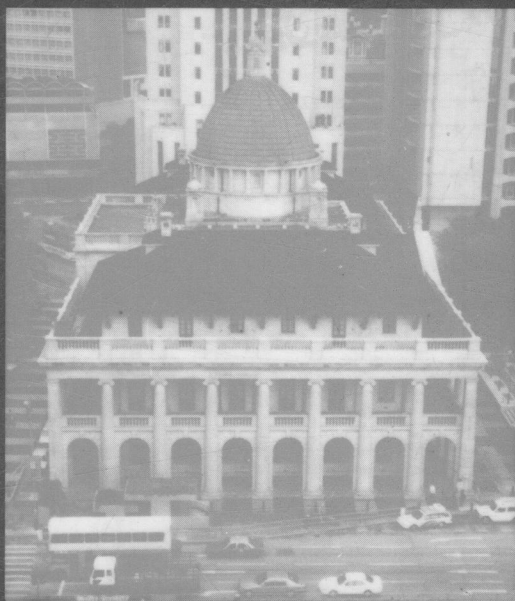


HONG KONG'S BILL OF RIGHTS: TWO YEARS ON



Edited by
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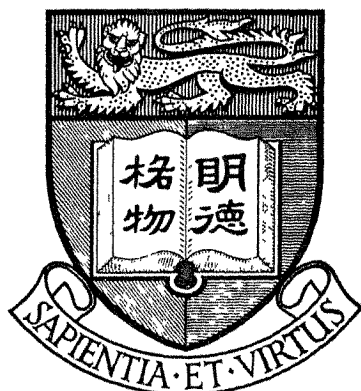
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HONG KONG'S BILL OF RIGHTS:

TWO YEARS ON

PROCEEDINGS OF A SEMINAR

ORGANISED BY THE

FACULTY OF LAW, UNIVERSITY OF HONG KONG

5 JUNE 1993

EDITORS:

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AND

GEORGE E. EDWARDS

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PREFACE

On 5 June 1993, the Faculty of Law of the University of Hong Kong held a seminar to review developments under the Hong Kong Bill of Rights Ordinance (Cap 383) that had occurred since its seminar (in June 1992) on the first year of the Bill. The speakers at the 1993 seminar came from government, the judiciary, the legislature, the private sector, academia and the broader community.

This volume contains edited versions of the papers presented. It offers, we hope, a varied picture of further developments under the Bill and of thinking about it in the community.

We should particularly like to thank Monnie Lee, Betty Lam, Rita Wai Wai-min, Eddie Leung, Raymond Lam, Henley Chan, Alice Iu and other members of the administrative staff of the Faculty for their assistance at the seminar and in the preparation of these Proceedings, and Karen Fontana for her proofreading. We also thank the University of Hong Kong Press for permission to reprint *Attorney General v Lee Kwong-kut*; *Attorney General v Lo Chak-man* (1993) 3 HKPLR 72, from the *Hong Kong Public Law Reports*. We gratefully acknowledge the financial support of the Hong Kong Research Grants Council for this Faculty's project on the Hong Kong Bill of Rights, of which the publication of these Proceedings forms a part.

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HONG KONG'S BILL OF RIGHTS: TWO YEARS ON

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Introduction

ANDREW BYRNES

INTRODUCTION¹

ANDREW BYRNES²

This is the fourth seminar since 1990 hosted by the Faculty of Law to examine the subject of Hong Kong's Bill of Rights. The first two seminars, held in 1990³ and 1991,⁴ were prospective in their outlook, the first being held before the Bill was enacted, the second before it had had a chance to have any significant impact. The next two seminars, that held in 1992⁵ and this seminar, have been more retrospective in their orientation, seeking to assess the impact that the Bill of Rights has had since its enactment.

Since our last seminar in June 1992, there have been a number of significant developments under Hong Kong's Bill of Rights, the most important being the first decision of the Privy Council interpreting it. This time last year, the possibilities for the Bill of Rights looked good. The tone had been set by the Court of Appeal in *R v*

¹ This is a revised and expanded version of comments made at the opening of the seminar on 5 June 1993.

² Faculty of Law, University of Hong Kong

³ For the proceedings, see R Wacks (ed), *Hong Kong's Bill of Rights* (Hong Kong: Faculty of Law, University of Hong Kong, 1990).

⁴ The papers presented at this conference were published in revised form in J Chan and Y Ghai (eds), *Hong Kong's Bill of Rights in Comparative Perspective* (Singapore: Butterworths 1993).

⁵ For the proceedings, see G Edwards and A Byrnes (eds), *Hong Kong's Bill of Rights: The First Year* (Hong Kong: Faculty of Law, University of Hong Kong, 1993).

Sin Yau-ming,⁶ in which the court expressed a willingness to adopt an expansive approach in interpreting the rights guaranteed by the Bill of Rights, and to require the government to discharge more than a nominal burden when a restriction on the enjoyment of a protected right had to be justified. In this context, the Court of Appeal embraced the analytical framework of the Canadian Charter cases (first elaborated in *R v Oakes*).⁷ In applying this framework, the Hong Kong courts were rather less demanding in their analysis than many Canadian courts: the upshot was thus the application of fairly demanding Canadian standards with a Hong Kong flexibility. As a result, despite the invocation of the expansive rhetoric about how one should interpret the Bill of Rights, relatively few legislative provisions were declared repealed by the courts.⁸

The judgment of the Privy Council in *Attorney General v Lee Kwong-kut*;

⁶ (1991) 1 HKPLR 88, [1992] 1 HKCLR 127

⁷ [1986] 1 SCR 103, 26 DLR (4th) 200. Under that framework, a legislative provision which restricts the enjoyment of a protected right may be justified if it is shown that: (a) the impugned provisions pursue a sufficiently important objective which is related to pressing and substantial concerns in a free and democratic society; (b) there is a rational connection between the objective and the means chosen; (c) the means adopted causes minimal impairment to the right or freedom in question; and (d) the effects on the limitation of rights and freedoms are proportional to the objective.

⁸ For a list of the provisions challenged under article 11(1) of the Bill of Rights, which has given rise to the largest number of challenges, see S R Bailey, *Presumption of Innocence (Article 11(1)) -- Significant Authorities: June 1992 to May 1993*. Appendix A below.

Attorney General v Lo Chak-man and another,⁹ delivered on 23 May 1993, represents in my view a step backwards. While the specific results of the two cases are reasonable, the limitations of the Privy Council's decision lie more in the message that it sends to Hong Kong courts about how one should go about interpreting the Bill of Rights. The central passage in the judgment of Lord Woolf expresses sentiments to which one can hardly object on their face, but which in context are deeply conservative:¹⁰

"While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public."

As my colleague Johannes Chan and I wrote:¹¹

"No one would object to the need for realism, good sense and avoidance of things being 'allowed to get out of hand'. The question is rather how one ensures this balance, in view of the fact that the legislature has enacted a Bill of Rights which gives an important emphasis to individual rights. The danger is that such sentiments can easily become an easy justification for adhering to the status quo without undertaking the fresh examination of existing law and practice which the enactment of a Bill of Rights should entail. Indeed, this passage has become the almost constant refrain of the government in the Hong Kong courts in defending Bill of Rights challenges; its subliminal impact is considerable, despite its analytical limitations."

⁹ (1993) 3 HKPLR 72, [1993] AC 951. The case is reproduced here as Appendix C and is analysed in some detail by S R Bailey in Appendix A.

¹⁰ (1993) 3 HKPLR at 100

¹¹ *Bill of Rights Bulletin*, v 2, n 3, p 19.

The Privy Council's approach, propounding an almost intuitive method of determining whether a provision is consistent with the Bill of Rights, is one which encourages the assumption that the status quo is consistent with the Bill of Rights, and one which militates against the examination of long-standing and well-accepted laws and arrangements in the light of contemporary human rights standards; and it fails to provide an adequate analytical framework for that task. In its deprecation of the Canadian approach to assessing the permissibility of restrictions on guaranteed rights, the Privy Council manifests an inward-looking and somewhat parochial approach which seems to have been too much in evidence in recent years at the highest levels of the English judiciary, and contrasts markedly with the practices of other leading Commonwealth courts, whether they be the Supreme Court of Canada, the High Court of Australia, the Court of Appeal of New Zealand or the Court of Appeal of Botswana.

Yet this gloomy assessment of the approach of the Privy Council is not shared by all;¹² indeed, its judgment has been welcomed by many, including judges and government officials. Whatever the merits of the approach adopted by the Privy Council, those who welcome it recognise only too clearly that the result of the decision in *Lee Kwong-kut* is that the test for scrutinising legislation and practices is now probably less stringent than under the more energetic approach of *Sin Yau-ming*. Since, in many cases, the courts had already been somewhat unreceptive to Bill of Rights arguments, and many policy-makers had not gone out of their way to eliminate

¹² S Bailey, "Striking a balance", *The New Gazette*, August 1993, 38-40

likely or possible inconsistencies with the Bill of Rights, the overall effect of the Privy Council's judgment is likely to be an even lower level of receptiveness on the part of the courts to Bill of Rights arguments, and less reason for policy-makers to take the initiative to amend legislation that may be inconsistent with the Bill of Rights.

However, it is not just developments in the courts that are important for any assessment of the impact of the Bill of Rights, though decisions adopting a restrictive interpretation of the Bill of Rights may set the parameters of and lessen the incentive for change if the legislature or the administration are intent on doing only as little as they must do to avoid clear violations.

There is little doubt that the passage of the Bill of Rights has had an impact on government policy-making (initiating or influencing the review of legislation) as well as on proceedings before the legislature itself. Indeed, it is probably in the Legislative Council that much of the most important influence of the Bill of Rights is now being felt.

Overall, however, the government's approach has been a less than enthusiastic embrace of the spirit of the Bill of Rights, though it must be said that some sectors of government have been better than others. The government's general stance is a minimalist one: it will wait for the decisions of the courts on all but the clearest cases. Such a rule of thumb is a convenient one for government in view of the difficulties facing a person who wants to litigate a Bill of Rights case (other than a criminal case), a situation exacerbated by the fact that it seems almost impossible to get the government to admit (publicly) that any law is "almost certainly" inconsistent with the

Bill of Rights.

The presentations that follow draw together some of the major developments relating to the Bill of Rights in the period from June 1992 to June 1993. In the first session, the presentation by the Independent Commissioner Against Corruption, Mr Bertrand de Speville, illustrates the stance taken by the Commission in its efforts to ensure that the powers of the ICAC are consistent with the Bill of Rights, while still permitting the Commission the powers which in its view it needs effectively to fight corruption. Some have criticised the Commission's approach as minimalist, and it may be contrasted with the approach adopted by the Correctional Services Department to the review of prison legislation, as outlined by Mr Samson Chan. An interesting contrast is also provided by the experience with recent amendments to the "stop order" provisions of the Inland Revenue Ordinance, the passage of which in the form originally proposed by government was derailed by pressure brought to bear in the Legislative Council on Bill of Rights grounds, by legislators and others. Finally, Mrs Doreen Le Pichon, Deputy Chief Counsel of the Securities and Futures Commission, details the recent challenge to the investigative powers of the SFC, in which those powers were resoundingly upheld by the Court of Appeal.

The second session shifts to the arena of the courts. Mr Justice Godfrey, of the Supreme Court of Hong Kong, discusses the principle of open justice under the common law and present Hong Kong law. He argues that the Bill of Rights essentially reiterates that guarantee and that the general law in Hong Kong in this regard passes muster with the Bill of Rights -- an issue of some controversy in Hong Kong in

relation to the extensive use of chambers hearings in civil proceedings. Mr Steve Bailey, the Government's principal advocate in Bill of Rights cases in the criminal field, reviews recent developments in relation to the presumption of innocence, in particular the Privy Council's judgment in *Lee Kwong-kut*. Mr Gerard McCoy, one of the leading local counsel in the Bill of Rights field, takes a good-natured but extremely critical look at a number of aspects of the operation of the Bill of Rights in practice.

The final session provides a broader perspective on experience under the Bill of Rights. Mr Sam Hui, of the Society for Community Organization, gives the views of one activist organisation on the inadequacies of the Bill of Rights for addressing many of the issues of concern to grassroots organisations. Ms Carole Petersen, of the School of Professional Education of the University of Hong Kong, vividly describes the prevarication of the government in relation to adopting policies to address discrimination against women, and the failure of the Bill of Rights in that regard. Mr Jonathan Daw, Legal Adviser to the Office of the Members of the Legislative Council, provides his thoughts on the impact of the Bill of Rights on the legislative process. Finally, Mr Simon Ip gives a legislator's perspective on the need to establish a Human Rights Commission in order to render effective the guarantees of the Bill of Rights.

We hope that this collection of papers provides a cross-section of the impact that the Bill of Rights has had in the courts and legislature of Hong Kong, and in the corridors of power in the Hong Kong administration. It would be no shame for Hong Kong's Bill of Rights to be rendered superfluous by energetic action by the three

branches of government to realise its guarantees in responsive case law, effective legislation and enlightened policy-making; how different will the assessment be if it is rendered superfluous by lack of interest, complacency and an unquestioning adherence to the way things "have always been done"!

SESSION I:

***THE IMPACT OF THE BILL OF RIGHTS
ON LAW ENFORCEMENT AND REGULATION***

CHAIR: MR ANDREW BYRNES

**LAW ENFORCEMENT AND THE
INDEPENDENT COMMISSION AGAINST CORRUPTION**

BERTRAND DE SPEVILLE¹

Ladies and gentlemen, good morning. First of all, thank you. I am grateful to you for inviting me to this, the second seminar organised by the Law Faculty on the Bill of Rights. I am also grateful, as Commissioner, for the opportunity to restate the commitment of the Independent Commission Against Corruption to the Bill of Rights Ordinance (Cap 383), and to access to justice and to the freedom under the rule of law that the Ordinance epitomises.

Today, I have been asked to talk about the Bill's impact on law enforcement in the field of corruption. Although my training as a lawyer enables me to read into anything an interpretation in no way intended by the maker, let me first give you a brief overview of the Bill's impact on the ICAC over the past two years, and then let me examine my crystal ball and say something about the Bill of Rights in 1995. By looking backwards and forwards, we may gain a balanced view of where we have come from and of where we are going in the areas of law enforcement and civil liberties. But before I take a look back, let me state, and without apology restate, the difficulty of investigating corruption and of proving it in the courts. In 1973, the High Court judge, Sir Alastair Blair-Kerr, in his second report on corruption in Hong Kong,

¹ Independent Commissioner Against Corruption

which opened the way to the establishment of the ICAC, described corruption as probably the most difficult of all offences to detect and prosecute successfully in the courts. As for those tasked with combatting corruption, he said any law enforcement agency entrusted with the difficult job deserves all the assistance the legislature feels it can reasonably give.

As we move towards our twentieth anniversary, the difficulty of investigating and prosecuting corruption has not diminished. Indeed it is arguable that it is even more difficult, since those who fall prey to the temptation of accepting or giving a bribe have probably heard of us and go to some length to conceal their transactions. Therefore we need the legislature and the community to give our agency their trust and all the help that they think they can properly give. Before it came into force in 1991, the Bill of Rights had impacted on the ICAC because we who are involved with these offences were concerned about its effect on our efficiency. So from 1989, soon after the Bill was announced to be on its way, we began assessing its possible impact on our effectiveness. We were considering our powers in the light of the Bill. We were looking at compatible legal alternatives, and at the advice and opinions that practising and academic lawyers were giving us, and at the advice that we were getting from interested groups. We were liaising with the Attorney General's Chambers, of course, and we were working out the solutions that we would need.

When the Bill came into force in 1991, the Prevention of Bribery Ordinance (Cap 201) and the ICAC Ordinance (Cap 204) were among the six Ordinances

exempted from the effects of the Bill until June 1992. It was a period that we were able to use positively. By the time that period came to an end, we had set up in the ICAC a unit with responsibility for the Bill of Rights problems that we faced. We had the first decisions on the Bill handed down by the courts, and thus some idea of how the courts would initially view the Bill. And, of course, we had had further time to study how other common law jurisdictions with similar instruments were faring.

We also evolved a practical strategy, simple and clear. We would repeal or amend those elements of our Ordinances which were by consensus manifestly contrary to the Bill, and stay with the rest until the matter could be decided by the courts either in decisions or in unequivocal guidance. As a result, we cut and trimmed sections and sub-sections from our Ordinances: sections 10C and 13(1) of the ICAC Ordinance, and sections 16, 17, 18 and 30 of the Prevention of Bribery Ordinance. These dealt with certain powers of arrest and detention, with aspects of preventing a suspect from leaving Hong Kong, and with requiring and providing information. We considered each in the face of a strong challenge under the Bill of Rights and the probability of the defeat of each. We considered that, even with these powers trimmed, our effectiveness would remain unchanged. I think generally that this has proved the case. As we had anticipated, those powers of arrest and detention still left with the Commissioner have proved adequate. Similarly, the courts have continued to use the remaining powers to issue notices to restrain the departure of suspects.

One unexpected result was a profound change arising from the amendment of section 30 of the Prevention of Bribery Ordinance. This is what the media sometimes

called the "press gag" law. The Operations Department of the Commission, now better known through the press, addresses matters of public interest, while still protecting the integrity of the investigation and the rights of suspects. What happened was that the relaxation of the law led, in the short term at least, to substantial coverage of our offices and publication of our exploits. This all happened at the time when we were seeking to keep the public informed about our work. We were more available; and perhaps not surprisingly, when we were no longer news, many became less interested.

In the year's breathing space that we had between June 1991 and June 1992, it was also necessary to meet the requirements of the Bill in our procedures. As a result of this internal assessment, we introduced audit trails for lengthy investigations. The continuation of a prosecution may be challenged at common law on the basis that undue delay means that a fair trial cannot be held; this is also the case under the Bill of Rights. The common law position has, as a result of decisions in England, recently taken on added force, reinforced, of course, by the Bill of Rights itself. The audit that we have prepared enables the court to assess whether the length of the investigation was necessary and justified. We also took a look at our decision-making processes so that the courts could be assured that alternative avenues of investigation had been properly considered and that the methods we had chosen had not been arbitrarily chosen.

The Commission itself has been made familiar with the Bill of Rights Ordinance. That may sound curious, but what has happened is that the Ordinance and

a guide to it have been given to each operations department officer. It forms part of the essential reference tools of the working investigator, and we hold Commission-wide briefings on the Bill regularly; lectures on it are included in the induction courses for our new officers and in the refresher courses for old hands. There is a regular Commission bulletin published and circulated throughout the operations department concerning Bill of Rights decisions and their implications. We are also long-time subscribers to this Faculty's *Bill of Rights Bulletin*. The wisdom contained there forms part of our regular diet, I am told.

Perhaps the most telling results of the Bill, as far as we are concerned, have emerged in the courts. I have to say that some of these results in the courts were quite unexpected. I also have to say from our point of view they are rather unwelcome. But I must say we feel that that is a temporary result of the introduction of the Bill of Rights. The coming of this Bill seems to have reawakened the imagination of defence lawyers to a rich seam of sometimes quite bizarre defences. We in the ICAC are not the only agency to feel the effects of this. It is throughout the criminal justice system that it is being felt. Steve Bailey is a mine of information on how bizarre some of the points taken can be. What has happened is that these points seem to have been given an aura of respectability by the Bill. And for the time being, at least, there are judges prepared to listen to them. I do believe that it is a temporary phenomenon. We will see, I am sure, a settling down. We are in that period where the Bill is being tested to its limits and sometimes beyond. We have of course on the horizon the possible introduction of measures in line with or similar to the Police and Criminal Evidence

Act in England. That is some way down the track yet, but one can anticipate that its introduction may have the same sort of effect as it had in England. One of the matters is delay. It is said that a bad lawyer can delay a trial for months; a good one for years. But my observation is that a good deal of defence strategy is premised on delay until a technicality surfaces.

Now, it is in our view sad that this trend should coincide with the coming of the Bill of Rights Ordinance. But I am not despairing -- let me say that straightaway -- either about the future state of the law under the Bill of Rights or about the future of the service that the ICAC can provide under the Bill. I am not on the other hand an optimist. I hope that I am a realist. In 1990, at the time of the preparation of the Bill, an ICAC survey showed that one person in five in Hong Kong thought that corruption would worsen as 1997 approached. By 1992, that figure was two in five. Our preliminary findings this year show that figures may now be as high as three in five. But throughout those years the community's confidence in the ICAC's ability to deal with this problem has remained pretty constant. Seven out of ten of those interviewed said, and still say, that the coming of 1997 would not reduce their confidence in the ability of the ICAC to deal with corruption. Our effectiveness and our efficiency are built on the twin foundations of public support and statutory powers. Each without the other is impotent. The continued confidence of the community and the rise in the number of reports that they are making to us show their continued support for us. I believe that this support will not diminish as time passes. Neither do I expect the Bill of Rights Ordinance to corrode our efficiency or effectiveness,

because I cannot believe that the courts will, over the period, allow misguided or unjustified claims, nominally sanctioned by the Bill, to erode the Bill's legitimacy in the eyes of the public and erode in turn their confidence in the criminal justice system.

Although, in introducing us, Andrew Byrnes made one or two unflattering comments on the recent Privy Council decision, I would like just to remind you of a few words that Lord Woolf said in the course of his speech:²

"While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion."

And then he goes on to give the prophecy:³

"If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public."

My confidence in the courts is such that I am sure that they will approach these matters with realism, good sense and caution. They will not allow the Bill to be an instrument of injustice nor allow unmeritorious arguments, predicated on a distortion of the Bill, to clog the justice system. Otherwise the Crown would be forced regularly to curtail the prosecution of some serious criminal cases, for it would be too costly in resources to put such cases before the courts. A plague of potential technicalities would make the expectation of conviction, even with an abundance of evidence, too

² *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72 at 100

³ *Ibid.*

low to merit the expenditure of public funds. Instead the Crown would be driven to plea bargaining.

Now let me look ahead briefly. By 1995, the Bill will have been in the Hong Kong public arena for more than five years. Five years is a very long time in Hong Kong terms. For the Commission, what this means is that investigators with less than five years' service will never have worked without the influence of the Bill. It will be second nature to them. Longer-serving officers will have had ample time, as will we all, to see the Bill at work, and become fully comfortable with it. 1995 will have given us the opportunity to apply to our procedures and Ordinances that greater degree of certainty we will have gained since the coming of the Bill. As we told the Ad Hoc Committee of the Legislative Council, we are reviewing, and we will continue to review, our procedures and powers in the light of decisions handed down by the courts. By 1995, I would not be entirely surprised if the Commission had again gone to the Legislative Council seeking further alteration to its legislation. 1995 will have given the courts a chance to gauge our everyday essential powers, and to test, approve and amend them. I doubt, however, that the courts will have concluded that these essential powers should, in any significant aspect, differ from where they now stand. Lastly, by 1995, the courts will have had two more years to achieve the proper balance between the rights of the individual and the legitimate interests of the community. It is, I suggest, in the interest of each of us in the community that this important evolutionary step in the development of our legal system should succeed. This precious Bill of Rights should be made to work effectively, and should not be

abused to the point where the criminal justice system is perceived to be undermined. If such a perception were to take hold, it would, I suggest, not take much to persuade the public that it could live perfectly well without it.

Thank you very much.

TAXATION AND THE BILL OF RIGHTS

ANTHONY AU-YEUNG¹

Ladies and gentlemen, I would like to talk to you this morning about a particular taxation issue: the proposed amendments to section 77 of the Inland Revenue Ordinance². Although I trust that you have not seen the section in operation, you are probably aware that it is the one under which persons with unpaid tax can be prevented from leaving Hong Kong.

You are no doubt aware that the amendment exercise was prompted by Bill of Rights considerations. And obviously, in the course of our deliberations, the requirements of the Bill of Rights Ordinance (Cap 383) have remained a matter of paramount concern. I do not propose, however, to attempt to deliver a dissertation on relevant legal principles. Rather, I would like to discuss, albeit from the administrator's perspective, the "real world" situation -- the steps we have taken to address the Bill of Rights concerns without detracting significantly from the efficacy of an important provision of the Inland Revenue Ordinance.

¹ Commissioner of Inland Revenue

² Since the delivery of this paper, section 77 of the Inland Revenue Ordinance (Cap 112) has been repealed and replaced by a new section 77: see section 30 of the Inland Revenue (Amendment) (No 5) Ordinance 1993 (No 56 of 1993), which received Royal Assent on 8 July 1993 and came into effect on 9 July 1993. This amendment, in its draft form, is discussed by the Commissioner in this paper. The text of the original provision, the draft amendment, and the present section 77 are attached as Appendix B.

The basic scheme of the present legislation is as follows:

- (i) If the Commissioner of Inland Revenue is of the opinion that a person is about to or likely to leave Hong Kong without paying all tax assessed upon him, he may issue a certificate to that effect to a District Judge.
- (ii) On receipt of such a certificate, the District Judge must then issue a stop order to the Commissioner of Police requiring him to take measures to prevent the person from leaving Hong Kong without paying the tax or furnishing satisfactory security for payment.
- (iii) The Ordinance does not contain any provision for the affected person to be heard by the District Judge or to appeal against a stop order.

Stop orders play an essential role in the tax collection game. Hong Kong does not have a withholding system, such as Pay As You Earn ("PAYE"), to provide for the collection of revenue as income is earned. Because of this, and because our economy is an open one where people can generally travel and transfer assets freely, stop orders are necessary to ensure that persons owing tax cannot leave Hong Kong without settling their liabilities.

Stop orders have proved to be a most effective inducement to payment. Typically, liabilities have been settled in 70% to 80% of cases where orders have been issued, involving in recent years revenue recovered of some \$80 million to \$100 million per annum.

The fact that our legislation has provided for the issue of stop orders has, no doubt, in itself represented a powerful deterrent against any inclination to "abscond".

One can appreciate the revenue at stake when it is understood that in 1992-1993 alone some 25,000 leaving Hong Kong cases were processed, involving tax of in excess of \$500 million. I am certain that if we were to do away with stop orders, the revenue leakage would be very significant indeed.

You may wonder when in practice we have applied for stop orders. As each case has to be decided on its merits, it is not possible to provide an exhaustive answer. Suffice it to say that generally stop orders have been sought where a large amount of tax is outstanding and we have information which indicates that the taxpayer is about to leave Hong Kong, for example from an employer or some other third party. Of course our investigation activities may reveal relevant information.

Prior to the recent developments concerning the Bill of Rights, the Department experienced very few problems in relation to the enforcement of stop orders. One could perhaps say that our track record speaks for itself. Over the six-year period ended 31 March 1991, the Department obtained some 4,100 stop orders. Yet during this period *only* three taxpayers applied to the courts to have the orders set aside. On each occasion the decision was in favour of the Commissioner.

The decisions in question confirmed that the section imposed a mandatory obligation on a District Judge to issue a stop order upon receipt of a relevant certificate from the Commissioner.

So the reality of the situation prior to the Bill of Rights was that the District Judge had a "rubber stamp" role as far as section 77 was concerned. Furthermore, the

section does not provide a right of appeal or, for that matter, allow the affected person to be heard by the Commissioner or District Judge at any stage.

Moving on to the circumstances surrounding the decision to amend section 77, the issue arose in 1989 during early deliberations into the possible enactment of a Human Rights Ordinance for Hong Kong. At that time a review of existing legislation was carried out.

In the course of the review, section 77 was considered in relation to article 12 of the International Covenant on Civil and Political Rights 1966.³ This article provides, along the lines of article 8 of the Bill of Rights, that "[e]veryone shall be free to leave any country, including his own". Conditional restriction of this right is, however, allowed by article 12(3), which provides that the right "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with other rights recognized in [this] Covenant". Although it was recognised that section 77 could abrogate the freedom of a person to leave Hong Kong if tax had not been paid, it was concluded that the restriction was acceptable according to international practice, as one imposed in the interests of "the rights and freedoms of others" in order to enforce legal obligations.

