis of reasonable suspicion In order to bring this section into conformity with article 8(2), the word "alleged" in s 17A(1) should be excised and the suspicion referred to in the subsection should be interpreted as meaning "reasonable suspicion".

   Re Nattrass (1994) 4 HKPLR 234, followed.

2. Requiring a person whose travel documents had been surrendered first to apply to the Commissioner before permitting the person to bring the matter before a court involved a delay in his enjoyment of the right of access to court, but that delay was in no way unfair. The Commissioner could be expected to deal with such matters expeditiously and, in a case involving undue delay, there was nothing to prevent a magistrate from deeming the Commissioner to have refused an application and then dealing with the matter under s 17B(5).

3 There was sufficient evidence to establish reasonable suspicion under s 17A(1) and the applicant had failed to establish on the balance of probabilities, as was required by s 17B(5), that he would suffer unreasonable hardship if the order were to remain in force

G J X McCoy, for the applicant,; I McWalters, for the respondent

RIGHT TO A FAIR HEARING IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10, BILL OF RIGHTS; ARTICLE 14(1), ICCPR)

Right to a fair hearing in the determination of a criminal charge -- Adverse pre-trial publicity -- Whether fair trial possible -- Stay of proceedings

***R v Lo Chak-man (No 2)* (1994) HCt, Case No 108 of 1990, Gall J, 23 June 1994**

The applicant was charged with one count of assisting another person to retain the benefit of drug trafficking, contrary to s 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) At first instance, Gall J held that s 25(1) and (4) were inconsistent with article 11(1) of the Bill of Rights and were declared repealed: (1992) 2 HKPLR 220 His decision was reversed by the Privy Council (1993) 3 HKPLR 72. The Crown then proceeded with the prosecution The decisions of both Gall J at first instance and the Privy Council attracted considerable media publicity, and in one instance, publicity of a prejudicial nature to the applicant. The applicant applied for a stay of prosecution on the basis that, as a result of such adverse pretrial media publicity, his right to a fair trial under article 10 of the Bill of Rights has been violated and that he has been denied his right to be presumed innocent until proved guilty according to law

Held (refusing the application):

1. A criminal matter remains sub judice until the time has expired within which notice of appeal may be given

   Attorney General v Guardian Newspapers [1992] 1 WLR 874, [1992] 3 All ER 38, followed.

2. It may be possible to argue that there is a difference in approaches at common law and under the Bill of Rights in respect of applications for a stay or other relief. The proper test to determine whether a stay should be granted is:

   (a) Has there been prejudice to the applicant?

   (b) Is a stay the appropriate and just remedy in all the circumstances? and

(c) Whether this is one of the rare cases where the application for stay passes the test under the Bill of Rights though it cannot pass the test at common law?

Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62 and *R v William Hung* (1993) 3 HKPLR 328, considered.

3. Only one article among the material produced by the applicant was prejudicial, and that involved only a low level of prejudice, to the applicant. Given that the article was published some two years and two months before the scheduled trial, and that any prejudice could be contained by proper directions by the trial judge, a stay was not the appropriate and just remedy .

A Hoo QC and J Chan (instructed by Lo, Wong & Tsui), for the applicant; M Lunn QC (on fiat) and M Blanchflower (of the Attorney General's Chambers), for the respondent.

Missing exhibits -- Whether defendants could obtain a fair trial in the circumstances

***R v Chiu Kam-tu and Wong Yuk-lam* (1994) HCt, Case No 229 of 1992, 21 June 1994, Deputy Judge Yam**

Each of the accused was charged with two counts of the possession of dangerous drugs for the purpose of unlawful trafficking. The charges were laid after police found drugs on the person of the second defendant and, following a search of the defendants' home, found a further quantity of drugs.

At the start of the trial the first defendant requested the Crown to produce the drugs for inspection, on the basis that the drugs had been planted by the police. Despite an adjournment the Crown was unable to produce the drugs, as these had been removed by a person posing as a police officer. The defendants thereupon sought a permanent stay of the proceedings, arguing that in the circumstances they could not make a full and fair defence to the charges and that therefore their rights under articles 10 and 11(2)(b) of the Bill of Rights would be violated if the trial were to continue.

Held (granting the application for a stay):

1. Section 86(4) of the Magistrates Ordinance imposes a mandatory duty on the Commissioner of Police to take charge of all non-documentary exhibits and to produce them at trial.

2. In order to obtain a stay of a prosecution on the ground of missing evidence under the Bill of Rights or at common law, it is necessary for the defendants to establish that there is a reasonable possibility that the destruction or loss of the evidence in question would impair their ability to make full answer and defence to the charge.

3. The failure to produce the exhibits would prevent the defendants from proving a material fact, namely, that they had not signed the envelope in which the exhibits were put, or discrediting the prosecution's case

4. Accordingly, there was a real possibility that the failure to produce the exhibits would impair the defendant's ability to make full answer and defence. To proceed would infringe the defendants' rights under articles 10 and 11(2)() of the Bill of Rights, as well as the right to a fair trial under common law. A stay should therefore be granted.

K Ramanathan (on fiat), for the Crown; M Poll (instructed by William Au & Co, for the first accused; J Matthews (instructed by Tang, Wong, Cheung), for the second accused.

Contempt of court -- Publication of photos of accused where identification an issue at trial -- Fair hearing

***R v Wong Sik-ming* (1994) DCt, Case No 791 of 1992 and 43 of 1993, 24 March 1994, Judge Lugar-Mawson**

During the trial of the defendant, two newspapers published photographs of him. The defendant had already been identified by civilian witnesses at pre-trial identification parades. The main issue at the trial was the accuracy and reliability of the identifications. The photographs were published before any in-court identification of the defendant.

The defendant argued that the publication of the photographs amounted to contempt of court and that it meant that the defendant was no longer able to enjoy the right to a fair hearing guaranteed to him under common law and by article 10 of the Bill of Rights. He sought a stay of the proceedings.

The Crown argued that, as the defendant had already been identified by the civilian witnesses at pre-trial identification parades and the risk of that publication of these photographs would prejudice the accuracy of any in-court identification was so negligible, there was little, or no, risk of prejudice to the defendant. Accordingly, there were no grounds for granting a stay.

Held (refusing the application for a stay):

Contempt of court

1. The publication of the photographs of the accused amounted to contempt of court. It is a contempt of court for a newspaper to publish photographs of a person charged with a criminal offence where it is reasonably clear that question of the identity of the accused person has arisen, or may arise and such publication is calculated to prejudice a fair trial.

R v Daily Mirror Newspaper, ex parte Smith [1927] 1 KB 845, followed

2 The contempt had not taken place in the face of the court and s 20 of the District Court Ordinance did not appear to give the court jurisdiction to deal with this manner of contempt. The correct procedure was for the court to submit a report to the Attorney General and request him to take proceedings for contempt before the High Court under RSC, O 52.

3 Although there was no explicit statutory power for the court to order the postponement of publication of part of the proceedings, the common law jurisdiction of the court extended to controlling proceedings before the court and making such orders as are necessary to ensure that that justice is duly administered

4 It was appropriate to make an order that no newspaper and no television broadcast which is published, circulated, or broadcast within Hong Kong should until the defendant's trial was concluded, publish his photograph, or a film, or video tape, or live broadcast depicting him

Right to a fair hearing -- article 10 of the Bill of Rights

5. Although the identification of the defendant would be the major issue at trial, the publication of the photographs of him did not so prejudice the conduct of this trial that a fair hearing, according to law, could not be achieved

6. Witnesses had purported to identify the defendant at identification parades conducted well before the trial commenced, and any purported identification of him in court would be scrutinized by the court with the utmost care after bearing in mind the possible corrupting effect the publication of the photographs may have had on the accuracy. However, the publication of the photographs by themselves was not so manifestly prejudicial that the court could conclude that the defendant cannot expect to receive a fair trial according to law, or that the court was unable to ensure that he did receive one.

J Chandler, for the defendant; P Leung, for the Crown

Right to silence -- Whether use at trial of evidence obtained by use of compulsory powers a violation of the right to a fair hearing

See the summary of the decision of the European Commission of Human Rights in *Saunders v United Kingdom*, at page 53 below.

RIGHT TO A FAIR HEARING UNDER ARTICLE 11

Missing witness -- Right to a fair hearing -- Opportunity to test the evidence of a crucial missing witness

R v Yeung Chi-chiu and another **(1994) DCt, Case No 367 of 1993, Deputy Judge Li, 4 September 1994**

The two defendants were police officers jointly charged with accepting an advantage and conspiracy to pervert the course of justice. The second defendant was a member of a team involved in the arrest of one Wong for a drug trafficking offence; the first defendant was a colleague of the second defendant Following a report by Wong to the ICAC, the ICAC arranged for the taping of a number of telephone calls and personal conversations between Wong and the defendants. Wong, who had been charged and released on bail pending trial, absconded in December 1993 and his whereabouts were unknown.

The defendants applied for a stay of the proceedings on the ground of abuse of process and the Bill of Rights, arguing that in order for them to receive a fair trial it was necessary for them to be able to question Wong to test his credibility and to elicit facts from him that might provide an innocent explanation for what occurred between Wong and the defendants.

Held (granting the application and ordering a stay):

Abuse of process

1. On an application for a stay based on the absence of material witnesses, there must be a preliminary inquiry into all factors and circumstances that may turn on the availability of the witnesses concerned. Where, after balancing all the relative advantages and disadvantages to the parties when those witnesses cannot be called, the trial judge finds that there would be injustice to the defence if the trial were to proceed without those witnesses, a stay should be granted.

2. In the present case the benefits and disadvantage to the defendants resulting from the absence of Wong more or less cancelled each other out; therefore it could not be concluded that injustice to the defendants would result if the trial were to proceed A stay could not therefore be ordered on this basis.

Bill of Rights -- articles 10 and 11

3. Article 11 [sic] of the Bill of Rights gives the defendant the right to a fair trial and such right entails opportunities to test the evidence of a crucial missing witness against other evidence. The right to these opportunities is not dependent on the prosecution being at fault or whether the defendant would in the final analysis benefit from the exercise of his right or the exploitation of such opportunities.[5]

4 In the present case the defendants were entitled to test Wong's evidence both in respect of his designs and conduct vis-à-vis the defendants and in relation to the inaudible or indistinct parts of the recorded conversations admitted as independent evidence. Since the defendants were now deprived of that opportunity, it would not be fair to allow the trial to proceed and a stay should be granted.

A Mitchell-Heggs (on fiat), for the Crown; T Jenkyn-Jones, for the first defendant; J Necholas, for the second defendant.

Editorial comment

This decision appears, with respect, internally inconsistent. In the first place, the judge concluded that there was no abuse of process in the sense that the defendants would suffer no prejudice if the trial were to proceed, as the benefits and disadvantages to the defendants resulting from the missing witness more or less cancelled each other out. He then turned to the Bill of Rights arguments and concluded that the right to examine witnesses against oneself under article 10 of the Bill of Rights was not dependent on whether the defendants would be benefited by having such an opportunity to examine witnesses As a result, a stay of proceedings was granted on the basis that it would not be fair to proceed with the trial because of the violation of the Bill of Rights.

There is a considerable body of Hong Kong case law that there will be no stay of proceedings under the Bill of Rights unless it can be shown that the defendants could no longer obtain a fair trial: see, for example, *R v Deacon Chiu Te-ken* (1993) 3 HKPLR 483. None of these cases was referred to in the judgment in this case It seems difficult to see why the missing witness would not prejudice the defendants' right to a fair trial at common law, but would have this effect under the Bill of Rights. It is true that that there are exceptional cases where a grant of a stay of proceedings would be justified under the Bill of Rights when this is not appropriate at common law. Is there anything to suggest that the present case is such an exceptional case?

An alternative explanation is that the Bill of Rights guarantees an independent right violation of which should give rise to just and appropriate remedy irrespective of the position under common law. We have suggested that this would be a welcome approach which is consistent with Silke VP's vision of a new era of jurisprudence under the Bill of Rights in *R v Sin Yau-ming*. Yet this approach, insofar as stay of proceedings resulting either from common

[5] The judgment refers to article 11, but it seems that the reference is intended to be to article 10.

law abuse of process or the Bill of Rights is concerned, has been rejected by the Hong Kong courts so far

PRESUMPTION OF INNOCENCE (ARTICLE 11 (1))

Possession of offensive weapon or other implement -- Requirement to give satisfactory account of possession -- Whether consistent with the presumption of innocence -- Repeal of part of section

Summary Offences Ordinance (Cap 228), s 17

***R v Chong Ah-choi and others* (1994) CA, Mag App No 281 of 1994, Yang CJ, Bokhary JA and Mayo J, 4 October 1994**

Each of the appellants had been charged with an offence against s 17 of the Summary Offences Ordinance (Cap 228). The charges arose out of an incident in which police officers were called to a karaoke bar and found four men in possession of various items Two (the first and second appellants) had iron bars, one (the third appellant) a metal pipe and another man had a slab of wood. When questioned by the police officers, the first appellant said that he had picked up the bar "for fun"; the second appellant initially remained silent and then said that the implement was not his; and the third appellant did not respond. Before the Magistrate's Court the first appellant pleaded guilty, and the other two appellants were found guilty after a trial. The first appellant appealed against sentence only, and the second and third appellants appealed against both conviction and sentence. In light of the Bill of Rights issues taken by the appellants, the High Court referred the appeal to the Court of Appeal.

The appellants argued that s 17 of the Summary Offences Ordinance was inconsistent with the presumption of innocence contained in article 11 of the Bill of Rights, insofar as it imposed liability on a person who was in possession of one of the specified implements and was unable to give a satisfactory account of his possession

Section 17 provides:

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

Held (allowing the appeals):

1 There were two alternative bases of liability under s 17 possession of one of the specified implements with intent to use it for an unlawful purpose, and possession of such an implement without being able to give a satisfactory account of that possession The appellants had been charged under the second limb of the section

2 The second limb of the section represented a departure from the general rule, embodied in article 11(1) of the Bill of Rights, that it is for the prosecution to prove beyond reasonable doubt all facts necessary to establish the guilt of the accused Here, once the prosecution had established possession of one of the specified implements, it fell to the accused to prove on the balance of probabilities that his possession was innocent.

3. Whether an exception to the general rule that the prosecution must prove guilt beyond reasonable doubt is be permissible under the Bill of Rights will depend on whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused and whether the exception is reasonably imposed

Attorney General v Lee Kwong-kut (1993) 3 HKPLR 72, applied

4. In assessing the reasonableness of the exception made by s 17, it was appropriate to consider whether it was more likely than not that a person in possession of one of the implements referred to in the section had it in his possession for an unlawful purpose Although one could say with substantial assurance that possession of some types of the implements listed would be inherently more likely than not for an unlawful purpose, this was not so of other implements covered by the section; much depended on the circumstances. Accordingly, the second limb of the section did not satisfy the "more likely than not" criterion.

5 The most significant element of the offence under the second limb of s 17 was the use which the accused intended to make of the implement. The effect of s 17 was to reduce the burden on the prosecution to proving possession of one of the listed implements, and to require the defendant to prove the innocent nature of his possession. Accordingly, it did not remain primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard

6 The imposition on an accused of the burden to prove the innocent nature of his possession could not be justified, taking into account the lack of complexity of the issues, the difficulties of prosecuting such offences, the extent and nature of social evil to be combatted, or the type of accused involved. The prosecution would not be placed in any special difficulty if it was required to prove that the possession is for an unlawful purpose. The nature of s 17 offences bore no comparison with offences involving activities such as drug-trafficking, corruption and the proceeds of such activities.

7 Accordingly, the second limb of s 17 was inconsistent with article 11(1) of the Bill of Rights and therefore repealed to the extent of that inconsistency This meant that the words "or being unable to give satisfactory account of his possession thereof," should be excised from the section, leaving the first limb of the offence (which was consistent with article 11(1)) intact

8 The appellants' convictions should be quashed and their sentences set aside It was beside the point that they might have been duly convicted under charges laid under the first limb of s 17 if such charges had been preferred against them, as the charges actually preferred against them were bad in law

Per curiam

The definition of offensive weapon in s 2 of the Public Order Ordinance (Cap 245) may be too broad because of its inclusion of the phrase "or suitable [for causing injury to a person]". The effect of excising those words from the definition and leaving the rest of the definition intact would mean that s 33 of the Public Order Ordinance [which also creates an offence of possession of an offensive weapon] would come within the type of exceptions referred to in *R v Edwards* and considered by the Privy Council in *Attorney General v Lee Kwong-kut* to be consistent with article 11(1).

Editorial comment

The consistency of s 17 of the Summary Offences Ordinance with article 11(1) of the Bill of Rights was considered in 1991 in the decision of the District Court (Judge Lugar-Mawson) in *R v Yiu Chi-fung* (1991) 1 HKPLR 183. In that case Judge Lugar-Mawson held that both limbs of s 17 were consistent with the Bill of Rights While his conclusion on the first limb has now been affirmed by the Court of Appeal, his conclusion on the second limb does not now represent the law

As charges under the second limb of s 17 of the Summary Offences Ordinance have been frequently brought in the lower courts, the problems which arose in relation to the repeal with effect from 8 June 1991 in the case of s 30 of the same Ordinance will arise again (see page 8 above). The convictions of all those convicted under this part of the section should now properly be expunged. One may hope that this time around the Attorney General will not take the position that it is for each individual convicted of such an offence to lodge an appeal to have his or her conviction quashed, but that it is the responsibility of the Attorney General, as the public official with prime responsibility for the due administration of justice, to take the initiative in this regard.

Strict liability offences -- Gammon criteria -- Honest and reasonable belief defence

Dutiable Commodities Ordinance (Cap 109), ss 2(1), 3, 17, 46

***R v Wang Shi-hung; Attorney General v Fong Chin-yue and others* (1994) CA, Mag App Nos 989 of 1993 and 604 of 1994, 25 October 1994, Bokhary JA, Ryan J and Stuart-Moore JJ**

This case involved a challenge to s 17(1) of the Dutiable Commodities Ordinance (Cap 109) on the ground that the provision was inconsistent with the right to be presumed innocent guaranteed by article 11(1) of the Bill of Rights. The first appeal was by a person convicted of an offence under the DCO; the second appeal was an appeal by the Attorney General by way of case stated against a decision of a magistrate dismissing the charges laid against the defendants/respondents on the ground that the provisions under which the charges were laid did not admit of a construction consistent with article 11(1) of the Bill of Rights and had therefore been repealed

The respondents in the second appeal had been charged with various combinations of four offences under the DCO in relation to dutiable goods (brandy). The four offences were (a) dealing with goods to which the DCO applied otherwise than in accordance with the Ordinance, contrary to s 17(1) of the Ordinance; (b) possession of dutiable goods otherwise than in accordance of the provisions of the Ordinance, contrary to s 17(6); (c) buying dutiable goods otherwise than in accordance with the provisions of the DCO, contrary to s 17(8) of the DCO, and (d) selling goods otherwise than in accordance with the provisions of the DCO, contrary to s 17(8).

Subsections 17(1), (6) and (8) of the Ordinance provide:

> "(1) No person shall import or export or have in his possession, custody or control, or in any way deal with or dispose of, any goods to which this Ordinance applies--
>
> (a) except in accordance with the provisions of this Ordinance; or
>
> (b) unless he has discharged all the obligations with respect to the goods imposed upon him by or under this Ordinance.
>
> . . .
>
> (6) No person shall have any dutiable goods in his possession, custody or control unless [certain conditions are satisfied].
>
> . . .
>
> (8) No person shall, on his own account or on behalf of another, sell, offer for sale or buy any dutiable goods which are in Hong Kong, unless the goods are--
>
> (a) in a general bonded or licensed warehouse; or

(b) in the place where they are manufactured, or

(c) in the ship, vehicle, train or aircraft in which they were imported, or

(d) on the railway premises "

Section 46 provides that a person who contravenes the provisions of s 17 commits an offence and shall be liable to a fine of $100,000 and to imprisonment for 2 years

Held (allowing the appeals and remitting the second appeal to the magistrate):

1 The mere fact that an offence is a strict liability offence does not mean that it is by virtue of that fact alone inconsistent with the Bill of Rights

2 Where rules of construction sufficiently strongly disposed in favour of individual freedom are employed, and an offence is nevertheless construed, in the public interest, to be one of strict liability, then that result can sit comfortably with the most powerful guarantees of individual freedom, even where the offence is punishable by a substantial term of imprisonment. Where a court reaches the conclusion, after applying the criteria laid down in *Gammon (Hong Kong) Ltd v Attorney General*, that an offence imposes strict liability, then such a provision will not be inconsistent with the Bill of Rights

3. Applying the *Gammon* criteria to the provisions under challenge, it was clear that (a) the offences in question were not "truly criminal" in character, (b) the presumption of mens rea was intended to be displaced by the legislative scheme, and (c) the statute dealt with an issue of social concern.

4. When one came to the fifth criterion -- that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act -- greater vigilance would indeed be encouraged by not requiring the prosecution to prove knowledge that duty was outstanding. On the other hand, it would not hamper the achievement of the objects of the statute if it were a defence for the accused to prove on the balance of probabilities that he believed for good and sufficient reason that the provisions of the DCO had been complied with. Indeed, such a defence would advance that objective by permitting it to be attained without convicting blameless persons. *Gammon* did not stand in the way of construing a penal provision to admit of such a defence.

5. It was possible to construe a provision under which the prosecution does not have to prove guilty knowledge as incorporating a defence for the accused to prove on the balance of probabilities that he reasonably although incorrectly held an honest belief as to the non-existence of the facts in question.

Proudman v Deyman (1941) 67 CLR 536, *R v City of Saulte Ste Marie* (1978) 85 DLR (3d) 161, *Millar v Ministry of Transport* (1986) 2 CRNZ 216, and *Sweet v Parsley* [1970] AC 132, considered

6 The fact that such a defence was expressly made available under s 17(2) did not mean that other subsections not containing a similar express provision could not be interpreted as incorporating a similar defence One could not attribute to the legislature an intention that no defence of reasonable belief would be available, since that would leave a gap through which the innocent would fall to their harm

7. Accordingly, it will be a defence under the provisions of s 17 of the DCO for an accused to prove on the balance of probabilities that he believed for good and sufficient reason, although erroneously, that the provisions of the DCO relating to the goods had been complied with, which compliance of course includes duty having been paid. So construed, s 17 of the DCO is not inconsistent with the Bill of Rights

Editorial comment

The question whether strict liability offences are consistent with the Bill of Rights has generated a number of conflicting decisions in the lower courts, and it is opportune that the Court of Appeal has finally been able to deal with the issue The decision is an important one for criminal law, as well as for the Bill of Rights Although the decision states a number of clear propositions, the implications of those propositions and of some of the other discussion by the court are not clear and it seems likely that the issues considered in this case will be further explored by the courts in the near future

The Court of Appeal appears to have accepted in this case that:

- a strict liability offence is not inconsistent with the Bill of Rights merely because it imposes strict liability,
- a strict liability offence *may* be inconsistent with the Bill of Rights, and
- a strict liability offence which has been subject to the *Gammon* analysis may incorporate as a matter of interpretation a defence of honest and reasonable belief

However, it is not entirely clear which strict liability offences are likely to fall foul of the Bill of Rights On the one hand, the court says that a provision which is construed in accordance with *Gammon* and interpreted as imposing strict liability is unlikely to be inconsistent with the Bill of Rights since the *Gammon* criteria import the same analysis that is undertaken under the Bill of Rights when deciding whether a restriction on the enjoyment of a right is justified. On the other hand, the court holds that the provisions in question should be read as subject to a defence of honest and reasonable belief so far as the mens rea elements which the prosecution is not required to prove are concerned. The case therefore is strictly authority only for the proposition that a provision which, construed in accordance with

Gammon, imposes strict liability but which also incorporates an implied defence of honest and reasonable belief is not inconsistent with the Bill of Rights

The judgment tantalisingly leaves a number of important questions open, important both from the criminal law perspective as well as from that of the Bill of Rights It is not clear whether the court takes the view that all strict liability offences should be construed so as to incorporate a defence of honest and reasonable belief (except where legislature has clearly excluded such a possibility), although it certainly provides strong support for that proposition Such a holding would be a welcome addition to the law of Hong Kong, and would involve Hong Kong following the lead of other Commonwealth countries.

The second issue is whether a provision which is not capable of being construed so as to incorporate the honest and reasonable belief defence (either because the legislature excludes that clearly or because it may otherwise not be an appropriate case) is necessarily inconsistent with the Bill of Rights (article 11(1) or article 5(1)). If the argument that the *Gammon* criteria are a good proxy for the analysis of whether a restriction is justified is accepted, then it would follow that provisions construed as imposing strict liability would not violate the Bill of Rights But the Court of Appeal does not endorse the *Gammon* approach as an exclusive one, preferring to add the additional defence Whether the reading in of this defence is viewed by the courts as a desirable policy decision or a constitutional requirement remains to be seen In the case of a provision which is *expressed* to impose strict liability and excludes any such defence, the issue is squarely raised: what sorts of "absolute liability" (in the Canadian sense) are (in)consistent with the Bill of Rights?

As *Gammon* is a Privy Council decision, it is, of course, binding on the Hong Kong courts, at last insofar as the law which it states is consistent with the Bill of Rights. But does it follow that a statute construed as imposing strict liability in accordance with *Gammon* necessarily satisfy the standards of the Bill of Rights? *Gammon*, after all, was a decision made under a regime of Parliamentary sovereignty.

The Court of Appeal may have accepted too readily the constitutionality of the *Gammon* criteria without subjecting them to sufficiently critical scrutiny against the relevant (and controlling) international standards). If one takes a closer look at the third criterion -- "the presumption [of mens rea] applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute", one can see that this does not require the court to look beyond the legislative scheme: the question is still largely regarded as one of construction only. The fourth criterion -- "the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue" -- is similar to the test of a legitimate objective which is familiar in international human rights jurisprudence.

The fifth criterion -- that even where a statute is concerned with such a legitimate purpose, the presumption of mens rea stands "unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act" -- comes closest to the notion of proportionality. The test thus formulated focuses predominantly on the effectiveness of the

imposition of strict liability in ensuring compliance However, the standard of proportionality requires the court to see the matter through the eyes of the individual, namely, whether the imposition of strict liability is proportionate to the attainment of the legitimate objectives of the statute and has impaired individual liberty unnecessarily. While these may be two sides of the same coin, it is quite possible that the test of ensuring effective compliance would not produce the same result as the test of causing minimal impairment.

In short, the *Gammon* criteria, if interpreted traditionally, may impose a standard of scrutiny which is less stringent than that imposed by the rationality and proportionality test. On the other hand, they are quite capable of imposing a higher standard consistent with international human rights jurisprudence.

Immigration Ordinance (Cap 115), s 37K(2)

***R v Chan Lan-po* (1994) DCt, Case No 1201 of 1993, Judge Jackson, 9 February 1994**

The defendant was charged with being a crew member of a ship which entered Hong Kong waters with unauthorised entrants on board. In his reasons for verdict Judge Jackson made the following comments in relation to s 37K(2) of the Immigration Ordinance (which has been replaced by a new s 37K(2)):

> "The section [the old s 37K(2)] states that, based on the content of the certificate, and in the absence of evidence to the contrary, the defendant is presumed to have been a member of the crew of the Shanwei 30019 on 29th October 1993.
>
> . . .
>
> A superintendent of police has formed a view -- undoubtedly an honest view -- but I do not know on what he has based that view. Possibly on the content of the prosecution file -- certainly not on the evidence before me. The section appears to seek to usurp the function of this court and I will not allow it to do so. Were it to be otherwise, and in the absence of any other evidence, I would have no alternative but to send the defendant to prison and for about five years. It cannot possibly be right and just that simply because a senior police officer honestly thinks so -- therefore it is so; such a proposition seems to me to offend all manner of legal principles not least of which is that enshrined in the Hong Kong Bill of Rights Ordinance -- the presumption of innocence.
>
> In the circumstances of this case the exception from the strict application of the fundamental rule that throughout a trial the burden is on the prosecution to prove the guilt of the defendant beyond reasonable doubt claimed by section 37K(2) cannot be justified or permitted. The reason for that, simply stated, is that when employing that section the responsibility for showing the guilt of the defendant does not remain primarily that of the prosecution by employing it. The vital ingredient of the offence (namely whether or not the defendant was a member of the crew would not be required to be proved to the requisite standard. [*Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man* (1993) 3 HKPLR 72]. Putting it another way -- "the provision under

consideration allows of the possibility that an accused person may be convicted of an offence without each essential element of that offence being proved against him beyond reasonable doubt [*R v Wong Hiu-chor* (1992) 2 HKPLR 288 at 308, per Mortimer J)".

The judge found the defendant guilty of the offence charged without having to rely on the certificate purporting to be tendered under s 37K(2). In fact, the old s 37K(2) was repealed and replaced, with effect from 26 November 1993 by s 9 of the Immigration (Amendment) Ordinance 1993 (No 82 of 1993). As the certificate tendered in this case was dated 13 December 1993, it was tendered in reliance on a section which had been repealed by then.

Control of Obscene and Indecent Articles Ordinance (Cap 390)

***R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd* (1994) CA, Civ App No 49 of 1994, Power VP, Penlington and Godfrey JJA, 18 October 1994, on appeal from (1994) 4 HKPLR 5**

This was an appeal from the decision of Mayo J who had rejected the applicants' challenge that the classification procedure in the Control of Obscene and Indecent Articles Ordinance was inconsistent with articles 10 and 16 of the Bill of Rights (see *Bill of Rights Bulletin*, v 3, n 1, pp 16-17). The appeal was allowed without hearing Bill of Rights arguments; it was held that the Obscene Articles Tribunal had acted ultra vires in classifying a photo of Madonna, which formed one of the four illustrations to a Chinese article in one issue of Ming Pao Weekly, without considering the accompanying Chinese text; the photo alone was not an "article" within the meaning of s 10 of the Ordinance. Godfrey JA, in delivering his judgment, commented that it would be an illegitimate use of power if the classification proceedings were to be used in such a way as to pre-empt any criminal prosecution for publishing indecent or obscene articles.

A Neoh QC and J Chan (instructed by Johnson Stokes and Master), for the appellants;
A Shum (of the Attorney General's Chambers), for the respondent.

Prevention of Bribery Ordinance (Cap 201), s 10(1)(a)

***R v Harry Hui Kin-kong* (1994) DCt, Case No 1230 of 1993, scheduled for 28 November 1994 before Deputy Judge Longley**

This case involves a challenge to s 10(1)(a) of the Prevention of Bribery Ordinance (Cap 201) on the ground that it is inconsistent with the right to be presumed innocent guaranteed by article 11(1) of the Bill of Rights.

Right to be presumed innocent until proved guilty according to law -- Whether adverse pre-trial publicity a violation of the right to be presumed innocent -- Whether stay of proceedings just and appropriate remedy -- Bill of Rights, art 11(1)

See ***R v Lo Chak-man (No 2)*** (1994) HCt, Case No 108 of 1990, Gall J, 23 June 1994, at page 19

RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGE AGAINST ONE (ARTICLE 11(2)(A), BILL OF RIGHTS; ARTICLE 14(3)(A), ICCPR)

Attorney General v Tang Yuen-lin **(1994) CA, Mag App No 1300 of 1994**

This case involves an appeal by way of case stated against a decision of Mr P C White, in which he held that a summons issued under the Town Planning Ordinance and addressed to a person apparently of Chinese ethnic origin who did not understand English was inconsistent with article 11(2)(a) of the Bill of Rights Accordingly, proceedings before the court based on such a summons were a nullity and the summons should be dismissed The case has been referred to the Court of Appeal

The case raises a similar issue to that considered by Mr White in an earlier decision involving the validity of summons issued only in English under the Fixed Penalty (Criminal Proceedings) Ordinance: *R v Tse Kim-ho* (1993) 3 HKPLR 298 The court held that such summonses were invalid where addressed to a person apparently of Chinese ethnic origin: see *Bill of Rights Bulletin*, v 2, n 3, pp 31-33. Although an appeal by way of case stated against that decision was planned, it did not proceed.

RIGHT TO ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF ONE'S DEFENCE (ARTICLE 11(2)(B), BILL OF RIGHTS; ARTICLE 14(3)(B), ICCPR)

R v Chiu Kam-tu and Wong Yuk-lam **(1994) HCt, Case No 229 of 1992, 21 June 1994, Deputy Judge Yam**

See page 20 above.

RIGHT TO EXAMINE OR HAVE EXAMINED WITNESSES AGAINST ONE (ARTICLE 11(2)(E), BILL OF RIGHTS; ARTICLE 14(3)(D), ICCPR)

***R v Yeung Chi-chiu and another* (1994) DCt, Case No 367 of 1993, Deputy Judge Li, 4 September 1994**

The court, following the earlier decision of Judge Tyler in *R v Ng Kam-fuk* [1993] HKDCLR 29, held that article 11(2)(e) had no application to missing witnesses cases See page 20 above

Admission of computer records as prima facie evidence -- Discretion of court to require oral evidence

Evidence Ordinance (Cap 8) s 22A

***R v Chow Chai-sang* (1994) DCt, Case No 124 of 1993, Judge Lugar-Mawson, 15 April 1994**

The three defendants were charged with offences of conspiracy to defraud and, in the alternative, conspiracy to utter forged documents As part of the evidence against the accused, the Crown introduced computer records obtained from the Japanese Government's Bureau of Motor Vehicle Registration, which were certified as accurate by the former head of that Bureau. The evidence was admitted pursuant to s 22A of the Evidence Ordinance (Cap 8).

After this evidence had been admitted by the trial judge, the accused sought to challenge its admissibility, on the ground that s 22A was inconsistent with the right of the accused under article 11(2)(e) of the Bill of Rights to examine witnesses against them

Section 22A provides:

"22A.(1) Subject to this section and section 22B, a statement contained in a document produced by a computer shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if--

(a) direct oral evidence of that fact would be admissible in those proceedings; and

(b) it is shown that the conditions in subsection (2) are satisfied in relation to the statement and computer in question "

Subsection 22A(7) of the Evidence Ordinance provides:

"(7) Notwithstanding subsection (5), a court may (except where subsection (3) applies) requires oral evidence to be given of any of the matters mentioned in subsection (5).

Held:

1. The effect of s 22A is to provide that, if there is reason to believe that certain facts can be proved by the introduction of a record produced by a computer, then that, although hearsay at common law, will suffice.

2. Where evidence is proposed to be admitted pursuant to s 22A, the party who may be affected by the introduction of the evidence has the right to ask to judge to exercise the discretion conferred on the court by s 22A(7) to require oral evidence to be given.

3. If the trial judge in his discretion believes that good and valid reasons exist to question the truth or accuracy of the computer produced record, he will then require oral evidence to be given of the matters in question. The right to examine, or have examined the witnesses against the accused is thus expressly preserved by s 22A(7) and the common law. Accordingly, s 22A is not inconsistent with the accused's right to examine witnesses against them guaranteed by article 11(2)(e) of the Bill of Rights.

RIGHT TO THE BENEFIT OF LESSER PENALTY (ARTICLE 12(1), BILL OF RIGHTS; ARTICLE 15(1), ICCPR)

Right to the benefit of lesser penalty -- Substitution of offence by another offence with a lesser penalty -- Penalty imposed in excess of maximum provided for by replacement provision --Penalty imposed less than maximum provided for by replacement provision -- Stare decisis -- Court of Appeal -- Whether Court of Appeal bound to follow earlier decisions

***R v Tai Yiu-wah* (1994) CA, Crim App No 249 of 1993, Silke VP, Macdougall VP and Mortimer JA , 5 May 1994 and 12 May 1994, (1994) 4 HKPLR 56**

The applicant had been convicted of one charge of being in possession of forged banknotes contrary to s 76(1) of the Crimes Ordinance (Cap 200) and of one charge of being in possession of forged dies (including forged credit cards and other items), contrary to s 76(2) of the Crimes Ordinance. He was sentenced to two years on the forged banknotes charge (s 76(1)) and four years' imprisonment on the forged dies charge (s 76(2)). The applicant sought leave to appeal against conviction and sentence.

Under ss 76(1) and (2) (as in force at the time of the commission of the offences) the maximum penalties to which the applicant was liable were 14 years' and 7 years' imprisonment respectively. After the commission of the offences but before the applicant's trial ss 76(1) and (2) of the Crimes Ordinance were repealed by Ordinance No 49 of 1992, with effect from 26 June 1992. Section 76(1) was replaced by a new s 100, which provided for a maximum period of 14 years' imprisonment for the offence of possession of forged notes with intent to pass them as genuine (s 100(1)), and for a maximum of 3 years' imprisonment for simple possession of forged banknotes (s 100(2)). Section 76(2) was replaced by the new s 75, which provided for a maximum penalty of 14

years' imprisonment for possession of a false instrument with intent to induce somebody to accept it as genuine and to act to his prejudice (s 75(1)), and a maximum penalty of 3 years' imprisonment for simple possession of a false instrument (including a die) (s 75(2)).

Article 12(1) of the Bill of Rights provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

Held (refusing the application for leave to appeal against conviction and allowing in part the appeal against sentence):[6]

1. On the evidence before him the trial judge had been entitled to reach the conclusion which he had as to the applicant's guilt.

2. The offence corresponding to the old s 76(2) of the Crimes Ordinance was the new s 75(2). Since the trial of the applicant had occurred after the repeal of s 76(2) and its replacement by s 75(2), article 12(1) of the Bill of Rights entitled the applicant to be sentenced on the basis of the lighter penalty provided for simple possession under the new s 75(2), viz a maximum of 3 years' imprisonment. Accordingly, the applicant was to be sentenced to 2½ years' imprisonment. (p 000, lines 00-00)

   R v Faisal (1993) 3 HKPLR 220, followed; *R v Wan Siu-kei* (1993) 3 HKPLR 228 and *R v Chan Kein-wing* (1993) 3 HKPLR 598, not followed.

3. The offence corresponding to the old s 76(1) of the Crimes Ordinance was the new s 100(2). However, the sentence of 2 years' imprisonment imposed in respect of that offence was not affected by article 12(1), since it fell within the maximum of 3 years' imprisonment provided for simple possession under s 100(2). (p 000, lines 00-00)

E McGuinniety (instructed by Director of Legal Aid), for the applicant.
A Schapel (of the Attorney General's Chambers), for the Crown.

Editorial comment

The law relating to article 12(1) of the Bill of Rights is, to put it mildly, in disarray. The different approaches adopted by different combinations of judges have been referred to in an earlier issue of the *Bulletin* (v 2, n 3, at pp 52-53). At present the outcome of an appeal

[6] See also *R v Wan Siu-kei* (1993) 3 HKPLR 228 and *R v Chan Chi-hung* (1993) 3 HKPLR 243.

depends on the particular appellate judges who hear the matter Fortunately, the matter may be resolved some time in the coming year, as the unsuccessful appellant in *R v Chan Chi-hung* (1993) 3 HKPLR 243 (CA) has now petitioned the Privy Council for special leave to appeal against the decision of the Court of Appeal If the Privy Council grants leave, then the issue may be resolved, one way or the other

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

Bill of Rights -- Right not to be subjected to arbitrary or unlawful interference with privacy -- Closure order -- Whether a violation of the right to privacy -- Buildings Ordinance (Cap 123), s 27(1)(a)(ii) -- Bill of Rights, art 14

***Building Authority v Business Rights Limited* (1994) CA, Civ App No 212 of 1993, Power VP, Nazareth and Litton JJA, 19 May 1994, (1994) 4 HKPLR 43**

See page 14 above.

Interception of telecommunications -- Whether power of Governor under s 33 of the Telecommunication Ordinance is consistent with the right to privacy

***Re Thanat Phakitithat and the Government of the United States of America* (1994) HCt, MP No 2904 of 1994, set down for hearing on 23-25 November 1994**

In the case, which involves an application for the extradition of a fugitive to the United States, the fugitive has challenged the admissibility of tapes of phone conversations made in Thailand. The fugitive has been granted leave to apply for habeas corpus to challenge the lawfulness of his committal, which is dependent on the evidence of the tapes, that evidence obtained by telephonic interception without authorisation would not be admissible under Hong Kong law. As part of the challenge to the admissibility of the evidence, the validity of s 33 of the Telecommunication Ordinance (Cap 106)is being called into questioned.

Section 33 of the Telecommunication Ordinance provides:

"33. Power of Governor to prohibit transmission of messages, etc.

Whenever he considers that the public interest so requires, the Governor, or any public officer authorized in that behalf by the Governor either generally or for any particular occasion, may order that any message or class of messages brought for transmission by telecommunication shall not be transmitted or that any message or any class of messages brought for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained or disclosed to the Government or to the public officer specified in the order."

Section 33 has been the subject of constant criticism from academics, human rights activists, lawyers and international bodies for its apparent inconsistency with article 17 of the ICCPR (the equivalent of article 14 of the Bill of Rights) The issue has recently been given prominence as a result of the inquiry by the Legislative Council into the dismissal of Mr Alex Tsui, the former senior ICAC officer, who alleged that the ICAC had engaged in the tapping of phones of leading political figures in Hong Kong. In the light of the international jurisprudence -- in particular the judgment of the European Court of Human Rights in the *Malone* case against the United Kingdom (and subsequent decisions in the *Kruslin* and *Huvig* cases) it is a matter of some surprise and considerable concern that the administration has not moved to put its house in order by amending the legislation. In view of Governor Patten's statement to an Amnesty International meeting earlier this year that he was committed to doing all that was reasonably within his power to take steps to ensure the full protection of human rights in Hong Kong, the retention of the provision on the statute books is poignant, since it is Mr Patten himself on whom the (probably now repealed) power to order interceptions is conferred.

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

Freedom of expression -- Whether restriction on personal advertisement by barristers a violation of the right to freedom of expression -- Bill of Rights, art 16 -- Bar's Code of Conduct, para 101

***Hong Kong Bar Association v Anthony Chua* (1994), Barristers Disciplinary Tribunal, A Hoo QC, S Westbrook, Shum Choi Sang, 15 September 1994**

The respondent was charged with two disciplinary offences, namely, advertising contrary to para 101 of the Code of Conduct of the Bar of Hong Kong, and failure to discharge duty of a barrister in accordance with para 10(a) of the Code. The respondent made a number of preliminary challenges to the conduct of the inquiry, including an application to have the proceedings conducted in public. By a majority the Tribunal ruled that s 35A(3) of the Legal Practitioners Ordinance, which required disciplinary proceedings to be held in camera, was inconsistent with article 10 of the Bill of Rights. Accordingly, it was repealed and the Tribunal had a discretionary power to conduct proceedings in public or private. The proceedings were then conducted in public.

At the substantive hearing, the respondent argued that para 101 was inconsistent with article 16 of the Bill of Rights. He further argued that, in view of the statutory powers enjoyed by the Bar Council under the Legal Practitioners Ordinance, together with the disciplinary system set up by statute which underpinned the status of the Bar Council, the Bar Council, in seeking to enforce the Code as promulgated by the Bar Association, was a public authority for the purposes of the Bill of Rights Ordinance.

Held:

1. As the respondent challenged the constitutionality of para 101 of the Bar's Code of Conduct, the issue under s 7 of the Hong Kong Bill of Rights Ordinance is whether the Bar Association in promulgating para 101 of the Code was acting as a public authority, and not whether the Bar Council, in seeking to enforce the Code, was a public authority.

2 "Public authority" in s 7 of the Hong Kong Bill of Rights Ordinance includes only those bodies entrusted with the discharge of governmental or quasi-governmental functions affecting the public at large.

3. The Hong Kong Bar Association is a self-governing professional association made up of private individuals who mutually agree to abide by the Code of Conduct as governing their professional conduct and etiquette in the form existing from time to time. The fact that the Bar Association has statutory recognition and is entrusted with statutory powers in relation to disciplinary matters does not make the dispute any less of an inter-citizen dispute. Nor is the mere fact that there is an element of public interest in the promulgation of any part of the Bar's Code sufficient to equate the Hong Kong Bar Association to that of a public authority or a body in the performance of any public function.

4 The Legal Practitioners Ordinance does not in any way deal with the power of the Bar Association to make rules relating to professional conduct and etiquette. Accordingly, the Bar Council in seeking to enforce para 101 of the Bar's Code before a Barristers Disciplinary Tribunal is not acting on behalf of the government.

5 The Hong Kong Bill of Rights has no binding effect on the Hong Kong Bar Association in the promulgation of the Code of Conduct for the Bar of Hong Kong.

L Lok QC, for the complainant; D Chang QC, for the respondent; R Ribeiro QC (amicus curiae).

Editorial comment

Is the Bar Association a private club when it enacts its Code of Conduct? The Disciplinary Tribunal thinks so. In coming to this conclusion it draws a distinction between enacting the Code and enforcing the Code. The arguments of the Tribunal would have more force if the Code concerned only membership fees or election of office bearer. But when the Code concerns professional conduct and ethics, when the Code sets the standards by which the conduct of practising barristers (not confined to members of the Association) is to be measured, and when violation of the Code may lead to disciplinary action which may result in disqualification or suspension of practice, the distinction between promulgation of the Code and its enforcement appears somewhat artificial.

The Tribunal held that "The fact that the Bar Association has statutory recognition and is entrusted with statutory powers in relation to disciplinary matters does not make the dispute any less of an inter-citizen dispute. Nor is the mere fact that there is an element of public interest in the promulgation of any part of the Bar's Code sufficient to equate the Hong Kong Bar Association to that of a public authority or a body in the performance of any public function " This may be true, what is to be made of the facts that the cost of disciplinary action may be recovered from general revenue, that the decision of any disciplinary proceedings is subject to judicial review, that compliance with the Code is conducive to the maintenance of public confidence in the integrity of the profession and the administration of justice; that a barrister may be deprived not only of his membership with his "club" but also his right to practise as a barrister; and that the Bar has been entrusted with the regulation of a statutory monopoly.

In our view there are powerful arguments that the Bar Association, either in promulgating its Code of Conduct or in enforcing it, is a "public authority" within the meaning of s 7 of the Bill of Rights Ordinance, and the Tribunal has fallen prey to the danger of the "austerity of tabulated legalism" referred to Lord Wilberforce in interpreting the meaning of "public authority" in the Bill of Rights Ordinance. There are cases from the European Court of Human Rights to the effect that restrictions on professional advertising is a justifiable limitation on the right to freedom of expression. It seems far preferable to defend the Bar's Code on that front, rather than to exclude the application of the Bill of Rights altogether. In adopting a disappointingly narrow interpretation of "public authority", the Tribunal may well be doing a disservice to the Association in the long run

Prevention of Bribery Ordinance (Cap 201), s 30

***R v Ming Pao Newspapers Ltd and others* (1995) Mag, Case No ESS10075-10078 of 1994**

In this case s 30 of the Prevention of Bribery Ordinance (Cap 201) is being challenged on the ground that it is inconsistent with the guarantee of freedom of expression contained in article 16 of the Bill of Rights. The hearing is set down for 11-13 January 1995.

RIGHT OF PEACEFUL ASSEMBLY (ARTICLE 17, BILL OF RIGHTS; ARTICLE 21, ICCPR)

Public Order Ordinance (Cap 245), s 18

Right of peaceful assembly -- Whether the guarantee of the right of peaceful assembly applies to unlawful assembly -- "peaceful assembly" -- "unlawful assembly"

***R v To Kwan-hang and Tsoi Yiu-cheong* (1994) CA, Mag App No 945 of 1993, Macdougall VP, Litton and Bokhary JJA, 9 September 1994**

The appellants were convicted of the offence of taking part in an unlawful assembly contrary to s 18(1) of the Public Order Ordinance: (1993) 3 HKPLR 308. The convictions arose out of a demonstration outside the New China News Agency (NCNA) in the early hours of the morning of 5 June 1992. After a protest meeting at Victoria Park in the evening of 4 June 1992, the appellants, together with a large group of protesters, arrived at the front entrance of the NCNA. The police told the group that they could only enter the cordoned area immediately outside the front entrance of the NCNA in small groups of 19 persons or less at one time. A small group of the protesters accepted the condition and dispersed after the protest. The rest of the group did not accept the condition and debated among themselves alternatives, one of which was to force their way through the police line to reach the NCNA. Later, a large group of protesters attempted to push through the barriers erected by the police, followed by a concerted rush on the police line. The unruly conduct lasted for about ten minutes, resulting in 31 police officers and a number of protesters being injured, and damages done to police uniforms and items of police equipment. No prior notification about the meeting has been given to the police.

Section 18(1) and (3) of the Public Order Ordinance provide:

> "(1) When three or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly.
>
> . . .
>
> (3) Any person who takes part in such an assembly which is an unlawful assembly by virtue of subsection (1) shall be guilty of the offence of unlawful assembly. . .".

On appeal, the appellants argued that s 18 of the Public Order Ordinance was inconsistent with the right to peaceful assembly guaranteed by article 17 of the Bill of Rights;

that the police had no legal power to cordon off the public area outside the NCNA at the material time and had, in so doing, acted contrary to articles 16 and 17 of the Bill of Rights, that the conduct of the appellants was not such as "would cause any person reasonably to fear that the persons so assembled will commit a breach of the peace" or provoke others into doing so, and there was no evidence from any civilian bystander that there was a reasonable fear of a breach of the peace.

Held (dismissing the appeal):

1. Where three or more persons conduct themselves in a disorderly, intimidating, insulting or provocative manner as described in s 18(1) of the Public Order Ordinance, it is they, not other members of their group who do not so conduct themselves, who become an unlawful assembly.

2. The Hong Kong Bill of Rights Ordinance is a constitutional instrument and that, in particular, the part which entrenches fundamental rights and freedoms must be given a generous and purposive interpretation, having regard to the aims of the International Covenant of Civil and Political Rights and giving full recognition and effect to the preamble in that Covenant. At the same time, the issues involving the Hong Kong Bill of Rights should be approached with realism and good sense, and kept in proportion.

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

3. Article 17 of the Bill of Rights protects only the right of peaceful assembly. It is not intended to confer a right of assembly on those who conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that those so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace. Accordingly, s 18 of the Public Order Ordinance is not inconsistent with article 17 of the Bill of Rights.

4. Under s 10 of the Police Force Ordinance (Cap 232), the police have the power to cordon off a public place in order to regulate processions and assemblies in public places. Although s 10 sets out only the duties of the police, the duty to take any lawful measure must carry with it the power to perform that duty. Taking into account the strong emotions of the crowd at the material time, the restrained nature of the restriction of the appellants' right of assembly, and the risk of an outbreak of violence and possible injuries to persons and property, the police had acted entirely within the powers conferred on them by s 10 of the Police Force Ordinance.

5. It was not necessary for the prosecution to call civilian bystanders to testify that they had been in fear that there would be a breach of the peace. The test whether there was a reasonable fear of a breach of the peace is an objective one, which can be established by evidence given by the police.

M Lee QC, H L Wong and J Chan (instructed by Chui & Lau), for the appellants; S R Bailey (of the Attorney General's Chambers), for the respondent.

Editorial comment

Article 17 of the Bill of Rights protects the right of *peaceful* assembly. While the adjective of "peaceful" is clearly intended to exclude violent assembly, it may be unfortunate if this term is to be given a narrow meaning. In a plural society it is quite possible that people hold polarized views on controversial matters. Just a few months ago Hong Kong witnessed the manner in which a demonstration by some New Territories indigenous groups against proposed amendments to the New Territories Ordinance provoked a counter-demonstration by various women's groups in favour of the amendments. It has been held elsewhere that the mere fact that an assembly or demonstration will provoke a hostile audience is of itself insufficient to deprive the organizers of the assembly of the right of peaceful assembly. In this regard it may be queried whether the whole of the activity covered by s 18 is outside the scope of the right guaranteed by article 17 of the Bill of Rights. Under s 18, it is an offence if three or more persons conduct themselves in a "disorderly or *provocative*" manner which is likely to cause other people to *fear* that they will *provoke* other persons to commit a breach of the peace. It is possible that an assembly which satisfies such description is nevertheless still a peaceful, albeit controversial, assembly. Of course, the significance lies in the fact that once the assembly is regarded as falling outside the scope of article 17, the court may not have any power (at least under article 17) to scrutinize the proportionality of the measures adopted by the Government in controlling such assembly.

Another controversial holding is that the police may derive from s 10 of the Police Force Ordinance the power to block off a part of public place. With respect, this may unnecessarily blur the distinction between duties and powers. Section 10 sets out the duties of the police. The court held that a duty to take lawful measure must carry with it the power to perform such duty. If so, what is the scope of the power? The duties under s 10 are set out in extremely broad terms. The power, even confined to what is necessary to discharge those duties, would still be sweeping. Unlike the position in England, the police force in Hong Kong is a statutory body which can only derive its powers from statute. If the court were right, it would almost be impossible to find a case that the police would be acting ultra vires.

On the other hand, the decision of the Court of Appeal confining the s 18 offence to those who conduct themselves in a disorderly, intimidating, insulting or provocative manner and not to other innocent members who happened to be in the same group is to be welcomed.

RIGHTS OF CHILDREN TO PROTECTION (ARTICLE 20, BILL OF RIGHTS, ARTICLE 22, ICCPR)

Bill of Rights -- Rights of children -- Right to protection by the State -- Right not to be subject to discrimination on the ground of birth -- Illegitimate child

See *L v C* (1994) HCt, MP No 4167 of 1993, 9 May 1994, Barnett J (in chambers), at page 49 below.

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

Right to vote and to be elected without unreasonable restrictions -- Reasonable restriction -- Whether requirement of ten years' continuous ordinary residence immediately before the date of nomination an unreasonable restriction of the right to be elected -- Whether a challenge to the decision of returning officer disqualifying a prospective candidate can proceed by way of judicial review before the election, or whether it must proceed by way of election petition -- Right to a fair hearing -- Right of access to court -- Whether exclusion of judicial review before election constitutes a denial of the right of access to court

***R v Apollonia Liu, ex parte Lau San-ching, R v Thomas Chow Tat-ming, ex parte Eric Chan Po-ming, R v Thomas Chow Tat-ming, ex parte Richard Fung Chan-ki* (1994) HCt, MP Nos 2302, 2263 and 2312 of 1994, Mayo J, 2 September 1994; (1994 Court of Appeal, Civ App Nos 159, 160 and 161 of 1994, Nazareth, Litton and Godfrey JJA, 9 September 1994**

Each of the applicants in these three cases had been nominated to stand as a candidate for the District Board elections scheduled to be held on 18 September 1994. The nomination papers had in each case been rejected by the returning officers concerned as invalid on the ground that the applicants failed to satisfy the requirement of ten years' continuous ordinary residence immediately before the respective dates of their nomination. All three applicants were Hong Kong permanent residents and had lived in Hong Kong for more than thirty years. Lau San-ching had been arrested and convicted in China for counter-revolutionary crimes and sentenced to ten years' imprisonment. He returned to Hong Kong in 1991 after he had served his sentence. Eric Chan Po-ming had taken up the directorship of a Chinese newspaper in Montreal, Canada in May 1989 where he had remained until his return to Hong Kong in April 1994. Richard Fung Chan-ki had studied and undertaken training in the United States between February 1986 and 1992.

Prior to the holding of the election, the appellants applied for judicial review of the respective decisions of the returning officers. They argued that the requirement of ten years' continuous ordinary residence was an unreasonable restriction of their right to be elected, as guaranteed by article 21 of the Bill of Rights. Alternatively, they were ordinarily resident in Hong Kong for the qualifying period notwithstanding their temporary (and involuntary in the case of Lau San-ching) absence from Hong Kong.

The respondents argued that, having regard to s 30(2) of the Electoral Provisions Ordinance (Cap 367) and reg 9(7) of the Boundary and Election Commission (Electoral Procedure)(Geographical Constituencies) Regulations (Cap 432 sub leg), the court had no

jurisdiction to entertain their applications for judicial review and that the only way they could challenge the decisions of the returning officers was by way of an election petition presented after the election The appellants responded that the term "election" in s 30(2) of the Electoral Provisions Ordinance referred to the results of the election, and did not cover a decision disqualifying the appellants from participating in the election. Further, they argued that reg 9(7) was ultra vires. Alternatively, the decisions of the returning officers were premised on s 18(2) of the Electoral Provisions Ordinance, which, if the Bill of Rights arguments were successful, was repealed. Accordingly, the decisions would be a nullity, and s 30 did not exclude the jurisdiction of the court to review a decision that was a nullity.

Before Mayo J

Held (dismissing the applications):

1. Section 30(2) of the Electoral Provisions Ordinance covers a determination by the returning officer of the eligibility of a prospective candidate. Nomination is an essential part of the election, and any wrongful rejection of a candidate constitutes a "material irregularity relating to [an] election process" within the meaning of s 30(2) of the Electoral Provisions Ordinance.

2. Since the nomination process is part of the election as a whole, reg 9(7) must be intra vires s 7 of the Boundary and Election Commission Ordinance. The clear wording of reg 9(7) excludes judicial review as a remedy before the election.

3. There is no denial of the right of access to court by excluding judicial review before the election. The applicants could obtain an expeditious hearing of their complaints by way of election petition, the procedure of which clearly complies with art 14(1) of the International Covenant on Civil and Political Rights.

4. The proposition that, notwithstanding the ouster clause, the court would have jurisdiction if the decision of the returning officer is a nullity because s 18 of the Electoral Provisions Ordinance has been repealed by the Bill of Rights, is highly questionable.

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, and *Pearlman v Harrow School* [1978] 3 WLR 736, considered.

G Li QC ~~and N Kat~~ (~~instructed by C Y Kwan & Co~~), ~~for~~ the applicant in MP No 2302 of 1994; J Chan and J Lam (instructed by David F K Yeung & Partners), for the applicants in MP Nos 2263 and 2312 of 1994; W Marshall QC and A Wu (of the Attorney General's Chambers), for the respondent in all three cases.

The appellants appealed to the Court of Appeal.

Held (dismissing the appeal):

1 Section 30(2) of the Electoral Provisions Ordinance covers the entire election process, including nomination. An election is already underway when the returning officer examines the nomination paper submitted to him under reg 9.

2. The wrongful rejection of a candidate constitutes a "material irregularity relating to [an] election process" within the meaning of s 30(2) of the Electoral Provisions Ordinance.

3 (Godfrey JA dissenting) The decisions of the returning officers disqualifying the appellants can only be challenged by way of election petition presented after the conclusion of the election. Given the tight timetable set down for holding an election, any intermediate judicial proceeding could have unexpected and perhaps the most deleterious effect. The intention of the legislature is to exclude any challenge by way of judicial review before the polling.

4. Regulation 9(7) of the Boundary and Election Commission (Electoral Procedure) (Geographical Constituencies) Regulations confers a specific power with regard to nomination on the returning officer. It is within the ambit of powers conferred generally on the returning officer under Part V of the Boundary and Election Commission Ordinance to supervise an election. Accordingly, Reg 9(7) is not ultra vires the powers of the Boundary and Election Commission.

per Godfrey JA (dissenting)

Section 30(2) of the Electoral Provisions Ordinance does not preclude the alternative remedy of judicial review before the election. However, the court should refrain from interfering with the election process unless very compelling reasons exist for its doing so. As the remedy by way of election petition will always be available to the aggrieved candidate, such compelling reasons are rarely likely to be found.

per Nazareth and Godfrey JJA

There are cogent reasons for refusing the appellants the remedy of judicial review because it would be wholly impracticable at this late stage of the electoral process to grant them the relief which they seek. Besides, no injustice will be done to the appellants by refusing them a judicial review, as their grievances can be adequately dealt with ~~by the election court after the election has taken~~ place. Accordingly, the applications for judicial review should be dismissed, not for want of jurisdiction, but as a matter of discretion.

G Li QC and T Yip (instructed by C Y Kwan & Co), for the appellant in Civ App No 159 of 1994; J Chan (instructed by David F K Yeung & Partners), for the Appellants in Civ App Nos 160 and 161 of 1994; W Marshall QC and A Wu (of the Attorney General's Chambers), for the respondent in all three cases.

Editorial comment

For those interested in seeing a resolution of the substantive issues arising in these cases, it is more than a little frustrating that not a single judge was prepared to decide on the merits of the article 21 issues raised in this case, despite full argument on the issue four different judges on two different occasions. This is the first Bill of Rights case involving the elections laws and there is considerable public interest in determining the constitutionality of the requirement of continuous ordinary residence in Hong Kong for ten years immediately before the date of nomination, a requirement which exists for all elections, including the coming Regional Council and Legislative Council elections.

The reason given by the courts for not deciding the article 21 issues was that it is preferable not to prejudice the deliberations of an election court should the matter be raised before that court in subsequent election petition. It seems to be a curious reason not to decide an issue because of *potential* future litigation. To say the very least, there may not be any election petition at all, as legal aid is not available for election petition. An election petition would see the same issues argued, and defended, at public expense yet a third (and possibly a fourth) time.

The conclusion of the courts is also unfortunate. If a returning officer rejects a candidate for absolutely unsound reasons (eg, because the candidate is a female or has red hair), the present law as laid down by a majority of the Court of Appeal in this case is that no judicial review before the election is possible. Any remedy will be available only after the election by way of election petition. If an election petition is successful, the result would presumably be that the person returned by popular vote would have his seat vacated and a by-election would have to be held. This does not seem to be in the interest of anyone involved, and would be quite unfair to the person elected who has to vacate his seat and spend time and money again in a by-election through no fault of his own.

