Democracy" [1995] Public Law 72; and Lord Donaldson, *Hansard*, HL (7 December 2004) at p.746.

1.043 With the benefit of over two decades' experience at the Bar and nearly four decades' experience on the Bench, Lord Denning came to favour a judicial power to "set aside statutes which are … repugnant to reason or fundamentals". You will find him saying that in Lord Denning, *What Next in the Law* (1982) (Butterworths) p.320. On the matter of "reason", Lord Mansfield said that "[a]s to right and wrong, human reason is much the same at all times and in all places". His letter of 3 March 1775 to Warren Hastings in which he said that can be found at Add MSS 398771, f2 in the British Library in London. Lord Bingham of Cornhill said (in Tom Bingham, *The Rule of Law* (2010) (Allen Lane an imprint of Penguin Books) at p.170) that "there are some rules which no government should be free to violate without legal restraint". Let it never be forgotten, for it would be to our sore loss ever to forget, that some entitlements, as it is so cogently put in Hans Kelsen, *General Theory of Law and State* (translated by Anders Wedberg) (1945) (Harvard University Press) at p.266, "correspond to the nature of man and their protection to the nature of any true community".

1.044 What Sir Edward Coke said in *Dr Bonham's Case* is sometimes criticized on the basis that he cited no authority for it. It is true that he did not. But in that regard it is worth remembering something which the Court of Common Pleas said in *Garland v Jekyll* (1824) 2 Bing 273 at 296–297 and the Court of Criminal Appeal repeated in *R v Casement* [1917] 1 KB 98 at 142. It is that "we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law".

1.045 The greatest legacy of *Dr Bonham's Case* must surely lie in the fact that it is (as noted in Claire Palley, *The United Kingdom and Human Rights* (1991) (Stevens & Sons / Sweet & Maxwell) at p.20) the precursor of the exercise by the United States Supreme Court of jurisdiction to adjudge legislation void. That jurisdiction was, as is well-known, established by their Honours' decision in the seminal case of *Marbury v Madison* 5 US 137 (1803). An American Chief Justice has (in Warren Burger, "The Doctrine of Judicial Review" (1972) Current Legal Problems 1 at p.6) traced the "roots" of *Marbury v Madison* to "English legal thought".

But first …

1.046 In some ways this would be an appropriate point at which to turn at once to how various court systems, including of course that of Hong Kong, deal with legislation, rules of common law or executive measures which are adjudged unconstitutional. But it is, on balance, better first to do two things: (a) compare and contrast the general nature of socio-economic rights with that of civil and political rights; and (b) say a word on the matter of democracy in general and then with reference to Hong Kong in particular.

CHAPTER 2

Civil and Political Rights / Socio-Economic Rights

2.001 Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted by the General Assembly of the United Nations on 16 December 1966. Subject to certain declarations and reservations, the United Kingdom signed both of these Covenants on 16 September 1968 and ratified both of them on 20 May 1976. By such ratification the United Kingdom accepted the obligations under both Covenants. Such acceptance extended to Hong Kong, which was a British colony at the time. The ICESCR had entered into force on 3 January 1976 and the ICCPR had entered into force on 23 March 1976. The Universal Declaration of Human Rights and these two Covenants form the International Bill of Human Rights.

2.002 What are the widely recognized civil and political rights? To an acceptable although by no means ideal extent, their general nature can be gathered from the subject matter of the ICCPR.

2.003 Next, what are the widely recognized socio-economic rights? To the same extent, their general nature can be gathered from the subject matter of the ICESCR.

Widely recognized Civil and Political Rights

2.004 On the foregoing basis, civil and political rights can be said to consist essentially of:

- right to self-determination;
- freedom from discrimination;
- right to gender equality;
- right to life;
- freedom from torture, from inhuman treatment and from experimentation without consent;
- freedom from slavery and from servitude;
- liberty and security of the person;
- rights when deprived of liberty;
- freedom from imprisonment for debt;
- freedom of movement;
- right of aliens to protection against arbitrary expulsion;
- right to procedural guarantees in civil and criminal trials;
- freedom from retrospective criminal laws;
- right to recognition as a person before the law;
- right to privacy;
- freedom of thought, conscience, religion and belief;

- freedom of opinion, expression and information;
- freedom of assembly;
- freedom of association and to form and join trade unions;
- rights in respect of marriage and family;
- rights of children;
- right to participate in public life;
- right to equality before the law and equal protection of law; and
- rights of minorities.

Widely recognized Socio-Economic Rights

2.005 Some of the rights dealt with by the ICESCR are directed in particular to: peoples; trade unions; national federations or confederations established by trade unions; the family; expectant and new mothers; or children and young persons. Those *directed* socio-economic rights are directed as they are for special and legitimate reasons. But most human rights extend to everyone. On the basis of the ICESCR as it applies to everyone, socio-economic rights can be said to consist essentially of:

- right to work;
- right to just and favourable conditions of work;
- right to form and join trade unions;
- right to strike;
- right to social security, including social insurance;
- right to an adequate standard of living in terms including food, clothing and housing;
- right to continuous improvement of living conditions;
- freedom from hunger;
- right to the highest attainable standard of physical and mental health;
- right to education;
- right to take part in cultural life;
- right to benefit from scientific progress;
- authors' rights; and
- freedom of scientific research and creative activity.

Constitutions in general and the Basic Law

2.006 At this stage it is appropriate to say something about constitutions in general. Constitutions may be written, unwritten or partly both. By no means inevitably but at least typically nowadays, constitutions: (a) are written; (b) contain governing generalities directed to the structure of power and to guarantees of fundamental rights and freedoms; (c) are entrenched so as to be beyond repeal or derogation by the ordinary legislative process; and (d) are superior to all other laws so that those other laws are void if incompatible with it. "The fundamental institution in modern democracy is", as Chief Justice Muhammad Munir said in

Federation of Pakistan v Moulvi Tamizuddin Khan PLD 1955 Federal Court 240 at 254, "the constitution, whether this be written or unwritten".

2.007 Beyond that characteristic which is shared by all constitutions worthy of the name, constitutions around the world vary — sometimes slightly and sometimes to a very considerable extent. In *Lochner v New York* 198 US 45 (1905), Mr Justice Holmes, dissenting in a case which some see as the second all-time worst decision of the United States Supreme Court (the all-time worst being the infamous *Dred Scott v Sandford* case 60 US 393 (1857)) said (in a famous passage at 75–76) that a constitution is not intended to embody a particular economic theory. That is certainly so for the purpose of rejecting the importation of social Darwinism into freedom of contract. And it is certainly so in the sense that a constitution is, as Mr Justice Holmes also said in that passage, "made for people of fundamentally different views". Otherwise than for that purpose and in that sense, it is difficult to ascribe universal application to the proposition that a constitution is not intended to embody a particular economic theory.

2.008 The Preamble to the Basic Law declares that "the socialist system and policies shall not be practised in Hong Kong". Chapter V of the Basic Law is headed "Economy". Section 1 of that chapter is headed "Public Finance, Monetary Affairs, Trade, Industry and Commerce". That section consists of arts.105–119.

