the exclusionary rule. And in terms of the substantive law, the police officer may be charged with assault and may also face an action for damages under the Law of Tort. Likewise, where a police officer effects an arrest in terms of the provisions of Hong Kong law, that infringement on the arrestee's right to freedom and bodily integrity is completely permissible and legally justified and the police officer effecting the arrest may rely on the substantive law of self-defence where the arrestee refuses to succumb and resists the arrest by, for example, attacking the police officer. It is clear from this second scenario therefore, that the substantive law on self-defence can also empower a police officer in performing his or her duties in the context of the Law of Criminal Procedure.

¶1-300 The Sources of the Hong Kong Law of Criminal Procedure

The Basic Law of the Hong Kong Special Administrative Region (the *Basic Law*) came into effect on 1 July 1997, and can be regarded as the primary source of law in Hong Kong. The provisions of the Hong Kong Basic Law does not only have *vertical* operation in the sense that it regulates the relationship between the government structures and the residents of Hong Kong, but it also has *horizontal* operation in the sense that it binds natural and juristic persons in upholding the law. More specifically with regard to the intersect between the Hong Kong Basic Law and the Law of Criminal Procedure, is that the relevant provisions of the Hong Kong Basic Law provide assurances to residents of the Hong Kong Special Administrative Region. Provision is made, for example, for the limitation of government powers,[24] and the prohibition of the infringement on Hong Kong residents' basic rights.[25] Yet, and as will become evident in the subsequent chapters of this book, the basic rights relevant to the Law of Criminal Procedure are not absolute and may under certain circumstances be curtailed or limited. For example, article 35 of the Hong Kong Basic Law provides for all Hong Kong residents to have the right, *inter alia*, to a "choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts".[26] Yet, from the discussion in Chapter Seven of this book it will become evident that the right to legal assistance is not an absolute right, but

24 Articles 19 and 25 of the Hong Kong Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997, available at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

25 Articles 26 to 42 of the Hong Kong Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997, available at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

26 Article 35 of the Hong Kong Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997, available at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

is rather, as with most other fair trial rights, a qualified right.[27] In other words, where an accused person is unable to afford or secure his/her own legal representation, that accused will not at all times and in all circumstances be able to insist that legal representation be assigned to him or her in terms of, for example, the Legal Aid in Criminal Cases Rules (Cap 221D). Section 11(2)(d) of the Hong Kong Bill of Rights Ordinance (Cap 383) makes it clear that legal representation will only be assigned to an accused where the interests of justice so require. A final observation with regard to the Basic Law provisions relevant to the Law of Criminal Procedure is that the assurances provided for in the Basic Law are ultimately of no cause or effect if Hong Kong does not have a strong and independent judiciary who, in terms of the principle of justiciability, give effect thereto.[28] This is also recognised in article 2 of the Basic Law where it is stated that the Hong Kong Special Administrative Region will enjoy, *inter alia*, an "independent judicial power, including that of final adjudication, in accordance with the provisions of this Law".[29]

The provisions of the Hong Kong Basic Law relevant to the Law of Criminal Procedure can therefore be described as overarching and ideological provisions. The more concrete legislative enactments of the Law of Criminal Procedure in Hong Kong are scattered over a number of different Ordinances, of which the most important include the following: Criminal Procedure Ordinance (Cap 221), Magistrates Ordinance (Cap 227),[30] District Court Ordinance (Cap 336), High Court Ordinance (Cap 4), Complex Commercial Crimes Ordinance (Cap 394), Court of Final Appeal Ordinance (Cap 484), Juvenile Offenders Ordinance (Cap 226), etc. These legislative enactments, with the full force of law, are supplemented by a wide range of codes, guidelines and practice directions by and for the various role-players and stakeholders in the criminal justice system like the prosecuting authority, the judiciary, and the Hong Kong Police Force. For example, the Prosecution Code (2013) of the Hong Kong Department of Justice is described as "a set of statements and instructions to guide prosecutors in conducting prosecutions. It also aims to give others a clearer understanding of the approach prosecutors take, and the considerations they employ, in handling prosecutions. It should be treated as a set of guidelines and always used subject to the issues and circumstances of the particular matter or case. The golden thread that runs through the fabric of the Prosecution Code is the importance of upholding the just rule of law by the just application of

27 *HKSAR v Wu Wai Fung and another* [2003] 4 HKC 259.

28 Joubert J.J. (ed.) *Criminal Procedure Handbook* 11th Edition JUTA (2015) p. 16.

29 Article 2 of the Hong Kong Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997, available at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

30 Note that the official spelling of this Ordinance is the Magistrates Ordinance (Cap 227), although the grammatically correct spelling would have been Magistrates' Ordinance (Cap 227).

just laws."[31] The Hong Kong Police Force General Orders (PGOs) made by the Commissioner of Police under section 46 of the Police Force Ordinance (Cap 232), together with the Force Procedures Manual (FPM) also include important information and guidelines on various police procedures and processes relevant to the Law of Criminal Procedure in Hong Kong. And, the Practice Directions for the conduct of criminal proceedings issued by the Department of Justice, specifically the judiciary, is another source of law pertaining to, *inter alia*, criminal proceedings on a wide range of matters including, for example, criminal appeals procedures,[32] voluntary bills of indictment,[33] and the management of complex commercial crime cases.[34] In addition to these, regard must also be had to rules that have been enacted as subordinate legislation to an existing Ordinance like, for example, the Indictment Rules (Cap 221C), or *soft law* sources like the Rules and Directions for the Questioning of Suspects and the Taking of Statements which was officiated by the Secretary for Security in 1992 and do not enjoy the full force of law, but have persuasive or guiding value and import.

31 Hong Kong Prosecution Code (2013), http://www.doj.gov.hk/eng/public/pubsoppapcon.html#1. This most recent (2013) version of the Hong Kong Prosecution Code replaced the previous Statement of Prosecution Policy and Practice of 2008. The specific objectives of the Prosecution Code are the following: to promote consistency in prosecution practice, eliminating unwarranted disparity between cases; promote regularity, without regimentation; facilitate the exercise of discretion in a flexible and principled manner; ensure the fair and effective exercise of prosecutorial responsibility; promote confidence in the community and with accused persons that decisions will be made rationally and objectively on the merits of each case; provide reference points and guidance for prosecutors; assist in training prosecutors; ensure the accountability of prosecution decision-making; enhance understanding between agencies and therefore better coordination; inform the public of the processes and standards being applied; and demonstrate internationally the standards and principles applied in Hong Kong. Included as appendixes to this Prosecution Code is the 1990 Guidelines on the Role of Prosecutors which were adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors which were adopted by the International Association of Prosecutors in 1999 and in 2008 as a Resolution by the 17th United Nations Commission on Crime Prevention and Justice. Both these two documents provide guidance to prosecutors in Hong Kong.

32 See Practice Directions 2.2 and 4.2 available at http://legalref.judiciary.hk/lrs/common/pd/Practice_Directions.jsp.

33 See Practice Direction 3.3 available at http://legalref.judiciary.hk/lrs/common/pd/Practice_Directions.jsp.

34 See Practice Direction 9.8 available at http://legalref.judiciary.hk/lrs/common/pd/Practice_Directions.jsp.

Indeed, a myriad of legislative and ancillary sources, varying in legal status and binding force exist in terms of the Hong Kong Law of Criminal Procedure and no one-stop directive exists to guide either the criminal justice practitioners or the ordinary Hong Kong residents through its labyrinth of complexity. It is interesting to note in this regard, that prior to 2005 the relevant provisions of the Law of Criminal Procedure in England and Wales were also scattered across various statutes, practice directions, and other rules. This situation was regarded as a significant barrier to an efficient and effective system of criminal justice, and a Criminal Procedure Rules Committee was ultimately appointed and mandated to consolidate the various sets of rules operating across the different criminal courts of England and Wales. The result of this committee's work was in the form of a consolidated and codified Criminal Procedure Rules for England and Wales in 2005, with the most recent update being the Criminal Procedure Rules (CrimPR) of 2015.[35] Today, the legal principles, criteria, requirements and other legislative pronouncements applicable to a specific issue in the Law of Criminal Procedure in England and Wales are set out in a number of statutes and are also informed by case law, while all the practical matters relating to the Law of Criminal Procedure, and irrespective of the level of court, are thematically set out in the CrimPR. The advantages of such a comprehensive and one-stop source for all the Criminal Procedure Rules and Practice Directions are obvious, and particularly important in ensuring a fair, just, transparent, and due process-oriented criminal justice system.

Common law principles relevant to and available for the Law of Criminal Procedure include remedies from the substantive private law, like a claim for damages under Tort Law where property was damaged during the course of an illegal search operation. Or substantive public law consequences particularly in the form of criminal sanctions where a crime was, for example committed in the context of criminal procedural conduct, or where the rules of evidence come into operation to disallow (or allow) certain evidence to be adduced based on executive (police) conduct.[36] Specific common law remedies available in the context of the Law of Criminal Procedure include the *writ habeas corpus* which is used to obtain judicial review of police action and to protect a legal subject against unlawful deprivation of liberty. An interdict is another example and refers to an order by a court whereby a person is prohibited from acting in a certain manner, while a mandamus is the opposite of an interdict and refers to a court order where positive action on the part of a functionary is ordered. In addition to these common law remedies, precedent (*stare decisis*) is, of course, also an important common

35 Sprack, Michael *A Practical Approach to Criminal Procedure* 15th Edition Oxford: Oxford University Press (2015) p. 10. For the complete Criminal Procedure Rules and the Criminal Practice Directions of England and Wales see https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015.

36 For example, the admissibility of confessions, legal privilege, exclusionary rules etc. will be considered in the second book in this series, focussing on the *Hong Kong Law of Evidence*.

law source for the Law of Criminal Procedure. Precedent refers to judicial pronouncements and decisions which are binding on courts of the same or lower status in relation to the court having made/handed down the decision, and which requires other such courts to apply and to adhere to the precedent when deciding similar cases (whether similar in facts or raising the same question of law).