In England, the returning officer has minimal power to exclude a candidate, and judicial review before the election is excluded only when the claim is made that the returning officer has wrongfully accepted the nomination of a candidate who is otherwise ineligible. That is, the English system errs on the side of inclusiveness. In contrast, in Hong Kong, the returning officer has wide power to exclude a potential candidate in Hong Kong. Even worse, in exercising that power the Hong Kong returning officer has been given the burden, quite unjustifiably, of interpreting difficult legal questions such as whether a potential candidate is ordinarily resident in Hong Kong. Against such background it seems unfair to exclude judicial review before the election; the dissenting judgment of Godfrey JA has much to be commended in this respect. This case also reveals many unsatisfactory aspects of our electoral law, and a comprehensive review before the next election would be timely and appropriate.

***Re Lee Mui-ling* (1994) HCt**

This case, for which legal aid has now been provided, involves a challenge to the system of functional constituencies.

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

Equality and non-discrimination -- Illegitimacy -- Whether time limit for filing an application for financial support and requirement for corroboration discriminatory

Affiliation Proceedings Ordinance (Cap 183), s 4 -- Guardianship of Minors Ordinance (Cap 13)

***L v C* (1994) HCt, MP No 4167 of 1993, 9 May 1994, Barnett J (in chambers)**

In December 1993 the applicant L commenced proceedings seeking various forms of relief against the respondent, whom she claimed to be the father of her child (who had been born out of wedlock on 5 March 1986). She sought custody, periodic payments for her son and other financial relief under the Guardianship of Minors Ordinance (Cap 13).

The respondent argued that applications for financial relief in respect of illegitimate children were required to be made under the Affiliation Proceedings Ordinance (Cap 183), s 4 of which required that an application must be made within 12 months of the child's birth. He further argued that a mother of an illegitimate child who was time-barred under the APO should not be allowed to circumvent that time bar by relying on the provisions of the GMO. Accordingly, the applicant's claim was out of time and should be struck out.

The applicant argued that the purpose of the Parent and Child Ordinance (Cap 429) was to eliminate distinctions between legitimate and illegitimate children. In light of the legislative history, the effect of the amendments introduced by the PCO was impliedly to repeal the APO or, at least, the provision in relation to the time bar. The applicant also argued that s 4 of the APO was inconsistent with articles 20 and 22 of the Bill of Rights, which guarantee the rights of the child and the right to equal protection of the law respectively.

Held (dismissing the application to strike out the summons):

1. The clear intention of the legislature in passing the Parent and Child Ordinance was to place an illegitimate child in the same position as a legitimate one; this goal included the abolition of the considerable obstacles placed in the path of the mother of an illegitimate child in obtaining appropriate financial provision for her child.

2. The effect of the Guardianship of Minors Ordinance as amended by the Parent and Child Ordinance was therefore impliedly to repeal the Affiliation Proceedings Ordinance insofar as the time limit to apply for financial relief by the mother of an illegitimate child is concerned.

3 While the requirement in s 5 of the Affiliation Proceedings Ordinance for corroboration of the mother's evidence as to the paternity of the putative father was proportionate and justified, the time-bar limiting the period for an application by the child's mother to 12 months after the child's birth meant that an illegitimate child would be unable through his mother to obtain appropriate financial provision from his father if the mother fails to make a timely application This is plainly discriminatory against an illegitimate child and inconsistent with the Bill of Rights

E Longmore (instructed by Van Langenberg & Lau), for the applicant
J Hingorani (instructed by H H Lau & Co), for the respondent

Editorial comment

The decision, insofar as it concerns article 22 of the Bill of Rights, appears to be per incuriam in the light of existing Hong Kong authority. The cases involves an inter-citizen dispute between the mother of an illegitimate child and the putative father over the right to maintenance of the illegitimate child. The Court of Appeal has taken the view that the Bill of Rights would not be applicable to inter-citizen disputes: *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 261, which was not referred to by the court in this case

On the other hand, the judge's conclusion on this issue is arguably the preferable one. The Court of Appeal decision in *Tam Hing-yee v Wu Tai-wai* has been subject to strong academic criticism (see, for example, *Bill of Rights Bulletin*, v 1, n 2, pp 1-4), although in no case has the correctness of that decision been challenged before the Court of Appeal or the Privy Council. In this particular case, the reason why the mother would not be able to apply for maintenance is because of a time bar in the Affiliation Proceedings Ordinance. Had there not been such a restriction she would have no difficulty in applying for maintenance for her illegitimate child. This is a classic case of state intervention in the form of legislation, and the Bill of Rights should be available as a redress against such discriminatory state intervention. The restrictiveness of *Tam Hing-yee v Wu Tai-wai*, which focuses on the formal status of the parties rather than the substantive nature of intervention, is clearly illustrated if it is applied to this case, which would have the effect of depriving the mother of a redress against legislation which is clearly discriminatory against children born out of wedlock. Such protection is required by the International Covenant on Civil and Political Rights as applied to Hong Kong and it was those guarantees to which the Bill of Rights Ordinance was intended to give effect

It may be of interest that clause 242 of the Equal Opportunities Bill introduced by independent legislator Anna Wu Hung-yuk would legislatively reverse the Court of Appeal's decision in *Tam Hing-yee*.

OTHER CASES RAISING INTERNATIONAL HUMAN RIGHTS ISSUES

***Statelessness** – **Whether Director of Immigration required to take possible statelessness into account when considering* whether to make a removal order**

R v Director of Immigration, ex parte Simon Yin Xiang-jiang and others **(1994) CA, Civ App No 218 of 1993, 22 June 1994, Bokhary and Mortimer JJA and Liu J**

The background to this case has been described in earlier issues of the *Bulletin* The applicants were originally Chinese citizens who had acquired the citizenship of Lesotho prior to coming to Hong Kong as visitors, but then subsequently applied for a change of status in order to engage in business activities. The government of Lesotho revoked their citizenship, following which the Director of Immigration refused to grant them a change of status An application for judicial review of the decision was refused and this refusal was affirmed by the Court of Appeal on the grounds that the application was directed against decisions which had not in fact been made

Following this decision and further representations made by the applicants based on their statelessness, the Director nevertheless refused to accept that the applicants were entitled to remain in Hong Kong or to give them permission to do so, and stated that statelessness was not a relevant issue. The applicants sought judicial review of this decision. The application for leave was initially granted, but subsequently set aside by Mayo J. The applicants appealed to the Court of Appeal against the decision of Mayo J.

Held (allowing the appeal):

1. The second application for judicial review did not involve an attempt to litigate the matters resolved in the first application.

2 Although the possible applicability of article 31 of the Convention relating to the Status of Statelessness Persons to the applicants was worthy of further examination, that did not assist the applicants, since the treaty had not been incorporated as part of domestic law and could not therefore be directly relied on

3. As a matter of domestic law, the Director was not obliged to exercise his powers in accordance with the provisions of the treaty, since to insist on his conforming his actions to the treaty would be incorporating the treaty into domestic law by the back door.

4 However, even if statelessness was not a conclusive consideration for the exercise of the Director's discretion, it was certainly a relevant one and the Director's failure to take it into account meant that his decision was vitiated by a failure to take into account a relevant consideration

Per curiam

"[I]t is not to be assumed that that Hong Kong has no respect at all for its treaty obligations, especially those pertaining to fundamental human rights of an international dimension It is at least potentially arguable, therefore, that where Hong Kong has a treaty obligation not to expel stateless persons except on grounds of national security or public order, then, even though that obligation has not been incorporated into our domestic law, it is nevertheless a factor which our immigration authorities ought to take into account when exercising a discretion whether or not, in all the circumstances, to insist upon the departure from this territory of any stateless person even though his departure is not required by national security or public order "

G J X McCoy and P Y Lo (instructed by Charles Yeung, Clement Lam & Co) for the appellants, W R Marshall QC and Meena Datwani (of the Attorney General's Chambers) for the respondent

DECISIONS FROM OTHER JURISDICTIONS

EUROPEAN COURT AND COMMISSION OF HUMAN RIGHTS

Saunders v United Kingdom, Application No 19187/91, Report of the Commission of 10 May 1994

This case arose out of a prosecution brought against the applicant following investigations by the Department of Trade and Industry into allegation that Guinness PLC had artificially maintained or inflated its share price during a takeover battle for Distillers PLC, which Guinness bought. The applicant was the chief executive officer of Guinness at the time During the investigations the applicant was required to answer questions put to him by DTI inspectors (in the presence of his legal advisers) Refusal to answer was subject to a sanction of up to two years' imprisonment Following the investigation the DTI, concluding that there was evidence of possible criminal offences, passed the matter to the Director of Public Prosecutions, and a police investigation followed, as a result of which the applicant was charged with 15 counts, the offences including destruction of documents, false accounting and theft

At his trial the applicant sought the exclusion of all the transcripts of the DTI interviews, but the court was prepared to exclude only the later ones The applicant was subsequently convicted on twelve counts. The material in the earlier interviews which were not ruled inadmissible contained damaging admissions and was used in cross-examination of the accused An appeal was allowed by the Court of Appeal in relation to one count only; the House of Lords refused leave to appeal.

The applicant complained to the European Commission, arguing that the use against him at the trial of incriminating material obtained from him by the exercise of the DTI inspectors' powers to compel persons to answer violated his right to a fair hearing guaranteed by article 6(1) of the European Convention on Human Rights.

The Commission found that there had been a violation of the right to a fair hearing under article 6(1) The Commission took the view that the right to silence (ie not to be compelled to give incriminating answers at the investigative stage) was part of the right to a fair hearing, although it was not necessarily an unqualified right The Commission commented

> "72. In the Commission's opinion, the privilege against self-incrimination is an important element in safeguarding an accused from oppression and coercion during criminal proceedings. The very basis of a fair trial presupposes that the accused is afforded the opportunity of defending himself against the charges brought against him. The position of the defence is undermined if the accused is under compulsion, or has been compelled, to incriminate himself. The privilege against self-incrimination is also closely allied to the principle of presumption of

> innocence protected in Article 6 para. 2 of the Convention in that it reflects the expectation that the State will bear the general burden of establishing the guilt of an accused, in which process the accused is entitled not to be required to furnish any involuntary assistance by way of confession
>
> 73. Whether a particular applicant has been subject to compulsion to incriminate himself and whether the use made of the incriminating material has rendered criminal proceedings unfair will depend on an assessment of the circumstances of each case as a whole."

The Commission also noted (in para 71) that 'the right of silence, to the extent that it may be contained in Article 6, must apply equally to alleged company fraudsters as to those accused of other types of fraud, rape, murder or terrorist offences."

After noting that the applicant had been compelled to provide material that formed a significant part of the case against him, the Commission concluded that there had been a violation of article 6(1), concluding:

> "76. . . .[T]he Commission finds that the use at the applicant's trial of incriminating evidence obtained from him under compulsory powers was oppressive and substantially impaired his ability to defend himself against the criminal charges facing him. He was therefore deprived of a fair hearing within the meaning of Article 6 para. 1 of the Convention."

The case has been referred to the European Court of Human Rights by the British Government.

Fayed v United Kingdom, Judgment of 21 September 1994, Series A, No 294-B (*The Times*, 11 October 1994)

The case may be contrasted with the recent decision of the European Court of Human Rights in *Fayed v United Kingdom*, in which the Court held that there had been no violation of article 6(1) in connection with a report drawn up by company inspectors appointed to investigate the affairs of a public company owned by the applicants (House of Fraser Holdings PLC). Although the report was critical of the conduct of the applicants and was made public, it did not lead to the laying of criminal charges. The applicants claimed that their reputation (a civil right) had been affected by publication and that the statutory protection against proceedings for defamation afforded to the inspectors in respect of their report and the lack of any procedure under which they could challenge the findings made in the report unjustifiably limited their right of access to court to obtain redress for violation of that right. The Court found that any restriction on their right of access to court in this respect was a reasonable and proportionate measure.

PRIVY COUNCIL

Rees v Crane [1994] 2 WLR 476 (on appeal from the Court of Appeal of Trinidad and Tobago)

This case concerned a challenge by a judge of the High Court of Trinidad and Tobago to steps taken to suspend him and to consider whether he should be removed from office The judgment is of interest in the Hong Kong context because the procedures for the suspension or removal of a judge under the Letters Patent are essentially the same as those considered in this case, and the procedures under the Basic Law are in generally similar terms. The Privy Council held that an administrative "suspension" of the respondent by simply not rostering him to sit was not authorised by the Constitution of Trinidad and Tobago; any suspension had to be in accordance with the procedures laid down in the Constitution. It was also held that the tribunal established to inquire into whether he should be removed from office had failed to act fairly towards the respondent by failing to inform him of the allegations made against him or to give him a chance to reply to them at the stage of determining whether there was a prima facie basis for inquiring into his conduct.

Vasquez v R; O'Neil v R [1994] 3 All ER 647 (on appeal from the Court of Appeal of Belize)

This case concerned a challenge to s 116(a) of the Criminal Code of Belize which had been interpreted as placing the burden of proving provocation on the accused. The accused challenged this provision on the ground that this burden was inconsistent with the presumption of innocence contained in s 6(3)(a) of the Belize Constitution.

The Privy Council held that the imposition of such a burden was inconsistent with the presumption of innocence, referring to the decision of the Board in *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72. The Board in this case considered that the provision in question should be reinterpreted in a manner which did not offend the constitutional guarantee, which they considered could be done by reinterpreting the language in a manner which imposed no more than an evidential burden on an accused. The extent to which the Board was prepared to go seems to go beyond the limits that the Hong Kong courts have been prepared to accept, and seems to amount to rewriting parts of the statute in question.

NEW ZEALAND

Tavita v Minister of Immigration [1994] NZAR 116 (CA)

In this case a challenge was made by way of judicial review proceedings to a decision by the immigration authorities to order the removal of a non-citizen. The applicant relied on the provisions of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Among the arguments put by the immigration authorities was the

argument that the authorities were not required to take into account the international instruments. In response to that argument, Cooke P commented:

> "That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at last be some hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments drawing on them is undergoing evolution . . ."

This case (and this passage) were referred to with approval by Bokhary JA in *R v Director of Immigration, ex parte Simon Yin Xiang-jiang* (at page 51 above).

LEGISLATION

Commissioner for Administrative Complaints (Amendment) Ordinance 1994 (No 44 of 1994)

This Ordinance, which commenced operation on 24 June 1994, amended the COMAC Ordinance. It is now possible for complaints to be made directly to the COMAC rather than via Legislative Council members, and for the Commissioner to publish reports of his investigations.

Criminal Procedure (Amendment) Ordinance (No 56 of 1994)

This Ordinance inserts a new Part IA in the Criminal Procedure Ordinance, creating a statutory right to bail. Of interest from the perspective of the public administration of justice is the new s 9P, which limits the information that may be published about a bail hearing. This provision assumes that bail hearings will be in public as a matter of course and that the press will therefore have access. As we and others have frequently commented, this practice does not seem to be observed in applications for bail in the High Court. Despite the public discussion of this issue, the Chief Justice and others still have not taken action to change a practice which appears to be in clear contravention of the Bill of Rights and the long-accepted principle of the open administration of justice. The fact that this seems to be a matter of indifference to judges of the High Court (who must surely be aware of the provisions of the Bill of Rights and the public criticism of this practice) insofar as they continue to preside over bail hearings in chambers is almost as much a matter of concern as the practice itself.

New Territories Land (Exemption) Ordinance **1994 (No 55 of 1994)**

This Ordinance, due to amendments introduced during its passage through the Legislative Council, provides that Chinese customary law no longer applies to matters relating to the succession of land in the New Territories The effect of this is that the discriminatory rules relating the inheritance of land no longer apply and succession to rural land in the New Territories will be governed by the general law. (The Ordinance has no application to Tso and Tong land.)

***Organized and Serious Crimes Ordinance* 1994 (No 82 of 1994)**

After a lengthy examination in the Legislative Council, the Organised and Serious Crimes Ordinance was finally passed by the Legislative Council and was assented to by the Governor on 20 October 1994. The Ordinance will come into operation on a date to be announced by the Governor.

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APPENDIX A

HUMAN RIGHTS COMMITTEE

GENERAL COMMENT ADOPTED UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

*General Comment No 23(50) (art 27)**

1. Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

2. In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant. Further, in reports submitted by States parties under article 40 of the Covenant, the obligations placed upon Dates parties under article 27 have sometimes been confused with their duty under article 2(1) to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under article 26.

3.1 The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals

* Adopted by the Committee at its 1214th meeting (fiftieth session) on 6 April 1994.

as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol [1]

3.2 The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party At the same time, one or other aspect of the rights of individuals protected under that article -- for example, to enjoy a particular culture -- may consist in a way of life which is closely associated with territory and use of its resources [2] This may particularly be true of members of indigenous communities constituting a minority.

4 The Covenant also distinguishes the rights protected under article 27 from the guarantees under article 2(1) and 26. The entitlement, under article 2(1), to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not.[3] Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

5.1 The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2(1) are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2 Article 27 confers rights on persons belonging to minorities with "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with

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[1] See Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40, UN Doc A/39/40, annex VI, General Comment No. 12(21) (article 1), also issued in document CCPR/C/21/Rev 1; ibid, Forty-fifth Session, Supplement No 40, (Bernard Ominayak, Chief of the Lubicon Lake Band v Canada), views adopted on 26 March 1990.

[2] See ibid, *Forty-third Session, Supplement No 40*, UN Doc A/43/40, annex VII, sect G, communication no 197/1985 (*Kitok v Sweden*), views adopted on 27 July 1988.

[3] See ibid, *Forty-second Session, Supplement No 40*, UN Doc A/42/40, annex VIII, sect D, communication no 182/1984 (*F H Zwaan-de Vries v Netherlands*), views adopted on 9 April 1987; ibid, sect C, communication no 180/1984 (*L G Danning v Netherlands*), views adopted on 9 April 1987.

members of their group, to enjoy their own culture, to practice their religion and speak their language Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

5.3 The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14(3) (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14(3)(f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.[4]

6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, there, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2 Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2(1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right

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[4] See ibid, *Forty-fifty Session, Supplement No 40*, UN Doc A/45/40), vol II, Annex X, sect. A, communication no 220/1987 (*T K v France*), decision of 8 November 1989; ibid, sect B, communication no 222/1987 (*M K v France*), decision of 8 November 1989.

may include such traditional activities as fishing or hunting and the right to live in reserves protected by law[5] The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

8. The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

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[5] See notes 1 and 2 above, communication no 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*), views adopted on 26 March 1990 and communication no 197/1985 (*Kitok v Sweden*), views adopted on 27 July 1988.

APPENDIX B

TEXT OF EXTENSION OF THE UNITED KINGDOM'S RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD TO CERTAIN DEPENDENT TERRITORIES[1]

The following are the relevant parts of the United Kingdom's instrument extending the application of the United Nations Convention on the Rights of the Child to various of its dependent territories including Hong Kong

'I have the honour to declare on behalf of the Government of the United Kingdom that its ratification of the Convention shall extend to the following territories

The Isle of Man
Anguilla
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands
Hong Kong
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St Helena, St Helena Dependencies
South Georgia and the South Sandwich Islands
Turks and Caicos Islands

The United Kingdom refers to the reservation and declarations (a), (b) and (c) [attachment refers] which accompanied its instrument of ratification and makes a similar reservation [viz (c) in the attachment] and declarations [viz (a) and (b) in the attachment] in respect of each of its dependent territories.

The United Kingdom, in respect of each of its dependent territories except Hong Kong and Pitcairn, reserves the right to apply Article 32 subject to the laws of those territories which treat certain persons under 18 not as children but as 'young people". In respect of Hong Kong, the United Kingdom reserves the right not apply Article 32(b) in so far as it might

[6] Dated 6 September 1994, deposited with the United Nations on 7 September 1994

require regulation of the hours of employment of young persons who have attained the age of fifteen years in respect of work in non-industrial establishments

Where at any time there is a lack of suitable detention facilities or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom, in respect of each of its dependent territories, reserves the right not to apply Article 37(c) in so far as those provisions require children who are detained to be accommodated separately from adults

The United Kingdom, in respect of Hong Kong and the Cayman Islands, will seek to apply the Convention to the fullest extent to children seeking asylum in those territories except in so far as conditions and resources make full implementation impracticable In particular, in relation to Article 22, the United Kingdom reserves the right to continue to apply any legislation in those territories governing the detention of children seeking refugee status, the determination of their status and their entry into, stay in and departure from those territories

The Government of the United Kingdom reserves the right to extend the Convention at a later date to any other territories for whose international relations the Government of the United Kingdom is responsible '

ATTACHMENT

CONVENTION ON THE RIGHTS OF THE CHILD: RESERVATIONS AND DECLARATIONS ENTERED BY THE UNITED KINGDOM UPON RATIFICATION

(a) The United Kingdom interprets the Convention as applicable only following a live birth

(b) The United Kingdom interprets the references in the Convention to "parents" to mean only those persons who, as a matter of national law, are treated as parents. This includes cases where the law regards a child as having only one parent, for example where a child has been adopted by one person only and in certain cases where a child is conceived other than as a result of sexual intercourse by the woman who gives birth to it and she is treated as the only parent.

(c) The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United

Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time

(d) Employment legislation in the United Kingdom does not treat persons under 18, but over the school-leaving age as children, but as "young people" Accordingly the United Kingdom reserves the right to continue to apply article 32 subject to such employment legislation

(e) Where at any time there is lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom reserves the right not apply article 37(c) in so far as those provisions require children who are detained to be accommodated separately from adults

(f) In Scotland there are tribunals (known as "children's hearings") which consider the welfare of the child and deal with the majority of offences which a child is alleged to have committed. In some cases, mainly of a welfare nature, the child is temporarily deprived of its liberty for up to seven days prior to attending the hearing The child and its family are, however, allowed access to a lawyer during this period. Although the decisions of the hearings are subject to appeal to the courts, legal representation is not permitted at the proceedings of the children's hearings themselves. Children's hearings have proved over the years to be a very effective way of dealing with the problems of children in a less formal, non-adversarial manner. Accordingly, the United Kingdom, in respect of article 37(d), reserves its right to continue the present operation of children's hearings.

APPENDIX C

VICTORIA FALLS DECLARATION ON THE PROMOTION OF THE HUMAN RIGHTS OF WOMEN.

Senior judges from Commonwealth African countries met at colloquium on 19 and 20 August at Victoria Falls to examine the domestic application of international and regional human rights norms as they specifically relate to women. The colloquium, which was the first such meeting devoted to the human rights of women, was organised and convened by the Women's Affairs and Youth Division of the Commonwealth Secretariat, with the approval and assistance of the Government of Zimbabwe. Participants, comprised of both female and male judges and drawn from all but two of the countries of Commonwealth Africa, included the Chief Justice of Zimbabwe, Hon A Gubbay, who opened the colloquium and Hon Justices Mavis Gibson and Vernanda Ziyambi, both of the High Court of Zimbabwe During the colloquium, the keynote address was delivered by Madam Justice Beverley McLachlin, of the Supreme Court of Canada, with further addresses being delivered by Hon Justice Bhagwati, former Chief Justice of India and Professor Albie Sachs of the University of Cape Town

There was a frank and full exchange of views and comprehensive discussion of human rights issues relating to women. Discussions resulted in the formulation of the Victoria Falls Declaration of Principles on the Promotion of the Human Rights of Women which follows

VICTORIA FALLS DECLARATION ON THE PROMOTION OF THE HUMAN RIGHTS OF WOMEN.

1. The participants reaffirmed the principles stated in Bangalore, amplified in Harare, affirmed in Banjul, confirmed in Abuja, reaffirmed at Balliol, Oxford and reinforced at Bloemfontein. These principles reflect the universality of human rights - inherent in women and men - and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ.

2. The participants noted that all too often universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. They stressed that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.

3. The participants were aware that universal human rights, are usually interpreted as applying to regulate the public sphere. Violations of human rights in the private sphere, including the family - the site of much of women's experience of violations - are usually perceived to be outside the reach of human rights. The participants noted that although the state does not usually directly violate women's rights in the private sphere, often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimate the authority of male members over the lives of female members of the family and, in any event, often fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently.

4. The participants recognised that many of the existing international and regional human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity and sometimes fail to provide protection for the gender specific interests of women. The participants emphasised the urgent need for the formulation of further specific rights for women, particularly in the economic and social field. The participants stressed the vital need for women to be centrally involved in decision making at all levels.

5. The participants recognised that discrimination against women can be direct and indirect. They noted that indirect discrimination requires particular scrutiny by the judiciary. The participants, further, emphasised the need to ensure not only formal, but also substantive equality for women and, for that purposes, affirmative action may be adopted if necessary.

6 The participants noted that although international human rights are inherent in all humankind, very often such rights are perceived to be owned, only or largely, by men The participants emphasised, as did the 1993 United Nations World Conference on Human Rights, that the human rights of women are as valuable as the human rights of men.

7. The participants recognised that international human rights instruments, both generally and particularly with reference to women, and their developing jurisprudence enshrine values and principles long recognised as essential to the happiness of humankind. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. These constitutional guarantees should be interpreted with the generosity appropriate to charters of freedom. Particularly the non discrimination guarantee should be construed purposively and with a special measure of generosity.

8. The participants agreed that it is essential to promote a culture of respect for internationally and regionally stated human rights norms and particularly those affecting women. Such norms should be applied in the domestic courts of all nations and given full effect. They ought not to be considered as alien to domestic law in national courts.

9. All Commonwealth governments should be encouraged to ratify the Convention on the Elimination of All Forms of Discrimination against Women before the Fourth United Nations World Conference on Women to be held in Beijing in 1995. Those governments which have ratified the Convention with reservations should examine the content of those reservations, with a view to their withdrawal.

10. All Commonwealth governments should ensure that domestic laws are enacted or adjusted to conform with the international and regional human rights standards.

11. The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.

12. The participants agreed with the views expressed in the Vienna Declaration and Programme of Action encouraging the speedy preparation of an optional protocol to enable individual petition under the Convention on the Elimination of All Forms of Discrimination against Women.

13. All Commonwealth governments should subscribe to the principles contained in the Declaration on Violence against Women, adopted by the UN General Assembly in December 1993. The participants agreed with the Declaration's classification of violence against women as a form of discrimination and violation of human rights.

14 All Commonwealth governments should offer appropriate assistance to the United Nations Special Rapporteur on violence against women

15 There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments which particularly pertain to women

16 The participants recognised and recommended that gender sensitised new initiatives in legal education, provision of material for libraries, programs of continuing judicial discussion and professional training to lawyers and other interest groups in the protection of the human rights of women and better dissemination of information about developments in this field to judges and lawyers should be undertaken for effective implementation of these principles.

17. The participants emphasised the need to translate the international human instruments and the African Charter of Human and Peoples' Rights into local languages, in a form accessible to the people and urged the governments to undertake or support that task.

18. The participants were of the view that the governments should mount extensive awareness campaigns through diverse means to disseminate and impart human rights education and encourage and support efforts by non-governmental organisations in this context.

19. The participants acknowledged the important contribution of non governmental organisations in the dissemination of information about women's human rights and making women aware of those rights. The participants called upon the governments to acknowledge and support the work of non-governmental organisations in the promotion of the human rights of women.

20. The participants emphasised the need to enable non governmental organisations to provide amicus curiae briefs and other legal advice, assistance and representation to women in cases involving human rights issues. The participants also stressed the need to provide free legal aid and advice to women at state cost for enforcement of their human rights.

21. Public interest litigation and other means of access to justice to litigants, especially women, who wish to complain of violations of their rights should be developed. Non-governmental organisations involved in women's issues should also be permitted to bring violations of human rights of women before the courts for redress.

22. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.

23 Closer links and cooperation across national frontiers by the judiciary on the interpretation and application of human rights law should be encouraged

24 Law schools should be encouraged to develop courses in human rights, which must include a module on the human rights of women.

APPENDIX D

EQUAL OPPORTUNITIES BILL 1994

Explanatory Memorandum

General

The main purposes of this Bill (set out in clause 2) are—

(a) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy, sexuality, family responsibility or family status, race, religious or political conviction, union membership or activities, spent criminal conviction, disability or age, as well as sexual harassment, racial harassment and harassment on the ground of sexuality or disability, in the workplace and in certain other areas (clause 2(a) and (b));

(b) to promote recognition and acceptance within the community of the equality of men and women (clause 2(c)), of all races and of all persons regardless of their religious or political convictions or their impairment or age (clause 2(d)); and

(c) to give effect to—

(i) obligations applicable to Hong Kong under certain international treaties to take appropriate steps, including legislative measures, to eliminate discrimination (clause 2(e));

(ii) relevant provisions of other international instruments applicable to Hong Kong (clause 2(g)); and

(iii) certain standards contained in the Convention on the Elimination of All Forms of Discrimination Against Women (clause 2(f)).

2. Part I provides for preliminary matters. Because a principal purpose of the Bill is to give effect to certain international instruments, the Bill should be given an interpretation consistent with standards contained in those instruments and an interpretation which gives effect to international obligations applicable to Hong Kong is to be preferred (clause 7). Laws (including rules of the common law) that cannot be construed consistently with the Bill are repealed to the extent of inconsistency (clause 8).

3. Clause 9 makes the exceptions and savings contained in sections 9 to 13 of the Hong Kong Bill of Rights Ordinance (Cap. 383) applicable to this Bill as well. These savings relate to legal restrictions imposed to preserve discipline in the armed forces and custodial discipline; the failure to accommodate juvenile detainees separately from adults; immigration

legislation, deportation proceedings, and the composition of the Executive and Legislative Councils

Definition of discrimination

4 Parts II through X contain clauses prohibiting discrimination on the ground of sex, marital status, and pregnancy (Part II); family responsibility or family status (Part III), sexuality or sexual preference (Part IV); race (Part V); disability (Part VI), religious or political conviction (Part VII); age (Part VIII); spent criminal conviction (Part IX), and union membership or activities (Part X). In each of these Parts, discrimination is defined to include both direct and indirect discrimination, and is made unlawful in the area of work, including—

(a) selection of employees, commission agents and contract workers (except that exemptions apply to a person selecting a domestic helper to work in that person's home);

(b) terms and conditions, access to opportunities for promotion, transfer, training and benefits, and dismissal or termination of employees, commission agents and contract workers;

(c) admission to partnerships and professional or trade organisations, and the treatment of members by such bodies; and

(d) the activities of qualifying bodies and employment agencies,

and in other areas including—

(i) education;

(ii) access to places and vehicles;

(iii) access to goods, services and facilities;

(iv) accommodation, other than within the home of the discriminator or a near relative;

(v) the disposition of interests in land, other than by will or by gift;

(vi) clubs, defined as voluntary associations of 30 or more persons, which maintain premises on which alcoholic beverages are served;

(vii) job application forms and certain other requests for information; and

(viii) the administration of laws and government programs.

Discrimination on the ground of sex, marital status, and pregnancy

5. Part II concerns discrimination on the ground of sex, marital status, and pregnancy. Clauses 10, 11 and 12 define discrimination for each of these three grounds respectively. Discrimination is prohibited—

(a) in work (clauses 13 through 19);

(b) in areas other than work (clauses 20 through 27), with certain exceptions—

(i) clause 20 exempts educational institutions enrolling students of one sex from any obligation to admit students of the other sex;

(ii) clause 23 exempts an employer or principal with respect to accommodation if existing accommodation is already occupied by persons of one sex, and it would be unreasonable to expect the employer to provide separate sleeping quarters for an applicant of the opposite sex;

(iii) if, taking account of the circumstances, it is impracticable for a club to provide a benefit for the use of men and women simultaneously or to the same extent, the club may provide equivalent benefits separately or apportion the benefit fairly and reasonably (clause 25).

6. Clause 28 prohibits discrimination on the ground of sex or marital status in the selection (whether by election, appointment or otherwise) of the members or office-holders of advisory bodies to government, with particular reference to village representatives and rural committees as defined in the Heung Yee Kuk Ordinance (Cap. 1097).

7. Discrimination in the form of sexual harassment is prohibited, in the areas of employment (clause 29), education (clause 30), accommodation (clause 31), and provision of goods and services (clause 32). Sexual harassment includes unwelcome sexual advances, conduct or speech, objection to which by the victim would reasonably be expected to disadvantage the victim in the relevant area, or which interfere with the victim's access to, use or enjoyment of the relevant facilities or create a hostile work environment for the victim.

8. Part II contains the following additional provisions concerning discrimination on the ground of sex, marital status, and pregnancy—

(a) exemptions apply in the area of work if sex is a genuine occupational qualification (clause 33) and, with respect to marital status, if the position is one of two to be held by a married couple (clause 35);

(b) rights or privileges relating to pregnancy and childbirth remain lawful even though granted to women exclusively (clause 34). Clause 36 also exempts services that by their nature can only be provided to members of one sex, and clause 37 generally exempts measures designed to achieve equality for, or to meet special needs of, pregnant women or persons of a particular sex or marital status;

(c) with respect to accommodation, clause 38 exempts single-sex student housing, and permits employers to provide employees with accommodation of varying standards if the standard is determined according to the number of persons in an employee's household;

(d) clause 39 provides an exemption with respect to sex for positions as a care-giver to a child in the child's home, and also with respect to marital status if it is intended that the spouse of the care-giver be employed as well;

(e) clause 40 permits discrimination on the ground of sex or marital status in the terms of superannuation or provident fund schemes; this provision may, however, be repealed by subsidiary regulations. With regard to the terms of annuities and insurance policies, discrimination on the basis of sex is lawful if reasonable and based upon actuarial or other relevant data;

(f) if the strength, stamina or physique of competitors is relevant, members of one sex may be excluded from competitive sporting activities, but not from coaching, umpiring or administering such activities (clause 41);

(g) clause 42 provides that nothing in Part II affects Chinese customary law in relation to New Territories land except, if relevant, clause 28 concerning advisory bodies.

Discrimination on the ground of family responsibility or family status

9. Part III concerns discrimination on the ground of family responsibility or family status. Discrimination is defined in clause 43 and is prohibited—

(a) in work (clauses 44 through 50); an exemption in clause 44 permits employers to afford persons of a particular family status or responsibility special benefits in connection with that status;

(b) in areas other than work (clauses 51 through 58); an exemption in clause 51 permits educational institutions to afford persons of a particular family status or responsibility special benefits in connection with that status.

10. Part III contains the following additional provisions concerning discrimination on the ground of family responsibility or family status—

(a) clause 59 exempts measures to meet the special needs of persons of a particular family status or responsibility;

(b) clause 60 permits employers to provide employees with accommodation of varying standards if the standard is determined according to the number of persons in an employee's household;

(c) clause 61 permits employers to restrict the employment of relatives of their own or others' employees where there is a significant likelihood of collusion and of resulting damage to the business.

Discrimination on the ground of sexuality or sexual preference

11. Part IV concerns discrimination on the ground of sexuality or sexual preference. Discrimination is defined in clause 62 and is prohibited—

(a) in work (clauses 63 through 69);

(b) in areas other than work.(clauses 70 through 77).

12. Discrimination in the form of harassment on the ground of sexuality is prohibited, in the areas of employment (clause 78), education (clause 79), accommodation (clause 80), and provision of goods and services (clause 81). Harassment includes threats, abuse, insults or taunts based on a victim's sexuality, objection to which by the victim would reasonably be expected to disadvantage the victim in the relevant area, or which interfere with the victim's access to, use or enjoyment of the relevant facilities or create a hostile work environment for the victim.

13 Clause 84 prohibits discrimination in the form of vilification on the ground of sexuality, meaning a public act inciting hatred, contempt or severe ridicule for a person on that ground "Public act" is defined in clause 83; fair reporting and privileged communications are exempt, as are reasonable acts done in good faith for academic, scientific, research or artistic purposes (clause 84) Serious vilification involving a threat of or an incitement to physical harm on the ground of sexuality is a criminal offence punishable by a $10,000 fine (clause 85)

14. Clause 86 provides an exception to Part IV permitting measures to meet the special needs of persons of a particular sexuality.

Discrimination on the ground of race

15. Part V concerns discrimination on the ground of race. Race includes colour, descent, ethnic or national origin and nationality (clause 3). Discrimination on the ground of race is defined in clause 87, and includes acts which segregate persons on the basis of their race. Discrimination is prohibited—

(a) in work (clauses 88 through 94);

(b) in areas other than work (clauses 95 through 102); a club formed to benefit persons of a particular race is exempt, provided the club does not discriminate between members of the relevant race by colour (clause 100).

16. Discrimination in the form of racial harassment is prohibited, in the areas of employment (clause 103), education (clause 104), accommodation (clause 105), and provision of goods and services (clause 106). Harassment includes threats, abuse, insults or taunts based on a victim's race, objection to which by the victim would reasonably be expected to disadvantage the victim in the relevant area, or which interfere with the victim's access to, use or enjoyment of the relevant facilities or create a hostile work environment for the victim.

17. Clause 109 prohibits discrimination in the form of racial vilification, meaning a public act inciting hatred, contempt or severe ridicule for a person on the ground of race. "Public act" is defined in clause 108; fair reporting and privileged communications are exempt, as are reasonable acts done in good faith for academic, scientific, research or artistic purposes (clause 109). Serious racial vilification involving a threat of or an incitement to physical harm is a criminal offence punishable by a $10,000 fine (clause 110).

18. Part V contains the following additional provisions concerning discrimination on the ground of race—

(a) exemptions apply to dramatic and artistic roles which demand racial authenticity, and to employment in services for or to promote the welfare of a particular race (clause 111);

(b) clause 112 exempts measures to achieve equality for or to meet the special needs of persons of a particular race.

Discrimination on the ground of disability

19 Part VI concerns discrimination on the ground of disability Disability includes any physical or mental impairment, as well as the presence of disease-causing organisms (such as HIV), and may be past, potential or imputed (clause 3). Clause 113 defines direct and indirect discrimination on the ground of disability. Discrimination on the ground of disability also includes discrimination on the ground that a person is accompanied by a guide dog or similar trained animal (clause 114), or by a palliative or therapeutic device or auxiliary aid, such as a wheelchair or neck brace (clause 115), or by an carer, interpreter or assistant such as a reader for the blind (clause 116).

20. Discrimination on the ground of disability is prohibited—

(a) in work (clauses 118 through 124); exemptions apply to hiring, selection, admission, termination and expulsion if—

(i) taking account of all reasonably relevant factors, the person affected would be unable to carry out the inherent requirements of the position or profession (clauses 118 through 121, 123 and 124); or if

(ii) special services or facilities would be required to provide equal opportunity, and such services or facilities would in the circumstances impose an unjustifiable hardship on the discriminator (clauses 118 through 121);

(b) in areas other than work (clauses 125 through 131, 133); exemptions apply if special services or facilities would be required to provide equal opportunity, and such services or facilities would in the circumstances impose an unjustifiable hardship on the discriminator. Clause 125 also permits schools established solely for students with a particular disability to restrict admissions to persons with that disability only;

(c) in sports (clause 132); exemptions apply if a person is not reasonably capable of performing the activity, or if an activity is restricted to persons with a particular disability only.

21. Public authorities shall not grant building or renovation approvals unless satisfied that reasonable access will be provided for persons with a disability, taking into account the degree of hardship imposed on the person seeking approval (clause 134). Private residences of 5 or fewer units are exempt.

22. Discrimination in the form of harassment on the ground of disability is prohibited, in the areas of employment (clause 135), education (clause 136), accommodation (clause 137), and provision of goods and services (clause 138). Harassment includes threats, abuse, insults or taunts based on a victim's disability, objection to which by the victim would reasonably be expected to disadvantage the victim in the relevant area, or which interfere with the victim's access to, use or enjoyment of the relevant facilities or create a hostile work environment for the victim. Harassment also includes interference with the provision of goods, services or facilities to a person on ground of that person's disability (clause 138).

23. Clause 141 prohibits discrimination in the form of vilification on the ground of disability, meaning a public act inciting hatred, contempt or severe ridicule for a person on that ground. "Public act" is defined in clause 140; fair reporting and privileged communications are

exempt, as are reasonable acts done in good faith for academic, scientific, research or artistic purposes (clause 141) Serious vilification involving a threat of or an incitement to physical harm on the ground of disability is a criminal offence punishable by a $10,000 fine (clause 142)

24. Part VI contains the following additional provisions concerning discrimination on the ground of disability—

(a) clause 143 exempts measures intended to achieve equality for or to meet special needs of persons with disabilities;

(b) clause 144 permits discrimination in the availability or terms of superannuation or provident fund schemes, annuities, or insurance policies, if reasonably based upon actuarial or other relevant data;

(c) clause 145 permits discrimination on grounds of an infectious disease if reasonably necessary to protect public health; this exemption explicitly does not permit discrimination against a person merely because that person is HIV-positive or has AIDS;

(d) clause 146 provides a temporary exemption of three years for payphones that are inaccessible to persons with disabilities.

Discrimination on the ground of religious or political conviction

25. Part VII concerns discrimination on the ground of religious or political conviction. Discrimination is defined in clause 147 and is prohibited—

(a) in work (clauses 148 through 154). Clauses 148 and 150 also make it unlawful for an employer or principal to refuse employees or contract workers permission to carry out recognised religious practices during working hours if such practices are reasonable in the circumstances of the employment;

(b) in areas other than work (clauses 155 through 162).

26. Clause 163 permits private educational authorities and religious bodies to discriminate on ground of religious or political conviction in hiring persons to perform duties involving religious observances or practices. It also permits discrimination on the ground of political conviction in connection with hiring persons to work for a political party, an electoral staff, or in similar work.

Discrimination on the ground of age

27. Part VIII concerns discrimination on the ground of age. Discrimination is defined in clause 164 and is prohibited—

(a) in work (clauses 165 through 171);

(b) in areas other than work (clauses 172 through 177, 179 and 181), with certain exceptions—

(i) mature age admission schemes are exempt from the provision concerning education (clause 172);

(ii) benefits or concessions may lawfully be offered to particular age groups in connection with accommodation, clubs and access to places, vehicles, goods, services and facilities (clauses 173, 174, 175, and 177),

(iii) residential complexes intended for a particular age group are exempt from the provision concerning dispositions of land (clause 176);

(iv) clubs formed to benefit members of a particular age group are exempt, and any club may lawfully retain age categories of membership (clause 177),

(c) in sports, including coaching, refereeing and administration (clause 178) Exemptions apply if a person is not reasonably capable of performing the activity, or, with respect to competitors only, if the activity is a competitive one between members of a particular age group;

(d) in connection with superannuation schemes and provident funds, except if necessary to comply with or obtain a benefit under any other law or if reasonable having regard to actuarial or other relevant data (clause 180).

28. Part VIII contains the following additional provisions concerning discrimination on the ground of age—

(a) clause 182 provides an exemption for discrimination which is justified by reasonable health and safety considerations;

(b) clause 183 exempts voluntary phased-in retirement schemes, and provides a temporary exemption of 2 years for mandatory retirement schemes;

(c) clause 184 permits a person to refuse to enter into a contract with a minor if the contract would be unenforceable at common law;

(d) clause 185 exempts measures to achieve equality for or to meet the special needs of persons of a particular age;

(e) clause 186 provides an exemption for dramatic and artistic roles if authenticity demands a person of a particular age, and for employment in services for or to promote the welfare of persons of a particular age;

(f) clause 187 provides an exemption with respect to the availability and terms of annuities or insurance policies if the discriminatory terms are reasonably based upon actuarial or other relevant data.

Discrimination on the ground of spent criminal conviction

29. Part IX concerns discrimination on the ground of spent criminal conviction. A person has a spent conviction if the person has been convicted of at most one offence, was not sentenced to death, imprisonment or a fine exceeding $5,000, and has had a "clean record" for at least three years (Clause 188). Discrimination on the ground of spent conviction is defined in clause 189 and is prohibited in work (clauses 190 through 196) and in areas other than work (clauses 197 through 204). Part IX extends the provisions of the Rehabilitation of Offenders Ordinance (Cap. 297), to which it is subject (clause 205).

Discrimination on the ground of union membership or activities

30. Part X concerns discrimination on the ground of membership or non-membership in a trade union or on the ground of union activities. Discrimination is defined in clause 206 and is prohibited in work (clauses 207, 210 through 215) and in areas other than work (clauses 216 through 223). In addition, clause 208 prohibits interference by employers with certain rights of employees to participate in union activities, and clause 209 prohibits offers of employment that forbid membership in or association with members of trade unions Clauses 208 and 209 create civil liability for anti-union practices which give rise to criminal liability under sections 21B and 21C of the Employment Ordinance (Cap. 57), and neither clause limits such criminal liability.

Offences

31. Clause 224 makes victimization unlawful. Victimization consists of subjecting or threatening to subject a person to any detriment because of that person's past or planned allegations, assertions of rights, or assistance to a court in connection with this Bill or proceedings under this Bill.

32. Clause 225 makes it a criminal offence to publish an advertisement that indicates an intention to do an act made unlawful by this Bill, punishable by a fine of $30,000 for a first offence and $100,000 for a subsequent offence. Advertisements include any notice, sign, label, circular or other matter which conveys a message, written or otherwise. Any person may initiate a private prosecution under this clause.

General exceptions

33. Part XII provides general exceptions to the Bill—

(a) gifts to charities may lawfully discriminate in identifying a class of persons eligible to receive charitable benefits (clause 226);

(b) voluntary bodies may lawfully discriminate in admission to membership and in the provision of benefits, facilities or services to members (clause 227). This exemption, however, does not apply to clubs (defined in clause 3 as associations of 30 or more persons, which maintain premises on which alcoholic beverages are served), to bodies established by law, or to associations with profit-making activities or which provide finance to members;

(c) religious bodies may lawfully discriminate in connection with the performance of religious duties, and in the training, appointment, etc. of persons to perform such duties (clause 228);

(d) .religious schools may discriminate in good faith in employment and educational matters to avoid injury to the religious susceptibilities of adherents of the religion (clauses 229);

(e) establishments providing housing for the aged and ancillary services may lawfully restrict admission to any class of applicants except classes defined in terms of

disability, and may discriminate on any ground except age in the provision of benefits, facilities or services to those admitted (clause 230)

Implementation and enforcement

34. Part XIII provides for implementation and enforcement. Discriminatory acts or practices made unlawful by the Bill are "civil wrongs" (clause 231) triable in the District Court (clause 232).

35. Pending determination of a claim, the court may make interim orders to preserve the status quo and the rights of the parties (clause 233). Once the court is satisfied that a person has unlawfully discriminated against another, it may make an order which it considers just and appropriate in the circumstances (clause 234). For example, the court may —

(a) order that the defendant pay to the plaintiff damages in compensation for any loss or damage suffered, or punitive and exemplary damages;

(b) make an order enjoining the defendant from continuing or repeating any unlawful conduct;

(c) order the defendant to perform any reasonable act or course of conduct to redress a plaintiff's loss or damage;

(d) order the defendant to employ, re-employ or to promote the plaintiff;

(e) make an order declaring void in whole or in part and from such time as is specified any unlawful contract or agreement; or

(f) declare that all or part of a pre-existing law has been repealed.

36. Clause 235 permits the court to disregard the ordinary rules of evidence to inform itself on any matter as it sees fit (by taking account, for example, of statistical evidence concerning claims of indirect discrimination). A person who asserts that an act or practice is lawful because it falls within an exemption provided by this Bill bears the burden of proof with respect to that exemption (clause 236).

37. In order to facilitate access to the courts and to assure affordable and effective remedies, clause 237 provides that each party to litigation will ordinarily bear that party's own costs. The court may, however, award costs as it thinks fit if it finds that exceptional circumstances justify doing so. Such circumstances include actions or claims which are frivolous or vexatious, allegations made in bad faith, or unnecessary and deliberate delay or prolongation of the hearings.

Miscellaneous

38. Part XIV sets out miscellaneous matters. Rules of liability are provided for persons who participate in others' unlawful acts (clause 238), for employers or principals with

respect to acts of their employees or agents (clause 239), and for corporate bodies (clause 240). Clause 241 gives the Governor power to make regulations subsidiary to this Bill.

39. Clause 242 amends the Hong Kong Bill of Rights Ordinance (Cap. 383). As interpreted by the Court of Appeal (in *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 261, [1992] 1 HKLR 185), the Bill of Rights Ordinance repeals inconsistent pre-existing legislation when that legislation is relied upon by the Government, but the same legislation nonetheless remains in force when relied upon by private citizens. Clause 242 removes this anomaly by amending the Bill of Rights Ordinance to make it applicable to all legislation, not merely to legislation invoked by the Government or public authorities.

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THE BILL OF RIGHTS

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

THE EDITORS

Andrew Byrnes and **Johannes Chan** are members of the Department of Law of the University of Hong Kong. Both teach and write in the area of human rights law. **Johannes Chan** has written two books (in Chinese) on human rights in Hong Kong and published on international human rights topics as well as on the *Hong Kong Bill of Rights*. **Andrew Byrnes** has published articles on international human rights law and on human rights in Hong Kong and served as a consultant to the Attorney General's Chambers of the Hong Kong Government during the drafting of the *Bill of Rights*. **Andrew Bruce** is Senior Assistant Crown Prosecutor with the Attorney General's Chambers, Hong Kong. He has appeared for the Government in a number of appellate cases in which *Bill of Rights* issues have been raised. **Editorial comments** are the sole responsibility of the editors (Andrew Byrnes and Johannes Chan) and should not be taken to represent the views of the University, the Faculty of Law or any other person.

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INFORMATION ON DEVELOPMENTS

We would particularly appreciate information about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We would like to thank Gerry McCoy, Ian Deane, Steve Bailey, Jeremy Croft, Susie Ho, Anthony Ismail, Philip Dykes, Tony Kinnear, Jane Connors, Eric Tistounet, Peter Wesley-Smith, Michael Wilkinson, Justice Patrick Chan, the Council of Europe and the UN Centre for Human Rights (as well as others) for providing us with information included in this issue of the *Bulletin*. We would also like to thank Nancy Choi, who is responsible for the administrative side of the *Bulletin*'s. This issue is based on (the necessarily incomplete) information available to the Editors as of the end of April 1995.

CONTENTS

RIGHT TO A FAIR HEARING IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10, BILL OF RIGHTS; ARTICLE 14(1), ICCPR)

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

RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGE AGAINST ONE (ARTICLE 11(2)(A), BILL OF RIGHTS; ARTICLE 14(3)(A), ICCPR)

TABLE OF STATUTES AND OTHER SOURCES CONSIDERED

TREATIES

HONG KONG CONSTITUTIONAL DOCUMENTS AND LEGISLATION[1]

[1] Including Bills

[2] See also references under the corresponding articles of the *International Covenant on Civil and Political Rights.*

TABLE OF CASES NOTED

HONG KONG CASES

CASES PENDING BEFORE THE PRIVY COUNCIL OR IN WHICH SPECIAL LEAVE TO APPEAL HAS BEEN OR IS TO BE SOUGHT

R v Chan Chi-hung (1993) 3 HKPLR 243 (petition for special leave granted; hearing scheduled for 18 May 1995)

CUMULATIVE TABLE OF HONG KONG BILL OF RIGHTS CASES REPORTED TO DATE[3]

The Appeal Tribunal v de Kantzow (1991) 1 HKPLR 143, [1992] 1 HKLR 55 (CA)
Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 1 HKCLR 249, [1994] 1 AC 1, [1993] 3 WLR 242, [1993] 2 All ER 510
Attorney General v Fong Chin Yue [1995] 1 HKC 21
Attorney General v Lee Kwong-kut (1992) 2 HKPLR 94; [1992] 2 HKCLR 76 (CA)
Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man (1993) 3 HKPLR 72, [1993] 2 HKCLR 186, [1993] AC 951, [1993] 3 WLR 329, [1993] 3 All ER 939 (PC)
Attorney General v Osman (1991) 1 HKPLR 59, [1992] 1 HKCLR 35 (HCt)

[3] Up to (1994) 4 HKPLR, Part 1, [1994] 2 HKLR Part II and HKC published as of end of April 1995.

Attorney General v Tang Yuen-lin [1995] 1 HKC 209
Building Authority v Business Rights Ltd (1993) 3 HKPLR 609 (DCt)
Building Authority v Business Rights Ltd (1994) 4 HKPLR 43 (CA)
Commissioner of Inland Revenue v Lee Lai-ping (1993) 3 HKPLR 141
Duty Free Shoppers Hong Kong Ltd v Wong Kwok-pong (1991) 1 HKPLR 150
Re Eng Sui-hang and the United States of America (1991) 1 HKPLR 298
Re Hong Kong and Shanghai Banking Corporation (1991) 1 HKPLR 59, [1992] HKDCLR 37
Hong Kong Stationery Manufacturing Co Ltd v Worldwide Stationery Manufacturing Co Ltd (1991) 1 HKPLR 156
L v C [1994] 2 HKLR 93
Re Le Tu Phuong (1994) 4 HKPLR 159 (CA)
Re Nattrass (1994) 4 HKPLR 234
Re Ng Hung-yiu and United States of America (1992) 2 HKPLR 209, [1992] 2 HKLR 383
Prime Computer (Hong Kong) Ltd v Sham Tak-leung (1991) 1 HKPLR 256, [1992] 1 HKLR 115
R v Alick Au Shui-yuen (1991) 1 HKPLR 71
R v Allen, ex parte Ronald Tse Chu-fai (1992) 2 HKPLR 266; [1993] 2 HKLR 453 (HCt)
R v Allen, ex parte Ronald Tse Chu-fai (1992) 2 HKPLR 282 (CA)
R v Benny Lai Kwai-wa (1993) 3 HKPLR 435
R v Chan Chak-fan (1993) 3 HKPLR 456 (DCt)
R v Chan Chak-fan; R v Lai Yiu-pui (1994) 4 HKPLR 115, [1994] 2 HKCLR 17 (CA)
R v Chan Chi-hung (1993) 3 HKPLR 243, [1993] 2 HKCLR 212
R v Chan Chuen-kam (1993) 3 HKPLR 215, [1993] 1 HKC 241, [1993] 2 HKCLR 144
R v Chan Kein-wing (1993) 3 HKPLR 598, [1994] 1 HKCLR 41
R v Chan Kwok-tung (1993) 3 HKPLR 201
R v Chan Sau-sum (1993) 3 HKPLR 308
R v Chan Suen-hay [1995] 1 HKC 847
R *v Chan Wai-ming (No 1)* (1991) 1 HKPLR 292
R v Chan Wai-ming (No 2) (1992) 2 HKPLR 231; [1993] 1 HKCLR 51
R v Charles Cheung Wai-bun (1992) 2 HKPLR 123; [1993] 1 HKCLR 189 (HCt)
R v Cheng Pui-kit (1991) 1 HKPLR 324
R v Deacon Chiu Te-ken (1992) 2 HKPLR 245
R v Deacon Chiu Te-ken (1993) 3 HKPLR 483, [1993] 2 HKCLR 21
R v Choi Kai-on (1994) 4 HKPLR 105
R v Chong Ka-man (1993) 3 HKPLR 789
R v Chong Nok-pang (1991) 1 HKPLR 358
R v Chu Kam-to [1994] 1 HKC 775
R v Crawley (1994) 4 HKPLR 62
R v Deputy District Judge, ex parte Chow Po-bor (1993) 3 HKPLR 101 (HCt)
R v Director of Immigration, ex parte Li Jin-fei and others; R v Director of Immigration, ex parte Yan Chen Chang-mei and others; R v Director of Immigration, ex parte Pan Ze-yan and others (1993) 3 HKPLR 565 (CA)
R v Director of Immigration, ex parte Wong King-lung (1993) 3 HKPLR 253, [1993] 1 HKC 461
R v Eddie Soh Chee-hong (1991) 1 HKPLR 83
R v Egan (1993) 3 HKPLR 277, [1993] 1 HKCLR 284
R v Faisal (1993) 3 HKPLR 220
R v Flickinger (1993) 3 HKPLR 677
R v Fong Fu-ching (1993) 3 HKPLR 761
R v Fu Yan (1992) 2 HKPLR 109; [1992] 2 HKCLR 59
R v Fung Shu-sing (1992) 2 HKPLR 383
R v Hong Kong Polytechnic, ex parte Jenny Chua Yee-yen (1992) 2 HKPLR 334
R v Hui Lan-chak (1992) 2 HKPLR 423
R v Hui Kwok-fai (1993) 3 HKPLR 752
R v Joshi (1992) 2 HKPLR 564
R v Ko Chi-yuen (1992) 2 HKPLR 310 (HCt)
R v Ko Chi-yuen (1994) 4 HKPLR 152, [1994] 2 HKCLR 65 (CA)
R v Kwan Kwok-wah (1992) 2 HKPLR 353

R v Kwok Hing-man (1994) 4 HKPLR 186
R v Kwok Wai-chun(1992) 2 HKPLR 532
R v Lai Kai-ming (1993) 3 HKPLR 58
R v Lai Yiu-pui (1993) 3 HKPLR 782 (DCt)
R v Lam Chau-on (1991) 1 HKPLR 271
R v Lam Kwok-keung (1993) 3 HKPLR 369
R v Lam Shun (1992) 2 HKPLR 14
R v Lam Tak-ming (1991) 1 HKPLR 222
R v Lam Wan-kow, R v Yuen Chun-kong (1992) 2 HKPLR 26; [1992] 1 HKCLR 272 (CA)
R v Lau Kung-shing (1993) 3 HKPLR 286, [1993] HKDCLR 57
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R v Lau Shiu-wah (1991) 1 HKPLR 202, [1992] HKDCLR 11 (DCt)
R v Lau Ting-fan (1992) 2 HKPLR 1
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R v Lee Kwong-ming (1992) 2 HKPLR 91
R v Leung Ping-lam (1991) 1 HKPLR 52
R v Li Kwok-wa; R v Chiu Chi-kwong (1992) 2 HKPLR 11
R v Li Tat (1993) 3 HKPLR 171, [1993] 2 HKCLR 203
R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Limited (1994) 4 HKPLR 168, [1994] 1 HKC 741
R v Lo Chak-man (1992) 2 HKPLR 220
R v Lo Hon-hin (1993) 3 HKPLR 622
R v Lo Wai-keung (1992) 2 HKPLR 478, [1993] HKDCLR 47
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R v Ma Man-ho (1991) 1 HKPLR 314
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R v Sze Yung-sang (1993) 3 HKPLR 211, [1993] 2 HKCLR 18
R v Tai Yiu-wah (1994) 4 HKPLR 56
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R v Tran Viet Van (1992) 2 HKPLR 237; [1992] 2 HKCLR 184
R v Tse Kim-ho (1993) 3 HKPLR 298
R v Tsui Shek-law (1991) 1 HKPLR 346
R v Tung Chi-hung (1991) 1 HKPLR 282
R v Wan Kit-man [1992] 1 HKCLR 224 (HCt)
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R v William Hung (1993) 3 HKPLR 328, [1994] 1 HKCLR 47 (CA)
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R v Wong Hiu-chor(1992) 2 HKPLR 288, [1993] 1 HKCLR 107
R v Wong Lai-shing (1993) 3 HKPLR 766
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R v Wright, ex parte Lau Wing-wo (1993) 3 HKPLR 126
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Re Law Kin-man and Commissioner of Correctional Services (1992) 2 HKPLR 332
R v Attorney General, ex parte Allied Group (1993) 3 HKPLR 386 (HCt)
R v Attorney General, ex parte Allied Group (1993) 3 HKPLR 386 (CA); leave to appeal to the Privy Council refused: [1993] 2 HKLR 419
R v Director of Immigration, ex parte Bui Thi Chin [1994] 1 HKC 441 (HCt)
R v Director of Immigration, ex parte Chan Heung-mui (1993) 3 HKPLR 533
R v Director of Immigration, ex parte Chan Kam-lun (1993) 3 HKPLR 581
R v Director of Immigration, ex parte Le Tu Phuong and another [1994] 1 HKC 263 (CA)
R v Director of Immigration, ex parte Ho Ming-sai [1993] 2 HKLR 29 (HCt)
R v Director of Immigration, ex parte Ho Ming-sai (1993) 3 HKPLR 187, [1994] 1 HKLR 21 (CA)
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R v Director of Immigration, ex parte Li Jin-fei (1993) 3 HKPLR 565 (CA)
R v Director of Immigration, ex parte So Kam-cheung (1993) 3 HKPLR 587
R v Director of Immigration, ex parte Yin Xiang-jiang [1994] 2 HKLR 101(CA)
R v Governor, ex parte Reid (1994) 4 HKPLR 18
R v Hui Lan-chak (1993) 3 HKPLR 184; [1993] 2 HKCLR 230 (CA)
R v Immigration Tribunal, ex parte Chan Choi-hung (1993) 3 HKPLR 374, [1994] 1 HKC 25 (CA)
R v Leung Kit-chun (1994) 4 HKPLR 38, [1994] 1 HKC 168
R v Obscene Articles Tribunal, ex parte Freeman Holdings Ltd (1993) 3 HKPLR 604, [1993] 1 HKC 300 (CA)
R v Obscene Articles Tribunal, ex parte Ming Pao Holdings Ltd (1994) 4 HKPLR 5
R v Panel on Takeovers and Mergers, ex parte Cheng Kai-man, William (No 1) [1994] 1 HKC 390 (HCt)
R v Panel on Takeovers and Mergers, ex parte Cheng Kai-man, William (No 2) (HCt) [1994] 1 HKC 400
R v Panel on Takeovers and Mergers, ex parte Cheng Kai-man, William (No 2) [1994] 1 HKC 413 (CA)

EDITORIAL

PERSONALIA

Our former collaborator in the Attorney General's Chambers, Mr Steve Bailey, was appointed a judge of the District Court at the end of 1994 We congratulate him and wish him well with his judicial career Mr Andrew Bruce, who has assumed primary responsibility for Bill of Rights matters in the criminal law field in the Legal Department, has kindly agreed to take over that role We welcome him to what has in the past been a fruitful collaboration between the two institutions.