2.009 Article 105 will be dealt with later in the present book. The effect of arts.106–119 is to provide for, among other things: independent finances; a balanced budget; low taxes; an economic and legal environment appropriate for an international financial centre; monetary and financial policies that safeguard the free operation of financial business and financial markets; a currency backed by a 100% reserve fund; the absence of foreign exchange control; the free convertibility of the Hong Kong dollar; the free flow of capital within, into and out of Hong Kong; an exchange fund for regulating the exchange value of the Hong Kong dollar; free port status; a policy of free trade; the safeguarding of the free movement of goods, intangible assets and capital; an economic and legal environment appropriate for encouraging investments, technological progress and the development of new industries; and policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries — paying regard to environmental protection.

2.010 To take another example, the Kenyan Constitution, which its architects call a "transformative constitution", reconfigures the socio-economic landscape of the nation, strongly advancing socio-economic rights with a view to attaining the fairness in society than which there is no better safeguard against turmoil.

2.011 As for entrenchment, it is said that the British Constitution is unwritten and unentrenched. That can be said, but when saying it you may have to glance over your shoulder at the Acts of Union (carrying into effect the Treaty of Union 1706 between England and Scotland) and at Britain's domestication by the Human Rights Act 1998 of the European Convention on Human Rights.

2.012 The Basic Law is entrenched at two levels. Being a national law, it is beyond the power of a regional legislature like Hong Kong's Legislative Council to repeal, amend or abrogate. Moreover, as Professor Martin Flaherty puts it (in his article "Hong Kong Fifteen Years after the Handover: One Country, Which Direction?" (2013) 31 Columbia Journal of Transnational Law 275 at p.279) "[a]ny significant change would put China in violation of the Sino-British Joint Declaration, providing the Basic Law a measure of entrenchment".

ICCPR and the Hong Kong Bill of Rights

2.013 Prior to 8 June 1991 Hong Kong's constitutional instruments were the Letters Patent and the Royal Instructions. On that day they were joined by a third constitutional instrument, namely the Hong Kong Bill of Rights (Bill of Rights). That came about in the following way. On 8 June 1991 the Hong Kong Bill of Rights Ordinance (Cap.383) (Bill of Rights Ordinance), which had been enacted on the 6 June of that month, came into operation. The Bill of Rights Ordinance contained the Bill of Rights thus incorporating the same into the domestic law of Hong Kong. The Bill of Rights reproduces the ICCPR almost word-for-word. By the Bill of Rights Ordinance there was a blanket repeal of all pre-existing legislation inconsistent with the Bill of Rights. Simultaneously the Bill of Rights was entrenched against future repeal or derogation. Such entrenchment was effected by an amendment to the Letters Patent. Up to and until the handover, Hong Kong's legislature the Legislative Council owed its powers and indeed its existence to the Letters Patent. The amendment concerned prohibited any legislation restricting rights and freedoms enjoyed under the ICCPR as applied to Hong Kong. That means the Bill of Rights, which embodies the ICCPR's application to Hong Kong.

Entrenchment of the Bill of Rights by the Letters Patent and then by the Basic Law

2.014 Just as the Bill of Rights had been entrenched by the Letters Patent prior to the handover, so is the Bill of Rights now entrenched by the Basic Law. By the first paragraph of art.39 of the Basic Law, it is provided that "[t]he provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region".

2.015 The second paragraph of art.39 says: "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article". This paragraph was explained as follows by the Court of Final Appeal in *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 at [27]–[28]. Any restriction of a right or freedom conferred by the Bill of Rights, whether or not it is also enumerated in the Basic Law: (a) *must be* prescribed by law; and (b) *must not* contravene the Bill of Rights. As for any right or freedom

conferred *only* by the Basic Law, whether it can be restricted, and if so the test for judging whether a restriction is permissible, will depend on the nature and subject matter of the right or freedom concerned. That would turn on how the courts interpret the Basic Law.

2.016 Prior to the handover, the Hong Kong courts, then dealing with the entrenchment of the Bill of Rights by the Letters Patent, consistently spoke of the Bill of Rights as the embodiment of the ICCPR as applied to Hong Kong. The first post-handover statement to this effect is the one made by Mr Justice Bokhary PJ in *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 463I–J where, dealing with the entrenchment of the Bill of Rights by the Basic Law, he said that the Bill of Rights is "the embodiment of the ICCPR as applied to Hong Kong". That was a judgment concurring in the conclusion reached by Chief Justice Li in a judgment with which the other three members of the Court agreed. In *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, Sir Anthony Mason NPJ, in a judgment with which all four of the other members of the Court agreed, repeated (at 401G–H) the description of the Bill of Rights as "the embodiment of the ICCPR as applied to Hong Kong". And in *Tse Mui Chun v HKSAR* (2003) 6 HKCFAR 601 at [33]–[34], the joint judgment of Mr Justice Bokhary PJ and Lord Scott of Foscote NPJ, with which the other three members of the Court agreed, referred to the ICCPR and stated that "[i]t is well established that the Bill of Rights (contained in the Hong Kong Bill of Rights Ordinance (Cap.383)) is the embodiment of the Covenant's application to Hong Kong, so that art.39 entrenches the Bill of Rights".

2.017 So the courts of Hong Kong apply the provisions of the Bill of Rights and not the provisions of the ICCPR on which they are based.

2.018 Of course when considering the meaning and effect of a Bill of Rights provision, our courts will have regard to anything which the United Nations Human Rights Committee has said, in a Communication or General Comment, as to the meaning and effect of the ICCPR provision on which the Bill of Rights provision in question is based.

2.019 Shortly stated, the position in regard to civil and political rights under Hong Kong's constitutional arrangements comes essentially to this. The civil and political rights set out in the leading international instrument on such rights, namely the ICCPR, are set out almost word-for-word in our Bill of Rights which is entrenched by art.39 of the Basic Law. So they take their place alongside many other such rights enumerated elsewhere in the Basic Law.

Civil and Political Rights Enumerated in the Basic Law

2.020 The civil and political rights enumerated in the Basic Law are mainly but not exclusively contained in Chapter III of the Basic Law which is headed "Fundamental Rights and Duties of the Residents" and consists of arts.24 to 42. Only one of these articles deals with duties rather than rights. It is art.42 which provides quite simply that "Hong Kong residents and other persons in Hong Kong

shall have the obligation to abide by the laws in force in the Hong Kong Special Administrative Region".

2.021 Article 24 divides Hong Kong residents into permanent residents and non-permanent residents, defines each category and confers the right of abode in Hong Kong on permanent residents.

2.022 By art.26 "the right to vote and the right to stand for election in accordance with law" are conferred on permanent residents.

2.023 The rights and freedoms guaranteed by arts.25 and 27 to 38 extend to all residents. In outline, these rights and freedoms are: equality before the law (art.25); freedom of speech, the press, publication, association, assembly, procession and demonstration, the right and freedom to form and to join trade unions and to strike (art.27); inviolable freedom of the person (art.28); inviolability of homes and premises (art.29); freedom and privacy of communication (art.30); freedom of movement (art.31); freedom of conscience and religion (art.32); freedom of choice of occupation (art.33); freedom to engage in academic research, literary and artistic creation and other cultural activities (art.34); right to confidential legal advice, access to the courts, choice of lawyers and to judicial remedies (art.35); right to social welfare in accordance with law (art.36); freedom of marriage and the right to raise a family (art.37); and enjoyment of all the other rights and freedoms safeguarded by the laws of Hong Kong (art.38).