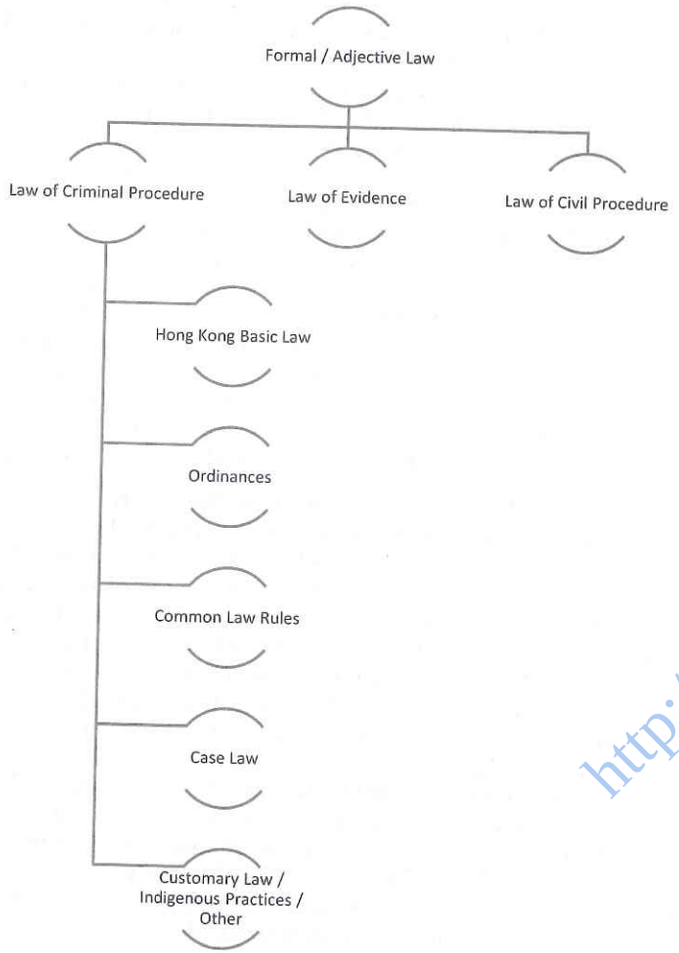

Diagram 1.2

Chinese customary law and indigenous practices have very limited application in the Hong Kong Special Administrative Region and at present usually find application in terms of Hong Kong substantive law and not formal/adjective law. For example, section 13 of the New Territories Ordinance (Cap 79) explicitly provides for courts to recognise and enforce

Chinese customs or customary rights in relation to land in the New Territories. Another example from substantive law where customary law is, to a more limited extent, acknowledged, is in terms of the Legitimacy Ordinance (Cap 184) and specifically with regard to the recognition of customary marriages. Customary law and indigenous practices can therefore serve as a source of law, but have limited application in Hong Kong formal, or adjective law. More important as other possible sources of law in criminal procedure are comparative sources, particularly in terms of the laws of England and Wales, but also with regard to other common law jurisdictions like Canada, Australia, and the United States of America. Especially the Hong Kong Court of Final Appeal often refer to laws and judicial decisions from other common law jurisdictions in deciding matters related to the development of Hong Kong law. Finally, international law both in terms of its common law principles (customary international law) as well as codified sources including conventions, treaties and judicial decisions by international courts like the European Court of Human Rights, are also important sources for the Hong Kong Law of Criminal Procedure.

¶1-400 Seven Fundamental Principles of a Criminal Trial

A criminal trial refers to the judicial proceeding that may or must commence and be concluded "from the time an accused has pleaded guilty until verdict on the merits" of the case, and "if the accused is convicted, the determination of an appropriate punishment imposed by the trial court."[37] A criminal trial can therefore be defined as a "state-sponsored public, judicial and primarily oral hearing in terms of which the alleged criminal liability of an accused must in the public interest be determined by an impartial adjudicator on the basis of constitutional, statutory, and common-law rules and principles of fairness which promote reliable and acceptable outcomes in convicting and punishing the guilty, whilst protecting the innocent from incorrect conviction and wrongful punishment."[38]

The following seven fundamental principles governing a criminal trial have been identified as the overarching values that underlie the procedural and technical rules of what is generally referred to as the Law of Criminal Procedure.[39]

- Fair trial principle

  The right to a fair trial entails both substantive and procedural fairness, in that an accused should only be convicted based on personal liability for a crime committed and be so convicted after a procedurally fair process. Of this all-encompassing right that forms the cornerstone of

37 Joubert J.J. (ed.) *Criminal Procedure Handbook* 11th Edition JUTA (2015) p. 292.

38 Ibid, at p. 292.

39 Ibid, at pp. 292-301.

any criminal justice system the South African Constitutional Court said: "It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what…lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of adverting a wrong conviction, but which arise primarily from considerations of dignity and equality."[40] Fair trial rights are therefore closely interwoven with the rules and processes of the Law of Criminal Procedure and will often feature in the chapters of this book, either explicitly or implicitly, and in terms of the rational effect and impact of certain rules and procedures.

- Principle of legality

  The principle of legality refers to the compliance in any legal, judicial or quasi-legal proceedings with all relevant common law, and statutory, and constitutional due process rules recognised in the particular jurisdiction. In terms of a criminal trial therefore, a determination of legal guilt is what is sought and not factual guilt, because it may be possible for an accused to be found factually guilty at the expense of a fundamental right like, for example his or her right to remain silent or the right to legal representation. Whereas legal guilt may not always reflect the factual reality of what had happened, it is a legally acceptable determination that is made in compliance with all relevant legal principles, rights, processes and procedures.[41]

40 *Dzukuda* 2000 (2) SACR 443 (CC) at para [11].

41 Joubert J.J. (ed.) *Criminal Procedure Handbook* 11th Edition JUTA (2015) p. 294. Also see *Commissioner of ICAC v A* [2011] 5 HKC 303 where Judge Pang for the Hong Kong Court of First Instance held (at para [4]) that under the principle of legality, a fundamental human right can only be overridden by statute by "express words or necessary implication".

- Principle of judicial impartiality

  In terms of the principle of judicial impartiality the trier of fact and law, whether that is a magistrate, a judge or a judge and a jury, must be completely impartial and unbiased in considering the evidence presented by the parties and in coming to a final determination on the matter, whether it is on a question of law, or a question of fact.

- Principle of equality of arms

  The Hong Kong legal system is an accusatorial or adversarial system and it is therefore required of parties to present their respective (individual) cases before the court. Given, however, that the prosecution is in effect the executive authority, and will inevitably have much more resources, financially and otherwise compared to any accused, it is necessary to recognise this inequality of arms and to ensure a more balanced distribution of power between the parties so as to optimise the search for the truth.[42] This principle of equality of arms has been described as follows: "The adversarial process functions effectively only when opposing counsel can fashion and present their strongest case from positions of relative equality. This equality, as significant as the other protections underlying the adversarial process in ascribing meaning to the nebulous guarantee of due process, must be extended formal protection."[43]

- Principle of judicial control

  For a criminal proceeding to be just and fair it should not only be conducted in terms of the law, but it must also be under the complete control of the court, under the authority of the presiding officer and no other. To ensure that all parties involved, including court officials and jury members obey and follow the letter of the law for as far as it relates to a criminal proceeding, a presiding officer is endowed with extensive powers. A magistrate or judge can, for example, acquit or convict and in case of the latter, impose a sentence upon a person who is found to be in contempt of court, the presiding officer may also adjourn proceedings, discharge an accused, call further witnesses and declare for certain evidence not to be admissible at trial.

- Principle of orality

  The principle of orality has been described as follows: "The principle of orality is the principle that evidence on disputed questions of fact should be given by witnesses called before the court to give oral testimony of matters within their own knowledge. Historically, the principle is intimately connected with the importance attached under the common law to the oath, to the demeanour of the witness, and to

42 Joubert J.J. (ed.) *Criminal Procedure Handbook* 11th Edition JUTA (2015) p. 296.

43 Silver, Jay Sterling 'Equality of Arms and the Adversarial Process: A New Constitutional Right' (1990) *Wisconsin Law Review* Issue 4, pp. 1007-1041, p. 1037.

cross-examination as guarantees of reliability. Oral testimony from witnesses physically present before the court also helps to legitimise the adjudication in other ways; it reinforces the drama and solemnity of the occasion, and it allows for maximum participation in decision-making in the sense that parties confront their accusers and challenge the evidence against them in the most direct way possible by cross-examination."[44]

- Principle of finality

  Finally, the principle of finality requires that neither the prosecution nor the accused may reopen their cases once closed, i.e. once the closing or final arguments have been led. What's more, is that once a competent court has made a finding in terms of the law as to an accused person's guilt or innocence, that accused person may not be tried for that exact same offence based on the exact same act or set of facts again. Also, while it is possible to take a judicial decision on review or appeal, even these post-trial procedures are not *ad infinitum* and the rights and procedures regulating post-trial proceedings, including that of review and appeal, are strictly demarcated in law and practice.

¶1-500 Conclusion: The Criminal Process and Procedure in Hong Kong

This book consists of sixteen chapters divided across four parts to reflect the main stages of a criminal proceeding in Hong Kong Law. The following flowchart present a visual depiction of these main stages of a criminal proceeding.

44 Dennis, Ian *The Law of Evidence* 5th Edition London Thomson Reuters trading as Sweet & Maxwell (2013) p. 15.

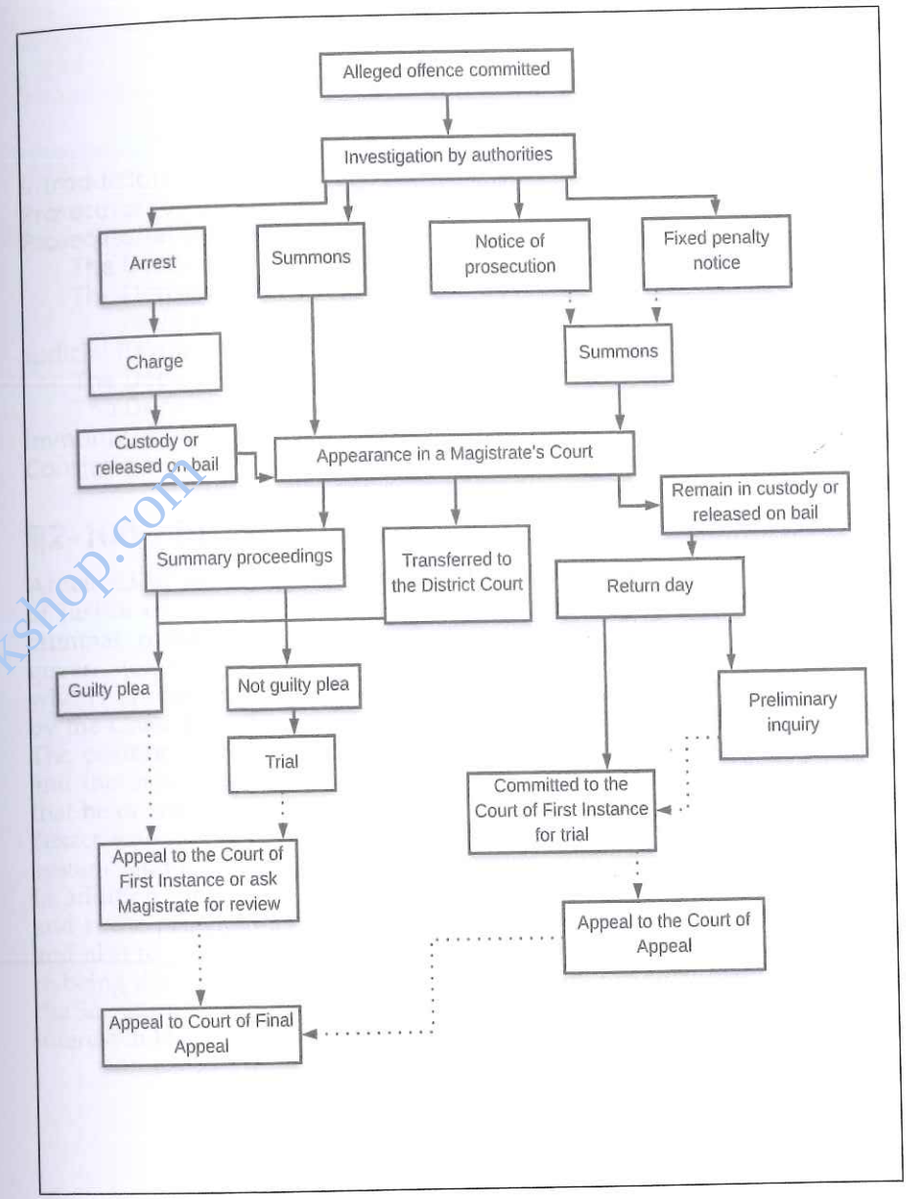

Chart 1.1 Overview of the Criminal Process

charged with or informed that he or she may be prosecuted for an offence. In such instances the person ought to be cautioned as follows:

> Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.