CASE LAW DEVELOPMENTS

There have been a number of major cases in the period since the publication of the last issue of the *Bulletin* A number of those challenges have been successful, though the trend has been that the higher courts (especially the Court of Appeal) have been far less ready to declare statutory provisions inconsistent with the Bill of Rights than have the lower courts

The provisions of anti-corruption legislation have been the subject of a number of challenges, with mixed results. The Court of Appeal in *R v Harry Hui Kin-hong* (page 23) reversed the decision of the District Court and upheld s 10(1)(a) of the Prevention of Bribery Ordinance (Cap 201). In *R v Liew Kwok-shan William* (page 27) the District Court held that s 25 of the same Ordinance was inconsistent with article 11(1), and in *R v Ming Pao Newspapers* (page 35) Mr H M Sinclair struck down s 30 of the same Ordinance. The last case is currently the subject of an appeal.

The Court of Appeal addressed the compatibility of strict liability offences alleviated by a due diligence defence in *R v Iu Tsz-ning* (page 18), upholding the offence contained in s 37C of the Immigration Ordinance (Cap 115) of being a member of crew of a ship which enters Hong Kong with unauthorized entrants on board. By contrast, in *R v China State Construction Engineering Corporation* (page 21) Mr Jonathan Acton-Bond held that s 38A(2) and (3) of the same Ordinance, which makes it an offence for illegal immigrants to be found on a construction site, were inconsistent with article 11(1).

In *Attorney General v Tang Yuen-lin* (page 30) the Court of Appeal held that it was not a violation of article 11(2)(a) of the Bill of Rights to issue a summons in English only to a person apparently of Chinese ethnic origin who could not read English, provided that appropriate steps were taken at a later stage to ensure that the defendant was aware of the details of the charge.

In *R v Chan Suen-hay* (page 32), an important decision, the District Court held that the imposition of a disqualification order under s 168E of the Companies Ordinance (Cap 32) on a person convicted of various criminal offences, involved the imposition of a "penalty" within the meaning of article 12(1) of the Bill of Rights. Accordingly, the retrospective application of that provision was inconsistent with the Bill of Rights. This case represents a welcome endorsement of the international approach to the issue of determining whether the

imposition of a sanction involves the determination of a criminal charge or imposition of a criminal penalty, an approach regrettably not displayed by the Court of Appeal in similar cases

In the civil area, there have been a number of important cases at the superior court level In *R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Ltd* (page 9) the Court of Appeal reversed the judgment of the High Court and held that the scheme established by the Lifts and Escalators (Safety) Ordinance (Cap 327) was consistent with the Bill of Rights The case turned on whether the right of access to an independent and impartial tribunal was violated in view of the participation of the Director of Electrical and Mechanical Services in referring matter to the Board and in adjudicating upon them The Court held that, since there was an appeal to the High Court by way of rehearing against the decision of the Board, the right of access to an article 10 tribunal was therefore satisfied The judgment also contains some controversial obiter about the procedure under the statute and its consistency with the Bill of Rights

The right of access to an independent and impartial tribunal has featured in a number of other cases, in particular in relation to the consistency of the town planning legislation with the Bill of Rights Judgment is still awaited in *R v Town Planning Board, ex parte Kwan Kong Company Ltd* (page 14), a case before the High Court challenging the role of the Town Planning Board. The applicability of the right to a fair hearing under article 10 to extradition proceedings was rejected once again by the High Court in *Re Thanat Phaktiphat* (page 17)

The area of electoral law has seen two important decisions The first, *R v Apollonia Liu, ex parte Lau San-ching* (page 38) involved a successful challenge in an election petition to the requirement of s 18(2) of the Electoral Provisions Ordinance (Cap 367), which requires that a person have been "ordinarily resident" in Hong Kong for the 10 years immediately preceding the person's nomination as a candidate for District Board elections. In *Re Lee Miu-ling* (page 41), a challenge to the system of functional constituencies was unsuccessful on the ground that functional constituencies were authorised by the provisions of the Letters Patent.

In short, there continues to be a significant flow of important Bill of Rights cases, with a somewhat more liberal trend in the lower courts. While the Privy Council in *Lee Kwong-kut* (1993) 3 HKPLR 72 at 100 exhorted Hong Kong courts not to let disputes over the Hong Kong Bill of Rights "get out of hand", the trend of decisions of the Court of Appeal appears to be less mindful of the Privy Council's encouragement to be "zealous in upholding an individual's rights". In its decisions, the Court of Appeal seems to have gone out of its way to limit the impact of the Bill of Rights, and has adopted restrictive and unsatisfactorily reasoned interpretations of Bill of Rights guarantees adopting strained readings of existing legislation in seeking to uphold existing legislation.

OTHER DEVELOPMENTS

Equal opportunities legislation[1]

The Legislative Council continues to consider a number of Bills relating to equal opportunities These are the Equal Opportunities Bill 1994 introduced in July 1994 by legislator Anna Wu Hung-yuk, the Sex Discrimination Bill introduced by the Administration in October 1994, and the Disability Discrimination Bill 1995 recently introduced by the Administration (see page 48. The Administration continues to resist proposals to expand the scope of its legislation to include discrimination on the grounds of marital status and pregnancy in areas other than work, as well as refusing to take up calls to legislate against discrimination on the ground of age, sexuality, family responsibility and other grounds contained in Wu's Equal Opportunities Bill. The Administration has so far refused to respond to calls to broaden the mandate of the proposed Equal Opportunities Commission so that the Commission can carry out research, education and related activities into types of discrimination other than sex and disability discrimination, and to investigate complaints of discrimination in violation of the Bill of Rights

At the meeting of the Bills Committee held on 21 April 1995 Anna Wu announced her intention to introduce a package of new Bills, which would include the main features of her Equal Opportunities Bill, while deleting the sections on sex discrimination and disability discrimination, these areas having now been dealt with by the Administration's Bills. The three Bills will deal with (a) age, sexuality and family responsibility; (b) racial discrimination, and (c) political and religious conviction, trade union membership and activities, and spent conviction.

INTERNATIONAL DEVELOPMENTS CONCERNING HONG KONG

Human Rights Committee: General comment on reservations

At its 52nd session, which concluded in early November 1994, the Human Rights Committee adopted *General comment 24(52)*, dealing with the question of reservations to the International Covenant on Civil and Political Rights. The text of that *General comment* is reproduced as Appendix A (page 51). The Committee is presently drafting a *General comment* on article 25 of the ICCPR (article 21 of the Bill of Rights, which has been the subject of a number of recent Hong Kong cases).

Committee on Economic, Social and Cultural Rights: General comment No 5 (1994) on persons with disabilities

At its 11th session, the Committee on Economic, Social and Cultural Rights adopted a general comment on persons with disabilities. The text of *General comment No 5* appears as Appendix B (page 58).

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[1] In the interests of full disclosure it should be mentioned that one of the editors (AB) has been closely involved in the drafting of the Bills prepared by Ms Wu.

HEARINGS BEFORE THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (NOVEMBER/DECEMBER 1994)[2]

The reports of the United Kingdom in respect of Hong Kong dealing with articles 10-15 of the International Covenant on Economic, Social and Cultural Rights were examined by the United Nations Committee on Economic, Social and Cultural Rights at its 11th session, in the week commencing 21 November 1994

On Monday, 21 November 1994 the Committee heard oral submissions from non-governmental organisations from Hong Kong, on Wednesday, Thursday and Friday it heard from the delegation of the United Kingdom, which included officials from Hong Kong. The United Kingdom delegation consisted of nine members overall, of whom six were from Hong Kong. The Hong Kong delegation was headed by the Solicitor General, Mr Daniel Fung QC, who was accompanied by Mr Duncan Pescod, Principal Assistant Secretary, Home Affairs Branch and four other officials, two from the Attorney General's Chambers, one from the Education and Manpower Branch, and one from the Education and Welfare Branch.

Hong Kong non-governmental organisations also participated in the hearing. A number of organisations attended the hearing and provided written and oral briefings to Committee members, while others provided written submissions to the Committee. The organisations which attended included the Society for Community Organisation, the (non-governmental) Hong Kong Human Rights Commission, JUSTICE (the Hong Kong branch of the International Commission of Jurists), two representatives of the Constitutional Development Panel of the Hong Kong Legislative Council, the Hong Kong Committee on Children's Rights and the International League for Human Rights All of these made written submissions and/or oral presentations to the Committee.

The groups and individuals who submitted written material only included 31 Hong Kong-based human rights organisations, which submitted a joint statement on general issues relating to the implementation of and reporting under the Covenant, 22 migrant organisations which raised the issue of the legal regime governing foreign domestic helpers and the situation of these workers in the territory. Ms Anna Wu, member of the Legislative Council made a submission relating to equal opportunities legislation, the Hong Kong Women's Coalition made a submission on the situation of women, and a collection of the papers from a University of Hong Kong seminar on the implementation of the Covenant was also presented to the Committee, as well as a letter from the Hong Kong Christian Institute and Hong Kong Youth Concern Group. Amnesty International's report, *Flaws in the System*, published in 1994, was also provided to Committee members on the second day of the hearings on Hong Kong.

The basis of the review

The Committee's examination of the situation in Hong Kong was based on the reports submitted in 1993 dealing with articles 10-12 and 13-15 of the Covenant,[3] as well as the

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[2] See generally A Byrnes, "Will the Government Put Its Money Where Its Mouth Is? The Verdict of the UN Committee on Economic, Social and Cultural Rights" (1995) 25 *Hong Kong Law Journal* (forthcoming)

detailed written material supplied by the UK and HK governments in response to the written questions sent by the Committee to the governments in early July 1994 (Appendix C), information provided orally to the Committee by the delegation, and material provided by the government immediately following the hearings The Committee also drew upon material provided by non-governmental organisations.

Major areas of concern

The Committee put a large number of questions to the government delegation These covered most of the areas emphasised by NGO submissions (although some areas did not receive much attention) On the whole, the Committee was well aware of many of the problems and contentious issues, but pressed the government when answers were vague or unsatisfactory Overall, members of the Committee placed considerable emphasis on the fact that, as Hong Kong had ample financial means at its disposal, the persistence of a number of serious social problems was difficult to understand and justify

The areas of particular concern to Committee members were:

- **Continuation of reporting obligations under the Covenant after 1997**
- **Preparation of the report and consultation with non-governmental organisations**
- **Incorporation of the Covenant in domestic law**
  - * manner in which the rights guaranteed by the Covenant were enforced under Hong Kong law
  - * reference to the Covenant in cases decided by courts and tribunals
  - * extent to which judges were aware of the provisions of the Covenant and international human rights law in particular
- **Post-1997 protection of human rights**
  - * Remedies for violations of economic, social and cultural rights under post-1997 legal system
  - * The "upward curve" towards a fully democratic system
- **Government's refusal to establish or to permit debate on the establishment of a Human Rights Commission**
- **Immigration law and practice**
  - * Responsibility for determining who may enter Hong Kong under the one-way permit system
  - * Lack of independent review on the merits of deportation decisions
- **Split families**
  - * the extent to which Hong Kong families were separated, particularly where children were concerned

[3] UN Doc E/1986/4/Add 27 (1993) and E/1990/7/Add.16 (1993), reproduced in *Bill of Rights Bulletin*, v 2, n 4, December 1993, Appendix C and v 3, n 1, May 1994, Appendix A, respectively.

  * the case of Hai Ho-tak was specifically raised by Committee members, as a result of their urging, the government undertook to respond on the case before the end of the Committee's session

- **Levels of inadequate housing in Hong Kong**
  * caged homes -- the existence of caged homes came under particularly strong criticism from members of the Committee
  * financial hardship in meeting rents
  * evictions and clearance of squatter developments
  * incorporation of the right to housing in domestic law

- **Social security, especially the position of the elderly**
  * adequacy of CSSA payments
  * health, nutrition

- **Discrimination**
  * failure to enact legislation covering all the grounds contained in article 2(2) of the Covenant

- **Refugees**
  * in particular the position of refugee children , especially those released recently who, it seems, will not be afforded access to local educational facilities

- **Foreign domestic helpers**
  * two week rule
  * inability of domestic helpers to have their families join them
  * general conditions of work and the impact on their ability to enjoy economic, social and cultural rights

Neglected areas

A number of areas were not targeted by the Committee for particularly intensive questioning. These included health, environment, cultural rights and persons with disabilities.

(Lack of) undertakings by the government

The government delegation showed little inclination to concede publicly that the administration's policies were inadequate or needed to be changed, although it was prepared to concede that there were problems and difficulties in giving full effect to the provisions of the Covenant in some areas. However, the only undertakings given by the delegation were to supply further information in response to the questions of Committee members, and the undertaking to "strengthen lines of communication" with NGOs during the preparation of reports under human rights treaties. There was no general undertaking by the government to give effect to any recommendations adopted by the Committee.

The outcome

The Committee formally adopted its *Concluding Observations* on Friday, 9 December 1994 [4] These are reproduced at Appendix D (page 58) These represent the collective pronouncement of the Committee on the substantive implementation of the Covenant in Hong Kong The Government has frequently stated how seriously it takes its international obligations, and one can only hope that it will take these authoritative pronouncements seriously enough to give effect to them A further report, covering the implementation of all the provisions of the Covenant, is already due for submission.

REPORTS UNDER OTHER HUMAN RIGHTS TREATIES

Reports under the Torture Convention and the Racial Discrimination Convention

The Hong Kong administration submitted its report under the Torture Convention to the Foreign Office in January 1994. That report was finally submitted to the United Nations on 24 March 1995, and tabled in the Hong Kong Legislative Council on 19 April 1995. (The reason for the delay was the need to wait for reports from other dependent territories.) The report is likely to be reviewed by the Committee against Torture in either November 1995 or April 1996.[5] The latest report under the Racial Discrimination Convention has also been submitted to London, but not yet submitted to the United Nations.

The Hong Kong and United Kingdom governments resisted calls for the "draft" reports to be made available for public discussion in Hong Kong and continue to resist such calls in relation to the report under the Racial Discrimination Convention. In the middle of March 1995 the Joint Meeting of the Legislative Council Panels on Constitutional Affairs and Home Affairs submitted a formal request under the Administration's new Code on Access to Information, requesting copies of the two draft reports. The request was refused on the ground that the reports came within the exception contained in paragraph 2.4(b) of the Code which relates to:

> "Information received in confidence from and conveyed in confidence to other government, courts in other jurisdictions and international organisations."

No doubt a request to the United Kingdom government under its code of access to information would have been met with a similar response, a somewhat bizarre outcome in view of the fact that for most international purposes the United Kingdom government is not separate from Hong Kong.

Public discussion of such reports is one of the fundamental purposes of the reporting procedure. In view of the fact that the treaty bodies concerned would probably welcome the public discussion of the reports before they themselves review them, there seems to be no

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[4] UN Doc E/C.12/1994/19

[5] On the Committee against Torture, see generally A Byrnes, "The Committee Against Torture", in P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), 509-546.

acceptable justification for the stance adopted by the two governments One consequence of this stance, of which the governments are no doubt aware, is that non-governmental organisations have much less time to analyze and discuss the reports before their consideration by the United Nations, with one possible result being that less NGO material will be available to the responsible committees as a basis for evaluating the government's reports

Report under the International Covenant on Civil and Political Rights

The fourth periodic report under the International Covenant on Civil and Political Rights in respect of Hong Kong was due to be submitted in August 1994 The Administration has stated that it intends to submit the report by the middle of this year. It has been agreed that the Hong Kong report will be forwarded to the United Nations without waiting for the reports of all the other dependent territories, in view of the request by the Human Rights Committee in 1991 that a special report in respect of Hong Kong be presented At this stage it is likely that the Hong Kong report will be considered by the Committee at its 1995 autumn session in Geneva (failing that, at the Committee's 1996 spring session in New York

The Administration recently circulated a document entitled *An Outline of Topics to be Covered in the 4th Periodic Report Under the International Covenant on Civil and Political Rights*. This gives effect to the Administration's undertaking to circulate such a document following the hearings of the Committee on Economic, Social and Cultural Rights last November (The Administration has reneged on its original oral undertaking to the Committee to circulate draft reports for comment.) The document sets out under each article of the Covenant a brief description of the issues which will be included in the report to the Human Rights Committee, and was intended to give non-governmental organisations and other interested parties a chance to comment on the proposed report. The closing date for comments was 20 April 1995. The text of the document is attached as Appendix E.

Report under the Convention on the Rights of the Child

The Convention on the Rights of the Child was extended to Hong Kong with effect from 7 September 1994. The United Kingdom government has indicated that it will submit an initial report under the Convention in the course of 1996 and that the preparation of the report will follow the same procedure as that presently being followed for the report under the ICCPR

HONG KONG PUBLIC LAW REPORTS

From volume 5 (1995), the *Hong Kong Public Law Reports* will be published by Butterworths Asia as part of the new *Hong Kong Cases* series. Subscribers to the *Hong Kong Public Law Reports* (and to *Hong Kong Cases*) will receive separate loose parts devoted to Bill of Rights and other public law cases.

CASES

APPLICATION OF THE BILL OF RIGHTS ORDINANCE: EXTRATERRITORIAL APPLICATION

See *Re Thanat Phaktiphat and the Government of the United States of America* (1994) HCt, MP No 2904 of 1994, 24 November 1994, Mayo J, page 17 below, on the extraterritorial application of the Bill of Rights Ordinance in the context of extradition proceedings

REMEDIES -- JURISDICTION OF THE COURTS TO GRANT RELIEF (BILL OF RIGHTS ORDINANCE, S 6)

See *Re Thanat Phaktiphat and the Government of the United States of America* (1994) HCt, MP No 2904 of 1994, 24 November 1994, Mayo J, page 17 below, on the powers of the court under the Bill of Rights Ordinance to exclude evidence in extradition proceedings

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

Independent and impartial tribunal -- Director being both the complainant and the judge -- Statutory right of appeal -- Whether appeal on point of law or by way of rehearing -- Lifts and Escalators (Safety) Ordinance (Cap 327), ss 11I, 11G

***R v Lift Contractors' Disciplinary Board, ex parte Otis Elevator Company (HK) Ltd* (1995) CA, Civ App No 184 of 1994, Litton VP, Nazareth VP and Liu JA, 11 April 1995**

This was an appeal against the judgment of Penlington JA, sitting as an additional High Court judge: see (1994) 4 HKPLR 168. The applicant, Otis Elevators, was charged with negligence as a result of an accident in which a member of the public was killed during maintenance of a lift by the applicant. The proceedings were brought by the Director of Electrical and Mechanical Services, pursuant to s 11G of the Lifts and Escalators (Safety) Ordinance (Cap 327). Such charges are heard by the Registered Lift Contractors' Disciplinary Board, appointed pursuant to s 11E of the Ordinance. Section 11E of the Ordinance provides that the Board in a given case shall consist of six members, one of whom is to be the Director or his representative (who is to serve as chairperson of the Board). At first instance, Penlington JA held that s 11E was inconsistent with the requirement of independence and impartiality contained in article 10 of the Bill of Rights, since the Director was in effect and in terms the prosecutor or complainant. On appeal, the appellant did not challenge this finding, but argued that the requirement of article 10 to have access to a tribunal that could

adjudicate all disputed issues of fact and law was satisfied by the existence of a statutory right of appeal to the High Court from the Disciplinary Board under s 11I of the Ordinance, since that appeal was by way of rehearing

Section 11I provides

"(1) Any lift contractor or escalator contractor aggrieved by any order made in respect of him under section 11G(2) may appeal to a judge of the High Court, and upon such appeal the judge may confirm, reverse or vary the order of the disciplinary board or may remit the matter to the board with his opinion thereon

(2) Notice of any such appeal shall be given by the lift contractor or the escalator contractor within one month from the date of such order

(3) Save as otherwise provided in this Ordinance, the practice in relation to any such appeal shall be subject to any rules of court made under the Supreme Court Ordinance (Cap 4).

(4) The decision of the judge shall be final "

Held (allowing the appeal):

1 The question before the court was whether the disciplinary scheme as formulated by the legislature was consistent with the Bill of Rights, not whether the way the scheme operated in this particular case was consistent with the Bill of Rights

2 Where a statute provides for different bodies to deal successively with disciplinary complaints against professional persons, article 10 of the Bill of Rights does not require that each of those bodies should meet the standard set forth in that article It suffices that either the jurisdictional organs themselves comply with the requirements of article 10, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 10.

Albert and Le Compte v Belgium (1985) 5 EHRR 533, followed.

3. Any person aggrieved by any order of the Disciplinary Board has, under s 11I, a general right of appeal to the High Court which may confirm, reverse or vary the order of the Board. Such an appeal is by way of re-hearing, and the court has power to receive further evidence on questions of fact, orally or by affidavit. The existence of such an appeal will cure whatever defect there may be in the proceedings before the Disciplinary Board.

4. (Liu JA not deciding) The statutory scheme as set out in s 11G can be construed in such a way that it is consistent with the Bill of Rights. Section 11G(1) merely requires the Director to "bring the matter to the notice of a disciplinary board appointed under s 11E". There is no statutory duty imposed on the Director to prosecute before the Board. Section 11G(1) does not necessarily cast the Director in the role of prosecutor or complainant at the hearing. It is possible for the Director to ask the Attorney General to prosecute and leave the conduct of the prosecution entirely to the Attorney General. While the present charge was brought by the Director, this was an operational error and did not go to the constitutionality of the legislative scheme.

P Dykes and L Shine (of the Attorney General's Chambers), for the appellant, J Bleach and G Lam (instructed by Wilkinson & Grist), for the respondent

Editorial comment

It is clear that the judgment of Penlington JA cannot be supported in light of s 11I, which the judge did not fully consider in his first instance decision The linchpin of the reasoning of the Court of Appeal is s 11I(3) (not set out in the judgment), which provides that, unless otherwise provided, the Rules of the Supreme Court shall apply to an appeal against the decision of the Disciplinary Board The Ordinance itself does not set out any procedure for an appeal against a decision of the Board, nor are there any special rules in the Rules of the Supreme Court governing such an appeal. As a result, Order 55 of the Rules of the Supreme Court (Appeal to the High Court from Tribunal General) applies and it is under this rule that the appeal is by way of rehearing (O 55, r 3(1))

A significant portion of the judgment addresses a question which was not argued before the Court of Appeal, but one on which two judges (Litton VP and Nazareth JA) considered it appropriate to express their views. This was the issue on which Penlington JA actually determined the case in the court below, namely whether the fact that the legislation provided for the Director to bring a matter before a disciplinary board on which the Director then sat meant that the tribunal could not be considered, as a matter of law, independent and impartial.

Both Litton VP and Nazareth JA drew the valid distinction between the application of legislation in a manner which is inconsistent with article 10 (but where the legislation itself does not require this violation of the guarantee of independence and impartiality), and legislation which is itself inconsistent with the guarantee. While article 10 applies to both situations, it is only in the latter case (assuming that the offending legislation cannot be interpreted consistently with the Bill of Rights) that the legislation itself will be repealed, as opposed to a particular decision taken under valid legislation.

Litton VP in particular considered whether the relevant sections of the Ordinance actually required the Director to act in a manner which was inconsistent with the Bill of Rights -- here the formulation and bringing of a charge, which (s)he then also adjudicated on -- or whether the legislation could be interpreted so as to avoid that. He was of the view that the Ordinance did not *require* the Director to act as prosecutor. it was open to the Director, once (s)he had formed the view that negligent or misconduct appeared to have occurred, to ask the Attorney General to take over the matter and to act as prosecutor before the Board. In his view, if the legislation were interpreted in this manner, the resulting procedure would not violate article 10, as the Board --even though it was chaired by the Director -- would be independent and impartial.

While the issue was not fully argued before the court, this line of reasoning appears unconvincing. First, an interpretation of the statutory scheme which requires the Director to hand over the prosecution at an early stage to the Attorney General seems strained. The fact that the Director can only bring the matter to the attention of the disciplinary board when he has formed the (albeit preliminary) view, that the contractor concerned has been guilty of negligence or misconduct indicates that there must be a body of evidence before the Director, either as the result of his own investigations or from other sources. The lack of reference to any prosecutorial authority other than the Director, who is responsible for the overall enforcement of the legislative scheme, further reinforces the conclusion that the intention of the legislature was that the Director should play an

investigatory and prosecutorial role appears This appears also to be the understanding of those involved in the Ordinance, though such administrative understandings cannot bind as to the proper interpretation of the statute

Thus the way the legislative scheme is drawn up does not seem to support the contention that the Director could play no meaningful role at all in the prosecution of offences under the Ordinance However, it might be argued that s 3(2) of the Bill of Rights requires such an interpretation to be adopted, namely that the Director should not be involved in the prosecution, which should be handed over to the Attorney General at an early stage Even then, one might ask from where the Attorney General derives his power to prosecute before the Disciplinary Board? Disciplinary proceedings are creatures of statute In the absence of a statutory power, the Attorney General may not even have locus standi to appear in such proceedings, let alone a general power to prosecute in such proceedings If he appears, he appears as counsel for the Director, and not in his own right It would be more than a little curious if the legislature spelt out the duty of the Director to bring the matter to the attention of the Board, but then left open fundamental procedural matters That presumably was not the original intention, and it is difficult to accept that the legislation 'admits of [such] a construction', as s 3(1) of the Bill of Rights Ordinance puts it.

Secondly, even if one accepts that this interpretation is open or mandated, it is far from clear that the resulting situation is consistent with article 10 of the Bill of Rights Litton VP appears inclined to accept that it would be, yet this seems difficult to maintain. Litton VP himself describes the steps involved in a way which suggest that the Director's involvement is more than formal:

> "[T]he disciplinary procedures might well, within the legislative frame-work, have been operated in this way: (a) the Director (meaning a senior member of his staff) investigates the complaint of negligence or misconduct and makes his recommendation to the Director; (b) the Director appoints the Board and asks the Attorney General to draw up charges and, if there are charges, to prosecute them before the Board; (c) the conduct of the prosecution is left entirely to the Attorney General who is not required to seek instructions of any kind from the Director."

This seems in fact an unrealistic and impractical scenario. (The Attorney General will surely have to rely upon the material collected by and the expertise of the Director or one of his officers, and the Director will have to have formed a view on whether a matter should go forward. Indeed the Director, or one of his officers, may well be a witness, a situation which would raise further problems if the Director were sitting as a member of the Board.) But even if one accepts that the procedure could be administered in this way, does it follow that the Board, chaired by the Director, is "independent and impartial" within the meaning of article 10? This depends on the content of those guarantees and whether (and to what extent) they differ from the guarantees against bias under the common law. It appears (and the courts have hitherto accepted this) that there is a considerable degree of overlap between the common law protections and the Bill of Rights guarantees. As under the common law, it is not necessary to show *actual* bias or partiality in order to prove a violation of article 10; the reasonable appearance of bias is sufficient.[6] Furthermore, a lack of institutional separation between the tribunal and the person bringing the action readily leads to a finding of lack of independence.

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[6] In this context the comment of Nazareth JA (at p 18) that "even if justice is not manifestly seen to be done, it may be possible to establish that justice was actually done e.g. that despite appearances, the tribunal

If one applies the standard recently applied by the Court of Appeal itself in a common law natural justice case (*R v Panel on Takeovers and Mergers, ex parte Cheng Kai-man, William (No 2)* [1994] 1 HKC 413[7]), then it would seem difficult to maintain that there was not "a real likelihood in the sense of a real possibility" of partiality even in the circumstances as postulated by Litton VP The court in *Cheng* followed the decision of the House of Lords in *R v Gough* [1993] AC 646, in which Lord Goff formulated the test as whether, when the court looked at the matter through the eyes of a reasonable man to say whether or not in the light of all the circumstances "there was a real danger of bias on the part of the relevant member of the tribunal in question in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue before him" Both this standard and the application of it in *Cheng* would support the conclusion that the procedure envisaged by Litton VP could not reasonably be viewed as rendering the Board "impartial and independent". (Cp *Business Rights Ltd v Building Authority* (1994) 4 HKPLR 43 (CA) for a slightly different situation and outcome)

Litton VP further warned that article 10 should be not used "too extravagantly to knock down statutory schemes" He said (at p 14):

> "It is always within the power of the legislature to amend the Ordinance by doing away with disciplinary proceedings altogether; the Director can simply be empowered personally or by his representative to decide if there has been negligence or misconduct, after entertaining written representations, and to order that a contractor be struck off the register or suspended without any kind of hearing - leaving, of course, s 11I intact. Would this be any fairer?"

This outcome -- leaving the High Court as the tribunal to hear the case on the merits -- would of course be unsatisfactory, both from the perspective of the person affected, as well as the public. Specialised tribunals are created in order to bring expertise to the resolution of disputes which the courts cannot reasonably be expected to have There is much to be said for ensuring that such tribunals function as article 10 tribunals and for not imposing this role on the High Court However, this would mean an overall rationalisation of the administration's approach to the review of administrative decisions and the establishment of a comprehensive system of administrative appeals. While much has been done in this respect since the enactment of the Bill of Rights, in particular the establishment of the Administrative Appeals Board and the reform of the constitutions and procedures of many other specialist tribunals, there has been no commitment to a comprehensive scheme for the review of administrative decisions. Until this is done, article 10 will continue to highlight the inadequacies of the existing system.

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was in fact independent and impartial" is worthy of comment. If the judge is suggesting that it will be sufficient, either under the common law or under article 10 of the Bill of Rights to show that there has *in fact* been no bias, this appears to be inconsistent with established authority. The converse, that proof of actual partiality is sufficient to violate the common law and Bill of Rights guarantees, is clear.

[7] An appeal against the decision of the Court of Appeal is to be heard by the Privy Council in mid-July 1995.

Town Planning Ordinance (Cap 131), s 6

Outline Zoning Plan -- Whether promulgation of OZP legislative process or policy making -- Determination -- Rights and obligations in a suit at law -- independent and impartial tribunal

R v Town Planning Board, ex parte Kwan Kong Company Ltd (1995) HCt, MP No 1267 of 1994, Huang J

The applicant owned a piece of agricultural land situated between Anderson Quarry and Sau Mau Ping Housing Estate. In December 1980 the applicant was given short term waiver to use the land as a storage site for construction material. In December 1987, the applicant's land was zoned to become a Green Belt. The applicant objected to the zoning and applied to have his land rezoned as Residential (Group B) zoning. The objection and application for rezoning were declined by the Town Planning Board on the ground that the Green Belt was required as a buffer between the quarry and the residential housing estate. The applicant accepted the decision and continued to use his land for storage purposes.

In 1992, a report recommending a rehabilitation scheme for the quarry was published. The report had commissioned jointly by the Geotechnical Control Office and the Town Planning Department and was funded by the existing quarry operators. The rehabilitation scheme envisaged the enlargement of the present quarry by converting most of the existing Green Belt to Quarry and Mining Use. The existing quarry operators were to be given a 20-year lease to continue with quarry operation, on condition that they return the quarry (which would be "greened") to the Government at the expiry of the lease and that they create two platforms suitable for residential development. The scheme was endorsed by the Government Liaison Group and the Development Planning Committee in November and December 1992 respectively. The rehabilitation scheme envisaged that the applicant's land would be resumed.

In May 1993 the applicant's land was rezoned under a draft Outline Zoning Plan as "Other Specified Use (Quarrying and Mining)". The applicant objected to the zoning pursuant to s 6(1) of the Town Planning Ordinance, and proposed the rezoning of its land as Residential (Group B). The objection was rejected by the Town Planning Board at a meeting. The applicant was then given a full hearing, pursuant to s 6(6) of the Ordinance.

Prior to the hearing, the applicant modified its position, in a submission dated 9 April 1994. However, in a letter dated 26 April 1994 the applicant changed its position by once again by proposing as a compromise that the status quo be preserved.

At the hearing on 29 April 1994, the applicant's counsel informed the Board that it would abandon its 9 April 1994 position, and the applicant was permitted to address the Board on its latest position, as outlined in the letter dated 26 April 1994. After hearing the applicant and the representative of the Town Planning Department, the Board decided, in the absence of the parties concerned, that the letter of 26 April 1994 had been submitted out of time and that it would not consider the submissions made in the letter. The Board then rejected the applicant's objection. The hearing was chaired by the Director of Planning, who was also the vice-chairman of the Town Planning Board. Also present at the hearing were a number of official members of the Town Planning Board who were senior Government officials.

The applicant challenged the decision of the Town Planning Board by way of judicial review, claiming that the decision was *Wednesbury* unreasonable Since the Board knew that the applicant was to abandon its former position and had permitted the applicant to develop its argument on its latest position, the applicant argued that the Board has acted unreasonably when it rejected its objection on the ground of delay without affording the applicant the opportunity to address the Board on the issue of delay or on its earlier position As the earlier stance had been abandoned and the new position not considered on technical grounds, the Board had failed to consider the applicant's objection at all Alternatively, it argued that its right to a fair hearing by an independent and impartial tribunal as guaranteed by article 10 of the Bill of Rights had been violated, as the Board, in view of its composition, could not be independent and impartial In reply, the Town Planning Board argued that no right and obligation in a suit at law had been determined, since the promulgation of a town plan was either a legislative process or a policy making process

Leave to apply for judicial review was granted on 3 July 1994 On 4 July 1994, the draft Outline Zoning Plan was approved by the Governor in Council. During the hearing, it transpired that the Governor in Council had, on the same date, decided that resumption of the applicant's land was in the public interest for the purpose of s 3 of the Crown Lands Resumption Ordinance, but the Governor would not make a resumption order until the disposition of the judicial review proceedings.

The case was heard in late January and early February. Judgment was reserved.

***R v Town Planning Board, ex parte Auburntown Ltd* (1995) CA**

The first instance judgment in this case was reported at (1994) 4 HKPLR 194. Rhind J held that the preparation of a draft Development Permission Area Plan was a legislative process and hence no rights and obligations in a suit at law were determined in the process. Had it been otherwise, the appeal procedure under s 6 of the Town Planning Ordinance would have been inconsistent with article 10 of the Bill of Rights. The applicant appealed, but the appeal was abandoned in January 1995. The same issue was litigated in *R v Town Planning Board, ex parte Kwan Kong Company Ltd* (see above at page 14).

***Re Chan Mo-lin and others* (1994) HCt, MP Nos 3637 of 1991 and 4098 of 1992, Bokhary JA, 23 June 1994**

This case involved a challenge by a number of former members of the Special Branch to the decision to exclude them from a scheme for early retirement prior to 1997 which carried with it a British passport and compensation. The applicants applied for leave for judicial review to challenge the decisions to exclude them on various grounds, including the ground that they had been denied natural justice and that there had been a denial of the right to a fair hearing as guaranteed by article 10 of the Bill of Rights.

Bokhary JA refused leave, holding that there was no material before the court which showed that the applicants satisfied the requirements for leave to be granted. In relation to the claims based on natural justice and article 10, he commented (at pp 4-5):

> "Turning to the question of a breach of the rules of natural justice or a denial of the right to a fair hearing under article 10 of the Bill of Rights, it is not necessary to treat the article 10 argument differently from the natural justice

argument The relevant parts of article 10 provide that in the determination of someone's rights and obligations in a suit at law, he shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law

It is unnecessary, since article 10 would add nothing to the rules of natural justice in the present case, to form any view as to the potential of an argument that the administration of the Scheme is a 'suit at law' And the reason why article 10 add nothing to the case here is this. All that it has been relied upon is for the right to a fair hearing. It is not suggested that the hearing be public Nor is it suggested that it requires some tribunal established by law rather than someone like the Chief Secretary

I must say that I am not attracted to the prospect of construing the formula 'suit at law' widely, only then to say that article 10's insistence upon publicity and a tribunal can justifiably be ignored. That may well involve casting the article too wide only so as to weaken it. I am attracted to a tighter construction, for in that tightness lies its strength."

D Fung QC, J Chan and L Pedruco (instructed by T C Lau & Co), for the applicants; V Hartstein and M Datwani (of the Attorney General's Chambers), for the respondent.

Editorial comment

It is important to keep in mind the distinction between the guarantee contained in article 10 (which guarantees access to a 'tribunal' for certain purposes) and the scope of the common law rules relating to natural justice. The rules of natural justice apply both to judicial and quasi-judicial and to many types of administrative decision-making. While the rules of natural justice and the right to a fair hearing under article 10 will overlap to a great extent in the procedural protection when they apply in (quasi-)judicial proceedings, the fair hearing requirement in article 10 goes beyond the common law rules. For instance, article 10 does provide the *right* of access to court (or to a tribunal).

The interesting feature of this case is that article 10 may in fact have been violated, not by the Chief Secretary, but by the lack of jurisdiction in the court or any other body to review the Chief Secretary's decision. If one accepts that the decision to admit a civil servant to a retirement scheme involves 'the determination of rights and obligations in a suit at law', then it would appear that there is no independent and impartial tribunal that could resolve any disputed issues of fact and law between the applicants and the government. The only avenue available to challenge the decision would be judicial review, which only permits review of legality, not of the merits. The stumbling-block to the success of this argument, however, would be the contention that a decision of this sort involves rights and obligations in a suit at law, an argument which has only weak support from both the domestic and international case law.

RIGHT TO A FAIR HEARING IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10, BILL OF RIGHTS; ARTICLE 14(1), ICCPR)

Whether right to fair hearing in article 10 applied to extradition proceedings - Whether admission of inadmissible evidence a violation of right

Re Thanat Phaktiphat and the Government of the United States of America (1994) HCt, MP No 2904 of 1994, 24 November 1994, Mayo J

The applicant was allegedly involved with a number of others in arranging for the importation of heroin from Thailand to the United States. Following an initial transaction, in which the applicant was alleged to have received money in Thailand for a shipment, arrangements were made for the next payment to be made to the applicant in Hong Kong. He was arrested on his arrival in Hong Kong, whereupon the United States government sought his extradition to the United States. Part of the evidence which was sought to be tendered before the magistrate in the extradition hearing was evidence of telephone calls between the applicant and others alleged to be involved in the conspiracy. These calls had been intercepted by United States authorities.

The applicant applied for a writ of habeas corpus, arguing that the evidence obtained by the interception of phone calls was inadmissible and that, in the absence of such evidence, there was insufficient evidence to justify his committal for surrender. He argued that only evidence which satisfied the Hong Kong rules of admissibility could be taken into account in extradition proceedings and that the telephone interceptions, had they been carried out in Hong Kong, would have violated article 14 of the Bill of Rights. Accordingly, under s 6 of the Bill of Rights Ordinance the magistrate has the power and the duty to exclude the evidence of the phone conversations. The applicant also argued that article 10 of the Bill of Rights applied to all proceedings, including extradition proceedings, and that it was a denial of the right to a fair hearing to base a decision to commit on inadmissible evidence.

Held (refusing the application):

1. The special particular nature of extradition proceedings -- which are founded on reciprocity, international comity and respect for differences in other jurisdictions -- meant that it was inappropriate to apply exactly the same rules of evidence as would be applied in a committal proceeding. One must assume that the fugitive will obtain a fair hearing in the requesting State and accordingly, the power of the magistrate to exclude evidence is severely circumscribed.

   Re Thongchai Sangandikul [1994] 1 HKCLR 1, followed.

2. The alleged breach of the Bill of Rights, namely the telephone interceptions, occurred outside Hong Kong. The provisions of the Bill of Rights did not have extraterritorial operation and did not apply to actions taken outside Hong Kong by officials of other States.

3 It was not possible to rely on articles 10 and 11 in relation to extradition proceedings, because extradition proceedings did not involve the "determination of a criminal charge Accordingly, the magistrate did not have jurisdiction to exclude the evidence complained of

Re Suthipong Smittachartch and the United States of America (1992) 2 HKPLR 249, [1993] 1 HKLR 93, applied.

The applicant appealed to the Court of Appeal and the case was heard in March 1995 Judgment is still awaited

Editorial comment

There is considerable Hong Kong and international authority to support the position that extradition proceedings do not involve the determination of a criminal charge and that the guarantees of articles 10 and 11 have no application. However, the guarantees of article 10 are not confined to the determination of a criminal charge but also extend to cases in which a persons rights and obligations in a suit at law are being determined. It is certainly arguable that extradition proceedings may be viewed as having a decisive effect on a person's liberty of movement and liberty of person (the role of the Governor in having a discretion to order surrender complicates the issue). If this is so, then the guarantees of fairness contained in the Bill of Rights should apply to extradition proceedings. This point does not appear to have been considered by any of the Hong Kong courts which have looked at the application of the Bill of Rights to extradition proceedings; the analysis has largely been framed by cases under the Canadian Charter, the corresponding guarantee of which has no equivalent to the "civil side' of article 10, but is confined to the procedural rights of persons "charged with an offence".

In any event, consideration of this issue would probably not change the outcome, as no doubt the courts would hold that it is consistent with fairness in an extradition hearing to apply different procedural standards to those applied in domestic criminal proceedings.

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

Immigration Ordinance (Cap 115), s 37C

Offence of being member of crew of a ship which enters Hong Kong with unauthorized entrants on board -- Strict liability -- Statutory defence -- Whether consistent with presumption of innocence

***R v Iu Tsz-ning* (1995) CA, Crim No 428 of 1994, Macdougall and Nazareth VPP and Penlington JA, 7 April 1995**

The defendant/applicant had been convicted in the District Court on a charge of being a member of the crew of a ship which entered Hong Kong with unauthorised entrants on board, contrary to s 37C(1) of the Immigration Ordinance. He applied to the Court of Appeal for leave to appeal against his conviction. Section 37C(1) provides that, subject to subsection

(2), if a ship enters Hong Kong with an unauthorized entrant on board, each member of the crew commits and offence Subsection (2) provides

> "
>
> (b) A person who is a member of the crew of a ship other than the captain shall not be convicted of an offence under subsection (1) if he proves that prior to the commencement of the voyage on which the unauthorised entrant was brought into Hong Kong, he did not know and had no reason to suspect that any unauthorised entrant would be carried on the ship.
>
> . . ".

One of the arguments raised by the appellant on appeal was that ss 37C(1) and (2) violated the presumption of innocence in article 11(1) of the Bill of Rights The appellant argued that the applicant's knowledge of the status of the persons on board was an essential element of the offence and that the defendant should not be required to discharge a burden of disproving knowledge on the balance of probabilities but should only be required to raise a reasonable doubt.

Held (refusing the application for leave to appeal):

1. A presumption that a person who is a member of a crew which brings illegal immigrants into Hong Kong knows that the persons on board the vessel are illegal immigrants follows rationally and realistically once it is proved beyond reasonable doubt that he was such a member and the vessel did bring the illegal immigrants into Hong Kong.

2. In view of the fact that in the vast majority of cases it would be well-nigh impossible for the prosecution to establish beyond reasonable doubt that a crew member knew that the persons on board were illegal immigrants. A provision placing an onus on a person to prove on the balance of probabilities that he did not in fact have such knowledge does not offend the principles contained in article 11(1) of the Bill of Rights.

3. In the present case the judge was satisfied on the balance of probabilities that the applicant did know that the six persons on board were illegal immigrants.

Leung Wing-kin (instructed by Leung, Chan & Pang), for the applicant; K Zervos (Senior Crown Counsel), for the Crown.

Editorial comment

This case illustrates the rather conservative approach to Bill of Rights issues in criminal cases which represents the dominant trend in the recent case law of the Hong Kong courts, especially the Court of Appeal. The decision contains little by way of convincing analysis of the issues raised by the provision in question, even on the basis of the rather unsatisfactory test laid down by the Privy Council in *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72. The judgment refers to the "presumption" that a person who is a member of a crew which brings illegal immigrants into Hong Kong knows that the persons on board the vessel are illegal immigrants and argues that it is a reasonable and rational one. But ss 37C(1) and (2)

contain no presumptions, other than the type of "implied" presumption that Gall J found at first instance in *Lee Kwong-kut* (1992) 2 HKPLR 220 However, the implied presumption approach was effectively rejected by the Privy Council in *Lee Kwong*-kut

Of course, the factors taken into account in determining whether a requirement that a defendant disprove an essential element of an offence (as knowledge of the unauthorized entrant's status must surely be in this case) is reasonable may overlap with those taken into account when determining whether a presumption is reasonable and rational But they are distinct analytically and it may be important to keep them distinct

A further unsatisfactory aspect of the Court of Appeal's decision is its failure to consider the context in which the particular provision operates. It is not necessary for the prosecution to *prove* beyond reasonable doubt that a person is an unauthorized entrant all the Crown has to do is to allege that a person is an unauthorised entrant and to show that there are reasonable grounds for believing that such a person may be an unauthorised entrant Section 37K(1) thereupon presumes that the person is an unauthorised entrant, in the absence of evidence to the contrary The effect of s 37K(1) of the Immigration Ordinance is that all the prosecution has to prove is the presence of the defendant on a vessel on which there are persons who are alleged to be unauthorised entrants and in respect of whom there are reasonable grounds for believing to be unauthorised entrants: *R v Chan Chak-fan* (1994) 4 HKPLR 115 (CA) The presumption of knowledge in s 37C(1)(a) can thus be built upon another presumption, that in s 37K(1) that certain persons are unauthorized entrants

It is clear that the most significant element of the offence under s 37C(1)(a) of the Immigration Ordinance is the knowledge of the crew member charged that there are persons on board who are unauthorized entrants. The effect of s 37C(1)(a) and 37C(2)(b) is to require the defendant to rebut the existence of that knowledge on the balance of probabilities in order to avoid conviction: "The provision . . . allows of the possibility that an accused person may be convicted of an offence, without each essential element of that offence being proved against him beyond reasonable doubt": *R v Wong Hiu-chor* (1992) 2 HKPLR 288 at 308, per Mortimer J; *R v Chan Lan-po* (1994) DCt, Case No 1201, 9 February 1994, Judge Jackson, at p 10. It thus represents a departure from the general rule that the prosecution must prove the essential elements of an offence.

Against this background, there are strong arguments to support the conclusion that the provision is not as clearly consistent with the Bill of Rights as the Court of Appeal suggests, but that the departure from the normal principle that it is primarily for the prosecution to prove beyond reasonable doubt the guilt of the accused is unjustifiable: (a) the burden shifts to the defendant at a very early stage, as the defendant is required to rebut the presumption of knowledge at a stage when there are only reasonable grounds to believe that the persons on board are unauthorized entrants; (b) the defendant must show not only lack of knowledge but lack of any reason to suspect that the entrants were unauthorised entrants; (c) the prosecution would usually encounter no great difficulty in establishing beyond reasonable doubt facts from which it can be reasonably inferred that a crew member knew that there were unauthorized entrants on board; and (d) the penalty (life imprisonment and a fine of $5,000,000) is severe.

One would have thought that these considerations might have moved the court to consider that the imposition of a *legal* burden was excessive and that the imposition of an evidential burden was required by the Bill of Rights. However, the Court of Appeal now

appears to have moved towards accepting strict liability offences alleviated by a defence to be established on the balance of probabilities as consistent with the Bill of Rights wherever a reasonable argument can be made that the legislation is addressing a serious social problem (This is somewhat ironic in view of the many amendments to legislation that the Administration has introduced which replace legal burdens with evidential burdens in order to avoid Bill of Rights challenges) The Court has also -- in a number of judgments authored by Bokhary JA -- sought to ameliorate the excesses of this approach This has been done by interpreting existing provisions in a manner that alleviates the burden on a defendant somewhat (see, for example the recent decision in *R v Hui Kin-hong*, at page 23 below), or in the case of strict liability offences by reading in a defence of honest and reasonable belief (*Attorney General v Fong Chin Yue*[1995] 1 HKC 21, noted in Bill of Rights Bulletin, v 3 n 2, at p 28)

One question which arises is the relationship between this decision and the decision of the Court in *Attorney General v Fong Chin Yue* If *Fong Chin-yue* established that there must always be a minimum mens rea for a criminal offence (by insisting on the availability of a defence of honest and reasonable belief as a *constitutional* requirement), does s 37C satisfy this test? Or, in other words, can a defendant establish that (s)he honestly and reasonably believed that passengers were not unauthorised entrants but fail to show that he had no reason to suspect that they were unauthorised? If so and *Fong Chin-yue* establishes a constitutional requirement, then there would appear to be a conflict between the approach adopted by the different divisions of the Court of Appeal.

Immigration Ordinance (Cap 115), s 38A

***R v China State Construction Engineering Corporation* (1994) Mag, ESS 3879/94, 10 November 1994, Mr J Acton-Bond**

The defendant was charged with an offence under s 38A of the Immigration Ordinance (Cap 115) That provision provides:

> "2) Where it is proved that [an illegal immigrant] was on a construction site, the construction site controller of that construction site commits an offence and is liable to a fine of $25,000.
>
> (3) It is a defence in proceedings for an offence under this section for the person charged to prove that he took all practicable steps to prevent [illegal immigrants] from being on the construction site."
>
> Under subsection (1):
>
> "'construction site' means a place where construction work is undertaken and includes any area in the immediate vicinity which is used for the storage of materials or plant used or intended to be used for the purpose of construction work;
>
> 'construction site controller' means a principal or main contractor and includes a subcontractor, owner, occupier or other person who has control over or is in charge of a construction site."

The Crown argued that, since s 38A(2) was a strict liability offence alleviated by a due diligence offence, it was therefore consistent with article 11(1) of the Bill of Rights

Held (ruling the provision repealed by the Bill of Rights Ordinance):

1 In assessing the consistency of an offence with the Bill of Rights, it is necessary to look at the section creating the offence as a whole Merely because a piece of legislation takes a particular form does not mean that it is automatically consistent with the Bill of Rights Adopting a rigid formalistic analysis which classified all strict liability offences with a due diligence offences as bill consistent would enable any competent legislative drafter to render article 11(1) of no effect

2. For a strict liability/due diligence defence provision to be bill consistent, there must be some nexus between the strict liability part of the section and the statutory defence. If what the Crown must prove has no possible logical or other kind of relationship to any statutory defence it would be ludicrous to say the section was bill consistent.

3. The appropriate test to apply is whether, if the Crown can prove what they have to prove beyond reasonable doubt, it follows from what they have proved that the defendant is more likely than not to fail in making out the statutory defence. In other words, for an offence of strict liability with special defences to be consistent with article 11(1) of Bill of Rights, it must be able to be said with substantial assurance that an inability to make out such a defence is more likely than not to be the case if the offence of strict liability is made out.

4. With s 38A that means that one had to ask whether, if an illegal immigrant is found on a site, it is more likely than not that a defendant construction site operator has not taken all practicable steps to avoid the presence of illegal immigrants on that site. That test was not satisfied in the present case, since:

> "First of all a construction site could be a complete motorway project - many miles long: One only has to consider the airport project and its related infrastructure projects to see how taking the definition of construction site to extremes the presence of a number of illegal immigrants on a site of that nature could have no possible bearing on whether the controller had taken all practicable steps.
>
> Even with the construction site at the centre of these allegations the absurdity of saying there must be a connection between the presence of an illegal immigrant and a failure to take all practicable steps is apparent. The Crown say it was 24,000 square metres in size. There were apparently at least 2 buildings on the site in the course of construction - one was more than 25 stories high, the other more than 32 stories high.
>
> Even with the best of precautions by the controller, an illegal immigrant could climb into such a site and hide himself away."

5. Although illegal immigration was a serious problem in Hong Kong, this did not justify the imposition of the reverse burden on a defendant. There are a limited number of steps a construction site controller can take to keep illegal immigrants off a site. They are effective fencing, good security at the entrances and exits, sufficient security patrols having regard to the size and type of site and proper means of identification to be worn by all those legitimately on the site. In most cases it would be very easy for the Crown to prove beyond reasonable doubt inadequacy in any one of these areas.

6 It was not possible to save s 38A(3) by excising the words "to prove" from it and reducing the burden on the defendant to an evidential one

T Casewell (of the Attorney General's Department), for the Crown

Prevention of Bribery Ordinance (Cap 201), s 10(1)(a)

Bribery -- Maintaining a standard of living incommensurate with one's official emoluments -- Presumption of corruption

***R v Harry Hui Kin-hong* (1994) DCt, Crim Case No 1230 of 1993, Judge Muttrie, 30 November 1994; (1995) CA, Crim App No 52 of 1995, Yang CJ, Litton VP and Bokhary JA, 3 April 1995**

The defendant, a Crown servant, was charged with an offence of maintaining a standard of living incommensurate with his official emoluments, contrary to s 10(1) of the Prevention of Bribery Ordinance. Before the trial at the District Court he successfully argued that s 10(1) was inconsistent with article 11(1) of the Bill of Rights and had been repealed as a result. Judge Muttrie dismissed the charge. The Crown appealed.

Section 10(1) of the Prevention of Bribery Ordinance provides:

"(1) Any person who, being or having been a Crown servant -

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence."

DISTRICT COURT

Held (quashing the charge and ordering a discharge):

1. In determining whether s 10(1)(a) of the Prevention of Bribery Ordinance is consistent with article 11(1) of the Bill of Rights, the court has to ask whether, under s 10(1)(a) the prosecution is required to prove the important elements of the offence, while the defendant reasonably has the burden of establishing a proviso or an exemption of the type indicated by Lawton LJ in *R v Edwards*.

Attorney General v Lee Kwong-kut (1993) 3 HKPLR 72, [1993] 2 HKCLR 186, [1993] AC 951, followed.

2 Under s 10(1)(a), all the prosecution must prove is that the defendant was maintaining a standard of living not commensurate with his official emoluments This is essentially an arithmetical exercise covering expenditures and capital accretions Once this is proved, the defendant has to show, on the balance of probabilities, that the difference between his actual standard of living and the standard of living which would have been commensurate with his official emoluments was paid for with money the source of which was untainted by any corruption by the accused

R v Hunt [1974] HKLR 31, applied.

3 In substance, what the defendant has to prove under s 10(1)(a) is that his extra wealth is not tainted by corruption. Irrespective of whether the failure to give a satisfactory explanation is to be regarded as an element of the offence or a condition precedent to conviction, there is no material difference between s 10(1)(a) and s 30 of the Summary Offences Ordinance, which the Court of Appeal has held needed to be justified as a reasonably imposed exception to the general rule that the prosecution must prove all the important elements of an offence.

R v Mok Wei Tak [1990] 2 AC 333, distinguished; *R v Chong Ah-choi* (1994) CA, Mag App No 281 of 1994, Yang CJ, Bokhary JA and Mayo J, 4 October 1994, followed.

4. There is no affirmative evidence that s 10(1)(a), with its reverse onus provision, is particularly needed in the fight against corruption There have been a handful of prosecutions under this section. The offence was outdated, as the opportunities for a Crown servant to live apparently beyond his means are greater now than they were 20 years ago when the section was first introduced. There is no cut-off point regarding the extra wealth, so that a person who spent only marginally over his emoluments could be liable to be prosecuted, and innocence may be extremely difficult to prove. For these reasons, s 10(1)(a), with its reverse onus provision, is inconsistent with article 11(1) of the Bill of Rights and has hence been repealed under s 3(2) of the Bill of Rights Ordinance.

J McLanachan (on fiat), for the Crown; G Plowman QC and A Chan (instructed by Wong & Lam), for the defendant.

COURT OF APPEAL

Held (allowing the appeal):

1. In deciding whether and if so to what extent any given provision reverses the normal onus and whether that is justifiable, the court looks at its substance and reality. The substance and reality of a provision involves its essence and how it works in practice.

Attorney General v Lee Kwong-kut (1993) 3 HKPLR 72, [1993] AC 951, applied.

2 Section 10(1) casts a burden of proving the absence of corruption upon a defendant Under s 10(1)(a), the prosecution has to prove beyond reasonable doubt the accused's Crown servant status, his standard of living during the charge period, his total official emoluments during that period, and that his standard of living could not reasonably, in all the circumstances, have been afforded out of his total official emoluments during that period Hence, what the prosecution has to prove are complex matters, despite the wide power of investigation conferred on the ICAC by the Prevention of Bribery Ordinance

3 Once the Crown has proved these matters, the defendant has to give a satisfactory explanation, on a balance of probabilities, as to how he was able to maintain an incommensurate standard of living or how disproportionate pecuniary resources or property came under his control. What triggers the explanation requirement is incommensurateness or disproportion which is unreasonable in the circumstances No notice shall be taken of any incommensurateness or disproportion unless it is of some substance The slighter such incommensurateness or disproportion is, the less is required by way of an explanation for the same.

4. The defendant may provide a satisfactory explanation by proving the existence of facts which might reasonably account for the incommensurate standard of living or disproportionate resources or property.

R v Mok Chan [1977] HKLR 605, followed.

5. Given that s 10(1) was introduced to combat serious corruption and the difficulty of detecting and proving corruption offences in the normal way, it was not unreasonable to require an accused to provide a satisfactory explanation of any disparity between official emoluments and standard of living. Section 10(1) is consistent with the Bill of Rights. It is dictated by necessity and goes no further than necessary.

6. Before the prosecution can rely on the presumption under s 10(2) of the Ordinance that pecuniary resources or property were in the accused's control, it has to prove beyond reasonable doubt the facts which trigger the presumption, and those facts must make it more likely than not that the pecuniary resources or property were held in trust for or otherwise on behalf of the accused or were acquired as a gift from him. Construed in this manner, s 10(2) is also consistent with the Bill of Rights.

D Fung QC and A Bruce (of the Attorney General's Chambers), for the appellant; A Huggins QC and A Chan (instructed by Wong & Lam), for the respondent.

Editorial comment

Very few people would dispute the insidious nature of corruption or the need to have sufficient powers to combat this social evil. There will also be few who would disagree that corruption is difficult to detect let alone to prove. Nonetheless, this does not of itself justify draconian measures. Corruption is not unique to Hong Kong; it exists in every country. However, the offences created by s 10 of the Ordinance are probably unique. Nor are corruption offences the only type of offence which is difficult to prove or detect. Conspiracy to defraud could be equally difficult to detect and prove. There is a limit to the extent to which such arguments should be relied upon to justify draconian measures. The Bill of Rights requires the court to scrutinize closely the justification for any draconian measure. Unfortunately, the decision of the Court of Appeal reveals

a loose standard of scrutiny which is characterized by sweeping statements of fact without reference to any supporting evidence

The essence of the decision of the Court of Appeal is that what the prosecution has to prove before an explanation is required under s 10 are not simply matters of formality They are complex matters which are difficult to prove, notwithstanding the wide powers conferred on the ICAC under the Prevention of Bribery Ordinance "And experience has borne that out" (at p 12) This is left largely as a matter of assertion rather than of evidence Proving the status of the defendant as a Crown servant and the amount of his official emoluments in the relevant period must be largely a matter of formality The only substantive matter that requires to be proved is the standard of living maintained by the accused or his control of pecuniary resources or property One would have thought that in nearly all cases there must be objective evidence of one's standard of living Once this is proved, whether the defendant's standard of living is reasonably commensurate with his official emoluments is a matter of inference from the facts, or in the words of the trial judge, "an arithmetic exercise" In establishing the defendant's standard of living one should not lose sight of the wide investigative powers conferred on the ICAC. It enjoys broad powers of entry, search and seizure, as well as extensive powers to require disclosure of bank accounts and other financial matters. It is not clear whether any evidence was tendered to the court to show that the ICAC has encountered difficulties in proving the matters required under s 10(1) in the past? The court may have conflated proving the matters required under s 10 and proving corruption as such

Similarly, Bokhary JA said that "in case after case over the years, section 10 has proved its effectiveness in the fight against corruption. Although less visible, its deterrent effect must have been even greater Chapter 201 of the Laws of Hong Kong is rightly named the *Prevention* of Bribery Ordinance. Section 10's worth is well-established." (p 4, emphasis in original) Not everyone would agree with such sweeping statements. In the District Court, the trial judge found that s 10 had been invoked on only a few occasions, the last time being in 1991, and there was no evidence to show that s 10 was effective or necessary. As the deterrent effect of a provision can be hard to measure, the Court of Appeal may be right in its observation, but once again the tendency to resort to intuitive impressions rather than hard evidence is disappointing.

In holding that the requirement that defendant provide a satisfactory explanation is triggered only by proof of unreasonable incommensurateness, and that the defendant must prove facts that "might reasonably account for" this, the court appears to be seeking to alleviate the burden that might be placed on a defendant if (s)he were required to prove an innocent source. Nevertheless, there is little discussion of the practical difficulties a defendant might face in discharging this onus, which as a practical matter may be a heavy one. This case is illustrative of the tendency of the Court of Appeal to take the easy way out: the invocation of the importance of combatting a serious social problem (in this case corruption) tends to become a substitute for a rigorous analysis of the legal and practical issues to which a provision gives rise.