2.024 We have already seen what art.39 does.

2.025 Article 40 provides that "[t]he lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special administrative Region".

2.026 By art.41 it is provided that persons in Hong Kong other than residents shall, in accordance with law, enjoy the rights and freedoms of residents prescribed in Chapter III.

2.027 Some civil and political rights are dealt with in provisions of the Basic Law which occur in other chapters of the Basic Law. As to the right to trial by jury, art.86 provides that the principle of trial by jury previously practised in Hong Kong shall be maintained. More generally, art.87 provides that in criminal or civil proceedings, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained, and then goes on to guarantee the right to fair trial without delay and the presumption of innocence.

2.028 With socio-economic as well civil and political elements, art.105 guarantees protection of the right to acquire, use, dispose of and inherit property and to receive compensation for lawful deprivation of property, such compensation to correspond to the real value of the property concerned at the time, be freely convertible and be paid without undue delay.

2.029 Educational institutions shall have, art.136 provides, academic freedom.

Students, art.137 provides, shall enjoy freedom of choice of educational institutions and freedom to pursue their education outside Hong Kong. **2.030**

Article 145 of the Basic Law: Social Welfare

The Basic Law enumerates relatively little by way of socio-economic rights. But we have seen art.36. And art.145 provides that "[o]n the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs". **2.031**

As we have seen, art.39 of the Basic Law speaks of the ICCPR and the ICESCR in identical terms, saying of each alike that their provisions as applied to Hong Kong shall remain in force and shall be implemented by the laws of Hong Kong. That similarity having been noted, one must turn to note the differences identified below. **2.032**

Differences between the two Covenants

Unlike the provisions of the ICCPR as applied to Hong Kong (which have been incorporated into the domestic law of Hong Kong by the Bill of Rights as the embodiment of those provisions so applied), no provision of the ICESCR has as such been incorporated into the domestic law of Hong Kong. **2.033**

Moreover, there is as between the two Covenants a relevant difference of terminology. The ICCPR tends to speak of rights in terms of their belonging to, for example, "every human being", "everyone" or "all persons". And it tends to speak of negative things such as torture, slavery and arbitrary interference in terms of "no one" being subjected to any of them. But the ICESCR's tendency when dealing with rights is not to speak in outright terms of everyone having those rights but to say instead that the State Parties "recognize" that everyone has them. Even in isolation, those differences would seem to go beyond mere form and to involve substance. That substance is indeed involved becomes clear when account is taken of the fact that all the differences occur in articles subsequent to art.2(1) which says that each State Party "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". So the State Parties' obligation to accord socio-economic rights is subject to the availability of resources and may, generally speaking, be fulfilled progressively rather than necessarily at once. **2.034**

That is not insignificant, but care must be taken to avoid an exaggerated view of its significance. The United Nations Committee on Economic, Social and Cultural Rights has cautioned that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. **2.035**

robustly" (as Mr Justice Ribeiro PJ put it at [107]). But a different approach could and would be adopted if and when called for.

Preventive detention

14.051 Preventive detention is a suspect concept. Persons against whom it is resorted to must be surrounded by safeguards such as: freedom from arbitrariness; the requirement of grounds; legal procedures; the supply of reasons; judicial control of the detention; and compensation where appropriate.

14.052 Persons *lawfully* deprived of their liberty stand in particular need of certain rights. It is now time to turn to those particular rights.

CHAPTER 15

Rights of Persons Deprived of their Liberty

There is a choice as to the title that can appropriately be given this chapter. The title chosen is the heading of art.6 of the Bill of Rights, the body of which is taken word-for-word from art.10 of the ICCPR. For the sake of completeness, it should be mentioned that the heading of art.10 of the ICCPR is "Right of Detainees to be Treated with Humanity and Dignity". That right they certainly have. **15.001**

The two identical articles referred to in the preceding paragraph open with a paragraph (numbered 1) which deals with the rights of *all persons* deprived of their liberty. Paragraph 2(a) differentiates between *accused persons* and *convicted persons*. Next, *accused juvenile persons* in particular are catered for in para.2(b). The final paragraph, para.3, consists of two clauses. Of these two clauses, the first states what the *essential aim* of the penitentiary system should be. And the second caters for *juvenile offenders* in particular. **15.002**

Save where otherwise expressly stated, all of the references to paragraphs made below will be to the paragraphs of those two identical articles, art.10 of the ICCPR and art.6 of the Bill of Rights. **15.003**

With humanity and respect for human dignity

"All persons deprived of their liberty shall", para.1 provides, "be treated with humanity and with respect for the inherent dignity of the human person". **15.004**

If there could only be one human rights provision, it would probably have to be that everyone should be treated with humanity and respect for the inherent dignity of the human person. Why? There appear to be three interlocking reasons why. (1) The inherent dignity of the human person is the true source of human rights. (2) Treatment of everyone with humanity and with respect for human dignity runs through the whole of the content of human rights. (3) Seeing to it that everyone is so treated is what the enforcement of human rights is all about. **15.005**

That states in three sentences the source, content and enforcement of human rights — which is the subject matter of the present book. But in these matters, as always, things are easier said than done. Otherwise all books on human rights could be condensed to what is said in the preceding paragraph — or, indeed, dispensed with altogether. **15.006**

Having stated the obvious truth that everyone is entitled to be treated with humanity and with respect for human dignity, it should be stressed that this entitlement is particularly important to persons who have been lawfully deprived of their liberty. They are in the most disadvantaged position in which the law can justifiably place a person. **15.007**

15.008 It is true that some of them, namely the worst convicted criminals, have been placed in that position by the law precisely because they have been found proved after fair to have treated others without a shred of humanity or respect for human dignity. But making the punishment fit the crime does not mean that society should behave like its criminals let alone its worse criminals. "Revenge", as Francis Bacon wrote in his *Essays, Civil and Moral* in the third decade of the 17th century, "is a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out".

15.009 Moreover, it is not only persons convicted of, or even persons awaiting trial on, criminal charges who may find themselves detained in custody. Some people are detained because their mental condition renders them a danger to themselves or to others. And, to take another example, asylum seekers sometimes find themselves detained for a period. Where they are concerned, a thirst for revenge is not a problem, but compassion fatigue can be.

15.010 Hong Kong has had its compassion tested on a number of occasions. One was the massive influx of the persons who came to be known as the Vietnamese Boat People, a name which tells you from where they came and how they came. In Hong Kong they were housed in camps and converted industrial buildings. The story is told in the author's memoirs (Kemal Bokhary, *Recollections* (2013) (Sweet & Maxwell) at pp.479–480) of the Correctional Services Superintendent in charge of a converted industrial building in which these asylum seekers were housed, and which the author visited as a Visiting Justice of the Peace. This admirable Superintendent freely acknowledged that he had, in order to make things more congenial for the people housed there, relaxed many Correctional Services rules which strictly speaking were applicable to the facility. "After all", as he put it, "they are not prisoners. They are families". After hearing so much about — and before hearing more about — all the rules to be adhered to in order to achieve the aim of humanity, the reader may find it a welcome change to hear about an instance in which rules were departed from in order to achieve that aim.