These two cautions are similar to the Miranda warning as per the decision of the United States Supreme Court in *Miranda v Arizona* 384 US 436 (1966) where it was held that "statements obtained during custodial interrogation of the accused may not be admitted into evidence unless the prosecution can show that appropriate procedural safeguards were used to secure the privilege against self-incrimination".[103] These procedural safeguards are described by Schwikkard and Van der Merwe as follows: "[A] person must be warned that she has the right to remain silent, and of the consequences of not remaining silent, and that she has a right to consult with a legal practitioner. [They also argue that] [t]he fact that an accused may be aware of her rights without having been warned, should not affect the inadmissibility of the evidence".[104]

Moreover, Rule III(b) states that an accused person, after having been charged or informed that he may be prosecuted, will only in exceptional cases be questioned in relation to the alleged offence. Such exceptional circumstances include instances where such questioning is necessary to minimise or prevent harm or loss to another person or for clearing up any ambiguity. In this regard it can be noted that it was held in *R v Lai Kin Ming* [1984] HKC 1 that "as soon as there is enough evidence to prefer a charge, the arrested person must without delay be charged or be informed that he may be prosecuted for the offence. Questioning of a suspect beyond the point at which officers have abundant evidence to justify charging him can amount to oppressive conduct, thereby rendering the evidence so obtained inadmissible."[105] Before any such questions are put to an accused he or she must be cautioned as follows:

103 Schwikkard, P.J. and Van der Merwe S.E. *Principles of Evidence* 4th Edition JUTA (2016) p. 139.

104 Ibid, at p. 140.

105 *R v Lai Kin Ming* [1984] HKC 1; *R v Holmes, ex p Sherman & another* [1981] 2 All ER 612; *R v Hudson* (1981) 72 Ct App R 163; *R v Mok Kwok Sui* (Crim App 702/78, unreported); *R v Lo Shun Wa* (Crim App 538/79, unreported) and *R v Cheng Ho Shing* (Crim App 356/81, unreported).

> I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.

An interesting case dealing with the various cautions under the 1992 Rules and Directions is *HKSAR v Chan Ka Chun* [1999] HKCU 1439. The applicant in this case was arrested after another accused, during police questioning, implicated the applicant for having been involved in a rape and a robbery on 27 January 1997.[106] Upon his arrest, the applicant was taken to the police station where a detective sergeant first cautioned him with regard to the rape investigation, and then proceeded to interview him. This interview was recorded and was followed by two further video-recorded interviews during which the applicant provided sufficient information which ultimately amounted to a full confession on his part. However, the applicant not only confessed to the rape, but also to various other offences, including murder. The applicant was ultimately tried for and convicted of all these offences.[107]

Upon appeal, it was argued on the applicant's behalf that the detective sergeant who had conducted the interview had erred in not properly extending a further caution beyond that relating to the rape charge for which he was arrested, the moment when the applicant started to divulge information about other offences, including the more serious offence of murder. It was submitted that "…it is a general principle of law that where a person is in custody and under caution for a particular offence and when he begins to make an admission to a more serious offence unrelated in any way to the offence for which he is under caution he should, without delay, be cautioned in respect of the more serious offence."[108] It was furthermore argued that the 1992 Rules and Directions require that "when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence".[109] This is known as principle (d) and it must be read with the following principle:

106 *HKSAR v Chan Ka Chun* [1999] HKCU 1439 at p.2.

107 Ibid, at pp.1-4.

108 Ibid, at p.5.

109 Ibid, at p.5, principle (d) of the 1992 Rules and Directions for the Questioning of Suspects and Taking of Statements.

> (e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

Thus, it was submitted that the failure to comply with this principle and to administer the appropriate caution under Rule III was a serious breach of the law and rendered the applicant's confession involuntary.[110]

Judge Wong writing for the majority of the Hong Kong Court of First Instance held that breaches of the rules and principles of the 1992 Rules and Directors for the Questioning of Suspects and Taking of Statements do not automatically render an admission or confession inadmissible. He explained that "[t]he circumstances when a judge would exercise this discretion will be rare and only in cases where it is clearly demonstrated that exclusion is necessary to secure a fair trial of the accused…"[111] In this instance the trial judge's decision to allow the confession evidence could not be faulted and the applicant's appeal on this ground was denied.[112]

Another case decided almost a decade after *HKSAR v Chan Ka Chun* [1999] HKCU 1439 and also dealing with the difficult question as to the requisite further caution when the questioning by a police officer reveals new, and possibly more serious offences having been committed is *HKSAR v Pang Ho Yin* [2010] HKCU 1415. The applicant in this case was convicted of conspiracy to traffic in a dangerous drug contrary to sections 4(1)(a) and (3) and 39 of the Dangerous Drugs Ordinance (Cap 134) and section 159A of the Crimes Ordinance (Cap 200), as well as one count of being in possession of an imitation firearm contrary to section 20(1) of the Firearms and Ammunition Ordinance (Cap 238) and one count of possession of an offence weapon in a public place, contrary to section 33(1) of the Public Order Ordinance (Cap 245). The applicant's convictions were subsequently quashed on appeal as it was found that he may have been aware of his right to silence and of his right to choose whether or not to speak, but his choice to speak did not remain an informed choice once the focus of the investigation and questioning by the police officers had changed.[113]

At issue on appeal therefore, was whether the applicant was, at all material times, in a position to make an informed choice whether to exercise his right of silence.[114] The applicant's arrest came about after police officers patrolling

110 *HKSAR v Chan Ka Chun* [1999] HKCU 1439 at p.5.

111 Ibid, at p.10.

112 Ibid, at p.11.

113 *HKSAR v Pang Ho Yin* [2010] HKCU 1415 at para [37].

114 Ibid, at para [9].

in the Mong Kok area found him and another individual sitting in a vehicle in Hoi Fai Road, Mong Kok. The applicant was asked to step out of the vehicle and he was searched. A plastic bag containing a small amount of *ice* was found upon him and he was consequently arrested for the offence of possession of a dangerous drug and cautioned in the normal way, "namely, that he was not obliged to say anything unless he wished to do so but that whatever he said might be taken down in writing and given in evidence."[115] The applicant hereupon replied that the *ice* was for his own consumption.[116] The police officers then proceeded to search the vehicle and found an air pistol under the driver's seat and a golf club in the boot of the car.[117] The applicant was thereafter also arrested for the offence of possession of a firearm and cautioned yet again. And in reply, the applicant stated that the airgun was used to scare enemies and that he had not used the gun and kept it in the car all the time.[118]

At the Mong Kok Police Station the events as it transpired at the vehicle were recounted to the applicant and a written record was prepared and he was given an opportunity to correct, alter, and add anything he wished. The applicant signed this statement as one made of his own free will. The applicant was also asked whether he knew his rights or needed a lawyer and was again told that he was still under caution.[119] During the interview at the police station the applicant was asked to explain where the gun came from and made the following statement:

> "Because earlier on I was engaging in dangerous drug redistribution, well, he bought some dangerous drugs from me…he said I was wasting his time, deliberately not handing over to him, well,…because of this, [he] asked a group of people to chase me away and said that I would no longer be allowed to do this sort of act in the Tin Shui Wai area."[120]

This statement clearly implicated the applicant in the trafficking of dangerous drugs and it was submitted on his behalf that the police officers should have cautioned the applicant anew at this stage since "the interview was delving into new territory and into an offence of significantly greater gravity than those to which he had already admitted."[121] But the police officers failed to give any further caution and continued with the questioning of the applicant, also on the new information he had divulged.[122]

115 Ibid, at para [10].

116 Ibid, at para [10].

117 Ibid, at para [8].

118 Ibid, at para [11].

119 Ibid, at para [15].

120 Ibid, at para [16].

121 Ibid, at para [17].

122 Ibid, at paras [18]-[20].

The trial judge rejected the applicant's objections to the admissibility of these confessional statements, stating that on the evidence as a whole, the applicant understood that he was under caution during the interview and the applicant had provided the adverse information to the police officers voluntarily.[123] Judge Hon Stock for the Hong Kong Court of Appeal did not agree with this finding and confirmed the argument made on behalf of the applicant in this case: "[I]n the particular circumstances of this case where the nature of the investigation moved to new and serious ground, the applicant not appreciating the fresh risk he faced, he was not, in the absence of a fresh caution, in an informed position in which to determine whether to be silent."[124] While Judge Hon Stock noted that breach of the rules and principles of the 1992 Rules and Directions for the Questioning of Suspects and Taking of Statements do not automatically render the evidence so collected inadmissible, he also emphasised the rationale behind the requirement to administer cautions to those suspected of criminal offences, and warned that by the passage of time and constant repetition, these cautions may well be considered a mantra of no significance.[125] Of this, Chief Justice Li in *Secretary for Justice v Lam Tat Ming and another* (2000) 3 HKCFAR 168 said as follows:

> "'[T]he underlying rational is based both on the need to ensure the reliability of confessions as well as the right of silence', that right being 'deeply rooted in the common law', a right 'to choose whether to speak or to remain silent [and in particular…a right [of a suspect] not to incriminate himself.' That right, he pointed out was one that was protected by the Rules. The judge, he said, had an overriding duty to ensure a fair trial for an accused according to law and for that purpose he had a discretion to exclude admissible evidence, including a voluntary confession: '…The essential question is not whether the law enforcement agency has acted unfairly in a general sense. …The court's function is to consider whether it would be unfair to the accused to use the confession though voluntary against him at his trial. The test of unfairness is not that of a game governed by a sportsman's code of fair play… Unfairness in this respect is to be judged against and only against what is required to secure a fair trial for the accused.'"[126]

Judge Hon Stock for the Hong Kong Court of Appeal in *HKSAR v Pang Ho Yin* [2010] HKCU 1415 therefore concluded that "the right to choose whether to speak or to remain silent is denuded of its force if the choice is based on a material misapprehension, created by the circumstances of his questioning, as to the nature of the peril in which, by such answers as he may advance,

123 Ibid, at para [25].

124 Ibid, at para [26]; *R v Kirk* [2000] 1 WLR 567.

125 *HKSAR v Pang Ho Yin* [2010] HKCU 1415 at para [30].