Prevention of Bribery Ordinance (Cap 201), s 25

Presumption that advantages given or accepted by a defendant charged with an offence under ss 4 or 5 are given or accepted as an inducement or reward for corruption

***R v Liew Kwok-shan William* (1995) DCt, Case No 365 of 1994, Deputy Judge Line, 20 April 1995**

The defendant, a former chief engineer of the Transport Department, was charged with the offence of accepting an advantage, contrary to s 4(2)(c) of the Prevention of Bribery Ordinance He submitted that he had no case to answer because s 25 of the Prevention of Bribery Ordinance was inconsistent with article 11(1) of the Bill of Rights and that, without reliance on s 25, there was no evidence to support the charges Section 25 provides·

> "Where, in any proceedings for an offence under section 4 or 5, it is proved that the accused gave or accepted an advantage, the advantage shall be presumed to have been given and accepted as such inducement or reward as is alleged in the particulars of the offence unless the contrary is proved "

Held:

The facts presumed did not follow rationally or realistically from the facts proved As the presumption could not otherwise be justified, it was inconsistent with article 11(1) of the Bill of Rights and repealed.

R v Sin Yau-ming (1991) 1 HKPLR 88, *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72, applied at 94

However, the court ruled that the evidence before it still disclosed a case to answer without any need to rely on the presumption.

Theft Ordinance (Cap 210), s 29(6)(a)(i)

Cheques -- Presumption that person who obtains goods or services by passing dishonoured cheque presumed to know that it would be dishonoured -- Legal burden of proof -- Lies as evidence of guilty knowledge

***R v Anatasius Chiu* (1994) CA, Crim App No 730 of 1993, Power and Nazareth VPP and Penlington JA, 8 December 1994**

The appellant had been convicted on 15 counts of obtaining property by deception contrary to s 17(1) of the Theft Ordinance (Cap 210) and one count of evasion of liability by deception contrary to s 18B(1) of the same Ordinance. The offences were part of a fraud involving the establishment of a sham company in order to carry out the fraud and involved, among other acts, the passing of cheques the appellant knew would be dishonoured. In his reasons for verdict the judge commented:

> "The one presumption of law which may assist the prosecution is to be found in Cap 210 s 29(6)(a)(i), which states that in relation to obtaining by deception

charges under s 17, where the property is obtained by means of a cheque which is subsequently dishonoured, the person obtaining the property shall be deemed to have obtained it with the knowledge that such cheque would not be honoured, until the contrary is proved

I say at once that I find the contrary has not been proved So Defendant is fixed with the knowledge that the cheques would be dishonoured by virtue of this section As will appear, however, in the context of this case that will not affect the outcome of any charge Nor does this presumption have any relevance in the instances where no cheques were obtained, the charges for 4, 8, 12, 17 and 19 "

Section 29(6)(a)(i) provided

"**29. Evidence and procedure on charge of theft, handling stolen goods, and obtaining by deception**

...

(6) In any proceedings for an offence under section 17

(a) any person who --

(i) obtains property, pecuniary advantage or services by means of a cheque or other bill of exchange which is refused payment upon presentation on or after becoming due shall, until the contrary is proved, be deemed to have obtained the property, pecuniary advantage or services with knowledge that such cheque or other bill of exchange would not be honoured

...".

In referring to lies which he found the defendant had told, the trial judge commented: "I find that they [the lies] are evidence of guilty knowledge on the Defendant's part."

The applicant applied for leave to appeal against conviction on the grounds that the trial judge (a) had relied on the presumption contained in s 29(6)(a)(i) of the Theft Ordinance which had been repealed by s 3(2) of the Hong Kong Bill of Rights Ordinance because of its inconsistency with article 11(1) of the Hong Kong Bill of Rights; and (b) had wrongly taken into account lies which he considered the defendant had told as evidence of guilty knowledge on the defendant's part.

Held (dismissing the appeal):

1. It was plain from the whole tenor of the trial judge's reasons for verdict, in particular from his findings of fact, that the judge had not relied on the presumption to establish the guilty knowledge of the defendant.

2. While the trial judge's comment that the lies told by the defendant were evidence of guilty knowledge was an unfortunate lapse, it was clear that he had properly established the guilty knowledge of the defendant on the basis of other evidence. Even if the judge had relied on the lies as direct evidence of guilt, it was clear that he would inevitably have come to the same conclusion without so relying on the lies.

Per curiam

"We feel bound to say that this stance of the authorities [in relation to the consistency of s 29(6)(a)(i) with the Bill of Rights] is less than satisfactory However well-reasoned and convincing the judgment of a subordinate court, there must remain the risk of it being reversed by a superior court The implications and consequences of such a reversal can hardly be acceptable Of course, it may be possible to discount such a risk, and it seems that it is not *Lau Shiu-wah* that is relied upon but rather the view taken by the Attorney General and his staff That hardly provides a better basis upon which to rest the repeal of a statutory provision and provide for its publication and proof Until Mr Saw's statement in Court, neither the Court nor the appellant's legal advisers were in a position to know that the presumption was to be regarded in practical terms as having been repealed. It must surely be within the competence of the authorities to accord the repeal of statutory provisions effected by the operation of the Bill of Rights, certainty, publicity and facility for proof of the sort required in respect of repeal effected directly by legislation We observe in that regard that there are in just the 1991 volume of the *Hong Kong Public Law Reports* numerous decisions of judges of the District Court and of magistrates on Bill of Rights challenges to particular statutory provisions Doubtless there are also provisions which the Attorney General is satisfied do not permit of a construction consistent with the Bill of Rights Ordinance and are therefore repealed by s 3(2)"

R Buchanan (instructed by Pang, Tang, Wan & Choi), for the applicant, D G Saw (of the Attorney General's Chambers), for the respondent

Note: Section 29(6)(a) of the Theft Ordinance was repealed by s 53 of the Administration of Justice (Miscellaneous Provisions) Ordinance (No 13 of 1995), with effect from 1 April 1995.

Public Health and Municipal Services Ordinance (Cap 132), s 67

Sale of prohibited article of food -- Presumption of sale

***R v Wong Moon-ting* (1995) Mag, TMC No 09655/94, Mr E Lim, 31 March 1995**

The defendant was charged with an offence of possession for sale of an article of food, namely, 23 cartons of pork, which is prohibited for sale in the Schedule of the Public Health and Municipal Services Ordinance. He challenged s 67 of the Ordinance as being inconsistent with article 11(1) of the Bill of Rights. The material parts of s 67 provide:

"For the purpose of this part -

(a) any article;

(b) any article commonly used for human consumption . . . which is found on any premises or in any vessel, vehicle or aircraft used for the preparation, storage, transport or sale of that . . . shall be presumed, until the contrary is proved, to be intended for sale or . . . as the case may be."

Held (upholding the section):

1 To invoke the presumption under s 67, the Crown must prove that the article must be commonly used for human consumption and be found on the premises or vessel or vehicle or aircraft which is used for the preparation, storage or transportation or sale of the article.

2 The section pursues a legitimate objective, as the importation of prohibited pork into Hong Kong has become a major social problem with possible health hazards to the consumers. The accused has been given a right to rebut the presumption Section 67 is similar to s 19 of the Gambling Ordinance, which has been upheld by the Court of Appeal. For these reasons, s 67 is rational, realistic and proportionate and thus consistent with the Bill of Rights.

P Law (instructed by the Duty Lawyer Scheme), for the defendant.

RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGE AGAINST ONE (ARTICLE 11(2)(A), BILL OF RIGHTS; ARTICLE 14(3)(A), ICCPR)

***Attorney General v Tang Yuen-lin* (1995) CA, Mag App No 1300 of 1994 Macdougall VP, Penlington JA and Barnett J, 14 February 1995, [1995] 1 HKC 209**

This case involved an appeal by way of case stated against a decision of Mr P C White, in which he held that a summons issued under the Town Planning Ordinance and addressed to a person apparently of Chinese ethnic origin who did not understand English was inconsistent with article 11(2)(a) of the Bill of Rights. Accordingly, proceedings before the court based on such a summons were a nullity and the summons should be dismissed. The case has been referred to the Court of Appeal.

[The case raised a similar issue to that considered by Mr White in an earlier decision involving the validity of summons issued only in English under the Fixed Penalty (Criminal Proceedings) Ordinance: *R v Tse Kim-ho* (1993) 3 HKPLR 298. The court held that such summonses were invalid where addressed to a person apparently of Chinese ethnic origin: see *Bill of Rights Bulletin*, v 2, n 3, pp 31-33. Although an appeal by way of case stated against that decision was planned, it did not proceed.]

Held (allowing the appeal):

1. Even adopting a broad and purposive approach to interpretation, article 11(2)(a) does not render a nullity a summons which is in a language which a defendant does not understand. The deficiency may be cured by subsequently giving the defendant full particulars of the summons in a language which he understands. This can be done by an officer of the court which issued the summons, by another person in authority, or even by the defendant's own legal adviser. It must be done within reasonable time and, if necessary, the defendant must be allowed an adjournment to enable him properly to prepare his defence to the charge.

2 The full particulars of the charge had been explained to the defendant by a Magistrate within a reasonable time, and the defendant had been given an opportunity to properly prepare his defence to the charge There is no evidence that the defendant was prejudiced by any delay thus caused Accordingly, there is no violation of article 11(2)(a) of the Bill of Rights

R v Tse Kim-ho (1993) 3 HKPLR 298, overruled

A Bruce (of the Attorney General's Chambers), for the appellant, J Necholas (instructed by the Director of Legal Aid), for the respondent.

RIGHT TO BE TRIED WITHOUT UNDUE DELAY (ARTICLE 11(2)(C), BILL OF RIGHTS; ICCPR, ARTICLE 14(3)(C))

***R v Law Chung-cheung* (1995) HCt, Case No 457 of 1993, Patrick Chan J, 9 March 1995**

The defendant was charged with trafficking in a dangerous drug. The alleged offence occurred on 13 May 1991, when a team of Customs and Excise officers saw a person (who they said was the defendant) enter a car and emerge with a packet, which he then gave to another person He then entered another car (which turned out to be registered in the defendant's name) and left. On 14 May 1991 a number of officers visited the defendant's home. However, none of the officers involved noted details of the visit in their notebooks, although a report of the visit, said to have been compiled by one of the officers who took part in the visit, was prepared. In the report no reference was made to the seizure of a photograph from defendant's home. Nor was there any reference to this in the statements made by the officers shortly after the defendant was arrested.

The first reference to the photograph (which the police officers claimed to be a photograph of the man they had seen at the scene) was made in statements made by the officers in August 1993. In August 1994, during the first day of the defendant's trial, two of the officers made a further statement about the visit to the defendant's home on 14 May 1991, mentioning for the first time that a slip of paper with a police contact number had been left with the defendant's wife. There was no mention of this in their notebooks or in any previous statement they had made. (The police had refused to supply copies of the notebooks despite several requests by the defendant. Copies were subsequently provided and the trial was adjourned.)

The defendant sought a permanent stay of proceedings on the ground of undue delay in violation of article 11(2)(c) of the Bill of Rights. He had been arrested on 18 May 1993 and charged 4½ months later.

Held (granting the stay):

1. There had been considerable delay between the time of the commission of the alleged offence and the trial. That delay was attributable to the prosecution:

- since they had failed to take serious efforts to find him after 14 May 1991 and for two years after the offence nothing active was done to bring the defendant to justice and there was no adequate explanation for the delay,

- 4½ months were allowed to elapse after the defendant's arrest before he was charged, although no further evidence was gathered during this time other than the officers' statements about the seizure of the photograph at the defendant's home and their recognition of it, and

- the refusal of the police to provide copies of the officers' notebooks at the trial in August 1994 was a primary cause of the adjourning of the trial and the further delay caused by that.

2. The defendant had suffered prejudice from the lengthy delay: the events had now occurred a considerable time ago and it would be difficult to remember the exact events; it would be difficult if not impossible to find any alibi witnesses at this stage It would be very difficult for the defendant to put forward such a defence and this would jeopardise his chances of a fair trial.

3. As the evidence of identification by the police officers was totally unreliable, in all the circumstances it was not just to put the defendant to the trouble and expense of trial on the evidence likely to be produced at the trial; nor was it in the public interest to incur further expense.

4. In conclusion, there had been a breach of article 11(2)(c) of the Bill of Rights. The officers had not done sufficient to bring the defendant expeditiously to trial and to justice resulting in undue delay which had prejudiced the defendant in his defence. It would be unfair and oppressive to proceed with the trial.

J Hemmings (instructed by Paul Kwong & Co), for the defendant.; A Ma, on fiat, for the Crown.

RIGHT NOT TO BE SUBJECT TO RETROSPECTIVE PENALTIES (ARTICLE 12, BILL OF RIGHTS; ARTICLE 15, ICCPR)

Disqualification order -- Retrospective application -- Discretionary nature of the disqualification order -- Whether disqualification order a penalty -- Companies Ordinance (Cap 32), ss 168E, 168T

R v Chan Suen-hay **(1995) DCt, Case No 83 of 1994, Judge Britton, 22 March 1995, [1995] 1 HKC 847**

The defendant was convicted, on his own guilty pleas, of two offences of obtaining a pecuniary advantage by means of a deception and one of furnishing false information, both offences having been committed in October 1988. At the time of sentence in February 1995, the Crown applied for a disqualification order under s 168E of the Companies Ordinance. The effect of such an order is to prohibit a person, without leave of the court, from being a director, liquidator or receiver of a company or to be connected or take part in any way in the promotion, formation or arrangement of a company for a specified period. Section 168E came into effect on 1 July 1994, but s 168T provides for retrospective application of the disqualification order, provided that in such

case the period of disqualification should not be more than 5 years The defendant argued that the disqualification order constituted a penalty within the meaning of article 12(1) of the Bill of Rights and hence s 168T, which provides for retrospective application, is inconsistent with the Bill of Rights and stands repealed

Held (refusing the application for a disqualification order):

1 The correct approach to interpreting article 12 of the Bill of Rights is a broad approach The broad and purposive intention of article 12 is to ensure that no one shall suffer a heavier penalty than that which existed at the time the offence was committed This is an issue not only of fairness but also of finality.

2 The concept of penalty under article 12 is an autonomous one. In considering whether the disqualification order constitutes a penalty within the meaning of article 12, the court should take into account whether the measure in question was imposed following conviction for a criminal offence, the nature and purpose of the measure in question, its characterisation under national law, the procedures involved in the making and implementation of the measure and its severity.

Welch v United Kingdom, European Court of Human Rights, Judgment of 15 February 1995, Series A, No 307A, followed.

3 A disqualification order under s 168E can only be triggered by a prior criminal conviction involving fraud or dishonesty. The order can affect matters which are in no way connected with the conviction. It cannot be excluded that one of the purposes of imposing the order was to punish the offender. The discretionary power of a judge to make a disqualification order and to determine the length of the discretion, and the possibility of imprisonment under s 168M for acting in breach of a disqualification order are strong indications of a regime of punishment. The order imposes severe detriment on the defendant. Section 168E, if valid, can be extended back in time indefinitely. This is clearly contrary to the aims of achieving fairness and finality, both of which being the purposes of article 12(1). Accordingly, s 168T is inconsistent with article 12 of the Bill of Rights and stands repealed.

4. Alternatively, if s 168T is not inconsistent with the Bill of Rights, the court exercises its discretion to refuse to make a disqualification order in the circumstances of this case.

T Casewell (of the Attorney General's Chambers), for the Crown; Mr Tse, for the defendant.

Editorial comment

The question of what constitutes a criminal charge is important as it is the key to the guarantees in article 11, which apply only when there is a determination of a criminal charge. This question has been considered by the Hong Kong courts in a number of previous cases: see, for example, *R v Ko Chi-yuen* (1994) 4 HKPLR 152 and *R v Crawley* (1994) 4 HKPLR 62. Unfortunately, the approach adopted by the courts in these cases has been rather restrictive and superficial. In *R v Ko Chi-yuen*, the Court of Appeal held that confiscation proceedings under Drug Trafficking (Recovery of Proceeds) Ordinance, despite their serious implications, did not constitute a criminal charge and hence article 11(1) was not applicable (the District Court had previously held that such proceedings were "criminal": see *R v Wong Ma-tai (No 1)* (1992) 2 HKPLR 490). The

European Court of Human Rights recently came to a different conclusion on the same issue *Welch v United Kingdom*, a decision which was followed in the present case (no reference was made in *Ko Chi-yuen* to the proceedings before the European Commission in the *Welch* case) In *R v Crawley*, the court adopted a somewhat parochial approach (and failed to refer to European Convention authority directly on point) in coming to the conclusion that a contravention of s 4 of the Fixed Penalty (Traffic Contraventions) Ordinance did not constitute a criminal charge (See also our previous comments in *Bill of Rights Bulletin*, v 3, n 1, at p 45) In contrast, the approach adopted by Judge Britton in the present case has much to be commended It looks at the substance and nature of the offence, as well as the severity of any potential penalty, and brings our law into line with the well-established international jurisprudence on this issue

RIGHT TO THE BENEFIT OF LESSER PENALTY (ARTICLE 12(1), BILL OF RIGHTS; ARTICLE 15(1), ICCPR)

Right to the benefit of lesser penalty -- Substitution of offence by another offence with a lesser penalty -- Penalty imposed in excess of maximum provided for by replacement provision --Penalty imposed less than maximum provided for by replacement provision -- Stare decisis -- Court of Appeal -- Whether Court of Appeal bound to follow earlier decisions

Editorial comment

The different approaches to the interpretation of article 12(1) have been discussed in earlier issues of the *Bulletin* (see v 2, n 3, pp 52-53, v 3, n 2, pp 37-38).The unsuccessful appellant in *R v Chan Chi-hung* (1993) 3 HKPLR 243 (CA) has now obtained special leave to appeal to the Privy Council against the decision of the Court of Appeal The issue may finally be resolved, one way or the other. The hearing before the Judicial Committee is scheduled for 18 May 1995.

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

Search and seizure -- Patients' Records -- Seizure by Inland Revenue Department under warrant -- Whether arbitrary interference -- Inland Revenue Ordinance (Cap 112), s 51B

***R v Commissioner of Inland Revenue, ex parte Patrick Shiu* (1995) HCt, MP No 3474 of 1994**

The applicant was a private medical practitioner whose clinic was searched by the Inland Revenue Department. The search was carried out pursuant to a warrant obtained by the Commissioner of Inland Revenue on the ground that there were reasonable grounds for suspecting that the applicant had made an incorrect return or supplied false information about his income or profits chargeable to tax under the Inland Revenue Ordinance and that material evidence could be found at the clinic. The records of over 1,000 patients were removed.

The applicant argued that the removal of the records might endanger his patients' health, but his request for the return of the records was refused The Commissioner, however, agreed to make copies of the record for the applicant, who insisted that the copying should be done by him or under his supervision This was done, and the original records were sealed pending this application In this application the applicant argued that the seizure was unlawful and constituted an arbitrary interference with his and his patients' right to privacy under article 14 of the Bill of Rights The case was settled before the hearing

G McCoy (instructed by Wong, Hui & Co), for the applicant, P Dykes (instructed by the Attorney General's Chambers), for the respondent

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

Prevention of Bribery Ordinance (Cap 201), s 30

Prevention of Bribery Ordinance -- Whether restriction on disclosure of details of an ICAC investigation a restriction prescribed by law -- Whether protection of rights and reputation of others an objective of restriction on disclosure -- Protection of public order (ordre public) -- Pressing social need -- Mandatory disqualification -- "ordre public"

R v Ming Pao Newspapers Ltd and others **(1995) Mag, Case No ESS10075-10078 of 1994, Mr Sinclair**

At a government land auction held on 26 May 1994 several developers collaborated in a successful attempt to keep down the prices of the land sold. The event was extensively covered by the Hong Kong media, and names of the developers involved, as well as photographs of several of them, were published. Following complaints from members of the public, the ICAC began an investigation into the affair in July 1994. On 2 August 1994, two ICAC investigators approached the secretary of the second defendant, the Editor-in-Chief of the first defendant, and informed her that they wished to interview the reporters who were present at the land auction. On 3 August 1994, the first defendant published an article in *Ming Pao Daily News* which stated that the ICAC had taken steps to meet reporters as part of its investigation into the joint bidding at the land auction, and that the ICAC had been investigating whether any offences had been committed under any Ordinance. The article also stated that the target of the investigation had not yet been ascertained.

As a result of the publication of this article, each of the defendants was charged with an offence under s 30(1) of the Prevention of Bribery Ordinance, which provides:

> "30(1) Any person who without lawful authority or excuse discloses to any person who is the subject of an investigation in respect of an offence *alleged or suspected* to have been committed by him under this Ordinance the fact that he is subject to such an investigation or any details of such an investigation, or discloses to any other person either the identity of any person who is the subject of such an investigation or *any details* of such an investigation shall be guilty of an offence. . .". (emphasis added)

At the close of the prosecution case, the defendants submitted that they had no case to answer on the basis that (a) s 30 of the Ordinance was inconsistent with article 16 of the Bill of Rights and had hence been repealed, and (b) there was insufficient evidence to support the charge

Held (finding no case to answer):[8]

1 The words "alleged or suspected" in s 30, when read with the words immediately following them, do no more than reflect the duties of the ICAC referred to and to identify the target of the investigation. As a matter of construction, an "allegation" need not even be an honest or informed one. Likewise, the suspicion need be no more than a mere surmise that someone has committed an offence under the Prevention of Bribery Ordinance

2 Under s 30 of the Ordinance, it is unnecessary to prove that the accused person knows that there is a specific target for the offence under investigation, or that he is reckless of the risk that this is the case

3. Section 30 of the Ordinance covers any details of an investigation, irrespective of the materiality of the details, or whether the details disclosed would cause any prejudice to the investigation. The term "any detail" covers the disclosure of the mere existence of an investigation.

Freedom of expression

4. Section 30 constitutes a prima facie restriction of the right to freedom of expression guaranteed by article 16 of the Bill of Rights. The right to freedom of expression is not unlimited, but any restriction must be provided by law and be necessary for the achievement of a legitimate objective; the protection of public order (*ordre public*) was such an objective.

5. Section 30 pursues the legitimate objective of the protection of public order (*ordre public*), which includes the prevention of disorder and crime in a society which recognizes human rights. There was no evidence that s 30 is concerned with the protection of the rights and reputation of others.

6. The concept of necessity implies the existence of a pressing social need. "Necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful" and "reasonable".

Sunday Times v United Kingdom (1979) 2 EHRR 245; *Handyside v United Kingdom* (1976) 1 EHRR 737, followed.

[8] The Crown has appealed against this ruling by way of case stated.

7 There is a pressing social need to combat all crimes, including corruption The particular nature of corruption suggests that specific powers may be necessary over and above those employed to combat other offences The question in the present case was, however, not whether there is a pressing social need to fight corruption, but rather whether there is a pressing social need for preservation of confidentiality in investigations into corruption

8 The restriction on disclosure under s 30 of the Ordinance was disproportionate to the achievement of the legitimate objectives of protection of public order/ordre public for the following reasons

(a) While restrictions on disclosure of the identity of suspects and details of an investigation would be useful weapons in the armoury of any law enforcement agency including the ICAC, s 30 is sui generis in that only the investigation of corruption offences, but not other, equally serious offences, attract the protection of s 30

(b) Section 30 is worded so that disclosure of the mere fact of the existence of an investigation by the ICAC into suspected breaches of the Bribery Ordinance is prohibited regardless of whether an allegation or suspicion is honestly held, justified, reasonable, or no more than conjecture.

(c) The prohibition on disclosure is mandatory regardless of its materiality to the investigation. It bears no relationship either to the prejudice which may be caused to an investigation or to the seriousness of the suspected offence. Bearing in mind that witnesses are nearly always sought in investigations, the disclosure in the present case that witnesses were being approached could hardly be material to any significant degree. Nonetheless, it was a "detail" within the meaning of s 30.

(d) Disclosure of "any detail" of such an investigation is an offence under the section. As such it is all-embracing. The term does not permit of qualifying words.

(e) In order to establish the commission of an offence under s 30, it is unnecessary to prove that the accused person knew that there is a specific target for the offence under investigation, or was reckless as to whether this was the case.

(f) Any person convicted of an offence under s 30 is liable, under s 33 of the Ordinance, to mandatory disqualification from holding public office, as defined in the Ordinance, for a period of 10 years.

(g) The utility of s 30 -- which is a blanket restriction taking no account of particular circumstances -- for investigations into offences under the Prevention of Bribery Ordinance does not correspond to but is, on the contrary, disproportionate to a social need to combat corruption.

9. For these reasons, s 30 of the Prevention of Bribery Ordinance is inconsistent with article 16 of the Bill of Rights and stands repealed.

C Ching QC, J Cagney and J Chan (instructed by Johnson Stokes & Master), for the defendants; T Casewell (of the Attorney General Chambers), for the Crown.

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

Elections -- Whether requirement of 10 years' residence for eligibility to stand for District Board elections an unreasonable and disproportionate restriction of the right to elect and to be elected -- Whether involuntary absence terminates ordinary residence in Hong Kong -- Electoral Provisions Ordinance (Cap 367), s 18(2)

***R v Apollonia Liu, ex parte Lau San-ching* (1995) HCt, MP No 3215 of 1994, Cheung J, 22 February 1995**

The petitioner, who wished to stand for election in the District Board election held in September 1994, had his nomination paper rejected by the Returning Officer on the ground that he failed to satisfy the requirement of ten years' continuous ordinary residence in Hong Kong immediately before the date of nomination, as prescribed by s 18(2) of the Electoral Provisions Ordinance. The petitioner was born and educated in Hong Kong. He was employed in Hong Kong after he had completed his university education. He had lived in Hong Kong for over 30 years. He visited China on 25 December 1981, with the intention to return to Hong Kong within a few days. On 26 December 1981 he was arrested by officers of the Guangzhou Municipal Bureau of Public Security and was subsequently charged and convicted of an offence of counter-revolutionary sedition, contrary to article 102 of the PRC Criminal Code. He was sentenced to 10 years' imprisonment. After serving the entirety of his sentence he returned to Hong Kong on 26 December 1991.

Following the rejection of his nomination, the petitioner challenged the rejection immediately by way of judicial review, but the application was refused by the High Court and the Court of Appeal on the ground that the proper procedure for challenging the decision was by way of election petition after the election. After the election, he brought this election petition challenging the decision of the Returning Officer that his nomination was invalid. He argued that (a) notwithstanding his physical absence in Hong Kong from 1981 to 1991, he was still ordinarily resident in Hong Kong; and (b) s 18(2) of the Electoral Provisions Ordinance was inconsistent with article 21 of the Bill of Rights and stood repealed. As a result, there was a material irregularity in the election in his constituency and the election should be declared invalid.

Section 18 of the Electoral Provisions Ordinance provides:

"(1) Subject to subsection (2), any person, unless disqualified by virtue of this Ordinance, the Boundary and Election Commission Ordinance (Cap 432) or any other enactment, shall be qualified for nomination as a candidate if he is entitled to be and is registered as an elector.

(2) No elector shall be qualified for nomination as a candidate or for election unless he has ordinarily resided in Hong Kong for ten years immediately preceding the day of his nomination."

Held (declaring the relevant election invalid):

Ordinary residence

1 The term "ordinary residence" should be given its natural and ordinary meaning and its determination is ultimately a question of fact and degree which must be determined in all the circumstances of the case Unless otherwise required by the statutory context, "ordinarily resident" refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration. The residence must be voluntarily adopted, and there must be a degree of settled purpose, that is, a sufficient degree of continuity. If there can be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose

R v Barnet London Borough Council, ex parte Shah [1982] 2 AC 309, *Levene v Commissioner of Inland Revenue* [1928] AC 217, followed.

2. In determining whether a person is ordinarily resident in a particular place, the court should look at the immediate past; his intention is of limited relevance. However, it is incorrect just to count the length of absence alone. Nor is it correct to look at the relevant period in question in isolation without regard to his previous mode of life.

R v Barnet London Borough Council, ex parte Shah [1982] 2 AC 309, discussed.

3 A person can be ordinarily resident in two countries at the same time, but a person he must have at least one residence at any one time.

4. Where a person did not choose to reside in a foreign country for a settled purpose, the duration of the period of absence could not be relevant in determining whether the continuity of the habitual residence has been terminated by the absence. While the quality of absence may change with the passage of time, involuntary detention in a foreign country cannot deprive a person of his ordinary residence in Hong Kong.

5. When the petitioner visited China in December 1981, he did not go there for a settled purpose. His visit lasted for only one or two days, and ended with his arrest. It is clear that he was ordinarily resident in Hong Kong immediately preceding his visit to China. Notwithstanding his absence from Hong Kong for 7 years and 5 months out of the relevant 10-year period, his absence was temporary because it was for a limited time since his sentence of imprisonment was for a fixed term of 10 years and it existed for a time only. On the facts of this case, the enforced absence of the petitioner did not disrupt his period of ordinary residence in Hong Kong.

Right to vote and to be elected

6. Article 21 of the Bill of Rights gives every permanent resident in Hong Kong the right to vote and to stand as a candidate for election. It is for the Crown to justify that the ten year prior ordinary residence is reasonable. To do so, the Crown must show that there is a legitimate objective by imposing the restrictions, and that the rationality and proportionality tests must be satisfied.

7 While the concept of "a high margin of appreciation" is employed when an international adjudicative body is assessing the permissibility of a restriction on a guaranteed right imposed by a State, this concept does not directly apply in an intra-state determination of rights However, if an exercise of comparing international practice is undertaken, local conditions, such as the stage of democratic development, the composition and fluctuation of the resident population and other such factors may justify restrictions that would not justify them elsewhere The domestic judge or assessor may legitimately consider what margin of appreciation would be afforded by outsiders in respect of local conditions

8 The imposition of a residence requirement for electors and candidates may serve a number of legitimate purposes These purposes include: (a) ensuring the integrity of the electoral process; (b) ensuring that voters are properly informed of the issues in any election, and (c) ensuring that voters [and candidates] have a sufficient connection with the territory

9. Article 21 of the Bill of Rights guarantees to every permanent resident of Hong Kong the right to vote and to be elected. "Permanent resident" is a term defined in the Immigration Ordinance. Neither article 21 nor the Electoral Provisions Ordinance makes any reference to citizenship. Thus it would be untenable to justify restrictions on the electoral rights of permanent residents on the basis of the distinction between citizens and non-citizens.

10. There is no rational basis for imposing a 10-year residential requirement on the election right, and such a requirement is disproportionate to achieve the legitimate aims of imposing a residential requirement in light of the following factors:

(a) Residence requirements in other jurisdiction are of a much shorter period;

(b) There is no logical link between conferring the right to vote on non-citizens and restrictions imposed on the fundamental rights of the permanent residents by means of a lengthy residence requirement;

(c) Both the voters and the candidates are important components of the electoral process. The great disparity between the right to vote (where there is no residence requirement) and the right to be elected (where there is a 10-year residence requirement) affords the clearest indication of the irrational and disproportionate nature of the 10-year restriction;

(d) The additional three years of residence on top of the seven-year residence requirements for voters does not bear any rational relationship to the aim of ensuring that the candidates concerned have sufficient local knowledge;

(e) There have been great constitutional changes in Hong Kong since 1981, and there is no evidence to show that article 21 of the Bill of Rights has been taken into account in the various periodic reviews of the residential requirement;

(f) There is no justification for restricting the right of returned residents to stand for election, even they may only represent a small percentage of the general population.

11. It is not necessary to reach a concluded view on the Bill of Rights, but a strong case has been made out that the 10-year residency requirement is inconsistent with article 21 of the Bill of Rights.

N Kat (instructed by Daniel Wong & Partners), for the petitioner, W Marshall QC and A Wu (of the Attorney General's Chambers), for the respondent

Legislative Council (Electoral Provisions) Ordinance (Cap 381) -- Electoral Provisions Ordinance (Cap 367)

Elections -- Functional constituencies -- Whether failure to provide an additional vote in functional constituencies to all electors in geographical constituencies inconsistent with the Bill of Rights or Letters Patent

***Re Lee Mui-ling* (1994) HCt, MP No 1696 of 1994, Keith J, 21 April 1995**

This case involved a challenge to the system of functional constituencies provided for under the Legislative Council (Electoral Provisions) Ordinance (Cap 381). Under the Hong Kong electoral system in place for the 1995 elections the Legislative Council will consist of 60 members: 20 to be elected by direct election from geographical constituencies, 30 by functional constituencies, and 10 by an Election Committee. All permanent residents of Hong Kong who are 18 or older are entitled to vote in one of the 20 geographical constituencies. There will also be 29 functional constituencies (electing 30 members); a person entitled to vote in a geographical constituency is eligible to vote in one of the functional constituencies if (s)he belongs to one of the occupational groups defined as making up the various constituencies Some 3.9 million persons are entitled to vote in geographical constituencies, but only 2.9 million of these are entitled to vote in the functional constituencies. The size of these functional constituencies varies dramatically, ranging from the smallest constituency of 39 persons to the largest constituency of 487,000 people.

The plaintiffs, both of whom were entitled to vote in a geographical constituency but were not entitled to vote in a functional constituency, challenged the consistency of the system of functional constituencies. The plaintiffs originally challenged the electoral system which had been in place for the 1991 elections, but, following the amendment of the relevant laws to introduce a modified system for the 1995 elections, they were permitted to challenge the current system. Although they did not claim that a system of functional constituencies itself was unconstitutional, they claimed that a system of functional constituencies could only be defended if every person who had a vote in a geographical constituency also enjoyed a vote in a functional constituency. Their primary contentions were that the exclusion of about 1 million people from the right to vote in the functional constituencies cannot be regarded as a reasonable restriction of the right of equal suffrage, especially in light of the fact that the exclusion is effectively based on the status of being employed. They also claimed that the large variation in the number of voters between the various functional constituencies meant that there was a violation of the right to equal voting power, which is an inherent aspect of the right of equal suffrage. The plaintiffs also made a number of subsidiary claims relating to the manner of operation of some functional constituencies.

The government argued in response that s 13 of the Bill of Rights and the United Kingdom's reservation , both of which provided that article 21 of the Bill of Rights (and article 25 of the ICCPR) did not require the establishment of an elected Legislative or Executive Council in Hong Kong: the composition of the legislature was entirely within the power of

the government The government also argued that the establishment of functional constituencies was permitted by articles VI(1) and VII(3) of the Letters Patent and that these provisions were not to be limited in any way by the Bill of Rights Ordinance or the entrenchment of the ICCPR in article VII(5) of the Letters Patent The plaintiffs argued that article VII(3) had to be read in a manner consistent with the right to equal suffrage and article VII(5), so that it should be interpreted as permitting functional constituencies only if all geographical electors also had a functional constituency vote.

Articles VI(1) and VII of the Letters Patent provide

"VI (1) There shall be a Legislative Council in and for the Colony, and the said Council shall consist of sixty Members, being persons who are qualified for election and elected in accordance with laws in that behalf in force in the Colony and of whom-

(a) twenty shall have been returned in respect of geographical constituencies;

(b) thirty shall have been returned in respect of functional constituencies; and (c) ten shall have been returned by an election committee.

. . .

VII. (1) The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good government of the Colony.

(2) Without affecting the generality of paragraph (1), laws of the Colony may provide for the holding of elections as regards the election of Members of the Legislative Council. Such laws may provide for different categories of such Members and provide generally, or in relation to a particular category of Member, for-

(a) different systems or methods of election;

(b) determination of constituencies and the number of Members to be returned in respect thereof;

(c) qualifications or disqualifications, as regards electors, candidates for election or such Members;

(d) tenure of office of Members.

(3) Nothing in this Article shall be construed as precluding the making of laws which, as regards the election of the Members of the Legislative Council, confer on persons generally or persons of a particular description any entitlement to vote which is in addition to a vote in respect of a geographical constituency.

(4) Laws of the Colony may provide, as regards the election of the Members of the Legislative Council, for the appointment of different dates for voting to take place in respect of constituencies of different descriptions or election of different categories of Members.

(5) The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966,

as applied to Hong Kong, shall be implemented through the laws of Hong Kong No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong "

Held (rejecting the challenge):

1 The right to participate in the public affairs of Hong Kong guaranteed by article 21(a) of the Bill of Rights and the right of universal suffrage guaranteed by article 21(b) requires every permanent resident of Hong Kong to be entitled to vote in elections of member of the Legislative Council and to be effectively represented by the members elected in their constituencies.

2 The right of equal suffrage guaranteed by article 21(b) requires every permanent resident of Hong Kong to have the same voting power and to be accorded votes of equal weight in such elections.

3. The concept of equal voting power can only be satisfied by a system which accords to each voter the same number of votes -- the "one person, one vote" principle. The concept of equal voting power does not, however, require constituencies to be of exactly the same size. The fact that the right of equal suffrage may be subjected to reasonable restrictions means that constituencies may vary considerably in size, if constituencies representing different sectional interests of varying sizes can be said to contribute to the better government of Hong Kong as a whole.

4. A restriction on the right of all voters to have the same number of votes cannot be regarded as reasonable if the system which accords more votes to some voters than to others does so by reference to distinctions based on their status.

5. The concept of equal voting power does not require absolute equality. The ideal of equality in voting power must be modified if other factors justify it. The desirability of permitting those who are entitled to be registered in more than one constituency to choose the constituency in which they will in fact be registered justifies marginally greater voting power arising from such a choice.

6. The purpose of functional constituencies is to give different sectional interests a voice of their own in the Legislative Council. Differences in the size of those constituencies are inevitable when constituencies are determined by occupation. Article 21 does not, at this embryonic stage in the development of Hong Kong's electoral process, require the number of the representatives of such sectional interests in the Legislative Council to be in proportion to the size of the constituencies.

7. The fact that bodies other than the legislature can in theory decide who some of the electors in some of the functional constituencies should be does not mean that those electors have greater voting power than other electors, if functional constituencies can be justified in the first place.

8. Legislation passed after 8 June 1991 which could not be interpreted in a manner consistent with the ICCPR as applied to Hong Kong was inconsistent with article VII(5) of the Letters Patent and of no force.

9. Section 13 of the Bill of Rights Ordinance did not avail the respondent. Since 16 July 1993, when article VI(1) of the Letters Patent had provided that all 60 members of the Legislative Council should be elected, s 13 did not restrict the guarantees of universal and equal suffrage contained in article 21.

10 Article VII(5) of the Letters Patent does not prevent the Letters Patent from derogating from the rights guaranteed by the Bill of Rights The Bill of Rights Ordinance does not fetter the supreme power of the Sovereign to provide for Hong Kong's constitutional framework through the Letters Patent

11 Article VII(3) of the Letters Patent conferred a clear mandate to enact laws establishing functional constituencies and was not limited in any way by article VII(5) Accordingly, article VII(5) did not prevent the enactment of laws which confer on a limited number of people the right to vote in the functional constituencies as well as in the geographical constituencies

Editorial comment

The judgment of Keith J confirms the efficacy of the government's attempt to entrench the functional constituency system through the Letters Patent However, the judge's view of the scope of article 21 and the irrelevance of s 13 of the Bill of Rights Ordinance once the Letters Patent provided for the constitution of the Legislative Council by election are of particular significance in relation to the government's international obligations He confirms that article 21 of the Bill of Rights guarantees every permanent resident a right to vote in the election of members to the Legislative Council The right to vote embodies the notions of equal voting power and votes of (roughly) equal weight The Government, as a result of the reservation to the ICCPR or s 13 of the Bill of Rights, is under no duty to introduce an elected legislature However, once the legislature is in fact constituted by election, s 13 of the Bill of Rights (and equally, it seems, the reservation to the ICCPR) cannot justify (unreasonable) restrictions on the enjoyment of the right of equal suffrage

One corollary of this analysis appears to be that any attempt to restrict the right of equal suffrage in future will be a violation of article 25 of the ICCPR, unless the restriction is done through the Letters Patent, or after 1997, the Basic Law. The phrase "the ICCPR as applied to Hong Kong" is in the court's view is by itself insufficient to justify a restriction of the right of equal suffrage.

The judge also rightly pointed out that the right to equality of voting power is not absolute, and it may be modified if there are other factors justifying its restrictions. It is unclear what factors could justify a restriction of this right, and in particular, whether the need to develop democratic institutions gradually could justify a restriction of the right to equality of voting power. The tenor of Keith J's judgment seems to be that a system of functional constituencies like the Hong Kong system is inconsistent with the government's obligations under article 25 of the ICCPR, even though a claim based on this article cannot succeed before the Hong Kong courts. (The fact that the UK government has denied redress under domestic law and that the UK and Chinese governments have agreed as between themselves to trade away the rights of Hong Kong people in this regard does not remedy the breach of international law, despite the lack of a judicial forum in which the issue can be pursued.) By holding that the Letters Patent prevent a challenge to the consistency of the electoral system with human rights standards, the effect of Keith J's judgment -- if indeed he accepts that but for the Letters Patent functional constituencies would otherwise be inconsistent with article 25 of the ICCPR -- has underlined the existence of the violation and the responsibility of the United Kingdom and Hong Kong governments for that violation.

Civil service -- Prohibition of transfer by expatriate officers from contract terms to local terms -- Whether racial discrimination -- Positive discrimination -- Proportionality -- Hong Kong Permanent Resident

Re Association of Expatriate Civil Servants of Hong Kong and others (1995) HCt, MP No 3037 of 1994, Keith J

This case involves a challenge by a number of expatriate civil servants to various decisions taken in pursuance of the government's localisation policy The hearing of the application for judicial review is yet to be held

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

In *R v Harry Hui Kin-hong* (page 23 above), Bokhary JA commented:

> "The Bill of Rights itself secures that right [right to protection against corruption] Article 22 of the Bill contains an 'equal protection' clause If the law only protected persons accused of corruption, but failed to protect members of the general public from the evils and perils of corruption, then it would deny them equal protection "

This follows up earlier comments by Bokhary JA in *Attorney General v Fong Chin-yue* [1995] 1 HKC 21 at 33 when he was considering whether the strict liability provision of the Dutiable Commodities Ordinance addressed an issue of social concern within the *Gammon* criteria([1985] AC 1):

> "The concern is to raise revenue and to raise it in a way that treats taxpayers with equality If the law were impotent, or even if it were merely inefficient, in visiting serious consequences on the evasion of duty, it would fail to accord equal protection to honest taxpayers. And of course article 22 of the Bill of Rights guarantees everyone equal protection of law. It is a mistake -- and an injustice to the Bill of Rights -- to think that it only protects the man in the dock and never protects the man in the street "

LEGISLATION

ORDINANCES

Administration of Justice (Miscellaneous Provisions) Ordinance (No 13 of 1995): "repeal" of provisions already repealed by the Bill of Rights Ordinance

The problem of what steps one takes to remove from the statute book provisions which have been repealed by the Bill of Rights Ordinance with effect from 8 June 1991 has in the past given rise to some perplexity. It is a welcome development to see that the administration has recently begun to remove from the statute book provisions held by the courts to be inconsistent with the Bill of Rights. The method of doing this has been to "repeal" them once again. While logically this may cause raised eyebrows, one hopes it will be effective.

Recent examples of the specific repeal of provisions held repealed by the Bill of Rights include a number of provisions repealed by the Administration of Justice (Miscellaneous Provisions) Ordinance (No 13 of 1995)("the Ordinance"). The Ordinance, the relevant provisions of which commenced operation on 1 April 1995,[9] repealed the following sections:

- s 30 of the Summary Offences Ordinance (Cap 228), which was held by the Privy Council to be inconsistent with the Bill of Rights in *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72 [s 66 of the Ordinance]

- s 83XX(3)(a) of the Criminal Procedure Ordinance (Cap 221), which was held repealed by the Court of Appeal in *R v Man Wai-keung (No 2)* (1992) 2 HKPLR 164; [1992] 2 HKCLR 207 [s 55]

- s 4(4) of the Massage Establishments Ordinance (Cap 266), which was held inconsistent with the Bill of Rights in *R v Wan Yan-fuk* (1993) 3 HKPLR 341 was also repealed [s 2 and Schedule 1, para 22]

- s 29(6)(a) of the Theft Ordinance.(Cap 210), which was held inconsistent with the Bill of Rights in *R v Lau Shiu-wah* (1991) 1 HKPLR 202 [s 53]. (Section 28(2) of the Theft Ordinance was also repealed, by s 52.)

Section 17 of the Summary Offences Ordinance, declared inconsistent with article 11(1) of the Bill of Rights by the Court of Appeal in *R v Chong Ka-on* is to be amended (by deletion of the offending phrase) the passage of the Administration of Justice (Miscellaneous Provisions)(No 2) Bill 1995 (*Hong Kong Government Gazette*, Legal Supplement No 3, 7 April 1995, C1113, cl 50

In view of the Court of Appeal's comments in *Anastasius Chiu* (above at page 27) about the undesirability of administrative suspension or repeal, one hopes that the Attorney General will now take steps to ensure that provisions which he considers inconsistent with the

[9] LN 129 of 1995

Bill of Rights (and has conceded to be so for the purposes of criminal proceedings) are formally repealed rather than not enforced at his discretion

Buildings (Amendment) Ordinance 1994 (came into operation on 16 November 1994)

Whether the Building Appeal Tribunal, in view of its composition, is an independent and impartial tribunal within the meaning of article 10 was the subject of the decision of the Court of Appeal in *Business Authority v Business Rights Ltd* (1994) 4 HKPLR 43. The Court of Appeal held that the fact that members of the Tribunal were appointed by the Building Authority did not per se infringe article 10 This amendment Ordinance addresses the Bill of Rights concerns more directly by reconstituting the Appeal Tribunal.

Section 44 provides that any person aggrieved by a decision of the Building Authority may appeal to the Appeal Tribunal. Under s 48, the Tribunal shall consist of a Chairman [sic] and not less than 2 members. The Chairman shall be a person who is qualified for appointment as a District Judge. The other members are to be chosen from a panel appointed by the Governor. The majority of the persons constituting the Appeal Tribunal shall be persons other than public officers (s 48(3)), and if a public officer is a Chairman or a member of the Tribunal, he shall act in his personal capacity only and shall not be subject to any direction to which he might be subject in his capacity as a public officer. (s 48(4)). The appeal is a hearing de novo: the Tribunal can receive and consider any oral, documentary or other evidence, and may make an order confirming, varying or reversing the decision that is appealed against or substituting therefore such other decision or make such other order as it thinks fit: s 50.

Criminal Procedure (Amendment) Ordinance 1994 (commenced operation on 1 April 1995)

This ordinance introduces 3 new sections governing bail: ss 83R(2), 83Z and 83ZA. Section 83R(2) extends the meaning of "appeal" to an appeal to the Privy Council and an application for special leave to appeal to the Privy Council. Section 83Z provides that any court may grant bail pending appeal, after taking into account the pending sentence, the likelihood of a custodial sentence, the likelihood of the sentence being completely served before the disposal of the appeal and any other relevant matters. Section 83ZA empowers the Court of Appeal to grant bail pending appeal to the Privy Council.

BILLS

Criminal Procedure (Amendment) Bill 1995 (*Hong Kong Government Gazette*, Legal Supplement No 3, 7 April 1995, C611)

A bill to establish special procedures respecting the giving of evidence by vulnerable witnesses during a criminal trial. In particular, it provides for testimony to be given by live television link and by way of a video recording of an interview provided the witness is available for cross-examination afterwards; it also allows evidence to be given by a deposition taken by a magistrate, and permits the prosecution to issue a notice of transfer to bypass the committal proceedings before a magistrate and have the matter go directly to a full trial.

Vulnerable witnesses include a child below the age of 14, or in sexual offence, below 17 years of age, and mentally handicapped person

Personal Data (Privacy) Bill 1995 (*Hong Kong Government Gazette*, Legal Supplement No 3, 7 April 1995, C611)

This Bill is intended to give effect to many of the provisions of the Law Reform Commission in its *Report on the Reform of the Law Relating to the Protection of Personal Data* The bill is intended to control the collection, holding and processing of personal data (and contains in Schedule 1 data protection principles intended to further this goal), to enable individuals to request access to personal data of which (s)he is the subject and to request correction of that data, and to establish the office of Privacy Commissioner, who will be responsible for monitoring compliance with the provisions of the legislation

Disability Discrimination Bill 1995 (*Hong Kong Government Gazette*, Legal Supplement No 32, 1 April 1995, C965)

This Bill will make unlawful discrimination on the ground of disability in many areas The Bill, which is based on a combination of Australian and UK models (the latter through the Sex Discrimination Bill, whose provisions it follows where appropriate), covers discrimination in many areas It will also confer jurisdiction on the Equal Opportunities Commission (to be established under the Sex Discrimination Bill) to deal with complaints of discrimination on the ground of disability and to undertake other activities in that field

RECENT PUBLICATIONS

HONG KONG

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APPENDIX A

HUMAN RIGHTS COMMITTEE

GENERAL COMMENT ADOPTED UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

General Comment No 24(52)

General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant

1 As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant Other are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions Still others are directed at the competence of the Committee The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties It is important for States Parties to know exactly what obligations they, and other States Parties, have in fact undertaken And the Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a State is bound by a particular obligation or to what extent This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects

2 For these reasons the Committee has deemed it useful to address in a General Comment the issues of international law and human rights policy that arise The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted It addresses the role of States Parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations And it makes certain recommendations to present States Parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations

3 It is not always easy to distinguish a reservation from a declaration as to a States's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State,

it constitutes a reservation [1] Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation

4 The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". Paragraphs 2 and 3 provide for certain procedural obligations

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance.[2] It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori

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1 Article 2(1) (d), Vienna Convention on the Law of Treaties 1969.

2 Although the Vienna Convention on the Law of Treaties was conclude in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951.

when they have the character of peremptory norms) may not be the subject of reservations Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be

9 Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (Article 2(1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)).

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples.[3] While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant

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[3] Reservations have been entered to both article 6 and article 7, but not in terms which reserve a right to torture or to engage in arbitrary deprivation of life.

also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose A State may not reserve the right not to present a report and have it considered by the Committee The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty

12 The intention of the Covenant is that the rights contained therein should be ensured to all those under a State's party's jurisdiction. To this end certain attendant requirements are likely to be necessary Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law And sometimes that tendency is elevated to a general policy Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognise the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14. The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to

acts and events occurring after entry into force for the State concerned of the first Optional Protocol In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence ratione temporis At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol

15 The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty[4] It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 1, provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. Two procedural obligations are incumbent upon State parties wishing to avail themselves of such a reservation Article 2, paragraph 1, obliges such a State to inform the Secretary General, at the time of ratification or accession, of the relevant provisions of its national legislation during warfare. This is clearly directed towards the objectives of specificity and transparency and in the view of the Committee a purported reservation unaccompanied by such information is without legal effect Article 2, paragraph 3, requires a State making such a reservation to notify the Secretary General of the beginning or ending of a state of war applicable to its territory In the view of the Committee, no State may seek to avail itself of its reservation (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the *Reservations to the Genocide Convention Case* (1951) that a State which objected to reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20,paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and

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[4] The competence of the Committee in respect of this extended obligation is provided for under article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to

17 As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations They concern the endowment of individuals with rights The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently

existing in less demanding standards of domestic law Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body

20 States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practice compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

APPENDIX B

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*

GENERAL COMMENT NO 5 (ELEVENTH SESSION, 1994)**

PERSONS WITH DISABILITIES

1. The central importance of the International Covenant on Economic, Social and Cultural Rights in relation to the human rights of persons with disabilities has frequently been underlined by the international community.[1] Thus a 1992 review by the Secretary-General of the implementation of the World Programme of Action concerning Disabled Persons and the United Nations Decade of Disabled Persons concluded that "disability is closely linked to economic and social factors" and that "conditions of living in large parts of the world are so desperate that the provision of basic needs for all - food, water, shelter, health protection and education - must form the cornerstone of national programmes".[2] Even in countries which have a relatively high standard of living, persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the Covenant.

2. The Committee on Economic, Social and Cultural Rights, and the working group which preceded it, have been explicitly called upon by both the General Assembly[3] and the Commission on Human Rights[4] to monitor the compliance of States parties to the Covenant with their obligation to ensure the full enjoyment of the relevant rights by persons with disabilities. The Committee's experience to date, however, indicates that States parties have devoted very little attention to this issue in their reports. This appears to be consistent with the Secretary-General's conclusion that "most Governments still lack decisive concerted measures that would effectively improve the situation" of persons with disabilities.[5] It is

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* UN Doc E/C.12/1994/13

** Adopted at the 38th meeting, on 25 November 1994.

[1] For a comprehensive review of the question, see the final report prepared by Mr Leandro Despouy, Special Rapporteur, on human rights and disability (E/CN.4/Sub.2/1991/31).

[2] See A/47/415, para. 5.

[3] See para. 165 of the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its resolution 37/52 of 3 December 1982 (para. 1).

[4] See Comm ission on Human Rights resolutions 1992/48, para. 4 and 1992/29, para. 7.

[5] See A/47/415, para. 6.

herefore appropriate to review, and emphasize, some of the ways in which issues concerning persons with disabilities arise in connection with the obligations contained in the Covenant.

3 There is still no internationally accepted definition of the term "disability" For present purposes, however, it is sufficient to rely on the approach adopted in the Standard Rules of 1993, which state.

> "The term 'disability' summarizes a great number of different functional limitations occurring in any population . . People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness Such impairments, conditions or illnesses may be permanent or transitory in nature."[6]

4. In accordance with the approach adopted in the Standard Rules, this General Comment uses the term "persons with disabilities" rather than the older term "disabled persons". It has been suggested that the latter term might be misinterpreted to imply that the ability of the individual to function as a person has been disabled.

5. The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 (2) of the Covenant that the rights "enunciated . . . will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability.

6. The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago. More recent international human rights instruments have, however, addressed the issue specifically. They include the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples' Rights (art. 18 (4)); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18). Thus it is now very widely accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programmes.

7. In accordance with this approach, the international community has affirmed its commitment to ensuring the full range of human rights for persons with disabilities in the following instruments: (a) the World Programme of Action concerning Disabled Persons, which provides a policy framework aimed at promoting "effective measures for prevention of disability, rehabilitation and the realization of the goals of 'full participation' of [persons with

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[6] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (Introduction, para. 17).

disabilities] in social life and development, and of 'equality'",[7] (b) the Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies, adopted in 1990,[8] (c) the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, adopted in 1991,[9] (d) the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (hereinafter referred to as the "Standard Rules"), adopted in 1993, the purpose of which is to ensure that all persons with disabilities "may exercise the same rights and obligations as others".[10] The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant.

I. GENERAL OBLIGATIONS OF STATES PARTIES

8. The United Nations has estimated that there are more than 500 million persons with disabilities in the world today. Of that number, 80 per cent live in rural areas in developing countries. Seventy per cent of the total are estimated to have either limited or no access to the services they need. The challenge of improving the situation of persons with disabilities is thus of direct relevance to every State party to the Covenant. While the means chosen to promote the full realization of the economic, social and cultural rights of this group will inevitably differ significantly from one country to another, there is no country in which a major policy and programme effort is not required.[11]

9. The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.

10. According to a report by the Secretary-General, developments over the past decade in both developed and developing countries have been especially unfavourable from the perspective of persons with disabilities:

> ". . . current economic and social deterioration, marked by low-growth rates, high unemployment, reduced public expenditure, current structural adjustment

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[7] World P rogramme of Action concerning Disabled Persons (see note 3 above), para. 1.

[8] A/C.3/46/4, annex I. Also contained in the Report on the International Meeting on the Roles and Functions of National Coordinating Committees on Disability in Developing Countries, Beijing, 5-11 November 1990 (CSDHA/DDP/NDC/4). See also Economic and Social Council resolution 1991/8 and General Assembly resolution 46/96 of 16 December 1991.

General Assembly resolution 46/119 of 17 December 1991, annex.

[10] Standard Rules, (see note 6 above), Introduction, para. 15.

[11] See A/47/415, *passim.*

programmes and privatization, have negatively affected programmes and services If the present negative trends continue, there is the risk that [persons with disabilities] may increasingly be relegated to the margins of society, dependent on ad hoc support "[12]

As the Committee has previously observed (General Comment No 3 (Fifth session, 1990), para 12), the duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints

11 Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States parties' obligations One is the need to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, the ability of persons with disabilities to participate in the mainstream of community activities and to realize their full potential as active members of society will be severely and often arbitrarily constrained. This is not to imply that legislative measures will always be the most effective means of seeking to eliminate discrimination within the private sphere. Thus, for example, the Standard Rules place particular emphasis on the need for States to "take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution".[13]

12. In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces. Similarly, while it is appropriate for Governments to rely on private, voluntary groups to assist persons with disabilities in various ways, such arrangements can never absolve Governments from their duty to ensure full compliance with their obligations under the Covenant. As the World Programme of Action concerning Disabled Persons states, "the ultimate responsibility for remedying the conditions that lead to impairment and for dealing with the consequences of disability rests with Governments".[14]

II. MEANS OF IMPLEMENTATION

13. The methods to be used by States parties in seeking to implement their obligations under the Covenant towards persons with disabilities are essentially the same as those available in relation to other obligations (see General Comment No. 1 (Third session,

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[12] Ibid., para. 5.

[13] Standard Rules, (see note 6 above) Rule 1.

[14] World Programme of Action concerning Disabled Persons (see note 3 above), para. 3.

1989)) They include the need to ascertain, through regular monitoring, the nature and scope of the problems existing within the State, the need to adopt appropriately tailored policies and programmes to respond to the requirements thus identified, the need to legislate where necessary and to eliminate any existing discriminatory legislation, and the need to make appropriate budgetary provisions or, where necessary, seek international cooperation and assistance In the latter respect, international cooperation in accordance with articles 22 and 23 of the Covenant is likely to be a particularly important element in enabling some developing countries to fulfil their obligations under the Covenant

14 In addition, it has been consistently acknowledged by the international community that policy-making and programme implementation in this area should be undertaken on the basis of close consultation with, and involvement of, representative groups of the persons concerned. For this reason, the Standard Rules recommend that everything possible be done to facilitate the establishment of national coordinating committees, or similar bodies, to serve as a national focal point on disability matters. In doing so, Governments should take account of the 1990 Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies.[15]

III. THE OBLIGATION TO ELIMINATE DISCRIMINATION ON THE GROUNDS OF DISABILITY

15 Both *de jure* and *de facto* discrimination against persons with disabilities have a long history and take various forms They range from invidious discrimination, such as the denial of educational opportunities, to more "subtle" forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. For the purposes of the Covenant, "disability-based discrimination" may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights. Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.

16. Despite some progress in terms of legislation over the past decade,[16] the legal situation of persons with disabilities remains precarious. In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties. Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.

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[15] See note 8 above.

[16] See A/47/415, paras. 37-38.

17 Anti-discrimination measures should be based on the principle of equal rights for persons with disabilities and the non-disabled, which, in the words of the World Programme of Action concerning Disabled Persons, "implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation Disability policies should ensure the access of [persons with disabilities] to all community services" [17]

18 Because appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities, such actions should not be considered discriminatory in the sense of article 2 (2) of the International Covenant on Economic, Social and Cultural Rights as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective

IV. SPECIFIC PROVISIONS OF THE COVENANT

A. Article 3 - Equal rights for men and women

19 Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected [18] Despite frequent calls by the international community for particular emphasis to be placed upon their situation, very few efforts have been undertaken during the Decade The neglect of women with disabilities is mentioned several times in the report of the Secretary-General on the implementation of the World Programme of Action [19] The Committee therefore urges States parties to address the situation of women with disabilities, with high priority being given in future to the implementation of economic, social and cultural rights-related programmes.

B. Articles 6-8 - Rights relating to work

20. The field of employment is one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities. Where persons with disabilities are employed, they are mostly engaged in low-paid jobs with little social and legal security and are often segregated from the mainstream of the labour market. The integration of persons with disabilities into the regular labour market should be actively supported by States

21. The "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (art. 6 (1)) is not realized where the only real opportunity open to disabled workers is to work in so-called "sheltered" facilities under substandard conditions. Arrangements whereby persons with a certain category of disability are effectively confined to

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[17] World Programme of Action concerning Disabled Persons (see note 3 above), para. 25.

[18] See E/CN.4/Sub.2/1991/31 (see note 1 above), para. 140.

[19] See A/47/415, paras. 35, 46, 74 and 77.

certain occupations or to the production of certain goods may violate this right. Similarly, in the light of principle 13 (3) of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,[20] "therapeutical treatment" in institutions which amounts to forced labour is also incompatible with the Covenant In this regard, the prohibition on forced labour contained in the International Covenant on Civil and Political Rights is also of potential relevance

22 According to the Standard Rules, persons with disabilities, whether in rural or urban areas, must have equal opportunities for productive and gainful employment in the labour market.[21] For this to happen it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed. As the International Labour Organisation has noted, it is very often the physical barriers that society has erected in areas such as transport, housing and the workplace which are then cited as the reason why persons with disabilities cannot be employed.[22] For example, as long as workplaces are designed and built in ways that make them inaccessible to wheelchairs, employers will be able to "justify" their failure to employ wheelchair users. Governments should also develop policies which promote and regulate flexible and alternative work arrangements that reasonably accommodate the needs of disabled workers.

23. Similarly, the failure of Governments to ensure that modes of transportation are accessible to persons with disabilities greatly reduces the chances of such persons finding suitable, integrated jobs, taking advantage of educational and vocational training, or commuting to facilities of all types. Indeed, the provision of access to appropriate and, where necessary, specially tailored forms of transportation is crucial to the realization by persons with disabilities of virtually all the rights recognized in the Covenant.