15.011 We can now revert to rules which are in the interests of humanity to apply. The following points were made by the Human Rights Committee in paras.2–4 of its General Comment No 21 (44th session, 1992). The rights conferred by art.10(1) of the ICCPR applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals — particularly psychiatric hospitals — detention camps or correctional institutions or elsewhere. State parties should ensure that the principle stipulated in art.10(1) is observed in all institutions and establishments within their jurisdiction where persons are being held. Article 10(1) imposes on a State a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in art.7 of the ICCPR. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to art.7, including medical or scientific experimentation, but also neither may they be subjected to any hardship or constraint other than that resulting from the

deprivation of liberty. Respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the ICCPR, subject to the restrictions that are unavoidable in a closed environment. Treating all persons deprived of liberty with humanity and with the respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule cannot be dependent on the material resources available to the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The "Minimum Rules"

15.012 A set of rules of considerable relevance to the topic under discussion — and which pre-dates the opening of the ICCPR for signature, notification and accession — is the one known as the Standard Minimum Rules for the Treatment of Prisoners 1955 (the Minimum Rules). The Minimum Rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955. They open with a number of "preliminary observations". Of these, the first is that the Minimum Rules "are not intended to describe in detail a model system of penal institutions [and] seek only, on the basis of the general consensus of contemporary thought and the most essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions".

15.013 There is support in s.84 of the Report of the Third Committee on the Draft International Covenant on Human Rights, United Nations Document A/4045, 9 December 1955 for the statement in *Halsbury's Laws of Hong Kong* (2nd ed., 2015) Vol 16 at para.105.348 on the Minimum Rules. This is that while the Minimum Rules are not mentioned in art.10 of the ICCPR, the Minimum Rules are intended to be taken into account in art.10's application, with nothing in art.10 prejudicing the application of the Minimum Rules.

15.014 On 16 December 1966 the General Assembly of the United Nations opened the ICCPR for signature, notification and accession. And on 23 March 1976 the ICCPR entered into force pursuant to its forty-ninth article (which provided for its entry into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of notification or notification of accession). True it is that the Minimum Rules had been adopted in 1955 over a decade prior to the ICCPR's opening of for signature, notification and accession in 1966. The Minimum Rules were, however, approved by the United Nations Economic and Social Council by two resolutions, the second of which is dated 13 May 1977 and is therefore post the ICCPR's entry into force in 1976.

15.015 Most importantly, there is what the Human Rights Committee said in regard to the Minimum Rules when it dealt with the communication in *Mukong v Cameroon*, Communication No 458 of 1994. The Human Rights Committee said as follows

at para.9.3. While the Minimum Rules are not referred to in art.10 of the ICCPR, they are intended to be taken into account in the application of art.10, with nothing in art.10 prejudicing the application of the Minimum Rules. The Minimum Rules, the Human Rights Committee said, set certain minimum standards regarding the conditions of detention which must be observed regardless of the State party's level of development. These minimum standards include, the Human Rights Committee said, requirements as to: minimum floor space and cubic content of air for each prisoner; adequate sanitary facilities; clothing which may not be in any manner degrading or humiliating; provision of a separate bed; and provision of food of nutritional value adequate for health and strength. And, the Human Rights Committee stressed, these are minimum requirements which must always be observed, even if budgetary considerations may make compliance with these obligations difficult.

15.016 When the Hong Kong case of *Chieng A Lac v Director of Immigation* [1997] HKLRD 271 was in the High Court prior to going to the Court of Appeal, Mr Justice Keith said (at 295D–E) that the Minimum Rules had to be interpreted and applied with an eye on practical resource constraints, rightly not treating them as liable to be to driven out of consideration by such constraints. (The author seeks the reader's indulgence to pause here in order to mention his high regard for Mr Justice Keith generally and particularly because Mr Justice Keith had held in favour of the adopted children when The Adopted Children Case was at first instance prior to going to the Court of Appeal, where the decision went unanimously against the adopted children, and ultimately to the Court of Final Appeal, where the decision went by a majority of 5:1 against the adopted children.)

Instances of ill-treatment of prisoners

15.017 It is probably already sufficiently clear why a provision like art.10(1) of the ICCPR is vitally needed. If not, then this vital need can be made amply clear by referring to the ill-treatment of prisoners which, in a series of communications, the Human Rights Committee saw and held to be in violation of art.10(1). This series consists of: *Caldas v Uruguay*, Communication No 43 of 1979 and *Espinoza de Polay v Peru*, Communication No 577 of 1994 (being held incommunicado); *Solorzano v Venezuela*, Communication No 156 of 1983 and *Walter v Jamaica*, Communication No 639 of 1995 (being beaten by prison warders); *Jijon v Ecuador*, Communication No 277 of 1988 (being shackled and blind-folded); *Mpandanjila v Zaire*, Communication No 138 of 1983 and *Lewis v Jamaica*, Communication No 527 of 1993 (being refused medical attention); *Francis v Jamaica*, Communication No 606 of 1994 (being subjected to ridicule); *Nieto v Uruguay*, Communication No 92 of 1981 (being denied reading facilities and not being permitted to listen to the radio); *Cabreira v Uruguay*, Communication No 105 of 1981 (being confined to one's cell for an inordinately long period each day); *Wolf v Panama*, Communication No 289 of 1988 (being confined in a special cell with a mentally disturbed prisoner); *Lluberas v Uruguay*, Communication No 123 of 1982 (subjected to the electric lights in one's cell being kept on

continuously; *Massiotti v Uruguay*, Communication No 25 of 1978; and *Perkins v Jamaica*, Communication No 733 of 1997 (being kept in an overcrowded and unhygienic cell).

A lawful restriction

15.018 The Hong Kong case of *Chim Shing Chung v Commissioner of Correctional Services* (1996) 6 HKPLR 313 concerned a restriction on the right of prisoners to receive material from outside prison, which restriction took the form of the withholding from prisoners of newspaper racing supplements containing the most up-to-date information on horse racing. This restriction was imposed to deal with the problem of illegal gambling in prison. The Court of Appeal held that the restriction was lawful as a rational and proportionate response to the problem.

An unlawful prohibition

15.019 Another Hong Kong case on prisoners' rights is *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166. The case consisted of a constitutional challenge to legislation by which prisoners were prevented from voting at Legislative Council elections or registering as an elector at such elections. This prohibition was general, automatic and indiscriminate. It took no account of the nature of the offence, its gravity, the type of sentence being served, its length, the culpability of the prisoner or her or his individual circumstances. The High Court declared the prohibition unconstitutional as incompatible with arts.26 and 39 of the Basic Law and art.21 of the Bill of Rights (which confers voting rights on permanent residents in the way in which art.25 of the ICCPR confers such rights on citizens).

Accused persons

15.020 As we have seen, art.10(2)(a) of the ICCPR and art.6(2)(a) of the Bill of Rights identically provide that "[a]ccused persons shall, *save in exceptional circumstances*, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons". (Emphasis supplied.) That can be said with some justification to be relatively straightforward.