126 Ibid, at para [31], quoting from *Secretary for Justice v Lam Tat Ming and another* (2000) 3 HKCFAR 168 at p. 178-179. Also see *R v Bryce* [1992] 95 Cr. App. R. 320.

he may place himself".[127] In *R v Kirk* [2000] 1 WLR 567 this was explained as follows:

> "…where the police, having made an arrest, propose to question a suspect or to question him further in relation to an offence which is more serious than the offence in respect of which the arrest was made, they must, before questioning or questioning further, either charge the suspect with the more serious offence…or at least ensure that he is aware of the true nature of the investigation. …They must do that so that he can give proper weight to that factor, namely the nature of the investigation which is being conducted, when deciding whether or not to exercise his right to obtain free legal advice…and in deciding how to respond to the questions which the police proposed to ask of him.
>
> It seems to us that the [Police and Criminal Evidence] Act of 1984 and the codes of practice which exist under it proceed upon the assumption that a suspect in custody will know why he is there and, when being interviewed, will know at least in general terms the level of offence in respect of which he is suspected and, if he does not know, and as a result does not seek legal advice and gives critical answers which he might not otherwise have given, the evidence, as it seems to us, in normal circumstances, ought to be excluded…because its admission will have a seriously adverse effect on the fairness of the proceedings…"[128]

In addition to these cautions as discussed above, the 1992 Rules and Directions also contain detailed guidance on how written statements ought to be taken down as well as matters relating to the questioning of persons generally, the conduct of police officers in this regard, and other basic safeguards in relation thereto. Particularly noteworthy is Direction 5 dealing with the interrogation of children and young persons:

> So far as practicable, children and young persons under the age of 16 years (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child. A child or young person should not be arrested, or even interviewed, at school if such action can possibly be avoided. Where it is found essential to conduct the interview at school, this should be done only with the consent, and in the presence, of the head teacher, or his nominee.

While the 1992 Rules and Directions do not have the force of law, as it was not incorporated in any Ordinance, a serious breach of its directions or blatantly ignoring the guidelines may be taken into consideration by a court when it has to decide on the admissibility of evidence so obtained.

127 *HKSAR v Pang Ho Yin* [2010] HKCU 1415 at para [32].

128 *R v Kirk* [2000] 1 WLR 567 at 572.

In England and Wales, a set of guidelines on police questioning and the admissibility of evidence so obtained was first issued in 1912 by the judges of the King's Bench and was generally referred to as "The Judges' Rules". Of this legal development T.E. St. Johnston explained as follows:

> "Prior to 1912 the problems of investigation and interrogation were not so profound as they are today. No rules governed investigations by the police, and indeed, it was not until 1912 that some form of guidance was given to them when questioning persons suspected of or charged with crime. This is not to say that the police in the nineteenth century were allowed unlimited scope when carrying out their investigations. As far back as 1870 Lord Chief Justice Cockburn said at the Central Criminal Court: 'You may ask a man a question with an honest intention to elicit the truth and ascertain whether there are grounds for apprehending him; but with a foregone intention of arresting him, to ask him questions for the main purpose of getting anything out of him that may afterwards be used against him, is very improper proceeding.' No doubt it is possible to go back still further. The point is, however, that there has been some form of guidance for many years, although it was not generally known to police officers and not enforced to any great extent."[129]

Following the issuing of the first Judges' Rules in 1912, revised and updated versions followed in 1918 and 1930, with a final version in 1964.[130] As with the 1992 Rules and Directions of Hong Kong, the English Judges' Rules were never incorporated in statute. The answer for this, according to Johnston "lies in the Englishman's tolerance and indeed affection for unwritten rules. He has a natural instinct to act according to what he believes to be right and not to be fettered with permitted or prohibited rules."[131] Today, The Judges' Rules has been replaced by Code C of the Police and Criminal Evidence Act of 1984 (PACE), entitled "Requirements for the Detention, Treatment and Questioning of Suspects not Related to Terrorism in Police Custody" and with the most recent version having been issued in February 2017.

In addition to this Code C of the Police and Criminal Evidence Act of 1984 (PACE), Part V of the Act itself, from sections 53 to 65B, also promulgate certain requirements, guarantees and prescriptions with full legal force. For example, section 58(1) of PACE provides that a person arrested and held in custody at a police station shall be entitled, if he so requests, to consult an independent solicitor privately at any time and free of charge.[132] Such a request must be complied with as soon as practicable unless the detainee

129 Johnston, T.E. St. 'The Judges' Rules and Police Interrogation in England Today' (1966) *Journal of Criminal Law and Criminology* Vol. 57, Issue 1, pp. 85-92, p. 85.

130 Ibid, at pp. 85-92, at p. 85; See generally *R v Voisin* [1918] 1 KB 531.

131 Johnston, T.E. St. 'The Judges' Rules and Police Interrogation in England Today' (1966) *Journal of Criminal Law and Criminology* Vol. 57, Issue 1, pp. 85-92, at p. 86.

132 Sprack, Michael *A Practical Approach to Criminal Procedure* 15th Edition Oxford: Oxford University Press (2015) p. 39.

is suspected of an indictable offence and a delay is authorised by an officer of at least the rank of superintendent.[133] Moreover, the delay may only be authorised if the senior police officer has reasonable grounds for believing that immediate consultation with a solicitor may result in any of the following:[134]

- will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons; or
- will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- will hinder the recovery of any property obtained as a result of such an offence.

Or, if there are reasonable grounds for believing that the detainee has benefited from his criminal conduct and the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right to consult with a solicitor.[135] A detainee may not, however, be refused access to a solicitor merely because the police fear that the solicitor will advise the suspect not to answer questions.[136]

An interesting judicial decision dealing with this Code C as it stood in 1985 – the English Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (1985) – is *R v Bryce* [1992] 95 Cr. App. R. 320. The appellant in this case was convicted of, *inter alia*, handling stolen goods and sentenced to twelve months' imprisonment. On appeal, it was submitted on behalf of the appellant that the recorded telephone conversation between an undercover police officer and the appellant was not admissible as it breached the provisions of the Police and Criminal Evidence Act 1984,[137] and that the trial judge had also erred in allowing into evidence statements the appellant had made to the police officers questioning him at the police station. With regard to these latter statements it was submitted that the interview with the police officers at the police station was not conducted properly in terms of Code C.10.5 of the Code of Practice, which provides as follows:

133 Section 58(6)(a)-(b) of the Police and Criminal Evidence Act of 1984 (PACE).

134 Section 58(8) of the Police and Criminal Evidence Act of 1984 (PACE).

135 Section 58(8A) of the Police and Criminal Evidence Act 1984 (PACE). Also see *Samuel* [1988] 1 WLR 920 in which the English Court of Appeal gave guidance on the circumstances under which a delay may be authorised.

136 Sprack, Michael *A Practical Approach to Criminal Procedure* 15th Edition Oxford: Oxford University Press (2015) p. 40; *Alladice* (1988) 87 Cr. App. R. 380.

137 See Chapter Nine of the second book in this series on the *Hong Kong Law of Evidence* for a discussion of the Police and Criminal Evidence Act 1984, and the residual common law discretion of courts to exclude evidence improperly, illegally, or unconstitutionally obtained, if that evidence would render the trial unfair.

> "A person of whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous questions that provide grounds for suspicion) are put to him for the purpose of obtaining evidence which may be given in a court in a prosecution…"[138]

The first part of the interview at the police station was recorded on video as is required, and then the video recording was switched off and in the conversation that followed between the police officers and the appellant, he (the appellant) was not freshly cautioned, nor was a contemporaneous record made of the confessional statements that the appellant allegedly made during this time.[139]

Lord Taylor for the English Court of Appeal, in allowing the appeal and quashing the appellant's convictions, held that both the evidence of what the appellant had said during the telephone conversation as well as thereafter during the uncautioned interview at the police station were inadmissible. The nature of the telephone conversation, he held, went directly to the critical issue of guilty knowledge and was in the nature of an interrogation and not an undercover operation.[140] In this regard it was noted that an undercover pose cannot be used to circumvent the Code.[141] And, of the interview evidence Lord Taylor held that if the interview was admitted as evidence, "the effect would be to set at nought the requirements of the Police and Criminal Evidence Act 1984 and the Code in regard to interviews. One of the main purposes of the Code is to eliminate the possibility of an interview being concocted or of a true interview being falsely alleged to have been concocted. If it were permissible for an officer simply to assert that, after a properly conducted interview produced a nil return, the suspect confessed off the record and for that confession to be admitted, then the safeguards of the Code could readily be bypassed. In our judgment there would have to be some highly exceptional circumstances, perhaps involving cogent corroboration, before such an interview could be admitted without it having such an adverse effect on the fairness of the trial, that it ought to be excluded under section 78. Here the situation was a classic example of that suspicious sequence – a total denial or refusal to comment, followed by an alleged confession, followed in its turn by a refusal to sign the notes and a denial that the confession was made. We have no doubt that the alleged interview should in the circumstances of this case have been excluded."[142]

138 *R v Bryce* [1992] 95 Cr. App. R. 320 at 321.

139 Ibid, at 323-324.

140 Ibid, at 325.

141 Ibid, at 325.

142 Ibid, at 326.

¶4-600 Detention

Article 5(3) of the Hong Kong Bill of Rights Ordinance (Cap 383) requires that any person arrested or detained on a criminal charge be brought promptly before a judge or other officer authorised by law to exercise judicial power and that such a person shall also be entitled to a trial within a reasonable time or, alternatively, to release. It is furthermore stated that it shall not be the general rule that persons awaiting trial be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, or for execution of the judgment.