24. The "technical and vocational guidance and training programmes" required under article 6 (2) of the Covenant should reflect the needs of all persons with disabilities, take place in integrated settings, and be planned and implemented with the full involvement of representatives of persons with disabilities.

25. The right to "the enjoyment of just and favourable conditions of work" (art. 7) applies to all disabled workers, whether they work in sheltered facilities or in the open labour market. Disabled workers may not be discriminated against with respect to wages or other conditions if their work is equal to that of non-disabled workers. States parties have a responsibility to ensure that disability is not used as an excuse for creating low standards of labour protection or for paying below minimum wages.

26. Trade union-related rights (art. 8) apply equally to workers with disabilities and regardless of whether they work in special work facilities or in the open labour market. In addition, article 8, read in conjunction with other rights such as the right to freedom of association, serves to emphasize the importance of the right of persons with disabilities to

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[20] See note 9 above.

[21] Standard Rules (see note 6 above), Rule 7.

[22] See A/CONF.157/PC/61/Add.10, p. 12.

form their own organizations If these organizations are to be effective in "the promotion and protection of [the] economic and social interests" (art 8 (1) (a)) of such persons, they should be consulted regularly by government bodies and others in relation to all matters affecting them; it may also be necessary that they be supported financially and otherwise so as to ensure their viability

27. The International Labour Organisation has developed valuable and comprehensive instruments with respect to the work-related rights of persons with disabilities, including in particular Convention No 159 (1983) concerning vocational rehabilitation and employment of persons with disabilities.[23] The Committee encourages States parties to the Covenant to consider ratifying that Convention.

C. Article 9 - Social security

28. Social security and income-maintenance schemes are of particular importance for persons with disabilities. As stated in the Standard Rules, "States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities".[24] Such support should reflect the special needs for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals (who are overwhelmingly female) who undertake the care of a person with disabilities. Such persons, including members of the families of persons with disabilities, are often in urgent need of financial support because of their assistance role.[25]

29. Institutionalization of persons with disabilities, unless rendered necessary for other reasons, cannot be regarded as an adequate substitute for the social security and income-support rights of such persons.

D. Article 10 - Protection of the family and of mothers and children

30. In the case of persons with disabilities, the Covenant's requirement that "protection and assistance" be rendered to the family means that everything possible should be done to enable such persons, when they so wish, to live with their families. Article 10 also implies, subject to the general principles of international human rights law, the right of persons with disabilities to marry and have their own family. These rights are frequently ignored or denied, especially in the case of persons with mental disabilities.[26] In this and other contexts, the term "family" should be interpreted broadly and in accordance with appropriate local

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[23] See also Recommendation No. 99 (1955) concerning vocational rehabilitation of the disabled, and Recommendation No. 168 (1983) concerning vocational rehabilitation and employment of persons with disabilities.

[24] Standard Rules (see note 6 above) Rule 8, para. 1.

[25] See A/47/415, para. 78

[26] See E/CN.4/Sub.2 /1991/31 (see note 1 above), paras. 190 and 193.

usage States parties should ensure that laws and social policies and practices do not impede the realization of these rights Persons with disabilities should have access to necessary counselling services in order to fulfil their rights and duties within the family.[27]

31 Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy As the Standard Rules state, "persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood" [28] The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts These rights are commonly denied to both men and women with disabilities worldwide.[29] Both the sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10 (2).

32. Children with disabilities are especially vulnerable to exploitation, abuse and neglect and are, in accordance with article 10 (3) of the Covenant (reinforced by the corresponding provisions of the Convention on the Rights of the Child), entitled to special protection.

E. Article 11 - The right to an adequate standard of living

33. In addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that "support services, including assistive devices" are available "for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights".[30] The right to adequate clothing also assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society. Wherever possible, appropriate personal assistance should also be provided in this connection. Such assistance should be undertaken in a manner and spirit which fully respect the human rights of the person(s) concerned. Similarly, as already noted by the Committee in paragraph 8 of General Comment No. 4 (Sixth session, 1991), the right to adequate housing includes the right to accessible housing for persons with disabilities.

F. Article 12 - The right to physical and mental health

34. According to the Standard Rules, "States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society".[31] The right to physical and mental health also implies the right to have access to, and to benefit from, those medical and social

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[27] See the World Programme of Action concerning Disabled Persons (see note 3 above) para. 74.

[28] Standard Rules (see note 6 above), Rule 9, para. 2.

[29] See E/CN.6/1991/2, paras. 14 and 59-68.

[30] Standard Rules (see note 6 above), Rule 4.

[31] Ibid, Rule 2, para. 3.

services - including orthopaedic devices - which enable persons with disabilities to become independent, prevent further disabilities and support their social integration [32] Similarly, such persons should be provided with rehabilitation services which would enable them "to reach and sustain their optimum level of independence and functioning" [33] All such services should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity

G. Articles 13 and 14 - The right to education

35 School programmes in many countries today recognize that persons with disabilities can best be educated within the general education system.[34] Thus the Standard Rules provide that "States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings" [35] In order to implement such an approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers. In the case of deaf children, for example, sign language should be recognized as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.

H. Article 15 - The right to take part in cultural life and enjoy the benefits of scientific progress

36. The Standard Rules provide that "States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas . . . States should promote the accessibility to and availability of places for cultural performances and services . . .".[36] The same applies to places for recreation, sports and tourism.

37. The right to full participation in cultural and recreational life for persons with disabilities further requires that communication barriers be eliminated to the greatest extent possible. Useful measures in this regard might include "the use of talking books, papers

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[32] See the Declaration on the Rights of Disabled Persons (General Assembly resolution 3447 (XXX) of 9 December 1975), para. 6; and the World Programme of Action concerning Disabled Persons (see note 3 above), paras. 95-107.

[33] Standard Rules (see note 6 above), Rule 3.

[34] See A/47/415, para. 73.

[35] Standard Rules (see note 6 above), Rule 6.

[36] Ibid., Rule 10, paras. 1-2.

written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons" [37]

38 In order to facilitate the equal participation in cultural life of persons with disabilities, Governments should inform and educate the general public about disability In particular, measures must be taken to dispel prejudices or superstitious beliefs against persons with disabilities, for example those that view epilepsy as a form of spirit possession or a child with disabilities as a form of punishment visited upon the family Similarly, the general public should be educated to accept that persons with disabilities have as much right as any other person to make use of restaurants, hotels, recreation centres and cultural venues

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[37] See A/47/415, paras. 79.

APPENDIX C

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

List of issues to be taken up in connection with the consideration of the second periodic report submitted by the United Kingdom of Great Britain and Northern Ireland on articles 10 to 12 and 13to 15 ofthe International Covenant on Economic, Social and Cultural Rights[1]

(extracts)

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PART THREE

HONG KONG

I. General legal framework within which human rights are protected

23. After 1 July 1997, the reporting obligation on the Covenant on Economic, Social and Cultural Rights as it applies to Hong Kong will pass on to China, a State which is not a signatory to the Covenant. In view of the statement in article 39 of the Basic Law that the provisions of the Covenant "shall remain in force" after 1997, what procedures are envisaged to ensure the implementation of that provision?

24. A Bill of Rights Ordinance incorporating the Covenant on Civil and Political Rights has already been enacted. When will the same status in domestic law be accorded to the Covenant on Economic, Social and Cultural Rights?

II. Issues relating to specific rights

Article 10: Protection of the family, mothers and children

25. Please indicate the meaning given in Hong Kong to the term "family" in view of the recent changes in family structure and composition.

26. According to reports, families are being forcibly separated as a result of immigration policy. Estimated number of children separated from one or both parents range from 100,000 to 300,000. Please discuss the matter in detail and explain how this practice is compatible with article 10 of the Covenant.

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[1] UN Doc E/C.12/19943/WP.13

27 The incidence of child suicide is reportedly on the rise as well as child abuse and drug abuse among the youth Please provide detailed information on these problems as well as the measures the Government is taking to protect the children of Hong Kong from the causes of such problems

28 What is the extent of domestic violence against women and what remedial measures have been taken to address this problem?

Article 11: Right to an adequate standard of living

29 What is the average income of the poorest segments of the Hong Kong population? Does a poverty line exist in Hong Kong?

30 What is the incidence of malnutrition in Hong Kong?

31 Please discuss the Government's measures to improve the living conditions in temporary housing areas.

32 Evictions reportedly take place when private developers resume land and blocks under the promulgated Metroplan Please discuss this situation in light of State party's obligations as set forth in article 11 of the Covenant.

33 Please provide information on the reported discrimination against women who are barred from inheriting the flats of their parents

34. What is the situation of Vietnamese refugees seeking asylum in Hong Kong?

35 What measures are being taken to protect migrant workers, especially female domestic helpers who are particularly vulnerable to abuse and exploitation by employers?

Article 13: Right to education

36. To what extent is human rights education already incorporated in school curricula?

37. What are the factors contributing to low enrolment figures in tertiary education?

38. Are there any major difficulties in terms of the right to education which result from providing instruction in schools in various languages?

[The United Kingdom submitted written and oral replies to these questions and other questions put to it by the Committee on Economic, Social and Cultural Rights at its hearing in November 1994. The *Concluding observations* of the Committee appear at Appendix D.]

APPENDIX D

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

CONSIDERATION OF THE REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT

CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

1. The Committee considered, at its eleventh session, the second periodic reports submitted by the United Kingdom of Great Britain and Northern Ireland (dependent territories) on articles 10 to 12 (E/1986/4/Add 27 and E/1986/4/Add.28) and on articles 13 to 15 (E/l990/7/Add.16) of the Covenant as well as additional information (E/1989/5/Add.9) submitted pursuant to the consideration of the second periodic report of the United Kingdom concerning rights covered by articles 10 to 12 of the Covenant. The Committee considered those reports at its 33rd and 34th meetings held on 23 November 1994, and paid particular attention to the specific situation of Hong Kong at its 34th, 36th and 37th meetings held on 23, 24 and 25 November 1994. After having considered those reports, the Committee adopted[2] the following concluding observations:

INTRODUCTION

2 The Committee notes that the reports submitted by the State party have been prepared in accordance with the Committee's guidelines. It welcomes the presence of a high level delegation composed of representatives from the United Kingdom of Great Britain and Northern Ireland and from Hong Kong. It notes with satisfaction that the information submitted in the reports and that provided by the delegation in reply to both written and oral questions enabled the Committee to obtain a comprehensive view of the extent of the State party's compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights. The Committee also appreciates the submission of written replies to its

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[1] UN Doc E/C.12/1994/19

[2] At the 53rd meeting (eleventh session), held on 7 December 1994.

list of issues The Committee considers that the content and form of the dialogue established between the delegation and the Committee was, in many respects, highly satisfactory

3 The Committee was especially appreciative of the constructive manner in which the delegation referred to and responded to the contributions of non-governmental organizations to the Committee's review of the implementation of the Covenant in Hong Kong

PART ONE

IMPLEMENTATION OF ARTICLES 10 TO 12 AND 13 TO 15 OF THE COVENANT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND ITS DEPENDENT TERRITORIES (WITH THE EXCEPTION OF HONG KONG)

A. POSITIVE ASPECTS

4. The Committee welcomes the enactment in recent years of a number of laws which aim to promote the safeguarding and enjoyment of the rights guaranteed by the Covenant It appreciates, in particular, the adoption of the Education Act 1993 and of the Code of Practice on the Identification and Assessment of Special Educational Needs and notes that the latter was issued in May 1994 to identify and assess children with special educational needs and provide for their education whenever possible in main-stream schools. It also welcomes the Local Government and Housing Act 1989 and the Homelessness Code of Guidance for Local Authorities which aim at overcoming certain difficulties in the implementation of the right to housing as specified in article 11 of the Covenant.

5. The Committee takes note with interest of the efforts undertaken by the Government to promote self-rule in the various Dependent Territories and to enhance public awareness of and ability to exercise economic, social and cultural rights.

B. FACTORS AND DIFFICULTIES AFFECTING THE IMPLEMENTATION OF THE COVENANT

6. The State party reported no specific factor or difficulty affecting the implementation of the Covenant. The Committee, however, notes that notwithstanding the absence of such an information in the reports it is clear that certain economic and social difficulties continue to be faced by the most vulnerable segments of society, partly as a result of the imposed budgetary constraints.

7. The Committee notes that while the small size and therefore limited human and material resources of most of the Dependent Territories might result in certain difficulties, the fact remains that the rights recognized in the Covenant must be fully implemented even if this requires additional efforts and resources from the United Kingdom Government.

C. MAIN SUBJECTS OF CONCERN

8 The Committee regrets that it has not been felt possible to include in the reports submitted to the Committee concerns and views expressed by the public and non-governmental organizations, including in the relevant territories In that regard, the Committee recalls that the meaning of the reporting procedure is precisely to focus attention and debate on the implementation of the rights guaranteed by the Covenant Similarly, judges and other members of the legal profession have not given sufficient consideration to the importance of this Covenant within domestic law The Committee considers that availability of the reports in the library of the House of Commons is insufficient to satisfy the interest of a public at large

9 The Committee notes the concern expressed to it about the situation of Gibraltar in relation to the right to self-determination recognized in article 1 of the Covenant and calls upon all parties to the existing situation to ensure full respect for all the rights recognized in the Covenant in relation to future developments concerning Gibraltar

10 The Committee takes note with concern that insufficient measures have been taken to address the apparent disparities in employment patterns and opportunities of certain minority groups and between men and women In the latter regard, it is regretted that women are still employed disproportionately in lower paid occupations.

11 The Committee is concerned about difficulties faced in the implementation of article 11 of the Covenant In this context, it regrets that a large number of households have experienced harassment or illegal eviction and notes that the national housing policy is not adequate to address this problem which particularly affects private tenants who are single parents, have low incomes or, in general, are among the most vulnerable groups of society. The Committee also notes with concern that serious difficulties continue to be faced regarding the enforcement of improvements to unsafe housing in England and Wales as well as in the handling by the authorities of the growing problem of homelessness.

12. The Committee considers the situation of disadvantaged groups in the education system to be of particular concern. It specifically notes the grave disparities which appear to prevail in the level of education depending on the social origin of the pupil. Regional differences in the quality of the education provided to children is also a matter of concern

13. The Committee regrets that insufficient measures have been taken towards the development of a universal pre-school education scheme. It is concerned at the relatively low proportion of 16 to 18 years old individuals who continue in full time education, the large number of children who do not complete their schooling and the growing reliance in the context of the education system reform upon voluntary contributions by parents. The Committee also regrets the lack of sufficient opportunities available to persons with disabilities to pursue their right to education within the mainstream.

D. SUGGESTIONS AND RECOMMENDATIONS

14. The Committee recommends that appropriate measures be taken to disseminate information on the rights guaranteed under the Covenant to all sectors of the society,

particularly to judges, civil servants, social workers and members of other professions concerned by its implementation The Committee encourages the United Kingdom of Great Britain and Northern Ireland to take into account the General Comment No 1 of the Committee in the preparation of its next periodic report, in order to enhance the transparency of government policy-making with respect to economic, social and cultural sectors of the society

15 The Committee underlines that efforts should be taken to identify the needs of disadvantaged groups in the field of education and to draw on the results of any studies or reviews in the development of policy initiatives to respond to the needs of such groups. The Committee also recommends that priority should be given to expand the access to pre-school education and to develop basic skill programs in reading, writing and numeracy, particularly to the benefit of children up to the age of 7 years. Appropriate school training should also be made available to long-term unemployed persons.

16. In view of the existing situation of older persons and of persons with disabilities the Committee urges the Government to make an enhanced effort to assess the needs of these groups in relation to their rights under articles 13 to 15 of the Covenant.

17. The Committee urges the State party to improve its monitoring of the problem of inadequate housing and to develop more active and focused measures to improve the situation. In this connection, it draws the attention of the State party to the provisions of its General Comment No. 4.

PART TWO

IMPLEMENTATION OF ARTICLES 10 TO 12 AND 13 TO 15 OF THE COVENANT IN HONG KONG

A. POSITIVE ASPECTS

18. The Committee notes with interest that Hong Kong has prospered economically to a degree that places considerable material resources at the disposal of the Government to enhance the enjoyment of economic, social and cultural rights in Hong Kong. The Committee acknowledges the significant number of measures that the Government has undertaken in relation to the rights enshrined in the Covenant.

19. The Committee notes with satisfaction the efforts made by the Hong Kong government to make available to the Hong Kong community the text of the Covenant and the report submitted to the Committee. It welcomes the commitment made that in future, the draft report will be circulated for public comment.

20. The Committee welcomes the terms in the Sino-British Joint Declaration and the Basic Law which affirm that the provisions of the Covenant will remain in force and continue to apply to Hong Kong after 1997. The Committee also welcomes the incorporation of the Covenant as a justiciable constitutional guarantee in article 39 of the Basic Law. While

the Committee realizes that the continuation of reporting in respect of Hong Kong after 1997 may pose some legal and technical problems, it emphasizes the very important role played by reporting in relation to the protection of economic, social and cultural rights The Committee is aware that there are various options by which these problems may be overcome On this basis the Committee affirms its willingness and indeed, its strong wish to receive reports on Hong Kong from the People's Republic of China or, if the authorities so decide, directly from the Hong Kong Special Administrative Region In the meantime, especially in view of the commitments entered into in the Joint Declaration, the Committee hopes that the People's Republic of China will accede to the Covenant

B. FACTORS AND DIFFICULTIES AFFECTING THE IMPLEMENTATION OF THE COVENANT

21 The Committee notes that uncertainties arising from the anticipated transfer of sovereignty to China in 1997 have apparently resulted in the reluctance on the part of the Hong Kong Government, to seek to its maximum capacity, the protection and promotion of the economic, social and cultural rights of its constituents.

C. PRINCIPAL SUBJECTS OF CONCERN

22. The Committee regrets that the provisions of the International Covenant on Economic, Social and Cultural Rights are not incorporated into Hong Kong domestic law, unlike the International Covenant on Civil and Political Rights. The Committee finds unacceptable the view expressed by the Government that the rights enshrined in the International Covenant on Economic, Social and Cultural Rights are "different in nature" from civil and political rights and therefore not capable of being the subject of an enforcement procedure under domestic law.

23. The Committee is concerned that the relatively low level of awareness of and interest in international human rights law on the part of the judiciary results in the inadequate consideration of the provisions of the Covenant in judicial decision-making to the extent that is permitted by the common law system.

24. The Committee expresses its concern that in spite of recent Government initiatives to introduce legislation concerning non-discrimination in relation to sex and disability, there is an absence of comprehensive legislation providing protection against discrimination on the grounds referred to in article 2 of the Covenant. The Committee notes with concern that the Government's proposed legislation on sex discrimination includes a number of exclusions and exemptions--in particular the so-called small-house policy--which discriminate against women.

25. The Committee is concerned at the Government's clear objection to the establishment of a human rights commission.

26. The Committee is particularly disturbed at the problem of split families in Hong Kong, especially where it concerns spouses who are forced to live apart from each other and children who are separated from parents and siblings. The Committee is of the view that this

situation is the result of Hong Kong's present immigration law, and considers that the separation of families is inconsistent with the obligations under article 10 of the Covenant

27 The Committee is also concerned that in the case of Hai Ho-Tak, it has received conflicting explanations as to the reasons for the separation of the child from his parents and as to which authorities are in a position to resolve the problem The Committee finds these reasons unconvincing and maintains its concern that unduly broad bureaucratic reasons have been used as a justification for a measure which is not compatible with the rights recognized in article 10 The suggestion that the child's parents should apply for a one-way permit would not appear to be an adequate solution given the very lengthy delay that would result. The Committee urges the Government to again reconsider its response to this case. It also notes that no compelling reason has been offered by the Government for its refusal to provide a statutory right of appeal in immigration cases which involve exceptional circumstances of a humanitarian nature and urges that this principle should also be reconsidered

28. The Committee is deeply concerned by the information it has received concerning the treatment of Vietnamese asylum-seekers in Hong Kong It is particularly concerned about the situation of the children and is alarmed by the statements made by the Government that these children have no entitlement to the enjoyment of the right to education or to other rights in view of their status as "illegal immigrants". The Committee considers the situation inconsistent with obligations set forth in the Covenant.

29. The Committee expresses its concern about the legal and social position of foreign employees known as domestic helpers in Hong Kong. It considers that these workers' economic, social and cultural rights are seriously impaired by the so-called two-week rule which provides that a worker may neither seek employment nor stay more than 2 weeks in Hong Kong after the expiration of original employment; by the fact that maximum working hours are not set, and by the discriminatory practice of not being allowed to bring their families to Hong Kong, while professional migrant workers from developed countries are allowed to do so.

30. The Committee deplores the plight of persons--most of whom are elderly--living in sub-human conditions in "cage homes", and considers unacceptable the inaction of the Hong Kong government despite abundant financial resources at its disposal.

31. The Committee notes with concern that the present level of social security payments available to the elderly appears to be insufficient to permit them to enjoy fully their rights under the Covenant. It is particularly concerned about the health and social problems facing elderly people who are totally dependent on Comprehensive Social Security Assistance payments.

D. SUGGESTIONS AND RECOMMENDATIONS

32. The Committee urges the Government of the United Kingdom to inform the Committee as soon as possible of the modalities arrived at in agreement with the Government of China by which the reporting obligations under the Covenant will continue after 1997.

33 The Committee enjoins the Government of Hong Kong to establish procedures to allow an appropriate body to adjudicate on complaints of infringement of the rights under the Covenant, and to allow the Hong Kong legislature to consider the desirability of establishing a human rights commission

34 The Committee recommends that competent authorities responsible for continuing legal education for the judiciary, take active steps to ensure that Hong Kong judges are appropriately updated on a continuing basis, on developments in international human rights law

35 The Committee recommends that the Government should take immediate steps to introduce a comprehensive anti-discrimination legislation especially in relation to all forms of discrimination against women

36 The Committee recommends a review of the existing immigration policy of Hong Kong with a view to amending the provisions which result in split families

37 The Committee urges the Hong Kong government to take immediate steps to ensure that children in refugee camps and those released from them, are accorded full enjoyment of the economic, social and cultural rights guaranteed to them under the Covenant. The Committee also recommends a closer cooperation with volunteer organizations and the United Nations High Commissioner for Refugees

38 The Committee recommends the repeal of the two-week rule and a review of the employment conditions of foreign domestic helpers to provide the full enjoyment of their rights under the Covenant.

39. The Committee urges the Government to take immediate steps, as a matter of high priority, to eradicate the phenomenon of "cage homes", and to ensure that those presently living in such accommodations are provided with adequate and affordable rehousing. The Committee also urges the Government to seriously consider the embodiment into domestic law of the right to housing.

40. The Committee recommends a review of the existing social security system as soon as possible, with a view to addressing the inadequacies of benefits for the older persons.

41. The Committee considers that Hong Kong is in the fortunate position of having sufficient resources to address its present inadequacies in relation to its obligations under the Covenant, and the Committee urges it to do so as soon as possible.

APPENDIX E

HONG KONG GOVERNMENT

AN OUTLINE OF THE TOPICS TO BE COVERED IN THE 4TH PERIODIC REPORT UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (MARCH 1995)

ARTICLE 1

Progress and Development of Democracy

- To be dealt with under Article 25

ARTICLE 2

The Bill of Rights Ordinance

- Enactment of the Bill of Rights Ordinance in June 1991
- Amendment to the Letters Patent (Article VII (3) of the Letters Patent)
- Review of legislation in the light of the BORO
- Implementation and impact of the Bill of Rights Ordinance
- Additional Courts for Bill of Rights Cases

Human Rights Commission (HRC)

- Calls for an HRC
- The Government's view on the establishment of an HRC
- Human rights strategies proposed by the Government

Legal Aid

- Existing system
- Measures to make legal aid more accessible
- The Legal Aid (Amendment) Bill
- The Legal Aid Services Council Bill

COMAC

- Review of the COMAC Ordinance

Complaints Against Police

- Government's decision on whether an independent Complaints Against Police office is necessary
- Proposals to enhance the existing systems

ARTICLE 3

Convention on the Elimination of All Forms of Discrimination Against Women

- Proposed extension of the Convention to Hong Kong

Sex Discrimination Bill

- Introduction of the bill in Oct 1994
- Principle and content
- Enforcement aspect of the bill
- The establishment and function of the Equal Opportunities Commission

Women in Politics

- Equal rights for men and women
- In 1992, female electors accounted for 47 1% of the registered electorate
- no significant difference in Voter turn-out rates

Rural Election

- The existing three-tier structure i e village representative, Rural Committee and the Heung Yee Kuk
- Head-of-household principle in rural elections
- The change to one-person-one-vote system in rural elections
- The relationship between rural elections and the three-tier representative government structure

Right in respect of Education

- Equal rights for male and female students
- Ratio of female to male students in matriculation and tertiary courses in 1991 was 0 91 (the ratio of female to male population in the 17-21 age bracket being 0.93)

Women in the Family

- Equal rights in transmission of nationality as governed by the British Nationality Act

Right in respect of Marriage

- see Article 23

ARTICLE 4

Emergency Regulations Ordinance

- Review of the Ordinance
- Way forward

ARTICLE 5

- There has been no restriction of human rights guaranteed or protected by other local law on the pretext that the Covenant does not recognize such rights

ARTICLE 6

Abolishment of the Death Penalty

- Crimes (Amendment) Ordinance enacted in April 1993
- Death sentence replaced with mandatory life imprisonment

ARTICLE 7

Extension of the UN Convention Against Torture

- Extension of the Convention to Hong Kong by the UK Government

Prohibition of Torture under the Crime (Torture) Ordinance

- Enactment of the Ordinance in January 1993
- Brief introduction of the Ordinance
- Prohibition of torture under the BORO
- Protection against torture by the Geneva Conventions Act 1957
- No reported case of torture as defined in the Crimes (Torture) Ordinance

Abolishment of Corporal Punishment in Schools

- Amendment to the Education Regulations in 1991 to abolish corporal punishment

ARTICLE 8

Prohibition of Forced or Compulsory Labour under the Hong Kong BORO

- No forced or compulsory labour in Hong Kong
- Protection offered in the BORO

ARTICLE 9

LRC Report on Arrest by the Law Reform Commission

- Published in November 1992
- Inter-departmental working group under the Secretary for Security scrutinizing the report
- Way forward

Power to stop, detain, search or arrest

- Amendments to the Police Force Ordinance in respect of the power to stop, detain, search or arrest (June 1992)

Rules and Directions for the Questioning of Suspects and taking of Statements

- Introduction of a new set of guidelines in late 1992 for law enforcement agencies to follow

Power of Detention - Immigration Ordinance

- Explanation of the power provided for in S.26 of Part VII of the Immigration Ordinance
- Immigration Statistics (In 1993, 15566 Immigration Offenders were detained, 10582 prosecuted and 4984 not prosecuted)

Amendment to the Prevention of Bribery Ordinance and Independent Commission Against Corruption Ordinance

- Amendments made in 1992

General Right to Bail

- Criminal Procedure (Amendment) Bill 1993

Challenges to Lawfulness of Detention

- Statistics for cases in which individuals challenged the lawfulness of their detention by way of applications for habeas corpus or judicial review

- Protection under the BORO (Articles 5 and 6)

Vietnamese Asylum Seekers

- Statistics of VBP in Camps, VBP given refugee status, and VBP pending repatriation
- Recent improvement to the Refugee status determination process
- Visits to Refugee Camps and Detention Centres by NGOs
- Comprehensive Plan of Action
- Legal Assistance to Vietnamese Asylum Seekers
- Court Cases Concerning Vietnamese Asylum Seekers
- Expenditure of Hong Kong on Care of Vietnamese Asylum Seekers
- Voluntary Repatriation Programme
- Orderly Repatriation Scheme
- Assistance to Vietnamese Returnees
- Problem with the Repatriation Programme (Refusal by the Vietnamese Government to accept some returnees and their subsequent transfer to open camps in Hong Kong)

Reception, Detention and Treatment of mentally Disorder Person

- Relevant provisions of the Mental Health Ordinance

Issues being considered to Promote the Well-being of mentally Handicapped Persons

- The review of the Mental Health Ordinance and Regulations and the way forward

ARTICLE 10

Regulation and Management of Penal Institution

- Regulation and management of all penal establishments governed by statutory rules

Prison Rules

- Brief introduction
- Proposed amendment to Prison Rules to bring them in line with the BORO
- Amendment to Rule 47 of the Prison Rules to relax the restriction on the number of letters prisoners are permitted to send out.

Rehabilitation of Ex-prisoners

- Post-release supervision of prisoners scheme
- Rehabilitation of offenders (Amendment) Bill

Rehabilitation of Juvenile Offenders

- Pilot community service support scheme to help rehabilitate juvenile offenders

Petition/Complaint by Prisoners

- Petition to the Governor, JP, officials
- Complaints to the Complaints Investigation Unit
- Complaints to COMAC and OMLEGCO

Separation of Young Offenders from Adults in Penal Institution

- Number of institutions for young offenders

ARTICLE 11

Rules of the Supreme Court regarding Judgement Debtors

- Conditions under which the court can exercise discretion to order the imprisonment of judgement debtor

ARTICLE 12

Freedom to choose residence

- No restriction in our laws

Restraint on Freedom to Leave HK

- Restrictions imposed by the Inland Revenue Ordinance, the Prevention of Bribery Ordinance, the ICAC Ordinance and the Travel Agents Ordinance

HK Travel Documents

- Issue of British passports and travel documents
- Statistics of issue/refusal to issue these documents

Lawful Entry into Hong Kong

- Condition for lawful entry

Rules of the Supreme Court regarding Judgement Debtors

- Dealt with under Article 11

ARTICLE 13

Deportation and Removal of Undesirable Immigrants

- Deportation by order of the Governor
- Statutory right to have cases reviewed by the Governor
- Statistics of deportation of undesirable immigrants

  (e.g. Between 1991 and 1993, 863 undesirable immigrants were deported)

ARTICLE 14

Discrimination Against Successful Appellant under the Criminal Procedure Ordinance

- Court of Appeal ruling in R v Man Wai Keung (i.e. that a provision of the Criminal Procedure Ordinance which prevents an order of costs in favour of a successful appellant ordered to be retried, is inconsistent with the BORO)
- Follow-up action

Appeal Arrangements Against Administrative Decisions

- The enactment of the Administrative Appeals Boards Ordinance in 1994
- Appeal procedures provided in other statutory licensing schemes

Stop Order under the Inland Revenue Ordinance

- District Court Ruling in Commissioner of Inland Revenue v Lee Lai Ping (1993) that S.77 of the Inland Revenue Ordinance which gives no discretion to a judge in issuing a stop order preventing a defaulting taxpayer from leaving Hong Kong, is not consistent with Art. 10 of the BORO
- Amendment to S.77 of the Inland Revenue Ordinance (Cap. 112) to confer a District Judge discretion in issuing a departure prohibition direction restraining a defaulting taxpayer from leaving HK, and to provide for a full right of appeal to the High Court

Criminal Offence Committed by a Prisoner

- Amendment to the Prison Rule in respect of internal disciplinary action to bring it in line with the requirement of the BORO

Loitering in Crime Ordinance

- Amendment to S 160(1) of the Crime Ordinance with regard to loitering in June 1992

Repeal of Presumption under the Dangerous Drugs Ordinance

- Legislative amendments in response to Court of Appeal ruling in R v Sin Yau Ming that certain mandatory presumptions in the Dangerous Drugs Ordinance are inconsistent with Article 11(1) of the BORO

Burden of Proof under the Summary Offences Ordinance and Drug Trafficking

- Privy Council ruling in AG of HK v Lee Kwong Kut and Lo Chak Man (1993) that (i) S.30 of the Summary Offences Ordinance which required a defendant to give a satisfactory explanation as to how he came to be in possession of property reasonably suspected of having been stolen or unlawfully obtained was inconsistent with Article 11(1) of the BORO (ii) provisions in S 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance - which provided a defence for a person charged with assisting another to retain the benefit of drug trafficking - were consistent with Art 11(1) of BORO
- Follow up action

Burden of Proof under the Prevention of Bribery Ordinance

- Recent court case concerning S.10(1)(a) of the PBO and the appeal lodged by AGC
- Follow-up action

Bilingual Charge Forms

- Progress on the production of bilingual charge forms

Measures by the Judiciary to reduce trial delays

Efforts to promote the greater use of Chinese in the courts

ARTICLE 15

Benefit of Lighter Penalty under New Legislation

- Various Court of Appeal decisions on the application of this Article in particular circumstances, leave to appeal one of those decisions has been granted by the Privy Council

ARTICLE 17

Protection of Personal Data

- Law Reform Commission Report on Reform of the law Relating to the Protection of Personal Data
- Proposed data protection legislation

Interception of Communications and Intrusion into Private Premises

- Review by the Law Reform Commission's Privacy Subcommittee

Investigatory Power of the Security and Futures Commission

- Court of Appeal ruling in R and Securities and Futures Commission Ex Parte Lee Kwok Hing (1993) that an investigatory power conferred by the statute on the Securities and Futures Commission does not infringe article 14 of the BORO. The power enables the Commission to require a person under investigation or any person reasonably believed to have information relevant to an investigation, to appear before an investigator to answer questions.

ARTICLE 18

Refusal to Register a School

- Repeal of S.14(1)(m) of the Education Ordinance

ARTICLE 19

Review of legislation having an impact on press freedom

Official Secrets Act

- Introduction of replacement legislation - way forward

Use of Sound Amplification Device in a Public Place under the Summary Offences Ordinance

- Proposed repeal of S 4(29) of the Summary Offences Ordinance in the Public Order (Amendment) Bill introduced on 20 April 1994

Power to Pre-censor and Prohibit Programmes under the Television Ordinance

- Repeal of S 32A, 35 and 36 of the Television Ordinance in April 1993 regarding the power of the Broadcasting Authority to pre-censor material before broadcast and to prohibit the broadcasting of any television programmes and parts thereof

Power to Give Directions to the Broadcasting Authority under the Television Ordinance

- Repeal of S 29 of the Television Ordinance with respect to the power of the Governor-in-Council to give directions to the Broadcasting Authority regarding programme standards and content of television broadcast

Broadcasting News from Approved Source under the Television (Programme) Regulations

- Repeal of a Television (Programmes) Regulation in April 1993 which required the television licensees to broadcast news, reports from sources/ services approved by the Broadcasting Authority

Film Censorship

- Film Classification System
- Private Members' Bill which repealed S.10(2)(c) of the Film Censorship Ordinance

Power to Control Public Entertainment Events

- Proposed amendments to the Places of Public Entertainment Ordinance

Restriction on Cross Media Ownership

- Plans to prohibit common ownership of the local television/ radio licenses and daily newspaper

Hong Kong Arts Development Council

- Statutory set-up and functions

Access to Information

- Private Members' Bill on Access to Information
- Code on Access to Information

Self-censorship

ARTICLE 21

Public Meetings and Procession

- Review of the Public Order Ordinance
- Proposed amendments to the Public Order Ordinance

ARTICLE 22

Freedom of Association

- Related provisions in the BORO, Employment Ordinance and Trade Unions Ordinance

Registration of Societies under the Societies Ordinance

- Amendment of the Societies Ordinance in 1992
- A notification system replacing the registration system of societies

Restriction on Traffic Wardens to join Trade Unions

- Amendment to S.59(6) of the Road Traffic Ordinance to allow traffic wardens to join trade unions

Restriction on Members of the Armed Forces to join Trade Unions

- Members of the armed forces not permitted to join trade unions by virtue of the regulations governing their own services

Restriction of members of the Police Force to join trade unions

- Prohibition specified in the Police Force Ordinance

Number, Membership and participation Rate of Trade Unions in Hong Kong

- Relevant statistics

ARTICLE 23

Family - A vital Component in Society

- White Paper on "Social Welfare into the 1990s and Beyond"

- Decrease in the number of extended families and increase in the number of nuclear families
- Single parents and unmarried couples on the increase

Welfare Policy towards Families

- Range of services available
- 62 family service centres in the territory

Guardianship of Minors

- Guardianship of Minors Ordinance
- Assistance in cases of marriage break-down and divorces
- Work of the Child Custody Service Unit of the Social Welfare Department

Right in respect of Marriage

- Equal right of men and women of marriageable age to marry and form a family
- Parental consent for persons under a certain age to marry
- plans to allow either the father or mother to give parental consent

Divorce

- Amendment of the Matrimonial Causes Ordinance

ARTICLE 24

Extension of the UN Convention on the Rights of the Child to Hong Konq

- Implementation of the Convention
- Reservations made to the Convention

Protection of Rights of Illegitimate Children

- Enactment of the Parent and Child Ordinance in 1993

Protection of Children from Abuse

- The Protection of Children and Juveniles Ordinance

Registration of Birth

- Procedures specified in the Births and Deaths Registration Ordinance

Day Care Services

- Services available
- Pilot scheme for extending the operating hours of aided day nurseries

Residential Child Care Services

- Future direction for the development of residential child care services

Financial Assistance to Children

- Child Supplement to help children on Public Assistance to meet extra costs of food and for recreational activities
- Special Grants under the Comprehensive Social Security Assistance Scheme (CSSA) to families with children
- Increase in the level of benefits for children under CSSA starting April 1994

Protection and Care of Children

- Children being left unattended
- Child abuse
- Amendments to the protection of Children and Juveniles Ordinance in Nov 1993
- Child Protective Service Unit of the Social Welfare Department

Review of the Adoption Ordinance

- Review of the Adoption Ordinance

ARTICLE 25

Executive Council

- Structure and function

Arrangements for the 1994 and 1995 Elections

- Background
- The First Stage Bill
- The Second Stage Bill

The General Electoral Roll

District Boards

- Structure and electoral system
- The 1994 District Board Elections

Municipal Councils

- Structure and electoral system

Legislative Council

- Structure and electoral system

The Boundary and Election Commission

- Functions
- Tasks accomplished in 1994

Government Advisory Boards and Committees

- Different categories of advisory boards and committees
- Appointment to boards and committees

Access to Public Services

- Localization policy
- An interim measure to allow officers employed on overseas agreement terms who are permanent residents of HK to transfer to local conditions
- A long term measure to open up agreement officers' positions for competition to select the best person for the job

ARTICLE 26

Disability

- Incidents of objection raised by residents to the setting up rehabilitation facilities in their neighbourhood
- proposed legislation to prohibit discrimination on the grounds of disability
- additional resource to promote community acceptance of disabled people

Legal Representation and Protection

- Report by the Judiciary on the question of mentally handicapped persons giving evidence in court
- Follow up action

Comprehensive Anti-discrimination Legislation

- Private Members' Bill on Equal Opportunities

Sex Discrimination Bill

- Dealt with under Article 3

Inheritance of Land and Properties in the New Territories

- New Territories Land (Exemption) Ordinance enacted in June 1994

ARTICLE 27

Official Languages

- Official Languages Ordinance
- Publication of laws in both languages, translation of Ordinances

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THE BILL OF RIGHTS

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

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INFORMATION ON DEVELOPMENTS

We are always grateful forinformation about pending cases in which *Bill of Rights* issues are being argued and for references to or copies of rulings and judgments in which *Bill of Rights* issues are decided. We would like to thank Gerry McCoy, Kenneth Kwok, Ian Deane, Jeremy Croft, Philip Dykes, Tony Kinnear, Eric Tistounet, Michael Wilkinson, and the UN Centre for Human Rights (as well as others) for providing us with information included in this issue of the *Bulletin*. We would also like to thank Nancy Choi, who is responsible for the administrative side of the *Bulletin*, as well as Scott Wilkens, Henry Luce Scholar presently with the Centre. This issue is based on the information available to the Editors as of early December 1995.

CONTENTS

REMEDIES -- JURISDICTION OF THE COURTS TO GRANT RELIEF (BILL OF RIGHTS ORDINANCE, S 6)

APPLICATION OF BILL OF RIGHTS ORDINANCE TO RELATIONS BETWEEN PRIVATE PERSONS (s 7)

RIGHT TO LIBERTY AND SECURITY OF THE PERSON; PROTECTION AGAINST ARBITRARY DEPRIVATION OF LIBERTY (ART 5(1), BILL OF RIGHTS)

RIGHT TO BE INFORMED, AT THE TIME OF ARREST, OF THE REASONS FOR THAT ARREST(ART 5(2))

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

RIGHT TO A FAIR HEARING IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10, BILL OF RIGHTS; ARTICLE 14(1), ICCPR)

TABLE OF STATUTES AND OTHER SOURCES CONSIDERED

TREATIES

HONG KONG CONSTITUTIONAL DOCUMENTS AND LEGISLATION[1]

[1] Including Bills

[2] See also references under the corresponding articles of the *International Covenant on Civil and Political Rights*.

*

TABLE OF CASES NOTED

HONG KONG CASES

CASES PENDING BEFORE THE PRIVY COUNCIL OR IN WHICH SPECIAL LEAVE TO APPEAL HAS BEEN OR IS TO BE SOUGHT

R v Ming Pao Newspapers Ltd (1995) 5 HKPLR 13 (petition for special leave granted; hearing scheduled for early 1996)

CUMULATIVE TABLE OF HONG KONG BILL OF RIGHTS CASES REPORTED TO DATE[3]

The Appeal Tribunal v de Kantzow (1991) 1 HKPLR 143, [1992] 1 HKLR 55 (CA)
Attorney General v Charles Cheung Wai-bun (1993) 3 HKPLR 62, [1993] 1 HKCLR 249, [1994] 1 AC 1, [1993] 3 WLR 242, [1993] 2 All ER 510
Attorney General v Fong Chin Yue (1994) 4 HKPLR 430, [1995] 1 HKC 21
Attorney General v Hui Kin Hong (1995) 5 HKPLR 100 (CA)
Attorney General v Lee Kwong-kut (1992) 2 HKPLR 94, [1992] 2 HKCLR 76 (CA)
Attorney General v Lee Kwong-kut, Attorney General v Lo Chak-man (1993) 3 HKPLR 72, [1993] 2 HKCLR 186, [1993] AC 951, [1993] 3 WLR 329, [1993] 3 All ER 939 (PC)
Attorney General v Osman (1991) 1 HKPLR 59, [1992] 1 HKCLR 35 (HCt)
Attorney General v Tang Yuen-lin [1995] 1 HKC 209
Building Authority v Business Rights Ltd (1993) 3 HKPLR 609 (DCt)
Business Rights Ltd v Building Authority (1994) 4 HKPLR 43, [1994] 2 HKLR 341 (CA)
Commissioner of Inland Revenue v Eekon Enterprises Ltd (1995) 5 HKPLR 322
Commissioner of Inland Revenue v Lee Lai-ping (1993) 3 HKPLR 141
Duty Free Shoppers Hong Kong Ltd v Wong Kwok-pong (1991) 1 HKPLR 150
Re Eng Sui-hang and the United States of America (1991) 1 HKPLR 298
Re Hong Kong and Shanghai Banking Corporation (1991) 1 HKPLR 59, [1992] HKDCLR 37
Hong Kong Stationery Manufacturing Co Ltd v Worldwide Stationery Manufacturing Co Ltd (1991) 1 HKPLR 156
L v C (1994) 4 HKPLR 388, [1994] 2 HKLR 93, [1994] 3 HKC 304
Lau San Ching v Apollonia Liu (1995) 5 HKPLR 23
Re Le Tu Phuong (1994) 4 HKPLR 159 (CA)
Lee Miu-ling v Attorney General(No 2) (1995) 5 HKPLR 181
Re Nattrass (1994) 4 HKPLR 234
Re Ng Hung-yiu and United States of America (1992) 2 HKPLR 209, [1992] 2 HKLR 383
Prime Computer (Hong Kong) Ltd v Sham Tak-leung (1991) 1 HKPLR 256, [1992] 1 HKLR 115
R v Alagon (1992) 2 HKPLR 723
R v Alick Au Shui-yuen (1991) 1 HKPLR 71
R v Allen, ex parte Ronald Tse Chu-fai (1992) 2 HKPLR 266, [1993] 2 HKLR 453 (HCt)
R v Allen, ex parte Ronald Tse Chu-fai (1992) 2 HKPLR 282 (CA)
R v Benny Lai Kwai-wa (1993) 3 HKPLR 435
R v Chan Chak-fan (1993) 3 HKPLR 456 (DCt)
R v Chan Chak-fan, R v Lai Yiu-pui (1994) 4 HKPLR 115, [1994] 2 HKCLR 17, [1994] HKC 145 (CA)
R v Chan Chi-hung (1993) 3 HKPLR 243, [1993] 2 HKCLR 212 (CA)
R v Chan Chi-hung (1995) 5 HKPLR 1, [1995] 2 HKC 721, [1995] 3 WLR 742 (PC)
R v Chan Chuen-kam (1993) 3 HKPLR 215, [1993] 1 HKC 241, [1993] 2 HKCLR 144
R v Chan Kein-wing (1993) 3 HKPLR 598, [1994] 1 HKCLR 41
R v Chan Kwok-tung (1993) 3 HKPLR 201
R v Chan Sau-sum (1993) 3 HKPLR 308
R v Chan Suen-hay [1995] 1 HKC 847
R v *Chan Wai-ming (No 1)* (1991) 1 HKPLR 292
R v Chan Wai-ming (No 2) (1992) 2 HKPLR 231, [1993] 1 HKCLR 51
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[3] Up to (1994) 4 HKPLR, Part 2, (1995) 5 HKPLR, [1994] 2 HKLR and HKC published as of end of November 1995

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R v Anastasius Chiu (1994) 4 HKPLR 457
R v Deacon Chiu Te-ken (1992) 2 HKPLR 245
R v Deacon Chiu Te-ken (1993) 3 HKPLR 483, [1993] 2 HKCLR 21
R v Choi Kai-on (1994) 4 HKPLR 105
R v Chong Ah-choi (1994) 4 HKPLR 375, [1994] 3 HKC 68, [1994] 2 HKCLR 263
R v Chong Ka-man (1993) 3 HKPLR 789
R v Chong Nok-pang (1991) 1 HKPLR 358
R v Chu Kam-to (1994) 4 HKPLR 472, [1994] 1 HKC 775
R v Crawley (1994) 4 HKPLR 62
R v Deputy District Judge, ex parte Chow Po-bor (1993) 3 HKPLR 101 (HCt)
R v Director of Immigration, ex parte Hai Ho-tak (1994) 4 HKPLR 324 (CA)
R v Director of Immigration, ex parte Li Jin-fei and others, R v Director of Immigration ex parte Yan Chen Chang-mei and others, R v Director of Immigration, ex parte Pan Ze-yan and others (1993) 3 HKPLR 565 (CA)
R v Director of Immigration, ex parte Wong King-lung (1993) 3 HKPLR 253, [1993] 1 HKC 461
R v Eddie Soh Chee-hong (1991) 1 HKPLR 83
R v Egan (1993) 3 HKPLR 277, [1993] 1 HKCLR 284
R v Faisal (1993) 3 HKPLR 220
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EDITORIAL

GENERAL

The period since the publication of the last issue of the *Bulletin* (vol 3, n 3) has seen a considerable amount of activity surrounding the Bill of Rights, most of it less than encouraging to those who would like to see the Bill of Rights not merely continue beyond 1997 in its present form but also to be interpreted by the courts in a manner that is faithful to the spirit of the Bill of Rights and its international origin and that supports the results in cases by rigorous and persuasive analysis and reasoning.

In the courts there have been a considerable number of cases, including a case before the Privy Council and a number before the Court of Appeal. Nearly all the challenges based on the Bill of Rights have failed. While that in itself may not be a particular reason for concern, it continues what has now become a well-established trend, with the superior courts showing themselves not particularly receptive to Bill of Rights challenges. Of more concern, however, is the reasoning and analysis that the courts offer in support of their conclusions. In the case of the Court of Appeal, the pattern has now become established that conclusions (generally rejecting but occasionally accepting Bill of Rights points) are essentially stated, with little or no detailed discussion of relevant international case law and supported by analysis sometimes at odds with accepted international approaches to the issue raised by the Bill of Rights. Little is offered by way of a solid framework of principle that might stand Hong Kong in good stead.

CASE LAW DEVELOPMENTS

The Privy Council finally resolved the difference of views in the Court of Appeal on the proper interpretation of the right guaranteed by art 12(1) of the Bill of Rights that a person should be entitled to the benefit of a lighter penalty where the applicable penalty for the offence of which he or she has been convicted has been changed after the commission of the offence. In *R v Chan Chi Hung* (1995) 5 HKPLR 1 (see page 29 below) the Privy Council decided for the substantive interpretation of the guarantee, namely that the central question was the penalty that could have been imposed in respect of the acts proved (or admitted) to have been committed by the accused had he or she been charged after the change to the law.

Two important challenges under art 25 of the Bill of Rights were also decided by the courts. In *Lee Miu Ling v Attorney General* (see page 45 below), the Court of Appeal rejected an appeal against the judgment of Keith J (reported at (1995) 5 HKPLR 181; see *Bulletin*, v 3 n 3), in which the appellants challenged the system of functional constituencies on a number of grounds. The

appellants in that case are seeking to take the matter further; having been denied leave to appeal to the Privy Council by the Court of Appeal, they now intended to petition the Privy Council for special leave.

The second important case decided under art 25 was the challenge to various aspects of the Government's civil service "localisation" policy in *Re Association of Expatriate Civil Servants of Hong Kong and others* (see page 49 below). In a lengthy judgment Keith J rejected most of the applicants' challenges, although he held in favour of them on 5 issues. The applicants have lodged an appeal to the Court of Appeal against the decision of Keith J.

There were also three cases involving the guarantee of freedom of expression contained in art 16 of the Bill of Rights and art 19 of the ICCPR. In *R v Ming Pao Newspapers* (see page 32 below) the Court of Appeal allowed an appeal against the decision of a magistrate who had declared s 30(1) of the Prevention of Bribery Ordinance (Cap 201) to be inconsistent with art 16 of the Bill of Rights. The Privy Council is to hear an appeal against this decision early in 1996.

In *Chim Shing Chung v Commissioner of Correctional Services* (see page 40 below) Sears J held that the decision by the Commissioner of Correctional Services to remove, on race days, the racing supplements from newspapers received by prisoners was inconsistent with the right of the prisoner to receive information guaranteed by art 16(2) of the Bill of Rights. In *Cheung Ng Sheong, Steven v Eastweek Publisher Ltd and another* (see page 37 below) the Court of Appeal was confronted with the issue of the relevance of the Bill of Rights Ordinance to a defamation case involving two private individuals. In considering whether a jury award was excessive, the court held that it could not look to art 16 of the Bill of Rights Ordinance to consider whether the older standard of review disproportionately restricted the right to freedom of expression, since s 7 of the Bill of Rights Ordinance confined its operation to legal relations between private individuals and the Government (and public authorities). However, following the approach of the English courts in an almost identical case, the court held that it could look to the identical provision of the ICCPR in order to formulate the appropriate test.

In *Leung Tak-choi* a challenge to s 76(1) of the Criminal Procedure Ordinance (Cap 221) -- which requires a court to commit to a mental health establishment a person who is found unfit to be tried -- was rejected. The challenge invoked various provisions of the Bill of Rights, in particular the guarantees against arbitrary deprivation of liberty contained in art 5 and various due process rights. The judge found against the applicant on all arguments.

RECENT CONTROVERSY SURROUNDING THE BILL OF RIGHTS ORDINANCE

In early November, shortly before the Human Rights Committee's consideration of the UK 4th Periodic Report on Hong Kong , the Legal Sub-group of the Preliminary Working Committee of the People's Republic of China proposed the repeal of ss 2(3), 3 and 4 of the Bill of Rights Ordinance and the reinstatement of certain legislation which have been amended or repealed in order to bring them in conformity with the Bill of Rights (see Appendix A) The proposals were met with strong criticism and opposition from almost all sectors, including even the pro-China political party and some Hong Kong Affairs Advisors. In mid-November, the Deputy Head of the New China News Agency in Hong Kong said that the Chief Justice had told him in a private conversation that the Bill of Rights had had adverse impact on the Hong Kong legal system. Following this, the Chief Justice, after consulting the Chief Secretary, decided to publish a statement of his own view on the Bill of Rights (Appendix B). In his statement, the Chief Justice expressed his concern that the Bill of Rights had created a third tier in the two-tier system in Hong Kong; that it had in practice enjoyed an entrenched status; that it gave the judiciary legislative power, and that it failed to preserve the demarcation between the judiciary and the legislature. A few days later the Government issued a response which addressed each of the points raised in the Chief Justice's statement (Appendix C).

In the meantime, Mr Justice Liu, a Justice of Appeal, was reported to have launched an attack on the Bill of Rights Ordinance on another private occasion. His speech, which was in Chinese, was subsequently published; a translation of this speech appears in Appendix D. Liu JA appeared to take the view that the Bill of Rights was undesirable and had had an adverse impact on the Hong Kong legal system; that it increased legal costs unnecessarily and weakened the powers of law enforcement agencies in maintaining law and order; that it was inconsistent with the Basic Law, and that its repeal or amendment should be welcomed. He also stated that these views were shared by many members of the judiciary.

We do not intend to repeat all the arguments which have been well rehearsed elsewhere, suffice to state that firstly, we believe that there is no inconsistency between the Bill of Rights and the Basic Law; secondly, the proposal of the Preliminary Working Committee to repeal the various provisions of the Bill of Rights Ordinance is unsound in law and would not achieve what they intend to achieve, namely, to rid off the "entrenched status" of the Bill of Rights; and finally, reinstating those amended or repealed provisions would be a retrograde step and in any event, these provisions would be inconsistent with art 39 of the Basic Law and hence would not be preserved under art 8 of the Basic Law (or would be declared unconstitutional if resurrected after 1997, at least if the courts give the human rights provisions of the Basic Law a reading that is consistent with international standards).

Of perhaps more concern are the views expressed by the Chief Justice and Liu JA, since these may be indicative of a more general judicial indifference or

hostility to the Bill of Rights. It is ironic that it is on the very judges who have slowly but surely chipped away at (or even undermined) the Bill of Rights that the community is relying to provide a bulwark against future encroachments on human rights. One hopes that the judiciary will have the necessary legal tools with which to perform this task if and when they must, and that the emaciated or gutted Bill of Rights that may then exist will not be needed. Unfortunately, the judiciary does not seem to be prepared or ready for the task which they would be entrusted with under the Basic Law.

OTHER DEVELOPMENTS

Equal opportunities legislation

The Government has announced that it intends to establish the Equal Opportunities Commission by the end of the first quarter of 1996. The Equal Opportunities Commission will be the statutory body with primary responsibility for the implementation of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance, enacted earlier this year. As of December 1995, neither of those Ordinances has commenced operation.

A number of legislators have announced their intention to continue the campaign for comprehensive anti-discrimination legislation begun in the last session of the Legislative Council by Ms Anna Wu Hung-yuk. The coalition of legislators will seek to reintroduce in revised format the various bills introduced last session by Ms Wu. These will cover discrimination on the ground of family responsibility, sexuality, age, race, political or religious conviction, spent conviction and trade union membership or activities. Amendments to the Sex Discrimination Ordinance and the Disability Discrimination Ordinance will also be introduced, and there are plans to introduce an amendment to the Bill of Rights Ordinance to make clear that the Ordinance applies to some inter-citizen relations, thereby, reversing the effect of the decision of the Court of Appeal in *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 261 (an amendment also proposed in Ms Wu's Bills).

INTERNATIONAL DEVELOPMENTS CONCERNING HONG KONG

TREATY INACTION

Convention on the Elimination of All Forms of Discrimination Against Women

Despite the Government's stated commitment to extend the Convention to Hong Kong, the Convention has not yet been extended. The reason given for the delay was that the United Kingdom Government was considering the removal of

a number of its own reservations to the Convention, a process completed by the time of the 4th World Conference on Women in Beijing in September 1995. In response to a question at an Amnesty International forum held on 15 December 1995, the Secretary for Home Affairs, Mr Michael Suen, stated that the matter would shortly be submitted to the Executive Council and that he hoped that the matter would be on the JLG agenda for its March 1996 meeting. Although Mr Suen stated in his speech on that occasion that human rights belong to the people, the Government apparently has no plans to consult the community on the reservations it will be requesting the United Kingdom Government to enter in respect of Hong Kong. If the Convention is not extended to Hong Kong before 1997, then the international law position seems to be that it will probably apply nonetheless, since China is a party (and has entered no substantive reservations).

TREATY ACTION

Submission of the fourth periodic report in respect of Hong Kong under the International Covenant on Civil and Political Rights and hearing before Human Rights Committee (October 1995)

The fourth periodic report under the International Covenant on Civil and Political Rights in respect of Hong Kong was submitted to the United Nations in August 1995. The Human Rights Committee considered the report on 19 and 20 October 1995 and issued its *Concluding observations* on 1 November 1995. These *Concluding observations* are reproduced in Appendix E. The Committee made a number of detailed recommendations and, in particular, called for another report to be submitted to the Committee by May 1996, to be considered at the Committee's October 1996 session.

Consideration by the Committee against Torture of the initial report in respect of Hong Kong under the Convention against Torture

The initial report of the United Kingdom in respect of Hong Kong was considered by the Committee against Torture on 17 November 1995 as part of the Committee's examination of the second periodic report in respect of the United Kingdom and other dependent territories and the initial report in respect of the Crown dependencies and other dependent territories. The hearings before the Committee were preceded by a seminar held on 28 October 1995 by the Centre for Comparative and Public Law at the University of Hong Kong, in which a number of speakers examined various aspects of the Government's report under the Convention. The seminar was attended by a member of the Committee against Torture, Professor Peter Burns.

The country rapporteur, Professor Burns, put a considerable number of questions to the UK and Hong Kong delegations (some of these were reiterated by other members of the Committee). The main questions were:

- whether all the provisions of the Convention were implemented in Hong Kong law and, if they were not, why not?

- whether the provision of a defence of "lawful authority, justification or excuse" under s 2(4) of the Crimes (Torture) Ordinance was consistent with the obligation under the Convention to criminalise all acts constituting torture;

- what comments the Government had to make on the many newspaper accounts of police brutality which appeared to take place in many cases on the basis of casual encounters with members of the public;

- whether the electroconvulsive therapy could be applied to a patient against his or her will if the approval of two doctors had been obtained;

- why the Criminal Injuries Compensation Scheme was restricted to "residents" and what was the definition of "resident"? Was a Vietnamese boat person a "resident" within the meaning of the Scheme?

- what guarantees were there that after 1997 Hong Kong will continue to comply with the terms of the Convention as applied to Hong Kong? In particular, would the procedure under article 20 of the Convention (which permits the Committee against Torture to inquire into situations in which there is evidence of a systematic pattern of torture) continue to be available in respect of Hong Kong?

- how does the Government ensure that the obligation under article 16 to eliminate cruel, inhuman or degrading treatment or punishment is given effect to? Are law enforcement officials specifically advised of their obligations under article 16?

- what plans does the Hong Kong government have to implement the recommendations of the Law Reform Commission relating to police powers of arrest (especially so far as they concern enacting provisions of the Police and Criminal Evidence Act 1984 (UK) to Hong Kong?

- in relation to Vietnamese boat people detained in the camps, what sort of oversight and administrative processes exist in order to ensure that treatment of the detainees does not amount to cruel, inhuman or degrading treatment?

- how does the Hong Kong government ensure that its obligation under article 3 not to return a person to a country where there are substantial grounds for believing that he or she would be tortured is fulfilled, both in relation to Vietnamese detainees and in relation to other persons it proposes to remove or depart from Hong Kong? Do persons in this situation receive specific advice as to their right under article 3?

- what are the concerns of the Government about the effect of ss 5 and 6 of the Crimes (Torture) Ordinance insofar as the obligations under article 8 of the Convention (to extradite persons accused or convicted of torture) are concerned?

- have there been any cases in which the consent of the Attorney General to prosecute for an offence of torture has been sought and, if so, was consent granted?

- was the fact that the maximum penalty for torture was life imprisonment a deterrent to bringing a prosecution for torture, as opposed to a prosecution for aggravated assault or similar criminal offence?

- what was the meaning of "public official" under the Crimes (Torture) Ordinance?

- would the UK government consider accepting the individual complaints procedure under article 22 of the Convention for itself and the dependent territories?

While these questions covered a broad range of issues, a number of issues which were of relevance were not raised, including the conditions in prisons and other detention centres and the law relating to the detention of persons who are mentally ill.

The *Concluding observations* of the Committee (reproduced in Appendix F) contain relatively little by way of specific mention of the position in Hong Kong. The concluding observations refer to the creation of an Independent Police Complaints Council in Hong Kong as a positive development, as well as to the absence of cases of torture in the dependent territories generally. Under the heading of factors and difficulties affecting the implementation of the Convention, reference is made to the lack of the possibility for individuals to invoke the jurisdiction of the Committee under its individual complaint procedure. Under this heading, the Committee noted that the "warehousing" of Vietnamese boat people may bring the Government into conflict with its obligations under article 16. Under the heading "Areas of Concern" the Committee referred to the standards of the conditions under which Vietnamese boat people were held in Hong Kong and the lack of a UK declaration under article 22 (generally, not specifically in relation to Hong Kong).

In its recommendations to the UK Government the Committee made no specific mention of the situation in Hong Kong. The only recommendation of relevance was the general recommendation that the UK should make a declaration under article 22 of the Convention (permitting the right of individual petition) both in respect of itself and its dependent territories.