Clearly the matter did not rest there. Concern was subsequently raised in respect of the absence of a discretion for the District Judge and also in respect of the

³ 999 UNTS 171

fact that the section makes no provision for a hearing or appeal against an order.⁴

However, it was acknowledged that the application of the law in this area is by no means simple, and that it would be difficult to give a clearcut answer until the matter was tested in the courts. Amending the section would, of course, go some way towards removing the risk of an order being challenged.

However, things developed very quickly once the Bill of Rights Ordinance was introduced. It came into effect, as you know, on 8 June 1991 and, before the month had come to a close, section 77 was under the spotlight. Three applications for stop orders came before Judge Cameron of the District Court on 26 June 1991. His Honour requested an explanation or justification as to why he should sign the orders in view of article 8 of the Bill of Rights. The Crown submitted that the exception to article 8, concerning the protection of "rights and freedoms of others", was applicable. The point was also made that persons subject to stop orders could institute judicial review proceedings. However, leave to withdraw the applications was requested because of the short notice, and to enable the Crown to undertake a comprehensive review and prepare full arguments. Judge Cameron agreed to the request.

Shortly afterwards a firm decision was taken to amend section 77 to ensure conformity with the Bill.

Various options for amending the section were considered. One possibility was to simply add appeal provisions to the existing section. The main objection to this

⁴ See *Commissioner of Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141 (declaring section 77 inconsistent with article 10 of the Bill of Rights).

course was that it would have involved retention of the District Court "rubber stamp" procedure. There were two reasons why at that time we considered it desirable to remove the procedure. The first was that, as the judge has no discretion in the matter, unnecessary administrative work is created for the Department and the judiciary. The second reason was that judges do not like having a "rubber stamp" role.

This led us to consider the question of whether it was necessary to involve the courts in the actual issue of stop orders. It was concluded that it is a matter of policy, not law, as to whether the power to issue a stop order should reside with the Commissioner or a judge. This conclusion was to some extent influenced by the decision in the case of *Klass v Federal Republic of Germany*.⁵

Furthermore, in the context of article 10 of the Bill of Rights, we believe that what is required is that any dispute over rights covered by that article is capable of *final* determination by a "competent, independent and impartial tribunal". The amending Bill was eventually drafted to address the Bill of Rights concerns by providing that the person affected would have a right of appeal to the High Court. It also provided that the person would be able to apply to the Commissioner for revocation of the order. For the sake of administrative efficiency for both the Department and the judiciary, and reflecting the reality of the present situation, the

⁵ European Court of Human Rights, Judgment of 6 September 1978, Series A, No 28, 58 ILR 423, 2 EHRR 214

Commissioner was to be able to issue stop orders direct.

Well, the amending Bill⁶ was gazetted in November last year and, to put it mildly, certain aspects were not "well received". The media, of course, had a field day and, quite rightly, reported the views of all and sundry. They say criticism is good for the soul and in this respect at least we should have been grateful.

And how did we feel about the constructive criticism? We did not, and do not, accept that an appeal to the High Court would *necessarily* be more expensive than one to the District Court. The important point in this regard is that the Bill defines High Court to include the Registrar and a Master as defined in the Supreme Court Ordinance (Cap 4). If an appeal is to a master or judge in chambers, solicitors have a right of audience as they do in the District Court. It is also relevant that stop orders are not dissimilar in nature to prohibition orders under section 21B of Cap 4. By virtue of section 21B, masters have developed, over the years, familiarity with the principles involved in such orders.

And, of course, we did not agree that removal of the District Judge from issuing process would result in the section not conforming with the Bill of Rights. Nevertheless it soon became apparent that providing the Commissioner with authority to issue stop orders direct was widely regarded as a retrograde step. Following discussions with the Legislative Council Bills Committee, it became clear that, irrespective of the merits of the initiative on efficiency grounds, and irrespective of whether it was consistent with the Bill of Rights, the more politically acceptable

⁶ Inland Revenue (Amendment) (No 5) Bill 1992

course was to provide the District Court with the discretion as to whether or not to issue stop orders. In the circumstances, we concluded that there would be little point in attempting to maintain or defend our initial position. We then had to consider how the judicial discretion should be provided for. Various options were considered.

One suggestion was that taxpayers should have the right to be heard before stop orders are issued. However, this would have placed considerable amounts of revenue at risk. It would have necessitated providing taxpayers with advance notice of hearings and, forewarned, they would have been provided with the opportunity to abscond. Furthermore, it was also considered relevant in relation to this proposal that the Federal Court in Australia had rejected the argument that it is a denial of natural justice not to give a taxpayer an opportunity to be heard before an order is issued: *Edelsten v FCT*.⁷

Another suggestion was that the procedures for issuing stop orders should be along the lines of those provided in relation to Order 44A of the Rules of the Supreme Court, whereby a plaintiff or judgment creditor may, by an *ex parte* application, obtain an order prohibiting a debtor from leaving Hong Kong.

There were, however, several aspects of the Order 44A approach which appeared to be unsuitable for use in relation to section 77 stop orders. For example, the limited life of prohibition orders -- they are initially for one month, but may on application be extended or renewed for up to three months -- would create administrative difficulties. Having regard to the number of stop orders typically issued

⁷ (1989) 20 ATR 238 at 244

in recent years, prior to the current moratorium, the workload imposed by applications for orders, extensions and renewals would almost certainly be very substantial for the Department and the judiciary.

Another aspect of concern is the requirement for the court to be satisfied that "there is probable cause for believing that the person against whom the order is sought is about to leave Hong Kong". Although the matter is not free from doubt, it is possible that such a requirement would be construed as meaning that a stop order could not be issued where a person has already left Hong Kong. We wish to be able to have stop orders issued in such circumstances because of the possibility that a person who has left Hong Kong permanently without meeting his taxation obligations might return for a visit. There is also the point, if I understand the position correctly, that where an order is issued by a District Judge, the person affected may apply to have it discharged, may apply to have the judge review his decision, or may appeal to the High Court. Against this, the direct approach of an appeal to the High Court (provided for in the amending Bill) would be more efficient and allow the earlier resolution of disputes.

Whilst on the subject of appeals, I would mention that one idea put to us was that only a limited appeal period should be allowed in respect of stop orders. In other words, unless an appeal were lodged within a prescribed period (say 14 days) after a judge had exercised his discretion to issue a stop order, the order would remain in force until such time as the tax was paid or satisfactory security was furnished.

I did not favour the idea. I felt that if we were to restrict the appeal period, it

was likely that we would be challenged on the basis of a conflict with article 10 of the Bill of Rights -- the right to a fair and public hearing. No doubt cases would arise of taxpayers not becoming aware of stop orders until after their appeal periods had expired. In such cases, I think we would find it difficult to justify, in terms of the Bill, refusing to consider appeals.

Difficulties would also be likely to arise on the administrative front. If only a limited period were to be allowed, this could actually tend to encourage taxpayers to appeal. Failing to do so would result in the opportunity being forfeited. On the other hand, with an unrestricted period frivolous appeals would be unlikely.

The time available does not permit me to discuss the other permutations and combinations we have considered since the amending Bill was published. I can, however, provide you with broad details of the package we now consider is the best one to take forward. The key elements are:

- The decision to issue a stop order would be exercised by a District Judge.
- Application for the stop order would be on an ex parte basis, by statement made on oath by the Commissioner or an authorised officer not below the rank of chief assessor.
- Issue of the stop order would be mandatory where the judge is satisfied:
 - (i) that the person has not paid all tax assessed upon him;
 - (ii) that there are reasonable grounds for believing that the person intends to leave, or has left, Hong Kong to reside elsewhere; and

- (iii) that it is in the public interest to ensure that the person does not depart from Hong Kong -- or if he returns does not depart again -- without first paying the tax or furnishing security to the satisfaction of the Commissioner.

Appeals against stop orders would be to the High Court where they could be heard by the Registrar or Master. The High Court would be able to:

- (i) set aside the stop order subject to such conditions as it may consider necessary;
- (ii) temporarily suspend or otherwise vary the stop order, subject to such conditions it may consider necessary;
- (iii) dismiss the appeal.

Where a stop order is in force the Commissioner may authorize the person to depart from Hong Kong on one or more specified occasions.

And, finally:

A stop order would be open-ended in the sense that it would remain in force until the tax is paid, satisfactory security is furnished or an appeal succeeds.

This package has yet to be cleared by the Legislative Council, but we are hopeful that it will be recognised as one which clearly satisfies the Bill of Rights concerns, without seriously impairing an essential revenue protection mechanism.

On a closing note, Judge Downey in the course of an early Bill of Rights case prophetically quoted Churchill: "This is not the end. It is not even the beginning of

the end. But it is, perhaps, the end of the beginning".⁸ I may be somewhat optimistic, but as far as the section 77 amendment exercise is concerned, I hope we have now at least reached "the beginning of the end".

Thank you.

⁸ *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 1 at 18

REGULATORY BODIES:

THE CASE OF THE SECURITIES AND FUTURES COMMISSION

DOREEN LE PICHON¹

1. Introduction

I am here today to talk about the Bill of Rights case against the Securities and Futures Commission ("the SFC") which came before the Court of Appeal in February of this year: *R v Securities and Futures Commission, ex parte Lee Kwok-hung*.² The challenge made was to the SFC's investigative powers, contained in section 33(4) of the Securities and Futures Commission Ordinance (Cap 24), to require a person on whom a notice is served pursuant to that section to attend before the SFC for an interview and to answer questions. I will go a little more into detail later. For the moment, I will say a brief word about the role of the SFC, including its objectives, and in particular the importance of its investigative functions. This is relevant because ultimately the question comes down to balancing the rights of the individual on the one hand against the interests of society on the other.

2. The role of the SFC

Those of you who were in Hong Kong in October 1987 will recall the closure of the Exchanges for four days during a period of global stock market turmoil. Those events precipitated the setting up of the SFC. We are charged with the task of ensuring both

¹ Deputy Chief Counsel, Securities and Futures Commission

² (1993) 3 HKPLR 39

the integrity of the markets and the protection of investors.

The SFC Ordinance, under which the SFC was established, became law on 1 May 1989. Underpinning the rationale for the new regulatory framework were the beliefs that:

- Hong Kong should aim at becoming the pre-eminent capital market in southeast Asia;
- Hong Kong should promote the progressive internationalisation of its securities markets; and
- Hong Kong should seek to develop stable, orderly and fair financial markets which offer adequate protection to investors at a reasonable cost.

3. The statutory framework

To enable the SFC to accomplish the objectives that it was set up to attain, the Ordinance vests the Commission with various powers, including investigative powers. In order to understand the context in which these investigative powers are exercised, it is necessary briefly to refer to the statutory scheme.

Section 33(1) enables the SFC to conduct investigations when it has reason to believe that one of the four matters enumerated in that section may have occurred. If, for example, it has reason to believe that an offence may have been committed, it may appoint one or more of its employees to investigate the suspected breach and to report on it.

How do investigations come about in practice? Investigations are commenced

as a result of complaints or information from a variety of sources, including the public, the Exchanges, other divisions within the SFC, other enforcement and regulatory authorities both in Hong Kong and elsewhere, and the enforcement division's own surveillance of trading on the Exchanges. Trading activities are monitored on a regular basis to detect unusual movements in price or volume, in order to determine whether such movements are indicative of either insider dealing or manipulation, warranting further inquiry. Investigation includes inquiries into possible breaches of relevant statutory requirements; misconduct of licensed dealers, advisers and their representatives; insider dealing; and breaches of the Takeovers Code.

During the four years since its establishment, the SFC has, on average, investigated roughly 150 to 180 cases each year. But only a fraction of these, no more than say 15% to 20%, reach a section 33(1) investigation.

A notice under section 33(1) of the SFC Ordinance is usually issued only after a complaint or information has been thoroughly vetted, often using information already contained in the SFC's files, to establish whether or not there is reason to believe that any of the criteria for investigation, listed under section 33(1), has been met. A section 33(1) direction is issued only if the Executive Director is so satisfied.

The direction issued under section 33(1) describes the subject matter of investigation as well as the identity of "the investigators". As required by section 33(7), this direction is shown to any person who is interviewed pursuant to the provisions of section 33(4). All persons interviewed, therefore, are aware of the scope of an investigation.

Once an investigation has commenced, an investigator may invoke various powers contained in section 33 in order to carry out the investigation. Section 33(4) is the main investigatory tool and is almost invariably used.

Section 33(4) of the SFC Ordinance provides as follows:

"The person under investigation or any person who is reasonably believed or suspected by the investigator to have in his possession or under his control any record or other document which contains, or which is likely to contain, information relevant to an investigation under this section, or who is so believed or suspected of otherwise having such information in his possession or under his control, shall--

- (a) attend before the investigator at such time and place as he may require in writing, and answer truthfully and to the best of his ability such questions relating to the matters under investigation as the investigator may put to him; and
- (b) give to the investigator all assistance in connection with the investigation which he is reasonably able to give."

Section 33(6) requires a person to answer questions put to him under section 33(4) by an investigator, but neither the question nor the answer is admissible against that person in criminal proceedings if he claims privilege before answering the question. The exceptions to this "use immunity" are limited to proceedings under section 33(12) or section 36 of the Crimes Ordinance (Cap 200), or for perjury, or for the purposes of the Securities (Insider Dealing) Ordinance (Cap 395).

4. The importance of investigative powers

The power to order investigations is critical to the role of regulating the securities industry, and it is no coincidence that countries with developed securities markets --

such as the United Kingdom, Canada, the United States and Australia -- have found it necessary to vest investigative powers, similar to those contained in section 33, in the relevant regulatory authority. Without these investigative powers, the power to order investigations would achieve little because of the increasing complexity and sophistication of corporate transactions. Detection of malpractice can be extremely difficult, especially when it is so easy to use devices such as nominees, foreign intermediaries, fictitious names and off-shore companies. Such offshore companies are often incorporated in such jurisdictions as Panama, Liberia and the British Virgin Islands, where no pertinent public information is available. These offshore companies often issue only bearer shares so that the identity of the ultimate owner is difficult, if not impossible, to establish.

Inadequate enforcement would lead to ineffective regulation. That would undermine market integrity and investor protection, without which it would not be possible to maintain Hong Kong as a major international financial centre. In short, these investigative powers are necessary to ensure that there is a level playing field out there for you, the investing public.

5. The Bill of Rights challenge

In July 1992, there was a section 33(1) investigation arising from the SFC's belief that:

- (a) offences contrary to section 135 of the Securities Ordinance (market manipulation) might have been committed in respect of the shares of a publicly listed company; and

- (b) the manner in which persons had been engaging in dealing in the shares of that company might not have been in the interest of the investing public, or the public interest,

during the period of eight weeks or so in the fall of 1991, and of another eight weeks in early 1992.

The company in question was a Cayman Islands company. It was floated on 1 July 1991 and raised approximately \$75 million from the market. A year later, in July 1992, section 33(4) notices were served on a number of persons. A production executive of the company, its chairman, and its finance director, on whom section 33(4) notices had been served, sought to challenge the legality of the notices, on the ground that those powers to which they pertained were inconsistent with the Bill of Rights Ordinance and deemed repealed under section 3(2) on 8 June 1991, when the Bill of Rights came into operation.

At first instance, before Jones J, the challenge was much broader. The applicant based his arguments on articles 5, 11(2)(g), 14, 15 and 16 of the Bill of Rights.³ But by the time the case reached the Court of Appeal, the applicant had abandoned most of those grounds and was relying solely on articles 5 and 14, and it is the case in the Court of Appeal that I shall be concentrating on today. The appellant confined his attack to section 33(4) itself. He did not seek to challenge *all* legislative provisions similar to section 33(4), since those in the Companies Ordinance (Cap 32) had been

³ *R v Securities and Futures Commission, ex parte Lee Kwok-hung* (1993) 3 HKPLR 1

upheld by Jones J in *R v Allen, ex parte Ronald Tse Chui-fai*.⁴

The argument made by the appellant in the Court of Appeal ran as follows:

- (1) A person who is being interviewed pursuant to a section 33(4) notice can claim use immunity under section 33(6) for answers that may incriminate him, except that the answers are admissible for all the purposes of the Securities (Insider Dealing) Ordinance.
- (2) Although the consequences for a person identified as an insider dealer by an Insider Dealing Tribunal, after an inquiry under that Ordinance, can be very serious -- prohibition from being a director or concerned in the management of a company for up to five years, and treble damages -- an inquiry under the Insider Dealing Ordinance is not a criminal proceeding, so that the right of a person not to be compelled to testify against himself or to confess guilt, as conferred by article 11(2)(g) of the Bill of Rights, affords him no protection.
- (3) In the circumstances, articles 5 and 14 must be read to give "residual protection" to a person such as the appellant, who is required to attend an interview under section 33(4), and would be subject to criminal sanctions if he failed to answer questions tending to identify him as an insider dealer.

Article 5

Article 5(1) provides:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The argument was that section 33(4) powers are inconsistent with the rights to "liberty" and freedom from "arbitrary detention", conferred by article 5(1); and a deprivation of liberty lies in the fact that the appellant is compelled to appear before

⁴ (1992) HCT, MP No 3646 of 1992, 20 November 1992, to be reported in (1992) 2 HKPLR

the SFC and is liable to sanctions if he does not. The Court of Appeal agreed with the judge that it is crystal clear from article 5, when read as a whole, that the "arrest" and "detention" referred to are in the criminal context, and that this article is intended to cover only physical interference with the liberty of the person. An investigator under section 33(4) has no power whatsoever to physically detain an interviewee who decides to walk out of an interview. Moreover, if the appellant's argument were correct, then the effect of a witness summons or a summons to attend as a juror would be indistinguishable from that under a section 33(4) notice. Cons VP would not agree that the man in the street would regard a summons to such duties as threats to personal liberty or security.

So the upshot was that the judgment at trial on this point was upheld. I should mention that in the very week that this appeal was heard, the New Zealand High Court reached a contrary conclusion in considering whether a person compelled to attend for examination by the Official Assignee under the Insolvency Act was "detained".⁵ Even if our Court of Appeal had had the benefit of reading the judgment of the New Zealand High Court, I very much doubt that it would have held any differently.

⁵ *In the Matter of Section 85 of the Insolvency Act 1967, The Official Assignee at Auckland v Murphy*, HCt, B 1685/87 (3 February 1993)

Article 14

I now turn to the argument based on article 14, which provides as follows:

"Protection of privacy, family, home . . .

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

Litton JA held that in considering whether or not a requirement to attend under section 33(4) breached article 14(1), the emphasis should be whether any interference was arbitrary or unlawful, and not whether personal or business affairs were affected.⁶ I should say in parenthesis that Cons VP appears to disagree with this view, since he found that a person trading in publicly listed shares on the official market must know that it is regulated for the benefit of market participants so that, at least vis-à-vis he cannot maintain that his trading is a private matter.⁷ It is difficult to say what the majority decision was, as the third member of the court agreed with both judgments. But there was no disagreement that a requirement by an investigator to attend under section 33(4) could not be described as arbitrary.

The appellant had advanced an interesting argument as to why the interference

⁶ (1993) 3 HKPLR at 50

⁷ (1993) 3 HKPLR at 55

with a person's privacy is "unlawful" within the context in which the word is used in article 14:

- (a) as a result of the requirement to answer questions, an interviewee is made to incriminate himself as an insider dealer in relation to the shares of the listed company, and this fact is reported to the SFC pursuant to section 33(9);
- (b) the SFC in turn reports to the Financial Secretary under section 4(1)(c) of the SFC Ordinance, which results in an inquiry by the Insider Dealing Tribunal;
- (c) the answers previously given by the interviewee are used for the purposes of the Tribunal inquiry and, on the basis of his self-incrimination, a person could be subjected to the heavy penalties imposed by the Tribunal under section 23 of the Insider Dealing Ordinance;
- (d) if an order under section 23 of the Insider Dealing Ordinance had been made against that person, prohibiting him from taking part in the management of a company, and he contravened this order, he would commit an offence and be liable on indictment to a fine of \$1 million and imprisonment for two years. An incriminating answer, given in a section 33(4) interview as to whether he is in breach of the section 23 order, can to this extent be used in criminal proceedings.

The court did not accept this argument. Litton JA (Wong J in agreement) held that the words, "for all the purposes of the Securities (Insider Dealing) Ordinance" in section 33(6), should be construed more narrowly, to mean for the purposes of the regulatory scheme under the Securities (Insider Dealing) Ordinance, and should not include criminal prosecution for breaches of orders made under the Securities (Insider Dealing) Ordinance.⁸ Cons VP preferred not to decide this issue then, concluding that

⁸ (1993) 3 HKPLR at 52

this was a question for a later occasion.⁹

But in any event, the court had no hesitation in holding that the interference resulting from an exercise of section 33(4) powers did not offend "universal concepts of justice".

It had also been argued that to test the "reasonableness" of the section 33(4) powers, the court should look at the "worst-case scenario". But the court held that the question to ask is who, in the general scheme of things, might be subjected to the compulsive powers of the investigators, and not who might conceivably be caught in the extremities of the net.¹⁰

The court had no difficulty in reaching the conclusion that the investigative powers of the SFC were not inconsistent with the Bill of Rights. What was involved was a balancing exercise between an individual's pursuit of his or her self-interest and the community's interest in the realisation of collective goals and aspirations.

Here the interests of society must prevail. In the result, the Court of Appeal reached the same conclusion as Canadian courts when faced with a similar challenge to similar investigative powers under Canadian securities legislation.¹¹

In my view, the Court of Appeal was plainly right in upholding the validity of the SFC's investigative powers.

⁹ (1993) 3 HKPLR at 56

¹⁰ (1993) 3 HKPLR at 53

¹¹ (1993) 3 HKPLR at 31-32, 35-37, 53-54

PRISON ADMINISTRATION

SAMSON CHAN¹

1. Introduction

As a component of the criminal justice system in Hong Kong, the Correctional Services Department (hereafter "the Department") derives its authority and duties from the following Hong Kong Ordinances and subsidiary legislation:

1. Prison Ordinance (Cap 234)
 - Prison Rules
2. Prisoners (Release Under Supervision) Ordinance (Cap 325)
 - Prisoners (Release Under Supervision) Regulations
3. Drug Addiction Treatment Centres Ordinance (Cap 244)
 - Drug Addiction Treatment Centres Regulations
4. Juvenile Offenders Ordinance (Cap 226)
5. Detention Centres Ordinance (Cap 239)
6. Training Centres Ordinance (Cap 280)
 - Training Centres Regulations
7. Crimes (Torture) Ordinance (Ordinance No 11 of 1993)
8. Acceptance of Advantages (Governor's Permission) Notice

The Department also interacts with various levels of the courts on sentences,

¹ Superintendent, Correctional Services Department

appeals, further charges against prisoners or death inquests under the following statutes:

1. Criminal Procedure Ordinance (Cap 221)
 - Criminal Appeal Rules
 - Legal Aid in Criminal Cases Rules
2. District Court Ordinance (Cap 336)
 - District Court Civil Procedure (General) Rules
 - District Court Civil Procedure (Forms) Rules
3. Magistrates Ordinance (Cap 227)
 - Magistrates (Administrative) Rules
 - Magistrates (Forms) Rules
4. Coroners Ordinance (Cap 14)

In addition to exercising its statutory obligations, the Department has integrated the United Nations *Standard Minimum Rules for the Treatment of Prisoners*² into the administrative instruments of the Department's Standing Orders, Headquarters Instructions, and Institutional Superintendents' Orders. A 1986 review by the Department concluded that "although we measure up to most of the standards and in

² *Minimum Standards for Institutions of the Correctional Services Department, Hong Kong* (Hong Kong: Correctional Services Department, 1986), Foreword. The *Standard Minimum Rules* are reproduced in *Human Rights: A Compilation of International Instruments, volume I (First Part), Universal Instruments* (New York: United Nations, 1993), p 243

some cases have exceeded the minimum standards, we are by no means complacent, but are endeavouring to maintain and improve so far as legislation and resources permit".

The Hong Kong Bill of Rights Ordinance (Cap 383), which in Part II, section 8 contains the Hong Kong Bill of Rights (hereafter "the Bill of Rights"), provides for the right to liberty and security of a person (article 5), the right to life (article 2), the right to recognition as person before law (article 13), and equality before the courts and the right to fair and public hearing (article 10). It forbids torture or inhuman treatment (article 3), and slavery or servitude (article 4). It guarantees the protection of privacy, family, home, correspondence, honour and reputation (article 14), freedom of thought, conscience and religion (article 15), freedom of opinion and expression (article 16), the right of peaceful assembly (article 17), freedom of association (article 18), a right in respect of marriage and family (article 19), and a right to participate in public life (article 21).

The Bill of Rights also touches on the work of the Correctional Services Department, with guarantees of the "rights of persons deprived of their liberty" (article 6), "rights of persons charged with or convicted of criminal offence" (article 11), "entitlement to rights without distinction" (article 1), "equality before and equal protection of law" (article 22), "no retrospective criminal offences or penalties" (article 12), and with its *exceptions and savings* for "armed forces and persons detained in penal establishments" and "juveniles under detention" (sections 9 and 10 of the Ordinance).

The relationship between the Bill of Rights and all the pre-existing legislation pertaining to the Department is defined by section 3(2) of Part I of the Bill of Rights Ordinance, which says that such legislation, if it does not admit of a construction inconsistent with the Bill of Rights, is repealed to the extent of the inconsistency. The provision introduces a broad range of opportunities for the Department to re-examine pre-existing statutes in light of the Bill of Rights, regardless of the United Nations standards on the treatment of prisoners attained so far by it.

2. Implementation of the Bill of Rights Ordinance in the Correctional Services Department

The common law standpoint on prisoner rights during incarceration is stated by Lord Wilberforce in *Raymond v Honey*:³ "a convicted prisoner . . . retains all civil rights which are not taken away expressly or by necessary implication". Examples of rights taken away expressly are provided by sections 1 and 3(1) of the Representation of the People Act 1983 (UK) (disqualification from membership of the House of Commons and voting rights); and by section 1, Schedule 1, Part II of the Juries Act 1974 (UK) (disqualification from jury service).

The Bill of Rights Ordinance itself expressly provides an exception in section 9, declaring: "Persons lawfully detained in penal establishments of whatever character are subject to such restrictions as may from time to time be authorized by law for

³ [1983] AC 1 at 10

. . . custodial discipline"; and also in article 4(3)(b)(i) of the Bill of Rights, where it is stipulated that forced or compulsory labour "shall not include . . . any work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention".

Section 10 of the Ordinance further provides:

"Where at any time there is a lack of suitable prison facilities or where the mixing of adults and juveniles is mutually beneficial, article 6(2)(b) and (3) does not require juveniles who are detained to be accommodated separately from adults."

There is only a limited body of authorities in the common law for the taking away of civil rights of prisoners by necessary implication. The most obvious right of a prisoner that is deprived by necessary implication is that of freedom of movement (article 8 of the Bill of Rights). Attempts to question the UK Home Secretary's powers of control over the conditions and the place of detention have met with little success. In *R v Secretary of State for the Home Department, ex parte McAvoy*,⁴ Webster J refused to impinge on a decision of the Home Secretary to remove the applicant from one prison to another. The court could not examine a decision made under section 12 of the Prisons Act 1952 (UK), for "operational and security reasons", unless the Secretary of State could be shown to have misdirected himself in law.

The International Covenant on Civil and Political Rights 1966,⁵ which is the

⁴ [1984] 1 WLR 1408

⁵ 999 UNTS 171

basis of the Bill of Rights, also states that a particular right or freedom may be abridged or curtailed because it is necessary to do so in the interests of the State, for example for the prevention of crime, or because of the interests of others.