Juveniles

15.021 We have also seen that art.10(2)(b) of the ICCPR and art.6(2)(b) of the Bill of Rights identically provide that "[a]ccused juvenile person shall be separated from adults and brought as speedily as possible for adjudication". And we have also seen that the second sentence of art.10(3) of the ICCPR and the second sentence of art.6(3) of the Bill of Rights identically provide that "[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status". It will be noticed that none of that is made subject to "exceptional circumstances" or anything else at all. Nevertheless the Bill of Rights Ordinance, had, whether effectively or not, said in s.10 that "[w]here 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". While the Bill of Rights itself has survived the handover as the embodiment of the ICCPR's application to Hong Kong entrenched by art.39 of the Basic Law, the Hong Kong Bill of Rights Ordinance has gone.

Reformation and social rehabilitation

15.022 The "reformation and social rehabilitation" of prisoners, we have seen it identically provided in the first sentence of art.10(3) of the ICCPR and the first sentence of art.6(3) of the Bill of Rights, shall be the "essential aim" of their treatment in the penitentiary system. As the Human Rights Committee said in para.10 of its General Comment No 21 (44th session, 1992), "[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner".

15.023 There can be no doubt that reformation should indeed be the essential objective of a prison sentence. It cannot, however, be its only objective. "If it were", as Oliver Wendell Holmes Jr pointed out in Lecture II of *The Common Law* (1881) (Little, Brown), "every prisoner should be released as soon as it appears clear that he will never repeat his offence, and if he is incurable he should not be punished at all". At the end of the day, the author feels that he should be as frank in this present book of his as he was in the one immediately preceding it, *Crocodile at Law* (2014) (Sweet & Maxwell), where he said (at p.19): "Let it be faced. We often send people to prison simply because we have not (yet) found a better way of protecting society".

15.024 Following on from this chapter, lets us turn in the next chapter to freedom from slavery, servitude and forced or compulsory labour.

CHAPTER 16

Freedom from Slavery, Servitude and Forced or Compulsory Labour

16.001 There may be room for doubting that the expression "The air of England is too pure for a slave to breathe" was indeed originated by Lord Mansfield. But there is no doubt that he did, when delivering the judgment of the Court of King's Bench in *Somersett's Case* (1772) 20 State Trials 1, condemn slavery as "odious". And he matched deed to words in that most famous of *habeas corpus* cases by ordering the discharge from detention of James Somersett who, having escaped and been re-captured, was being kept in chains on board a ship anchored in the Thames and due to sail for Jamaica where he was to be sold in the slave market. As Mr Justice McLean, dissenting in the notorious *Dred Scott v Sandford* case 60 US 393 (1856), said (at 535), "the words of Lord Mansfield [in *Sommerstt's Case*] were such as were fit to be used by a great judge, in a most important case".

16.002 While slavery did not exist in England herself, it was not, however, until 1 August 1834 that slavery was, by the Emancipation Act 1834, abolished "throughout the British Colonies, Plantations and Possessions Abroad".

16.003 One may not see human beings in chains being bought and sold in open slave markets today, but there are still forms of slavery going on in the world — perhaps closer to home than some may think.

16.004 Slavery in Lord Mansfield's time is described in Norman S Poser, *Lord Mansfield: Justice in the Age of Reason* (2013) (McGill-Queen's University Press) at p.286. There, citing Seymour Drescher, *Abolition: A History of Slavery and Antislavery* (2009) (Cambridge University Press) at p.58, this is said: "The slave trade was a complex commercial enterprise, requiring the participation of African sellers of slaves, merchants, financiers, transatlantic carriers, plantation owners, and consumers of the product of slave labour, as well as support and subsidy by the British government".

16.005 That state of affairs goes towards explaining Lord Mansfield's reference to "inconveniences" in the final sentence of his judgment in *Sommersett's Case* at 82. Having said that slavery "is so odious that nothing can support it, but positive law", he concluded that judgment thus: "Whatever inconveniences, therefore, may follow from this decision, I cannot say this case is allowed by the law of England; and therefore the black must be discharged".

16.006 As to the attitude and the actions or inaction of governments nowadays, let us be content to say that some governments would seem to do very far less against present-day slavery than one would hope and may expect. The *active* exploiters of slave labour in days of old have been replaced by a new breed no less evil than their predecessors. They are unlikely to be among the persons who would read books like this one. But the readership of this book and ones like it will include

the conscious or unconscious *passive* exploiters of slave labour, namely the consumers of goods that are cheaper to buy because they have been produced wholly or in part by slave labour. Slavery is no longer, as it seems to have been in some quarters at certain times in the past, coated with a veneer of respectability. But some things have not changed — yet.

16.007 Perhaps the key to the solution, or at least an important step on the way to it, is education. It would be education at two levels. One would be formal education at institutions of learning: to reduce the number of persons so vulnerable to exploitation at the hands of modern-day slave masters. The other would be informal education in the implications of how we live our daily lives: to reduce the number of persons unaware of how they may be unconsciously fuelling such exploitation and of how they can help to at least reduce, if not eradicate, it.

Gross and obvious violations of freedom of the person

16.008 Forced or compulsory labour is a gross and obvious violation of the human right to personal liberty. Servitude is a more gross and obvious violation of that human right. And slavery is an even more gross and obvious one. Nevertheless it is common for a human rights instrument to contain not only a provision for freedom of the person but also to contain a separate provision for freedom from slavery, servitude and forced or compulsory labour.

ICCPR and Bill of Rights

16.009 Article 8(1) of the ICCPR provides for freedom from slavery. It says: "No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited".

16.010 Exactly the same thing as that is said in art.4(1) of the Bill of Rights.

16.011 In providing for freedom from servitude, art.8(2) of the ICCPR says: "No one shall be held in servitude".

16.012 Article 4(2) of the Bill of Rights says exactly the same thing as that.

16.013 Freedom from forced or compulsory labour is dealt with in art.8(3) of the ICCPR and art.4(3) of the Bill of Rights. Subparagraph (a) of each says: "No one shall be required to perform forced or compulsory labour".

16.014 Subparagraph (b) of art.8(3) of the ICCPR deals with the position in countries in which imprisonment with hard labour may be imposed as punishment for a crime. It says that para.(3)(a) shall not be held to preclude, in such countries, "the performance of hard labour in pursuance of a sentence to such punishment by a competent court".

16.015 No such provision is contained in the Bill of Rights since there is no such thing as imprisonment with hard labour in Hong Kong now, and there was no such thing in Hong Kong at the time when the Bill of Rights came into force.

16.016 Subparagraph (c) of art.8(3) of the ICCPR says that for the purposes of art.8(3) thereof the term "forced or compulsory labour" shall not include: "(a) Any work or service, not referred to in sub-paragraph (b), 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; (b) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (c) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (d) Any work or service which forms part of normal civil obligations".

16.017 Article 4(3)(b) of the Bill of Rights is the equivalent of art.8(3)(c) of the ICCPR. There are two differences between them. Neither difference really matters. Article 4(3)(b) of the Bill of Rights omits the phrase "not referred to in sub-paragraph (b)" to be found in art.8(3)(c)(i) of the ICCPR. This is because that phrase operates as a reference to imprisonment with hard labour. And that is a type of imprisonment which does not exist, and has not at any material time existed, in Hong Kong. Article 4(3)(b) of the Bill of Rights also omits words "in countries" to be found in art.8(3)(c)(ii) of the ICCPR. This is because the Bill of Rights does not deal with countries. Apart from those two omissions, art.4(3)(b) of the Bill of Rights says exactly the same thing as art.8(3)(c) of the ICCPR says.