This fundamental guarantee is echoed in the two other Ordinances dealing with the power to arrest and which were discussed above. Section 101(5) of the Criminal Procedure Ordinance (Cap 221) state, in the context of citizen's arrest, that every person who arrests any person under any of the provisions in the Ordinance, shall deliver the person so arrested and the property, if any taken possession of, to some police officer in order for the arrestee to be conveyed as soon as reasonably possible before a magistrate who will be able to deal with the arrestee according to law. It is also recognised in the provision that the arrestor may him- or herself also take the responsibility of conveying the arrestee in the manner prescribed before a magistrate. Specifically with regard to police officers effecting an arrest, section 51 of the Police Force Ordinance (Cap 232) provides that "[e]very person taken into custody by a police officer with or without a warrant, except a person detained for the mere purpose of taking his name and residence or detained under section 54, shall be forthwith delivered into the custody of the officer in charge of a police station or a police officer authorized in that behalf by the Commissioner".[143]

More practically, after arriving at the police station, the duty officer present at the station must be informed on what grounds the arrestee was arrested. If it is not a very serious charge, the station sergeant will grant the arrestee bail or the arrestee may be discharged on his or her own recognisance, subject to the obligation to appear in court before a magistrate on a set date. For more serious charges, the arrestee will be processed, which include the taking of the arrestee's photograph and fingerprints. A decision will also be taken at this stage on what charges to bring against the arrestee and a charge sheet will be prepared. If no police bail is granted and the arrestee is kept in custody, he or she must be brought before a magistrate as soon as practicable.[144] Where a warrant for the arrestee's arrest and detention under any law relating to deportation is applied for within 48 hours of the arrest,

143 See *Yeung Ka Yee v HKSAR* [2003] HKCFA 28; FAMC 16/2003 (30 May 2003) at para [7] where the Hong Kong Court of Final Appeal described this as an important provision, but an issue of oppression would not always arise whenever there has been any kind of non-compliance therewith. Also see *Secretary for Justice v Lam Tat Ming & another* [2000] HKCFA 90; (2000) 3 HKCFAR 168 at 177.

144 Section 52(1) of the Police Force Ordinance (Cap 232); Police General Orders Chapter 39 at 49-01.

to questions of law that may arise during the course of the trial. In addition to considering the procedural aspects relating to this final adjudication of a criminal trial, a number of miscellaneous (procedural) matters to the trial will also be considered, most notably, cost orders that a presiding officer may make against any of the parties involved in the criminal proceeding, including the prosecution.

¶13-200 The Jury

According to article 86 of the Hong Kong Basic Law "[t]he principle of trial by jury previously practiced in Hong Kong shall be maintained," and section 41 of the Criminal Procedure Ordinance (Cap 221) provides that the general mode of trial in Hong Kong is for a person to be tried before a court on an indictment, and that such a trial shall "be had by and before a judge and a jury".[2] Section 42 of the Criminal Procedure Ordinance (Cap 221) furthermore empowers the Secretary for Justice to, by way of a motion, request that a judge order the trial of any indictment to "be had at bar, that is to say, by and before two judges and a jury…"[3] However, as was explained in Chapter Two of this book, only trials before the Court of First Instance will be heard by both a judge and a jury. Trials in a Magistrate's Court will be dealt with by a magistrate only and trials in the District Court will be dealt with by a judge, also in the absence of a jury.[4]

In order to fully understand this dual system whereby an accused will be tried before a judge and a jury if the case warrants committal to the Court of First Instance, but will in all other circumstances be tried by a judge or a magistrate sitting alone, a brief synopsis on the history and development of the jury system in Hong Kong is necessary. Indeed, the Hong Kong jury system has been described as somewhat of an "oddity".[5]

¶13-210 A Brief History on the Origin and Development of the Hong Kong Jury System

The jury system of Hong Kong was, like most of the legal institutions of Hong Kong, imported to Hong Kong by its colonising power, the United Kingdom.[6] In fact, Duff et al describes the Hong Kong jury as one of the

2 Section 41(1)-(2) of the Criminal Procedure Ordinance (Cap 221).

3 Section 42 of the Criminal Procedure Ordinance (Cap 211).

4 Section 6 of the District Court Ordinance (Cap 336).

5 Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 37.

6 Mawer, R. Knox 'Juries and Assessors in Criminal Trials in Some Commonwealth Countries: A Preliminary Survey' (Oct 1961) *The International and Comparative Law Quarterly* Vol. 10, No. 4, pp. 892-898.

earliest features of the English criminal justice system to be adopted in Hong Kong in 1845.[7] However, right from the get-go, the Hong Kong jury featured different characteristics from that of the jury system in England and Wales. Originally the Hong Kong jury only comprised six men, rather than twelve like its counterpart in England and Wales, with the "smallness of the population" cited as the rationale; it was believed that a twelve men jury would cause "very great hardship and inconvenience" to the colonial inhabitants.[8] In 1864, the number of jury members was increased to seven and it has remained at this number ever since. However, in 1986, in anticipation of a complicated trial involving commercial fraud – a case that later became known as the Carrian case – legislation was hurriedly passed so as to allow for a court to order the empanelling of a nine member jury, if such was warranted under the circumstances.[9] This was thought to be necessary as the Carrian trial was expected to last for many months, even years, and in such cases there are always a risk that some of the jury members will withdraw, which may lead to the abandonment of the trial if the number of jurors fall below the requisite five.[10] This discretion of a court to empanel a nine member jury instead of a seven member jury has been retained in Hong Kong law under section 3 of the Jury Ordinance (Cap 3).

Other differences between the early Hong Kong jury system and its British counterpart was that the original Hong Kong Ordinance of 1845 imposed a financial qualification for jury service in that a jury member had to either hold property as owner or tenant and in the case of the latter with a monthly value of HK$25 upwards, or be in receipt of a salary of more than HK$1,000 per annum. While this property and financial qualification for jury service was dropped from the list of requirements for jury duty in Hong Kong in 1851, the comparable property qualification for jury duty in England and Wales was only abandoned some one hundred years later.[11] Also, the 1851 Hong Kong Ordinance disqualified any person from jury duty who was ignorant of the English language,[12] and language competency remains a

7 Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 37, quoting from Ordinance No. 7 of 1845, section 1 which provided that "…all questions of fact, whether of a civil and criminal nature upon which issue shall be taken in the course of any proceeding before the Supreme Court…shall be decided by the verdict of a Jury of six men." Koo, Franklin 'Power to the People: Extending the Jury to the Hong Kong's District Court' (2010) *City University of Hong Kong Law Review* Vol. 2:2, pp. 301-329, p. 302.

8 Duff, Peter et al. *Juries: A Hong Kong Perspective* (1992) Hong Kong: University of Hong Kong Press (1992) p. 38.

9 Ibid, at p. 38.

10 Ibid, at p.38.

11 Ibid, at p. 38.

12 Ibid, at p. 39.

ground for disqualification from Hong Kong jury service to this day.[13] Similar concerns regarding language is for obvious reasons not as problematic with regard to jury service in England and Wales. Another major historical difference between the Hong Kong jury system and its British counterpart is with regard to the verdict handed down by a jury. By 1851, a verdict by a majority of the jury members was accepted under Hong Kong law, while England and Wales continued to hold that only a unanimous verdict will be acceptable in terms of the law.[14] It was only in 1967 that a majority verdict also became acceptable under English law.[15]

It has previously been questioned whether the jury system should not also be extended to the District Court of Hong Kong, especially given the historical significance of a trial by jury in most common law systems and particularly that of England and Wales.[16] The Hong Kong District Court was established in 1953 as an intermediate court with both civil and criminal jurisdiction and with the purpose to relief the workload on both the Magistrates' Courts and the High Court (as it was known at that time).[17] The District Court was furthermore established to provide for a trial by a judge in the absence of a jury as the historically stringent eligibility requirements for jury duty which was described above, especially with regard to language competency, also resulted in the overburdening a relatively small cohort of the Hong Kong population for having to perform jury duty.[18] While the reasons for the establishment of the Hong Kong District Court - providing for a trial by a judge in the absence of a jury and as an effort to alleviate the burdens of jury duty on the Hong Kong population - may not be as pressing today as it was in the 1950s, it would not be advisable to extend the trial by jury in Hong Kong to also apply to proceedings at the District Court level. Of this, the following was said by the Secretary for Justice, Mr Wong Yan Lung SC in the Legislative Council on 11 November 2009:

13 Section 4 of the Jury Ordinance (Cap 3); Norton-Kyshe, James William *History of the Laws and Courts of Hong Kong Volume 1* Hong Kong: Noronha and Company (1902) p. 465.

14 Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 39; It was only in capital cases that a unanimous verdict remained requisite in Hong Kong law.

15 Ibid, at p. 39.

16 Koo, Franklin 'Power to the People: Extending the Jury to the Hong Kong's District Court' (2010) *City University of Hong Kong Law Review* Vol. 2:2, pp. 301-329.

17 Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 41.

18 Koo, Franklin 'Power to the People: Extending the Jury to the Hong Kong's District Court' (2010) *City University of Hong Kong Law Review* Vol. 2:2, pp. 301-329, p. 303. In 1995, for example, it was quoted that only 0.3% of the Hong Kong population (i.e. 20,000 people out of an approximately six million) qualified for jury duty.

> "This issue was last raised in the Legislative Council in March 1997 and…it was said that any change at the present arrangements would require a lengthy, detailed and in-depth study. Having reviewed the matters set out in that paper and having consulted the Judiciary, the Administration is not convinced that a re-examination of this issue is warranted. The number of criminal cases tried in Chinese in the District Court has shown a steady increase in recent years, while the number of those in the Court of First Instance has shown no comparable increase. Since 2007, the availability of an increased pool of Chinese speaking jurors has not led to an increase in jury trials in Chinese in the Court of First Instance. It appears unlikely therefore that the introduction of jury trials in the District Court would lead to an increased use of Chinese in that Court…The resource implications and the demand on jurors would also be very considerable if the same number of cases were to be tried each year."[19]

¶13-220 General Principles Regarding the Contemporary Hong Kong Jury System

In trials involving both a judge and a jury it is important to distinguish between the duties and responsibilities that rest on the judge, as the adjudicator of law, and the jury, as the adjudicator of fact. This can briefly be explained as follows: in a trial involving both a judge and a jury, the jury will be tasked with settling disputed questions of fact, and ultimately on making a finding on whether the accused person is guilty or innocent of the offences charged. The judge, on the other hand, must decide on all questions of law, decide whether there is a *prima facie* case against an accused upon a submission of *no case to answer*, supervise the conduct of the trial and regulate its processes and procedures, and also give appropriate instructions and guidance to the jury members. On this last point, it must be noted that a judge can exercise great influence over the decisions that a jury makes, for example, a judge may rule that certain evidence be excluded from the jury's consideration, or direct the jury to exclude a particular verdict or to consider a possible verdict, or give directions to the jury as to important evidence and its evaluation. A judge can also discharge a jury if there has been an irregularity and it is unsafe to allow for the jury to make a verdict. At the most extreme, a judge may overturn the verdict of a jury if it is perverse or plainly wrong. It is ultimately also the judge that is tasked with handing down a sentence where the jury has returned a verdict of guilty. In deciding upon an appropriate sentence, the judge will also deal with questions of fact that may arise from a plea in mitigation of sentence. The jury therefore, does not decide on the admissibility of evidence, argument or decisions,

19 Secretary for Justice Mr Wong Yan Lung SC LCQ8: Implementation of Jury System in District Court (9 November 2011) available online at http://www.info.gov.hk/gia/general/200911/11/P200911100261.htm.

or consider motions to quash an indictment for failing to state an offence known to law.