On the whole, the situation in Hong Kong received a significant proportion of the Committee's time so far as questions were concerned and many

important issues were raised. Unfortunately, the Committee's practice of not providing governments with written questions in advance and not asking much in the way of follow-up questions in response to the Government's oral answers means that answers which are incomplete or evasive may be allowed to pass.

While there were many questions on Hong Kong, the fact that there is virtually no reference in the concluding observations to the specific problems in Hong Kong and no specific recommendations addressed to the Hong Kong Government will limit the use that can be made of the Committee hearing in Hong Kong. The Hong Kong government will be able to claim that the Committee was largely satisfied with the situation in Hong Kong and that the fact that the Committee did not, for example, make statements on issues such as the need for lay participation in police complaint investigation and other matters will not be helpful to those advocating change. In contrast, the recommendations of the Human Rights Committee in a number of areas provide solid and detailed support for many of the policy changes advocated in relation to the Torture Convention.

This is the last occasion on which the Committee will consider Hong Kong on the basis of a report submitted by the United Kingdom.

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

The thirteenth periodic report in respect of Hong Kong has been submitted to the United Nations by the United Kingdom Government in August 1995. The report is reproduced in Appendix G. The report is scheduled to be considered by the Committee on the Elimination of Racial Discrimination on 4-5 March 1996 as part of the Committee's consideration of the United Kingdom's report in respect of its metropolitan territory and Hong Kong. The Centre for Comparative and Public Law held a roundtable discussion on Hong Kong and the Racial Discrimination Convention on 11 November 1995, at which the keynote speaker was Professor Rüdiger Wolfrum, a member of the Committee on the Elimination of Racial Discrimination. Speakers from Hong Kong analysed the situation in Hong Kong in the light of the Government's report under the Convention.

The hearing before the Committee in early 1996 is likely to be the last occasion on which the Committee will consider Hong Kong on the basis of a report submitted by the United Kingdom. The *General recommendations* of the Committee are reproduced in Appendix H. The PRC is also a party to the Convention.

REPORTS UNDER OTHER HUMAN RIGHTS TREATIES

Reports under the ICESCR and the Convention on the Rights of the Child

Reports under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child are likely to be submitted sometime in the course of 1996.

HONG KONG PUBLIC LAW REPORTS

From volume 5 (1995), the *Hong Kong Public Law Reports* will be published by Butterworths Asia as part of the new *Hong Kong Cases* series. Subscribers to the *Hong Kong Public Law Reports* (and to *Hong Kong Cases*) will receive separate loose parts devoted to Bill of Rights and other public law cases. Andrew Byrnes and Johannes Chan will remain as editors of the *Hong Kong Public Law Reports*.

CASES

INTERPRETATION OF THE BILL OF RIGHTS ORDINANCE (BILL OF RIGHTS ORDINANCE, s 2(3))

See *R v Town Planning Board, ex parte Kwan Kong Company Ltd* (page 17 below).

BILL OF RIGHTS ORDINANCE NOT TO BE READ AS RESTRICTING THE ENJOYMENT OF RIGHTS BASED ON OTHER LEGISLATION OR RULES (BILL OF RIGHTS ORDINANCE, s 2(5))

See *Cheung Ng Sheong, Steven v Eastweek Publisher Ltd and another* (page 37 below).

EFFECT OF THE BILL OF RIGHTS ORDINANCE ON PRIOR INCONSISTENT LEGISLATION (BILL OF RIGHTS ORDINANCE, s 3(2))

See *R v Leung Tak-choi*, at page 11 below, and *Lee Miu Ling v Attorney General*, at page 45.

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

See *R v Leung Tak-choi*, at page 11 below.

APPLICATION OF BILL OF RIGHTS ORDINANCE TO RELATIONS BETWEEN PRIVATE PERSONS (s 7)

See *Cheung Ng Sheong, Steven v Eastweek Publisher Ltd and another* (at page 37 below).

RIGHT NOT TO BE SUBJECTED TO CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (BILL OF RIGHTS, ART 3)

See *R v Leung Tak-choi*, below.

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

Criminal Procedure Ordinance (Cap 221), ss 75, 76, Fourth Schedule -- Mental Health Ordinance (Cap 136), s 45

Detention of criminal defendant where defendant not fit to be tried – Inhuman or degrading treatment – Right not to be arbitrarily detained – Right to be brought before a court or tried within a reasonable time – Treatment of detainees – Equality before the courts – Fair and public hearing – Determination of a criminal charge – Right to be presumed innocent – Right to trial without undue delay – Equal protection

***R v Leung Tak-choi* (1995) 5 HKPLR [HCt, Crim Case No 457 of 1995, 26 June 1995, Patrick Chan J]**

The defendant was charged jointly with three others with false imprisonment, blackmail and robbery The defendant's counsel requested that no plea be taken from the defendant, on the ground that he was unfit to plead, and applied for the proceedings against him to be permanently stayed. The judge refused the application on the ground that, if the defendant was not fit to be tried, he could be dealt with under s 75 of the Criminal Procedure Ordinance (Cap 221) (CPO). A special jury was empanelled to decide the issue of the defendant's fitness to be tried. The jury concluded that the defendant was under a disability and was not fit to be tried.

Counsel for the defendant thereupon applied once again for a permanent stay of proceedings. The medical evidence adduced by the defendant showed that the defendant was mentally retarded, that the condition was permanent and there was no cure. It also sought to prove that committing the defendant to a mental health establishment was inappropriate. The application was based on the argument that the jury's finding brought into operation s 76 of the CPO, and that making an order under that section would work an injustice to the defendant, since there was no opportunity of an acquittal there being no hearing on the merits, and was inappropriate since no option was given to the court but to order the detention of a defendant in a mental hospital or psychiatric centre. The defendant also argued that s 76(1) of the Ordinance was inconsistent with s 45 of the Mental Health Ordinance (Cap 136) (MHO), which required medical evidence as to the appropriateness of detaining a defendant in a mental hospital and that the treatment was likely to improve his condition, and such an order could only be made after the defendant

had been convicted or some form of assessment of his involvement in the crime made. Section 76(1) had no similar preconditions. The defendant further argued that in any event s 76(1) was inconsistent with arts 3, 5, 10, 11 and 22 of the Bill of Rights and had been repealed by s 3(2) of the Bill of Rights Ordinance to the extent of the inconsistency.

Section 76 provides:

> **76. Orders for admission to hospital**
>
> (1) Where --
>
> . . .
>
> (b) a finding is recorded that the accused person is under disability,
>
> the court shall make an order that the accused person be admitted to the Correctional Services Department Psychiatric Centre or such mental hospital as may be specified by the Governor.
>
> (2) The provisions in that behalf of the Fourth Schedule shall have effect in relation to orders for admission to the Correctional Services Department Psychiatric Centre or a mental hospital made under this section.
>
> (3) Subject to the provisions of the Fourth Schedule, if while a person is detained in a mental hospital in pursuance of an order under subsection (1)(b) the Governor, after consultation with the medical superintendent, is satisfied that the said person can properly be tried, the Governor may by order direct such person be remitted to prison or to a training centre established under section 3 of the Training Centres Ordinance (Cap. 280) for trial at the court where but for the order he would have been tried; and on his arrival at the prison or training centre the order under subsection (1)(b) shall cease to have effect.
>
> (4) Subject to the provisions of the Fourth Schedule, if the Governor, after consultation with the Commissioner of Correctional Services, is satisfied that a person detained in the Correctional Service Department Psychiatric Centre in pursuance of an order under subsection (1)(b) can properly be tried --
>
> (a) the Governor may by order direct that such person be detained in the custody of the Commissioner of Correctional Services for trial at the court where but for the order under subsection (1)(b) he would have to be tried; and

(b) the order under subsection (1)(b) shall cease to have effect if the Governor makes an order under paragraph (a).

In response the Crown argued that the effect of the Fourth Schedule to the CPO was that a person detained under s 76(1) was to be treated as if (s)he had been admitted under s 45 of the MHO. Accordingly, there were a number of ways in which the person could seek a discharge, and there was ample protection of the person's procedural rights. The Crown also rejected the arguments that s 76(1) was inconsistent with the Bill of Rights.

Held, refusing the application for a stay of proceedings:

1. While it is in the public interest that a person who is suspected of having committed a crime should be tried, it would be unfair to proceed with a trial against a defendant if the defendant is under a disability and is not fit to stand trial. Section 75 permits the court to postpone the question of the defendant's fitness to stand trial in order to provide the defendant with a chance to be acquitted if the prosecution case is insufficient. If a defendant is found to be under a disability, then the defendant need not be tried and, were it not for s 76, would be entitled to go free. The effect of s 76(2) and (3) is to ensure that, if there is sufficient evidence against the defendant, a decision will be made by the Governor as to whether the defendant should stand trial at a later stage if fit to be tried at that time.

2. Accordingly, s 76 served the interest of the defendant, in that the defendant was detained in a psychiatric centre or mental hospital to be examined, assessed and treated if possible. It also served the public interest by providing the Governor with the opportunity to decide at a later stage whether the defendant was fit to be tried. Detention pursuant to s 76 did not involve the punishment of an innocent person, and an order made under s 76(1) was not a "hospital order" within the meaning of s 2 of the CPO.

3. Section 76(1) is mandatory and the court has no discretion to refuse to make an order under that section if the necessary preconditions exist.

4. Section 76(1) of the CPO was not inconsistent with s 45 of the MHO. An order made under s 45 marks the end of criminal proceedings for a person who is regarded as having a mental disorder. It is a method of dealing with a person with a mental condition who has been convicted or found to have been involved with criminal activities at the end of a criminal proceeding. By contrast, an order under s 76(1) is not the end of the proceedings for a defendant, but by virtue of s 75(5) puts an end to the trial for the time being. If the defendant becomes fit to stand trial, the Governor may order that he do so. If he does not become fit to stand trial, then he will continue to be detained for his benefit and will benefit from the safeguards in the MHO.

5. A person detained pursuant to the MHO can avail himself of a number of provisions which permit him to be discharged if he is considered well enough. Although a person detained pursuant to s 76(1) of the CPO is not detained pursuant to the MHO, the effect of the Fourth Schedule to the CPO is that the defendant is governed by the provisions of the MHO and entitled to the benefit of those provisions relating to discharge. These include the ability to appeal against the s 76(1) order under s 48 of the MHO, the power of the Commissioner of Correctional Services, with the consent of the Governor, to discharge a person so detained, and the right to apply to the Mental Health Review Tribunal to have his case reviewed or for a discharge. It was also possible to apply for guardianships under s 33 of the MHO, itself a status from which the person affected could apply for a discharge under ss 42A and 42B. Accordingly, an order under s 76(1) was not an order for detention for an indefinite duration.

6. If s 76(1) were held to be inconsistent with the Bill of Rights, it was not possible for the court to substitute the word "may" for the word "shall". The court was merely empowered to declare that a particular provision has been repealed by s 3 of the Ordinance, if it took the view that the provision is inconsistent with the Bill of Rights.

7. If s 76(1) were repealed by the Bill of Rights, it would not be open to the court to stay the proceedings against the defendant. If the section were repealed, there was no power in the court, be it mandatory or discretionary, to deal with the defendant under that section and the defendant would be discharged from further attendance in court.

8. Detention under s 76(1) of the CPO could not be regarded as inhuman or degrading treatment or punishment within the meaning of art 3 of the Bill of Rights.

9. Detention pursuant to s 76(1) did not involve arbitrary arrest or detention in violation of art 5(1). There was sufficient material to raise a suspicion that he had been involved in a crime and would have stood trial but for his disability. His detention under s 76(1) is in accordance with the procedures established by the CPO, and cannot be regarded as arbitrary since there are sound legal reasons for his detention, namely, to examine, assess or treat him and to enable a decision to be made by the Governor at a later stage as to whether he can properly be tried. The detention is not for an indefinite period in view of the provisions of the MHO, particularly those relating to discharge and guardianship. Nor can the Governor's power be regarded as arbitrary, as he would be acting in consultation with the medical superintendent or the Commissioner of Correctional Services who would be advising him as to the condition of the defendant.

10. There was no violation of art 5(3), since the defendant had been brought before a court but found to be under a disability so that he cannot be tried for the time being. He was certainly entitled to a trial, but it would be unfair to him to try him or even to have a determination on his involvement in the crimes alleged against him now because of his condition until after he has been examined, assessed or treated if necessary and possible, and a decision has been made by the Governor when he is satisfied that the person can properly be tried. If it is clear that he cannot be cured, a decision will be made that he will no longer have to face trial in future.

11. Since a person detained under s 76(1) is not being detained for the purpose of punishment, he cannot be regarded as a prisoner. There was no violation of art 6(1) or 6(3).

12. Detention pursuant to s 76(1) did not involve a violation of art 10, since the defendant had been treated equally before the court and provided with a fair and public hearing on the issue of his fitness to be tried. To proceed when he was unfit to be tried would be unfair to him at this stage, and there had as yet been no determination of the criminal charge against him. Nor was there a violation of arts 11(1) or 11(2)(c).

13. Detention under s 76(1) could not be considered discriminatory under art 22 of the Bill of Rights. While the defendant was being treated differently, this was because he was under a disability. It would be discriminatory in this context to treat him as if he were an ordinary person.

RIGHT TO BE INFORMED, AT THE TIME OF ARREST, OF THE REASONS FOR THAT ARREST(ART 5(2), BILL OF RIGHTS)

***R v Chan King Hei & Ors* [1995] 2 HKC 681 (CA, Crim App No 358 of 1994, 29 May 1995, Power VP, Mortimer and Liu JJA**

The defendants/applicants were among a number of defendants who had been convicted of conspiracy to rob; a number of them were also convicted to having with them firearms and ammunition with intent to commit an arrestable offence. The defendants had been arrested after the preparations had been made to rob an electrical goods factory, but the police arrested the defendants before they were able to carry out their plan. The third defendant claimed that excessive force was used in arresting him and that he was not told the reason for his arrest at the time when he was arrested. The defendants appealed against conviction and sentence. The third defendant argued that the judge should have (a) made a ruling on the voir dire as to the lawfulness of his arrest; (b) made a ruling whether there had been any breach of the *Rules and Directions for the Questioning of Suspects and Taking of Statements 1992* and instructing the jury on these matters; (c) given full reasons for his decision to admit the confessions made by the applicants after their arrests.

Held, dismissing the application of the third defendant in these respects:

1. It is not necessary for a judge to give reasons for his decision on a voir dire. If he chooses not to give reasons he will not be criticised.

R v Lam Yip Ying [1984] HKLR 419 followed.

2. The judge's refusal to rule on the lawfulness of the third defendant's arrest was not objectionable since there was no relevant issue upon which a ruling was required.

3. Whether a breach of the 1992 Rules was a matter on which the judge should have ruled and instructed the jury depended upon the nature of the breach. If a breach of the Rules was relevant to weight or credibility, that could be dealt with in a proper manner before the jury. That was not the case here.

4. It is possible that a judge will consider excluding evidence as unfair after substantial and significant breaches of the 1992 Rules. But the circumstances when a judge will exercise this discretion will be rare, and only in cases where it is clearly demonstrated that exclusion is necessary to secure a fair trial of the accused. *R v Cheung Hon Yeung* [1993] 1 HKC 26; *Scott v R* [1989] AC 1242; and *R v Sang* [1980] AC 402 followed.

5. It was not necessary for a judge to give reasons for refusing, in the exercise of his residual discretion, to exclude the statements made by the third defendant. There were not grounds on which the judge could have excluded the confessions once he had concluded that they had been made voluntarily.

6. Article 5(2) of the Bill of Rights adds little, if anything, to the duty of an officer to inform the person of the grounds upon which he is being arrested at the time. A breach of this duty, even if established, could have no additional bearing upon the admissibility or the admission of the confessions. In any event, even if the police officer had failed to tell the third defendant that he was being arrested for conspiracy to rob and told him only that he was being arrested for possession of firearms, this would not have assisted him, since any unlawfulness had been cured by the time he confessed. *R v Kulynycz* [1971] 1 QB 367.

7. Article 11(2)(a) was not relevant to the time of arrest.

D Tolliday-Wright (Augustine CY Tong & Co), for the third defendant/applicant; J Reading and D Chan (Crown Prosecutor), for the respondent.

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

RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

Although not a Bill of Rights case, in *R v Panel on Takeovers and Mergers, ex parte Cheng Kai-man, William*, a judgment delivered on 30 October 1995, the Privy Council dealt with the issue of bias and reversed the decision of the Court

of Appeal reported at (1994) 4 HKPLR 298, [1994] 1 HKC 413, restoring the judgment of Liu J reported at (1994) 4 HKPLR 285, [1994] 1 HKC 400.

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

Town Planning Ordinance (Cap 131), s 6

Outline Zoning Plan – Whether promulgation of OZP legislative process or policy making – Determination – Rights and obligations in a suit at law – independent and impartial tribunal – Right of access to court – Relevance of international authorities to interpretation of Bill of Rights

***R v Town Planning Board, ex parte Kwan Kong Company Ltd* (1995) 5 HKPLR 261, [1995] 3 HKC 254, [HCt, MP No 1267 of 1994, Waung J, 31 July 1995]**

The applicant owned a piece of land situated between Anderson Quarry and Sau Mau Ping Housing Estate. Under the relevant Crown lease, use of the land was restricted to agricultural purposes. In 1982 the applicant was given a short-term waiver to use the land as a storage site for construction material. In December 1987, the applicant's land was zoned to become a Green Belt zone. The applicant objected to the zoning and applied to have his land rezoned as Residential (Group B), which would have permitted development. The objection and application for rezoning were rejected by the Town Planning Board on the ground that the Green Belt was required as a buffer between the quarry and the residential housing estate. The applicant accepted the decision and continued to use his land for storage purposes.

In 1992, a consultancy report recommending a rehabilitation scheme for the quarry was published. The report had been commissioned jointly by the Geotechnical Control Office and the Town Planning Department and funded by the existing quarry operators. The rehabilitation scheme envisaged the enlargement of the present quarry by converting most of the existing Green Belt to Quarry and Mining Use. The existing quarry operators were to be given a 20-year lease to continue with quarry operation, on condition that they return the quarry (which would be 'greened') to the Government at the expiry of the lease and that they create two platforms suitable for residential development. The scheme was endorsed by the Government Liaison Group and the Development Planning Committee in November and December 1992 respectively. The rehabilitation scheme envisaged that the applicant's land would be resumed.

In May 1993, the applicant's land was rezoned under a draft Outline Zoning Plan for 'Other Specified Use (Quarrying and Mining)'. The applicant objected to the zoning pursuant to s 6(1) of the Town Planning Ordinance, and proposed the rezoning of its land as Residential (Group B). The objection was

rejected by the Town Planning Board at a meeting. The applicant was then given a full hearing, pursuant to s 6(6) of the Ordinance.

Prior to the hearing, the applicant modified its position, in a submission dated 9 April 1994. However, in a letter dated 26 April 1994 the applicant changed its position by once again proposing as a compromise that the status quo be preserved by zoning his land to 'Other Specified Use (Comprehensive Development)'.

At the hearing on 29 April 1994, the applicant's counsel informed the Board that it would abandon its 9 April 1994 position, and the applicant was permitted to address the Board on its latest position, as outlined in the letter dated 26 April 1994. After hearing the applicant and the representative of the Town Planning Department, the Board decided that the letter of 26 April 1994 had been submitted out of time and that it would not consider the submissions made in the letter. The Board then rejected the applicant's objection. The hearing was chaired by the Director of Planning, who was also the vice-chairman of the Town Planning Board. Also present at the hearing were a number of senior Government officials who were official members of the Town Planning Board.

The applicant challenged the decision of the Town Planning Board by way of judicial review, claiming that the decision was *Wednesbury* unreasonable. Since the Board knew that the applicant was to abandon its former position and had permitted the applicant to develop its argument on its latest position, the applicant argued that the Board had acted unreasonably when it rejected its objection on the ground of delay without affording the applicant the opportunity to address the Board either on the issue of delay or on its earlier position. As the earlier stance had been abandoned and the new position had not been considered on technical grounds, the Board had failed to consider the applicant's objection at all. Alternatively, it argued that its right to a fair hearing by an independent and impartial tribunal as guaranteed by article 10 of the Bill of Rights had been violated, as the Board, in view of its composition, could not be independent and impartial. In reply, the Town Planning Board argued that no 'right . . . in a suit at law' had been determined, since the promulgation of a town plan was either a legislative process or a policy making process.

Leave to apply for judicial review was granted on 3 July 1994. On 4 July 1994, the draft Outline Zoning Plan was approved by the Governor in Council. During the hearing, it transpired that the Governor in Council had, on the same date, decided that resumption of the applicant's land was in the public interest for the purpose of s 3 of the Crown Lands Resumption Ordinance, but the Governor would not make a resumption order until the disposition of the judicial review proceedings.

Held, dismissing the application:[1]

1. The court would not intervene in the decision of a public body on the ground of Wednesbury unreasonableness simply because the court might think that the public body was wrong or that it should have acted differently. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, *R v Hillingdon LBC, ex p Pulhofer* [1986] 1 AC 484 applied.

2. Where a decision was challenged on the ground that the decision-maker had failed to take into account a relevant consideration, it was important for the court to recall that its role was not to review the merits of the decision, only its lawfulness. The correct approach is that matters of planning merits are exclusively within the province of the Board and that, unless the Town Planning Board had acted illegally in law by failing to take into account a material consideration which it ought to have taken into account, it was for the Board to consider what weight, if any, should be given to that material consideration. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 applied.

3. Under s 6 of the Ordinance, the duty of the Board was confined to considering a written statement of objection. For an objection to qualify as a written statement of objection within the meaning of the section, it must set out the nature of the objections, the reasons for the objections, and any proposed alteration to the draft plan. The proposal contained in the applicant's letter of 26 April 1994 did not do this and, furthermore, had not been submitted within the two month period provided for by s 6. Nor could it be regarded as an elaboration or development of the earlier proposal which had been made within the statutory period, as the letter had put forward proposals which went far beyond the proposed alterations made in the applicant's earlier objections. Therefore, the Board had not been under a statutory duty to consider the new proposal.

4. The Board's failure to exercise any discretion it may have had to consider the new proposal despite the late submission could not be characterised as perverse, absurd or irrational, or as something that no reasonable body would have done. Where there is a decision-making body consisting of a large number and diverse group of distinguished professionals with expertise in different aspects of planning, it would be rare and difficult to establish both as a matter or law and as a matter of fact that the body had acted unreasonably.

The Bill of Rights

5. Article 10 of the Bill of Rights was plainly a provision dealing with courts and tribunals. The plain and ordinary meaning of the term 'suit at law' contained in art 10 of the Bill of Rights was very clearly a formal law suit, action or proceeding brought in court by one party against another. The refusal of the Board in this case was not made in a legal court proceeding or in a lawsuit and therefore the applicant's reliance on art 10 was ill-founded.

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[1] The applicant has lodged an appeal against this decision to the Court of Appeal.

6. The Hong Kong Bill of Rights Ordinance was not a constitutional document and accordingly should be interpreted according to the normal rules of statutory interpretation applicable to ordinary statutes. The proper approach to interpreting the Ordinance was by concentrating on the text of the Ordinance. *R v Sin Yau Ming* (1991) 1 HKPLR 88 not followed.

7. Section 2(3) of the Ordinance[2] meant that it was permissible for a court, when interpreting an article of the Bill of Rights, to have regard to the interpretation by other courts or judicial bodies of the identical article of the ICCPR. However, given that other domestic or international human rights instruments are the product of very different circumstances and situations and are not identical to our Bill of Rights, a court would not be much assisted by considering jurisprudence under these instruments other than in very exceptional circumstances.

8. In view of the international nature of the ICCPR and the compromises it reflects, the interpretation of the Covenant by the courts of Hong Kong should be limited to what had been agreed or can properly be assumed to have been agreed between the States which drafted it. Thus, there should be judicial restraint in interpreting the articles of the Bill of Rights, which should be construed as providing for no more than is necessarily to be inferred from what the text contains.

9. The Hong Kong legislature had chosen to incorporate the ICCPR, and not some or all of the European Convention on Human Rights, as part of Hong Kong law and had made no reference to the European Convention in the Ordinance. Accordingly, the proper interpretation of the Ordinance ought not to be affected, as a general rule, by any consideration of the decisions made under the European Convention. The Hong Kong courts would be wise, unless something overwhelming and compelling can be shown in any particular European authority, to decline to be seduced by the complex foreign jurisprudence and the seemingly inexhaustible literature from the European Court of Human Rights.

11. Even if the court should have regard to foreign jurisprudence in the interpretation of the Bill of Rights, the court would not be justified in importing the foreign autonomous meaning of a provision that contradicted or substantially different from the interpretation that would be arrived at by normal common law methods of interpretation. Importing into the Bill of Rights those rights which the court considered to be human rights worthy of protection but which the legislature had not intended to confer and had not conferred would amount to judicial legislation under the guise of the principle of autonomous interpretation.

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[2] Section 2(3) provides: 'In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters.'

12. The phrase 'rights and obligations in a suit at law' in the Bill of Rights should not be equated with the term 'civil rights and obligations' in art 6(1) of the European Convention on Human Rights and be interpreted in line with the cases interpreting art 6(1). It was not a legitimate exercise in statutory interpretation to transform the meaning of the words in a Hong Kong statute ('rights and obligations in a suit at law') to an autonomous (i.e. totally different and independent) meaning by a complex process of interpretation, and thereby creating a right which did not otherwise exist in Hong Kong under Hong Kong law. *Golder v UK* (1975) 1 EHRR 525 considered.

13. The draft OZP did not affect the applicant's rights. It was only concerned with land usage and did not touch in any way upon land ownership or land resumption. There is no right to be zoned in any particular way; nor is there any right of development, as development is subject to the lease conditions together with the laws of Hong Kong for development.

14. Properly interpreted, art 10 of the Bill of Rights did not confer a right of access to a court where there was no existing right under Hong Kong law to bring a suit before a court. The article merely conferred rights in relation to proceedings already underway before a court or tribunal, and was a procedural provision regulating court proceedings to ensure that the court hearing a case is fair and gives equal treatment to everyone. Accordingly, the applicant's claim based on art 10 must fail.

15. In any event, the decision of the Board under s 6 of the Town Planning Ordinance did not constitute a 'determination' of any rights of the applicant, since the final determination was made by the Governor in Council under s 9 of that Ordinance. *Quebostock Ltd v Building* Authority [1986] HKLR 467, *R v Director of Buildings and Land, ex p Super Mate Ltd* (MP 200/94, unreported) considered; *Singway Co Ltd v A-G* [1974] HKLR 275, *R v Town Planning Board, ex parte Auburntown* (1994) 4 HKPLR 194 not followed.

16. The decision made by the Board under s 6 could not be regarded as legislative in nature or as subsidiary legislation. *Quebostock Ltd v Building* Authority [1986] HKLR 467, *R v Director of Buildings and Land, ex p Super Mate Ltd* (MP 200/94, unreported) considered; *Singway Co Ltd v A-G* [1974] HKLR 275, *R v Town Planning Board, ex parte Auburntown Ltd* (1994) 4 HKPLR 194 not followed (pp 29-30)

17. The procedures for appointment of the members of the Board were not inconsistent with the requirements of independence and impartiality guaranteed by art 10. *Otis Elevator Co (HK) Ltd v Lift Contractors' Disciplinary Board* (1995) 5 HKPLR 78, *Nortier v Netherlands* (1993) 17 EHRR 273 considered.

18. There was no evidence of actual bias on the part of members of the Board in relation to the present case.

Martin Lee QC, Wong Hin Lee and Johannes Chan (CT Chan & Co) for the applicant; NJ Cooney (Crown Solicitor) for the respondent.

Editorial comment

The compatibility of the objection procedure under s 6 of the Town Planning Ordinance with art 10 of the Bill of Rights has been the subject of a number of legal proceedings. It was first raised in *R v Town Planning Board, ex parte Ever Sure Investments Ltd* (1992) HCt, MP No 844 of 1992 (*Bill of Rights Bulletin*, v 2 n 1, p 10), but the case was settled shortly after the hearing commenced. In *R v Town Planning Board, ex parte Auburntown Ltd* (1994) 4 HKPLR 194, Rhind J held that the Town Planning Board, in hearing objections to draft Development Area Plans, was not an independent and impartial tribunal within the meaning of art 10 of the Bill of Rights. However, art 10 was not engaged because the preparation of town plans was a legislative act and no determination was involved. In *R v Town Planning Board, ex parte Kwan Kong Co Ltd*, Waung J disagreed with Rhind J and held that the preparation of town plans was not a legislative act. On the other hand, he found that art 10 was not engaged for another reason, namely that there was no "suit at law", which he defined as "formal law suit". There are at least two more cases which raise the same issue before the High Court: *R v Town Planning Board, ex parte Wing On Company Ltd* (1996) HCt, MP No 1456 of 1995 (leave to apply for judicial review having been granted in June 1995) and *R v Town Planning Board, ex parte Real Estate Developers Association of Hong Kong* (1996) HCt, MP No 2457 of 1995 (set down for 19 March 1996). In the meantime, the applicant in *R v Town Planning Board, ex parte Kwan Kong Co Ltd* has lodged an appeal to the Court of Appeal. Given the far reaching implications of this issue, an earlier decision from the Court of Appeal, and possibly the Privy Council, would be desirable.

Kwan Kong also raises important issues concerning the proper approach to interpreting the Bill of Rights. The received judicial wisdom since *Sin Yau-ming* and *Lee Kwong-kut* is that a broad and purposive approach of interpretation is called for, as the Bill of Rights is sui generis with a constitutional document. This was challenged by Waung J in the present judgment, which is a lengthy and detailed -- but in our view ultimately flawed -- analysis of important issues related to the interpretation of the Bill of Rights. Waung J argues that the Bill of Rights is not a constitutional document and that therefore normal rules of statutory interpretation should be adopted. In his analysis of the status of the Bill of Rights, Waung J, as a strictly formal matter quite correct, though he does not consider whether this *necessarily* debars a court from adopting a similarly broad approach to interpretation because of its status as human rights legislation. On the basis of this fundamental premise, he reinforced the argument that foreign jurisprudence on other human rights instruments is of limited assistance to the Hong Kong judiciary in interpreting the Bill of Rights, and that since the ICCPR reflected a compromise among many different States, the Hong Kong courts should be restrained in giving effect to it and should not construe the Bill of Rights as providing more than was necessarily to be inferred from what the text contained. In short, a literal and restrained approach, as opposed to a broad and purposive approach, is called for.

As a result, he found that art 10 could not apply if there were no pending legal suits; that "rights and obligations in a suit at law" should not be equated with "civil rights and obligations" in art 6 of the European Convention of Human Rights; that art 10 did not guarantee a right of access to court; that draft town plans did not affect any right; that no final determination was made by the Town Planning Board in rejecting the objections under s 6 despite the fact that the Governor in Council had no power to reverse the decisions of the Town Planning Board; and that the Town Planning Board, with distinguished professionals and academics on the Board, could not be challenged for not being independent and impartial in the absence of evidence of actual bias on the part of its members.

This approach to interpretation seems to ignore the nature of the Bill of Rights, and particularly the aims of the ICCPR as stated in its preamble. Indeed, while invoking the normal rules of statutory interpretation Waung J overlooks the well-established rule that, where a statute gives effect to a treaty, then the terms in the statute should be given the same meaning as they bear in the treaty, and that this meaning is to be determined by applying the normal rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties. While it is accepted that foreign jurisprudence on human rights instruments are not necessarily applicable to Hong Kong, Waung J seems to have adopted a more stringent test for the applicability of this jurisprudence, namely that "something overwhelming and compelling" has to be shown. This test, if adopted, would effectively exclude the consideration of any foreign jurisprudence. It ignores the universality of fundamental human rights and Hong Kong will soon distant itself from international norms for the protection of human rights.

In sharp contrast to this "common law being the best" approach, the Privy Council in *Chan Chi-hung* displayed a greater sensitivity and a more balanced approach towards international human rights instruments. It adopts the common law linguistic approach as one of the possible routes in testing the meaning of art 12 of the Bill of Rights. At the same time it acknowledges that the ICCPR springs from a consensus of nations, many of whose legal systems adopt a less linguistic and analytical approach to the interpretation of instruments than is taken for granted in countries whose systems originate in the common law. Therefore, technical and legalistic analysis characteristic of the common law is out of place and the adoption of a broad approach by testing the meaning of the words against the purpose which they are intended to fulfil is called for. Unfortunately, it is exactly this kind of intellectual quality that is lacking in many Hong Kong judgments.

The right to a fair hearing is no stranger to the common law. There are abundant occasions where the courts have upheld this right in many quasi-judicial proceedings, for example, where property right is at stake, or one's reputation is likely to be tainted by the outcome of the proceedings. By confining art 10 to pending lawsuits, the effect of the judgment of Waung J would be that the protection of art 10 is even more restrictive that that already exists under the common law. Likewise, in holding that the Town Planning Board was an

independent and impartial tribunal within the meaning of art 10 of the Bill of Rights, the court was effectively asking for evidence of actual bias, a standard which is far more stringent than that adopted in landmark common law decisions such as *R v Gould* [1993] AC 646 and *William Cheng Kai-man v Penal on Takeovers and Mergers* (1994) 4 HKPLR 298, [1994] 1 HKC 740.

***R v Town Planning Board, ex parte Real Estate Developers Association of Hong Kong* (1996) HCt, MP No 2457 of 1995**

The applicant challenged 16 draft Outline Zoning Plans (OZPs) which introduced significant changes that materially affected the development potential of sites in Kowloon and New Kowloon. These OZPs sought to give effect to the recommendations of a Kowloon Density Study, which reviewed the restriction on height and building density in Kowloon and New Kowloon as a result of the relaxation of height restriction of Kai Tak International Airport. Among other things, the applicant argued that the objection procedure to these OZPs under s 6 of the Town Planning Ordinance constituted a violation of their right to fair hearing under art 10 of the Bill of Rights. Leave to apply for judicial review has been granted, and the substantive hearing is set down for 17 March 1996.

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

The first applicant was the owner of a site in Yau Ma Tei, Kowloon. It entered into a joint venture agreement with the 2nd applicant to redevelop the site in September 1993. Since then it has taken various steps to implement the agreement. At that time the site was zoned for "Commercial/residential" use and was not subject to any planning control on development density. On 24 December 1993, the Town Planning Board gazetted a draft Yau Ma Tei Outline Zoning Plan which rezoned the site for "commercial" use only and imposed restrictions on the plot ratio for redevelopment. Objections lodged by the applicants pursuant to s 6 of the Town Planning Ordinance were rejected. Leave to apply for judicial review was granted by Jerome Chan J in June 1995. Among other things, the applicants argued that the objection procedure under s 6 of the Town Planning Ordinance was inconsistent with art 10 of the Bill of Rights.

Inland Revenue Ordinance (Cap 112), ss 71(2), 75(4)

Taxation assessments – Whether existence of judicial review satisfies the requirements of art 10 – Whether art 10 guarantees a right of access to court – Equality before the law – Whether requirement to purchase Tax Reserve Certificates discriminatory under art 22 – Hong Kong Bill of Rights, arts 10, 22

Commissioner of Inland Revenue v Eekon Enterprises Ltd **(1995) 5 HKPLR 322 [DCt, Case No 3665 of 1995, Judge B Kwan, 27 September 1995]**

Relying on s 75 of the Inland Revenue Ordinance (Cap 115), the Commissioner of Inland Revenue claimed against the defendant a sum of about $4.4 million as profits tax for the year 1992/93. Section 75 provides for the recovery of tax due and payable in the District Court as a civil debt. The Commissioner applied to strike out the defence and counterclaim of the defendant on the ground that the defence disclosed no reasonable defence. In opposing this application the defendant argued: (a) the pleadings disclosed a reasonable and adequate defence; (b) ss 71 and 75 of the Inland Revenue Ordinance independently and/or together with other provisions are inconsistent with the Hong Kong Bill of Rights; and (c) the Commissioner's certificate issued pursuant to s 75(3) of the Inland Revenue Ordinance did not constitute conclusive evidence of tax liability and hence, there was insufficient evidence for judgment to be entered.

Held (striking out the defence and counterclaim, and entering judgment for the plaintiff):

1. Section 75(4) of the Inland Revenue Ordinance ousts the jurisdiction of the District Court to entertain a plea of incorrect assessment of tax. *CIR v Au Yu Shuet* (1966) 1 HKTC 489, *Ng Chun Kwan v CIR* [1976] HKLR 94, *CIR v Choy Sau Kam* (1983) 2 HKTC 10, *CIR v Lai Yin Ha* (1988) 2 HKTC 374, *CIR v Lee Lai Ping* (1993) 3 HKPLR 141 followed.

2. The discretionary power of the Commissioner under s 71(2) of the Inland Revenue Ordinance to allow the holding over of payment of tax pending the result of any objection or appeal is subject to judicial review. *CCSU v Minister for the Civil Service* [1985] AC 374 applied.

3. The procedure set up in Part XI of the Inland Revenue Ordinance was intended to deal with tax appeals in an administrative way. As the Commissioner's acts are subject to judicial review, there is access to the courts by way of judicial review, and in this manner art 10 of the Bill of Rights has been complied with.

4. The purpose of art 10 of the Bill of Rights is to ensure a fair hearing once the matter is brought before a court or tribunal. Article 10 does not guarantee a right of access to court if none already exists; it is not a tool for bringing a matter before the court or tribunal. *Kwan Kong Co Ltd v Town Planning Board* (1995) 5 HKPLR 261, [1995] 3 HKC 254 followed.

5. The requirement that the defendant's appeal to the Board of Review being conditional upon its purchasing Tax Reserve Certificates, and the fact that the defendant was unable to meet this condition by reason of impecuniosity, does not violate art 22 of the Bill of Rights. Impecuniosity is not a prohibited ground for discrimination under art 22. In any event, as this defendant was not treated in any way differently than any other financially embarrassed taxpayer, there was no violation of art 22.

RIGHT TO A FAIR HEARING IN THE DETERMINATION OF A CRIMINAL CHARGE (ARTICLE 10, BILL OF RIGHTS; ARTICLE 14(1), ICCPR)

See *R v Leung Tak-choi*, at page 11 above.

Whether right to fair hearing in article 10 applied to extradition proceedings - Whether admission of inadmissible evidence a violation of right

***Re Thanat Phaktiphat and the Government of the United States of America* (1994) CA**

The applicant was allegedly involved with a number of others in arranging for the importation of heroin from Thailand to the United States. Following an initial transaction, in which the applicant was alleged to have received money in Thailand for a shipment, arrangements were made for the next payment to be made to the applicant in Hong Kong. He was arrested on his arrival in Hong Kong, whereupon the United States government sought his extradition to the United States. Part of the evidence which was sought to be tendered before the magistrate in the extradition hearing was evidence of telephone calls between the applicant and others alleged to be involved in the conspiracy. These calls had been intercepted by United States authorities.

The applicant applied for a writ of habeas corpus, arguing that the evidence obtained by the interception of phone calls was inadmissible and that, in the absence of such evidence, there was insufficient evidence to justify his committal for surrender. He argued that only evidence which satisfied the Hong Kong rules of admissibility could be taken into account in extradition proceedings and that the telephone interceptions, had they been carried out in Hong Kong, would have violated article 14 of the Bill of Rights. Accordingly, under s 6 of the Bill of Rights Ordinance the magistrate has the power and the duty to exclude the evidence of the phone conversations. The applicant also argued that article 10 of the Bill of Rights applied to all proceedings, including

extradition proceedings, and that it was a denial of the right to a fair hearing to base a decision to commit on inadmissible evidence. Mayo J dismissed the application and the applicant appealed to the Court of Appeal.

Held (dismissing the appeal) :

1. Unlike criminal proceedings, extradition proceedings have their roots in international comity and are founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions. Accordingly, a Hong Kong magistrate, hearing an application for extradition by a requesting state, and faced with evidence that was lawfully obtained in and under the law of that state, is not entitled to exclude it from his consideration on the ground that the court would have had a discretion to exclude such evidence in committal proceedings for having been obtained unlawfully, even if this were made out. *Kindler v Canada (Ministry of Justice)* (1991) 84 DLR (4th) 438, *Re Thongchai Sanguandikul and Government of the United States (No 1)* (1992) 2 HKPLR 619, and *R v Governor of Pentonville Prison, ex parte Lee* [1993] 3 All ER 504, applied.

2. In extradition proceedings, questions relevant to the fairness or otherwise of receiving evidence are questions for the court of trial, not for the magistrate hearing the extradition proceedings.

3. In committal proceedings in Hong Kong, a magistrate has no discretion to exclude relevant and therefore admissible evidence from his consideration, even if it be alleged that it was unlawfully obtained. *R v Khan (Sultan)* [1994] 4 All ER 426 applied.

4. While a magistrate in England and Wales now enjoys a discretion to exclude unlawfully obtained evidence in committal proceedings under s 78 of the Police and Criminal Evidence Act 1984, this discretion should only be exercised in the clearest case and in exceptional circumstances, such as where a magistrate is satisfied that the admission of the evidence at trial would be so obviously unfair that no judge properly directing himself could admit it. *R v King's Lynn Justice, ex parte Holland* (1993) 96 Cr App R 74 followed.

5. Even if it is assumed that a Hong Kong magistrate in extradition proceedings has, by virtue of art 10 of the Bill of Rights, the same right or even duty to exclude such evidence as a magistrate in England and Wales would have under s 78 of the Police and Criminal Evidence Act 1984, the suggestion that evidence of these telephone calls, lawfully obtained in the USA, would not be admitted at a trial in the USA, because it would be so obviously unfair that no judge properly directing himself could admit it was quite unsustainable.

G McCoy and P Y Lo (Haldanes), for the appellant; R G McMeans (Crown Solicitor), for the respondents.

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

Prevention of Bribery Ordinance (Cap 201), s 10(2)

Bribery – Maintaining a standard of living incommensurate with one's official emoluments – Presumption of corruption

Following the decision of the Court of Appeal in *Attorney General v Hui Kin Hong* (1995) 5 HKPLR 100 the administration introduced a Bill into the Legislative Council the purpose of which is to replace the existing legal burden under s 10(2) that must be discharged by the defendant by an evidential burden. Clause 3 of the Prevention of Bribery (Amendment) Bill 1995 (*Hong Kong Government Gazette*, 6 October 1995, *Legal Supplement No 3*, p C2001) would delete the words "until the contrary is proved" and substitute the words "in the absence of evidence to the contrary".

Securities Ordinance (Cap 333), s 80(1), (4)(a)

Short selling – Whether offence violated the presumption of innocence

***R v Yeung Yee Hing* (1995) Mag, WSS 12933-4/95**

In this case the defendant proposed to challenge s 80(4)(a) of the Securities Ordinance (Cap 333) on the ground that it was an impermissible infringement of the right to be presumed innocent contained in art 11(1). Section 80(1) and 80(4)(a)provides:

> 80.(1) A person shall not sell securities at /or through the United Exchange, unless, at the time he sells them--
>
> > (a) he has, or where he is selling as agent, his principal has; or
> >
> > (b) he reasonably and honestly believes that he has or, where he is selling as agent, that his principal has;
> >
> > a presently exercisable and unconditional right to vest the securities in the purchaser of them.
> >
> > . . .
> >
> > (4) Subsection (1) does not apply to or in relation to--
> >
> > (a) a person acting in good faith in the reasonable and honest belief that he has a right, title or interest to or in securities that he purports to sell, offers for sale, or holds himself out as capable of selling; . . ..

The challenge was eventually abandoned in the light of the decision of the High Court in *R v Lam Nai Sun Robin* [1991] 2 HKC 582, in which Duffy J held that s 80 did not require the defendant to establish his bona fides, and that the onus was on the prosecution to prove beyond reasonable doubt that the short selling was dishonest and that the defendant had no honest and reasonable belief as to the facts mentioned in the section.

RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGE AGAINST ONE (ARTICLE 11(2)(A), BILL OF RIGHTS; ARTICLE 14(3)(A), ICCPR)

See *R v Chan King Hei* [1995] 2 HKC 68, in which reference was made to art 11(2)(a), but was held by the court not to be relevant in relation to arrest.

RIGHT TO TRIAL WITHOUT UNDUE DELAY (BILL OF RIGHTS, ART 11 (2)(C)

See *R v Leung Tak-choi*, at page 11 above.

RIGHT TO THE BENEFIT OF LESSER PENALTY (ARTICLE 12(1), BILL OF RIGHTS; ARTICLE 15(1), ICCPR)

Crimes Ordinance (Cap 200), LHK 1984 ed, ss 76, 76A – Crimes Ordinance (Cap 200), ss 75, 76

> ***Right to the benefit of lesser penalty – Offences – Possession of implements for forgery – Offence carrying a maximum penalty of 7 years' imprisonment replaced by two new offences carrying maximum penalty of 14 years' and 3 years' imprisonment – Possession of forged seal or die – Offence carrying a maximum penalty of 14 years' imprisonment replaced by two new offences carrying maximum penalty of 14 years' and 3 years' imprisonment –Whether guarantee applicable where offence substantially amended between time of offence and sentencing – Bill of Rights, art 12(1)***

***R v Chan Chi-hung* (1995) 5 HKPLR 1, [1995] 3 WLR 742 (Privy Council)**

The appellant was charged with, inter alia, an offence of possession of forged credit cards, contrary to s 76(2) of the Crimes Ordinance (Cap 200, LHK 1984 ed), and an offence of possession of an article fit and intended for use in the forgery of a document, contrary to s 76A of the same Ordinance. The crimes were committed on 18 May 1992. The then maximum sentences for these two offences were 7 years' and

14 years' imprisonment respectively. On 26 June 1992, the Crimes (Amendment) Ordinance came into effect. It repealed ss 76(2) and 76A, and reformulated the offences by splitting each of the old offences into two new offences, one based on simple possession and another based on possession with intent to defraud. Under the new regime, there existed two levels of gravity, attracting widely different maxima, and the provisions concerning the mental elements of the offences were different from the repealed provisions. The appellant was convicted on a guilty plea on 22 December 1992. Relying on art 12(1) of the Bill of Rights, the appellant argued that he was entitled to be sentenced on the basis of maximum sentences of 3 years under the new ss 75(2) and 76(2), rather than on the basis of the maximum sentences of 7 years and 14 years under the repealed ss 76(2) and 76A(1) respectively. The District Judge rejected this argument, and held that in deciding whether a lighter penalty had been provided by law within the meaning of art 12(1) of the Bill of Rights, the court should consider the actual criminal conduct of the appellant as found at the trial or admitted by the appellant after a plea of guilty. Since the actual conduct of the appellant was such that he would have been charged with the more serious offences, art 12(1) had no application. The appellant's appeal against sentence was dismissed by a majority of the Court of Appeal: *R v Chan Chi-hung* (1993) 3 HKPLR 243. MacDougall VP dissented on the ground that he was bound by the earlier decision of the Court of Appeal in *R v Faisal* (1991) 3 HKPLR 220. The appellant obtained special leave to appeal to the Privy Council.

Held, dismissing the appeal:

1. There are essentially two different understandings of the word "offence" in the third sentence of art 12(1). The first approach consists of the following:

    - first, to identify the category of conduct, declared by the law to be a particular offence, to which the prosecuting authority seeks to assign the conduct of the defendant;

    - secondly, to identify the elements of the conduct which define the old category of offence with which the defendant is charged, and to search among the new categories for one whose elements correspond substantially with those of the old category; the elements of the old offence, but no more, must be sufficient to satisfy the requirements of the new offence;

    - thirdly, to compare penalties attaching to the equivalent new category of offence with those of the old category, and the defendant is entitled to be sentenced by reference to whichever is the less severe.

    In the present case this approach would have meant that the equivalent new categories of offence would not have been the aggravated offences under ss 75(1) and 76(1) (since they required a specific intent which was not previously required), but rather the offences of simple possession under ss 75(1) and 76(1).

2. This approach is subject to two serious practical objections. The first is that, except where the new legislation is a simple re-enactment of the old, the comparison of one category of offence with another will often be impossible. Secondly, this approach is capable in practice of producing an outcome far more favourable to an offender than the policy of art 12, and of the Covenant on which it is founded, can reasonably be supposed to sustain.

3. In light of the first two sentences of art 12(1), the focus of the third sentence of art 12(1), according to traditional common law methods of interpretation, is not how the new definition of the offence corresponds with the old, but how a defendant would have stood if he had been convicted and sentenced for what he did under the new law rather than the old.

4. The International Covenant on Civil and Political Rights springs from a consensus of nations, many of whose legal systems adopt a less linguistic and analytical approach to the interpretation of instruments than is taken for granted in countries whose systems originate in the common law. Thus, it is right as a precaution to adopt a broad approach by testing the apparent meaning of the words against the purpose which they are intended to fulfil.

5. The purpose of art 12(1) is plain, namely, to make sure that the criminal consequences of what someone has done must be judged according to the law as it stood when he or she did it. This is a practical standard directed to the conduct and situation of the individual. Applying this standard, it is out of place to engage in a technical and essentially legalistic exercise of comparing in the abstract the requirements of one statutory definition with another.

6. On the agreed facts, it was plain that the appellant intended to use the forged credit cards to induce somebody to accept them as genuine. If he had been convicted and sentenced under the new law on the day when he committed the offence, the maximum sentence in each case would have been 14 years' imprisonment rather than the 7 and 14 years which the sentencing judge had plainly assumed to be appropriate. It would have made no difference if the appellant's guilty conduct had taken place two months later than it did, and he has suffered no injustice thereby.

G McCoy and P Y Lo (Chan & Kong/Haldanes), for the appellant; A Bruce and T Casewell (Crown Solicitor/Macfarlanes), for the respondent.

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

Prevention of Bribery Ordinance (Cap 201), s 30(1)

Prevention of Bribery Ordinance – Disclosure of details of an investigation of an offence alleged or suspected to have been

committed under the Prevention of Bribery Ordinance – Whether restriction is "provided by law" – Whether restriction is "necessary" for the protection of public order/ordre public and maintaining respect for the rights and reputations of others – "provided by law" – "necessary" – "pressing social need" – Mandatory disqualification

R v Ming Pao Newspapers Ltd & Others **(1995) 5 HKPLR 13 [Mag App No 514 of 1995, Litton VP, Mortimer and Mayo JJA, 5 July 1995]**

The respondents were respectively the proprietor and publisher, editor-in chief, executive chief editor and deputy chief editor of *Ming Pao Daily News*. They were charged with the offence of disclosing, without lawful authority or reasonable excuse, to other persons, namely readers of *Ming Pao Daily News*, details of an investigation in respect of an offence alleged or suspected to have been committed under the Prevention of Bribery Ordinance, contrary to s 30 of the Prevention of Bribery Ordinance (Cap 210). The article which was the subject of the charge related to a Government land auction held on 26 May 1994, during which several land developers joined together in a successful bid to keep down the prices of the land sold. This event was extensively covered by the Hong Kong media. In several newspaper articles the names of the land developers involved and the photographs of some of them were published. Descriptions such as "cartel", "unholy alliance" and "gang up" were used in several of the newspaper articles. On 18 July 1994, the Independent Commission Against Corruption ("ICAC"), upon receipt of a complaint from a member of the public, began investigating the matter. On 2 August 1994, two investigators of the ICAC approached the secretary of the second respondent, leaving a message that the ICAC was "investigating the conduct of the land auction" in question and that it wished to interview the reporters who had been assigned by *Ming Pao Daily News* to cover that auction. There was no mention of any offence or of the evidence of any suspect. On 3 August 1994, *Ming Pao Daily News* published an article which was the subject matter of the charges. The relevant parts of the article read:

> "ICAC took steps to meet reporters in its investigation in relation to the developers' joint bidding (for) land."
>
> And:
>
> "The ICAC is investigating whether anyone had infringed any Ordinance in a land auction held on 26 May this year in which over 10 developers combined to bid for land."

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

The respondents pleaded not guilty to the charges, and were jointly tried before a magistrate. At the close of the prosecution case, a submission of no case to

answer was made on the basis that s 30 of the Prevention of Bribery Ordinance was inconsistent with the guarantee of freedom of expression under art 16 of the Bill of Rights. The submission was upheld and the respondents were acquitted and discharged: see *Bill of Rights Bulletin*, v 3, n 3, pp 35-37. The Crown appealed by way of case stated, and the appeal was referred to the Court of Appeal.

Section 30 of the Prevention of Bribery Ordinance provides:

"(1) Any person who, without lawful authority or reasonable excuse, discloses to any person who is the subject of an investigation in respect of an offence **alleged or suspected** to have been committed by him **under this Ordinance** the fact that he is subject to such an investigation or any details of such investigation, or discloses to **any other person** either the identity of any person who is the subject of such an investigation or any **details of such an investigation**, shall be guilty of an offence and shall be liable on conviction to a fine of $20,000 and to imprisonment for 1 year.

(1A) Where a person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under this Ordinance has been **arrested in connection with such offence**, subsection (1) shall not apply as regards the disclosure after such arrest of details of the investigation or the identity of the person.

(2) Notwithstanding anything in subsection (1), the Commissioner may disclose the identity of any person if -

(a) he has failed to comply with a notice under section 14(1)(a) or (b);

(b) a restraining order has been served on any person under section 14C(3);

(c) his residence has been searched under a warrant issued under section 17;

(d) he has been required to surrender any travel document under section 17A; or

(e) a warrant for his arrest has been issued."

Held (allowing the appeal and ordering the case be remitted to the trial magistrate):[3]

1. Since the respondents were only charged with an offence under the second limb of s 30(1) of the Prevention of Bribery Ordinance, the magistrate had no jurisdiction to hold that the whole of s 30(1) of the Ordinance had been repealed on the ground of inconsistency with the Bill of Rights.

2. Section 30(1) of the Prevention of Bribery Ordinance constituted a prima facie violation of the right to freedom of expression and had to be justified under art 16(3) of the Bill of Rights.

3. Section 30(1) of the Prevention of Bribery Ordinance, being a restriction on the freedom of the press, satisfied the requirement that the restrictions be "provided by law" under art 16(3) of the Bill of Rights. The requirement that the restrictions be "provided by law" was satisfied when the law set out with particularity the specific ingredients of an offence.

   Sunday Times v United Kingdom (1979) 2 EHRR 245, considered.

4. Section 30(1) of the Prevention of Bribery Ordinance pursued the legitimate purposes of protecting effective law enforcement in the field of prevention of bribery, and of ensuring respect for the rights and reputations of other persons. Corruption was a particularly insidious evil usually involving two satisfied parties. The ICAC must be armed with very wide powers to combat this evil. The prohibition was necessary as an ICAC investigation might often involve third parties, who might disclose to the suspect the existence of the investigation and hence defeat the investigation. Section 30 also served the purpose of protecting informers and persons under suspicion, as in the latter case the suspicion might turn out to be groundless.

5. It was doubtful whether there would be any public interest in disclosing the details of an investigation before any person had been arrested and charged. If he was charged, the matter comes within the restrictions imposed by the common law, ie the *sub judice* rule and the law of contempt. If he was not charged, the public interest was not served by disclosing the ICAC's suspicions regarding that person.

6. Section 30(1) did not impose an absolute prohibition. If a person disclosed the details of an investigation did so in the bona fide belief that the disclosure was to reveal an abuse of powers or any illegality committed by the ICAC, such disclosure would be covered by the defence of reasonable excuse.

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[3] In November 1995 the Privy Council granted the respondents special leave to appeal. The appeal is expected to be heard in early 1996.

7. Section 30(1) was necessary for ensuring effective law enforcement in the field of prevention of bribery and for the respect for the rights and reputations of other persons. It was therefore not inconsistent with art 16 of the Bill of Rights. In considering whether the restriction was necessary, the court was not assisted by substituting for "necessity" some phrase such as "pressing social need".

Tam Hing-yee v Wu Tai-wai (1991) 1 HKPLR 261, [1992] 1 HKLR 185, followed; *Sunday Times v United Kingdom* (1979) 2 EHRR 245, not followed.

Per curiam

If it should transpire that an investigation, the details of which had been disclosed by a newspaper, was not an investigation into offences under the Prevention of Bribery Ordinance, no offence under s 30(1) would have been made out.

Daniel Fung QC (Solicitor General) and Andrew Bruce (Crown Solicitor) for the appellant; Gladys Li QC and Johannes Chan (Johnson Stokes & Master) for the respondents.

Editorial comment

The judgment of the Court of Appeal in *R v Ming Pao Newspapers* is an illustration of the type of analytical approach which now appears to be dominant in that court. The court manifests a somewhat ambivalent attitude towards the international case law (expressing its doubt, for example, as to the relevance to the circumstances of Hong Kong of the European Court's interpretation of the phrase "provided by law" in the *Sunday Times* case), though it must be said that at times the international case law does not provide particularly focused assistance in resolving an individual case.

Of more concern, however, is the relatively loose scrutiny to which the court subjects the restriction on freedom of expression which s 30(1) of the Prevention of Bribery Ordinance represents. The court readily accepts the Government's identification of the primary purposes served by the legislation, namely, the protection of the reputation of persons under suspicion and to protect the integrity of investigations. The former was clearly not a stated objective of the legislation when introduced. While this does not prevent it from being called in aid to support the legislation, there is no consideration of whether and when a justification which is first relied on and articulated after the enactment of legislation can be used to justify legislation as a permissible restriction on protected rights.

The manner in which the court approaches the issue of necessity is particularly disappointing. Its reasoning is essentially encapsulated in the following passage:

> "In our judgment, s 30(1) is necessary for the purposes urged by the Solicitor General. In our judgment, the experience of the courts has demonstrated over and over again the necessity for legislation such as s 30(1) which, as the Solicitor General has so cogently put it, protects two interests:
>
> (a) effective law enforcement in the field of prevention of bribery;
>
> (b) the respect for the rights and reputations of other person."

Once legitimate objectives have been identified, the court appears prepared to assume that the measures purportedly adopted to achieve these goals are necessary and proportionate means of achieving them, without any further detailed examination. There is in the judgment no analysis of the scope of the offences, no explicit examination of the question of proportionality, and no consideration of whether the legitimate goals of the legislation could be achieved by something less than a blanket prohibition. Nor are we told more about the experience of the courts that has so clearly demonstrated the need for this provision.

The court also seeks to bolster its reasoning by looking at the "reverse side of the argument", arguing that "it is difficult to see what public interest can be served by newspapers disclosing details of an investigation before a suspect is charged", because once the person is charged the sub judice rule will apply and "if [the person] is not charged, what possible public interest is served by disclosing the ICAC's suspicions regarding that person?" The court notes that, if disclosure were to reveal abuse or power of illegality, then this would constitute "reasonable excuse" within the meaning of the section and protect the person making the disclosure. (Whether "reasonable excuse" can be so widely construed is arguable.) Nevertheless, this "reverse" approach is dangerous, since it comes close to asking that the person whose freedom of expression is restricted to demonstrate that the absence of that restriction would be more beneficial to the public interest, and thereby reverses the priorities of the Bill of Rights Ordinance (a point made in the *Sunday Times* case).

At the end of the day, the most disappointing aspect of the court's decision is its failure to analyse in a rigorous and principled fashion the consistency of this legislation with the Bill of Rights Ordinance. While there may be differing views over the correctness of the outcome, in our view the judgment is most unsatisfactory because of this defect. One must ask how much assistance this judgment will provide in future cases in which restrictions on freedom of expression are challenged, or whether its conclusory nature will limit its utility for that purpose.

Freedom of expression – Effect of excessive libel awards on enjoyment of right – Necessary - Hong Kong Bill of Rights, arts 16(2), 16(3) – International Covenant on Civil and Political Rights, art 19 – European Convention on Human Rights, art 10

Cheung Ng Sheong, Steven v Eastweek Publisher Ltd and another **(1995) 5 HKPLR [CA, Civ App No 198 of 1994, Nazareth VP, Liu and Mayo JJA, 20 October 1995]**[4]

The respondent was professor of economics at the University of Hong Kong. On 4 February 1993 *Eastweek* magazine published an anonymous article which contained a number of defamatory statements, to the effect that he had skipped lectures, refused to take part in group photographs with his students, and had failed to discharge his professional duties as a professor. Two weeks after the publication of the original article the magazine published a letter from a student, accompanied by a supporting comment from the editor, pointing out the falsity of the earlier report that the respondent had absented himself from classes and missed the group photographs. Some 18 months after the publication of the original article the magazine published an apology.

The respondent commenced an action for libel against the appellants. The case was heard before Rogers J sitting with a jury. The jury found for the respondent and awarded him the sum of $2.4m damages.

The appellants appealed against the award on three grounds: (a) that the award was plainly excessive; (b) that the judge's summing-up contained a number of errors which collectively were liable to cause the jury to award a higher sum than the law and evidence warranted; and (c) that it was to be inferred that the jury had taken into account extraneous and irrelevant material published in *Next* magazine on the evening before the closing speeches were made.

Held, allowing the appeal and ordering a reassessment of damages:

1. The Court of Appeal had power to set aside the jury's award of damages and to order a new trial on damages. However, unlike the English Court of Appeal it did not have the power to substitute for the sum awarded by the jury such sum as appeared to it to be appropriate.

[4] Our thanks to Kenneth Kwok QC for bringing this case to our attention.