What "forced or compulsory labour" does not include

16.018 It will have been observed that much, quantitatively anyway, of what art.8 of the ICCPR and its almost identical twin, art.4 of the Bill of Rights, are devoted to saying what is *not* forced or compulsory labour within their purview.

Supplementary Slavery Convention 1956

16.019 An exercise going in the opposite direction is to be seen being performed by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery signed at Geneva in 1956 (the Supplementary Slavery Convention 1956). Article 1 of the Supplementary Slavery Convention 1956 sets out a number of institutions and practices similar to slavery which the State Parties to that Convention agree completely to abolish or abandon where they still exist, whether or not they are covered by the definition of "slavery" contained in art.1 of the Slavery Convention signed at Geneva in 1926 (the Slavery Convention 1926). There are two definitions to look at before looking at those institutions and practices.

16.020 By art.7(a) thereof, the Supplementary Slavery Convention 1956 provides that for its purposes "'Slavery' means, as defined by the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". And by art.7(c), the Supplementary Slavery Convention provides that for its purposes "'Slave trade' means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view

to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and in general, every act of trade or transport in slaves by whatever means of conveyance".

16.021 We can now look at the institutions and practices similar to slavery completely to be abolished or abandoned pursuant to art.1 of the Supplementary Slavery Convention 1956.

16.022 Debt bondage is the first of these institutions and practices. Serfdom is the second.

16.023 The third category of these institutions and practices consists of any whereby: (a) a woman without the right to refuse, is promised or given in marriage in payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; (b) the husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or (c) a woman on the death of her husband is liable to be inherited by another person.

16.024 And the fourth and final category of these institutions and practices is any whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Hardly any cases

16.025 Hardly any cases have been cited in this chapter because there are hardly any cases to cite on its subject matter. This is a fact to which attention is drawn in Sarah Joseph and Mellisa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed., 2013) (Oxford University Press). In that book arts.8 (personal liberty and security), 11 (prohibition of detention for debt) and 16 (recognition of legal personality) of the ICCPR are dealt with as "miscellaneous" rights in the same chapter, the tenth one. And that is explained in the opening paragraph of that chapter (para.10.01 at p.328) on the basis that "[t]hough the rights are not similar in nature, articles 8, 11 and 16 are grouped together in this chapter due to a virtual absence of jurisprudence on these articles".

16.026 The paucity of cases on these fundamental rights and freedoms do not mean that they are unimportant. They are vitally important.

An organized crime against humanity

16.027 Sometimes slavery, servitude and forced labour occur in isolated instances, but the slave trade is an *organized* crime against humanity. How organized crime is to be dealt with is a large subject in itself.

Eradicating the conditions in which people can be exploited

16.028 Slavery, servitude and forced labour all depend on exploitation. Such exploitation depends on people being highly vulnerable. One way, perhaps the surest way, to free the world from the scourge of slavery, servitude and forced labour is to eradicate the conditions in which people are so vulnerable to the exploitation on which those terrible things depend. And that calls for according them their socio-economic rights. Freedom from slavery, servitude and forced labour present an example, perhaps the prime example, of a civil and political right which is best secured by delivering socio-economic rights.

16.029 None of this is to suggest that the effective delivery of socio-economic rights is easy. In regard to cheap products without awkward questions asked, there is a reality to be recognized (being the one referred to in Peter Stein, "Adam Smith's Jurisprudence" *Jubilee Lectures Celebrating the Foundation of the Faculty of Law, University of Birmingham* (1981) (Wildy & Sons) 136 at p.152). It is that, as Adam Smith is said to have understood, "the law of a society sits, a little uneasily perhaps, between its morality and its economics".

16.030 We will in due course look at socio-economic rights. But there are more civil political rights to discuss first.

CHAPTER 17

No imprisonment for Inability to Pay

ICCPR and the Bill of Rights

"No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation". That is what art.11 of the ICCPR says. Article 7 of the Bill of Rights says exactly the same thing. **17.001**

Thirteenth Amendment

Another bulwark against imprisonment for inability to fulfil a contractual obligation is the "involuntary servitude" clause of the Thirteenth Amendment to the United States Constitution. The Thirteenth Amendment, most famous for its abolition of slavery, says this (in s.1): "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof a party shall have been convicted, shall exist within the United States, or any place subject to their jurisdiction". **17.002**

Debtors' prisons a thing of the past

Perhaps the *squalor carceris*, as a procedure for imprisoning a defaulting debtor to compel payment did not involve deliberately harsh conditions, but the mere fact of confinement was bad enough in itself. Duly interpreted and enforced, provisions like those cited above put an end to — and prevent the reintroduction of — institutions such as debtors' prison: the inside of which Charles Dickens's characters Mr Pickwick and Mr Micawber saw in fiction, and Dickens's father saw in real life. **17.003**

Actually Mr Pickwick was not unable to pay but refused to pay on principle. **17.004**

Inability and wilful disobedience contrasted

Inability to pay is one thing. Wilful disobedience to pay pursuant to a court order despite ability to do so is another matter. **17.005**

In Hong Kong as elsewhere, such disobedience may result in committal for contempt of court. **17.006**

Self-induced inability

While a principled refusal like Mr Pickwick's may attract understandable sympathy, a refusal to make court-ordered child support payments is not. And even where inability is put forward as the reason for not making such payments, the courts may properly look to see if such inability is in effect self-induced so as not to attract constitutional protection. **17.007**

17.008 In *Moss v Superior Court (Ortiz)* 17 Cal 4th 396 (1998), the Supreme Court of California held, as it was put in the second sentence of the majority's judgment, that "there is no constitutional impediment to imposition of contempt sanctions on a parent for violation of a judicial child support order where the parent's inability to comply with the order is the result of the parent's wilful failure to seek and accept employment that is commensurate with his or her ability and skills". The court departed from its previous decision in *Ex parte Todd* 119 Cal 57 (1899) in so far as it might be read to apply to child support orders.

17.009 As to the Thirteenth Amendment, it was said that the United States Supreme Court "has never held that employment undertaken to comply with a judicially imposed requirement that a party seek and accept employment necessary to meet a parent's fundamental obligation to support a child is involuntary servitude".

17.010 In regard to all of the foregoing, the court was unanimous. The reason for the dissent was this. Notwithstanding its view of the law, the majority declined to reverse the decision of the intermediate appellate court which had annulled the first instance court's judgment of contempt. The reasons for so declining were as follows. In the light of the past understanding of *Ex parte Todd*, the holding that a wilfully unemployed non-supporting parent is subject to contempt for failure to comply with a child support order "might be deemed an unanticipated change in the law". And the mother had not shown that the non-supporting father had the "actual" financial ability to comply with the order. The dissenting judge would have reversed the intermediate appellate court's decision and reinstated the first instance court's judgment of contempt.

Imprisonment for non-payment of a fine

17.011 Freedom from excessive fines has a long history. It can be traced back to Magna Carta in 13th-century England. Ratified in the 18th century, the Eighth Amendment to the United States Constitution includes a prohibition of excessive fines.