In general, the Department holds the view that the ordinary and reasonable requirements of imprisonment are a necessary implication of, a permissible restriction on, or a justifiable interference with, a prisoner's rights. No prisoner shall be subjected to arbitrary or unlawful interference with his rights. Any past policies, orders, instructions, procedure, decisions, and administrative process must yield to the content and the spirit of the Bill of Rights.

Both before the enactment of the Bill of Rights and after its enactment, the Department took the actions listed below to implement the Bill of Rights in its day-to-day operations. Close cooperation with the Attorney General's Chambers was necessary in the detailed interpretation of the Bill of Rights and of the principles laid down in common law.

3. Pre-existing legislation

Relevant Ordinances and Prison Rules necessary for the management of the institutions were being reviewed by the Department as early as May 1988 for consistency with the Bill of Rights and the various rights of prisoners. Those that have been considered to be inconsistent with the Bill of Rights fall into two categories:

- (i) statutes requiring only minor amendment or a change of Department policies;

- (ii) statutes requiring a complete overhaul.

The following is a summary of pre-existing legislation that is incompatible with the Bill of Rights:

(i) Sections of Ordinances or Prison Rules requiring minor amendments are:

- (a) *Prison Rules 9(1A) and 34(a) on the searching of external orifices and conducting urine tests on prisoners.*

The Department considers that intimate body searches and the collection of urine specimens, for the purpose of discovering drugs, are not inconsistent with article 3 (right not to be subjected to cruel, inhuman or degrading treatment). However, if searches and urine tests are routine and are carried out without there being any evidence of an actual drug problem in the particular institution, then there may be a breach of article 3 or article 14 (right to privacy).

The Department has since implemented revised guidelines on conducting urine tests and intimate body searches on prisoners to ensure such tests and searches should not be conducted as a matter of routine but on a need basis. Tests on blood, stools and other body fluids will only be carried out for health reasons.

- (b) *Prison Rule 61(w) on a disciplinary report on a prisoner convicted of a criminal charge whilst being a prisoner.*

Prison Rule 61(w) provides as follows:

"Every prisoner shall be guilty of an offence against prison discipline if he . . . is convicted of a criminal offence committed while a prisoner."

This rule involves two issues. First, whether forfeiture of remission is punishment for the purposes of article 11(6) of the Bill of Rights, which guarantees

that no one shall be liable to be tried or punished again for an offence, for which he has already been finally convicted or acquitted, in accordance with the law and penal procedure of Hong Kong. Secondly, if it is punishment, whether its imposition for a breach of Prison Rule 61(w) is double punishment for a criminal offence (the same offence) for which the prisoner has already been punished.

The Department, upon consultation with the Attorney General's Chambers, agrees that forfeiture of remission is a punishment. The Department issued an instruction on 24 February 1993 to the heads of the institutions, to prevent them from instituting any disciplinary action against prisoners under Prison Rule 61(w), and to review and set aside the punishment of loss of remission imposed upon any prisoners since 8 June 1991.

- (c) *Recall orders for released persons under supervision in accordance with sections 6 and 8 of the Detention Centres Ordinance, sections 5 and 6 of the Training Centres Ordinance, section 14 of the Prisoners (Release Under Supervision) Ordinance, and sections 109(AB) and 109(AC) of the Criminal Procedure Ordinance are signed by the Commissioner.*

The Department considers that a recall order does not of itself amount to the arbitrary deprivation of liberty. It is only when the decision to recall is capricious that there will be a breach of article 5 (liberty and security of person), which guarantees that no one shall be subjected to arbitrary arrest or detention.

The Department is ensuring that the reasons for recall are well documented in

order to stand up under judicial scrutiny.

- (d) *Conditions of supervision, especially permission to leave Hong Kong, under the Detentions Centre, Training Centres, and Drug Addiction Treatment Centres Ordinances, section 109(AA) of the Criminal Procedure Ordinance, and section 10 of the Prisoners (Release Under Supervision) Ordinance.*

Section 5 of the Detention Centres Ordinance (Cap 239), the Training Centres Ordinance (Cap 280), the Drug Addiction Treatment Centres Ordinance (244), section 109(AA) of the Criminal Procedure Ordinance (Cap 221), and section 10 of the Prisoners (Release Under Supervision) Ordinance (Cap 325) set a condition in a Supervision Order requiring the supervisees to obtain approval before leaving Hong Kong. This has been criticised as inconsistent with article 8(2), which provides that everyone shall be free to leave Hong Kong.

The opinion of the Department is that this requirement is essential for the purpose of supervision and to assist the supervisee in rehabilitation. There should be no intention to restrain him from leaving the territory.

An amendment to this supervisory condition is necessary to avoid a breach of article 8(2), however, because it may be quite unnecessary in particular cases. Action therefore has been taken to rephrase the condition to read "a supervisee must inform his supervisor of an intention to leave Hong Kong for more than a certain number of days or of an intention to take up residence abroad".

(ii) Ordinances or Prison Rules requiring complete overhaul are:

- (a) *Prison Rule 47 on prisoner communications with family and friends by letter.*

Prison Rule 47 forbids a prisoner to correspond with any person other than relatives or friends unless he obtains special permission.

The Department considers that this rule probably offends article 14 (protection of privacy and correspondence), in that the basic right to write to any person whatsoever is reduced to a right to correspond only with family and friends.

Further, Prison Rule 47(b) allows the stopping and censoring of any outgoing letter if its contents are "objectionable", by the standard set by the Department Standing Order No 420.

It is proposed that Prison Rules 47 and 47(b) be restated in positive terms, along the lines that a prisoner can correspond with any person he chooses, except under specific restrictions warranted for the purposes of prison discipline; the prevention of crime; the interests, rights or freedom of any other persons; or the protection of national security, public safety, order, public health or morals. The censorship of correspondence must also satisfy this "purpose test".

- (b) *Prison Rules 57 to 65 on disciplinary proceedings against prisoners.*

After a study of disciplinary proceedings in penal institutions, the Department considers that articles 10 and 11 of the Bill of Rights give rise to concern about prison

accused of a criminal offence (eg assault), may be subject to internal disciplinary proceedings which may result, exceptionally, in the loss of up to six months' remission.

The existing provisions regarding internal discipline are considered inadequate, as many of the disciplinary charges can be characterised as "criminal", in view of the nature and severity of the penalties that can be imposed. This in turn means that prisoners are entitled to a hearing before someone other than the Commissioner of Correctional Services or his representatives.

Consideration is now being given to re-classifying the "offences" set out in Prison Rule 61, so as to separate those which can properly be described as being merely against discipline (eg disobeying an order, using abusive language, minor assaults), from those which are in reality criminal offences, that is when the prisoner under:

Prison Rule 61(e), is indecent in language, act or gesture;

Prison Rule 61(f), commits any assault;

Prison Rule 61(i), wilfully disfigures or damages any property which is not his own;

Prison Rule 61(m), escapes from prison or legal custody; or

Prison Rule 61(n), mutinies.

Infringements which are merely disciplinary should be punishable with a maximum of, say, 30 days' loss of remission, after investigation and "trial" by a Superintendent. More serious matters should be dealt with in the courts.

In order to avoid the impression of suppressing complaints, it is also proposed to delete Prison Rule 61(t).

In line with this classification, offences that are criminal will be dealt with by the court, whilst those that are of a disciplinary nature will continue to be dealt with by the Superintendent, whose powers of punishment in respect of loss of remission of up to two months, under Prison Rule 63(1)(c), are considered more appropriate. However, where there is a need for a treatment award, it is essential for the Commissioner of Correctional Services to retain the power of awarding six months' forfeiture of remission to deal with serious cases.

As a longstanding practice, the Commissioner of Correctional Services also considers appeals against the findings of a disciplinary hearing against a prisoner, and his decision is final.

On 25 September 1991, a prisoner wrote a letter through OMELCO to the Commissioner for Administrative Complaints, complaining that he had not been fairly dealt with in a disciplinary proceeding held on 21 September 1991, whilst he was a prisoner. Both the Commissioner for Administrative Complaints and legal advice obtained shared the view that Prison Rule 63(2) only provides a prisoner with the right to appeal against the decision but not the findings. Furthermore, disciplinary procedures that do not provide for appeal are certainly unfair and contrary to the Bill of Rights. It is therefore considered essential that the Prison Rules be amended to provide for appeal by prisoners against the findings of guilt in a disciplinary proceeding.

4. Conclusion

The Hong Kong Correctional Services Department has endorsed the 1955 United Nations *Standard Minimum Rules for the Treatment of Prisoners*. A 1986 review of the relevant legislation, Department Standing Orders and Department Headquarters Instructions confirmed that the Department had measured up to most of the standards, and in some cases had exceeded the minimum standards.

Prisoners are being treated with humanity and with respect for the inherent dignity of the human person. It is the policy of the Department that no prisoner is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Staff must carry out their statutory duties with regard to the decency and self-respect of the prisoners, as well as with regard to the essential aim of their reformation and social rehabilitation.

With the enactment of the Hong Kong Bill of Rights Ordinance in 1991, the Department has taken the opportunity to re-evaluate its relevant Ordinances, regulations, standing orders and instructions in order to comply with the content and spirit of the Bill of Rights and to take a step beyond the requirements set by the United Nations *Standard Minimum Rules*.

As the contents of the Bill of Rights cover a wide range of aspects, with the exemption clause for the "preservation of custodial discipline" not elaborated, it is envisaged that the present course of action taken by this Department is not final. Further deliberation on the fine points of the Bill of Rights, covering the work of the Department, will continue to surface in future and this Department is committed to

copied with changing needs, and is ready to change its rules in conformity with the spirit of the Bill of Rights.

SESSION II:

THE BILL OF RIGHTS IN LITIGATION -- GENERAL

CHAIR: MR PHILIP DYKES

ADMINISTRATION OF THE COURTS:

THE OPEN ADMINISTRATION OF JUSTICE AND THE BILL OF RIGHTS

MR JUSTICE GODFREY¹

The principle of "open justice" is one of the pillars of the common law. Without open justice the rule of law would crumble. So it is right to consider whether in Hong Kong this principle of "open justice" is honoured in the observance, or whether in practice our legal system fails in any respect to deliver "open justice". If there are failings, it is right to go on to consider how they are to be corrected, and whether the Bill of Rights has any useful part to play in that exercise.

The questions I propose to address are therefore these. Are there any respects in which our legal system fails to deliver "open justice"? If so, what should we be doing to correct these failings? Can the Bill of Rights afford us any help in this connection?

First, what *is* "open justice"? "Open justice" means justice dispensed in open court, in open view, in public, in a court to which the public and the press are entitled to be admitted. In Hong Kong, as in England, it is the "inveterate rule" that justice must be administered in open court.² This "inveterate rule" is part of the foundations on which the civil liberties enjoyed by those entitled to the protection of the common law have been built. It was partly because of its failure to dispense open justice that the Court of Star Chamber, which flourished in England under the Tudors and Stuarts

¹ Supreme Court of Hong Kong

² See *Scott v Scott* [1913] AC 417 at 445, per Earl Loreburn.

until its abolition in 1641, was so hated and detested by the King's subjects, by whom its procedures were rightly regarded as being at odds with their civil rights under the common law.

But civil rights are not absolute. I doubt whether the most passionate defender of the right to liberty would protest against the imprisonment for life of a serial rapist for whom there appears no prospect of a cure. And what for one man is the exercise of his right to freedom of expression may be, to another, an incitement to racial hatred to be prohibited by law.

So it is with "open justice".

The common law recognises that there are exceptional cases in which, in the interests of justice, the proceedings or part of them cannot be conducted in open court and must instead be conducted "in camera", that is to say, in private, in secret, behind closed doors, in proceedings at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded. The exceptional cases in which a judge may direct that the proceedings or part of them be conducted in camera fall into the following well-recognised categories:

- (i) where it appears to him necessary in the interests of national security;
- (ii) where the conduct of the proceedings in open court might defeat the interests of justice (for example, if the proceedings would involve the disclosure of trade secrets or of confidential documents);
- (iii) where it appears to him necessary for the proper administration of justice (for example, where there are grounds for apprehending disorder

in court); and

- (iv) where he is sitting in the exercise of the court's parental jurisdiction over mental patients or minors.

When a judge directs that proceedings, or part of them, are to be heard in camera he is, no doubt, acting in breach of the principle that justice must be open justice; but, from the nature of the categories of case which I have mentioned, it will, I hope, immediately be appreciated that he does so because in these exceptional cases rights even more important than the principle of open justice are involved, and need, in the interests of justice itself, to be properly protected.

It should be observed that the court's power in exceptional cases to hear civil proceedings, or part of them, in camera is a limited power. Thus an order that the proceedings be held in camera cannot be justified by the fact that the parties to the proceedings have consented to that course. This has sometimes caused much anguish, particularly in the matrimonial jurisdiction of the court, and most particularly in contested cases of nullity of marriage, when there is to be medical evidence likely to cause grave distress to the parties to the suit. It has been held that that consideration does not itself justify a departure from the principle of open justice. The wishes of the parties are subordinated to the principle.

I believe that the exceptional cases to which I have referred are all entirely justified. If a trial involves the disclosure of trade secrets, or confidential documents, it may be that justice could not be done at all if the trial took place in open court. If evidence in open court is likely to be damaging to national security, surely it must be

accepted that the demands of national security must transcend even the public interest in the open administration of justice. And how can justice be done in court if order cannot be maintained? It must be right that the judge has power to close or clear his court if such a precaution is necessary for the proper administration of justice.

The underlying principle, I suggest, is that the court may sit *in camera* where the case cannot otherwise be effectively tried, or where the parties otherwise entitled to justice would reasonably be deterred from seeking it at the hands of the court.

So far, I have identified a number of situations in which the principle of "open justice" may, in our system, be required to give way to other considerations. But, as I hope I have persuaded you, all of these are entirely justified.

However, there may be a few failings in our system which require correction and I will endeavour to draw your attention to these.

All of them stem, I think, from the intervention of the legislature, which has for many years expressly conferred on judges a power in certain cases to sit "in chambers" as it is called. I have already explained what is meant by "in camera" and in truth the expression "in chambers" is no more than the English translation of the Latin expression. However, in practice, the expression "in camera" is used for proceedings which, but for the direction of the judge, would have been held in open court; while the expression "in chambers" is used for those private proceedings which are heard as such under the direction, or the authority, of some legislative provision in that connection.

It has sometimes been suggested in Hong Kong that the public and the press

ought to be admitted to chambers proceedings, or that, at least, the reasons given by a judge for his decision in proceedings in chambers ought to be made publicly available as a matter of right. I have to say that this betrays a fundamental confusion of thought. To speak of chambers proceedings to which the public and the press are to be admitted involves the speaker in a contradiction of terms. Chambers proceedings are private proceedings, held behind closed doors, at which only the parties and their advisers are entitled to be present, and from which the public and the press are excluded, unless present with the consent of the parties and the court.

Proceedings in chambers do involve a breach in the principle of "open justice". But it would, I suggest, be ridiculous for this reason to scrap proceedings in chambers completely, and to insist that all proceedings at every stage in any suit at law must be heard and disposed of in open court. It is surely not necessary, in the interests of justice, that the public and the press should be allowed to attend hearings before the judge, or the master, on an application for further and better particulars, or for discovery of documents. It might, strictly, be in accordance with principle to insist on this; but such an insistence would demonstrate a loss of all sense of proportion on the part of the person so insisting. And the concept of proportionality is one which everyone concerned with the right to "open justice", like any other civil right, ought to be aware.

However, I believe that one failing in our system does require correction.

The practice in Hong Kong is such that comparatively little of the business of the court is conducted in open court. A study of the lists reveals that most of the civil

business is interlocutory business and that very few actions come to trial. Interlocutory applications in Hong Kong often assume a place out of proportion to their nature and to the real need for the court to resolve the issues between the parties at a proper trial. This phenomenon does no credit to those practitioners who are astute enough to deluge the court with floods of interlocutory work rather than to ensure that their clients' cases come to trial. The vast majority of these interlocutory applications are heard "in chambers", and this does put at risk the principle of "open justice". In particular, it seems to me that applications *inter partes* for interlocutory injunctions ought to be brought on in open court, and not in chambers. An exception must of course be made for applications *ex parte*; it is not fair to the absent respondent, who has had as yet no chance to be heard, that the case against him should be deployed in public before he has had a chance to answer it. In particular, in certain cases such as applications for pre-emptive injunctions of the *Anton Piller* or *Mareva* type, which are intended to have effect before the respondent is able to re-arrange his affairs so as to defeat the purpose of the injunction, it is all the more necessary to retain privacy for such hearings at the *ex parte* stage.

Another instance in which, it seems to me, the proceedings ought to be in open court are proceedings in which the applicant applies *ex parte* for leave to apply for a judicial review. Such applications are often dealt with on paper, without a hearing at all; but, when there *is* to be a hearing, it does seem to me that that hearing ought to be in open court, like the application for judicial review itself.

Apart from these two instances, I do not think there is any failing in our system

which we should feel called upon to correct so far as the principle of "open justice" is concerned. And those two failings, if it is agreed that they need correction, can easily be corrected by amendments to the Rules of Court.

Does our system, then, in any way fall foul of the Bill of Rights so far as "open justice" is concerned?

You will all be familiar with article 10, which provides:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of the trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but any judgment rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile or persons otherwise requires or the proceedings concern matrimonial disputes over the guardianship of children."

From what I have said so far, it will be apparent that I do not consider there is anything we do in Hong Kong which falls foul of article 10. You are entitled, in the determination of your rights and obligations in a suit at law, to a public hearing; but you do not need article 10 to give it to you, for you have that right already. The fact that interlocutory proceedings may, under the Supreme Court Ordinance³, be heard in chambers is not a breach of the principle enshrined in article 10; for those interlocutory proceedings do not "determine" your rights and obligations. (So far as hearings in camera are concerned, there is, I think, no substantial distinction between

³ Cap 4

the exceptions made by the common law to the principle of "open justice" and the exceptions made in article 10. So far as the requirement in article 10 that any judgment in a suit of law shall be made public, except as there mentioned, is concerned, on any fair construction of article 10, that relates back to a judgment which "determines" a person's rights and obligations, and not to interlocutory judgments such as those pronounced in chambers.)

As to judgments pronounced in chambers, it must be remembered that article 10 is concerned with the protection of the parties to the suit at law, not with the protection of the press or the public. The press and the public may well be extremely interested in the outcome of proceedings in chambers, but if the parties wish to preserve the privacy which is accorded to such proceedings, it cannot possibly be right to defeat their wishes: that would be to infringe their civil rights, not to protect them. Of course, judgments in chambers may well be of interest to the legal profession, as establishing or illustrating some point of principle; in that case, the judge may give leave for his judgment to be reported, or, if he prefers, deliver his judgment in open court so that it may be reported anyway. The idea that article 10 confers some right, on the press and the public, to demand to know the judge's reasons for his conclusion arrived at in chambers is, with respect, patently misconceived.

It follows from all this that, in my opinion, article 10 of the Bill of Rights, though extremely valuable as a re-statement of the right to "open justice", does not in fact add anything to the existing law, nor does it operate to strike down any practice currently in force.

I am one of those who believe that the Bill of Rights is a very valuable instrument; but like anything valuable, its abuse will serve only to diminish its value. I hope that practitioners, and academics, will continue to promote it; but will not fall victim to the tendency to lose all sense of proportion when doing so. The common law is not perfect, and there may be times when the Bill of Rights will come to the aid of the subject so as to protect him from tyranny, oppression and injustice. But it is not, at present, needed to ensure that, in Hong Kong today, the principle of "open justice" is properly observed.

THE PRESUMPTION OF INNOCENCE

MR S R BAILEY¹

Just before leaving Mr Justice Godfrey's address, I notice his reservation about turning the Bill of Rights into a massive legal industry. Some of us have a vested interest in achieving just that. It provides some of us with work. Anyway, today I am going to talk about the presumption of innocence, as I did last year at this seminar. Let us remind ourselves of article 11(1). It is twenty words but it has generated a lot of litigation:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

That is simple enough one may think.

Just to recap, at the end of year one of the Bill of Rights, at this time last year, we had the Court of Appeal's judgment in *R v Sin Yau-ming*,² which took quite a strict approach to the presumption of innocence, which means essentially that it is up to the prosecution to prove the case beyond reasonable doubt. The accused need not do anything. Article 11(1) litigation asks how the law can derogate from this principle. *Sin Yau-ming* suggested, in very broad terms, that any derogation from the presumption of innocence had to be justified. There the dangerous drugs provisions effectively required the defendant to rebut (ie to disprove) the presumptions. There

¹ Senior Assistant Crown Prosecutor, Attorney General's Chambers. For further discussion on Hong Kong case law concerning the presumption of innocence, see Appendix A.

² (1991) 1 HKPLR 88, [1992] 1 HKCLR 127

was clearly a derogation from the principle that the Crown must prove its case, and the court found this unjustified, using tests of rationality, proportionality and minimum impairment. The court took this approach in large measure from a series of Canadian cases, which took a very strict approach as to the content of the presumption of innocence and required any derogation to be justified.

Coming to year two, I want to deal with *R v Wong Hiu-chor*,³ the judgment handed down by the Court of Appeal on 4 December 1992. This concerned presumptions, provisions that presume that part of the prosecution's case exist. This related to sections 18A(2) and 35A(2) of the Import and Export Ordinance (Cap 60). Under the dangerous drugs provisions, which had been struck down in *Sin Yau-ming*, it was up to the defendant to rebut. Here, the presumptions were in different language, and their effect was that part of the Crown's case was presumed "only in the absence of evidence to the contrary". Thus the defendant did not have to *prove* anything, but simply had to *introduce evidence* that the presumption was wrong in his case. The Court of Appeal continued its approach in *Sin Yau-ming* here, by taking quite a strict view of the presumption of innocence. Even though the defendant did not have to *prove anything*, it held that the provisions still derogated from the presumption of innocence because they helped the Crown prove its case. However, the court went on to say that in the case of the particular provisions of this Ordinance, they were reasonable and justified and should be upheld.

What does the Crown have to do to show that a presumption is reasonable? In

³ [1993] 1 HKCLR 107; to be reported in (1992) 2 HKPLR

Sin Yau-ming, it was suggested that the Crown might have to bring "persuasive and cogent evidence". But in *Wong Hiu-chor* the court also showed no interest in the statistics presented to prove the blindingly obvious, such as the existence of smuggling as a problem in Hong Kong -- thus introducing what the Privy Council would later call "realism and good sense" into its judgment.

Let me come to the Privy Council cases of *Attorney General v Lee Kwong-kut* and *Attorney General v Lo Chak-man and another*.⁴ These two cases turn on very different provisions. The Privy Council held that section 30 of the Summary Offences Ordinance (Cap 228) was repealed, and section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) was consistent with the Bill of Rights. According to the Privy Council, section 30 was inconsistent with the Bill in that it was not reasonable for a person to establish that he had innocently come by property where the circumstances raised only the suspicion that that property was stolen or unlawfully obtained. Suspicion was not enough to haul a person before the court and require him to show that he had come by suspect property legally. Section 25(1) of Cap 405, on the other hand, makes it an offence to engage in transactions with a view to laundering money, with the Crown required to prove that the defendant either knew or had reasonable grounds to believe that he was dealing with a drug trafficker. For the offence to be proved, the Crown must also show that the money was drug money and that the accused entered into a transaction with the trafficker. Here, section 25(4)

⁴ (1993) 3 HKPLR 72, [1993] AC 951. This judgment is reproduced here as Appendix C.

provides a defence to that charge, whereby it is sufficient for the defendant to prove that he did not know, and did not suspect, that the money he was dealing with was drug money. The Privy Council found this reasonable, even though the defendant bears the burden of proof, given what the Crown have to prove. So the Crown still have to prove that it was drug money and that the defendant knew or suspected that he was dealing with a trafficker; but if the defendant wishes to rely on his lack of knowledge or suspicion that he was dealing with drug money, he must prove it. The Ordinance says that the defendant may report a suspicious transaction to the authorities and, if he fails to do so and carries on with the transaction, he must be able to prove that he did not know or suspect.

In broad terms, the Privy Council has laid a great deal of stress on what it sees as a commonsense approach to Bill of Rights issues. One of its comments is destined to be repeated often in the courts of Hong Kong, if only by me:⁵

"While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public."

This is a very pragmatic approach. If a provision derogates from the presumption of innocence, if some burden is placed on a defendant to prove something to escape conviction, whether it is valid or not will depend on whether it is reasonable, and whether it is reasonable will depend on what the burden is compared

⁵ (1993) 3 HKPLR at 100

with what the Crown has to prove. And so if the Crown has to prove the essential elements of the case, and the defendant is merely required to establish some defence by way of an exemption or a proviso, then that is valid and consistent with the Bill of Rights. In coming to the decision that the question was one of balance, the Privy Council stressed common law tests. In *R v Edwards*,⁶ we have the leading authority on exemptions and provisos when a burden is placed on the defendant, and it suggests that they are valid at common law. The Privy Council adopted this notwithstanding the Bill of Rights, and showed strong support for the common law, in contrast to its lukewarm reception of Canadian jurisprudence, which it considered overly complex and unnecessary to follow in the vast majority of cases.

Both the Privy Council and the Court of Appeal decisions that I have discussed today exhibit a high regard for maintaining the rule of law in Hong Kong. The focus in Bill of Rights cases, particularly in the criminal law from the defence point of view, is on the rights of the individual, and the support which the Bill can offer for those fundamental rights. The courts are alive to this, and the Privy Council decision on section 30 is a good example. But the individual's rights are not the only concern of the rule of law: there are other considerations. Both the Privy Council and the Court of Appeal suggest that it is a question of balancing the rights of the individual against those of society generally. They have relied strongly on the separation of powers. The Privy Council says that legislative policy is primarily the concern of the legislature, which makes the law to be interpreted and applied by the judiciary. The Bill of Rights

⁶ [1975] QB 27

has the capacity to blur this distinction, but both the Privy Council and the Court of Appeal are at pains to preserve it, and I would suggest rightly so. The judiciary are not elected, and they are not directly answerable to society as members of the legislature are. Accordingly, I would support the Privy Council's deference to legislative policy.

The Privy Council has also given strong support to longstanding common law principles. The problem of defence burdens, statutory defences, exemptions and provisos is not new. *Edwards*, and the case of *R v Hunt*⁷ in the House of Lords, have established that it can be reasonable to place a burden on a defendant to prove his innocence. The District Court, as well as the Privy Council, have given strong support to such a common law principle. Section 37C of the Immigration Ordinance (Cap 115) has given rise to three cases in the District Court that followed *Gammon (Hong Kong): Ltd v Attorney General of Hong Kong*;⁸ *R v Tsui Tsz-fat*;⁹ *R v Lau Wan-chung*;¹⁰ and *R v Hui Lan-chak*.¹¹ I would submit that it is appropriate for the common law to be applied in a Bill of Rights context. Some may suggest that undue deference is being paid to the legislature, and to common law principles. But the Bill of Rights was not enacted in a vacuum, but within a tradition of the common law. Common law

⁷ [1987] AC 352

⁸ [1985] AC 1

⁹ (1992) DCt, Crim Case No 402 of 1992, 3 July 1992, Judge B Chan

¹⁰ (1992) DCt, Case No 450 of 1992, 12 August 1992, Judge Kilgour

¹¹ (1992) DCt, Case No 556 of 1992, 8 September 1992, Judge Lugar-Mawson

principles -- which have evolved over hundreds of years -- should not be thrown out just because we now have a Bill of Rights.