In Hong Kong, the composition of a jury and the procedural matters related thereto are provided for in the Jury Ordinance (Cap 3).[20] Section 3 of the Jury Ordinance (Cap 3) states that in all civil and criminal trials and in all inquiries into "idiocy, lunacy, or unsoundness of mind of any person, the jury, if any, shall consist of seven persons except where the court or the judge before whom any such trial or inquiry is or may be heard, orders that the jury shall consists of nine persons."[21] This is further explicated in section 20 of the Ordinance where it is stated that a judge has a discretion to, on an application made by or on behalf of the parties, or even at the judge's own instance, to order that the jury shall be composed of men only or of women only as the case may require.[22] A judge also has the power to exempt any person from jury duty upon an application made by such a person and in respect of any case by reason of the nature of the evidence to be given or the issues to be tried.[23]

As to the question who is eligible for jury duty in Hong Kong, regard must be had to sections 4, 4A, and 5 of the Jury Ordinance (Cap 3).[24] Section 4 of the Jury Ordinance (Cap 3) sets out the baseline requirements for eligibility and disqualifications for being called upon to serve as a jury member in Hong Kong:

Section 4 Qualifications and disabilities

(1) A person who has reached 21 years of age, but not 65 years of age, and is a resident of Hong Kong is, except as provided by this Ordinance, liable to serve as a juror in the proceedings in the court or in an inquest under the Coroners Ordinance (Cap 504) if (but only if) –

(a) the person is of sound mind and not afflicted by blindness, deafness or other disability preventing the person from serving as a juror; and

20 The Jury Ordinance (Cap 3) was passed in 1887 but have since been amended numerous times; Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 37.

21 Section 3 of the Jury Ordinance (Cap 3).

22 Section 20(a) of the Jury Ordinance (Cap 3.

23 Section 20(b) of the Jury Ordinance (Cap 3).

24 Note that the Hong Kong Law Reform Commission in a report 'Criteria for Service as Jurors' dated June 2010 have made some significant recommendations to the eligibility criteria for jurors in Hong Kong. These recommendations is currently being considered by the Department of Justice. See Hong Kong Law Reform Commission 'Criteria for Service as Jurors' June 2010, available online at http://www.hkreform.gov.hk/en/docs/rjurors_e.pdf.

(b) the person is of good character; and

(c) the person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings.

(2) In a trial before a jury, the court or a coroner may, on the court or the coroner's own motion or on the application of the Registrar or of any interested party, discharge any person summoned to serve as a juror who is unable to satisfy the court or the coroner that the person's knowledge of the language in which the proceedings are to be conducted is sufficient to enable the person to understand the proceedings.

In order to ensure that persons identified as eligible jury members do indeed meet the baseline requirements as set out in section 4 of the Jury Ordinance (Cap 3), the Registrar of the High Court or the Commissioner in terms of the Registration of Persons Ordinance (Cap 177) may request of eligible jury members to supply certain information or to undergo an English or Chinese language examination.[25] The following categories of persons are explicitly excluded from service as jurors: members of the Executive or Legislative Council, justices of peace, certain public officers including members of the Hong Kong judiciary, staff members of certain public offices, members of the Hong Kong Police Force, consuls, barristers-at-law and solicitors as well as their clerks, persons duly registered as or deemed to be medical practitioners under the Medical Registration Ordinance (Cap 161) or dentists under the Dentists Registration Ordinance (Cap 156), or persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap 529), editors of daily newspapers in Hong Kong, chemists and druggists actually carrying on business as such, various religious leaders and practitioners, full-time students, members of the Chinese People's Liberation Army, pilots, and the spouses of certain public officials like that of the Chief Justice, a judge of the Court of Final Appeal etc.[26]

Even where a person meets all the requirements for eligibility to serve as a jury member in Hong Kong and as set out in sections 4, 4A, and 5 of the Jury Ordinance (Cap 3), the court retains the power to exempt a juror from service. Mention has already been made of a judge's power in this regard in terms of section 20 of the Jury Ordinance (Cap 3), note can also be taken of section 28 of the Jury Ordinance (Cap 3). In terms of section 28(2) of the Jury Ordinance (Cap 3), this power to exempt an otherwise eligible person to serve on a jury is also extended to the Registrar of the High Court upon condition that where the Registrar has exempted a jury member from attending on that

25 Section 4A of the Jury Ordinance (Cap 3).

26 For a full list see section 5 of the Jury Ordinance (Cap 3). On the exclusion of certain professionals from the jury, see Mushin, Michael B. 'Bound and Gagged: The Peculiar Predicament of Professional Jurors' (2006) *Yale Law and Policy Review* Vol 25:2, pp. 239-287.

jury, that the Registrar produce to the court or judge the application received by him or her from that jury member asking to be excused from attendance on the jury. Typical examples of where such an application for exemption of jury duty will be allowed, includes instances where the jury member has a personal interest in the case or have knowledge of the parties, where serving on the jury would result in the jury member suffering some form of hardship, including financial hardship, and any other issue of practical significance.

If any person is summoned as a juror who is not qualified or liable to serve as such, or is exempt from service, that person may either bring an application him- or herself to the Registrar or the judge to be excused from attending the jury,[27] or the inclusion of that jury member on the panel may be challenged by either the defence counsel or the prosecution. In either case, such a jury member will then be discharged by the court if the court is satisfied of the facts presented in this regard. However, it must also be noted that where such a jury member was sworn before the court and the want of qualification or exemption was not raised or challenged before the swearing in, this cannot afterwards be used as a ground for impeaching any verdict given by the jury on which that jury member had served.[28]

It remains possible for a court at any time during the trial and prior to the verdict of the jury being handed down, to discharge any juror where, in the interests of justice, it appears to the court expedient to do so, or where it is in the interests of the juror to do so.[29] Where a member of the jury dies or is discharged by the court, the jury shall nonetheless be considered as remaining properly constituted for all the purposes of the trial.[30] Such a jury, *sans* the member who was discharged or who had died, shall proceed as if the full number of jurors had continued to serve on the jury and any verdict returned by the remaining members being a unanimous verdict or a majority verdict shall be of equal validity as if it had been returned by a jury consisting of the full number of jurors.[31] However, a jury may never consist of less than five persons.[32]

¶13-230 Empanelling a Jury

The formation of a panel of jurors is set out in sections 9 to 20 of the Jury Ordinance (Cap 3). The process of empanelling a jury commences with the Registrar of the High Court being tasked to keep a list containing the names, places of abode, and additions of the persons who are eligible for jury duty

27 Sections 20 and 28 of the Jury Ordinance (Cap 3).

28 Section 6 of the Jury Ordinance (Cap 3).

29 Section 25(1)(a)-(b) of the Jury Ordinance (Cap 3).

30 Section 25(2) of the Jury Ordinance (Cap 3).

31 Section 25(3) of the Jury Ordinance (Cap 3).

32 Section 25(4) of the Jury Ordinance (Cap 3).

in Hong Kong. Section 9 of the Jury Ordinance (Cap 3) provides that "[o]n or before 1 October in each alternate year after the year 1960, the Registrar shall publish in the Gazette and in one English language daily newspaper and in one Chinese language daily newspaper, each circulating in Hong Kong, a notice stating that copies of the provisional list of jurors are available for inspection at his office and at other addresses specified in the notice upon such days and between such hours as shall be specified in the notice up to and including the next 14 October."[33] This provision gives Hong Kong people the opportunity to check whether their name appears on the list of jurors and to apply in writing for amendments to be made where necessary.[34] Whether or not a person's name appears on the lists of jurors, is ultimately a matter that falls within the discretion of the Registrar.[35] This lists of jurors so compiled under the discretion of the Registrar, must be published no later than 1 February of each alternative year starting in 1961, and shall be in force from fifteen days after the date on which the notice indicating that the lists will be finalised and may be inspected by any person had passed, until fifteen days after the date on which the subsequent notice of the next alternate year relating to the next succeeding list had been published.[36] The Registrar may, however, add to a settled list of jurors and notice of such additions must also be duly published with notice given to the public to inspect the lists and to make any applications for the amendment thereof.[37] Likewise, the Registrar may also remove names from the settled list of jurors as per his or her discretion.[38]

Once it then becomes necessary for a jury to be empanelled, the Registrar shall select from this list of jurors, by ballot or by any other method of random selection, such number of jurors as a judge shall direct to form a panel. Section 13 of the Jury Ordinance (Cap 3) furthermore provides that "[w]henever from any cause any juror who has been selected cannot be served the Registrar shall select a further juror to complete the number required for such panel…Whenever a judge so directs the Registrar shall divide such panel equally into two or more sets, and the first of such sets shall attend and serve, and the second and any subsequent set shall attend and serve, for such respective periods as the judge shall direct." In other words, from the extensive list of jurors the Registrar shall, upon the direction of a judge, and by ballot or any other method of random selection, select such a number of potential jurors as requested by that judge. In forming the panel, the Registrar may pass over the names of those who he or she reasonably believe to be dead or absent from Hong Kong, not qualified or liable to serve

33 Section 9(1) of the Jury Ordinance (Cap 3).

34 Section 9(2) of the Jury Ordinance (Cap 3).

35 Section 9(3)-(5) of the Jury Ordinance (Cap 3).

36 Section 10 of the Jury Ordinance (Cap 3).

37 Section 11 of the Jury Ordinance (Cap 3).

38 Section 12 of the Jury Ordinance (Cap 3).

as a juror, or who is otherwise exempt from service.[39] The Registrar may also pass over the names of any persons whom he or she is of the opinion cannot conveniently be served in sufficient time to secure their attendance as jurors at the inquiry.[40]

The Registrar must then issue a summons according to Form 1 in the Schedule of the Jury Ordinance (Cap 3), to all those persons selected for the panel, requiring them to appear on the day specified in the summons.[41] Such a summons may be served by post, or in person, or by leaving it at a place of residence or business.[42] Where the person so summoned fails to attend as required by the summons, an officer of the court or a police officer may warn him or her personally to attend before the court and upon non-compliance with such a warning it shall be lawful for a police officer with or without a warrant to apprehend the person and bring him or her before the court.[43] As soon as convenient after summonses had been served, the Registrar must cause a list containing the names, places of abode, and additions of the persons so summoned to be made out.[44] Both the defence and the prosecution may preview this list to give some advance indication of possible challenges of the persons so summoned.