2. In deciding the appropriate standard for appellate review of jury libel awards, it was not possible to take into account art 16 of the Hong Kong Bill of Rights, as s 7 of the Bill of Rights Ordinance limited the application of the Bill of Rights to relations between private individuals and Government and public authorities, and the Ordinance therefore did not apply to litigation between two private individuals. However, the non-applicability of the Bill of Rights Ordinance to private relations did not have the effect of limiting fundamental human rights otherwise provided for or recognised under the law of Hong Kong.

3. However, it was appropriate to have regard to the identical guarantee in art 19 of the International Covenant on Civil and Political Rights, which applied to Hong Kong. The courts should, where they were free to do so, develop the law in accordance with treaty obligations applicable to Hong Kong; in relation to freedom of expression these could in any event properly be regarded as an articulation of some of the principles underlying the common law.

   Rantzen v Mirror Group Newspapers Ltd [1994] QB 670 and *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 followed.

4. In light of the importance of the principle of freedom of expression as embodied in art 19 of the ICCPR or the common law as properly understood, in determining the standard to be applied when considering whether a jury award in a libel case was excessive, it was appropriate to have regard to the effect that a largely uncontrolled discretion on the part of a jury had on the enjoyment of the right to freedom of expression. Accordingly, the courts should subject large awards of damages to a more searching scrutiny than has been customary in the past under the *Wednesbury*-type standard, and the barrier against intervention should be lowered. The relevant standard was whether a reasonable jury could have thought that the award was necessary to compensate the plaintiff and to re-establish his reputation.

   Rantzen v Mirror Group Newspapers Ltd [1994] QB 670 followed; *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 considered.

5. Notwithstanding the fact that it would not be proper for a jury in England to be referred to libel awards made by judges, the circumstances of Hong Kong made it appropriate that a jury in Hong Kong, when assessing the quantum of libel damages, should be afforded such guidance as may be available from libel awards made by judges, at least until there was in Hong Kong resort to jury trials in libel actions on a significant scale.

   de Lasala v de Lasala [1980] AC 546 considered.

6. It was not appropriate for a jury in assessing damages in a libel suit to have regard to personal injury awards. The nature of the injury in libel cases is very different from that in personal injury cases, as are the consequences and the nature of what is sought to be met or provided for by relevant damages.

Broome v Cassell & Co Ltd [1972] AC 1027 applied; *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670 followed.

7. The award made was well above the general level of awards made by judges in libel cases in Hong Kong; an award of the size in question was likely to have a serious effect on freedom of expression and could not be regarded as necessary to protect the reputation of the respondent. The libel was not a particularly serious one and was unlikely to have had any effect upon the respondent's high professional standing and reputation. A very minor fraction of the $2.4m awarded would amply serve to compensate the respondent for any injury to his reputation and esteem, to vindicate him and compensate his injured feelings.

8. There was no substance in the argument that the judge's summing-up contained errors the overall result of which was to aggravate the jury's view of the libel and the defendant's conduct. Although the judge had failed to give the jury any form of guidance as to how it should relate the purchasing power of money to the sum necessary to provide adequate compensation and to re-establish the respondent's reputation, such directions, though desirable, were not to be regarded as necessary in every case in the sense that their absence results in a misdirection.

Sutcliffe v Pressdram Ltd [1991] 1 QB 153 considered.

9. (Per Nazareth VP) The evidence of the article in *Next* magazine stating that the respondent's legal costs were $2.4m, published the evening before closing speeches, should have been admitted on the appeal, even though the article was available at the time of the verdict, the appellants knew about it and could have adduced evidence of it. This was because, its relevance emerged only after the jury's verdict. Accordingly, it should have been admitted as an exception to the normal rule, since it would probably have had an important influence on the result of the case and was clearly credible.

Ladd v Marshall [1954] 1 WLR 1489 considered.

Michael Thomas QC and Jat Sew Tong (Carey & Lui) for the appellants; Martin Lee QC and Anderson Chow (Hau, Lau, Li & Yeung) for the respondent.

Editorial comment

The approach taken by the Court of Appeal to the use of international standards which bind Hong Kong but which have not been directly incorporated as part of Hong Kong law is a welcome one. There is a certain irony in the fact that the court had to resort to an unincorporated version of the right to freedom of expression, when the identical right had been (partly) incorporated in Hong Kong law in the form of art 16 of the Bill of Rights. It is perhaps unfortunate that the court simply accepted the *Tam Hing-yee v Wu Tai-wai* position without demur, and without any reference to the fact that it has been stringently

criticised and has even been the subject of a High Court decision which on one view is inconsistent with that position.[5] However, this was presumably the stance adopted by the parties and the court, one assumes, did not ask to be addressed on the issue, as it saw a more efficient way of reaching what it viewed as the appropriate result. At the end of the day, though, one is left with a lingering doubt: would the Court of Appeal have been so ready to embrace the international standard and the case law of the European Court of Human Rights if there had not been a recent decision of the English Court of Appeal on basically an identical point which our court effectively followed? While we would like to believe that this would be the case, the decisions in cases such as *R v Ming Pao* leave more than a lingering doubt.

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

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

***Chim Shing Chung v Commissioner of Correctional Services* (1995) 5 HKPLR [HCt, MP No 2271 of 1995, 2 November 1995, Sears J]**

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

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

[5] See *L v C* (1994) 4 HKPLR 388, [1994] 2 HKLR 93, [1994] 3 HKC 304

The applicant sought legal advice on the lawfulness of the action taken by the prison authorities in removing the racing supplements, and his lawyers wrote to the Commissioner requesting details of the legal basis of the decision. The Commissioner replied that the action was taken pursuant to r 56 of the Prison Rules (Cap 234) and Standing Orders made under r 77. The Commissioner refused to provide the solicitors with a copy of the relevant standing orders made under r 77, on the ground that the standing orders were "solely for internal use as management guidelines". The standing orders were not published generally, nor were they made available to prisoners. It was only some weeks before the hearing that the Commissioner provided details of the contents of the standing order.

The applicant challenged the decision to remove the racing supplements from his newspaper on the ground that there was no basis in law for the decision, that it was *Wednesbury* unreasonable, and that it violated the applicant's right to receive information guaranteed by art 16(2) of the Bill of Rights.

The Commissioner argued that Standing Order 397 (h) provided the legal basis for his decision. This purported to confer on the Prison Superintendent "the discretion to withhold or withdraw any newspaper or part of a newspaper, on a regular basis, if he believes on reasonable grounds that its availability in the institution will jeopardize the institutional security or custodial discipline. Newspaper covering only horse racing information will obviously fall into the category to be rejected for entry into an institution."

The Commissioner further argued that r 56 of the Prison Rules provided a basis for the decision to remove the supplements. Rule 56 provides: "Prisoners may receive books or periodicals from outside the prison under such conditions as the Commissioner may determine".

In relation to art 16 of the Bill of Rights, the Commissioner argued that the removal of the supplements was a lawful and permissible restriction on the applicant's rights. He maintained that gambling on the races was a serious problem in prisons and that removal of information about races help to prevent gambling by prisoners.

Held, allowing the application and quashing the decision:

1. A convicted prisoner retains all of his civil rights which are not taken away expressly or by necessary implication and the Prison Rules should be construed in that light. *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425; *Raymond v Honey* [1983] 1 AC 1, followed.

2. Standing Order 397 provided no legal basis for the decision to remove the racing sections. It was not a rule made in an open manner and approved by the Governor, but merely a direction to a prison officer to remove part of the newspaper, something which conferred no legal right upon the Commissioner so to do.

3. The reference in r 56 to books and periodicals did not appear to include newspapers. However, even assuming that newspapers were covered by r 56, the rule merely permits the Commissioner to determine the conditions under which they are received (in particular the mechanics of receiving a newspaper). The rule does not give the Commissioner the power to censor books or periodicals.

4. In the present case the Commissioner's decision to remove part of a newspaper (even if he had the power to do so) was irrational since:

   (a) there was no evidence before the court to show a causal connection between the provision of racing information and the illegal gambling which takes place in prison;

   (b) only part of the information was removed, so that information was available on non-race days without restriction and on race days if it appeared in the general body of the newspaper; and

   (c) in light of the statistics that there had been a 30% increase in disciplinary offences connected with illegal horse gambling, the censorship was ineffective.

5. The consent form signed by the applicant provided no legal basis for the decision. Signing the consent form was the only way in which a prisoner can obtain a newspaper; if he had a right to have a newspaper, he cannot surrender that right in any way by signing the form.

6. The Commissioner's actions also violated the applicant's freedom to receive information guaranteed in art 16(2) of the Bill of Rights. Article 16(2) gives all citizens a right to receive information, subject to art 16(3), and imprisonment does not of itself prevent the enjoyment of that right by a prisoner.

7. If the Commissioner wishes to interfere with information coming to prisoners, that is "prima facie" an infringement of this article. It is clear that it is for the government to justify any departure from the rights enshrined in the Bill of Rights, and the grounds for that justification must be cogent and persuasive. What has to be shown is that the exercise of the right protected by the Bill of Rights would have been irreconcilable for the achievement of an important objective on the part of the Government.

8. The interference with the right had no basis in Hong Kong domestic law, which here was merely an unpublished instruction to a prison officer. *Silver v United Kingdom* (1983) 5 EHRR 347, applied.

9. In the present case the partial removal of the racing information had not been shown to be necessary, or proportionate to any legitimate need, and it was irrational. Accordingly, the government had failed to show that the restriction on the enjoyment of the right was a restriction permitted by art 16(3).

10. To impede a prisoner in obtaining access to legal advice, or in taking advantage of his right to have full access to the court is a serious matter and may amount to a contempt of court. The Commissioner's refusal to disclose the contents of the Standing Order to the applicant's solicitors in response to their request was arrogant and unwarranted, particularly in view of the Government's adoption of a Code on Access to Information which applied to the Correctional Services Department. However, as the standing order had eventually been disclosed, the Commissioner had apologised for his action and there had been no deliberate impeding of the applicant's efforts to seek justice, no relief would be granted in this respect. *Golder v United Kingdom* (1975) 1 EHRR 524 and *Raymond v Honey* [1983] 1 AC 1, considered.

Philip Dykes (Paul Kwong & Co) for the applicant; L M A Shine (Crown Solicitor) for the respondent.

Editorial comment

This case raises a number of interesting issues. Among other things, Sears J affirms that gambling information, though it may not be highly regarded in some quarters, falls within the scope of the right to freedom of expression and the right to receive information guaranteed in the Bill of Rights. He also affirms that prisoners, although lawfully deprived of their liberty, still enjoy fundamental rights and that any restriction of their rights must be justified.

Another interesting aspect of this decision is the reference by Sears J to the requirement that is well-established under the international case law (and has been accepted in principle in a number of Hong Kong decisions[6]) that a restriction on a guaranteed right must be imposed by "law" and that any such "law" must not only be law in a formal sense but must also satisfy a "quality of law" test (see *Silver v United Kingdom* (1983) 5 EHRR 347, cited by Sears J). This test requires that the "law" embodying the restriction must be sufficiently certain and must be accessible to those affected, something which was not done in the present case so far as the Standing Orders are concerned. While this test has its complications, its applicability to the Standing Orders in this case seems clear and the case could have been decided on that ground alone. Sears J goes further and tests the necessity of the law by a fairly stringent test, concluding that the restriction is not effective. The difficulties of making that assessment are evident, particularly on the basis of the evidence before the court. However, an important dimension of Sears J's judgment is his readiness to scrutinise with some care the justifications offered for the restriction and the proportionality of the measures taken.

A further point of interest is the judge's discussion of whether the applicant had waived the full enjoyment of his right to freedom of expression by

[6] Though see the doubts expressed by the Court of Appeal in the *Ming Pao* case, at page 32 above.

signing the form which permitted him to receive a newspaper. Sears J concludes that, since the applicant had no choice if he wanted to receive a newspaper, then this could hardly be viewed as a voluntary waiver of his rights under art 16(2). The topic of waiver of rights -- a complicated issue in international human rights law -- has received little judicial attention in the Hong Kong cases so far, other than in the context of cases involving claims of undue delay.

Finally, there is also a passing remark on the right of access to court. Sears J refers to the refusal of the Commissioner to disclose the contents of the Standing Order and states that to impede a prisoner in obtaining access to legal advice, or in his ability to have full access to the courts is a serious matter. *Golder v UK* is cited in support of this proposition. It may be noted that in *R v Town Planning Board, ex p Kwan Kong Co Ltd* (see page 17 above), Waung J, and in the *Eekon Enterprises* case (see page 25 above), Judge Kwan refused to follow the *Golder* decision and to interpret art 10 of the Bill of Rights as conferring a right of access to court.

RJR MacDonald Inc v Attorney General of Canada (1995), Judgment of the Supreme Court of Canada, 21 September 1995

Under the Tobacco Products Control Act 1988, all advertising and promotion of tobacco products offered for sale in Canada was prohibited, except advertising of foreign tobacco products in imported publications. The legislation also required the display of unattributed health warnings on all tobacco products. The applicants were tobacco manufacturers. They argued that the whole of the Tobacco Products Control Act was inconsistent with the guarantee for the right to freedom of expression under the Canadian Charter. At first instance, the court held that the restrictions on tobacco advertising constituted a restriction on freedom of expression and that they could not be justified under s 1 of the Charter as, among other things, the evidence did not establish that a ban on tobacco advertising resulted in a decline in tobacco consumption: (1991) 82 DLR (4th) 449. The decision was partially reversed on appeal. On further appeal, the Supreme Court of Canada held, by a majority of 5 to 4, that the provisions prohibiting the advertising of tobacco products offered for sale in Canada (s 4); the restrictions on the use of tobacco trade mark on any article other than a tobacco product and the use and distribution of tobacco trade marks in advertising for products other than tobacco products (s 8); and the provisions imposing a mandatory requirement to display unattributed warnings on tobacco products (s 9) were inconsistent with the right of freedom of expression as set out in s 2(b) of the Canadian Charter and did not constitute a reasonable limit on that right as can be demonstrably justified. The rest of the provisions in the Act were severable and upheld.

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

Legislative Council (Electoral Provisions) Ordinance (Cap 381)

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

Lee Miu Ling and Law Pui v Attorney General (1995) CA, Civ App No 145 of 1995, 24 November 1995, Litton VP, Bokhary and Godfrey JJA[7]

The appellants, both of whom were entitled to vote in a geographical constituency but were not entitled to vote in a functional constituency, challenged the consistency of the system of functional constituencies provided for under the Legislative Council (Electoral Provisions) Ordinance (Cap 381). Under the Hong Kong electoral system in place for the 1995 elections the Legislative Council was to consist of 60 members: 20 to be elected by direct election from geographical constituencies, 30 by functional constituencies, and 10 by an Election Committee. All permanent residents of Hong Kong who are 18 or older were entitled to vote in one of the 20 geographical constituencies. There were also 29 functional constituencies (electing 30 members); a person entitled to vote in a geographical constituency was eligible to vote in one of the functional constituencies if (s)he belonged to one of the occupational groups defined as making up the various constituencies. Some 3.9 million persons were entitled to vote in geographical constituencies, but only 2.9 million of these were entitled to vote in the functional constituencies. The size of these functional constituencies varied dramatically, ranging from the smallest constituency of 39 persons to the largest constituency of 487,000 people.

The appellants claimed that a system of functional constituencies could only be defended if every person who had a vote in a geographical constituency also enjoyed a vote in a functional constituency. Their primary contentions were that the exclusion of about 1 million people from the right to vote in the functional constituencies could not be regarded as a reasonable restriction of the right of equal suffrage, especially in light of the fact that the exclusion was effectively based on the status of being employed, and this constituted a violation

[7] On 14 December 1995 the Court of Appeal refused to grant the appellants leave to appeal to the Privy Council against the judgment of the court. The appellants intended to petition the Judicial Committee for special leave to appeal.

of their rights under arts 21 and 22 of the Bill of Rights and/or arts 25 and 26 of the International Covenant on Civil and Political Rights. They also claimed that the large variation in the number of voters between the various functional constituencies meant that there was a violation of the right to equal voting power, which is an inherent aspect of the right of equal suffrage. Keith J dismissed their application on the ground that art VII(5) of the Letters Patent conferred a clear mandate to enact laws establishing functional constituencies and hence the electoral laws relating to functional constituencies could not be challenged for being inconsistent with art VII(5) of the Letters Patent: (1995) 5 HKPLR 181. The appellants appealed.

Held, dismissing the appeal:

1. The proper question before the court was not whether the provisions challenged had been repealed by the Bill of Rights, but rather whether they were unconstitutional under the Letters Patent, as these provisions had been enacted after the coming into effect of the Bill of Rights. The test of constitutionality was the same as the test of consistency with the Bill of Rights.

2. The challenge was necessarily directed at the whole of the legislation relating to functional constituencies. The court had no power to eliminate only those features of the functional constituencies which made them objectionable. If the law relating to the functional constituencies were unconstitutional, those members returned by the functional constituencies would not be Legislative Councillors; there would be no Legislative Council, and there would be no Legislative Council to enact the laws necessary to form a Legislative Council as required by the constitution.

3. A departure from identical treatment would not constitute discrimination if the departure can be justified by showing that (a) sensible and fair-minded people would recognize a genuine need for some difference of treatment; (b) the difference embodied in the particular departure selected to meet that need is itself rational; and (c) such departure is proportionate to such need. *R v Man Wai-keung (No 2)* (1992) 2 HKPLR 164, [1992] 2 HKCLR 207, followed.

4. (Bokhary JA not deciding) The appellants, not being voters in any functional constituency, had no locus standi to challenge disparity in the voting power in those functional constituencies.

5. Some variation in size in each functional constituency is necessary and inevitable. The size will depend on the way in which each functional constituency is drawn up. This is something which sensible and fair-minded people could legitimate differ. The proper test is therefore whether sensible and fair-minded people would condemn the existing arrangement of functional constituencies as irrational and disproportionate. They would not, and therefore the complaint relating to disparity in voting power failed on its merits.

6. Article VII(3) of the Letters Patent confers, on persons of a particular description, an entitlement to vote which is in addition to a vote in respect of a geographical constituency. The law establishing functional constituencies fell within the parameters of art VII(3) and could not therefore be unconstitutional.

7. (per Litton VP) What the appellants were in fact seeking to impeach was the Governor's act in assenting to the Legislative Council (Amendment) Ordinance 1994 which introduced the 29 functional constituencies. Therefore, the only proper proceedings to be adopted was an application for judicial review.

Gladys Li QC & Nigel Kat (Robertson, Double & Lee) for the plaintiffs/appellants; Geoffrey Ma QC & Paul Shieh (Attorney General's Chambers) for the defendant/respondent.

Editorial comment

We commented in the previous issue of the *Bulletin* that the United Kingdom and Hong Kong governments have acted in clear breach of obligations under art 25 of the ICCPR by instituting the system of functional constituencies that presently exists. This view has been confirmed by the recent statement by the Human Rights Committee following its review of the report under the ICCPR in respect of Hong Kong (*Concluding observations*, paras 19 and 25, reproduced in Appendix E). Failing to provide a domestic remedy for this breach is a further violation of the Covenant.

The Court of Appeal, in affirming the decision of Keith J, has reached a result that is one clearly intended by those who drafted what is now art VII(3) of the Letters Patent, namely to immunise the system of functional constituencies from challenge under the Bill of Rights Ordinance and Letters Patent. As Godfrey JA put it, "But the source of that grievance, whether justified or not, is art VII(3) of the Letters Patent". However, there are a number of matter in the court's judgment worthy of comment.

It is, for example, curious that the only reference made to the jurisprudence of the Human Rights Committee under the Covenant is to a case under art 26 involving discrimination in social security benefits in the Netherlands. No member of the court makes reference to the *Concluding observations* of the Human Rights Committee on the very point in issue, although these had been reported in the press and were available at that time. Those observations (and the deliberations of the Committee relating to its pending general comment on art 25 of the ICCPR) make it clear, that but for the UK's reservation in respect of the electoral system, the system of functional consistencies is a clear violation of the Covenant. The High Court has held, and the Human Rights Committee agrees, that once the Legislative Council is fully elected (by whatever means), the reservation falls away and art 25 applies in its full amplitude in relation to the legislature. Had the court given due weight to the Committee's views, then it is hard to see how they could have concluded that

the differences between the different functional constituencies were not discriminatory, as did Bokhary JA. The difficulty here is that the system itself violates the fundamental equality guarantees of the Covenant and seeking to identify reasonable distinctions within that framework to argue that *these* are consistent with art 25 appears to be a largely futile and misguided exercise.

The court found the answer to the challenge in art VII(3) of the Letters Patent which, as a specific provision relating to functional constituencies, prevailed over the more general provisions of art VII(5). As a result, if the electoral law was authorised by art VII(3), it was constitutional. It is curious that the court was so ready to accept, in a categorical manner, that these two provisions were irreconcilable, and that it did not even attempt to consider the possibility of reconciling them. By failing to do so, the court appears not to have addressed important dimensions of the appellants' argument. The appellants had argued that the two provisions should be read together and that any system of functional constituencies under art VII(3) had to be consistent with art VII(5). The consequence of this was that every voter should have two votes, one in a functional constituency and one in a geographical constituency. The court rejected this argument, although it is not clear whether they accepted that there were *some* limits to the manner in which functional constituencies could be composed (all blue-eyed men, for example?). No reference was made to the presumption of statutory interpretation that national legislation -- which the Letters Patent are -- should be read consistently with international obligations so far as that is possible.

While the court explicitly reaffirmed that the constitutional standard of review is essentially the same as that under the Bill of Rights Ordinance, it apparently took a different tack in relation to the consequences of a finding of unconstitutionality in respect of legislation. The result of s 3(2) of the Bill of Rights Ordinance is that only those parts of the legislation which are inconsistent with the Bill of Rights are repealed; the courts have been prepared to excise words, phrases and sections where to do so would remove the offending provisions while leaving intact an intelligible and workable remainder. Yet Bokhary JA comments in relation to the plaintiff's contention that "only seek the elimination of those features of the functional constituencies which make them objectionable" (5 HKPLR at 186):

> That may be what the plaintiffs desire. But we cannot re-write the legislation under challenge. Our task is to decide whether such legislation is constitutional or unconstitutional. If we decide that it is constitutional, we uphold it. But if we decide that it is unconstitutional, then, simply by saying so, we strike it down.
>
> Since we cannot re-write the legislation which the plaintiffs challenge, their challenge is necessarily to the whole of the legislation relating to functional constituencies. No half-way course is open.. . .

As a matter of principle, there appears to be no reason why a similar approach to severance should not be taken when a constitutional challenge is

involved as when a Bill of Rights challenge is involved. Even though it is not expressly stated in the Letters Patent, it must be implicit that the legislation in question would be invalid only to the extent of the inconsistency with the constitutional provision. If the offending portions can be severed leaving a workable scheme intact, then that should be done. This is the practice followed in jurisdictions such as Australia and Canada. In the present case Bokhary JA may have considered that, had it been necessary to consider the issue, it would have been impossible to sever any offending provisions without bringing the whole electoral legislative scheme down.

A final point may also be made about standing. A majority of the court held that the applicants, not being voters in any functional constituency, did not have standing to challenge the disparity in the size of the different functional constituencies. While the traditional rules of standing serve important functions, perhaps it is time for the courts to consider whether the normal rules of standing should be modified in cases involving constitutional challenges to legislation.

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

Re Association of Expatriate Civil Servants of Hong Kong and others (1995) 5 HKPLR [HCt, MP No 3037 of 1994, 31 October 1995, Keith J][8]

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

[8] The applicants have lodged an appeal against the decision of Keith J.

On 30 July 1993, as a result of a threat of court action by the overseas officers, the Government decided that overseas officers on agreement terms who were permanent residents of Hong Kong would be allowed to transfer to local conditions of service ("the original transfer scheme"). The original transfer scheme allayed the worry of overseas officers who were also permanent residents of their being replaced by a qualified and suitable local candidate in future. However, the scheme met with a hostile reception from the associations representing local officers, as well as members of the responsible Legislative Council Panel. A private member's bill was passed to freeze the scheme.

After many months of discussions, the Government revised the original transfer scheme. Under this revised scheme, an overseas officer on agreement terms was no longer permitted to apply for transfer to local conditions of service. Instead, he was permitted to apply for transfer to terms modelled on local conditions of service. Moreover, if there was a qualified and suitable local officer available to replace him, and if a local officer was recommended for promotion, the overseas officer would be offered appointment on terms modelled on local conditions of service at one rank below his existing rank, though he would retain his existing salary. Besides, transferring officers would not be allowed to transfer to the permanent establishment for the duration of their agreements modelled on local conditions of service ('the modified transfer scheme"). In the meantime, the Government also proposed that all ranks other than basic ranks would be opened up for competition on the expiry of the agreements (whether overseas or local). This applied to all officers on agreement terms whose agreement expired on or after 1 September 1995 ("the opening-up scheme"). Under this scheme, the incumbent officer and officers one rank below would compete for the post, and the most meritorious officer would be appointed.

Finally, as the Basic Law has required a number of senior posts to be held by Chinese citizens who are permanent residents of the Hong Kong SAR with no right of abode in any foreign country, the Government decided to limit the number of overseas officers who would be promoted to certain senior posts in the Administrative Service. The Attorney General introduced a Succession Posts Scheme accelerating the promotion of local officers in the Attorney General's Chambers to the senior directorate. The applicants challenged various features of the original transfer scheme, the modified transfer scheme, and the opening-up scheme. They also challenged the two decisions relating to the Succession Posts Scheme. On 24 June 1994, the Government published proposals for a uniform set of conditions of service for all civil servants. Two of the proposals were also challenged in these proceedings.

Held (upholding 5 out of 23 challenges):[9]

Delay

1. In the usual run of applications for judicial review, once leave has been granted, the court can only take into account undue delay on the part of the applicants if the delay has caused hardship, prejudice or detriment to good administration, and only to refuse to grant the applicants any relief relating to those decisions which leave to apply for judicial review has been granted. *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738 considered.

2. The challenges to some of the decisions involved were made more than three months after the dates when grounds for the application first arose. Although leave had been granted, the number of decisions being challenged, the relationship between each of them and the volume of material presented to the court at the leave stage made it impossible for the court to reach an informed and concluded view as to whether there was good reason for extending the period to apply for judicial review. In these circumstances, the court is free to revisit the question of delay at the substantive hearing. As the various decisions challenged were all made in the context of a continuing process by the Government to revise its employment policies, and as it would be premature for the applicants to lodge a challenge to particular features of the various schemes in their embryonic form until they were aware of the measures in their final form, the applicants has made out a sufficient explanation for the delay.

Standing

3. The fact that leave has been granted does not prevent the court from revisiting the issue of standing in the light of all the evidence at the substantive hearing.

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[9] The court found the following 5 decisions inconsistent with art 21(c) of the Bill of Rights:

(1) The decision that transferring officers would only be eligible to receive school passages and overseas education allowances for their dependent children attending full-time education in the United Kingdom and not in the officers' country of origin (holding no 18);

(2) The decision prohibiting overseas officers on agreement terms from transferring to the permanent establishment under the Original and Modified Transfer Scheme (holding no 19);

(3) The decision not to offer to transferring officers agreements that would last beyond 30 June 1997 (holding no 27);

(4) The decision prohibiting transferring officers from applying to transfer to the permanent establishment under the Opening-up Scheme (holding no 28);

(5) The decision requiring all transferring officers to undergo Chinese language training when proficiency in the Chinese language has not been shown to be related to job performance (holding no 30).

4. On an application for judicial review by a representative body on behalf of its members, the body has standing if it is possible that at least one of its members is or will be affected by the decisions challenged and wishes the body to challenge the decisions on his behalf. It is not necessary for the body to identify a member who is or will actually be affected by those decisions. In such circumstances, it is for the respondent to demonstrate that the challenges are academic by showing that, despite the terms of the decisions concerned and the breadth of their application, no member of the representative body could be affected by it.

Right of access to public service

5. The right of access to public service relates not only to initial entry to the Civil Service, but also includes access to the terms and conditions of service enjoyed by other officers as well as access to opportunities for promotion enjoyed by other officers.

6. Article 21(c) of the Bill of Rights guarantees only general terms of equality. This means that (a) identical treatment for overseas and local officers is not required; (b) equality of treatment for all overseas and local officers is not required. If overseas officers are treated equally with all but a few local officers, the fact that they have not been treated equally with these few local officers does not necessarily mean that their right of access to the Civil Service on general terms of equality has been restricted.

7. The right of access to public service is to be enjoyed without any of the distinctions prohibited by art 1 of the Bill of Rights and without unreasonable restrictions. It is for the Government to determine what restrictions are reasonably necessary, and the court cannot substitute its own view for that of the Government if the reasonableness of a restriction is within the range of reasonable views which the Government can form.

8. A departure from the rights protected by art 21(c) of the Bill of Rights does not amount to an infringement of that right if the departure can be justified. It is for the Government to demonstrate that (a) the exercise of the rights protected by the Bill of Rights would have been irreconcilable with the achievement of an important objective on the part of the Government, and (b) that objective could not have been achieved by means which did not involve a departure from constitutionally entrenched rights. The burden of justifying any departure from the rights protected by the Bill of Rights is on the Government, and the justification has to be cogent and persuasive. While the interests of the individual have to be balanced against the interests of society generally, there is a bias towards the interests of the individual. However, in attempting to strike the right balance between the individual and society as a whole, rigid and inflexible standards should not be imposed on the Government's attempts to resolve the problems with which it is faced. *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127; *Attorney General of Hong Kong v Lee Kwong-kut* (1993) 3 HKPLR 72, [1993] AC 95 followed.

9. Article 21(c) requires only general terms of equality of treatment. Any difference in treatment must be as limited as possible; it must not merely be rational, but rationally connected to the need which justifies it; and it must be no more extensive than is necessary to achieve the objective which made some difference in treatment necessary.

Permanent residents

10. The term "permanent resident" in article 21(c) of the Bill of Rights refers to a person who has a right of abode in Hong Kong. The term was selected deliberately to replace the term "citizen" in art 25 of the ICCPR.

11. The ICCPR itself imported nationality into the rights protected by art 25 by granting those rights to "citizens". Since it is permissible to include racial or nationality criteria in order to determine who is a citizen of a country for the purpose of art 25 of the ICCPR, it is equally permissible to include them in the criteria for the corresponding exercise for determining who is a permanent resident of Hong Kong within the meaning of art 21 of the Bill of Rights.

12. In construing a legislative provision, no weight could be attached to what is purported to be an authoritative statement of legislative intent if it is not possible to ascertain the meaning of that statement. While it was permissible to consider the statement made by the Chief Secretary when moving the Bill of Rights Ordinance, the statement was ambiguous as to the intention of the legislature and did not elucidate the matter.

13. The common law meaning of "permanent resident" should not be adopted for art 21(c) of the Bill of Rights because (a) the common law test does not converge with the five classes of persons defined in art 24 of the Basic Law who will be the permanent residents of the Hong Kong SAR; (b) the common law test is inconsistent with the use of the phrase "right of abode" elsewhere in the Bill of Rights; and (c) the common law test, which looks to future intention, is difficult to operate in practice.

14. It is also inappropriate to adopt the definition of permanent resident in art 24 of the Basic Law as the meaning of the words "permanent resident" in art 21 of the Bill of Rights. Although it is desirable for the laws of Hong Kong to converge with the laws of the SAR when the transfer of sovereignty occurs, that does not mean that convergence should take place before the transfer of sovereignty.

The Original and Modified Transfer Schemes

Deadline for transfer

15. The complaints made against the deadlines for applying to transfer to local terms of service were unfounded. A restriction on the right to transfer of officers who had not yet acquired a right of abode in Hong Kong could not have been an infringement of art 21(c) of the Bill of Rights, because those officers would not have acquired any rights under art 21 until they had acquired the right of abode in Hong Kong.

Untaken leave

16. The disparity in treatment between transferring officers and local officers on the restrictions on untaken casual and vacation leave was minimal, especially when transferring officers were not required to give up their accrued rights: they were merely being required to exercise their accrued rights in a way in which they were already required to exercise them.

Outward passage back to Hong Kong

17. Civil Service Regulation 1320(2), which entitles an overseas officer on agreement terms "returning to duty" on the expiry of his leave to an outward passage back to Hong Kong, applies to transferring officers as they are returning to duty, albeit to duty on different conditions of service. However, since local officers on agreement terms did not enjoy the right to an outward passage, the loss of that right by transferring officers merely equalised their position with their local counterparts and could not be an infringement of art 21(c) of the Bill of Rights.

School passages and overseas education allowances

18. The decision that transferring officers would only continue to receive those benefits for their dependent children attending full-time education in the United Kingdom violated art 21(c) of the Bill of Rights because: (a) it indirectly discriminated against local officers (including transferring officers) whose national or social origins were not in the United Kingdom, as fewer of them would derive any benefit from that right; and (b) the rationale of strengthening the colonial ties between the United Kingdom and Hong Kong by exposing their children to life in the United Kingdom could hardly be appropriate in the twilight of British sovereignty over Hong Kong.

Transfer to the permanent establishment

19. The decision prohibiting overseas officers on agreement terms from transferring to the permanent establishment for the duration of their agreements modelled on local conditions of service was not irrational. As an interim measure pending the introduction of a uniform set of conditions of service for all officers, it was open to the Government to conclude that the Chinese Government should be consulted and that transferring officers should not be allowed to bypass the proposed requirements in the uniform set of conditions for transfer to the permanent establishment pending discussions with the Chinese Government. However, the decision was discriminatory and inconsistent with art 21(c) of the Bill of Rights as those objectives could be equally achieved by refusing, for the time being, local officers on agreement terms from transferring to the permanent establishment.

Proficiency in the Chinese language

20. The decision to take into account the ability of the officer seeking a transfer to communicate in Cantonese if there was any post in his rank which might become available and in which communication in Chinese would be required, was not irrational. This was so because (a) exceptions for specialist skills were provided for; (b) it was open to the Secretary for Civil Service reasonably to conclude that an officer should be able to stand in for his colleagues from time to time in other posts in the same rank for which a proficiency in Chinese was required; (c) allocation of resources to the provision of courses in Cantonese for officers who wished to transfer to local conditions of service was a matter of political judgment and not a matter for the court; and (d) proficiency in English, though an official language, was no substitute for proficiency in Chinese if proficiency in Chinese was required to enable an officer to carry out his duties or to stand in for his colleagues.

21. Nor was the decision inconsistent with art 21(c) of the Bill of Rights. It was a justifiable assumption that most of the local officers on agreements terms are already proficient in Chinese. The difference in treatment between overseas and local officers on agreement terms, if any, was entirely rational, and rationally connected to and proportionate to the need which justified it, bearing in mind that proficiency in Chinese was only a factor to be taken into account in appropriate cases, and that a language requirement was rationally connected to the performance of the job in hand in view of the need for officers in the same rank to deputise for their colleagues when necessary.

Eligibility for transfer for those officers whose agreements had expired by 30 July 1993

22. The decision that overseas officers whose agreements had expired by 30 July 1993 without being renewed would not be eligible to apply for transfer to local conditions of service, even if they continued to be paid after that date, was lawful. "Transfer" connotes the idea of an officer still serving in the Civil Service. Officers whose agreements expired on a particular date could not properly be regarded as continuing to serve in the Civil Service after that date simply because they continued to receive leave payments.

Selection exercise and demotion under the modified transfer scheme

23. The decision requiring transferring officers to be demoted by one rank if there was a qualified and suitable local replacement for the officer constituted a prima facie infringement of art 21(c) of the Bill of Rights, as the restriction was based on their national or social origins which, as a result of Civil Service Regulation 115(1), had caused them to be classified as overseas officers in the first place. However, the difference in treatment was proportionate to the need which justified it, in view of the limited scope and duration of the restriction and that the transferring officers were not financially worse off. In the context of the need for the Government to maintain good industrial relations with local officers, the form which the difference in treatment took was also rational.

Restriction on promotion before transfer

24. The decision excluding transferring officers from being eligible for promotion prior to their transfer if their current agreements had less than 12 months to run was lawful, as it was obvious that officers should not be promoted if they were only going to spend a short time at the new rank. Besides, the maintenance of good industrial relations with local officers warranted taking into account what they might have seen as the cynical manipulation of the modified transfer scheme.

Restriction on promotion after transfer

25. The decision excluding transferring officers from being eligible for promotion during the terms of their new agreements was a proportionate response to the need which justified it, as it was only a short term measure, and was rational in the context of the Government's need to maintain good industrial relations with local officers.

Reduction in the length of the new agreements

26. The decision that any extensions granted to a transferring officer's previous agreement for the completion of naturalisation procedures and/or as a result of the legislative freeze on the original transfer scheme would be deducted from the length of the new agreement was lawful, for otherwise the transferring officer would have received the windfall of the period of the extension, during which period the transferring officers continued to enjoy the fringe benefits which local officers did not enjoy.

The limit on the length of the new agreements

27. The decision not to offer to transferring officers agreements that would last beyond 30 June 1997 constituted an infringement of art 21(c), as the restriction was attributable to the national or social origins of transferring officers which had caused them to be classified as overseas officers in the first place. It satisfied the test of rationality, but the objectives which the Government wished to achieve could have been achieved without departing from art 21(c), namely, by applying the same cap to the length of any new agreement offered to local officers.

The Opening-up Scheme

28. The prohibition on transferring officers from applying to transfer to the permanent establishment in the context of the Opening-up Scheme was unlawful for the same reasons given in the context of the original and modified transfer schemes. Besides, the difference in treatment between local officers on agreement terms and transferring officers on agreement terms had a much more far-reaching impact that it enabled only local officers to avoid the Opening-up Scheme by transferring to the permanent establishment.

29. The requirement of proficiency in Chinese in the context of the Opening-up Scheme was lawful for the same reasons given in the context of the original and modified transfer schemes.

30. The decision that all transferring officers be required to undergo Chinese language training was unlawful because no rational connection had been shown that this requirement would improve effectiveness and efficiency of job performance if the discharge of their own duties and those duties of other officers in the same rank whom they might be required to deputise did not require the need to speak colloquial Chinese. There was no evidence that the requirement to undergo Chinese language training was confined to officers who have to speak colloquial Chinese to perform their duties.

The Principal Official Posts and the Succession Posts Scheme

31. None of the applicants had been able to identify a member in the Administrative Service who would be adversely affected by the decision to limit the number of overseas officers at a certain rank below that of Secretary and hence none of them had standing to challenge this aspect of the decision.

32. The decision to implement the Succession Posts Scheme in the Attorney General's Chambers was lawful. It was rational in that sensible manpower planning required the creation of a pool of talent from which senior officers would be drawn in the future. Given that only few, if any, of the officers currently in line for the Principal Official posts were Chinese citizens, it was necessary to include in the pool officers whose eligibility to be Principal Officials was only potential. In addition, it was also rational to exclude overseas officers because only local officers, who are overwhelmingly likely to be ethnic Chinese, had the real potential to be eligible for the Principal Official posts. Therefore, the Succession Posts Scheme was not inconsistent with art 21(c) of the Bill of Rights.

The Uniform Terms Scheme

33. Mere proposals should not be susceptible to judicial review - even if the proposals are likely to be put into effect because (a) there is always the possibility that they might not be put into effect and hence the proceedings would have served no useful purpose; and (b) no one has the standing to challenge mere proposals as no one is affected by them until they are implemented. Even if it can be said that a "decision" is not a necessary prerequisite for an application for judicial review, there must have been a concluded stance on whatever it is sought to challenge. *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1994] 2 WLR 409 considered.

34. The Government's proposals for a uniform set of conditions of service were provisional and a further consultation exercise was to take place. Accordingly, these proposals were not amenable to judicial review, and it would be wrong for the court to give an advisory opinion merely because the parties wished the court to do so.

P Dykes (Boase & Cohen), for the applicants; A Huggins QC and J Fok (Wilkinson & Grist), for the respondents.

Editorial comment

A positive aspect of this important judgment is its clear exposition of the law on equality and non-discrimination. The court re-affirms the principle that any departure from identical treatment must pursue a legitimate objective, must be rational in itself, and must be proportionate to the needs that justify it. In the context of the right of access to civil service, the court states, in our view correctly, that the right of access to civil service includes not only the initial entry but also promotion opportunities. We also welcome the court's liberal view on standing, namely that in a representative action, it is not necessary to identify a member who is actually affected by the decisions challenged, but that it suffices if it is likely that at least one of the members is likely to be affected by the decisions challenged and is willing to take the action.

On the substantive issues, the case involved highly controversial issues underlying long-term frustration and hostility towards the distinction between local and expatriate terms of employment, as well as highly emotive and diametrically opposed perceptions and expectations about localization on all sides.

Views will no doubt differ as to the judge's conclusions on the substantive issues, a fuller analysis of which has to be undertaken elsewhere. However, the passage in the judgment which has given rise to most public comments was that which dealt with the justifiability of the Modified Transfer Scheme. Referring to the decisions taken by the Government, Keith J commented (at pp 20, 87):

> Its task was an unenviable one. It had to steer a course between (a) the retention of a localisation policy which the Government had always deemed to be necessary for the advancement of the career prospects of local officers, and on which the maintenance of good industrial relations with local officers depended, and (b) the need to remain within the law and to avoid perpetuating what was said to be unfavourable treatment for overseas officers which the BOR was alleged to outlaw. It is no exaggeration to say that the Government was caught between the devil and the deep blue sea. Something akin to the judgment of Solomon was called for.
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> . . .
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> The rationality of the difference in treatment can, I think, only be justified by reference to the need which is said to justify it. The particular form which the difference in treatment took cannot be rationalised outside that context. But, not without considerable hesitation, I have reached the view that, within the context of the need for the Government to maintain good industrial relations with local officers, the form which the difference in treatment took was rational. The Government's objective could not have been achieved otherwise. It must be unique for a difference in treatment on grounds of national or social origins, which is not capable of being justified on its merits, to be nevertheless capable of being justified

> on the basis that it is a rational response to pressure from a particularly vociferous and powerful pressure group. But the dilemma which the Government faced after the legislative freeze on the original transfer scheme was simply not capable of being resolved without either an infringement of art 21(c) or a significant deterioration in the morale of local officers as a result of the shameless breach of trust which they believed the original transfer scheme amounted to. The Government had to decide between the lesser of these two evils. That was a matter for mature political judgement. I do not say that the Courts are not equipped to review such judgments, but I cannot characterise as irrational the Government's decision as to which of the two evils should be avoided.

As the court rightly stated, the standard of review required under the international case law in determining whether a decision is discriminatory is whether the difference in treatment is based on objective and rational grounds and whether it is a proportionate means to achieve the legitimate objective. It is of interest that, by invoking something similar to the doctrine of margin of appreciation, the court apparently turns the test into a less stringent one of irrationality, at least when it comes to matters involving "political judgment".

These passages also give rise to the question when the views and opposition of others will provide a sufficient justification for a prima facie infringement of a fundamental human rights and how intense the opposition has to be, as there must be opposition to almost any government's policy decision. While such assessment must be made on a case by case basis, it cannot be assumed that the desire to achieve good industrial relations will necessarily justify restrictions on fundamental rights.

Another issue which may cause some concern is that in two of the decisions which the court found to be discriminatory, the court suggested that there would not be any discrimination if the restrictions imposed on expatriate transferring officers were to be imposed on local transferring officers as well (applying the same restrictions to local transferring officers on transfer to permanent establishment and the same cap to the length of new agreements offered to local officers). While this is legally permissible, it would be a retrograde step in human rights protection if it becomes a policy that equality is to be achieved by downgrading everyone.

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

See *Lee Miu Ling and Law Pui v Attorney General* (page 44 above) and *Re Association of Expatriate Civil Servants of Hong Kong and others* (page 48 above). See also *R v Leung Tak-choi*, at page 11 above.

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APPENDIX A

STATEMENT OF THE LEGAL SUB-GROUP OF THE PRELIMINARY WORKING COMMITTEE CONCERNING THE BILL OF RIGHTS ORDINANCE (PRESS RELEASE)

Preliminary Working Committee Statement on the Bill of Rights*

At the 17th Meeting of the Legal Sub-Group of the Preliminary Working Committee (of the People's Republic of China) held on 15-17 October 1995, the Legal Sub-Group put forward the following preliminary views on the Hong Kong Bill of Rights Ordinance:

The members reiterated that protection of the rights and freedoms of Hong Kong residents is an important component of the basic policy of the Government of the People's Republic of China towards Hong Kong. This basic policy has been written into the Sino-British Joint Declaration and has been incorporated into the Basic Law of the Hong Kong Special Administrative Region. However, the British Government decided to ignore repeated reiterations by the Government of the People's Republic of China of its basic principles and chose to enact the Hong Kong Bill of Rights Ordinance which has an adverse effect on the implementation of the Basic Law. Members took the view that section 2(3) of the Bill of Rights Ordinance on the principles and purposes of the Bill of Rights, section 3 on the effect of pre-existing law and section 4 on interpretation of subsequent legislation are inconsistent with articles 8, 11 and 39 of the Basic Law. Accordingly, members recommended that sections 2(3), 3 and 4 of the Bill of Rights Ordinance not be adopted as the laws of the Hong Kong Special Administrative Region. As to the other problems of the Bill of Rights Ordinance, members recommended that they be dealt with in future by the Government of the Hong Kong Special Administrative Region.

The British/Hong Kong Government, by introducing, without consulting the Government of the People's Republic of China, a series of amendments to the pre-existing laws of Hong Kong to bring them in line with the Hong Kong Bill of Rights Ordinance, has violated the principle under the Joint Declaration and the Basic Law that the laws previously in force in Hong Kong shall remain basically unchanged. Some of these major amendments will weaken the administration of Hong Kong and are not conducive to the maintenance of stability of Hong Kong. These amendments include the Societies (Amendment) Ordinance (Ordinance

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* 17 October 1995: This translation from the original Chinese Press Release was prepared by Johannes Chan.

No 75 of 1992), Television (Amendment) Ordinance 1993 (Ordinance No 22 of 1993), Amendments to the Telecommunications Ordinance 1993 (Ordinance No 22 of 1993), Amendments to the Broadcasting Authority Ordinance 1993 (Ordinance No 22 of 1993), Public Order (Amendment) Ordinance 1995 (Ordinance No 77 of 1995). as well as LN No 251-255 of 1995 amending the subsidiary legislation made under the Emergency Regulations Ordinance. Members recommended to the National People's Congress Standing Committee not to adopt as part of the laws of the Hong Kong Special Administrative Region these major amendments. In order to avoid any legal vacuum, members further recommended the adoption of the pre-amended version of these legislation as the laws of the Hong Kong Special Administrative Region."

APPENDIX B

STATEMENT BY THE CHIEF JUSTICE, SIR T L YANG ON THE HONG KONG BILL OF RIGHTS ORDINANCE*

Statement on the Hong Kong Bill of Rights Ordinance (Cap 383) by the Hong Kong Chief Justice, Sir Ti Liang Yang

The following is issued on behalf of the Chief Justice, Sir Ti Liang Yang:

"I have outside of court expressed some personal views on the Bill of Rights Ordinance. I repeat those views here to inform the general public of what I have said in private.

2. I have expressed the view that s 3(2) of the Ordinance does two things which cause concern:

(1) It gives the judicial organ legislative power.

(2) It in effect raises the status of the Ordinance above the ordinary ordinances so that in reality the Ordinance occupies a position between the Basic Law (as from 1 July, 1997) and the ordinary statutes.

The New Zealand model may well be a more preferable solution.

In other words, s 3(2) raises a number of concerns from a jurisprudential point of view:

(1) The power to repeal is a legislative function and not a judicial function. Section 3(2) in effect gives the courts a legislative function though it does not specifically say so. A practical difficulty is that Magistrate A and Magistrate B may hold different views on the same issue in different cases. The resulting chaos need not be specified.

(2) The true effect of S 3(2) is to raise the Ordinance above Hong Kong's ordinary laws in spite of the fact that the Ordinance may be repealed or amended like any statute (unlike the Canadian Charter of Rights, which is incorporated into the Canadian Constitution.) So instead of a 'two-tier' system (that is, the Basic Law and the ordinary laws) the Bill comes in between and creates a three tier system.

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* [17 November 1995]

3. The gist of the views which I expressed (purely as my own) can be outlined as follows:

(i) It is cause for concern that our Bill of Rights Ordinance does not preserve the demarcation between the Judiciary and the Legislature as clearly as does, for example, New Zealand's Bill of Rights Act which, as I understand it, requires their Executive to bring to their Legislature's attention any bill (that is, proposed legislation) which appears to be inconsistent with their Bill of Rights. Therefore New Zealand's system may be preferable to ours.

(ii) While the Bill of Rights Ordinance (unlike the Letters Patent now and the Basic Law in future) cannot entrench anything against future repeal by ordinary legislation, it might be thought to give the Bill of Rights some quality higher than that of ordinary legislation. That too is cause for concern.

4. There is an obvious difference between, on the one hand, views so expressed and, on the other hand, conclusions reached in an actual case after mature consideration having heard counsel and deliberated with other members of the court hearing an appeal. That difference is too obvious to require elaboration. It is equally obvious that I, like every other judge, would faithfully apply the law as he finds it. The Bill of Rights Ordinance is part of the fabric of the laws of Hong Kong and will be given effect to in the courts whenever the occasion arises in accordance with its provisions."

APPENDIX C

STATEMENT OF THE HONG KONG GOVERNMENT IN RESPONSE TO THE STATEMENT OF THE CHIEF JUSTICE ON THE HONG KONG BILL OF RIGHTS ORDINANCE*

"The Government issued the following statement on the Bill of Rights Ordinance today:

THE BILL OF RIGHTS ORDINANCE

The Government has carefully studied the Chief Justice's comments on the Bill of Rights Ordinance (BORO). It notes that the Chief Justice does not suggest that the BORO is inconsistent with the Joint Declaration or Basic Law. It welcomes the Chief Justice's acknowledgement that the BORO is part of the fabric of the laws of Hong Kong and his commitment that it will be given effect to in the courts. The Attorney General has been asked for his considered opinion on the specific points raised by the Chief Justice. His views are attached.

The Government would like to take this opportunity to re-state certain key points concerning the BORO.

Status of the Bill of Rights Ordinance

The BORO incorporates into the law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. It was drawn up with full regard to the Joint Declaration, the Basic Law and the experience of other jurisdictions that had or were contemplating such a law. It is a law to meet the specific circumstances of Hong Kong.

The Joint Declaration and the Basic Law both provide that the ICCPR as applied to Hong Kong shall remain in force. The Basic Law further provides, in Article 39, that the ICCPR shall be implemented through the laws of the Hong Kong Special Administrative Region). This is precisely what the BORO does -- it is a law implementing the provisions of the ICCPR as applied to Hong Kong. This is entirely consistent with Article 39 of the Basic Law.

The BORO has a status no different to that of any other Ordinances. Pre-existing legislation inconsistent with it is repealed to the extent of the

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* [23 November 1995]

inconsistency but this does not mean that the BORO comes in between other Ordinances and the Basic Law. There is nothing in the BORO or the Letters Patent which gives the BORO any status superior to that of other Ordinances. Like other Ordinances it will be subject to the Basic Law. What is entrenched by the Letters Patent now and by the Basic Law after 30 June 1997 is the ICCPR not the BORO.

Review of Laws

The BORO and the laws which have been amended in the light of it are fully consistent with the Joint Declaration and the Basic Law. Restoring laws which have been found to be inconsistent with the BORO and therefore with the ICCPR would bring these laws into conflict with Article 39 of the Basic Law. This provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force and that rights shall not be restricted in contravention of the Covenant.

By the same token, to leave laws untouched which were inconsistent with the BORO and therefore with the ICCPR would bring them into conflict with Article 39 of the Basic Law after 1997.

Since 1991, the Legislative Council has enacted 36 amending Ordinances or orders to bring existing legislation into line with the BORO. The issues involved have been approached with realism, and good sense balancing the protection of rights and freedoms with other needs of society such as to deal with serious crime. The amendments that have been made have not undermined the Government's authority or ability to govern. There has been no breakdown of law and order. Hong Kong people exercise their rights and freedoms in a responsible manner.

The Bill of Rights Ordinance and the Courts

Pre-existing legislation inconsistent with the provisions of the BORO is repealed, not by the courts, but by the BORO itself. In enacting the BORO, the Government and the Legislature determined that the courts should have the authority to decide how the BORO should be applied in specific cases. The courts have faithfully performed their role and implemented the BORO as enacted by the Legislature.

It is noted that challenges under the BORO have been primarily concerned with provisions of the criminal law relating to the principle that it is for the prosecution to prove the accused's guilt beyond reasonable doubt. Through decisions of the Court of Appeal and Privy Council, the principles applied to such provisions are now well established. In reaching these decisions, the courts have taken care to balance individual freedoms with the public interest.

The BORO enjoys widespread support within the community. It has made the rights protected by the ICCPR justiciable in the courts of Hong Kong. It is a vital component in the protection of civil liberties and enhances the rule of law in Hong Kong. There is absolutely no reason to tamper with the Ordinance.

Attachment

The specific points made by the Chief Justice, and our comment on them, are as follows:

> ***(1) "The power to repeal is a legislative function and not a judicial function. Section 3(2) in effect gives the courts a legislative function though it does not specifically say so. A practical difficulty is that Magistrate A and Magistrate B may hold different views on the same issue in different cases. The resulting chaos need not be specified."***

Comment: The role of the courts under s.3 is to decide whether or not challenged legislation is or is not inconsistent with the Ordinance. If a court decides that there is inconsistency, it will go on to declare that the relevant provision has been repealed *by s.3(2)* to the extent of the inconsistency. The repeal of inconsistent earlier provisions is effected not by a judge in the course of deciding a particular case, but rather by the legislature through s.3(2) of the Ordinance. This is made plain by Silke V.P. in *R v Sin Yau-ming* [1992] 1 HKCLR 127, 138 when he said this:

> "It needs to be emphasised that the only duty of this, or any other court, considering legislation is to decide whether that legislation is or is not inconsistent with the Hong Kong Bill. This, or any other court, does not repeal legislation. That is done by the Hong Kong Bill itself. This, or any other court, does not redraft legislation or for that matter make suggestions for the form of future legislation."

The court's function in applying s.3(2) is no different to the court's function in applying the common law principle upon which s.3(2) is based. That principle is that where two pieces of legislation are inconsistent, the later law repeals the earlier one to the extent of the inconsistency. An example of the application of this principle is *L v C* [1994] 2 HKLR 92 where the High Court ruled that the time limit for applying for financial relief under the Affiliation Proceedings Ordinance had been impliedly repealed by a subsequent Ordinance.

There are other contexts in which the court's function is to rule on the compatibility of different pieces of legislation. For example, there are numerous Hong Kong cases where a court has had to decide whether subsidiary legislation is inconsistent with the Ordinance under which it is made, and therefore invalid.

Regarding the alleged "practical difficulty" of conflicting decisions by magistrates on the same issue, this is (and has been in practice) easily resolved by the Crown appealing one of the decisions to a higher court in order to get an

authoritative ruling. Conflicting decisions can and do arise on non-BOR issues and are resolved in the same way. This is a feature of the existing legal system, continuation of which is guaranteed under the Joint Declaration and the Basic Law.

> *(2) "The true effect of s.3(2) is to raise the Ordinance above Hong Kong's ordinary laws in spite of the fact that the Ordinance may be repealed or amended like any statute (unlike the Canadian Charter of Rights, which is incorporated into the Canadian Constitution). So instead of a "two-tier" system (that is, the Basic Law and the ordinary laws) the Bill comes in between and creates a three tier system."*

Comment: The true legal effect of s.3(2) is that inconsistent pre-existing legislation is repealed to the extent of the inconsistency. However, this does not mean that the BORO comes in between other Ordinances and the Basic Law. There is nothing in the BORO or the Letters Patent which gives the BORO any status superior to that of other Ordinances. The position will be the same after 30 June 1997 when the Basic Law will replace the Letters Patent as Hong Kong's constitutional instrument. Then, as with all other Ordinances, the BORO will be subject to the Basic Law, rather than, as now, the Letters Patent.

> *(3) "It is cause for concern that our Bill of Rights Ordinance does not preserve the demarcation between the Judiciary and the Legislature as clearly as does, for example, New Zealand's Bill of Rights Act which, as I understand it, requires their Executive to bring to their Legislature's attention any bill (that is, proposed legislation) which appears to be inconsistent with their Bill of Rights. Therefore New Zealand's system may be preferable to ours."*

Comment: The New Zealand Bill of Rights Act 1990 requires the Attorney General to bring to the legislature's attention any provision of a bill that appears to be inconsistent with the Bill of Rights. This requirement as to *proposed* legislation needs to be understood in the context of the New Zealand system, under which there is no constitutional impediment to the enactment of legislation restricting human rights. In Hong Kong, however, Article VII(5) of the Letters Patent (which mirrors Article 39 of the Basic Law) prohibits the enactment of any law after commencement of the Bill of Rights Ordinance which is inconsistent with the ICCPR as applied to Hong Kong.

So far as *existing* legislation is concerned, the New Zealand Act prohibits a court from holding any enactment to be impliedly repealed by reason of inconsistency with the Bill of Rights. That provision represented a deliberate policy choice by the new Zealand legislature based on a range of local political and other factors. Similarly, the approach in s.3 of the Hong Kong Ordinance was a deliberate policy choice by the Hong Kong legislature, made in 1991 in the light of the particular circumstances of Hong Kong. In arriving at that choice, a number of different models were considered, including but not limited to the

New Zealand one. The New Zealand model is but one of several different Bill of Rights models operating throughout the world.

The repeal-by-reason-of-inconsistency approach in s.3 of the Hong Kong Ordinance was chosen to give the Ordinance a direct impact in relation to existing legislation. It is worth recalling in this respect that the Administration's original proposal for a two-year "freeze" period for existing laws, during which time suspect laws would be reviewed and amended, was rejected by the Legislative Council in favour of a one-year freeze for six key Ordinances only. The commonly held view at the time was that the protection of human rights afforded under the Bill of Rights should be made fully available as soon as possible and that the authority for deciding whether local laws are consistent with the Bill should be the Judiciary not the Administration or the Legislature.

> ***(4) "While the Bill of Rights Ordinance (unlike the Letters Patent now and the Basic Law in future) cannot entrench anything against future repeal by ordinary legislation, it might be thought to give the Bill of Rights some quality higher than that of ordinary legislation. That too is cause for concern."***

Comment: It is unclear what point is being made here. The BORO is a piece of ordinary legislation just like any other statute in Hong Kong. There is nothing in the BORO or the Letters Patent which gives the BORO any status superior to that of other Ordinances. It is not entrenched and has no overriding effect in relation to future legislation. What is entrenched, before 1997 by the Letters Patent and after 1997 by the Basic Law, is the ICCPR as applied to Hong Kong. The direction in s.4 of the BORO that all future legislation shall, if possible, be construed so as to be consistent with the ICCPR as applied to Hong Kong, merely reflects this position.

Attorney General's Chambers

November 1995

APPENDIX D

THE PAST, THE PRESENT AND THE FUTURE OF THE HONG KONG BILL OF RIGHTS ORDINANCE[1]

Benjamin Liu JA

A lot of people of Hong Kong, especially those who are pro-British, showed a lack of confidence in the future of Hong Kong during the Sino-British negotiation on the future of Hong Kong. In order to allay their fears, the then British Foreign Minister Sir Geoffrey Howe introduced into Hong Kong within the shortest possible time the Hong Kong Bill of Rights Ordinance so as to strengthen the promise of Hong Kong remaining unchanged for 50 years. The Bill of Rights[2]is not the law of the United Kingdom or other Commonwealth countries, nor is it to be generally implemented by other means. However, it became law and was generally enforced in Hong Kong in just about a year. The then Deputy Minister of Justice of Canada, Mr Justice Strayer, was invited to come to Hong Kong to assist with the drafting of the Basic Law. Mr Justice Strayer had assisted the Canadian Government in introducing their Bill of Rights [the Canadian Charter of Fundamental Rights and Freedoms 1982]. During the three months he was in Hong Kong, Mr Justice Strayer met with members of the Hong Kong judiciary. When I asked him whether the Bill of Rights would override the Basic Law, he did not give me a clear reply.

After the speedy enactment of the Bill of Rights in Hong Kong, it has been shown that the Bill of Rights has had a greatly adverse impact on criminal and civil litigation; its adverse impact has particularly been felt in criminal law. The Bill of Rights has also exerted fundamental impact on judicial reasoning, judicial process and law enforcement agencies in such a way that it indirectly weakens the effectiveness of law enforcement agencies in the maintenance of public order. As to the implementation of the Bill of Rights, Professor David Beatty of the University of Toronto had commented that the Canadian Charter was both ambiguous and too fexible ("Talking Heads and the Supremes -the Canadian Production of Constitutional Review" (1990), p 8) Those who are sceptical

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[1] [Eds] This is a translation from the Chinese version of the paper published in *Ming Pao* on 16 Nov 1995. This paper was distributed at a dinner reception for the Judges' Association of the People's Republic of China hosted by the Local Judges Association. Mr Justice Liu is the Chairman of the Local Judges Association. The translation was done by Johannes Chan.