17.012 The payment of a fine is of course not a contractual obligation. Nevertheless, imprisonment for non-payment of a fine is worth a mention in the present context. In Hong Kong — and there is no reason to think that the position in Hong Kong is anomalous in this regard — care is taken not to impose a fine that is beyond the defendant's ability to pay. As it is succinctly put in *Archbold Hong Kong 2015* (Sweet & Maxwell) at p.508 para.5–334, "[t]he quantum of a fine should be tailored according to the resources of the defendant". Moreover, a Hong Kong court which imposes a fine is empowered by s.113A(2) of the Criminal Procedure Ordinance (Cap.221) to allow time for payment and to direct payment by instalment.

17.013 This is a convenient stage at which to turn to the right to recognition as a person before the law.

CHAPTER 18

Right to Recognition as a Person before the Law

18.001 The right to recognition as a person before the law is sometimes called the right to recognition of legal personality. In practical terms, it is the right to enjoy legal rights. As a human right and therefore inherent in the human person, it would have existed before human-made laws came into existence. One might think of it as having lain dormant in the human person and awakening when human beings first made laws.

18.002 Article 6 of the Universal Declaration of Human Rights says: "Everyone has the right to recognition everywhere as a person before the law". In almost identical words — and to identical effect — art.16 of the ICCPR says: "Everyone shall have the right to recognition everywhere as a person before the law". Article 13 of the Bill of Rights is taken word-for-word from that.

18.003 The right to recognition as a person is of course particularly important to persons in vulnerable circumstances.

18.004 One such group of persons would be migrant workers. The International Covenant on the Protection of the Rights of All Migrant Workers and Their Families is a United Nations treaty which was signed on 18 December and entered into force on 1 July 2003. Article 24 of this covenant provides that "[e]very migrant worker and every member of his or her family shall have the right to recognition as a person before the law". Whatever the attitude of the host population to them, the presence of migrant workers is at any rate welcomed by the host government. Otherwise they would not have been let in to begin with.

18.005 For a number of obvious reasons, refugees form an even more vulnerable group than migrant workers. One such reason is that their presence is usually far from desired by the host population and the host government alike. In its Conclusion No 22 (XXXII)-1981 on Protection of Asylum Seekers in Situations of Large-Scale Influx, the Executive Committee of the United Nations High Commissioner for Refugees, make a number of points on the treatment of asylum seekers who have been temporarily admitted to a country pending arrangements for a durable solution. One of these points is that "they are to be considered as persons before the law, enjoying free access to courts and other competent administrative authorities".

18.006 For two reasons, special notice is to be taken of that point. The first reason is that it asserts the right to recognition as a person before the law on behalf of the group most in need such a right. And the second reason is that it underlines the utility of the right by making express reference to access to the courts, which will administer the law, and to competent administrative authorities, which will exercise administrative powers in accordance with law.

18.007 Lets us now turn to freedom from torture. This freedom is one which the Basic Law deals with in the same article (art.28) as it deals with freedom of the person, which freedom has already been discussed. Torture is prominent among the things from which asylum seekers flee.

CHAPTER 19

Freedom from Torture

19.001 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This single sentence constitutes art.5 of the Universal Declaration of Human Rights. Article 7 of the ICCPR consists of the repetition of that sentence plus a second sentence which reads: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation". Article 3 of the Bill of Rights is taken word-for-word from art.7 of the ICCPR. By arts.28 and 41 of the Basic Law, it is provided that torture of anyone in Hong Kong "shall be prohibited".

19.002 It is impossible to suggest that you can subject people to cruel, inhuman or degrading treatment or punishment and still deny that you have tortured them. Such treatment or punishment is torture. Freedom from torture is a human right within the irreducible core of human rights. It is therefore to be regarded as an absolute freedom from which there can be no derogation even in an emergency. So ought we to regard freedom from non-consensual medical or scientific experimentation. History reveals that medical or scientific experimentation on people without their consent is an activity indulged in by, and typical of, regimes which institutionalized torture.

19.003 The position under art.7 of the ICCPR is deal with extensively by the Human Rights Committee in its General Comment No 20 (44th session, 1992) which consists of 15 paragraphs. This General Comment is obviously to be treated as authoritative on art.3 of the Bill of Rights as well.

19.004 It is convenient to deal with the contents of this General Comment under 15 subheadings, each subheading numbered to correspond to the paragraph of the General Comment to which it relates. In so dealing with those contents, the author will both quote from them and make such observations in connection with them as it is hoped will be helpful to the reader.

(1) Replacing, reflecting and further developing

19.005 This General Comment, it is stated, replaces General Comment No 7 (16th session, 1982) "reflecting and further developing it".

(2.1) Protection of dignity and physical and mental integrity

19.006 Article 7's aim, it is stated, is "to protect both the dignity and the physical and mental integrity of the individual".

(2.2) Duty of States to afford protection

19.007 Naturally the State is not merely required to refrain from the acts prohibited by art.7. It is stated in terms that the State is under a duty "to afford everyone

protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity".

19.008 For people to be secure in their rights and freedoms, it is necessary that the State is not merely prohibited from abusing those rights and freedoms but is also required to act as necessary to safeguard them against them against abuse. Thus the State's obligation has, as it must have, both that negative dimension and that positive dimension.

(2.3) Complemented by article 10(1)

19.009 The prohibition in art.7 is, it is stated, "complemented by the positive requirements" of art.10(1) of the ICCPR. Those requirements, which are repeated word-for-word in art.6(1) of the Bill of Rights, are that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". This statement by the Human Rights Committee underlines the always consistent and often interlocking nature of the fundamental rights and freedoms guaranteed by the ICCPR (and consequently of those guaranteed by the Bill of Rights).

19.010 It is a reflection of a wider point which is this. Both in principle and for practical reasons, the network of fundamental rights and freedoms collectively called human rights is to be approached in a holistic way.

(3) No limitation, no derogation and no excuses

19.011 Article 7, it is stated, "allows of no limitation". "Even in situations of public emergency such as those referred to in [art.4 of the ICCPR]", it is stated, "no derogation from the provisions of article is allowed and its provisions must remain in force". "[N]o justification or extenuating circumstances", it is stated, "may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority".

19.012 Article 4(1) of the ICCPR provides that "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion or social origin".

19.013 But the article immediately goes on to say in its second paragraph that "[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision". So there can be no derogation even in an emergency from: the right to life (art.6); freedom from torture (art.7); freedom from slavery and servitude (art.8(1) and (2)); no imprisonment for inability to pay (art.11); prohibition of retroactive criminal laws (art.15); right to recognition as a person

before the law (art.16); and freedom of thought, conscience, religion and belief (art.18).

19.014 Finally, art.4(3) thus requires: "Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant through the intermediary of the Secretary General of the United Nations, of the provisions from which it has derogated and the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation". This is a considerable safeguard. It prevents unknown or undefined derogation.

19.015 There is no article in the Bill of Rights corresponding to art.4 of the ICCPR. But sub-ss.(1) and (2) of s.5 of the Bill of Rights Ordinance, contained provisions corresponding to those of paragraphs (1) and (2) respectively of art.4 of the ICCPR.

(4)(1) Contains no definitions of the concepts covered

19.016 The ICCPR does not, the Human Rights Committee points out, "contain any definitions of the concepts covered by" art.7 of the Covenant. Nor does the Bill of Rights contain any definition of the concepts covered by art.3 of the Bill.