The empanelling of the jury is provided for under sections 21, and 23 of the Jury Ordinance (Cap 3). According to section 21 of the Jury Ordinance (Cap 3), the Registrar is tasked with printing separate cards of equal size with a number and the corresponding names of all the jurors so summoned. These cards are placed in a box and the Registrar or a clerk of the court must, in open court, draw names from this box until a jury is empanelled. Of this empanelling process section 23 of the Jury Ordinance (Cap 3) provides as follows:

Section 23 Empanelling new jury for new case

The names of the persons drawn as jurors shall be marked on the list provided for in section 18, and the cards with the numbers corresponding to such names shall be kept apart by themselves until all the cards in the box have been drawn. Provided that –

(a) if any case is brought on to be tried before the jury in any other case have brought in their verdict, it shall be lawful for the court to order another jury to be drawn from the residue of the said cards for such trial; and

39 Section 16(1) of the Jury Ordinance (Cap 3).

40 Section 16(2) of the Jury Ordinance (Cap 3).

41 Section 17 of the Jury Ordinance (Cap 3).

42 Section 17(1) of the Jury Ordinance (Cap 3).

43 Section 17 of the Jury Ordinance (Cap 3).

44 Section 18 of the Jury Ordinance (Cap 3).

(b) where no objection is made on behalf of the plaintiff or prosecutor or on behalf of the defendant or person accused, it shall be lawful for the court to try any case with the same jury who have previously tried or been drawn to try any other case, but it may order the name of any person on such jury, whom both parties may consent to withdraw or who may be justly challenged or excluded by the court, to be set aside and another number corresponding to a name to be drawn from the box.

During this process by which the Registrar draws from a box the names of jurors, section 29 of the Jury Ordinance (Cap 3) provides that the accused – who had already been arraigned at this stage – or his or her legal counsel, may challenge no more than five jurors without cause and any juror or jurors for cause.[45] This provision can be explained as follows: It is the aim of the defence to empanel a jury constituting a reasonable number of persons who understand, appreciate, or are sympathetic towards the accused's point of view and/or circumstances. The defence will therefore challenge for cause, any selected juror who do not meet the eligibility requirements for serving on a jury in terms of Hong Kong law, or who is suspected of bias. The test to determine whether such a challenge for cause is justified, is to consider whether there is a real risk that the accused would not have a fair trial if the said juror is indeed selected to serve on that specific jury. The five peremptory challenges or challenges without cause refer to challenges by the defence for which no reason or explanation or cause is required to be identified by the defence. In other words, the defence has the opportunity to challenge no more than five jury members selected by the Registrar from the names in the box without having to justify the challenge to the presiding judge. However, no such peremptory challenges is available to the defence where a jury is empanelled only to hear a preliminary issue like, for example, whether the accused is fit to stand trial.[46]

No provision is made for the prosecution to challenge a jury member without cause. The prosecution can only challenge a jury member for cause, or ask the judge for permission that a particular jury member selected, stand by.[47] First, it must be remembered that the aim of the prosecution in empanelling the jury is to constitute a body of peers that can be described

45 Such peremptory challenges have since been abolished in the laws of England and Wales. Sprack, Michael *A Practical Approach to Criminal Procedure* 15th Edition Oxford: Oxford University Press (2015) pp. 256-257.

46 It is interesting to note that the defence challenge without cause and the prosecution's right to ask that a selected jury member stand by was only introduced in Hong Kong law in late 1971. Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 39.

47 For the English position on the prosecution's ability to ask a jury member to stand by see *Mason* [1981] QB 881 and *Attorney-General's Guidelines on Exercise by the Crown of its Right of Stand-by* (1989) 88 Cr App R 123.

as level-headed citizens that is representative of the community. Similar to the defence, the prosecution may therefore also challenge for cause any jury member who do not meet the eligibility requirements for serving on a jury in terms of Hong Kong law, or who is suspected of bias, or having an interest in the case or prejudice etc. The test is again, as stated earlier, whether there is a real risk that the accused would not have a fair trial if the said juror is indeed selected to serve on that specific jury. Examples of where a potential juror may present bias or prejudice towards the case or may influence the outcome of the case in such a manner that it can be said that the accused would not have a fair trial are *legio*. One can imagine, for example, that a juror who expresses an opinion as to the outcome of the trial, or who expresses a liking or dislike that is pertinent to the facts of the case, or who has had contact with the accused, a complainant or victim, may be challenged for cause.[48] With regard to the ability of the prosecution to ask that a juror selected by the Registrar from the box of names, be asked to stand by, it can be noted that similar to the defence's ability to challenge a juror without cause (although this is limited to five), the prosecution has a comparable competence by asking a juror to stand by. With the asking for a selected jury member to stand by, the prosecution also do not have to show cause or give any justification to the court and can merely request that the jury member stand by and be empanelled on the jury only if no other selected jury member drawn from the box can be agreed upon by both the defence and the prosecution. Heilbronn suggests that a judge presiding over the case may also ask for a juror selected by the Registrar to stand by, and the defence may also ask a judge for leave to request that a particular juror stand by.[49]

A curious provision is section 30 of the Jury Ordinance (Cap 3), which applies whenever there is an insufficient number of jurors upon the conclusion of the empanelling process, and which allows for the judge to command the bailiff "to collect a number of persons, apparently qualified, from the vicinity of the court and if their names are on the jury roll, they can be immediately sworn in and may serve as jurors".[50]

Section 30 Talesmen

Whenever there is a deficiency of jurors, it shall be lawful for the court, at the prayer of either of the parties in the action or of the prosecutor or person accused, to put upon the jury so many fit and proper persons of the bystanders or others who can be speedily procured as may be sufficient to make up the full number thereof.

48 Heilbronn, Gary N. *Criminal Procedure in Hong Kong* 3rd Edition Hong Kong: Longman Hong Kong Education (2002) p. 249.

49 Ibid, at pp. 250-252.

50 Ibid, at p. 248.

Jury members in Hong Kong are paid an allowance in terms of section 31 of the Jury Ordinance (Cap 3), at a rate determined by the Chief Executive from time to time and published in the Gazette.[51] In addition to an allowance, a jury member can also receive an additional allowance for a case in the Court of First Instance or in the case of an inquest under the Coroners Ordinance (Cap 504).[52] Where a juror, having been duly served with a summons fails to attend, or being present, does not appear when called, or after appearance withdraws himself without the permission of a judge, such a juror shall be guilty of an offence and is liable to a fine unless he or she can show some reasonable cause for the failure to comply with the summons or for not appearing or for withdrawing without permission.[53] In terms of section 32(3), such failure on the part of a juror may also be punishable as "a criminal contempt of court committed in the face of the court".[54]

¶13-240 Miscellaneous Matters Relating to Jury Trials

Two miscellaneous matters relating to jury trials in Hong Kong will briefly be considered, both pertain to the nature of jury trials in Hong Kong. First, the increasing complexity of criminal activity and the prosecution thereof, raises the question whether a lay jury is truly capable of comprehending the evidence and arguments led in a complex trial, and casting an appropriate verdict as to the guilt or innocence of the accused in complex proceedings. So-called *complex* criminal proceedings in this context are not exactly definable, but refer to cases which involve one or more of the following general features:

> "First, there is the existence of a number of defendants with multiple charges against each. The difficulty for the jury in those circumstances is that of remembering who is who and who is accused of what. Another problem concerns the jury's lack of experience in the world of high finance and international trading which represents the backdrop to most commercial fraud cases. The length of such trials was seen as a further feature of complexity. This is thought to be perhaps the most significant cause of juror dissatisfaction and results from the disruption which long jury service causes to the lives of ordinary citizens. Fourth, the jury faces the problem of maintaining an adequate degree of concentration for long periods and, consequently, of understanding the issues…Another factor is the sheer volume of the evidence itself. Much

51 Section 31(1) of the Jury Ordinance (Cap 3).

52 Section 31(2) of the Jury Ordinance (Cap 3).

53 Section 32(1)-(2) of the Jury Ordinance (Cap 3).

54 Section 32(3) of the Jury Ordinance (Cap 3).

of it may be in the form of documents placed before the jury and these may run into thousands of pages and are usually difficult to digest."[55]

This question, as to whether a jury trial is indeed the most appropriate mode of trial for complex cases is a question that has indeed already been raised in English law in 1984, in what became known as "the Roskill Report on Fraud Trials".[56] In this report it was noted that "[t]he increasing sophistication of business aids such as computers and the development of instant communication at an international as well as local level means that fraud investigations and trials are acquiring a new dimension."[57] The Council responsible for this report, however, was not convinced that it could be shown that the average juror was any less capable of understanding and weighing the issues in a case of serious fraud, for example, than in any other serious criminal case.[58] Similar concerns with regard to the trial by jury for complex commercial crimes were also raised in Hong Kong in 1979.[59] These concerns were further exacerbated with a series of criminal proceedings against Carrian Holdings Ltd from 1986 to 1995,[60] and also with the passing of the Complex Commercial Crimes Ordinance (Cap 394) in 1988. Of these concerns Peter Duff and his co-authors noted that "[a]s was the case in England, the expression of concern about the role of the jury in complicated fraud trials was often a symptom of a more general and underlying unease

55 Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) pp. 43-44; For recent examples of complex commercial crime cases in Hong Kong see *HKSAR v Yeung Ka Sing, Carson* [2016] HKCFA 52; (2015) 19 HKCFAR 279; [2016] 5 HKC 166; FACC 5/2015 (11 July 2016); *HKSAR v Tsang Yau May* [2017] HKCA 101; CACC 16/2016 (10 March 2017); *HKSAR v Jariabka Juraj* [2016] HKCA 512; [2017] 2 HKC 207; CACC 321/2014 (27 October 2016); and *HKSAR v Tai Chi Wah and another* [2008] HKCA 78; CACC 497/2006 (22 February 2008).

56 Cooper, Beryl et al. *Fraud Trials* (1984) London: Justice, available online at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/FraudTrials.pdf, at p. 21.

57 Ibid, available online at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/FraudTrials.pdf, at p. 1.

58 Ibid, available online at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/FraudTrials.pdf, at p. 22. Also see *R v Simmonds* (1967) 51 CAR 316.

59 Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) pp. 43 and 44.