Before I close, in relation to anything Mr McCoy may say, I would ask you to bear in mind a few facts. Mr McCoy's client, Mr Lee Kwong-kut, won in the Magistrates Court and the Court of Appeal, and he received full costs. Mr McCoy went to London, with a promise from the Attorney General that his costs would be met, whether the result was a win, or a loss, or a draw. In fact he won. Mr Lee Kwong-kut got back his \$1.76 million in cash. Mr McCoy did not have to say a word in the Privy Council. So I would ask you to treat any criticism of the Privy Council's approach he has with those facts in mind.

SOME ISSUES IN CRIMINAL LAW AND PROCEDURE

UNDER THE BILL OF RIGHTS

MR GERARD MCCOY¹

When I looked at the list of speakers for the seminar this morning, I knew at least three things. I knew that it would be learned because we have a judge. I knew that it would be provocative as we have Mr Bailey from the Legal Department here. And I hoped that it would be tax-deductible because of the Commissioner of Inland Revenue being here. There are a vast number of non-lawyers here, and so I have decided to demystify my prepared speech from some mumbo-jumbo. I do not intend to talk about any particular facet, because of my limited powers of concentration. In fact I intend to address a number of topics quickly.

Let me begin with a short introduction to legal reasoning. If you can think about something that is related to something else, without thinking about the thing to which it is related, you are well on the way. The Bill of Rights is a protection against the tyranny of the majority, because the tyranny of the majority can exist even in a democratic society. It provides a remedy for the past and a promise for the future. One of the worldwide phenomena in the past few decades has been the emergence of human rights as a pre-eminent political force in itself. The Bill of Rights of Hong Kong reinforces the legal foundation of society and it enhances the role of law in society. But lawyers and judges must not work it out by spasmodic sentiment. They

¹ Barrister

can only proceed by way of consecrated principles.

I now wish to move to the decision of the Privy Council in *Attorney General v Lee Kwong-kut*.² What did the Privy Council decide? The ratio of the case, that is the essential decision, is that it is not unlawful to walk in Ap Lei Chau at 3 o'clock in the morning, carrying a plastic bag containing \$1.76 million. Indeed it would be a sad day if it were otherwise. And it is still not unlawful even if the stillness of the morning is broken only by the sound of a *dai fei* departing towards the horizon with the outline of second-hand Mercedes-Benzes on board.

It is virtually obligatory for lawyers to show a sycophantic regard for any decision of the House of Lords or the Privy Council. That is part of our training. But I would respectfully suggest of the decision in *Lee Kwong-kut* that anyone who is not confused by it does not really understand it. Although my client succeeded, I regard, with great respect, Lord Woolf's speech in part with the type of affection reserved, I understand, for discarded lovers. In my submission, it is a very utilitarian speech. In particular, it warns us from following the Canadian jurisprudence and its artificial excesses. That is obviously a good thing. It reminds us, correctly also, that the Bill of Rights will become a "Bill of Wrongs" unless common sense prevails, which is also obviously a good thing. Now, generally an appeal to that universal commodity, common sense, is the first refuge of a judge who wishes to appear logical without necessarily being logical.

² (1993) 3 HKPLR 72, [1993] AC 951. This judgment is reproduced here as Appendix C.

In my respectful submission, Lord Woolf's speech is a return to the Chancellor's foot. Chancery lawyers would no doubt denounce that by saying "cobbler's". What Lord Woolf says in part is that Hong Kong lawyers tend to circumnavigate the globe of irrelevance in their submissions. That is why the other case, the associated appeal to the Privy Council, took no less than six weeks to decide whether a piece of legislation, one page long, was invalid in whole or in part. And we are not having that again, thank you Hong Kong. Secondly, the Bill of Rights ought to be confined to the extremes of legislation, because many of the intrusions will be illegitimate. Lord Woolf also says that we do not need -- we can eschew -- the Canadian jurisprudence, because we now all know whether something is unlawful when we see it. It is a sort of instant-noodle reaction to the law that you happen to be considering. It is now an instant recognition of unconstitutionality. I fully accept that the courts should not be tied into lengthy, prolix arguments about the analysis of legislation. But there has to be some balance.

In my view, the Privy Council actually proceeded on the basis of a number of inarticulate premises, which may include the following. Judges are now lawmakers. Forget the idea that judges only declare what the law is. They are now making it and they have been given this new responsibility. Secondly, political and policy questions may end up as judicial ones. Thirdly, human rights have significant economic consequences, a fact that is often overlooked. There is a price for every right that is given. The judiciary is not free to soar on the wings of policy, as it sees fit. But if it is now making law, is it entitled to think politically? Will the fear of consequences

inhibit decisions? Will it dominate decisions? It places the judiciary in a particularly difficult role: they now walk a tightrope, because if they go too far one way they will endanger their legitimacy; and if they go too far the other way, they will endanger their credibility. So, at the end of the day, it is all a matter of balance, so that the judges are now converted into trick cyclists. I mean that with all respect. It is a very difficult political situation. The judges, whether they like it or not, are now making law for the first time. In previous generations, judges by stealth showed judicial activism when they wanted to. Now, it is an open secret.

In addition, the Privy Council also spoke, in my view, in meteorological terms. They said that over Hong Kong there really are no lofty clouds where constitutional concepts may be formulated. They also said that human rights are a pre-eminently political force, firstly for the legislature. Hands off! It is for the legislature to make decisions. Only in a limited number of cases ought the judiciary to be confronted with making law themselves. A sign that the Privy Council put up was "Beware of traffic". Finally, the Privy Council said, in my view, that justice is not to be taken by storm. It is to be wooed by slow advances. Hasten slowly because it is very difficult to undo the damage of early decisions, unless the consequences of them are thought through.

The next matter that I wish to deal with is bail applications. A cynical definition of bail might be this: the small charge that criminals must pay to the court in order to reoffend prior to trial. But of course it is an extremely serious matter: the pressing and immediate right to be set free. In Hong Kong, people have to wait too long for criminal trials, particularly in the High Court. It is a systemic failure. People here are

tried with undue delay, and magistrates and judges are reduced to handwriting the evidence in a great number of cases, all day, every day. And notwithstanding that Hong Kong is a world centre of technology and computers, we are still in antediluvian times when it comes to the recording of evidence. In my view, this is indefensible hypocrisy if the government is taking rights seriously. It is no good slapping ourselves on the back for having passed a Bill of Rights, unless the consequences are fully understood. It is truly remarkable that the explanatory note to the Bill of Rights actually said that there were no financial implications in this Bill. The government, if it is not careful -- and I mean this in a totally apolitical sense -- is actually offering an indignity to our society. It is vital that the recording of evidence be immediately addressed.

Further, with regard to bail applications, they are heard in open court, before both magistrates and District Court judges. But for some reason, never explained, in the High Court and the Court of Appeal, they are heard behind closed doors, in chambers. What can the rationale for this be? Some judges mercifully allow the persons who are actually paying the legal fees, the friends and families, to actually come in and watch justice in action. Others utterly refuse, on the ground that chambers means private. The position is unclear and therefore unsatisfactory.

On the voluntary repeal of legislation, I was genuinely impressed this morning to hear of the work that the Correctional Services Department has done. But generally, the amount of voluntary repeal of legislation in conflict with the Bill of Rights has been woefully small in statistical terms. In fact, it is difficult to believe that there is

any sincere commitment to this. There have been vast amounts of political posturing, perhaps I could say even sumo wrestling, on this point. There have been promises to review legislation from many government departments. But very little has managed to hit the floor. It is clear, in my view, that some departments are simply taking a calculated risk. Knowing that the law is unlawful, they will maintain it until someone points out in court that it is in fact unlawful. Then they will be left with having it repealed for them. But there has to be an enduring incentive and it is this. Because all repeals are going to be backdated to 8 June 1991, the longer Government departments leave it, the harder it is going to become, the more dreadful and worrying will be the utterly self-induced consequences. Some of the reasons given for not repealing are simply impenetrable. They remind me of that concept, the waterproof teabag. It is time to stop the pious bleating and get on with it.

Let me proceed to my last topic, the speech by Mr Justice Godfrey on open justice. I have unfeigned respect for the judge because, both as a distinguished Queen's Counsel and as a judge of our High Court, he has led a good number of sacred cows to the abattoir. But, when he said in his speech that any reference to article 10 was patently misconceived, I became alarmed. It is not a question of label-switching. In my view, the issue is not as the judge put it. He said that private matters should remain private. That is circular reasoning, because the question is what should be private? Should appeals to judges of the High Court from masters be heard in private? Much law is decided there and it is reported only if the judge so allows. Law is not accessible if it is heard behind closed doors. Some great judge once said that

justice is not a cloistered virtue. Even if your only motivation in going to watch a court is that it is a source of cheap entertainment, you ought to be allowed to go and watch it because, in my view, judges do a better job when there is some anonymous person sitting in the back of the court watching them.

I do agree with the judge naturally, that judicial review -- because of its oozing public law element -- should be heard in open court, including leave applications. The current practice direction, given by the Chief Justice, has developed over time, in relation to the reporting of judgments in chambers.³ Originally, nothing was to be reported unless the judge allowed it. Now things can be reported unless the parties can convince the judge not to permit this. In my respectful view, the practice direction is unlawful. It contravenes article 10 because the only things which cannot be reported concern the guardianship of children and other limited matters. The onus is the other way round. It is all open unless there is very good reason to make it private. The judge quoted the well-known words of *Scott v Scott*,⁴ about open justice. I prefer the

³ The Practice Direction concerning Reports on Chambers Proceedings, issued by the Chief Justice on 10 July 1992, provides:

"No report shall be made of any proceedings (including the judgment) held in Chambers (which are private proceedings) without the authority of the master or the judge before whom the proceedings were conducted. If the master or judge considers that the report should be released for publication he should afford the parties any opportunity to make representations to him on the matter before so declaring.

2. Nothing in this Practice Direction is intended to affect the powers of a judge to adjourn proceedings from Chambers into Court (whether for judgment or otherwise) and vice versa as the judge thinks fit."

⁴ [1913] AC 417

words of the Privy Council, which bind Hong Kong: "publicity is the authentic hallmark of judicial, as distinct from administrative, procedure".⁵ Why should not somebody be allowed to go and watch what takes place in chambers, particularly when -- on any empirical view -- 75% of the work of civil judges in the High Court takes place in chambers? The presence of the public is not necessary to constitute an open court, but the remoteness of the possibility of attendance must not be reduced to a certainty by hearing the case in chambers. That is my controversy for today.

⁵ *McPherson v McPherson* [1936] AC 177 at 200

SESSION III:

***THE BROADER IMPACT AND (IR)RELEVANCE OF
THE BILL OF RIGHTS***

CHAIR: MR ANDREW BYRNES

THE RELEVANCE OF THE BILL OF RIGHTS TO COMMUNITY ORGANISATIONS

SAMUEL HUI¹

My topic today is the relevance of the Bill of Rights to community organisations. These organisations have been becoming more familiar with the term "human rights" over the past two years. What is less clear is the boundaries of the rights protected by the Bill of Rights Ordinance (Cap 383), which these community organisers in Hong Kong have to take time and pains to learn.

The Bill of Rights Ordinance is, and is merely, a piece of legislation. It is this simple fact that community organisers in Hong Kong have ignored in the past. Most social activists have a vague sense of what is called human rights. In bringing this concept into their arena, they define human rights politically, in light of a power struggle with the Government. Last year, a number of events well illustrated different interpretations of human rights held by the Government, the activists and legal professionals. For the activists, human rights justified social action under the banner of moral justice. For lawyers, human rights made sense only as carefully defined and enforceable legal instruments.

This is not to suggest that social activists in Hong Kong are ignorant or naive. The government bureaucracy in Hong Kong is not very repressive, but it is not particularly responsive to the social and political demands of the society. The relative

¹ Society for Community Organization

powerlessness of most members of Hong Kong society breeds radical attitudes among grassroots organisers. Moreover, the much more repressive, although indirect, long shadow of the Chinese government serves as another imagined foe of certain social activism. The overlapping images of these two governments, as seen in the suppression by the local police of protests against China, give rise to mixed feelings of threat, injustice and oppression. Human rights serve as a unifying symbol for activists, in defining their political position and in justifying their struggle. They therefore interpret the Bill ideologically rather than legalistically. Few organisers read the Bill word by word until they are charged. It is then that they realise that it provides less protection than they had supposed.

Of course, as numerous people have already pointed out, the Bill suffers from inherent limitations; but beyond even such rights as some may presume to be adequately protected, it fails to meet the requirements of social activists.

Two months ago, a group of protesters blocked Upper Albert Road for half a day. They were apprehended and warned by the police. The protesters argued that their rights to free assembly and free expression were being infringed. But few in the legal profession or the media showed sympathy with them. Members of the public even called radio stations to condemn the protesters as self-interested.

Did these protesters have the "right" to block a public road as an exercise of their right to freedom of opinion and expression? Under article 16 of the Bill, limitations on free expression can be imposed if necessary "(a) [f]or respect of the rights or reputations of others"; or "(b) [f]or the protection of national security or of

public order (*ordre public*), or of public health or morals". These restrictions are necessary if the Bill is to protect all citizens. A balance between the interests of the individual and those of the community as a whole, however difficult, must be maintained. No mere sectoral interests should be allowed to detract from the universality of such legislation. The protection offered by the Bill is formal and procedural in character, which is the best and the most valuable aspect of the law more generally.

On the other hand, all social movements serve substantive and sectoral, though not necessarily unjust, interests. They may create, and indeed aim at, the disruption of public order, because their action is organised to change substantive policies. A legally defined right to freedom of expression is a means for change, though perhaps not the best means, if the Government is not responsive to rational argument, which is exactly the case in Hong Kong. Disruptive action is the ultimate non-violent means for organisers.

Legal affairs are usually political, but not all political affairs can be resolved in legal ways. The eternal conflict between substantive and procedural justice, that is between means and ends, is always part of reality. If the Bill of Rights guarantees natural rights, it also exerts social control. If disruptive social action is necessary for liberation, it also paves the way for irrational dogmatism and moral authoritarianism. Social activists should be more aware of the costs and the benefits of the Bill to them and to society more generally.

Less problematical is the question of the implementation of the Bill. The

Government is less than wholehearted in promoting the promised rights. Last year, a few laws, mainly concerned with law enforcement agencies, were amended to meet the requirements of the Bill. But, as everyone knows, a change in the wording of the law cannot alter the real practices of law enforcement agencies until sufficient instruction in human rights is given to them and impartial supervision is placed over them.

In May 1993, a team of police officers surrounded a housing estate in Tsing Yi to search, household by household, for illegal immigrants. No warrants had been issued by the courts. When faced with complaints, the police said that their power was conferred by section 50(1) of the Police Force Ordinance (Cap 232). Section 50(1) provides:

"It shall be lawful for any police officer to apprehend any person who he reasonably believes will be charged with or whom he reasonably suspects of being guilty of--

- (a) any offence for which the sentence is fixed by law or for which a person may (on first conviction for that offence) be sentenced to imprisonment; or
- (b) any offence, if it appears to the police officer that service of a summons is impracticable because--
 - (i) the name of the person is unknown to, and cannot readily be ascertained by, the police officer;
 - (ii) the police officer has reasonable grounds for doubting whether a name given by the person as his name is his real name;
 - (iii) the person has failed to give a satisfactory address for service; or

- (iv) the police officer has reasonable grounds for doubting whether an address given by the person is a satisfactory address for service."

The police interpret this unwarranted power to arrest in an extremely broad way and cite it often retrospectively merely in justification of their actions.

The Bill of Rights cannot check the exercise of such discretion by the police. Although the right to free assembly is assured under the Bill, the police have arbitrarily set up no-go areas near the New China News Agency and the main gate of Government House. They have even limited to twenty the number of protesters at the east gate of Government House, where there is no traffic.

At the departmental level, the Government uses various strategies to discriminate against blacklisted nongovernmental organisations. Some estate managers in the Housing Department, for example, deliberately disallow certain community organisations from holding residents' meetings, occupying space, or advertising on official billboards. Here the right to free expression and assembly cannot be exercised. The Office of the Commissioner for Administrative Complaints has not proved a helpful mechanism in dealing with these local government officers. Excessive social control can assume many forms, most of them very subtle and delicate.

Gradually, the Bill is becoming an integral part of justice in Hong Kong. Last year, certain grey areas of the law were clarified through jurisprudence. At the same time, community organisations faced unprecedented challenges from Government. For example, two husbands of "illegal mothers" were each sentenced to two months' imprisonment, and two former secretaries of the Federation of Student Unions were

found guilty of unlawful assembly. Often, social activists have been warned and threatened. The furtherance of human rights demands both better implementation and better monitoring of the Bill. Ultimately, it depends on the openness and the responsiveness of the Government. If, over the past year, community organisers have learnt anything, it is that their fight is always a political one.

THE BILL OF RIGHTS AND WOMEN: A BAIT AND SWITCH?

CAROLE J PETERSEN¹

1. Introduction

Approximately three years ago, I worked with a Hong Kong women's organisation on a paper that was submitted to the Government as part of its public consultation on the draft Bill of Rights. I recall that our submission expressed a number of concerns that we felt were not adequately addressed in the draft Bill, and that we knew that regardless of what the Bill of Rights said, little could be achieved unless the Government was prepared to enact policy changes consistent with the principles in the Bill. Nonetheless, there was at least a small feeling of optimism in our little group and in other women's organisations in Hong Kong. At that time the draft Bill of Rights applied to everyone, not just to the Government, and there was reason to hope that its equality provisions might help to eliminate at least some of the more glaring forms of sex discrimination in Hong Kong -- such as sex discrimination in employment and the enforcement of male-only inheritance of land in the New Territories.

Indeed, I recall that at that time, the expectation that the Bill of Rights could bring about change in this area was so strong that the Heung Yee Kuk was demanding that an exemption be written into the Bill for male-only inheritance of New Territories land. I attended an OMELCO consultation session with women from the New Territories who opposed the requested exemption. And we rejoiced when the Hong

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Kong legislature said "no" to the Heung Yee Kuk, thinking that this was, indeed, the beginning of at least some change for women in Hong Kong.

Unfortunately, we were wrong. The Bill of Rights was amended at the last minute so as to restrict its application to the Government and "public authorities", eliminating any real hope of using it as a weapon against sex discrimination in the private sector. Then, in November 1991, the Court of Appeal surprised us by holding that section 3 of the Bill of Rights Ordinance is limited by section 7, and that the Bill cannot be applied to a dispute between private parties even where one of the parties is relying upon legislation that the other party alleges violates the Bill of Rights.² It may well be that this decision eventually will be overridden, either by the Privy Council or by legislative action. Nonetheless, for the immediate future, the decision does not bode well for women who might challenge legislation that discriminates against them.

But the focus of this paper is not so much the failure of the Bill of Rights directly to achieve sexual equality, but rather the relationship between the Bill of

² *Tam Hing-yea v Wu Tai-wai* (1991) 1 HKPLR 261, [1992] 1 HKLR 185. The Court of Appeal reversed the judgment of Judge Downey below that the Bill of Rights applied to all legislation: see (1991) 1 HKPLR 1. The Court of Appeal stated that it found no "conceptual difficulty" with the fact that its judgment would mean that pre-existing legislation could be held to have been repealed by section 3 of the Bill of Rights Ordinance if the government sought to rely upon it, but not with respect to private citizens who may wish to rely upon it ((1991) HKPLR at 267, [1992] 1 HKLR at 189). The Court of Appeal acknowledged, however, that the inevitable result of its interpretation was that the Bill of Rights would fail to comply with the intention expressed in its Preamble: "to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights" (HKPLR at 267, HKLR at 189).

Rights and Government policy towards women and towards the goal of sexual equality. And I will argue that not only has the Bill of Rights not influenced Government policy in a positive way as regards women, but that indeed it has had a negative impact, in that the Government has deliberately used it as an excuse for not addressing obvious injustices and social needs.

2. The Bait -- "The Bill of Rights is coming"

The struggle for sexual equality is not new to Hong Kong. For years, women in Hong Kong have been petitioning the Government for change. They have sought legislation prohibiting discrimination in private sector employment. They have sought reform of the legislation that recognises and enforces male-only inheritance of New Territories land. They have sought the extension to Hong Kong of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Britain, China and a number of other Asian countries have already ratified. They have sought better public child-care so that the children of parents who both work outside the home (often because they must) will be properly supervised. And they have argued for the creation of a women's commission to study and address the inequalities that exist in Hong Kong as well as the social needs that accompany the changing roles of women in Hong Kong society.

Prior to the introduction of the Bill of Rights, the response of the Hong Kong Government to these pleas was either: (i) to maintain that there was no sex

discrimination in Hong Kong,³ or (ii) to delay making any response by insisting that the issue required "more study" and then failing seriously to study it. This strategy worked pretty well with respect to women's demands, in part because women lack political and economic power, and in part because so many women activists are bearing the double responsibility of a job and children, leaving them with limited time for public lobbying.

With the introduction of the Bill of Rights, human rights issues gained more respectability in Hong Kong and women renewed their demands for fair treatment with increased vigour.⁴ But rather than responding with the spirit that one might expect of a government which had just introduced legislation guaranteeing a basic level of human rights for its citizens, the Hong Kong Government instead used the Bill of

³ For example, in a letter to the Hong Kong Council of Women dated 21 April 1989, Mr Stanley Wong, Secretary for Education and Manpower, maintained (at paragraph 3) that the differences in wages between men and women were not evidence of sex discrimination because they "are generally due to the different nature and content of their jobs." Mr Wong apparently did not place much weight on government statistics showing that women regularly are paid less than men even when employed in the same positions within the same industries, or to studies that show that sex discrimination is a *reason* that women tend to be employed in jobs of "different nature and content" -- a polite way of referring to low-paying jobs. See, for example, *Report on Half-Yearly Survey of Wages, Salaries and Employee Benefits*, published by the Wages and Labour Costs Statistics Section of the Census Statistics Department, March 1990, volume II, and Ho Suk Ching, "The Position of Women in the Labour Market in Hong Kong: A Content Analysis of the Recruitment Advertisements", 10 *Labour and Society* 334 (1985).

⁴ See, for example, Coalition for the Education of Women Voters, *The Women's Platform* (January 1991). (Members of the Coalition included the Association for the Advancement of Feminism, the Hong Kong Christian Women Council, Hong Kong Association of Women Workers, the Shaukeiwan Federation of Women, and the Women's Centre -- Hong Kong Council of Women.)

Rights as an excuse for further delay. The Government argued that it was too occupied with the Bill of Rights to address specific proposals for redressing women's grievances, such as anti-discrimination legislation. The Government urged women to be patient and wait for the Bill of Rights which, it was quick to point out, promised "equal protection of the law". Certainly, women were led to believe that once the Bill of Rights was in place the Government would take a proactive approach and seek to identify and reform laws and policies that discriminate against women.

The Government took a similar position before the United Nations Human Rights Committee, which takes an interest in the matter because article 26 of the International Covenant on Civil and Political Rights, which has long applied to Hong Kong, provides that

"[A]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex"

For example, in 1989, the Hong Kong Government assured the United Nations that it intended to address sex discrimination in Hong Kong, claiming that it had been "actively considering the application to Hong Kong" of CEDAW and that all "existing policies and legislation relevant to the question of equality between the sexes [were] being reviewed."⁵ Two years later, in March 1991, the Hong Kong Government submitted an updated report which emphasised the efficacy of the draft Bill of Rights,

⁵ *Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights* (1989), paragraph 26, reproduced in A Byrnes and J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993) at 419

and with regard to sex discrimination assured the Human Rights Committee that "[t]he Hong Kong Administration is reviewing all its legislation to ensure that it complies with" article 26 and that the "application of [CEDAW] to Hong Kong is still under consideration".⁶

These statements certainly implied that the Hong Kong Government would do its best to identify discriminatory policies and legislation and reform them of its own accord, even before they were challenged under the future Bill of Rights. Unfortunately, experience has proven that the Government is unwilling to do so with respect to any controversial issues, and that the Bill of Rights itself is unlikely to compel significant change.

3. The First Switch: "Oops, the Bill of Rights no longer applies to private parties"

I do not actually suspect this, but if anyone had been looking for a way of securing women's support for the Government during the consultation on the draft Bill of Rights, making the initial draft applicable to all parties would have been a very clever strategy. This language not only obtained significant support from women for the Bill of Rights, but it also kept women from pressing too hard for more specific legislation against discrimination. Granted, no one was quite sure how a general document like the Bill of Rights was going to be applied to private employers. But I remember

⁶ *Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights: An Update* (March 1991), at paragraph 89, reproduced in A Byrnes and J Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Singapore: Butterworths, 1993) at 437

thinking that if it did apply to private parties, the employers themselves might soon be seeking specific anti-discrimination legislation, if only to obtain guidance on what standard of conduct would be necessary in order to avoid violating the Bill of Rights.

But of course, in the end, the Bill of Rights was amended at the last minute so as to apply only to the Government and "public authorities". One of the arguments that was made in support of this amendment was that issues such as discrimination in the private sector were actually much better dealt with by "specific legislation." This is probably true, so long as such legislation is forthcoming. But then, at that time the Hong Kong Government was still maintaining that it was "actively considering" the application of CEDAW to Hong Kong, which would require the introduction of anti-discrimination legislation, as well as the adoption of Government policies designed to promote sexual equality.

4. The Second Switch: "If it has not been successfully challenged under the Bill of Rights, then it must not require reform"

In fact, despite all those public statements and promises to the United Nations, the Hong Kong Government has not published the results of any comprehensive "review" of CEDAW or of "policies and legislation relevant to the question of equality between the sexes". Is it the position of the Government that its "review" revealed no policies or legislation that might, even arguably, have violated article 26 of the ICCPR (and/or article 23 of the Bill of Rights), and that therefore there is nothing to talk about?

Consider, for example the laws that enforce male-only inheritance of land in

the New Territories. These are obviously relevant to the issue of equality between the sexes. They almost certainly violate article 26 of the ICCPR, and prior to the decision in *Tam Hing-ye* (and perhaps even after) they very likely would have been considered to violate the Bill of Rights. But the Government made no serious attempt to reform these laws or even to consult the public as a whole on the issue. (Friendly meetings with the Chairman of the Heung Yee Kuk do not count as widespread public consultation.) Instead, the Government has left it entirely to the affected women to challenge these laws in the courts. And while I rather doubt that the Government expected a court decision like that in *Tam Hing-ye*, it must have been aware that such a court action would require financial resources well beyond those of the average New Territories woman, and was therefore unlikely.

Recently there have been reports that the Government is in fact considering legislation to reform the New Territories Ordinance (Cap 97).⁷ But the Kuk has already made its opposition clear and there is no real indication that the Government is prepared to press the issue. Indeed, it is possible that the real intention of the Government is not to eliminate male-only inheritance of New Territories land, but rather merely to "clean up" what appear to be some unintended and embarrassing consequences of the legislation enforcing these rights (namely that it applies not only to indigenous residents, but to all residents of New Territories land not specifically exempted, including such modern developments as Shatin, and that women cannot

⁷ See, for example, "Kuk shoots down move for women to inherit", *South China Morning Post*, 8 April 1993, p 3

inherit such land even when it is bequeathed to them by a will).⁸ It will be interesting to see whether women will accept such a partial reform if and when the subject is really opened for review.