(4)(2) Nature, purpose and severity of the treatment applied

19.017 The Human Rights Committee states that it does not "consider it necessary to draw up a list of the prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment". The distinctions, it is stated, "depend on the nature, purpose and severity of the treatment applied". This must be a reference which is not directed to torture but only to cruel, inhuman or degrading treatment or punishment.

(5)(1) Not only physical pain but also mental suffering

19.018 It is stated that the prohibition in art.7 relates not only to acts that cause physical pain but also to acts that cause "mental suffering" to the victim.

(5)(2) Extends to corporal punishment

19.019 "[M]oreover", it is stated as the Human Rights Committee's view, "the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure"

(5)(3) Protects, in particular, children, pupils and patients

19.020 "It is appropriate to emphasize in this regard", the Human Rights Committee stated, "that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions".

(6)(1) Prolonged solitary confinement

19.021 The Human Rights Committee noted that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7".

(6)(2) Desirability of abolition of the death penalty

19.022 Then the Human Rights Committee reiterated its statement in an earlier General Comment that art.6 of the ICCPR "refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable".

(6)(3) Must be strictly limited

19.023 Having reiterated that, the Human Rights Committee stressed two requirements "when the death penalty is applied by a State party for the most serious crimes". Of these requirements, the first is that it must be "strictly limited in accordance with article 6".

(6)(4) The least possible physical and mental suffering

19.024 The second requirement is that the death penalty, if it is to be carried out, "must be carried out in such a way as to cause the least possible physical and mental suffering".

(7)(1) No non-consensual medical or scientific experimentation

19.025 Reference is made to the prohibition by art.7 of medical or scientific experimentation without the free consent of the person concerned.

(7)(2) States should give more attention to ensuring observance

19.026 Noting that "the reports of States parties generally contain little information on this point", the Human Rights Committee stated that "[m]ore attention should be given to the need and means to ensure observance of this provision".

(7)(3) Persons not capable of giving valid consent

19.027 It was observed that "special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment". "Such persons", it was stated, "should not be subjected to any medical or scientific experimentation that may be detrimental to their health".

(8) Informing the Human Rights Committee of measures taken

19.028 As to what is required of States parties for the implementation of art.7, it was noted that it was not sufficient for them to prohibit or criminalize acts of torture and cruel, inhuman or degrading treatment or punishment. They should, it was stated, inform the Human Rights Committee of the legislative, administrative,

judicial and other measures which they take to prevent and punish such acts in any territory under their jurisdiction.

19.029 In referring to territory under the States parties' jurisdiction rather than to territory within their sovereignty, the Human Rights spoke consistently with the judgment which the Court of King's Bench had given in *The King v Cowle* (1759) 2 Burr 834 and with the judgment which the United States Supreme Court was to give in *Rasul v Bush* 524 US 466 (2004). It will be remembered that it was held in *The King v Cowle* that *habeas corpus* at the hands of the English courts was not confined to territory that was part of the realm and extended to territory that was a dominion of the Crown. And it will be remembered that in *Rasul v Bush* the United States Supreme Court held that *habeas corpus* at the hands of the United States courts extended to territory under the control, even though outside the sovereignty, of the United States.

(9) Not to expose to danger of torture etc by extradition etc

19.030 It is stated, in effect, that States parties: (a) must not expose individuals to the danger of acts of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement; and (b) should indicate in their reports what measures they have adopted to that end.

19.031 Provision of that nature is made in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Torture Convention), art.3(1) of which says that "[n]o State party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". The Torture Convention was considered in the two Court of Final Appeal cases which will be discussed later in the present chapter, namely *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187 and *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743.

19.032 In its General Comment No 1 (16th session, 1997) the United Nations Committee on Torture said that the expression "another State" in art.3(1) of the Torture Convention includes any State to which the person concerned may *subsequently* be expelled, returned or extradited.

(10)(1) Informing the Committee on dissemination of information

19.033 It is said that States parties should inform the Human Rights Committee of how they "disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7".

(10)(2) Instructions and training

19.034 "Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of

arrest, detention or imprisonment must", it is stated, "receive appropriate instruction and training".

(10)(3) Informing the Committee of instructions and training etc

19.035 "States parties should", it is stated, "inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons".

(11)(1) Detailed information on particularly vulnerable persons

19.036 In addition to describing steps to provide the *general* protection against acts prohibited by art.7 to which *anyone* is entitled the State party should, it is stated, provide detailed information on safeguards for the *special* protection of *particularly vulnerable persons*.

(11)(2) Systematic review

19.037 It is stated that it should be noted that keeping under *systematic review* interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an *effective* means of *preventing* cases of *torture and ill-treatment*.

(11)(3) Officially recognized places of detention

19.038 To guarantee the effective protection of detained persons, provision should, it is stated, be made for detainees to be held in *places officially recognized as places of detention* and for *their* names and places of detention, as well as the names of the *persons responsible* for their detention to be kept in *registers* readily available and accessible to those concerned, including relatives and friends.

(11)(4) Time and place and names of all persons present

19.039 To the same effect, it is stated, the *time* and *place* of all interrogations should be recorded, together with the names of *all those present* and this information should also be available for the purpose of judicial or administrative proceedings.

(11)(5) No incommunicado detention

19.040 Provision should also be made, it is stated, against *incommunicado* detention.

(11)(6) No equipment liable to be used for torturing

19.041 In that connection, States parties should, it is stated, ensure that any places of detention should be *free from* any *equipment liable to be used for inflicting torture or ill-treatment*.

(11)(7) Doctors, lawyers and family members

19.042 The protection of detainees also requires, it is stated, that prompt and regular access be given to *doctors and lawyers* and, under appropriate supervision when the investigation so requires, to *family members*.

(12) Inadmissibility of confessions obtained by torture etc

19.043 It is stated that "[i]t is important for the discouragement of violations under article 7 that the law must *prohibit* the use of admissibility in judicial proceedings of *statements* or *confessions* obtained through *torture* or *other prohibited treatment*." Certainly for that reason, and of course also in order to avoid the inherent unreliability of any admission that has not been proved beyond reasonable doubt to be free and voluntary and unaffected by oppression.

(13)(1) Indicating the laws which punish violations of art.7

19.044 States parties should, it is stated, indicate when presenting their reports the provisions of their criminal law which *penalize* torture and cruel, inhuman and degrading treatment or punishment, specifying the *penalties* applicable to such acts, whether committed by *public officials* or *other persons acting on behalf of the State*, or by *private persons*.

(13)(2) Those who violate art.7 must be held responsible

19.045 It is stated that those who violate art.7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.

(13)(3) Protection of those who refuse to obey orders to violate it

19.046 And, it is stated, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

(14)(1) To be read in conjunction with art.2(3)

19.047 Article 7, it is stated, should be read in conjunction with art.2(3).

19.048 By art.2(3) of the ICCPR, each State Party to the Convention undertakes to ensure three things. Of these three things, the first thing undertaken to be ensured is "that any person whose rights or freedoms as [in the ICCPR] recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". The second thing undertaken to be ensured is "that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy". And the third thing to be ensured is "that the competent authorities shall enforce such remedies when granted".