[2] [Eds] The original is unclear and it is likely that this is a reference to the International Covenant on Civil and Political Rights or the International Bill of Rights.

always said that the greatest beneficiary of a Bill of Rights is lawyers and not illegal immigrants or criminals. Lord Goff of the Judicial Committee of the Privy Council in London, in his private discussion with Sir T L Yang on the Hong Kong Bill of Rights, also took the view that the Bill of Rights was inconsistent with the Basic Law.[3] Some academics have also said that the Bill of Rights had made little contribution to members of society, but it created difficulties for the law enforcement agencies in carrying out their duties. The Bill of Rights has also increased legal fees by creating unprecedented obstacles in legal proceedings. These are also the comments I have frequently heard in private discussions with many judges in Hong Kong.

As to the future, the amendment or repeal of the Bill of Rights and the reinstatement of previous laws in Hong Kong by the Preliminary Working Committee/ Preparatory Committee or the Hong Kong Special Administrative Region is not only a practical matter, but also a political question. Many people believe that human rights have been reasonably protected by the existing laws of Hong Kong, especially in view of the recently reinforced administrative law[4]and that Hong Kong was bound by international human rights treaties. The Basic Law has also implemented international human rights treaties in Hong Kong law (Art 8 of the Basic Law: the British Government has already extended the ICCPR to Hong Kong).[5] The decision of the Preliminary Working Committee/ Preparatory Committee or the Hong Kong Special Administrative Region will not bring any adverse effects to the laws of Hong Kong.

2 November 1995

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[3] [Eds] In reply to Mr Martin Lee, who asked Lord Goff to clarify this point, Lord Goff said that he had never expressed such a view.

[4] [Eds] The original is unclear. It is likely be a reference to the amendment to the Commission for Administrative Complaints Ordinance.

[5] [Eds] The original refers to art 8 of the Basic Law, but it may be a mistake for art 39 which provides that the ICCPR as applied to Hong Kong shall remain in force.

APPENDIX E

CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE ON THE FOURTH PERIODIC REPORT OF THE UNITED KINGDOM IN RESPECT OF HONG KONG SUBMITTED UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*

Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland (Hong Kong)

1. At its 1451st to 1453rd meetings, held on 19 and 20 October 1995, the Human Rights Committee considered the part of the fourth periodic report of the United Kingdom of Great Britain and Northern Ireland relating to Hong Kong (CCPR/C/95/Add.5 and HRI/CORE/1/Add.62), and adopted[1] the following the observations:

A. Introduction

2. The Committee welcomes the presence of a high level delegation which included several officials of the Hong Kong Government. It expresses its appreciation to the representatives of the State party for the high quality of the report, abundance of additional information and detailed and frank answers provided in response to the oral and written questions posed and comments made by the Committee during its consideration of the report. The Committee notes with satisfaction that such information enabled it to engage in a highly constructive dialogue with the State party.

3. The detailed information submitted by a wide range of non-governmental organizations has greatly assisted the Committee in its understanding of the human rights situation in Hong Kong.

B. Factors relating to reporting obligations under the Covenant

4. The Committee notes that the United Kingdom and the People's Republic of China have agreed in the Joint Declaration and Exchange of Memoranda of 19 December 1984 that the provisions of the Covenant as applied to

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* CCPR/C/79/Add.57 (3 November 1995)

[1] At its 1469th meeting (fifty-fifth session) held on 1 November 1995.

Hong Kong shall remain in force after 1 July 1997. In this connection, the Committee, at its 1453rd meeting on 20 October 1995, made clear its view on future reporting obligations in relation to Hong Kong in a statement made by the Chairperson, which is attached to the present document that, as the reporting obligations under article 40 of the Covenant will continue to apply, the Committee will be competent to receive and consider reports that must be submitted in relation to Hong Kong.

C. Positive aspects

5. The Committee welcomes the initiatives taken by the Government with a view to ensuring the full implementation of the Covenant in Hong Kong, in future as well as at present. In that regard, the Sino-British Joint Declaration on the question of Hong Kong appears to provide a sound legal basis for the continued protection of the rights as specified in the Covenant. The Committee welcomes the enactment of the Bill of Rights Ordinance in June 1991.

6. The Committee takes note with appreciation of the various ordinances that have been reviewed as to their conformity with the Bill of Rights and amended accordingly, and also appreciates the continuing process of reviewing and updating of relevant legislative provisions in that regard.

7. The Committee welcomes efforts being made by the authorities to disseminate information on human rights to members of the judiciary, civil servants, teachers and the public in general, including school-age children.

8. The Committee further welcomes the recent enactment of the Sexual Discrimination Ordinance and the Disability Discrimination Ordinance, the aims of which include the elimination of discrimination against women and disabled persons. It welcomes the oral information provided by the authorities that an Equal Opportunities Commission will be established in the first quarter of 1996 with power to recommend draft laws and draft amendments to these Ordinances.

9. The Committee welcomes the enactment of the Torture Ordinance, which gives domestic effect to part of article 7 of the Covenant.

D. Principal subjects of concern

10. The Committee notes that Section 7 of the Bill of Rights Ordinance provides that "the Ordinance binds only the Government and all public authorities, and any person acting on behalf of the Government or a public authority". The Committee emphasizes in this regard that under the Covenant a State party does not only have an obligation to protect individuals against violations by Government officials but also by private parties. It thus notes with deep concern the absence of legislation providing effective protection against violations of Covenant rights by non-governmental actors.

11. The Committee expresses concern over the investigative procedure in respect of alleged human rights violations by the police. It notes that the investigation of such complaints rests within the Police Force itself rather than being carried out in a manner that ensures its independence and credibility. In light of the high proportion of complaints against police officers which are found by the investigating police to be unsubstantiated, the Committee expresses concern about the credibility of the investigation process and takes the view that investigation into complaints of abuse of authority by members of the Police Force must be, and must appear to be, fair and independent and must therefore be entrusted to an independent mechanism. The Committee welcomes the changes made to strengthen the status and authority of the Independent Police Complaints Council but notes that these changes still leave investigations entirely in the hands of the police.

12. The Committee notes with concern that, while majority of the population is Chinese-speaking, official charge forms and charge sheets as well as court documents are in English only, though efforts are being made to make Chinese versions available.

13. The Committee expresses concern over the situation of women in Hong Kong, particularly the high level of violence and the absence of adequate punitive or remedial measures. It regrets that the Sexual Discrimination Ordinance is not yet in force and that it limits the damages awarded to women who are subject to sexual discrimination and does not give power to direct the reinstatement of women who have lost their jobs due to sexual discrimination. The Committee is also concerned that the Sexual Discrimination Ordinance has significant exemptions and that it is limited in its application to discrimination based on gender and marriage and does not prohibit discrimination on ground of age, family responsibility or sexual preference.

14. The Committee notes with concern that there is as yet no detailed regulations to cover emergencies and that under the Court of Final Appeal Ordinance, the jurisdiction of the Court will not extend to reviewing undefined "acts of state" by the executive. The Committee is concerned that vague terminology such as "acts of state" may be interpreted so as to impose undue restrictions on the jurisdiction of the Court, including the application of any emergency laws that may be enacted in the future.

15. The Committee also regrets that there is not yet detailed legislation to cover emergency and that the provision in article 18 of the Basic Law on that subject appears not to correspond with the provisions of article 4 of the Covenant.

16. The Committee expresses concern that the administration of legal aid in Hong Kong is refused in a large number of Bill of Rights cases that are directed against the Government or public officers.

17. While noting with satisfaction the efforts by the Government, in co-operation with the United Nations High Commissioner for Refugees, to care for the needs of the Vietnamese asylum-seekers, the Committee expresses concern that many Vietnamese asylum-seekers are subject to long-term detention and that many

are held under deplorable living conditions that raise serious questions under articles 9 and 10 of the Covenant. It is particularly alarmed about the situation of children living in camps who are deprived of enjoyment of rights under the Covenant in practice, given their parents' status as illegal immigrants. The Committee also expresses concern at the conditions under which deportations and removals of non-refugees of Vietnamese origin were carried out in practice.

18. With respect to article 17, the Committee takes note of the Law Reform Commission's review of the Telecommunication Ordinance and the Post Office Ordinance. The Committee notes with concern that these ordinances can be abused to intrude on the privacy of individuals and that their amendment is urgently required.

19. The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25 (b) and 26. It is also concerned that laws depriving convicted persons of their voting rights for periods of up to ten years may be a disproportionate restriction of the rights protected by article 25.

E. Suggestions and recommendations

20. The Committee recommends that efforts be accelerated to introduce, as soon as possible, Chinese version of official charge forms and charge sheets as well as court documents.

21. The Committee recommends that the State party adopt the proposal of the Independent Police Complaints Council to incorporate non-police members in the investigation of all complaints against the police.

22. The Committee recommends that the State party reconsiders its decision on the establishment and competence of a Human Rights Commission.

23. The Committee recommends that the deficiencies in the Sexual Discrimination Ordinance be overcome by appropriate amendments and that comprehensive anti-discrimination legislation aiming at eliminating all remaining discrimination prohibited under the Covenant be adopted.

24. The Committee urges the Government to take immediate steps to ensure that living conditions in Vietnamese Refugee detention centres be improved. Special attention should be devoted to the situation of children whose rights under

the Covenant should be protected. Refugee status of all detainees should be speedily determined with right of judicial review and legal aid. Deportation and removal of non-refugees of Vietnamese origin should be closely monitored to prevent abuse.

25. The Committee recommends that immediate steps be taken to ensure that the electoral system be put in conformity with articles 21, 22 and 25 of the Covenant.

f. Request for a report

26. The Committee requests the Government of the United Kingdom to submit a brief report, by 31 May 1996, on new developments with regard to the enjoyment of human rights in Hong Kong, pursuant to the recommendations contained in these Observations and in the attached Statement by the Chairperson, for consideration by the Committee at its 58th session to be held in Geneva from 21 October to 8 November 1996.

STATEMENT BY THE CHAIRPERSON ON BEHALF OF THE HUMAN RIGHTS COMMITTEE RELATING TO THE CONSIDERATION OF THE PART OF THE FOURTH PERIODIC REPORT OF THE UNITED KINGDOM RELATING TO HONG KONG[2]

The Human Rights Committee - dealing with cases of dismemberment of States parties to the International Covenant on Civil and Political Rights - has taken the view that human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered by the predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State.[3]

However, the existence and contents of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong make it unnecessary for the Committee to rely solely on the foregoing jurisprudence as far as Hong Kong is concerned. In this regards, the Committee points out that the parties to the Joint Declaration have agreed that all provisions of the Covenant as applied to Hong Kong shall remain in force after 1 July 1997. These provisions include reporting procedures under article 40. As the reporting requirements under article 40 of the International Covenant on Civil and Political Rights will continue to apply, the Human Rights Committee considers that it is competent to receive and review reports that must be submitted in relation to Hong Kong.

Accordingly, the Committee is ready to give effect to the intention of the parties to the Joint Declaration as far as Hong Kong is concerned, and to cooperate fully with the parties to the Joint Declaration to work out the necessary modalities to achieve these objectives.

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[2] Read out by the Chairman at the Committee's 1453rd meeting on 20 October 1995

[3] See documents CCPR/C/SR.1178/Add.1, CCPR/C/SR1200, CCPR/C/SR1201 and CCPR/C/SR.1202.

APPENDIX F

CONCLUDING OBSERVATIONS OF THE COMMITTEE AGAINST TORTURE ON THE INITIAL AND SECOND PERIODIC REPORTS OF THE UNITED KINGDOM SUBMITTED UNDER ARTICLE 19 OF THE CONVENTION AGAINST TORTURE*

Conclusions and recommendations of the Committee against Torture United Kingdom of Great Britain and Northern Ireland

1. The Committee considered the second periodic report of United Kingdom of Great Britain and Northern Ireland and Dependent Territories (CAT/C/25/Add.6) at its 234th and 235th meetings, held on 17 November 1995 (CAT/C/SR.234 and 235) and has adopted the following conclusions and recommendations:

A. Introduction

2. The Committee thanks the Government of United Kingdom of Great Britain and Northern Ireland for its comprehensive report, well-supported by appendixed material. The Committee also wishes to acknowledge the breadth of the United Kingdom representatives and the way in which they encouraged a full and open dialogue between themselves and the Committee.

B. Positive aspects

3. The Committee is pleased to acknowledge the following positive aspects:

(a) an in-country right of appeal for all refused asylum seekers;

(b) the use of tape recording for all interrogations by the police in England and Wales, many interrogations in Scotland, and for non-terrorist related interrogations in Northern Ireland;

(c) the introduction of Codes of Practice applied to the interrogations of detainees in relation to terrorist activities in Northern Ireland;

(d) the appointment of an Independent Commissioner for Holding (Detention) Centres for Northern Ireland;

(e) the appointment of an Independent Accusor of Military Complaints procedures in Northern Ireland;

(f) the renewal of the prison infrastructure throughout the United Kingdom;

(g) the noticeable reduction of the level of violence at detainees in detention centres of Northern Ireland;

(h) the creation of an Independent Complaints Council to deal with complaints against the police in Hong Kong;

(j) the appointment of a Prisons Ombudsman in 1994;

(k) the present practice of permitting detainees in Northern Ireland, in respect of terrorist-related offenses, to consult in private counsel is considered by the Committee as a shift in the right direction;

(l) the Committee notes that new Prison Rules have been drafted for Monserrat and that they will likely be enacted within a few months;

(m) the new suicide-prevention processes in the prison system;

(n) the Committee notes with pleasure that no case of torture appears to have come to light in the dependent territories.

C. Factors and difficulties impeding the application of the Convention

4. In Northern Ireland the maintenance of the emergency legislation and of separate detention or holding centres will inevitably continue to create conditions leading to breach of the Convention. This is particularly so because at present the practice of permitting legal counsel to consult with their clients at their interrogations is not yet permitted.

5. The Committee regrets that invocation of the Convention by individuals is not possible since the United Kingdom has not declared in favour of Article 22 of the Convention. This appears unusual given that the United Kingdom has acceded to the jurisdiction of the European Commission of Human Rights.

6. In Hong Kong the warehousing of Vietnamese boat people in large detention centres may bring the government into conflict with Article 16 of the Convention.

D. Subjects of concern

7. The practice of vigorous interrogation of detainees under the emergency powers, which may sometimes breach the Convention.

8. The method adopted in forcibly returning persons under deportation orders.

9. The rate of suicide in prisons and places of detention.

10. The renewal of emergency powers relating to Northern Ireland.

11. The practice of refouling asylum seekers in circumstances that may breach Article 3 of the Convention.

12. The army in Northern Ireland's practice of dispersing what have been described by non-governmental organisations as peaceful demonstrations with plastic bullets.

13. The failure of the United Kingdom to declare in favour of Article 22 both for itself and its overseas dependencies.

14. The failure to provide for counsel to be present during interrogation in Northern Ireland for terrorist related offenses.

15. The standards of detention of the Vietnamese boat people in Hong Kong.

16. The allegations of discrimination in the treatment of black citizens in the United Kingdom by police and immigration authorities.

E. Recommendations

17. The Committee recommends to the Government of the United Kingdom and Northern Ireland to take the following measures:

(a) the abolition of detention centres in Northern Ireland and the repeal of the emergency legislation;

(b) review of practices related to deportation or refoulement where such practices may conflict with the State party's obligations under Article 3 of the Convention;

(c) re-education and retraining of police officers, particularly investigating police officers, in Northern Ireland as a further step in the peace process;

(d) training of immigration officers on how to manage violent prisoners with a minimum of risk of harm to all those involved;

(e) the extension of taping interrogations to all cases and not merely those that do not involve terrorist related activities and in any event to permit lawyers to be present at interrogations in all cases;

(f) declaration in favour of Article 22 of the Convention and specifically on behalf of Hong Kong and the other United Kingdom Dependant Territories;

(g) given the need for prisons, a continuation of the present policy of rebuilding in accordance with the most modern standards;

(h) a review of the policies favouring private policing with a view to properly regulating that activity;

(i) corporal punishment should be reconsidered with a view to determining if it should be abolished in those dependencies that still retain it.

APPENDIX G

THIRTEENTH PERIODIC REPORT IN RESPECT OF HONG KONG UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND*

[2 August 1995]

Part Two

DEPENDENT TERRITORIES

Hong Kong

CONTENTS

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[1] CERD/C/263/Add.7 (Part II) (14 September 1995)

* For the first part of the thirteenth periodic report submitted by the Government of the United Kingdom, see document CERD/C/263/Add.7. For the eleventh and twelfth periodic reports and the summary records of the meetings of the Committee at which those reports were considered, see:

Eleventh periodic report - CERD/C/197/Add.2 (CERD/C/SR.907-908); Twelfth periodic report - CERD/C/226/Add.4 (CERD/C/SR.996-998).

The information submitted by the United Kingdom with respect to its dependent territories in accordance with the consolidated guidelines concerning the initial part of reports of States parties is contained in the core document (HRI/CORE/1/Add.6).

* [Eds] Only the references to paragraphs are retained from the original UN document; references to pages have been omitted.

Introduction

1. In its concluding observations on the twelfth periodic report of the United Kingdom and its dependent territories, the Committee raised a particular issue which was applicable to all the dependent territories, including Hong Kong. Since the present report in respect of Hong Kong is being submitted in advance of those in respect of the other dependent territories, it is hoped that the Committee will find it helpful if that particular issue is addressed in general terms - because it is a general issue which goes wider than Hong Kong - at this point so that the remainder of this report can be devoted to matters specifically relating to Hong Kong.

2. In paragraph 10 of its concluding observations the Committee expressed its concern that the Convention had not been incorporated in the domestic legislation of the territories and cannot be invoked in the courts. In paragraph 15 it accordingly recommended that the Convention should be incorporated into the domestic legislation of the dependent territories. The United Kingdom Government has, of course, given very careful consideration to the Committee's views on this matter and to its recommendation. But, with great respect, it is unable to agree that the express incorporation of the Convention into the domestic law of the territories either is required as a matter of legal obligation or would be the most appropriate way of ensuring the implementation of the Convention in the territories.

3. As the Committee is doubtless aware, under the Common Law system which operates in the territories, as in the United Kingdom itself, treaties which apply to the territories do not themselves have the force of internal law and cannot be directly invoked as a source of individual rights or obligations, though the courts are required to construe domestic legislation, when possible, in such a way as to avoid incompatibility with the United Kingdom's international legal obligations. In order to ensure full compliance with its treaty obligations, the practice of the United Kingdom and its dependent territories is therefore as follows. In the case of many such obligations, examination of the position established by existing law and practice reveals that it is already fully in conformity with those obligations; and in those cases no further legislation or other measures are required. But where it is ascertained that the treaty obligations do require some change (by way of addition or alteration) to existing law or practice, the usual method of effecting that change is to enact specific new legislation - which may or may not take the form of reproducing the exact terms of some or all of the provisions of the treaty in question: this is a matter of legislative technique rather than of substance - or to

amend existing legislation or to adapt existing administrative practices, as the case may require. In the specific case of the International Convention on the Elimination of All Forms of Racial Discrimination, it is the considered view of the Government of the United Kingdom and the Governments of the dependent territories that the obligation which that Convention imposes can be fully and effectively discharged by the application of the usual procedures for that purpose, as just described, and that the express incorporation of the provisions of the Convention into domestic law would therefore be an unnecessary departure from the United Kingdom's established practice in these matters.

4. The foregoing does not, of course, detract in any way from the willingness of the Governments of the United Kingdom and the dependent territories, in accordance with the procedures just described, to procure the enactment of new legislation specifically for the purpose of satisfying particular requirements of the Convention in any case where it is established that the existing law is, in one respect or another, defective for that purpose.

5. As explained above, the above response to the Committee's observations and recommendation is applicable to the position in all the United Kingdom's dependent territories. The remaining paragraphs of this report concern Hong Kong only.

I. GENERAL

6. The Committee is referred, as essential background to the whole of this report but with special reference to the provisions of article 1 of the Convention, to the core document (the "country profile") for Hong Kong (and to the relevant legislation submitted therewith). That document is now supplemented by the following further information and explanatory material which may be helpful to the Committee in relation to article 1 of the Convention.

Policy on elimination of racial discrimination

7. The Government of Hong Kong subscribes to the principle of equality between persons of different race, colour, language, national or social origin. The Bill of Rights Ordinance (see the core document* and para. 10 below) ensures that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In conformity with article 2 (1) (c) of the Convention, the Government has taken steps to amend legislation to ensure compatibility with the Bill of Rights (see also paras. 18 and 19 below).

8. Hong Kong is an open, progressive and dynamic society where people of different race, colour and origin live in peace and harmony. Isolated

* As of the date of publication of the present report, the core document had not yet been issued. The legislation referred to is available for consultation in the files of the secretariat.

incidents reflecting possible discriminatory attitudes have occurred, but public pressure has been effective in resolving the conflicts at an early stage.

Legal framework within which racial discrimination is prohibited and eliminated and the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social and cultural or any other field of public life are promoted and protected

9. In enacting legislation, the Governor is prohibited, by virtue of the Royal Instructions, from giving his assent to any bill whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable, unless he has had prior permission from Her Majesty's Government to do so.

10. The Bill of Rights Ordinance, incorporating into Hong Kong law the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong was enacted in June 1991. The Ordinance binds the Government and all public authorities. Articles 1 and 22 of the Bill of Rights prohibits discrimination based on such ground as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. While article 1 only protects the rights which are recognized in the Bill, article 22 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

11. To complement the protection afforded by the Bill of Rights, the Letters Patent, Hong Kong's principal constitutional document, have been amended so as to ensure that no law can be made in Hong Kong that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with the ICCPR as applied to Hong Kong. The Amending Letters Patent (see the core document) came into operation at the same time as the Bill of Rights Ordinance. The equal enjoyment of rights and equal protection of the law regardless of one's race, colour or national or ethnic origin, as guaranteed in the Covenant, have thus been strengthened.

12. Since April 1989, all new principal legislation and most new subsidiary legislation have been drafted in English and Chinese. Pre-existing legislation drafted in English is also being rendered into Chinese. At the end of November 1993, about 277 Ordinances out of 528 Ordinances (together with their accompanying subsidiary legislation and new amendments) have Chinese drafts at various stages of completion. Out of these 277 Ordinances, 107 have been examined by the Bilingual Law Advisory Committee. Those Ordinances so far examined by the Committee relate mainly to subjects most likely to be of use to large sections of the public or those Ordinances most frequently used in lower courts. To date, Chinese texts of 13 Ordinances and the list of Short Titles have been declared authentic. It is expected that the whole process of rendition will be

completed in 1995. The English and Chinese texts of legislation are equally authentic for legal purposes.

Ethnic characteristics of Hong Kong

13. According to the most recent estimate, the population of Hong Kong at the end of 1993 was 6,019,900.

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

1991 Hong Kong Population Census

Number of enumerated residents by place of birth

	Number	Per cent
Hong Kong	3 299 600	59.8
China (including Macau and Taiwan)	1 967 500	35.6
Philippines	66 100	1.2
Indonesia	40 700	0.7
United Kingdom	23 700	0.4
India, Pakistan, Bangladesh and Sri Lanka	14 300	0.3
Thailand	14 100	0.3
Malaysia	12 800	0.2
Japan	11 200	0.2
United States of America	11 200	0.2
Viet Nam	10 300	0.2
Elsewhere	50 800	0.9
TOTAL	5 522 300	100.0

15. The 1991 Population Census also asked about the usual language/dialect of each resident. This referred to the language/dialect that the resident would use to speak to other family members. Although usual language may differ from mother tongue, figures in the table below give additional information on the ethnic mix of the population:

Proportion of population aged 5* and over by usual language/dialect. 1991

Usual language/dialect	Per cent
Cantonese	88.7
Putonghua	1.1
Other Chinese dialects	7.0
English	2.2
Japanese	0.2
Filipino	0.1
Indonesian	0.1
Hindi	0.1
Others	0.5

II. ARTICLES 2 TO 7

Article 2

16. Article 22 of the Bill of Rights effectively prohibits public authorities in Hong Kong from engaging in any practice that discriminates on the basis of race.

17. Under the Commissioner for Administrative Complaints Ordinance (see the core document), the Commissioner for Administrative Complaints is empowered to investigate complaints against maladministration of government departments and major statutory organizations. Maladministration includes any action which is unreasonable, unjust, oppressive or improperly discriminatory or

* Excluding dumb persons

which is in accordance with a practice which is or may be unreasonable, unjust, oppressive or improperly discriminatory.

18. Since the enactment of the Bill of Rights Ordinance, the Hong Kong Government has conducted a review of legislation to ensure that existing laws are compatible with the Bill of Rights. So far 14 amending bills have been enacted to amend 26 existing pieces of legislation for compatibility with the Bill of Rights; more amendments are in the pipeline. The review of legislation is an ongoing exercise and will take into account developments in local human rights jurisprudence.

19. One recent amendment removed a provision for differential treatment on the ground of race that was considered to be inconsistent with article 22 of the Bill of Rights. The provision in question was contained in the Brewin Trust Fund Ordinance and restricted eligibility to apply for grants from the trust fund governed by the Ordinance to persons of Chinese race. While there may have been sound social reasons for this preferential treatment when the Ordinance was enacted, it is not considered justified under current circumstances.

20. There are currently no antidiscrimination laws in Hong Kong apart from the Bill of Rights Ordinance which binds only the Government and public authorities. The Hong Kong Government is taking action to introduce specific legislation to prohibit discrimination on the grounds of sex and disability, in both the private and the public sector. As antidiscrimination legislation is a relatively new area of law, of which Hong Kong has little experience, the approach adopted by the Hong Kong Government has been to start first with a more confined scope, concentrating on areas where there is a clear need and public demand for action. This will permit the effect of such legislation to be tested in a focused manner, allow time for the community to adjust and adapt to the new norms set by the legislation and enable the Government to deal with any problems that may arise as a result of the legislation. This is in line with the Hong Kong Government's well-tested and effective step-by-step approach to new forms of legislation such as this. After there has been sufficient experience with the legislation dealing with discrimination on grounds of sex and disability, consideration will be given to the need for comparable legislation in other areas, including racial discrimination.

21. Schools and colleges have continued to give instruction to bring about greater appreciation of the achievements of different cultures. More emphasis has also been placed on civic education to foster a greater degree of understanding, interaction and interdependence within the community.

Cultural, recreational and sporting activities

22. No distinction is made by the Hong Kong Government on racial, ethnic or religious grounds in providing cultural recreational and sporting facilities and financial support. Regardless of race, Hong Kong people have equal

opportunities to participate in all cultural, sporting and recreational activities. It is the policy of the Hong Kong Government to promote the development and appreciation of, and participation in, the arts with a view to improving the quality of life of the whole community. It is also the policy of the Hong Kong Government to promote sports, both in terms of excellence and at the grass-roots level, for the community as a whole. Major sports, open championships, international events and territory-wide, regional and district events are open to all.

Treatment of special groups

23. *Foreign workers.* There are different categories of foreign workers in Hong Kong. Among them are professionals and others with technical expertise or administrative and managerial skills from outside Hong Kong. In addition, there are foreign domestic helpers and skilled workers who entered Hong Kong for employment. Except to the extent that particular laws may distinguish, for particular purposes, between citizens and non-citizens, all these foreign workers are treated equally before the law with other persons in Hong Kong and enjoy the same rights and freedoms, and there is no discrimination against them on the grounds of their race, colour, descent or national or ethnic origin.

24. The Labour Department provides conciliation services to all workers, including foreign workers of different categories, when there is a dispute on conditions of employment between them and their employers. It also assists the workers to pursue their claims through the appropriate legal channels if both parties fail to reach a settlement. Foreign workers who have any queries related to their statutory rights under relevant labour legislation are given free access to briefing and counselling services provided by the Labour Department.

25. The number of foreign domestic helpers in Hong Kong now exceeds 100,000. Most of them come from the Philippines. They constitute such a fast-growing community that the Hong Kong Government has found it necessary to examine the extent to which their need for recreational outlets has been met by the existing level of facilities. The preliminary plan is to identify desirable venues to develop facilities that would meet the special needs of this group of population.

26. *Vietnamese refugees.* Vietnamese refugees in Hong Kong who are awaiting resettlement overseas are accommodated in an open centre which is funded and managed through the office of the United Nations High Commissioner for Refugees. Apart from a requirement that they must reside in the centre, they enjoy the same rights and freedoms as other persons in Hong Kong and are treated equally before the law, and there is no discrimination against them on the grounds of their race, colour, descent or national or ethnic origin.

27. *Vietnamese migrants.* Vietnamese migrants who have been screened out as non-refugees in accordance with the 1951 Convention and the 1967 Protocol relating to the Status of Refugees are returned to Viet Nam as illegal immigrants and are in the meantime detained in detention centres. The status determination criteria for the screening process are those recommended by the United Nations High Commissioner for Refugees (UNHCR) and the procedures were devised in consultation with UNHCR and contain checks and balances to ensure that they are administered as fairly as possible. The treatment of the Vietnamese migrants under detention is subject to the detention centres rules which have been reviewed and, where necessary, revised having regard to the provisions of the Bill of Rights Ordinance. In addition, Vietnamese migrants have access to lawyers, non-governmental organization workers and UNHCR field officers, and they are also allowed to be visited from time to time by friends and relatives. There are regular visits to detention centres by justices of the peace, members of Parliament, legislative councillors District Board members and journalists. The presence of UNHCR officers in Hong Kong's camps also ensures that any mistreatment of the Vietnamese migrants will be immediately brought to the attention of the proper authorities. Subject to the restrictions inherent in their status as detained persons awaiting return as illegal immigrants, Vietnamese migrants enjoy the same rights and freedoms as other persons in Hong Kong and are treated equally before the law, and there is no discrimination against them on the grounds of their race, colour, descent or national or ethnic origin.

Article 3

28. Neither apartheid nor any other form of racial segregation is practised in Hong Kong, nor would it be tolerated by the Government or people of Hong Kong. So far as concerns apartheid as formerly practised in South Africa, it is to be noted that Hong Kong, as a dependent territory of the United Kingdom, applied and enforced the applicable United Nations sanctions until, following the first all-race multiparty elections and the establishment of a democratic and non-racial Government in South Africa, the United Nations revoked all its remaining measures against South Africa in May 1994. Hong Kong then also lifted all of its previous sanctions against South Africa.

Article 4

29. As stated in paragraph 20 above, it is the intention of the Hong Kong Government, after there has been sufficient experience with the operation of the projected legislation against discrimination on grounds of sex and disability, to give consideration to the need for comparable legislation against racial discrimination.

30. With regard to the particular provisions of paragraphs (a) and (b) of article 4, the United Kingdom Government's interpretation of the effect of these two provisions, which is set out in paragraph 30 of its thirteenth periodic report

under the Convention in respect of the United Kingdom itself (i.e. the metropolitan territory), is of course equally applicable to their effect in respect of Hong Kong. For reasons similar, *mutatis mutandis*, to those explained in paragraphs 31-36 of that report, but having regard especially to the fact that activities and organizations of the kind at which paragraphs (a) and (b) of article 4 are directed are at present virtually unknown in Hong Kong, the Hong Kong Government does not consider that it is necessary or desirable to introduce additional legislation specifically to make all such activities and organizations illegal. It must be made clear, however, that the existing law of Hong Kong already contains adequate provision which would enable any racially motivated acts of violence (or the incitement to such acts) and any activities, whether of individuals or organizations, aimed at inciting racial hatred, to be effectively punished or suppressed. Thus, the general criminal law of Hong Kong proscribes acts of violence of various kinds, as well, of course, as the incitement of others to commit such acts. So far as organizations are concerned, under section 8 of the Societies Ordinance an order may be made prohibiting the operation of a society where it is considered that its operation may be prejudicial to the security of Hong Kong or to public safety or public order (*ordre public*).

31. With regard to paragraph (c) of article 4 of the Convention, article 22 of the Bill of Rights effectively prohibits public authorities in Hong Kong from engaging in any practice that involves racial discrimination within the meaning of the Convention. Attention is also drawn to paragraphs 57 and 58 below which describe the measures in force to prevent television and radio broadcasts containing material which is likely to incite racial hatred or is racially denigrating.

Article 5

32. None of the rights specified in article 5 is subject, in Hong Kong, to any restriction based on race, colour or national or ethnic origin.

33. In Hong Kong, all persons, regardless of their race, colour or national or ethnic origin, are equal before the law and have equal access to the courts. This always was the position and is now expressly provided for by, among other provisions, articles 1, 10 and 22 of the Bill of Rights. Legal aid is available to all persons if they satisfy the Director of Legal Aid on financial eligibility and justification for legal action. In addition, article 11 provides that any person charged with a criminal offence is entitled, in full equality, to legal aid where the interests of justice 80 require and without payment if he himself cannot pay for it. Both English and Chinese, being the official languages, are used in the lower courts. Although proceedings in the higher courts are conducted in English, ample interpretation facilities are provided for non-English speakers. Legislation has recently been introduced to enable the judiciary to give effect to an eight-phase implementation strategy which is aimed at putting into place, before 1 July 1997, a framework for the use of Chinese, along with English, in

all judicial proceedings in Hong Kong. It is the Government's stated objective that more judicial posts be filled by local candidates.

34. The right to security of person is principally secured through the Offences against the Person Ordinance which makes it an offence in law to assault or wound anyone. There is no distinction as to race, colour or national or ethnic origin. The penalty for committing such an offence varies depending on the gravity of the assault.

35. The Crimes (Torture) Ordinance provides that torture is an offence under the law of Hong Kong. Section 3 creates the offence of torture, defining it as the intentional infliction of severe physical or mental suffering by a public official, a person acting in an official capacity or another person at his instigation or with his acquiescence. A person convicted of torture is liable to life imprisonment.

36. Elections to the Municipal Councils and the District Boards are based on geographical constituencies. Elections to the Legislative Council are based on geographical as well as functional constituencies. As from September 1995, there will be an additional Election Committee constituency to elect Legislative Council members. The laws governing such elections to the Legislative Council, the Municipal Councils and the District Boards make no reference to race, colour or national or ethnic origin.

37. For the geographical constituency elections, the electoral franchise is based on residence, irrespective of race, colour or national or ethnic origin. Essentially everyone who is 18 years of age or over and who is a Hong Kong permanent resident is eligible to apply for registration as an elector in the constituency in which he lives. Where a person is a non-permanent resident, he is additionally required to have ordinarily resided in Hong Kong for the seven years immediately before his application. The electorate for functional constituency elections comprises, at present, either individual or corporate electors or a mixture of both. As from September 1995, the franchise will be significantly broadened. All corporate voting will be abolished and replaced by individual voting. The electorate for the Election Committee constituency will comprise all elected District Board members. The franchise for both the functional and Election Committee constituencies do not make any reference to race, colour or national or ethnic origin.

38. As for the qualifications for candidature in geographical constituency and the Election Committee constituency elections, every person who is a registered elector and has ordinarily resided in Hong Kong for the immediate preceding 10 years is eligible to be nominated. As for candidates for functional constituency elections, they must be registered geographical electors. In addition, they must either be registered electors of or have substantial connection with the relevant functional constituencies. There is no reference to race, colour or national or ethnic origin.

39. All Hong Kong residents, unless under lawful arrest or detention, enjoy the right to freedom of movement. They are free to travel and take up residence anywhere within the territory, irrespective of their race, colour or national or ethnic origin.

40. All Hong Kong residents are free to leave the territory unless under lawful arrest or detention or injunction of a court. Permanent residents of Hong Kong have the absolute right to return to Hong Kong. This right is provided for by law. It is not dependent on race, colour or national or ethnic origin.

41. Hong Kong is not a sovereign State and therefore does not have nationality laws of its own. Under the relevant United Kingdom legislation (the British Nationality Act 1981), the status of British Dependent Territories citizen (BDTC) can be acquired, by virtue of a connection with Hong Kong, through various means, e.g. by birth, by adoption or by naturalization. The possession of a particular race, colour or national or ethnic origin is neither a requirement for, nor an impediment to, the acquisition of that status. There is also a quasi-nationality status of permanent resident of Hong Kong, which is automatic for all persons who are BDTCs by virtue of their connection with Hong Kong. Again, there is no discrimination against any person on grounds of race, etc. In addition, the status of permanent resident can be acquired by persons of Chinese race who have resided in Hong Kong continuously for seven years. This additional right for ethnic Chinese takes account of Hong Kong's historical background and close relationship with China. (Chinese immigrants make up the largest group entering Hong Kong for permanent settlement every year.) The major difference between a permanent and a non-permanent resident is that the former has the right to land unconditionally and not to be deported. Practically speaking, permanent resident status is not relevant to the enjoyment of welfare, educational, medical and other social facilities. Moreover, a non-ethnic Chinese may acquire permanent resident status by becoming naturalized as a BDTC.

42. In paragraph 10 of its concluding observations on the twelfth periodic report of the United Kingdom and its dependent territories, the Committee expressed its concern at what it regarded as the discriminatory provisions of the British Nationality (Hong Kong) Act 1990. This concern appears to be based on a misconception of the purpose and effect of that Act. Its main purpose is to facilitate the acquisition of British citizenship by key Hong Kong workers (and their families) who would otherwise not be in a position to claim it and thereby give them confidence to remain in Hong Kong up to and beyond 1997, when sovereignty over the territory will be transferred to the People's Republic of China. The Act provides for up to 50,000 heads of household to be granted citizenship. These are selected on the basis of their actual and potential contributions to the smooth running, stability and prosperity of Hong Kong. It is expressly provided by section 2 (3) of the Act that section 44 (1) of the British Nationality Act 1981 shall have effect as if included in it. Section 44 (1) provides that any discretion vested in the Secretary of State or a Governor shall be exercised without regard to the race, colour or origin of any person who may be affected by its exercise. Successful applications under the 1990 Act come from

a wide range of backgrounds, income levels and occupations. The grant of citizenship is being confined to 50,000 principal beneficiaries because of the need to strike a balance between maintaining confidence in Hong Kong and limiting potential immigration into the United Kingdom.

43. Every Hong Kong resident has an absolute right, without distinction as to race, colour or national or ethnic origin, to marry and to choose his or her spouse. Marriage between two persons of different ethnic origins is common and well accepted in Hong Kong.

44. The rights mentioned in article 5 (d) (v) and (vi) (the right to own property and the right to inherit) are secured in Hong Kong by a combination of statutory and common law. Article 22 of the Bill of Rights ensures that all relevant laws are applied in a non-discriminatory fashion.

45. The rights mentioned in article 5 (d) (vii) (freedom of thought, etc.), (viii) (freedom of opinion and expression) and (ix) (freedom of assembly and association) are specifically secured by articles 15, 16, 17 and 18 of the Bill of Rights. Article 1 of the Bill of Rights provides that they shall be enjoyed without distinction of any kind, such as race, colour or national or social origin.

46. In Hong Kong, everyone, without distinction as to race, colour or national or ethnic origin, has the right to work. There is freedom of choice of employment for all persons (save that the employment of women and young persons, again without distinction as to race, etc., is prohibited in certain trades or work processes which are likely to jeopardize their safety, health and welfare). As regards the rights to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work and to just and favourable remuneration, they are enjoyed by all workers regardless of race, colour or national or ethnic origin.

47. There is also no racial discrimination in any form in respect of employment benefits, welfare and protection. These benefits are available, without any such discrimination, to all workers of foreign origin in Hong Kong, including foreign domestic helpers and indeed to all employees. Workers from outside Hong Kong, regardless of their countries of origin, are given equal treatment in the employment sphere with the general population in Hong Kong. Persons from overseas (whatever their race) will not be admitted to Hong Kong for employment unless their prospective employers are prepared to offer them employment terms no less favourable than those which are offered to local workers, and the labour legislation relating to employment benefits and protection applies in the same way to foreign workers, irrespective of their race, colour or national or ethnic origin, as to local workers.

48. There is also no distinction as to race, etc., regarding the right to form and join trade unions. This right is secured by article 18 of the Bill of Rights and, again, article 1 of the Bill of Rights requires that it is to be enjoyed without distinction of any kind, such as race, colour or national or social origin.

49. The recruitment policy of the Hong Kong Government has been for many years to appoint suitable and qualified local candidates to positions in the public service, but no discrimination is made on the basis of race. The recruitment of overseas candidates is undertaken only when local candidates are not available or are available in insufficient numbers. To cater for the different needs of overseas candidates, a different set of terms and conditions of service has been offered to these candidates. However, under present day circumstances, the differences in terms and conditions of service have become less necessary. The Government has therefore proposed one set of common terms of appointment and conditions of service for general application in future.

50. There are 189,927 officers in the public service as at 1 April 1994, comprising 187,901 (98.9 per cent) officers on local terms and conditions of service and 2,026 (1.1 per cent) officers on overseas terms and conditions.

51. The right to be allocated public housing is based on an applicant's housing need, and is enjoyed without distinction as to race, colour or national or ethnic origin. There is special provision to address the housing needs of indigenous villagers and their families in rural areas in the New Territories of Hong Kong. A male indigenous villager is entitled to apply for permission to erect for himself and his family, during his lifetime, a small house on his own agricultural land within his own village. Alternatively he may apply for the grant, at a concessionary premium, of a site on government land for the same purpose (in which case, if he later sells the house, he must pay the balance of the full market premium). The restriction of this facility to indigenous villagers reflects the traditions and customs of the indigenous communities where heads of households were traditionally male and women moved away from their villages upon marriage.

52. The right to receive medical care, social security and social services is enjoyed without distinction as to race, colour or national or ethnic origin.

53. There is no discrimination on grounds of race, colour or national or ethnic origin in the enjoyment of the right to education and training.

54. There is no racial discrimination in any form with respect to the right to participate in cultural activities.

55. The effect of article 22 of the Bill of Rights is that all laws which regulate the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks, must not be discriminatory either in their terms or in their practical application.

Article 6

56. Any act of racial discrimination by the Government or any public authority of Hong Kong (or by any person acting on behalf of that Government or any such authority) would constitute a breach of the Bill of Rights Ordinance.

Section 6 of that Ordinance provides that a court or tribunal, whether in proceedings within its jurisdiction for a breach of the Ordinance or in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant, may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances. In most cases the remedy or relief granted by the court or tribunal could be expected to include an award of financial compensation. However, there would not necessarily be such an award in every case. In this connection, the Committee's attention is drawn to paragraph 110 of the United Kingdom Government's thirteenth periodic report under the Convention in respect of its metropolitan territory. What is said there is, of course, equally applicable to the operation of article 6 of the Convention in respect of Hong Kong.

Article 7

57. Since the twelfth periodic report in respect of Hong Kong under the Convention a new statutory provision has been introduced to prohibit local television licensees from broadcasting any programme, advertisement, announcement or other material that is likely to incite hatred against any group of persons, defined by reference to colour, race, sex, religion, nationality or ethnic or national origin.

58. Codes of Practice on Programme Standards for television and radio broadcasts in Hong Kong also contain provisions to forbid the broadcast of any programme which is likely to encourage hatred against or fear of, and/or considered to be denigrating or insulting to, any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion, age, social status or physical or mental disability.

59. In Hong Kong, teachers are encouraged to promote respect and appreciation for the achievements of other cultures. Human rights and the elimination of discrimination are taught through the formal curriculum on social studies, economics, public affairs and geography, as well as through extracurricular activities. In the 1993/94 school year the Hong Kong Government organized talks and workshops on human rights for teacher trainees.

60. In Hong Kong, students are taught to understand the basic concepts of human rights and the culture, characteristics and achievements of different racial communities. Efforts have also been made through the school curriculum and civic education programmes to foster positive attitudes of awareness and acceptance of human rights among students.

61. In May 1992, a Human Rights Education Sub-Committee was set up under Hong Kong's Committee on the Promotion of Civic Education to promote human rights education among the general public. Since then it has been involved in a number of successful projects and activities. These include

community participation schemes on human rights projects; production and distribution of picture books to arouse interest in human rights; production and dissemination of human rights messages on a free telephone "information line"; radio and television programmes on human rights; production of teaching kits for secondary schools; large-scale exhibitions; and seminars and topical discussion sessions. Over the next three years, an extra $20 million will be granted to the Committee on the Promotion of Civic Education to expand its educational programmes on equal opportunities and human rights. The Committee will also establish a full-time educational unit to develop human rights education materials and programmes.

62. The Hong Kong Government has in the past produced and made available to the public various human rights documents and introductory booklets in both English and Chinese. These include the text of the International Convention on the Elimination of All Forms of Racial Discrimination and the twelfth periodic report in respect of Hong Kong under the Convention. The text of the present report will be tabled in the Legislative Council and distributed to the public and the media following its submission to the United Nations for consideration by the Committee.

APPENDIX H

GENERAL RECOMMENDATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

According to article 9, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee may make suggestions and general recommendations based on the examination of the reports and information received from the States parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States parties. The Committee has so far adopted a total of 18 general recommendations.

General Recommendation I (Fifth session, 1972)*

On the basis of the consideration at its fifth session of reports submitted by States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee found that the legislation of a number of States parties did not include the provisions envisaged in article 4 (a) and (b) of the Convention, the implementation of which (with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention) is obligatory under the Convention for all States parties.

The Committee accordingly recommends that the States parties whose legislation was deficient in this respect should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of article 4 (a) and (b) of the Convention.

General Recommendation II (Fifth session, 1972)*

The Committee has considered some reports from States parties which expressed or implied the belief that the information mentioned in the Committee's communication of 28 January 1970 (CERD/C/R.12), need not be supplied by States parties on whose territories racial discrimination does not exist.

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* Contained in document A/8718.

However, inasmuch as, in accordance with article 9, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, all States parties undertake to submit reports on the measures that they have adopted and that give effect to the provisions of the Convention and, since all the categories of information listed in the Committee's communication of 28 January 1970 refer to obligations undertaken by the States parties under the Convention, that communication is addressed to all States parties without distinction, whether or not racial discrimination exists in their respective territories. The Committee welcomes the inclusion in the reports from all States parties, which have not done so, of the necessary information in conformity with all the headings set out in the aforementioned communication of the Committee.

General Recommendation III (Sixth session, 1972)*

The Committee has considered some reports from States parties containing information about measures taken to implement resolutions of United Nations organs concerning relations with the racist regimes in southern Africa.

The Committee notes that, in the tenth paragraph of the preamble to the International Convention on the Elimination of All Forms of Racial Discrimination, States parties have "resolved", inter alia, "to build an international community free from all forms of racial segregation and racial discrimination".

It notes also that, in article 3 of the Convention, "States parties particularly condemn racial segregation and apartheid".

Furthermore, the Committee notes that, in resolution 2784 (XXVI), section III, the General Assembly, immediately after taking note with appreciation of the Committee's second annual report and endorsing certain opinions and recommendations, submitted by it, proceeded to call upon "all the trading partners of South Africa to abstain from any action that constitutes an encouragement to the continued violation of the principles and objectives of the International Convention on the Elimination of All Forms of Racial Discrimination by South Africa and the illegal regime in Southern Rhodesia".

The Committee expresses the view that measures adopted on the national level to give effect to the provisions of the Convention are interrelated with measures taken on the international level to encourage respect everywhere for the principles of the Convention.

The Committee welcomes the inclusion in the reports submitted under article 9, paragraph 1, of the Convention, by any State Party which chooses to do

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* Contained in document A/8718

so, of information regarding the status of its diplomatic, economic and other relations with the racist regimes in southern Africa.

General Recommendation IV (Eighth session, 1973)**

The Committee on the Elimination of Racial Discrimination,

Having considered reports submitted by States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination at its seventh and eighth sessions,

Bearing in mind the need for the reports sent by States parties to the Committee to be as informative as possible,

Invites States parties to endeavour to include in their reports under article 9 relevant information on the demographic composition of the population referred to in the provisions of article 1 of the Convention.

General Recommendation V (Fifteenth session, 1977)*

The Committee on the Elimination of Racial Discrimination,

Bearing in mind the provisions of articles 7 and 9 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Convinced that combating prejudices which lead to racial discrimination, promoting understanding, tolerance and friendship among racial and ethnic groups, and propagating the principles and purposes of the Charter of the United Nations and of the human rights declarations and other relevant instruments adopted by the General Assembly of the United Nations, are important and effective means of eliminating racial discrimination,

Considering that the obligations under article 7 of the Convention, which are binding on all States parties, must be fulfilled by them, including States which declare that racial discrimination is not practised on the territories under their jurisdiction, and that therefore all States parties are required to include information on their implementation of the provisions of that article in the reports they submit in accordance with article 9, paragraph 1, of the Convention,

Noting with regret that few States parties have included, in the reports they have submitted in accordance with article 9 of the Convention, information on the measures which they have adopted and which give effect to the provisions

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** Contained in document A/9018.

* Contained in document A/32/18.

of article 7 of the Convention, and that that information has often been general and perfunctory,

Recalling that, in accordance with article 9, paragraph 1, of the Convention, the Committee may request further information from the States parties,

1. *Requests* every State party which has not already done so to include - in the next report it will submit in accordance with article 9 of the Convention, or in a special report before its next periodic report becomes due - adequate information on the measures which it has adopted and which give effect to the provisions of article 7 of the Convention;

2. *Invites* the attention of States parties to the fact that, in accordance with article 7 of the Convention, the information to which the preceding paragraph refers should include information on the "immediate and effective measures" which they have adopted, "in the fields of teaching, education, culture and information", with a view to:

(a) "combating prejudices which lead to racial discrimination";

(b) "Promoting understanding, tolerance and friendship among nations and racial or ethnical groups";

(c) "Propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination" as well as the International Convention on the Elimination of All Forms of Racial Discrimination.

General Recommendation VI (Twenty-fifth session, 1982)*

The Committee on the Elimination of Racial Discrimination,

Recognizing the fact that an impressive number of States has ratified, or acceded to, the International Convention on the Elimination of All Forms of Racial Discrimination,

Bearing in mind, however, that ratification alone does not enable the control system set up by the Convention to function effectively,

Recalling that article 9 of the Convention obliges States parties to submit initial and periodic reports on the measures that give effect to the provisions of the Convention,

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* Contained in document A/37/18.

Stating that at present no less than 89 reports are overdue from 62 States, that 42 of those reports are overdue from 15 States, each with two or more outstanding reports, and that four initial reports which were due between 1973 and 1978 have not been received,

Noting with regret that neither reminders sent through the Secretary-General to States parties nor the inclusion of the relevant information in the annual reports to the General Assembly has had the desired effect, in all cases,

Invites the General Assembly:

(a) to take note of the situation;

(b) to use its authority in order to ensure that the Committee could more effectively fulfil its obligations under the Convention.

General Recommendation VII relating to the implementation of article 4 of the Convention (Thirty-second session, 1985)*

The Committee on the Elimination of Racial Discrimination,

Having considered periodic reports of States parties for a period of 16 years, and in over 100 cases sixth, seventh and eighth periodic reports of States parties,

Recalling and reaffirming its General Recommendation I of 24 February 1972 and its decision 3 (VII) of 4 May 1973,

Noting with satisfaction that in a number of reports States parties have provided information on specific cases dealing with the implementation of article 4 of the Convention with regard to acts of racial discrimination,

Noting, however, that in a number of States parties the necessary legislation to implement article 4 of the Convention has not been enacted, and that many States parties have not yet fulfilled all the requirements of article 4 (a) and (b) of the Convention,

Further recalling that, in accordance with the first paragraph of article 4, States parties "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination", with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention,

Bearing in mind the preventive aspects of article 4 to deter racism and racial discrimination as well as activities aimed at their promotion or incitement,

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* Contained in document A/40/18.

1. *Recommends* that those States parties whose legislation does not satisfy the provisions of article 4 (a) and (b) of the Convention take the necessary steps with a view to satisfying the mandatory requirements of that article;

2. *Requests* that those States parties which have not yet done so inform the Committee more fully in their periodic reports of the manner and extent to which the provisions of article 4 (a) and (b) are effectively implemented and quote the relevant parts of the texts in their reports;

3. *Further requests* those States parties which have not yet done so to endeavour to provide in their periodic reports more information concerning decisions taken by the competent national tribunals and other State institutions regarding acts of racial discrimination and in particular those offences dealt with in article 4 (a) and (b).

General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4, of the Convention (Thirty-eighth session, 1990)*

The Committee on the Elimination of Racial Discrimination,

Having considered reports from States parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic groups or groups,

Is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.

General Recommendation IX concerning the application of article 8, paragraph 1, of the Convention (Thirty-eighth session, 1990)*

The Committee on the Elimination of Racial Discrimination,

Considering that respect for the independence of the experts is essential to secure full observance of human rights and fundamental freedoms,

Recalling article 8, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination,

Alarmed by the tendency of the representatives of States, organizations and groups to put pressure upon experts, especially those serving as country rapporteurs,

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* Contained in document A/45/18

Strongly recommends that they respect unreservedly the status of its members as independent experts of acknowledged impartiality serving in their personal capacity.

General Recommendation X concerning technical assistance (Thirty-ninth session, 1991)**

The Committee on the Elimination of Racial Discrimination,

Taking note of the recommendation of the third meeting of persons chairing the human rights treaty bodies, as endorsed by the General Assembly at its forty-fifth session, to the effect that a series of seminars or workshops should be organized at the national level for the purpose of training those involved in the preparation of State party reports,

Concerned over the continued failure of certain States parties to the International Convention on the Elimination of All Forms of Racial Discrimination to meet their reporting obligations under the Convention,

Believing that training courses and workshops organized on the national level might prove of immeasurable assistance to officials responsible for the preparation of such State party reports,

1. *Requests* the Secretary-General to organize, in consultation with the States parties concerned, appropriate national training courses and workshops for their reporting officials as soon as practicable;

2. *Recommends* that the services of the staff of the Centre for Human Rights as well as of the experts of the Committee on the Elimination of Racial Discrimination should be utilized, as appropriate, in the conduct of such training courses and workshops.

General Recommendation XI on non-citizens (Forty-second session, 1993)*

1. Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination. Article 1, paragraph 2, excepts from this definition actions by a State party which differentiate between citizens and non-citizens. Article 1, paragraph 3, qualifies article 1, paragraph 2, by declaring that, among non-citizens, States parties may not discriminate against any particular nationality.

2. The Committee has noted that article 1, paragraph 2, has on occasion been interpreted as absolving States parties from any obligation to

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** Contained in document A/46/18.

* Contained in document A/48/18.

report on matters relating to legislation on foreigners. The Committee therefore affirms that States parties are under an obligation to report fully upon legislation on foreigners and its implementation.

3. The Committee further affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

General Recommendation XII on successor States (Forty-second session, 1993)*

The Committee on the Elimination of Racial Discrimination,

Emphasizing the importance of universal participation of States in the International Convention on the Elimination of All Forms of Racial Discrimination,

Taking into account the emergence of successor States as a result of the dissolution of States,

1. *Encourages* successor States that have not yet done so to confirm to the Secretary-General, as depositary of the International Convention on the Elimination of All Forms of Racial Discrimination, that they continue to be bound by obligations under that Convention, if predecessor States were parties to it;

2. *Invites* successor States that have not yet done so to accede to the International Convention on the Elimination of All Forms of Racial Discrimination if predecessor States were not parties to it;

3. *Invites* successor States to consider the importance of making the declaration under article 14, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, recognizing the competence of the Committee on the Elimination of Racial Discrimination to receive and consider individual communications.

General Recommendation XIII on the training of law enforcement officials in the protection of human rights (Forty-second session, 1993)*

1. In accordance with article 2, paragraph 1, of the International Convention on the Elimination of All forms of Racial Discrimination, States

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* Contained in document A/48/18.

* Contained in document A/48/18.

parties have undertaken that all public authorities and public institutions, national and local, will not engage in any practice of racial discrimination; further, States parties have undertaken to guarantee the rights listed in article 5 of the Convention to everyone without distinction as to race, colour or national or ethnic origin.

2. The fulfilment of these obligations very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their State has entered into under the Convention. Law enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin.

3. In the implementation of article 7 of the Convention, the Committee calls upon States parties to review and improve the training of law enforcement officials so that the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented. They should also include respective information thereupon in their periodic reports.

General Recommendation XIV on article 1, paragraph 1, of the Convention (Forty-second session, 1993)*

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights. The Committee wishes to draw the attention of States parties to certain features of the definition of racial discrimination in article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination. It is of the opinion that the words "based on" do not bear any meaning different from "on the grounds of " in preambular paragraph 7. A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by article 2, paragraph 1 (c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.

2. The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

3. Article 1, paragraph 1, of the Convention also refers to the political, economic, social and cultural fields; the related rights and freedoms are set up in article 5.

General Recommendation XV on article 4 of the Convention (Forty-second session, 1993)*

1. When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.

2. The Committee recalls its General Recommendation VII in which it explained that the provisions of article 4 are of a mandatory character. To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.

3. Article 4 (a) requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.

4. In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

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* Contained in document A/48/18.

5. Article 4 (a) also penalizes the financing of racist activities, which the Committee takes to include all the activities mentioned in paragraph 3 above, that is to say, activities deriving from ethnic as well as racial differences. The Committee calls upon States parties to investigate whether their national law and its implementation meet this requirement.

6. Some States have maintained that in their legal order it is inappropriate to declare illegal an organization before its members have promoted or incited racial discrimination. The Committee is of the opinion that article 4 (b) places a greater burden upon such States to be vigilant in proceeding against such organizations at the earliest moment. These organizations, as well as organized and other propaganda activities, have to be declared illegal and prohibited. Participation in these organizations is, of itself, to be punished.

7. Article 4 (c) of the Convention outlines the obligations of public authorities. Public authorities at all administrative levels, including municipalities, are bound by this paragraph. The Committee holds that States parties must ensure that they observe these obligations and report on this.

General Recommendation XVI concerning the application of article 9 of the Convention (Forty-second session, 1993)*

1. Under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, States parties have undertaken to submit, through the Secretary-General of the United Nations, for consideration by the Committee, reports on measures taken by them to give effect to the provisions of the Convention.

2. With respect to this obligation of the States parties, the Committee has noted that, on some occasions, reports have made references to situations existing in other States.

3. For this reason, the Committee wishes to remind States parties of the provisions of article 9 of the Convention concerning the content of their reports, while bearing in mind article 11, which is the only procedural means available to States for drawing to the attention of the Committee situations in which they consider that some other State is not giving effect to the provisions of the Convention.

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* Contained in document A/48/18.

General Recommendation XVII on the establishment of national institutions to facilitate the implementation of the Convention (Forty-second session, 1993)*

The Committee on the Elimination of Racial Discrimination,

Considering the practice of States parties concerning the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination,

Convinced of the necessity to encourage further the establishment of national institutions to facilitate the implementation of the Convention,

Emphasizing the need to strengthen further the implementation of the Convention,

1. *Recommends* that States parties establish national commissions or other appropriate bodies, taking into account, *mutatis mutandis*, the principles relating to the status of national institutions annexed to Commission on Human Rights resolution 1992/54 of 3 March 1992, to serve, *inter alia*, the following purposes:

(a) To promote respect for the enjoyment of human rights without any discrimination, as expressly set out in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination;

(b) To review government policy towards protection against racial discrimination;

(c) To monitor legislative compliance with the provisions of the Convention;

(d) To educate the public about the obligations of States parties under the Convention;

(e) To assist the Government in the preparation of reports submitted to the Committee on the Elimination of Racial Discrimination;

2. *Also recommends* that, where such commissions have been established, they should be associated with the preparation of reports and possibly included in government delegations in order to intensify the dialogue between the Committee and the State party concerned.

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* Contained in document A/48/18.

General recommendation XVIII on the establishment of an international tribunal to prosecute crimes against humanity (Forty-fourth session, 1994)*

The Committee on the Elimination of Racial Discrimination,

Alarmed at the increasing number of racially and ethnically motivated massacres and atrocities occurring in different regions of the world,

Convinced that the impunity of the perpetrators is a major factor contributing to the occurrence and recurrence of these crimes,

Convinced of the need to establish, as quickly as possible, an international tribunal with general jurisdiction to prosecute genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977 thereto,

Taking into account the work already done on this question by the International Law Commission and the encouragement given in this regard by the General Assembly in its resolution 48/31 of 9 December 1993,

Also taking into account Security Council resolution 872 (1993) of 25 May 1993 establishing an international tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia,

1. *Considers* that an international tribunal with general jurisdiction should be established urgently to prosecute genocide, crimes against humanity, including murder, extermination, enslavement, deportation, imprisonment, torture, rape persecutions on political, racial and religious grounds and other inhumane acts directed against any civilian population, and grave breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977 thereto;

2. *Urges* the Secretary-General to bring the present recommendation to the attention of the competent organs and bodies of the United Nations, including the Security Council;

3. *Requests* the High Commissioner for Human Rights to ensure that all relevant information pertaining to the crimes referred to in paragraph 1 is systematically collected by the Centre for Human Rights so that it can be readily available to the international tribunal as soon as it is established.

Contained in document A/49/18.

General recommendation XIX (47) (1995)*

1. The Committee on the Elimination of Racial Discrimination calls the attention of States parties to the wording of article 3, by which States parties undertake to prevent, prohibit and eradicate all practices of racial segregation and apartheid in territories under their jurisdiction. The reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries.

2. The Committee believes that the obligation to eradicate all practices of this nature includes the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State or imposed by forces outside the State.

3. The Committee observes that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.

4. The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. It invites States parties to monitor all trends which can give rise to racial segregation, to work for the eradication of any negative consequences that ensue, and to describe any such action in their periodic reports.

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* Contained in document A/50/18, Annex VII.

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