It is worthwhile to contrast the Government's failure to take the initiative with respect to reforming the laws enforcing male-only inheritance of land with its approach to other legislation that it suspected might violate the Bill of Rights. In the spring of 1990, the Hong Kong Government asked the Legislative Council to debate the question of whether the laws against male homosexual conduct should be reformed so as to decriminalise such acts when taken in private by consenting adults. A number of members of the Legislative Council opposed having such a debate, arguing that it was not the right time for it. But the Hong Kong Government insisted. Moreover, in the debate, the Chief Secretary argued that reform of the laws was necessary because

⁸ Dr Carol Jones, of the University of Hong Kong, has argued that there are three common misunderstandings concerning the application of customary law in the New Territories. The first is the misconception that customary law only applies to the indigenous residents of the New Territories, when in fact the provisions of the New Territories Ordinance (Cap 97) would appear to apply to anyone living on New Territories land (known as "Part II" land). The second misconception is that the densely populated New Towns of Shatin, Tsuen Wan and Tuen Mun were specifically exempted from the application of customary law, when in fact they have not been (and thus a woman is barred from inheriting a flat in Shatin). The third misconception is that a woman can inherit Part II land that is bequeathed to her by a will, when in fact the 1971 Probate and Administration Ordinance specifically exempts Part II New Territories land from its provisions. Thus administrators may have no statutory authority to probate such wills, and women who have been permitted to inherit in this manner may find that their title is bad and that they can be ousted from the land by the nearest male heir. See C Jones, "Addendum to Part V of the Report of the Hong Kong Council of Women on the Third Periodic Report by Hong Kong under Article 40 of the ICCPR" (unpublished).

they would "be open to challenge under the [proposed] Bill of Rights".⁹ The Attorney General also argued that the laws were inconsistent with the ICCPR, adding that "[i]t hardly needs saying that the laws of Hong Kong are required, in accordance with our international obligations, to be consistent with those obligations."¹⁰

In fact, as the Government acknowledged, it could not be sure that the laws against homosexual conduct would have been held to violate the Bill of Rights, as the case law on the subject is sparse and at the time the Bill itself was only in draft form and still open to amendment. But the Government did not wait to ascertain what final form the Bill of Rights would take. And it did not leave it to gay men in Hong Kong to challenge the laws. Instead it took the initiative and argued persuasively that it had an obligation to reform the law immediately. And while I fully supported its decision to do so, we must ask: why has the Government not been equally willing to reform laws that discriminate against women?

Indeed, even if the Bill of Rights continues to be interpreted so as not to apply to legislation governing private transactions (and therefore not to fulfil the intention to incorporate the ICCPR into domestic law), the fact still remains that discriminatory laws violate the Hong Kong Government's obligations under the ICCPR. Moreover, the Hong Kong Government has *assured* the United Nations Human Rights Committee that it will conduct a full review of all potentially discriminatory laws and policies, and presumably reform those found to violate article 26 of the ICCPR. Has the

⁹ *Hong Kong Hansard 1990*, p 1969 (11 July 1990)

¹⁰ *Ibid*, p 1971

Government forgotten that "it hardly needs saying" that the laws of Hong Kong are required to be consistent with its obligations under the ICCPR?

Perhaps the difference is that the Hong Kong Government cares about privacy, but not about sexual equality. Or perhaps it is the pressure of interest groups more powerful than women that prevents the Hong Kong Government from addressing sexual discrimination.

Certainly, the power of private sector employers has influenced the Government's approach to the subject of discrimination in employment. After the proposed Bill of Rights was amended so as not to apply to private parties, women's organisations renewed their campaign for the application of CEDAW to Hong Kong and for specific legislation prohibiting discrimination in employment. And so, after years of inaction, the Government announced in the spring of 1992 that it was creating an "Inter-departmental Working Group on Sex Discrimination". The group was chaired by the Secretary for Education and Manpower and included representatives from seven other policy branches and departments: the Constitutional Affairs Branch, the Health and Welfare Branch, the Economic Services Branch, the Civil Service Branch, the City and New Territories Administration, the Labour Department and the Legal Department.¹¹ The terms of reference of the group were: to ascertain the extent to which discrimination against women is a problem in Hong Kong; to consider what Government measures, if any, should be adopted to tackle the problem of sex

¹¹ *Findings of Working Group on Sex Discrimination in Employment*, paragraph 2.

discrimination; and to advise whether CEDAW should be extended to Hong Kong.¹²

Frankly, if the copy of the written "Findings" of the Working Group, released in December of 1992, is a fair indication of the extent of its investigation, it should not have bothered. The findings consist of six pages, with no footnotes or specific sources cited other than the 1981 and 1991 Population Censuses. The Working Group loosely refers to a number of unnamed surveys, claiming that they show that only a small proportion of women in Hong Kong perceive themselves to be victims of discrimination. It also makes much of the fact that there have been only a small number of specific complaints of discrimination to the Government. (But then, why *would* anyone bother to register a complaint about a perfectly legal employment practice?) Although the Working Group acknowledged the existence of sex-specific job advertisements and a high concentration of women in low-paying jobs, it apparently viewed these facts as insignificant. Perhaps most disappointing was the Working Group's refusal to study the issue, arguing that the extent of discrimination would be "very difficult to ascertain since many factors including judgmental ones" -- it mentions differences in "productivity" as an example of such a factor -- could give rise to differences in treatment.¹³ (Translation: it's not really discrimination, because we all know that women are not as productive as men.)

In all, the Working Group used three paragraphs to justify its conclusion that

¹² *Working Group on Discrimination Problem in Employment Terms of Reference*, provided at consultation session with representatives of Working Group.

¹³ *Findings of Working Group on Sex Discrimination in Employment*, paragraph

"the problem [of sex discrimination] is not serious in Hong Kong."¹⁴ After all those years of lobbying by women's organisations, that was the extent of attention and resources that the Government was prepared to devote to investigating the extent of discrimination against women in employment.

The Working Group then proceeded to recommend that anti-discrimination legislation should not be introduced. It justified this recommendation with a two-page discussion in which it alleged, without citing any evidence, that such legislation would likely have an "adverse impact" on the Hong Kong economy. The Working Group also argued against the extension of CEDAW to Hong Kong (discussed in two brief paragraphs).

Having met with representatives of the Working Group in the early stages of its "deliberations", I cannot say that I was terribly surprised. The two comments that kept being repeated in that meeting were "so hard to measure" (regarding the extent of discrimination) and "so hard to enforce" (regarding legislation prohibiting it). True, but then it is very hard to measure the extent of pollution, illegal drug smuggling, child abuse and a host of other evils. It is also very hard to enforce the laws against such acts. But this has not stopped society from legislating against them, or from doing its best to enforce such legislation.

¹⁴ Ibid, paragraph 8

I am not sure that one can blame individual members of the Working Group, as I am sure that it was given inadequate time and resources, and that the pressure was on to arrive at these conclusions. Still, it is difficult to accept that the very allegation of the existence of significant discrimination was so summarily dismissed. The fact that there were women members on this Working Group is perhaps the greatest slap in the face to the working women of Hong Kong -- particularly since the civil service itself already enjoys at least an official policy of equal treatment of male and female employees. (Ironically, when the Working Group ascertained that certain departments had not completely adopted this policy, it apparently persuaded those departments to agree "to change their policies and give opportunities to female applicants.")¹⁵

The recently renewed debate over a Women's Commission and the extension of CEDAW to Hong Kong are yet further examples of how the Hong Kong Government has consistently resisted action that would promote sexual equality in Hong Kong -- the exact opposite of the position that it has assured the United Nations it pursues with regard to women. Indeed, during all those years of purporting to be "actively considering" the extension of CEDAW to Hong Kong, the Hong Kong Government never conducted widespread consultation on the issue. Yet, in December 1992, when the Legislative Council defied the Government and passed a motion calling on it to ask the British Government to extend CEDAW to Hong Kong, the Government suddenly decided that we needed a Green Paper on the issue. That step should succeed in delaying matters by at least several months to a year. Then, even

¹⁵ Ibid, at paragraph 9

if CEDAW is extended to Hong Kong, there will very likely be insufficient time before 1997 to implement its requirements in the form of legislation and Government policies. Thus the existing Hong Kong Government will be "off the hook".

To conclude, it would appear that the true "policy" of the Hong Kong Government with respect to women's issues has been to delay making any response as long as possible, and at all costs to delay making any changes that would upset powerful groups (such as employers, or the Heung Yee Kuk). Moreover, it appears that the Bill of Rights actually has assisted the Government in this strategy in that it has provided a nice thick smokescreen to hide behind. Thus, if there is any hope for increased sexual equality in Hong Kong, it probably lies not with the Bill of Rights, but rather with the increased political involvement of women and the legislators that they can elect.

Of course, I continue to keep an open mind. Indeed, I would be very pleased if the Hong Kong Government would prove me wrong.

ADDENDUM

(February 1994)

Since this paper was presented in June 1993, there have been three potentially significant development in the area of women's rights in Hong Kong: (1) the issuance, in August 1993, of the *Green Paper on Equal Opportunities for Women and Men*; (2) the introduction, in November 1993, of the New Territories Land (Exemption) Bill;

and (3) the announcement of a private member's bill prohibiting discrimination.

(i) The Green Paper

The *Green Paper* marked the first attempt by the Hong Kong Government to conduct widespread public consultation on what, if any, steps should be taken to address sex discrimination in Hong Kong. The Government insisted on issuing the *Green Paper* before acting on the unanimous vote of the Legislative Council (in December 1992) in favour of the extension of CEDAW to Hong Kong.

Not surprisingly, the Government used the *Green Paper* to try to persuade the public that sex discrimination is not a significant problem in Hong Kong and to perpetuate the myth that the Bill of Rights Ordinance is a sufficient guarantee of sexual equality. For example, the *Green Paper* asserts that the "effect of the Bill of Rights Ordinance, together with the provisions of Article VII(3) of the Letters Patent, is to ensure that Hong Kong laws are not . . . discriminatory against women."¹⁶ This is simply wrong. The Court of Appeal's decision in *Tam Hing-yeo v Wu Tai-wai*¹⁷ ensures that the Bill of Rights cannot be used to challenge pre-existing legislation unless the Government is relying upon it.¹⁸ Moreover, it is obvious that Hong Kong law continues to discriminate against women, the most blatant example being the legal

¹⁶ *Green Paper on Equal Opportunities for Women and Men* (hereinafter *Green Paper*), p 51

¹⁷ (1991) 1 HKPLR 261, [1992] 1 HKLR 185

¹⁸ This decision is discussed in footnote 2 of this paper.

prohibition on female inheritance of most of the land in the New Territories. (Perhaps this is why the issue of male-only succession to land was almost entirely ignored in the *Green Paper*).

The *Green Paper* also includes a number of biased statements that apparently cannot be substantiated by Government. For example, the chapter on employment asserts that the "tight labour market in Hong Kong . . . has left little scope for employers to adopt discriminatory practices."¹⁹ But when asked for the source of this claim, Government officials would only state that it was the opinion of an unnamed "government economist". Government is still considering my request (made over four months ago) for the name of this mystery economist and the evidence that he or she relied upon in forming this "opinion".²⁰

But despite these efforts by Government, preliminary assessments of the submissions made in response to the *Green Paper* indicate overwhelming public support for the extension of CEDAW to Hong Kong.²¹ The Government has indicated that it will make an announcement regarding CEDAW in the spring of 1994.

¹⁹ *Green Paper*, p 18

²⁰ Additional examples of biased statements in the *Green Paper* are provided in my comment, entitled "The Green Paper on Equal Opportunities for Women and Men: An Exercise in Consultation or Evasion", forthcoming in the *Hong Kong Law Journal*, 1994.

²¹ At the conclusion of the consultation period, the Secretary for Home Affairs conceded that the overwhelming majority of submissions were in favour of the extension of CEDAW to Hong Kong and that in light of this "[it] would be difficult for [Government] to come up with credible arguments not to extend CEDAW". *South China Morning Post*, 31 December 1993, p 2

If eventually ratified and implemented, CEDAW will hopefully do more for Hong Kong women than the Bill of Rights.

(ii) The New Territories Land (Exemption) Bill

Although the *Green Paper* was entirely silent on any specific proposals to reform male-only inheritance, less than three months later, the Government introduced the New Territories Land (Exemption) Bill. As predicted in this paper, this Bill does not provide anything approaching comprehensive reform of sex discrimination in the New Territories. Rather, it is designed to provide the Government with a "quick fix" for some of the more embarrassing results of the New Territories Ordinance, such as the prohibition of female succession to apartments in urban areas. In its present form, the Bill would permit the continuation of male-only succession to rural land, as well as the Government policy of granting small house entitlements only to males. However, the Bill has already received substantial criticism and amendments may be proposed by members of the Bills Committee.

(iii) Domestic anti-discrimination legislation

Perhaps the most promising recent development is the announcement by Anna Wu Hung-yuk, Member of the Legislative Council, that she intends to introduce a private member's Bill prohibiting discrimination on a wide range of grounds, including sex, in both the public and the private sectors. Thus, despite Government's assurances to the United Nations that it would address sex discrimination in Hong Kong, it has

fallen to an individual member of the Legislative Council to take any real action. While it is impossible to predict the fate of Ms Wu's Bill at this time, recent votes of the Legislative Council clearly indicate that it supports the concept of prohibiting discrimination by legislation.²²

(iv) Conclusion

These recent developments only strengthen the conclusion of my original paper that the Bill of Rights Ordinance itself has done very little for women in Hong Kong, that Government has actually used it as an excuse for delaying real reform, and that women's best hopes lie with their own increased political activity.

²² The Legislative Council has voted twice in favour of the extension of CEDAW to Hong Kong -- on 16 December 1992 and 8 December 1993. The Council was clearly aware that CEDAW would require the introduction of domestic anti-discrimination legislation. See, for example, the motion speech of Ms Emily Lau, *Hong Kong Hansard* 1992, p 1454

THE BILL OF RIGHTS AND THE LEGISLATIVE COUNCIL:

A PERSONAL VIEW

JONATHAN DAW¹

The work that I do for members of the Legislative Council is by way of legal advice on all aspects of their legislative functions. My team of six lawyers advises legislators and they take the decisions.

I want to address four broad themes. The first (the track record of the Legislative Council) may be comparable to football results! The Legislative Council 177, Others 1. Since 8 June 1991, 177 Ordinances have been enacted by the Legislative Council, and none of them have been struck down by the Court of Appeal; and only one of them has been interfered with at the High Court level, where, in a very lucid judgment, a Deputy High Court judge took exception to just one subsection of the new section 47 of the Dangerous Drugs Ordinance.² These figures do not demonstrate without a doubt that the legislature has taken on board fully the implications of the Bill of Rights. But the figures do provide one practical perspective. A large number of items of subsidiary legislation, 848, have also been enacted and none of them, to our knowledge, has been successfully challenged on Bill of Rights

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² Section 47(1)(c) of the Dangerous Drugs Ordinance (Cap 134), inserted by section 8 of the Dangerous Drugs (Amendment) (No 2) Ordinance 1992 (No 59 of 1992). See *R v Lum Wai-ming* [1992] 2 HKCLR 221. The Court of Appeal, in *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127, had declared repealed parts of the previous section 47 of the Dangerous Drugs Ordinance.

grounds. Now of course it could be argued that our legislature has been taking such a conservative approach to Bill of Rights matters, striking out offending provisions at the very mention of the Bill of Rights, that a disservice might have been done to the administration of justice by weakening enforcement powers. I do not believe this. Equally, however, I have to accept that since at least 80% of the Ordinances enacted since June of 1991 have had no Bill of Rights implications, you the public, in judging the performance of the legislature, will take into account that reality. A large number of pieces of subsidiary legislation are also purely routine.

What is more important, in the context of these statistics, is to recognise that the potential for getting the Bill of Rights wrong is always there. It is more than a question of performance: it is to get the law right, the balance in society correct.

My second theme is the approach of the legislature to lawmaking in view of the Bill of Rights. The non-Government members are supported by independent advisers. We have no contractual relationship with Government and are answerable to members. We discuss matters with the Legal Department but, at the end of the day, our duty lies firmly with the legislature. What do we do when we get a Bill of Rights point? The process of scrutiny is long. We look at every Bill for Bill of Rights implications. Now virtually all our meetings are open. We would invite any of you to come to see our Legislative Councillors at work, and you will be surprised at the insistence of individual members on Bill of Rights points in the face sometimes of strong counter-arguments of the Legal Department of Government. It is not simply going through the motions. The replies are analysed by members and then it is back to another round

with Government. Members do not always get their own way, possibly because of the timing of Government legislation relating to frozen Ordinances, but I won't expand on that. In one case, I was honoured to receive four written legal opinions on a Bill of Rights issue, evenly divided. These had been commissioned by persons with entirely legitimate interests in securing the conclusion argued for within their legal opinions. Here as elsewhere legislators were faced with divided views on finely balanced Bill of Rights issues. Hence when necessary they bring scholarship to their deliberations.

Thirdly, there is a potential for conflict between the courts and the legislature. I have no time today to talk about social engineering as the underlying philosophy of the Bill of Rights. I am not suggesting that the courts should "butt out", but that the practical balance between the courts and the legislature needs careful consideration in Hong Kong.

Fourthly, the recent Privy Council judgment refers to serious crime and the balance between the individual and society as a whole, and advocates flexibility. I do not take this as indicating to the legislature that they should disregard scholarship, particularly in the Canadian judgments and comparative case law, although I am disappointed by the dismissive attitude of the Privy Council as it may encourage shortcuts in dealing with Bill of Rights issues which deserve the closest consideration. But that is merely my personal opinion.

A HUMAN RIGHTS COMMISSION FOR HONG KONG?

A LEGISLATOR'S PERSPECTIVE

SIMON IP¹

Introduction

It is recognised by many, but not by the Hong Kong Government, that human rights commissions make important contributions to the development of human rights. It is particularly so in a place like Hong Kong, where history of human rights legislation is short and development of human rights is embryonic. Today I want to focus, from a legislator's perspective, on one important function of a human rights commission -- that of providing expert legal knowledge to enable the legislature to repeal, amend and enact laws according to universally accepted standards of human rights and having regard to policy considerations relevant to Hong Kong. In reviewing laws for inconsistency with the Bill of Rights, it is obvious to me that the Government has been adopting a "minimalist" approach. This means that the Government has been and is doing the bare minimum necessary to ensure that our laws are compatible with the Bill of Rights. The slow pace of the review has cast serious doubt on the commitment of the Government to the promotion of human rights.

The "minimalist" policy has manifested itself in various ways: the perfunctory nature of Bill of Rights reviews; the reluctance to accept opposing views; and the failure to provide the legislature with the appropriate level of resources.

¹ Member of the Legislative Council

1. The perfunctory nature of reviews

Amendments to the six frozen Ordinances² were presented to the Legislative Council so close to the end of the freeze period that there was little time to conduct a full review. Amendments were made only to those provisions which were considered by the Government to be "almost certainly incompatible" with the Bill of Rights. Those provisions which were Bill of Rights suspect were left untouched despite the prospect of future successful challenges which would result in legal and operational vacuums in our laws. Review of other Ordinances is proceeding in a similar manner. No attempt is being made to apply a generous and purposive interpretation to the Bill of Rights and to re-cast the law accordingly.

The current review of the law affecting freedom of expression affords a good example of Government complacency. The Government asserts that freedom of the press is secure under Hong Kong law. It has chosen to review seven laws despite the Hong Kong Journalists Association having identified 17 laws as a potential threat to press freedom and thus requiring attention.

2. Reluctance to accept opposing views

A recent example of this is the Inland Revenue (Amendment) (No 5) Bill 1992. Under

² See the Hong Kong Bill of Rights Ordinance (Cap 383), section 14 and Schedule, which refer to the following Ordinances: Immigration Ordinance (Cap 115), Societies Ordinance (Cap 151), Crimes Ordinance (Cap 200), Prevention of Bribery Ordinance (Cap 201), Independent Commission Against Corruption Ordinance (Cap 204), and Police Force Ordinance (Cap 232).

the old section 77 of the Inland Revenue Ordinance (Cap 112),³ the court had no discretion over issuing a stop order to prevent a taxpayer leaving Hong Kong upon the request of the Commissioner of Inland Revenue. When a District Judge questioned the law after enactment of the Bill of Rights, and refused to issue stop orders as being inconsistent with the Bill of Rights, the Government sought to amend the provision to bypass the District Court altogether. The proposed amendment gave the Commissioner the power to issue stop orders subject to an appeal to a High Court Judge. The Government defended its position for six months before finally dropping the proposal under pressure from legislators.

Another example is the Dangerous Drugs (Amendment) (No 2) Bill last year which made various amendments after certain presumptions were struck down by the Court of Appeal in *R v Sin Yau-ming*.⁴ The amended section 47(1)(c), providing for a presumption based upon physical possession of keys to vehicles, was held in *R v Lum Wai-ming*⁵ to have failed the test of rationality and proportionality and was thereby repealed.

The Government had been explicitly warned by the Bar Association about the potential conflict of the new section 47(1)(c) with the Bill of Rights. But the Government was insistent that the presumption as contained in the new section

³ The old section 77 of the Inland Revenue Ordinance is reproduced in Appendix B.

⁴ (1991) 1 HKPLR 88, [1992] 1 HKCLR 127

⁵ [1992] 2 HKCLR 221

47(1)(c) was necessary to fight drug trafficking, and that it would not be inconsistent with the Bill of Rights. Within weeks of its enactment, however, it was struck down. This illustrates the dilemma of legislators who have to balance the efficacy of a law giving effect to Government policy against its prospects of survival under a Bill of Rights challenge.

3. Lack of appropriate resources

The review of laws for Bill of Rights compatibility is currently a Government responsibility. Amendment Bills presented to the Legislative Council are scrutinised by Bills Committees which do not have the time or the necessary expertise to examine the entirety of Ordinances which the Bills seek to amend. The focus of scrutiny is, therefore, normally confined to the amendments proposed by the Government. A wider review by the legislature would bring the legislative process to a halt.

While the Constitutional Development Panel of the Legislative Council monitors progress of Government's review, it is not a body which can engage in detailed research or analysis, for it has many other issues on its agenda. Besides, a cross-party panel with different political interests conducting discussions in public is hardly conducive to an impartial study of laws. The Legislative Council is supported by a highly efficient and knowledgeable legal unit headed by Jonathan Daw. We can always rely on impartial and high quality professional advice. But they are already fully stretched and cannot accommodate the task of a comprehensive Bill of Rights review. While it is possible for the Legislative Council to consider setting up a human rights

panel, the necessary resources are simply not available to do a meaningful job even if it be deemed the responsibility of the legislature to do that job, which I think it is not.

4. The fallacy of the Government's position

The Government has maintained that a human rights commission is unnecessary for basically three reasons. First, its functions would overlap with those of the Legal Department and the courts. Secondly, it would entail considerable costs. Thirdly, with the removal of "inter-citizen rights" from the Bill of Rights, the mediation or conciliation role of a human rights commission would be rendered redundant. But these seem to me more excuses than reasons.

(a) Overlapping of functions

The "minimalist" approach is testimony to the inadequacies of the Legal Department trying to fill the role of a human rights commission. But more fundamentally, as the primary objective of the Bill of Rights is to prevent encroachment on rights by the Government, how can that objective be fulfilled by a Government department which acts on the instructions of the Government?

Reliance on the courts alone for development of human rights law has its limitations. Judges are limited by the confines of the case before them. A commission on the other hand can take a more comprehensive approach encompassing political and general socio-economic factors.

(b) Cost

I accept that the protection of human rights should not involve layers of bureaucracy with exorbitant expense to taxpayers. However, a commission will decrease the call on judicial resources and reduce publicly funded court proceedings. The likely result would be a net saving of resources.

(c) "Inter-citizen rights"

The absence of "inter-citizen rights" in the Bill of Rights does not mean that a human rights commission is unnecessary. There will be conflicts between citizens and the state under the Bill of Rights. If resolution of these conflicts is left entirely to litigation with all the costs and delays involved, the average citizen with limited means and requiring quick relief will be greatly disadvantaged. Citizens need a cheap and speedy mechanism to air their grievances and seek redress.

Conclusion

If the Government continues with its "minimalist" approach, many of the perceived benefits of enacting the Bill of Rights will be superficial. Without a deep-rooted human rights culture transcending each stratum of the community, from policy-makers to the man-in-the-street, our rights and freedoms enshrined in the Bill of Rights will be at risk in the uncertain times ahead. That is one of the fundamental reasons why a human rights commission is so urgently needed.

APPENDICES

APPENDIX A

**THE PRESUMPTION OF INNOCENCE (ARTICLE 11 (1))
SIGNIFICANT AUTHORITIES: JUNE 1992 TO MAY 1993¹**

S R BAILEY²

Section 30, Summary Offences Ordinance (Cap 228) and Sections 25(1), 4 (a) and (b), Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)

1. On 19 May 1993, the Privy Council handed down its (combined) judgment in *Attorney General v Lee Kwong-kut* and *Attorney General v Lo Chak-man and another* (1993) 3 HKPLR 72, [1993] AC 951, concerning the validity of the above provisions. In *Lee Kwong-kut*, the Attorney General had appealed the Court of Appeal's decision, [1992] 2 HKCLR 76, that section 30 of Cap 228 was inconsistent with article 11(1) of the Bill of Rights and repealed by section 3(2) of the Bill of Rights Ordinance. While in *Lo Chak-man*, the Attorney General sought to overturn Gall J's decision (HCt 108/90) to quash indictments upon the basis that sections 25(1) and (4)(a) and (b) of Cap 405 were similarly inconsistent with and repealed by the Bill of Rights Ordinance.

2. The Privy Council held:

(a) Section 30 of Cap 228 contains three elements:

(i) the possession or conveying of property by the defendant;

¹ The authorities cited in this Appendix have been updated to reflect the position as of 15 February 1994.

² Senior Assistant Crown Prosecutor. For a discussion of the presumption of innocence, see pp 71-77 above.

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- (ii) the reasonable suspicion that the property had been stolen or unlawfully obtained; and
 - (iii) (contrary to the Crown's submission that this was a defence) the inability of the defendant to give a satisfactory account of how the property came into his possession.
- (b) The burden on a defendant to provide a satisfactory account as to how the property came into his possession was one of those "exceedingly rare" provisions -- where a burden of proof was imposed upon a defendant -- which did not fall within the formulation of Lawton LJ (in *R v Edwards* [1975] QB 27) of the common law exception to the fundamental rule of the criminal law that the prosecution must prove every element of the offence charged: "If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like then the prosecution can rely upon the exception." (Lawton LJ at 39-40).
- (c) The offence in section 25(1) of Cap 405 is "draconian" in that it imposes an absolute prohibition on engaging in the activities referred to therein (assisting another to retain the proceeds of drug trafficking) with someone you know or have reasonable grounds to believe is a person who carries on, or has carried on, or has benefited from, drug trafficking, subject to an exception in section 25(3) (reporting of suspicious transactions to the authorities) and a special defence in subsection (4).
- (d) Section 25 is an offence which falls within the class referred to by Lawton LJ in *R v Edwards* above.
- (e) A defendant bears the legal or persuasive burden of proof in relation to the defence in subsection (4): it is for the defendant to establish on a balance of probabilities that he did not know or suspect that the prohibited arrangement related to "drug money". The only mens rea that the Crown need prove is that the defendant knew or had reasonable grounds to believe that the relevant person is connected with drug trafficking (regardless of whether the defendant actually held such a belief).
- (f) The Hong Kong Bill of Rights is to be given a generous and purposive construction. However:
- (i) even though not subject to express limitation, article 11(1) has an

implicit degree of flexibility;

- (ii) a contravention of article 11(1) does not automatically follow as a consequence of a burden on some issues being placed on a defendant in a criminal trial;
 - (iii) some exceptions to the principle, that the prosecution must prove the defendant guilty beyond reasonable doubt, will be justifiable; others will not: it is the need to balance the interests of the individual and society which are the heart of the justification of an exception;
 - (iv) in considering whether an exception is justifiable, it is not necessary in the vast majority of cases to follow the somewhat complex process now established in Canada (ie the tests of "rational connection", "proportionality" and "minimum impairment of rights"), although regard can be had to the Canadian approach in cases of real difficulty, and these tests do not need to be applied rigidly or cumulatively and the results achieved need not be regarded as conclusive;
 - (v) whether an exception is justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused and whether the exception is reasonably imposed: if the prosecution is required to prove the essential elements of the offence, while the defendant is reasonably given the burden of establishing a proviso or exemption of the type indicated by Lawton LJ in *R v Edwards*, article 11(1) is not contravened;
 - (vi) it is the substance rather than the letter of the statute that is important in deciding the "essential ingredients" of an offence, and whether there is an exemption or a proviso within the tests formulated by Lawton LJ in *R v Edwards*.
- (g) The substantive effect of section 30, Cap 228, is to place the onus on the defendant to establish the most significant element of the offence ie, that he can give an explanation as to his innocent possession of the property. The burden on the prosecution is likely to be a formality in most cases, since it need only prove possession by the defendant and facts from which a reasonable suspicion can be inferred that the property was stolen or unlawfully obtained. It therefore contravenes article 11(1) in a manner that the Attorney General could not justify.

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- (h) In contrast, the substance of the offence in section 25 is in subsection (1), where the onus is on the prosecution. The defendant will be acquitted unless the prosecution can prove that he knows or has reasonable grounds to believe that he is dealing with a drug trafficker. If that is so, the defendant knows that unless he reports to the authorities under section 25(3), he can only proceed safely by relying on section 25(4). To be able to do so, the defendant will have to take steps necessary to ensure that he does not have knowledge or suspicion that the arrangement concerns drug money. If the defendant has done this, then he will be aware of the relevant facts, and it is reasonable that he should be required to establish them. In the context of the war against drug trafficking, for a defendant to bear the onus in section 25(4) is manifestly reasonable and clearly does not offend article 11(1).
- (i) While the persuasive burden placed on a defendant by section 25(4) is consistent with the Bill of Rights, if this had not been so, all that would have been required was the repeal (pursuant to section 3(2) of the Bill of Rights) of the words "to prove", with the effect of reducing the defendant's burden from persuasive to evidential. Such a burden could not conceivably contravene article 11(1).
- (j) In considering whether the burden placed on a defendant in section 25(4) was reasonable, the judge was entitled to have regard to common knowledge of the need to prevent laundering of the proceeds of drug trafficking and the policy of the legislature made clear by the enactment of section 25; in this context it was unnecessary for the prosecution to call any evidence.
- (k) While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Bill of Rights, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion; rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime; and questions of policy remain primarily the responsibility of the legislature.

Sections 37C(1)(a) and 2(b) of the Immigration Ordinance (Cap 115)

3. Section 37C(1)(a) provides that if a ship enters Hong Kong waters with an

"unauthorized entrant" (ie illegal immigrant), each member of the crew commits an offence. The maximum penalty (on indictment) is imprisonment for life and a fine of \$5 million. Section 37C(2)(b) provides that a crew member shall not be convicted of the offence "if he proves that prior to the commencement of the voyage on which the unauthorized entrant was brought to Hong Kong, he did not know and had no reason to suspect that an authorized entrant would be carried on the ship".

4. These provisions have received attention in a number of District Court cases (where the offence is usually tried), where challenges have been made under the Bill of Rights (following the expiry of the one-year "freeze" on the operation of the Bill of Rights in relation to, inter alia, the Immigration Ordinance).

5. In the first such case, *R v Tsui Tsz-fat* (1992) DCt, Crim Case No 402 of 1992, 14 July 1992, Judge CB Chan held:

- (a) section 37C(1)(a) is an offence of "strict liability" (ie mens rea -- knowledge, intent, recklessness -- was not an element of the offence);
- (b) strict liability offences are not inconsistent with the Bill of Rights (also conceded by defence counsel); and
- (c) even if section 37C(2)(b) amounted to a mandatory "presumption" of mens rea, the provisions met the tests of "rationality" and "proportionality" adopted by the Court of Appeal in *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127, and accordingly any breach of article 11(1) of the Bill of Rights was reasonable and justified.

6. Judge Chan's ruling was followed shortly by one from Judge D Kilgour in *R*

v Lau Wan-chung (1992) DCt, Case No 450 of 1992, 10 August 1992, in which he agreed with the earlier ruling that this offence was one of strict liability (applying the principles of the well-known case of *Gammon v Attorney General of Hong Kong* [1985] AC 1, [1984] 2 All ER 503). In Judge Kilgour's view, this was the end of the issue:

"Article 11(1) is not concerned with the elements which go to make up an offence only how such elements are to be proved". Accordingly in his Honour's view it was unnecessary to consider whether the provisions were "rational" and "proportional".

7. The continuing validity of section 37C(1)(a) and (2)(b) was again confirmed in *R v Hui Lan-chak* (1992) DCt, Case No 556 of 1992, 8 September 1992, by Judge Lugar-Mawson, albeit at some damage to the world's forests. In an 87-page judgment Judge Lugar-Mawson, after extensively considering Canadian human rights jurisprudence, concluded:

- (a) article 11(1) Bill of Rights is concerned with the burden and the standard of proof -- not the elements which comprise an offence;
- (b) the offence is one of strict liability and neither article 11(1) nor article 5(1) prohibits the creation of such offences; and
- (c) the burden on a defendant to prove the defence in section 37(2)(b) did not need to be established as "rational" and "proportional" by the Crown, since it was imposed in relation to an offence of strict liability, for which the legislature was under no obligation to provide any defence.³

³ The issue of whether section 37C(1)(a) and (2)(b) is consistent with the Bill of Rights was pending before the Court of Appeal in *R v District Judge Lugar-Mawson, ex parte Tse Sun-mui*. However, the Court of Appeal dismissed the appeal on non-Bill of Rights grounds. See (1993) 3 HKPLR 358 and *R v Hui*

Dangerous Drugs Ordinance (Cap 134): presumptions

8. Following the Court of Appeal's judgment in *R v Sin Yau-ming*, the legislature moved to formally remove the presumptions held repealed by that case, but sought to re-introduce new provisions covering some of the same ground in a revised form. The Dangerous Drugs (Amendment) (No 2) Ordinance, No 52 of 1992, was enacted on 26 June 1992; and it introduced a number of important changes regarding the structure of dangerous drugs offences, reducing the major offences from three to two -- ie, "possession" and "trafficking", deleting the offence of possession of dangerous drugs for the purpose of unlawful trafficking, and increasing substantially the penalties for simple possession. The amending legislation sought to replace presumptions, as to the possession and knowledge of the nature of drugs, by more tightly defining the circumstances of their application, in an attempt to meet the criteria adopted by the Court of Appeal in *R v Sin Yau-ming* -- and, in particular, to make the presumptions more "rational".

9. Challenge to the new provisions was not long coming: see *R v Lum Wai-ming* [1992] 2 HKCLR 221 (27 July 1992).

Lan-chak (1993) 3 HKPLR 184.

10. The "new" presumptions provide:

"47. Presumption of possession and knowledge of dangerous drug

- (1) Any person who is proved to have had in his physical possession--
- (a) anything containing or supporting a dangerous drug;
 - (b) the keys of any baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar container containing a dangerous drug;
 - (c) the keys of any motor vehicle containing a dangerous drug
- shall, until the contrary is proved, be presumed to have had such a drug in his possession;
- (2) Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug."

11. Deputy High Court Judge Burrell ruled that sections 47(1)(a) and (b) and 47(2) were "rational" and "proportional", and hence consistent with article 11(1) of the Bill of Rights, while section 47(1)(c) was held to be unjustified -- irrational, disproportionate and failing to provide for a "minimum impairment" of Bill of Rights guarantees. In the learned judge's view, section 47(1)(c) was inconsistent with the Bill of Rights and ultra vires the Letters Patent.⁴

12. It would appear that in relation to section 47(1)(a) and (b), the new requirement for "physical" possession of a relevant article (rather than mere possession, custody

⁴ A conclusion confirmed by Saied J in *R v Lai Kwai-wa* (1993) 3 HKPLR 435

or control), containing dangerous drugs, played an important part in Deputy Judge Burrell's judgment that the presumptions were reasonable and justified. On the other hand, the "vehicle keys presumption" simply went too far, having regard to the number of Hong Kong vehicles for which there are multiple keyholders, such as taxis and goods vehicles. Perhaps the most interesting aspect of the judgment relates to the "new" section 47(2), which is in identical terms to the "old" section 47(3), which the Court of Appeal (Penlington JA dissenting) had held "repealed" in *R v Sin Yau-ming*. At first sight, the Deputy Judge's ruling would appear to ignore a binding Court of Appeal judgment. A reading of the judgments of Silke VP and Kempster JA in *R v Sin Yau-ming* supports the view that the Court of Appeal had held the old section 47(3) repealed *only* insofar as it was a presumption which came into play on the basis of other presumptions, which were themselves inconsistent with the Bill of Rights. Where knowledge of the nature of drugs was presumed on proof of actual possession of the drugs, or possession presumed on the basis of a valid presumption, the old section 47(3) (and now section 47(2)) was valid.

13. Deputy Judge Burrell's ruling was followed shortly afterwards, on 6 August 1992, by *R v Chan Wai-ming (No 2)* [1993] 1 HKCLR 51, in which Ryan J adopted similar reasoning to uphold sections 47(1)(b) and 47(2).

14. Further consideration of the new presumptions soon came to a temporary halt in *R v Tran Viet-van* [1992] 2 HKCLR 184, in which section 47(2) was under

challenge yet again. Deputy High Court Judge Jones, relying upon common law principles regarding the retrospective application of amending laws, held that the "new" presumptions were not available (assuming consistency with the Bill of Rights) in relation to "old" cases, ie where the offence was alleged to have occurred before the date of the enactment of the new presumption, 26 June 1992. This ruling was not appealed by the Crown.

15. The ruling of Deputy Judge Burrell re section 47(1)(c) could not be made the subject of a reference to the Court of Appeal, as the defendant was subsequently convicted without the presumption being relied on by the Crown. He has appealed his conviction (CA 329/92), but a hearing has not yet been fixed. The Crown now accepts that, whatever the validity of section 47, the presumptions did not apply on the facts in light of *R v Tran Viet-van* [1992] 2 HKCLR 184.

16. The above situation has not changed since the above cases, with the result that the application of dangerous drugs presumptions has become dependent on the date of the alleged offence:

- (a) for offences which are alleged to have occurred before 26 June 1992, the Crown accepts that it can rely on neither the "old" presumptions nor the "new" presumptions (notwithstanding that the decision of Deputy Judge Burrell could be taken to indicate that the "old" section 47(3) "knowledge" presumption could be applicable where the defendant was proved (rather than presumed) to have possession of drugs; and
- (b) the "new" presumptions are applicable to offences alleged that have occurred on or after 26 June 1992, subject to the ruling of Deputy Judge

Burrell re section 47(1)(c).

17. In light of the ruling of Saied J in *R v Lai Kwai-wa* (1993) 3 HKPLR 435, the Crown has decided to accept that section 47(1)(c) is inconsistent with the Bill of Rights and ultra vires the Letters Patent.

Import and Export Ordinance (Cap 60): presumption imposing an "evidential burden": sections 18A(2) and 35A(2)

18. In three cases heard together, *R v Wong Hiu-chor*; *R v Yeung Chu-tim*; and *R v Suen Shun* [1993] 1 HKCLR 107 (to be reported in (1992) 2 HKPLR), the Court of Appeal (Fuad VP, Penlington JA and Mortimer J) upheld sections 18A(2) and 35A(2) of Cap 60 as consistent with the presumption of innocence.

19. The two provisions are similar in effect by raising a mandatory presumption that an accused had the requisite intent for a smuggling-related offence, where proof of the actus reus of the offence is combined with "circumstances that give rise to a reasonable suspicion" of such intent "in the absence of evidence to the contrary".

20. In upholding these presumptions, the Court of Appeal held that the effect of the words "in the absence of evidence to the contrary" was to impose a mere evidential burden upon an accused: ie, in contrast to the traditional formula for presumptions to

be rebutted on a balance of probabilities ("until the contrary is proved"), the presumption was rebutted by an accused adducing "credible" evidence that he did not have the particular intent necessary for the offence. The effect of the formula is accordingly similar to a common law defence in that, once there is sufficient evidence to raise the issue, it is for the prosecution to prove the existence of intent beyond reasonable doubt or the defendant will be entitled to an acquittal.

21. The reasoning in the three separate Court of Appeal judgments varies, but each focuses upon the "rationality" of the presumption and the minimal nature of the burden imposed upon a defendant. In the court's view, there was a "rational and realistic connection" between proof that a person performed the actus reus of an offence, coupled with proof that the circumstances (objectively viewed) gave rise to reasonable suspicion that the person had the requisite mens rea and the existence of such an intent in the absence of (any credible) evidence to the contrary.

22. The case is interesting, aside from its actual result, in that:

- (a) even a mere evidential burden in relation to an essential element of the Crown's case needs to be justified if it is to be consistent with the Bill of Rights (albeit the indications are that this will be considerably easier for the Crown than where a persuasive burden is imposed in similar circumstances); and
- (b) on the extent to which the court was prepared to take judicial notice of the serious evils presented by smuggling offences to Hong Kong's society, all three judges indicated that it was unnecessary for the Crown to have presented statistics relating to the extent and nature of such offences.

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405): assumptions as to fact and extent of benefiting from drug trafficking: section 4(2) and (3)

23. On application by the Attorney General, the court is required to determine whether a person convicted of certain specified drug offences has benefited from drug trafficking and, if so, the "amount to be recovered in his case" (by reference to how much, of the total amount by which he has benefited, is in fact "realisable"). Cap 405 provides for a default period of imprisonment (up to ten years by reference to the relevant amount) if the defendant fails to pay the amount of a "confiscation order".

24. In considering whether a defendant has benefited from drug trafficking and if so to what extent, the court is given discretion to make certain assumptions "except to the extent that the defendant shows that any of the assumptions are incorrect in his case" (section 4(2)). The assumption, set out in section 4(3), allows a court to assume that:

- (a) property held by a defendant since his conviction or transferred to him within the six years preceding the institution of the prosecution, was received by him as a payment or reward in connection with drug trafficking;
- (b) that any expenditure of the defendant's since the beginning of that period was met from the proceeds of drug trafficking; and
- (c) that any property received as payment or reward for drug trafficking was free of any other interests in it.

25. Similar provisions in UK legislation have been described by the UK Court of Appeal as "draconian". It could not seriously be suggested that it is "rational and

realistic" to assume that because a man has been convicted of a drug trafficking offence, everything he owns or has acquired in the previous years and everything he has spent have come from the proceeds of trafficking in drugs. On the other hand, the application of the assumptions is not mandatory (cf *Sin Yau-ming*): the court has a discretion to apply all or any of the assumptions in a particular case.

26. In *R v Ko Chi-yuen* (1992), HCt, Case No 286 of 1991, 22 December 1992, the assumptions were challenged under article 11(1) of the Bill of Rights. Leonard J, after rejecting the Crown's submission that the rights in article 11(1) (and article 10) had no application, upon the basis that the proceedings were civil rather than penal in nature, adopted a narrow approach in upholding the validity of the legislation, on the basis that a person, faced with a Cap 405 application, was not "charged with a criminal offence" (a prerequisite to application of article 11(1)). The proceedings were post-conviction, and notwithstanding that the criminal standard of proof applied to applications for confiscation orders, article 11 "has no relevance because the defendant is not charged with a criminal offence".

Miscellaneous

27. Other provisions which have been the subject of challenge under article 11(1) where written rulings have been delivered during the period June 1992 to May 1993 are:

- (a) Section 17 of the Summary Offences Ordinance (Cap 228) ("possession of an offensive weapon in the absence of a satisfactory account") has been held consistent with the Bill of Rights: *R v Lau Chi-yung*, E 18095/92 (Magistrate M D Hill, 10 July 1992)
- (b) Section 14A(6) of the Import and Export Ordinance (Cap 60) (evidential presumption as to whether a vessel is intended for the purpose of smuggling) -has been held consistent with the Bill of Rights: *R v Man Wong-kwong*, SK 4835/91 (Magistrate G Tallentire, June 1992)
- (c) Reg 3(3) and (5) Import and Export Ordinance ("carrying prescribed articles on board a vessel without lawful excuse") has been held consistent with the Bill of Rights: *R v Wong-fat*, KT 2803/92 (Magistrate J Saunders, 4 September 1992). In two cases in which this issue was raised, *R v Wong Shui-hay*, MA 458/92, and *R v Wong Tam-tai*, MA 457/92, the Court of Appeal has dismissed the appeals on non-Bill of Rights grounds.
- (d) Sections 7(1)(b), 9(2) and 26 of the Trade Descriptions Ordinance (Cap 362) ("due diligence" defences to offences of strict liability re possession of goods with false trade description/trade mark) have been held consistent with the Bill of Rights: *R v Joshi*, SK 5420/92 (Magistrate E Lim, 14 September 1992)
- (e) Section 137(2) of the Crimes Ordinance (Cap 200) (presumption re living off the earnings of prostitution) has been held consistent with the Bill of Rights: *R v Lam Wing-nin*, E 3768/92 (Magistrate A Wright, 14 November 1992); *R v Choi Bik-wan*, NK 504939/92 (Magistrate B Chau, February 1993)
- (f) Sections 5 and 9 of the Copyright Ordinance (Cap 38) (Possession of copyright articles -- strict liability with due diligence defence plus proof by affidavit) have been held consistent with the Bill of Rights: *R v Wong Leung-fung*, W 51235/92 (Magistrate B Kwan, 10 February 1993)
- (g) Section 57(7F) of the Landlord and Tenant Ordinance (Cap 8) ("deemed" order for possession where tenant objection withdrawn) has been held *inconsistent* with the Bill of Rights, as not "rational" or "proportional": the provision amounts to an irrebuttable presumption: *R v Lau Kung-shing* (1993) 3 HKPLR 286 (DCt).

Appeals recently pending in which the validity of legislation was challenged on the basis of article 11(1):

- (a) *R v Tse Sun-mui*, MA 395/92:
Section 37C(1)(a) and (2)(b) of the Immigration Ordinance (Cap 115)
(see paragraphs 3 to 7 above);⁵
- (b) *R v Choi Ka-on*, MA 316/92:
Section 19(2) of the Gambling Ordinance (a presumption of unlawful gambling based on presence in or escape from a gambling establishment); the Court of Appeal reserved judgment on 10 December 1993;⁶
- (c) *R v Cheng Pui-kit*, MA 165/92:
Section 21(1)(a) of the Control of Obscene and Indecent Publications Ordinance (Cap 390) ("absolute" liability for publishing an obscene article); before the Court of Appeal on 15 February 1994, the appellants abandoned all Bill of Rights issues, and the matter was referred back to Duffy J for hearing on another ground;
- (d) *R v So Wai-hong*, MA 106/93:
Section 57(1) of the Road Traffic Ordinance (strict liability for moving a vehicle after a fatal accident without the authority of a police officer), the appeal was upheld on non-Bill of Rights grounds on 18 August 1993;
- (e) *R v Lui Tak-hoi*, MA 1/93:
Section 18 of the Import and Export Ordinance (exporting unmanifested cargo) strict liability subject to a "due diligence" defence); this appeal was dismissed on non-Bill of Rights grounds on 21 July 1993.

⁵ See Note 3 above.

⁶ In a judgment delivered on 24 February 1994, the Court of Appeal upheld section 19(2) as consistent with article 11(1).

APPENDIX B

**PROVISIONS RELATING TO THE AMENDMENT OF SECTION 77
OF THE INLAND REVENUE ORDINANCE (CAP 112)**

**1. VERSION OF SECTION 77 IN FORCE PRIOR TO ITS AMENDMENT
IN 1993. CAP 212, LHK 1986 ED**

"77. Recovery of tax from persons leaving Hong Kong

- (1) Where the Commissioner is of opinion that any person is about to or likely to leave Hong Kong without paying all tax assessed upon him, he may issue a certificate containing particulars of such tax and the name and last known place of abode, business or employment of such person to a District Judge, who shall on receipt thereof issue a direction to the Commissioner of Police to take such measures including the use of such force as may be necessary to prevent such person from leaving Hong Kong without paying the tax or furnishing security to the satisfaction of the Commissioner for payment thereof. *(Amended 49 of 1956 s. 57; 35 of 1969 Schedule)*
- (2) The District Judge shall cause a notice of his direction to the Commissioner of Police to be served on the person affected thereby either personally or by being delivered at his last known place of abode, business or employment. *(Replaced 49 of 1965 s. 57. Amended 35 of 1969 Schedule)*
- (3) Production of a certificate signed by the Commissioner stating that the tax has been paid, or that security has been furnished for payment of the tax, to a police officer in charge of a police station shall be sufficient authority for allowing such person to leave Hong Kong. *(Amended 30 of 1950 Schedule; 2 of 1971, s. 45)*
- (4) Any person who knowing that a direction has been issued under this section for the prevention of his departure from Hong Kong, leaves or attempts to leave Hong Kong without paying all tax assessed upon him or furnishing security to the satisfaction of the Commissioner for payment thereof shall be guilty of an offence and may be arrested without warrant by any police officer or member of the Immigration Service. Any person who commits an offence under this subsection shall be liable to a fine of \$2,000 and to imprisonment for 6 months. *(Added 49 of 1956 s. 57)*

- (5) No civil or criminal proceedings shall be instituted or maintained against the Crown, the Commissioner, a District Judge, the Commissioner of Police, or any police officer or member of the Immigration Service in respect of anything lawfully done under the authority of this section.
(*Added 49 of 1956 s. 57. Amended 35 of 1969 Schedule*)

(*Amended 7 of 1986, s. 12*)"

**2. AMENDMENT PROPOSED BY INLAND REVENUE (AMENDMENT)
(NO 5) BILL 1992, CLAUSE 30¹**

"77. Recovery of tax from persons leaving Hong Kong

- (1) Where--
- (a) a person has not paid all tax assessed upon him; and
 - (b) the Commissioner believes on reasonable grounds that it is in the public interest to do so for the purpose of ensuring that that person does not depart from Hong Kong without first--
 - (i) paying the tax; or
 - (ii) furnishing security to the satisfaction of the Commissioner for payment of that tax,

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

- (2) A departure prevention direction made under subsection (1) shall remain in force until such time as it is revoked under subsection (7) or (8), as the case may be, or is set aside by the High Court under subsection (11)(a).
- (3) The Commissioner shall, as soon as practicable after he makes a departure prevention direction under subsection (1), serve a copy of it upon the person who is the subject of the direction.

¹ *Hong Kong Government Gazette*, 13 November 1992. *Legal Supplement No 3*, pp C1316-C1319.

- (4) Where--
- (a) an immigration officer or immigration assistant (within the meaning of section 2(1) of the Immigration Ordinance (Cap. 115);
 - (b) a police officer,

believes on reasonable grounds that--

- (i) a person the subject of a departure prevention direction made under subsection (1) is about to depart from Hong Kong; and
- (ii) the direction has not been revoked or set aside under this section,

he may take such measures including the use of such force as may be necessary to prevent the departure of that person from Hong Kong.

- (5) Where--
- (a) a copy of a departure prevention direction has been served on the person the subject of it, or the person has, at the time of departure, been verbally advised of its existence; and
 - (b) the departure prevention direction has not been revoked or set aside under this section,

the person commits an offence if he departs or attempts to depart from Hong Kong and an immigration officer, immigration assistant or police officer may arrest him without a warrant.

- (6) Any person who commits an offence under subsection (5) is liable to a fine of \$20,000 and to imprisonment for 6 months.
- (7) Where a departure prevention direction made under this section is in force and--
- (a) all tax assessed upon the person the subject of the direction has been paid; or
 - (b) the Commissioner is satisfied that security for payment of that tax has been furnished, and that the payment in respect of the tax will be forthcoming,

the Commissioner shall, on the written application of the person the subject of the direction or, in the absence of any such application, of his own initiative, revoke the departure prevention direction.

- (8) Notwithstanding subsection (7), where a departure prevention direction made under this section is in force, the Commissioner may, if he thinks fit, on the written application of the person the subject of the direction

or, in the absence of any such application, of his own initiative, revoke the departure prevention direction.

- (9) Where a departure prevention direction is revoked or set aside under this section, the Commissioner shall, as soon as practicable after such revocation or the decision of the High Court to set aside the direction has come to his notice, as the case may be, serve--
- (a) a notice ('notice of revocation') upon--
 - (i) the Director of Immigration; and
 - (ii) the Commissioner of Police; and
 - (b) a copy of the notice of revocation upon the person the subject of the direction.
- (10) Where a person the subject of a departure prevention direction applies under subsection (7) or (8), the Commissioner shall, as soon as possible after he has decided--
- (a) that he is not satisfied under subsection (7)(b) as to the matters mentioned in that paragraph; or
 - (b) not to revoke the departure prevention direction under subsection (8),

serve a notice ('notice of decision') upon the person.

- (11) A person aggrieved by a departure prevention direction under subsection (1) or a notice of decision under subsection (10), as the case may be, may appeal to the High Court which may--
- (a) make an order setting aside the departure prevention direction;
 - (b) make an order temporarily suspending or otherwise varying the departure prevention direction, and the court may attach such conditions to the suspension or variation as it considers necessary; or
 - (c) dismiss the appeal.
- (12) Service of--
- (a) a copy of a departure prevention direction under subsection (3) shall be effected personally upon the person who is the subject of it;
 - (b) a copy of a notice or revocation under subsection (9) or a notice of decision under subsection (10) may be served personally on the person who is the subject of it or by post addressed to that person at his last known place of abode, business or employment.
- (13) Where a direction was issued by a District Judge under section 77 as

repealed by the Inland Revenue (Amendment) (No. 5) Ordinance 1992 (of 1992), that direction shall be deemed to be a departure prevention direction issued by the Commissioner under this section and the provisions of this section shall apply to it accordingly.

- (14) In this section, 'High Court' includes 'Registrar' and 'Master' within the meaning of the Supreme Court Ordinance (Cap. 4)."

3. THE CURRENT SECTION 77, WHICH COMMENCED OPERATION ON 9 JULY 1993²

"77. Recovery of tax from persons leaving Hong Kong

- (1) If the Commissioner, or an officer of the Inland Revenue Department not below the rank of chief assessor authorized in writing by the Commissioner for the purpose ('authorized officer'), satisfies a District Judge, by statement made on oath--
- (a) that a person has not paid all tax assessed upon him; and
- (b) that there are reasonable grounds for believing that the person intends to depart, or has departed, from Hong Kong to reside elsewhere,

and if the District Judge is satisfied that it is in the public interest to ensure that the person does not depart from Hong Kong or, if he returns, does not depart again, without first paying the tax or furnishing security to the satisfaction of the Commissioner for payment of that tax, he shall issue a direction ('departure prevention direction') to the Director of Immigration and the Commissioner of Police directing them to prevent the person from departing from Hong Kong without paying such tax or furnishing such security.

- (2) The District Judge shall, as soon as practicable after he makes a departure prevention order under subsection (1), cause a copy of it to be served upon the person who is the subject of the direction, if he can be found, but, whether or not a copy is so served, the direction comes into force immediately upon being issued and continues in force until--
- (a) the tax is paid;
- (b) security is furnished to the satisfaction of the Commissioner for payment

² Substituted by the Inland Revenue (Amendment) (No 3) Ordinance 1993 (No 56 of 1993), s 30.

- of the tax; or
 - (c) the departure prevention direction is set aside by the High Court under subsection (9).
- ((3) Where--
 - (a) an immigration officer or immigration assistant (within the meaning of section 2(1) of the Immigration Ordinance (Cap. 115); or
 - (b) a police officer,

believes on reasonable grounds that--

- (i) a person the subject of a departure prevention direction made under subsection (1) is about to depart from Hong Kong; and
- (ii) the Commissioner has not authorized the person to depart from Hong Kong nor has the High Court suspended or otherwise varied the departure prevention direction so as to permit the person to depart from Hong Kong,

he may take such measures including the use of such force as may be necessary to prevent the departure of that person from Hong Kong.

- (4) Where--
 - (a) a copy of a departure prevention direction has been served on the person the subject of it or the person has been verbally advised of its existence by a person referred to in subsection (3)(a) or (b); and
 - (b) the Commissioner has not authorized the person to depart from Hong Kong nor has the High Court suspended or otherwise varied the departure prevention direction so as to permit the person to depart from Hong Kong,

the person commits an offence if he departs or attempts to depart from Hong Kong, and an immigration officer, immigration assistant or police officer may arrest him without a warrant.

- (5) Any person who commits an offence under subsection (4) is liable to a fine of \$20,000 and to imprisonment for 6 months.
- (6) Where a departure prevention direction made under this section is in force, the Commissioner may, if he thinks fit, on the written application of the person the subject of the direction or, in the absence of any such application, of his own initiative, authorize, in writing, the person to depart from Hong Kong on one or more occasions as specified in the authorization.

- (7) Where--
- (a) the tax owing has been paid or security has been furnished to the satisfaction of the Commissioner for payment thereof;
 - (b) a departure prevention direction is set aside or temporarily suspended under this section; or
 - (c) the Commissioner authorizes a person to depart from Hong Kong on one or more occasions,

the Commissioner shall, as soon as practicable, notify--

- (i) the Director of Immigration; and
- (ii) the Commissioner of Police,

that the person is permitted to depart from Hong Kong.

- (8) Where a person the subject of a departure prevention direction applies under subsection (6) and the Commissioner does not see fit to authorize his departure, the Commissioner shall, as soon as practicable, serve a notice ('notice of decision') upon the person.
- (9) A person aggrieved by a departure prevention direction under subsection (1) or a notice of decision under subsection (8), as the case may be, may appeal to the High Court which may--
- (a) make an order setting aside the departure prevention direction subject to such conditions as the Court may consider necessary, including the supplying of security to the Commissioner as specified by the Court;
 - (b) make an order temporarily suspending or otherwise varying the departure prevention direction, and the Court may attach such conditions to the suspension of variation as it considers necessary; or
 - (c) dismiss the appeal.
- (10) Service of--
- (a) a copy of the departure prevention direction under subsection (2) shall be effected personally on the person who is the subject of it;
 - (b) a notice of decision under subsection (8) may be effected personally on the person who is the subject of it or by post addressed to that person at his last known place of abode, business or employment.
- (11) Where a direction was issued by a District Judge under section 77 as repealed by the Inland Revenue (Amendment) (No. 3) Ordinance 1993 (56 of 1993), that direction shall be deemed to be a departure prevention direction issued under this section and the provisions of this section shall apply to it accordingly.

- (12) In this section, 'High Court' has the same meaning as in section 2 of the Supreme Court Ordinance (Cap. 4) and includes the Registrar and a Master as defined in that Ordinance.
 - (13) In proceedings under this section, the production of a certificate signed by the Commissioner or an authorized officer stating the name and last known postal address of the person referred to in subsection (1) and particulars of the unpaid tax assessed upon him shall be sufficient evidence of the amount and a court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal.
 - (14) The Commissioner or an authorized officer may apply ex parte to the District Court for a departure prevention direction.
 - (15) In any proceedings in the District Court under this section, the Commissioner or an authorized officer, as the case may be, may appear in person or may be represented either by a legal officer within the meaning of the Legal Officers Ordinance (Cap. 87) or by any other person authorized in writing by the Commissioner."
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APPENDIX C

Attorney General v Lee Kwong-kut

Attorney General v Lo Chak-man and another

5

Judicial Committee of the Privy Council
Privy Council Appeals Nos 59 and 60 of 1992

10 Lord Keith of Kinkel, Lord Lane, Lord Bridge of Harwich, Lord Browne-
Wilkinson and Lord Woolf
Dates of hearing — 22–25 March 1993
Date of judgment — 19 May 1993

15 *Bill of Rights — Application — Retrospective effect — Applica-*
tion to offence committed prior to the coming into force of the Bill
of Rights while the trial was on foot after commencement of Bill
of Rights — Retrospectivity — Interpretation and General Clauses
Ordinance (Cap 1), s 23 — Hong Kong Bill of Rights Ordinance, s
20 *3*

Bill of Rights — Interpretation — Proper approach to interpret-
ing human rights legislation — Relevance of international and
comparative jurisprudence — Hong Kong Bill of Rights Ordi-
25 *nance, ss 2 (3), 3, 4*

Bill of Rights — Presumption of innocence — Reverse onus —
Requirement that defendant offer a satisfactory account — Bur-
den on defendant to prove that property honestly acquired — Bill
30 *of Rights, art 11 (1) — International Covenant on Civil and Po-*
litical Rights, art 14 (2)

Bill of Rights — Presumption of innocence — Reverse onus —
35 *Defendant to show that he did not know or suspect that arrange-*
ment would assist retention or control of proceeds of drug traf-
ficking — Bill of Rights, art 11 (1) — International Covenant on
Civil and Political Rights, art 14 (2)

Bill of Rights — Severance of provisions of statute inconsistent
40 *with Bill of Rights — “to the extent of the inconsistency” — “to*
prove” — Legal or persuasive burden — Evidential burden —
Hong Kong Bill of Rights Ordinance (Cap 383), s 3 (2)

Criminal law — Offence of being in possession of goods reason-
45 *ably suspected to have been stolen or unlawfully obtained and*

failing to offer a satisfactory account — Whether consistent with presumption of innocence — “Reasonably suspected” — “Satisfactory account” — Summary Offences Ordinance (Cap 228), s 30

5 *Criminal law — Drug trafficking — Money laundering — Assisting person in retaining or controlling proceeds of drug trafficking — Mens rea — Whether defence that person did not know or suspect that arrangement would assist retention or control of*
 10 *proceeds of drug trafficking — Burden of proof — Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), s 25*

15 *Statutory interpretation — Retrospectivity — Application of changes to procedural law brought about by Bill of Rights to proceedings on foot after commencement of Bill of Rights — Contrary intention — Interpretation and General Clauses Ordinance (Cap 1), s 23*

20 These cases involved two consolidated appeals brought by the Attorney General against judgments of the Court of Appeal and the High Court of Hong Kong, in which those courts had held that s 30 of the Summary Offences Ordinance (Cap 228) and ss 25 (1) and (4) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) respectively were inconsistent with article 11 (1) of the Bill of Rights and had been repealed with effect from 8 June 1991.

25

ATTORNEY GENERAL v LEE KWONG-KUT (THE FIRST APPEAL)

30 The respondent was arrested and charged on 16 February 1991 with having in his possession \$1.76m which was reasonably suspected of having been stolen or unlawfully obtained contrary to s 30 of the Summary Offences Ordinance. Section 30 provides:

35 “Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of \$1,000 or to imprisonment for 3 months.”

40 At first instance the magistrate held that s 30 was inconsistent with the presumption of innocence contained in article 11 (1) of the Bill of Rights and had therefore been repealed by s 3 (2) of the Hong Kong Bill of Rights Ordinance (Cap 383). He accordingly dismissed the charge: *R v Lee Kwong-kut* (1991) 1 HKPLR 337.

45 The Attorney General appealed by way of case stated against the decision of the magistrate and the appeal was reserved to the Court of

Appeal by Gall J. The Court of Appeal dismissed the appeal of the Attorney General in June 1992, holding that the provision was inconsistent with article 11 (1) of the Bill of Rights: [1992] 2 HKCLR 76.¹ The Judicial Committee of the Privy Council granted special leave to the
5 Attorney General to appeal.

On the appeal the respondent argued that s 30 was inconsistent with arts 3, 5, and 11 (1) of the Bill of Rights. The Attorney General argued, inter alia, that s 30 was a strict liability offence and that such offences were not inconsistent with the Bill of Rights.
10

ATTORNEY GENERAL v LO CHAK-MAN AND ANOTHER (THE SECOND APPEAL)

The respondents were each 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). That section provides that a person commits an offence if he enters into or is concerned with an arrangement whereby the retention or control of another person's proceeds of drug trafficking was facilitated, knowing or
15 having reasonable grounds to believe that the other person carried on or had carried on drug trafficking or had benefited from drug trafficking. It is a defence under s 25 (4) for the accused to show that he did not know or suspect that the arrangement related to the proceeds of drug trafficking or that the arrangement would facilitate the retention or control of the proceeds of drug trafficking.
20

The defendants challenged ss 25 (1) and (4) on the ground that they were inconsistent with the right to be presumed innocent contained in article 11 (1) of the Bill of Rights. At first instance, Gall J held that the provisions constituted a prima facie violation of article 11 (1) and that the Crown had failed to demonstrate that they were permissible restrictions according to the tests laid down in *R v Sin Yau-ming* (1991) 1
25 HKCLR 88, [1992] 1 HKCLR 127. The Attorney General appealed by special leave of the Privy Council. The first and second appeals were heard together.
30

Held (dismissing the first appeal and allowing the second appeal):

Interpretation of the Hong Kong Bill of Rights

1. The Hong Kong Bill of Rights Ordinance, being an instrument in-

¹To be reported in (1992) 2 HKPLR.

tended to protect fundamental human rights and freedoms, should be given a generous and purposive construction. (p 90, lines 35–37)

- 5 2. Decisions from other common law jurisdictions, including the United States and Canada, and international decisions, in particular those of the European Court of Human Rights, can give valuable guidance as to the proper approach to the interpretation of the Hong Kong Bill, particularly where the decisions in the other jurisdictions are in relation to an article in the same or substantially the same terms as that contained in the equivalent provision of the Hong Kong Bill. However, decisions from these other jurisdictions are persuasive and not binding authority and it should be remembered that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong. (p 90, line 41 to p 91, line 4)
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- 15

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

20 **Application of the Bill of Rights to acts committed before 8 June 1991**

- 25 3. Article 11 (1) of the Bill of Rights establishes a defendant's right "to be presumed innocent until proved guilty according to law". That right came into existence on the coming into force of the Hong Kong Bill of Rights Ordinance and so it applied in any trial taking place thereafter. It is not the date of the offence but the date of trial which is conclusive. Section 23 of the Interpretation and General Clauses Ordinance (Cap 1) did not affect this outcome, since the same result could have been achieved by saying that the Bill of Rights Ordinance evinced the intention that the provision made by s 23 should not apply and was thus "a contrary intention" within the meaning of s 2 of the Interpretation and General Clauses Ordinance. (p 99, lines 4–12)
- 30

35 **Article 11 (1) — the presumption of innocence**

- 40 4. Article 11 (1) is one of a group of provisions contained in articles 10 and 11 of the Bill of Rights which are designed to ensure that, before an individual is convicted of a criminal offence, he will have a fair trial and that justice will be done. In general it requires that the prosecution prove the guilt of the accused beyond reasonable doubt. (p 92, lines 6–9)
- 45 5. Although article 11 (1) was not subject to any express limitation, it does permit the degree of flexibility which is normally assumed to be

implicit in any provision of general application which is of the same nature as article 11 (1). Provisions such as article 11 (1) are always subject to implied limitations, so that a contravention of the provision does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial. This implicit flexibility allows a balance to be drawn between the interest of the person charged and the State. (p 92, lines 25-35)

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6. A determination whether an exception to the general rule that the prosecution bears the burden of proof is inconsistent with article 11 (1) will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11 (1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what the essential ingredients are, the language of the relevant statutory provision will be important. However, what will be decisive will be the substance and reality of the language creating the offence rather than its form. (p 94, lines 15-27)

7. If an exception to the general rule requires certain matters to be presumed until the contrary is shown, it will be difficult to justify that presumption unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. (p 94, lines 27-33)

Leary v United States, 395 US 6, 23 L Ed 2d 57 (1969), considered.

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8. In applying the Bill of Rights, it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process adopted in Canada. The court should normally be able to come to a firm conclusion as to whether a provision has been repealed by the Bill of Rights by examining the substance of the statutory provision. Article 11 (1) is not contravened if the prosecution is required to prove the important elements of the offence, while the defendant is reasonably given the burden of establishing a proviso, an exemption or the like. (p 97, lines 15-31)

R v Edwards [1975] QB 27, approved.

9. In a case where there is real difficulty or where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of s 1 of their Charter. However, in doing this the tests which have been identified in Canada should be treated as providing useful general guidance and do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. This is particularly so as regards proportionality, since it is the need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule. (p 97, lines 32–41)

Section 30 of the Summary Offences Ordinance

10. The substantive effect of s 30 was to place the onus on the accused to establish the most significant element of the offence, namely that he can give an explanation as to his innocent possession of the property. This reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. It was not a reasonable exception to the general rule and was thus inconsistent with article 11 (1), the Crown not having sought to justify the exception. (p 98, lines 3–12)

Section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance

11. The purpose of s 25 was to make it more difficult for those engaged in the drug trade to dispose of the proceeds of their illicit traffic without the transactions coming to the knowledge of the authorities. The substance of the offence is contained in s 25 (1), as to which the onus is on the prosecution. It is not important whether s 25 (4) is regarded as creating a defence or an exception if it does not constitute part of the substance of the offence. (p 98, lines 14–17)
12. Unless the prosecution can prove all the elements of the offence under s 25 (1), the defendant is entitled to be acquitted. On the other hand, it would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken the precautionary steps under s 25 (4) which, if taken, would afford him a defence. In the context of the war against drug trafficking, for a defendant to bear that onus under s 25 (4) is manifestly reasonable and does not offend article 11 (1). (p 98, lines 17–39)

13. Alternatively, s 25 (4) could have been rendered consistent with the Bill of Rights by regarding the words “to prove” as being repealed. Section 3 (2) of the Bill of Rights Ordinance repeals existing legislation “to the extent of the inconsistency”. If the words “to prove” are removed from s 25 (4), the respondents would no longer be under a legal or persuasive burden of proof to establish the defence contained in s 25 (4). Instead, they would be under an evidential burden merely requiring them to raise the issue. This burden could not conceivably contravene article 11 (1). (p 99, lines 17–27)

Per curiam:

While the Hong Kong judiciary should be zealous in upholding an individual’s rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature’s attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature. (p 100, lines 8–20)

N Bratza QC and S R Bailey, for the Attorney General.

G J X McCoy and K Oderberg (instructed by Phillips & Co), for the respondent in the first appeal (Lee Kwong-kut).

A Hoo QC and K Chan (instructed by Kennedys), for the first respondent in the second appeal (Lo Chak-man).

M Thomas QC and P J Dykes (instructed by Philips Conway Thomas), for the second respondent in the second appeal (Tsoi Sau-ngai).

The following cases and materials are referred to in the judgment:

Attorney General v Chiu Man-lun [1989] 1 HKLR 99

Attorney General v Lo Man-cheuk [1980] HKLR 687

Attorney General of The Gambia v Jobe [1984] AC 689

Hadley v Perks (1866) LR 1 QB 444

Leary v United States, 395 US 6, 23 L Ed 2d 57 (1969)

Minister of Home Affairs v Fisher [1980] AC 319

Patterson v New York, 432 US 197, 53 L Ed 2d 281 (1977)

- R v Appleby* (1971) 21 DLR (3d) 325
R v Chaulk [1990] 3 SCR 1303, 62 CCC (3d) 193
R v Colle (1992) 95 Cr App R 67
5 *R v Downey* [1992] 2 SCR 10, 72 CCC (3d) 1
R v Edwards [1975] 1 QB 27
R v Holmes [1988] 1 SCR 914, 50 DLR (4th) 680, 41 CCC (3d) 497
R v Hunt [1987] AC 352
R v Mok Wei-tak [1990] 2 AC 333
10 *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200, 24 CCC (3d) 321
R v Sin Yau-ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127
R v Whyte [1988] 2 SCR 3, 51 DLR (4th) 481, 42 CCC (3d) 97
Salabiaku v France, European Court of Human Rights, Judgment of 7
October 1988, Series A, No 141-A, 13 EHRR 379
15 *Woolmington v DPP* [1935] AC 462
- 15 Hong Kong Letters Patent 1917–1991, art VII
- Dangerous Drugs Ordinance (Cap 134), ss 46, 47
Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), s 25
20 Hong Kong Bill of Rights Ordinance (Cap 383), ss 3, 8
Hong Kong Bill of Rights, arts 11 (1), 11 (2)
Interpretation and General Clauses Ordinance (Cap 1), ss 2, 23
Police Force Ordinance (Cap 232), s 55
Prevention of Bribery Ordinance (Cap 201), s 101 (1)(a)
25 Summary Offences Ordinance 1845, s 66
Summary Offences Ordinance (Cap 228), s 30
- Canadian Bill of Rights 1960, s 2 (f)
Canadian Charter of Rights and Freedoms 1982, ss 1, 11 (d)
30 Constitution of the United States of America, Amendment XIV
Drug Trafficking Offences Act 1986 (UK), s 24
Interpretation Act 1978 (UK), s 16 (1)
Metropolitan Police Act 1839 (UK), s 36
Metropolitan Police Courts Act 1839 (UK), s 24
35
- European Convention on Human Rights, art 6 (2)
International Covenant on Civil and Political Rights, art 14 (2)
- 40 Human Rights Committee, *General comment 13 (21)*, para 7, UN Doc
CCPR/C/21/Rev 1 (1989)

The following cases and materials were also referred to in argument or written submissions but are not cited in the judgment:

- Andrews v Lucas* (1876) ILTR 146
- 5 *Attorney General for Alberta v Attorney General for Canada* [1947] AC 503
- Attorney General of Hong Kong v Sham Chuen* [1986] AC 887
- Blyth v Blyth* [1966] AC 643
- Charles Early & Marriott (Witney) Ltd v Smith* [1978] QB 11
- 10 *County Court of Ulster County v Allen*, 442 US 140, 60 L Ed 2d 777 (1979)
- DPP v Hutchison* [1990] 2 AC 783
- Dumbell v Roberts* [1944] 1 All ER 326
- Flatman v Light* [1946] 1 KB 414
- 15 *Gammon (Hong Kong) Ltd v Attorney General (Hong Kong)* [1985] AC 1
- Gough v Braden* (1991) 55 A Crim R 92
- Hamdard Dawakhana (wafk) Lal Kuan v Union of India* [1960] 2 SCR 671
- Hand v Lord Mayor of Dublin* [1989] IR 26
- 20 *Hunter v Southam Inc* [1984] 2 SCR 145, 11 DLR (4th) 641
- Hussien v Chong Fook-kam* [1970] AC 942
- Kiondo Hamisi v Republic* [1963] EA 209
- Koech v Republic* [1968] EA 109
- Lee Fan v Dempsey* (1907) 5 CLR 310
- 25 *Leland v Oregon*, 343 US 790, 96 L Ed 1302 (1952)
- Lewis v Lewis* [1985] AC 828
- Lingens v Austria*, European Commission of Human Rights, Application No 8803/79, decision on admissibility of 11 December 1981, 26 D & R 171
- 30 *Malone v United Kingdom*, European Court of Human Rights, Judgment of 2 August 1984, Series A, No 82, 74 ILR 304, 7 EHRR 14
- Martin v Ohio*, 480 US 228, 94 L Ed 2d 267 (1987)
- Mullaney v Wilbur*, 421 US 684, 44 L Ed 2d 508 (1975)
- Ong Ah Chuan v Public Prosecutor* [1981] AC 648
- 35 *Pepper v Hart* [1992] 1 WLR 1032
- Pham Hoang v France*, European Court of Human Rights, Judgment of 25 September 1992, Series A, No 243, 16 EHRR 53
- R v Bank* [1916] 2 KB 621
- R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 18 DLR (4th) 321, 18 CCC
- 40 (3d) 385
- R v Boyle* (1983) 5 CCC (3d) 193
- R v Chan Hoi* [1966] HKLR 42
- R v Finlay* (1991) 64 CCC (3d) 557
- R v Fisher* [1969] 1 WLR 8
- 45 *R v Goltz* (1992) 67 CCC (3d) 481

- R v Grant* (1981) 147 CLR 507
R v Ho Shing-tuen (1980) CA, Crim App No 5 of 1979, 3 March 1980
R v Hunt, 1957 (2) SA 465
R v Ireco Canada II Inc (1988) 43 CCC (3d) 482
5 *R v Ismail*, 1958 (1) SA 206
R v Ismail Abdulrehman (1952) 20 EACA 246
R v Keegstra [1990] 3 SCR 697, 61 CCC (3d) 1
R v Laba (1992) 74 CCC (3d) 538
R v Lau Shiu-wah (1991) 1 HKPLR 202, [1992] HKDCLR 11
10 *R v Lee's Poultry Ltd* (1985) 17 CCC (3d) 539
R v Li Kwok-wa (1992) CA, Crim App No 350 of 1991, 31 January 1992*
R v Mandavu [1962] R & N 298
R v Lam Wan-kow [1992] 1 HKCLR 272
R v Nova Scotia Pharmaceutical Society [1992] 2 SCR 606, 74 CCC (3d)
15 289
R v Rodway (1990) 169 CLR 515
R v Schwartz [1988] 2 SCR 443, 55 DLR (4th) 1, 45 CCC (3d) 97
R v Seo (1986) 25 CCC (3d) 385
R v Singh (1987) 41 CCC (3d) 278
20 *R v Slavens* (1991) 64 CCC (3d) 29
R v Smith [1987] 1 SCR 1045, 34 CCC (3d) 97
R v Tran Viet Van [1992] 2 HKCLR 184
R v Vaillancourt [1987] 2 SCR 636, 47 DLR (4th) 399, 39 CCC (3d) 118
R v West London Magistrates, ex parte Simeon [1983] AC 234
25 *R v Wholesale Travel Group Inc* [1991] 3 SCR 154, 84 DLR (4th) 161
R v Wong Hiu-chor [1993] 1 HKCLR 107*
Reference re section 94 (2) of the Motor Vehicle Act [1985] 2 SCR 486, 24
DLR (4th) 536, 23 CCC (3d) 289
Secretary of State for Social Security v Tunncliffe [1991] 2 All ER 712
30 *Sweet v Parsley* [1970] AC 132
Sunday Times v United Kingdom (No 1), European Court of Human
Rights, Judgment of 26 April 1979, Series A, No 30, 58 ILR 490, 2
EHRR 245
Tatchell v Lovett [1908] VLR 645
35 *Tepper v Kelly* (1987) 45 SASR 340
Todd, ex parte; In re Ashcroft (1887) 19 QBD 186
Tot v United States, 319 US 463, 87 L Ed 1519 (1943)
United Marketing Co v Hasham Kara [1963] 1 WLR 523
Van Alphen v Netherlands, Human Rights Committee, Communication
40 No 305/1988, decision of 23 July 1990, UN Doc A/45/40, vol 2, Annex
IX.M, p 108 (1990)

Winship, Re, 397 US 358, 25 L Ed 2d 368 (1970)

Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553

Hong Kong Bill of Rights, arts 3, 5 (1)

5 Magistrates Ordinance (Cap 227), s 118 (1)(d)

Marine Stores Protection Ordinance (Cap 144), s 7

Public Stores Ordinance (Cap 143), s 7

Summary Offences Ordinance (No 40 of 1932), s 24

Summary Offences Ordinance, (Cap 228), LHK 1950 ed, s 29

10 Summary Offences Ordinance (Cap 228), s 33

Canadian Charter of Rights and Freedoms 1982, ss 7, 9, 12

Criminal Law Act 1977 (UK), s 65, Schedule 13

Dublin Metropolitan Police Act 1841, s 53

15 Liverpool Corporation Act 1921 (UK), s 507

Magistrates Courts Act 1980 (UK), ss 81, 101

Basic Law of the Hong Kong Special Administrative Region of the People's
Republic of China 1990

20 Sino-British Joint Declaration on the Future of Hong Kong 1984

M Bossuyt, *Guide to the "Travaux Préparatoires" of the International
Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff,
1987), pp 291–293

25 A Byrnes, "The Impact of the Bill of Rights on Litigation", in J Sihombing
(ed), *Law Lectures for Practitioners 1992* (Hong Kong: Hong Kong
Law Journal, 1992), pp 151–235

Committee for the Review of Commonwealth Criminal Law, *Review of
Commonwealth Criminal Law, Final Report*, December 1991, paras
30 8.10–8.11

Halsbury's Laws of England (London: Butterworths, 4th ed 1992), v 44,
para 911

"Oakes: A Bold Initiative impeded by old ghosts", (1983) 32 CR (3d) 221

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Lord Woolf delivered the judgment of the Board:

40 These appeals illustrate the effect on existing legislation of adopting a
Bill of Rights. On 8 June 1991 the Hong Kong Bill of Rights Ordinance,
(Cap 383) Laws of Hong Kong, ("the Hong Kong Bill") came into force.

After a hearing on 2 September 1991, at which no evidence was called,
a magistrate dismissed an information preferred against Lee Kwong-kut
45 ("the first respondent") under s 30 of the Summary Offences Ordinance
(Cap 228), Laws of Hong Kong ("s 30"), on the ground that s 30 had been

repealed by s 3 (2) of the Hong Kong Bill. The Attorney General of Hong Kong appealed against that decision and on 18 June 1992 the Court of Appeal of Hong Kong dismissed that appeal.

5 On 4 August 1992 Gall J quashed an indictment against Lo Chak-man and Tsoi Sau-ngai ("the second respondents"), charging each of the second respondents with one count of assisting another to retain the benefit of drug trafficking contrary to s 25 (1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), Laws of Hong Kong ("s 25"). Gall J quashed the indictment as a result of his ruling that s 25 (1) 10 and s 25 (4)(a) and (b) had been repealed by s 3 (2) of the Hong Kong Bill.

In relation to the rulings in both cases, the Attorney General sought special leave to appeal, and this was granted on 17 November 1992. In both cases the rulings were made on the ground that the respective 15 sections were inconsistent with s 8, article 11 (1) ("article 11 (1)") of the Hong Kong Bill, which provides:

20 "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

Both appeals were heard together. This was a convenient course to adopt on what is the first appeal to come before the Board as to article 11 (1) since it has enabled the Board to consider a wide-ranging argument about s 30 and s 25 which have very different structures. It was 25 not however necessary for their Lordships to call upon counsel for the first respondent since, having heard the argument on behalf of the Attorney General in relation to the appeal in his case, their Lordships were satisfied that the appeal could not succeed. Their Lordships have humbly advised Her Majesty accordingly.

30 It is desirable at the outset to explain the different structure of the two offences before turning to consider the possible effects of the Hong Kong Bill.

35 THE STRUCTURE OF S 30

The terms of s 30 are:

40 "Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of \$1,000 or to imprisonment for 3 months."

45 The way in which the present information was worded shows how a charge under s 30 is approached in practice. What is alleged is that the

first respondent had on 17 November 1990 (at a named place) in his possession cash \$1.76 million Hong Kong currency, reasonably suspected of having been stolen or unlawfully obtained. The failure to give an account to the magistrate is not mentioned.

5 In his judgment in the Court of Appeal relating to the first respondent, Kempster JA points out that s 30's source, like similar provisions in the laws of each of the States of Australia and of a number of former British colonies in Africa, was the former offence under s 24 of the Metropolitan Police Courts Act 1839 (which was repealed by the Criminal Law Act 1977) and that its history in Hong Kong goes back to s 36 of the Summary Offences Ordinance 1845.

10 For a proper understanding of s 30, it is useful to have in mind the powers given to the Hong Kong Police by s 55 of the Police Force Ordinance (Cap 232), which is comparable to part of what was s 66 of the Metropolitan Police Act 1839. Section 55 of the Police Force Ordinance states:

20 "It shall be lawful for any police officer to stop, search and detain any vessel, boat, vehicle, horse or other animal or thing in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained . . .".

25 As has been decided in England in *Hadley v Perks* (1866) LR 1 QB 444 and in Hong Kong in *Attorney General v Chiu Man-lun* [1989] 1 HKLR 99, s 30 and s 24 of the Metropolitan Police Courts Act 1839 are to be regarded as supplemental to the powers of arrest given respectively by s 55 of the Police Force Ordinance and s 66 of the Metropolitan Police Act 1839. Construed in this way, s 30 created an offence with
30 which a person could be charged after he was stopped and arrested by a police officer in circumstances where there was a suspicion that he had committed an offence, but where it was not possible to establish that he was guilty of what were the more serious offences of larceny or receiving. The nature of that offence was made clear by Lush J in *Hadley v Perks* when he said of s 24 (at 462):

35 "It makes it an offence for a person to have in his possession, or convey in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, without being able to give a satisfactory account of how he came by it."

40 Section 30 is therefore an offence which contains three elements: (1) the possession or conveying of the property by the defendant, (2) the reasonable suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession.

The third element is not a special defence as is contended by Mr Bratza QC in his extremely persuasive argument on behalf of the Attorney General, but an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the property.

This third ingredient is the most important element of the offence since, were it not for the third ingredient, it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law. He could, for example, be in possession of the property without having any knowledge of any of the circumstances which gave rise to the reasonable suspicion that the property was either stolen or obtained unlawfully which justified the police officer detaining him. Section 30 therefore does not create an offence of the class identified in *R v Edwards* [1975] QB 27 at 39-40 by Lawton LJ when, in giving the judgment of the court, he said, after examining a line of authority dating from the seventeenth century:

“ . . . this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.”

This does highlight the very special nature of s 30 since, as Lord Griffiths said in *R v Hunt* [1987] 1 AC 352 at 375 of the formulation of the exception by Lawton LJ in *R v Edwards*, “the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare”.

On this point, s 30 can be compared with the approach adopted by the majority of the Board in *R v Mok Wei-tak* [1990] 2 AC 333, concerning s 101 (a) of the Prevention of Bribery Ordinance (Cap 201), where, in the words of Lord Roskill (at 349), “the offence is maintaining a standard of living which cannot be satisfactorily explained”. Here the offence is being in possession of the suspicious property without being able to give a

satisfactory explanation. In adopting this approach to the nature of s 30, it is also not intended to cast any reflection on the correctness of the decision in *Attorney General v Lo Man-cheuk* [1980] HKCLR 687 that it was not necessary to make any reference to the failure of the accused to give an account to the satisfaction of the magistrate of his possession of the property reasonably suspected of being stolen or unlawfully obtained in a charge under s 30. The correctness of this decision was not in issue before their Lordships.

THE STRUCTURE OF S 25

The respective counts of contravening s 25 (1)(a) on which the second respondents were to be tried were identical; the particulars of each count alleged that, between 6 and 20 December 1989, they had respectively been concerned in an arrangement whereby the retention or control of another's proceeds of drug trafficking was facilitated, knowing or having reasonable grounds to believe that the other person carried on, or had carried on, drug trafficking or had benefited from drug trafficking.

The relevant provisions of s 25 are as follows:

"(1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby —

(a) the retention or control by or on behalf of another ('the relevant person') of the relevant person's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) the relevant person's proceeds of drug trafficking —

(i) are used to secure that funds are placed at the relevant person's disposal; or

(ii) are used for the relevant person's benefit to acquire property by way of investment,

knowing or having reasonable grounds to believe that the relevant person is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking, commits an offence.

(2) In this section, references to any person's proceeds of drug trafficking include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking.

(3) Where a person discloses to an authorized officer a suspicion or belief

that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based —

- 5 (a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if the disclosure is made in accordance with this paragraph, that is —
- 10 (i) it is made before he does the act concerned, being an act done with the consent of the authorized officer; or
- (ii) it is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it;
- 15 (b) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by rules of professional conduct; and
- 20 (c) he shall not be liable in damages for any loss arising out of —
- (i) the disclosure;
- (ii) any act done or omitted to be done in relation to the funds or investments in consequence of the disclosure.
- 25 (4) In proceedings against a person for an offence under this section, it is a defence to prove —
- (a) that he did not know or suspect that the arrangement related to
- 30 a person's proceeds of drug trafficking; or
- (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of the relevant person of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1);
- 35 or
- (c) that —
- (i) he intended to disclose to an authorized officer such a suspicion, belief or matter as is mentioned in subsection (3) in relation to the arrangement; but
- 40 (ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(a).
- 45 (5) A person who commits an offence under this section is liable —

(a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years . . .”.

5 The only significant difference between s 25, and s 24 of the (United Kingdom) Drug Trafficking Offences Act 1986 is in relation to the knowledge which is required of the status of “the relevant person” before an offence is committed. Section 25 (1) refers to “knowing or having reasonable grounds to believe” whereas the United Kingdom legislation refers to “knowing or suspecting”.

10 The language of s 25 makes the purpose of the section clear. It is designed to make it more difficult for those engaged in the drug trade to dispose of the proceeds of their illicit traffic without the transactions coming to the knowledge of the authorities. Once a person has knowledge or has reasonable grounds to believe that a relevant person carries on or has carried on drug trafficking or has benefited from drug trafficking, then it will be an offence to become involved with “the relevant person” in any of the wide-ranging activities referred to in the section, unless the activity is reported in accordance with s 25(3), or the person who engages in the activity is in a position to establish the defence provided for in s 25 (4). The section therefore creates an offence, which involves an absolute prohibition on engaging in the activities referred to in the section with someone whom you know or have reasonable grounds to believe to be a person who carries on or has carried on, or has benefited from drug trafficking, subject to an exception contained in s 25 (3), and a special defence contained in s 25 (4). Section 25 is an offence which falls within the classes referred to by Lawton LJ in the passage cited from his judgment in *Edwards*.

25 As was held in *R v Colle* (1992) 95 Cr App R 67, in relation to that special defence, the legal or persuasive burden of proof is on a defendant, the standard required being proof on a balance of probabilities. Furthermore the only “mens rea” which the prosecution is required to establish, if mens rea is an appropriate description of the necessary mental element, is that the defendant should know or have reasonable grounds to believe that the relevant person is connected with drug trafficking. This mental element can exist, even if the defendant does not have the required belief, if there are reasonable grounds for his holding the belief. The offence is therefore a draconian one.

40 **The application of article 11 (1) of the Hong Kong Bill**

The Hong Kong Bill was enacted by the Governor of Hong Kong, with the advice and consent of the Hong Kong Legislative Council. Its provisions are for the time being entrenched under the Hong Kong Letters Patent 1991 (No 2). The Ordinance is designed to achieve “the incorpo-

ration into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong . . .” (“the International Covenant”). Section 3 of the Hong Kong Bill provides:

5

“3. Effect on pre-existing legislation

(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.

10

(2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.”

15

“Pre-existing legislation” means legislation enacted before the commencement date of the Hong Kong Bill, so both s 30 and s 25 are pre-existing legislation.

The close link between the Hong Kong Bill and the International Covenant is emphasised by s 4 which states:

20

“4. Interpretation of subsequent legislation

All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.”

25

Part II of the Ordinance consists of s 8 which contains the 23 articles which constitute the Hong Kong Bill. Each of those articles refers in terms to the equivalent articles of the International Covenant. Article 11 (1), the terms of which have been referred to earlier, is to be compared with article 14 of the International Covenant and it should be considered together with that part of article 10 of the Hong Kong Bill, which provides that:

30

35

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

40

Article 11 (2) is also of relevance since it provides:

“(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

45

...

(g) not to be compelled to testify against himself or to confess guilt”.

5 The decision of the Court of Appeal in the case of the first respondent
was not the first appeal heard by that court which involved article 11 (1)
of the Hong Kong Bill. In *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992]
1 HKCLR 127, the Court of Appeal (Silke VP, Kempster and Penlington
10 JJA) gave admirably clear judgments which were intended to provide
guidance to the Hong Kong courts as to the proper approach to the
application of article 11 (1) of the Hong Kong Bill. The judgment was in
relation to offences of possession of dangerous drugs for the purpose of
unlawful trafficking. In their decision, the Court of Appeal decided that
15 certain of the provisions of ss 46 and 47 of the Dangerous Drugs Ordinance
(Cap 134) were repealed as being inconsistent with article 11 (1).

Although this is the first appeal in which the Hong Kong Bill has
been considered by the Board, the Board has had from time to time to
consider earlier constitutional orders which contain similar provisions
and, in his judgment, Kempster JA referred to the general approach to
20 the interpretation of constitutions and bills of rights, indicated in the
previous decisions of the Board in *Minister of Home Affairs v Fisher*
[1980] AC 319 and *Attorney General of The Gambia v Jobe* [1984] AC
689. In the former case, in relation to the Bermuda Constitution Order
1968, Lord Wilberforce stated (at 328), of instruments of this nature,
25 that they “call for a generous interpretation, avoiding what has been
called ‘the austerity of tabulated legalism’, suitable to give to individuals
the full measure of the fundamental rights and freedoms referred to”. In
the latter case Lord Diplock said (at 700):

30 “A constitution, and in particular that part of it which protects and
entrenches fundamental rights and freedoms to which all persons in the
state are to be entitled, is to be given a generous and purposive construction.”

35 Lord Diplock’s comment was as to the Constitution of the Republic of
The Gambia but, as in the case of the statement of Lord Wilberforce, the
approach indicated is equally applicable to the Hong Kong Bill.

Reference was also made in the judgments in the *Sin Yau-ming* case
to decisions in other common law jurisdictions, including the United
40 States and Canada, and of the European Court of Human Rights in
relation to the European Convention on Human Rights. Such decisions
can give valuable guidance as to the proper approach to the interpretation
of the Hong Kong Bill, particularly where the decisions in the other
jurisdictions are in relation to an article in the same or substantially the
45 same terms as that contained in the equivalent provision of the Hong

Kong Bill. However, it must not be forgotten that decisions in other jurisdictions are persuasive and not binding authority and that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong. This is particularly true in the case of decisions of the European Court, as Silke VP recognised. The European Court is not concerned directly with the validity of domestic legislation but whether, in relation to a particular complaint, a State has in its domestic jurisdiction infringed the rights of a complainant under the European Convention; whereas, in the case of the Hong Kong Bill, the Hong Kong courts, and on appeal the Board, have to determine the validity of domestic legislation having regard to the entrenched provisions of the Hong Kong Bill.

Of the various authorities to which the Court of Appeal were referred in the *Sin Yau-ming* case and on the appeal in the case of the prosecution of the first respondent, the Court of Appeal in Hong Kong found that the decisions of the Supreme Court of Canada provided the most assistance, in particular on the interpretation of article 11 (1). In the *Sin Yau-ming* case all three judges and, on the Attorney General's appeal in the case of the first respondent, Kempster JA relied heavily on the judgment of Dickson CJC in the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200, 24 CCC (3d) 321, while on that appeal Cons ACJ and Bokhary J followed the subsequent judgment of Dickson CJC in *R v Whyte* [1988] 2 SCR 3, 51 DLR (4th) 481, 42 CCC (3d) 97. When giving his ruling in the second respondents' case, Gall J also applied the approach which was identified by Dickson CJC in *R v Whyte*. In both cases, the Chief Justice of Canada was applying s 11 (d) of the Canadian Charter of Rights and Freedoms which is the equivalent of article 11 (1) of the Hong Kong Bill. In *Whyte* a stricter approach was adopted to s 11 (d) than that which had been adopted in the earlier case of *Oakes*. Mr Bratza accepts that the approach in *Whyte* now represents the accepted approach in Canada, as is confirmed by later decisions of the Canadian Supreme Court (for example in *R v Downey* [1992] 2 SCR 10, 72 CCC (3d) 1). However, on behalf of the Attorney General he submits that it is not desirable for the Hong Kong courts to follow that approach in relation to article 11 (1), as it is more intrusive in its effect on existing legislation than the approach adopted in other jurisdictions.

So far as the present appeals are concerned, their Lordships are of the opinion that, whether what can be described as the *Whyte* approach or the less intrusive approach adopted in other jurisdictions is applied, the outcome would be the same. However, in order to assist the Hong Kong courts in the future, and in view of the carefully reasoned decisions of the Court of Appeal already referred to, the Board feel it is necessary to give some assistance as to the correct approach for the courts to adopt in relation to article 11 (1) and in particular as to whether

it is appropriate to adopt the *Whyte* approach in Hong Kong as a matter of course.

5 Before examining the approach adopted in Canada, it is helpful to consider the language and objectives of article 11 (1) and the approach adopted in other jurisdictions apart from Canada to similar provisions.

10 Article 11 (1) of the Hong Kong Bill is part of a group of provisions contained both in that article and in article 10 which are designed to ensure that before an individual is convicted of a criminal offence, he will have a fair trial and that justice will be done. Article 11 (1) would be described in the United States as a due process provision. In his case the first-named of the second respondents draws attention to the fact that article 11 (1) is not subject to any express limitation. Reference is also made to the comments by the United Nations Human Rights Committee at its 21st session on article 14 of the International Covenant (*General comment 13 (21)*, para 7, UN Doc CCPR/C/21/Rev 1 (1989)), which include the statement that:

20 "The burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond all reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial".

25 However, it should not be assumed from this statement that the comparable article in the International Covenant to article 11 (1) does not permit the degree of flexibility which is normally assumed to be implicit in any provision of general application which is of the same nature as article 11 (1) of the Hong Kong Bill. Placing to one side for the moment the decisions in Canada, all of the many decisions in different jurisdictions to which their Lordships were referred recognise that provisions similar to article 11 (1) are always subject to implied limitations, so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial. In the common law jurisdictions, Viscount Sankey LC's famous statement in *Woolmington v DPP* [1935] AC 462 at 481 that:

40 "Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception."

45 is regularly treated as a starting point for the approach to provisions equivalent to article 11 (1). If that statement is taken together with the comments of Lawton LJ and Lord Griffiths, referred to earlier, and if it

is also remembered that it is the substance rather than the letter of the language of the statute which is important when considering whether there is an exemption or proviso, this statement is also a useful starting point when considering the effect of article 11 (1) itself.

5 Mr Bratza relied on the decision in the United States Supreme Court in *Patterson v State of New York*, 432 US 197, 53 L Ed 2d 281 (1977) as showing that that court had rejected an argument that the "due process" clause of the Fourteenth Amendment required a state to disprove beyond reasonable doubt every fact constituting any offence and all affirmative defences relating to the culpability of the accused. He also
10 relied upon the cases before the European Court of Human Rights which were referred to in the judgments in the *Sin Yau-ming* case. Here reference can be usefully made to the decision in *Salabiaku v France*, European Court of Human Rights, Judgment of 7 October 1988, Series A, No 141, 13 EHRR 379, where the judgment, which has been followed in
15 later cases in the European Court, contains the following statement as to the equivalent provisions to article 11 of the Hong Kong Bill (at para 28):

20 "Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in
25 paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by
30 protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law.

35 Article 6 (2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

40 This statement provides a valuable illustration of the collective effect of the decisions in other jurisdictions, apart from Canada, to which their Lordships have been referred on equivalent provisions to article 11 (1) in other constitutional documents. Even though they are not subject to any express limitation, they are considered to have an implicit degree of flexibility. The situation is the same in relation to article 11 (1).

45 The implicit flexibility allows a balance to be drawn between the

interest of the person charged and the State. There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious
5 example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence. The position
10 is the same with regard to insanity, which was one of the exceptions identified by Lord Sankey in the passage of *Woolmington v DPP* which has already been cited. The other qualification which Lord Sankey made as to statutory exceptions clearly has to be qualified when giving effect to a provision similar to article 11 (1).

15 Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11 (1) enshrines. The less significant the departure from the normal
20 principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States
30 Supreme Court in *Leary v United States*, 395 US 6 at 36, 23 L Ed 2d 57 at 82 (1969), "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend".

35 Turning to the recent decisions of the Canadian Supreme Court, they contain remarks of considerable value. In particular the majority judgment of Dickson CJC in *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200 contains a number of helpful statements.

40 His general conclusion, after examining the authorities in various other jurisdictions, was in the following terms (SCR at 132-133, DLR at 222) with which, with its reference to "important element" and "essential element", their Lordships would respectfully agree:

45 "In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question,

violates the presumption of innocence If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient
5 evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.”

It is, however, important when considering the decision in *Oakes* and
10 the cases in which it has been followed, to remember that, prior to the adoption of the Canadian Charter, Canada had a Bill of Rights and that, while the Bill of Rights did not have an express limitation on the effect of its specific provisions, the Charter does have such a limitation in s 1:

15 “1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Having regard to this express limitation, it is understandable that Dickson
20 CJC in *Oakes* (SCR at 135, DLR at 223) considered that “it is highly desirable to keep ss 1 and 11 (d) (of the Canadian Charter) analytically distinct”. Having adopted a two-stage process, it is again understandable that the Canadian Supreme Court has adopted a strict approach as to when there had been a contravention of s 11 (d). This is in contrast to
25 the flexible approach which had been adopted by the Canadian Supreme Court in *R v Appleby* (1971) 21 DLR (3d) 325 to s 2 (f) of the Canadian Bill of Rights, which is the equivalent provision to s 11 (d) of the Canadian Charter. Dickson CJC in *Oakes* (SCR at 136, DLR at 224–225) regarded s 1 of the Charter as stating “explicitly the exclusive justificatory
30 criteria . . . against which limitations on those rights and freedoms [set out in the Charter] must be measured”. Having come to this conclusion in *R v Whyte* [1988] 2 SCR 3, 51 DLR (4th) 481, 42 CCC (3d) 97, the Canadian Supreme Court, as already indicated, applied a stricter approach to the application of s 11 (d) of the Charter than had been
35 adopted not only in *Oakes* but in the subsequent case of *R v Holmes* [1988] 1 SCR 914, 50 DLR (4th) 680. In the passage of his judgment in *Oakes* cited above, Dickson CJC regarded presumptions in relation to “an important element” or “an essential element” as offending s 11 (d) of the Canadian Charter. In *R v Whyte*, his approach was not confined to
40 these elements, as appears from the following passage of his judgment (SCR at 17–18, DLR at 493, CCC at 109):

45 “In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, section 237 (1)(a) does not infringe the presumption of innocence. Counsel

relied on the passage from *Oakes* quoted above, with its reference to an 'essential element', to support this argument. The accused here is required to disprove a fact collateral to the substantive offence, unlike *Oakes* where the accused was required to disprove an element of the offence.

5 The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the section 11 (d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

10 The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

20 It was the approach reflected in this passage of Dickson CJC's judgment ("the *Whyte* approach") which was followed in these cases, in the Court of Appeal by Cons ACJ and Bokhary J in the first respondent's case, and by Gall J in the second case.

25 Applying the *Whyte* approach, even to place the onus on a defendant to prove insanity as a "defence" to murder has now been held to contravene the presumption of innocence guaranteed by s 11 (d) of the Canadian Charter (*R v Chaulk* [1990] 3 SCR 1303, 62 CCC (3d) 193). However, the Supreme Court was able to justify the conventional position in relation to insanity under s 1. This result illustrates the fact that, applying the two-stage approach, the courts in Canada in the end tend to come to the same conclusion as would be reached in other jurisdictions.

30 This does not mean that the adoption of a two-stage, as opposed to a single-stage, approach does not have practical consequences. In relation to the second stage, the s 1 of the Charter stage, formal criteria which need to be satisfied have been established. In *Chaulk* (SCR at 1332, CCC at 216-217) Lamer CJC, Dickson CJC concurring, described the reasoning to be followed when there is an attempt to rely on s 1 of the Canadian Charter in the following terms:

- 40 "1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
- 45 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

- (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the right or freedom in question as 'little as possible', and
- (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective."

In applying these tests, the Canadian Supreme Court has injected a degree of flexibility. In particular, in *Chaulk* it was made clear that reliance on s 1 would not be prevented because Parliament had failed to search out and adopt the least possible intrusive means of attaining its objective, as long as it has chosen from a range of means which impairs s 11 (d) as little as is reasonably possible.

Notwithstanding this, it is their Lordships' opinion that, in applying the Hong Kong Bill, it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process now established in Canada in order to assess whether an exception to the general rule that the burden of proof should rest upon the prosecution throughout a trial is justified. Normally, by examining the substance of the statutory provision which is alleged to have been repealed by the Hong Kong Bill, it will be possible to come to a firm conclusion as to whether the provision has been repealed or not without too much difficulty and without going through the Canadian process of reasoning. The application of a test along the lines suggested by Lawton LJ in *Edwards*, in the manner already indicated, will often be all that is required. The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton LJ. If this is the situation, article 11 (1) is not contravened.

In a case where there is real difficulty, where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of s 1 of their Charter. However in doing this the tests which have been identified in Canada do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. They should be treated as providing useful general guidance in a case of difficulty. This is particularly true in relation to what was said in *Chaulk* about proportionality since it is the need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule.

THE APPLICATION OF ARTICLE 11 (1) TO SS 30 AND 25

So far as the first issue in the present appeals is concerned, that is

whether the Hong Kong Bill has repealed the statutory provisions, their Lordships regard the answer as being straightforward once the substance of the offences has been identified. In the case of the first respondent, the substantive effect of the statutory provision is to place the onus on the defence to establish that he can give an explanation as to his innocent possession of the property. That is the most significant element of the offence. It reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. It therefore contravenes article 11 (1) of the Hong Kong Bill in a manner which the Attorney General could not justify.

This is by contrast to the situation in relation to the second respondents' case and s 25. It is not important whether s 25 (4) is regarded as creating a defence or an exception if it does not constitute part of the substance of the offence. The substance of the offence is contained in s 25 (1) as to which the onus is on the prosecution. Unless the prosecution can prove that the defendant has been involved in a transaction involving the relevant person's proceeds of drug trafficking (within the wide terms of s 25 (2)) as set out in s 25 (1) and that at that time he had the necessary knowledge or had reasonable grounds to believe the specified facts, the defendant is entitled to be acquitted. However, once the defendant knows, or has reasonable grounds to believe, that the relevant person is a person who carries on or has carried out drug trafficking, or has benefited from drug trafficking, then the defendant knows that he is at risk of committing an offence, and that he can only safely deal with that person if he is in a position to satisfy s 25 (3) or (4). If the defendant chooses not to take the precautionary action under s 25 (3), then he knows he can only safely proceed by relying on s 25 (4). To be able to achieve this, the defendant will have to take any steps necessary to ensure that he does not have the knowledge or suspicion referred to. An example would be by insisting on seeing documents establishing the untainted source of the funds. If the defendant has done this, then he will be aware of the relevant facts, and it is reasonable that he should be required to establish them. It would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps. In the context of the war against drug trafficking, for a defendant to bear that onus under s 25 (4) is manifestly reasonable, and clearly does not offend article 11 (1). Indeed s 30 and s 25 can be regarded as examples of situations close to the opposite ends of the spectrum of what does and does not contravene article 11 (1).

It was argued on behalf of the Attorney General that, as the first respondent's alleged offence was committed prior to the coming into force of the Bill of Rights, s 3 should not be invoked so as to repeal

retrospectively s 30. In support of this argument, Mr Bratza relied on s 23 of the Interpretation and General Clauses Ordinance (Cap 1), Laws of Hong Kong, which corresponds closely to s 16 (1) of the Interpretation Act 1978. However, quite independently of s 3, s 8 and article 11 (1) established a defendant's right "to be presumed innocent until proved guilty according to law". That right came into existence on the coming into force of the Hong Kong Bill, and so it would apply in any trial taking place thereafter. It is not the date of the offence but the date of trial which is conclusive. If it had been necessary to do so, the same result could have been achieved by saying that in this context a contrary intention appears, so s 23 of the Interpretation and General Clauses Ordinance does not apply. (See s 2 of the Ordinance).

The Attorney General did not contend that it was possible to save s 30 by treating it as being only partly repealed.

Having come to the conclusion that s 25 (4) does not offend article 11 (1), the appeal of the Attorney General in respect of the proceedings against the second respondents must inevitably be allowed. However, it is desirable that their Lordships indicate that if they had not come to that conclusion, then, contrary to the judgment of Gall J, they would have regarded only the words "to prove" as being repealed by s 3 (2) of the Hong Kong Bill. Section 3 (2) repeals existing legislation "to the extent of the inconsistency" and, if the words "to prove" are removed from s 25 (4), the second respondents would be no longer under a legal or persuasive burden of proof to establish the defence contained in s 25 (4). Instead they would be under an evidential burden merely requiring them to raise the issue. This burden could not conceivably contravene article 11 (1).

The final matter to which reference should be made is that Gall J was of the view that the Crown had failed to adduce the necessary evidence to establish that the interference with the interests of the individual for the benefit of the State contained in s 25 was justified. As to this, he was in the difficulty that the issues before him were presented on the basis that he was required to adopt the two-stage process laid down in the *Whyte* case in circumstances where the Crown was conceding before him that there had been a prima facie contravention of article 11 (1). This concession having been made, on the basis of the Canadian authorities, the burden on the Crown was a heavy one and his conclusion that the evidence which was available to him was not sufficient to enable him to be satisfied has to be understood in this context. However, as was apparent from his judgment, Gall J had ample knowledge to hold the balance appropriately between the individual and the government, in relation to s 25, without any evidence being called. The need to prevent the laundering of the proceeds of drug trafficking is common knowledge. He was entitled to have regard to the policy which the legislature had made clear by enacting s 25. He was in a position to assess the extent of

5 the burden which s 25 (4) imposed upon the second respondents. If he
had adopted, as he should have done, a broad unified approach to the
application of article 11 (1) to s 25, he should have had no difficulty on
the material which was before him in coming to the conclusion that the
10 section did not contravene the article. The fact that he found this pro-
cess as complex as he did illustrates the disadvantage that can flow from
seeking strictly to emulate the current approach of the Canadian Su-
preme Court. While the Hong Kong judiciary should be zealous in up-
holding an individual's rights under the Hong Kong Bill, it is also neces-
sary to ensure that disputes as to the effect of the Bill are not allowed to
15 get out of hand. The issues involving the Hong Kong Bill should be
approached with realism and good sense, and kept in proportion. If this
is not done the Bill will become a source of injustice rather than justice
and it will be debased in the eyes of the public. In order to maintain the
balance between the individual and the society as a whole, rigid and
inflexible standards should not be imposed on the legislature's attempts
to resolve the difficult and intransigent problems with which society is
faced when seeking to deal with serious crime. It must be remembered
20 that questions of policy remain primarily the responsibility of the legis-
lature. (See *R v Downey* [1992] 2 SCR 10 at 36-37, 72 CCC (3d) 1 at 18,
and *Chaulk* [1990] 3 SCR at SCR at 1302, 62 CCC (3d) at 222.) It would
not assist the individuals who are charged with offences if, because of
the approach adopted to "statutory defences" by the courts, the legis-
lature, in order to avoid the risk of legislation being successfully chal-
25 lenged, did not include in the legislation a statutory defence to a charge.

For these reasons, their Lordships have humbly advised Her Majesty
that the appeal of the Attorney General, in the case of the first respon-
dent, ought to be dismissed; and they will humbly advise Her Majesty
that the appeal of the Attorney General in the case of the second re-
30 spondents ought to be allowed and the order of Gall J set aside. The
Attorney General must pay the costs of the first respondent before their
Lordships' Board. There will be no order as to costs in the case of the
second respondents.

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