60 The Carrian case lasted no less than 280 actual sitting days in court, of which the jury was out of court for 115 days, the judge delivered 53 rulings in the jury's absence, and the Crown called 104 witnesses. The defendants in this case were ultimately acquitted by the jury. Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 45.

about the whole institution of trial by jury and, in particular, a product of doubts about the competence of the jury to perform its task."[61]

Yet, despite the similar concerns raised with regard to the appropriateness of jury trials in complex criminal proceedings, the development of the English law and Hong Kong law took divergent paths. In England and Wales, the Criminal Justice Act (Cap 44) was enacted in 2003 and allows for the prosecution to make an application for certain trials to be conducted without a jury. Section 43 of the Act relates to proceedings where the "complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration be given to the question of whether the trial should be conducted without a jury." And section 44 of the Act relate to proceedings where there is "evidence of a real and present danger that jury tampering would take place…[and] notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury." In Hong Kong, however, the Complex Commercial Crimes Ordinance (Cap 394) did not abolish trial by jury in cases involving complicated commercial crimes. It rather incorporated in the final draft of the Ordinance several measures designed to make such trials less complex and easier for the jury to follow. These measures include the following: "Provision is made for a preparatory hearing before the jury is empanelled, for the purpose of identifying material issues, expediting the proceedings, assisting the jury's comprehension and helping the judge. Thus much greater emphasis is placed on the pre-trial stage."[62]

A further matter with regard to the nature of jury trials in Hong Kong that deserves consideration is the impact that the characteristic collectivist Chinese culture may have in terms of the operation, deliberation, and ultimate verdict of a Hong Kong jury. The common law jury, as it also exists in Hong Kong today, evolved in England and was transplanted to various parts of the world during the English imperial reign.[63] Today, the jury system exists, in various versions and forms, in at least fifty countries the world over.[64] Yet, true to its common law heritage, the jury system is still closely associated with the common law, with an adversarial system of trial, and

61 Duff, Peter et al. *Juries: A Hong Kong Perspective* Hong Kong: University of Hong Kong Press (1992) p. 43.

62 See, for example, section 13 of the Ordinance which allows for the submission of documentary evidence which would otherwise have been inadmissible in the proceedings, but which may serve as explanatory material which can be helpful to aid comprehension by the jury. Duff, Peter et al. *Juries: A Hong Kong Perspective* (1992) Hong Kong: University of Hong Kong Press (1992) pp. 46-47.

63 See Chapter One of the second book in this series on the *Hong Kong Law of Evidence*.

64 Vidmar, Neil *World Jury Systems* Oxford: Oxford University Press (2000) p. 3.

with the notion of public (involvement in) justice. The value of a jury is also still championed in terms of its ability to "inject community values in the formal legal process, [and to] bring a sense of equity and fairness against the cold and mechanistic application of legal rules".[65] It is furthermore generally believed that a jury will, "through robust deliberation (or participation), reach a just and fair conclusion as to the guilt or innocence of an accused; their peer, thereby guarding against the power of the State and the social class or other biases of appointed judges or corrupt officials".[66] However, given the transplanted nature of the jury system the world over, and the general acceptance of late that a close relationship exists between law and culture, each partaking in, reflecting, and refracting the other, the impact of dominate cultural views and practices on the operation, deliberation, and ultimate verdict of a legal relic like that of the jury system in a post-colonial world cannot be ignored. In the discussion that follows, the characteristic collectivist Chinese culture will briefly be outlined for as far as it may be relevant to the operation, deliberation and ultimate verdict cast by a Hong Kong jury.

In 1980, Gerard Hendrik (Geert) Hofstede, a Dutch social psychologist, published one of the most comprehensive studies on national values at that time, and introduced an important dimension of cultural variations by way of his *cultural dimension theory*.[67] Individualism, according to Hofstede, "pertains to societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family."[68] Individuals in individualistic societies therefore, "view themselves as independent of collectives and…give priority to their personal goals over the goals of others."[69] Countries found to be high on the individualistic end of what Hofstede called "the cultural dimension" included most northern and western regions of Europe, as well as North America.[70] Conversely, Hofstede found collectivism as a cultural pattern common in Asia, Africa, the Middle East, Central and South America, as well

65 Ibid, at p. 1.

66 Ibid, at p. 1.

67 Hofstede, G.H. *Culture's Consequences: International Differences in Work Related Values* Beverly Hill: Sage (1980).

68 Hofstede, G.H. *Culture and Organisations: Software of the Mind* London: McGraw Hill (1991) p. 51.

69 Ting-Toomey, Stella and Kurogi, Atsuko 'Facework Competence in Intercultural Conflict: An Updated Face-negotiation Theory' (1998) *International Journal of Intercultural Relations* Vol. 22, No. 2, pp. 187-225, p. 190.

70 Hofstede, G.H. *Culture and Organisations: Software of the Mind* London: McGraw Hill (1991) p. 51.

Ting-Toomey, Stella and Kurogi, Atsuko 'Facework Competence in Intercultural Conflict: An Updated Face-negotiation Theory' (1998) *International Journal of Intercultural Relations* Vol. 22, No. 2, pp. 187-225, p. 190.

as the Pacific.[71] He defined collectivism as the opposite of individualism, pertaining "to societies in which people from birth onwards are integrated into strong, cohesive ingroups, which throughout people's lifetime continue to protect them in exchange for unquestioning loyalty".[72] Collectivism is therefore "a social pattern consisting of closely linked individuals who see themselves as part of one or more collectives (family, co-workers, tribe, nation) and are willing to give priority to the goals of these collectives over their own personal goals."[73] Individualism can be characterised by three critical features: "(a) emphasis on distinct and autonomous individuals, (b) separation from ascribed relationships such as family, community, and religion, and (c) emphasis on abstract principles, rules, and norms that guide the individual's thoughts, feelings, and actions".[74] And for collectivism, in turn, two main types exist: horizontal collectivism generally refers to the team orientation of a group of people working together to the benefit of the group as a whole, and vertical collectivism refers to the tendency of people in a society to obey and be subordinate to laws and authority. This too is a form of collectivism as the collective interests and security of the group or society as a whole are advanced when people conform to societal norms and authority.[75]

71 It is interesting to note, that less than one-third of the world population resides in cultures with high individualistic value tendencies, and more than two-thirds of the world's population live in cultures with high collectivistic value tendencies. Ting-Toomey, Stella and Kurogi, Atsuko 'Facework Competence in Intercultural Conflict: An Updated Face-negotiation Theory' (1998) *International Journal of Intercultural Relations* Vol. 22, No. 2, pp. 187-225, p. 190.

72 Hofstede, G.H. *Culture and Organisations: Software of the Mind* London: McGraw Hill (1991) p. 51.

73 Oetzel, John et al. 'Face and Facework in Conflict: A Cross-cultural Comparison of China, Germany, Japan, and the United States' (3 September 2001) *Communication Monographs* Vol. 68 No. 3, pp. 235-258, p. 239.

74 Kim, Uichol 'Chapter 9 Asian Collectivism: An Indigenous Perspective' in Kao, Hendry S.R. and Sinha, Durganand (eds.) *Asian Perspectives on Psychology* Thousand Oaks, California: Sage Publications (1997) pp.147-163, p. 149.

75 In 1980, Hofstede characterised individualist societies in emphasising "I consciousness, autonomy, emotional independence, individual initiative, right to privacy, pleasure seeking, financial security, need for specific friendship, and universalism". And collectivist societies in emphasising "we consciousness, collective identity, emotional dependence, group solidarity, sharing, duties and obligations, need for stable and predetermined friendship, group decision, and particularism". Kim, Uichol et al. 'Chapter 1 Introduction' in Kim, Uichol *Individualism and Collectivism: Theory, Method and Applications Volume 18* Thousand Oaks, California: Sage Publications (1994) p. 2, referring to Hofstede, G.H. *Culture's Consequences: International Differences in Work Related Values* Beverly Hill: Sage (1980).

Traditional Chinese culture shares characteristics of both horizontal and vertical collectivism. For example, in terms of Confucian teachings, social harmony and collective benefits are particularly important and deference to societal norms, laws and authority, as well as in terms of inter-personal relationships, are essential. *Face* is furthermore a particularly important value in terms of traditional Chinese culture. The Chinese cultural concept of *face* can be described as "the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact".[76] Erving Goffman explains: "A person may be said to *have*, or *be in*, or *maintain* face when the line he effectively takes presents an image of him that is internally consistent, that is supported by judgments and evidence conveyed by other participants, and that is confirmed by evidence conveyed through impersonal agencies in the situation."[77] *A line* in this context refers to patterns of "verbal and nonverbal acts by which [a person] expresses his view of the situation and through this his evaluation of the participants, especially himself. Regardless of whether a person intends to take a line, he will find that he has done so in effect. The other participants will assume that he has more or less wilfully taken a stand, so that if he is to deal with their response to him he must take into consideration the impression they have possibly formed of him."[78] A person's *face*, in this sense, is clearly not something that is lodged in or on their body, "but rather something that is diffusely located in the flow of events in the encounter and becomes manifest only when these events are read and interpreted for the appraisals expressed in them."[79]

76 Goffman, Erving 'On Face-work an Analysis of Ritual Elements in Social Interaction' in Goffman, Erving *Interaction Ritual Essays on Face-to-Face Behaviour* Penguin Books (1967) pp. 5-46, p. 5; John Oetzel et al defines *face* as "an individual's claimed sense of positive image in the context of social interaction". Oetzel, John et al. 'Face and Facework in Conflict: A Cross-cultural Comparison of China, Germany, Japan, and the United States' (3 September 2001) *Communication Monographs* Vol. 68 No. 3, pp. 235-258, p. 235. And Stella Ting-Toomey and Atsuko Kurogi define *face* as "a claimed sense of favourable social self-worth that a person wants others to have of her or him." Ting-Toomey, Stella and Kurogi, Atsuko 'Facework Competence in Intercultural Conflict: An Updated Face-negotiation Theory' (1998) *International Journal of Intercultural Relations* Vol. 22, No. 2, pp. 187-225, p. 187; Ho, Yau-fai David 'On the concept of face' (1976) *American Journal of Sociology* Vol. 81, No. 4, pp. 867-884; Chen, Cher Weixia 'A Critique of "loss of face" Arguments in Cultural Defense Cases: A Comparative Study' in Foblets, Marie-Claire and Renteln, Alison Dundes *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* Portland OR: Hart Publishing (2009) pp. 247-260.

77 Goffman, Erving 'On Face-work an Analysis of Ritual Elements in Social Interaction' in Goffman, Erving *Interaction Ritual Essays on Face-to-Face Behaviour* Penguin Books (1967) pp. 5-46, p. 6-7.

78 Ibid, at p. 5.

79 Ibid, at pp. 6-7.

This synergy between *face* and the taking of *a line* can be explained by way of the following examples:

> "A person may be said to *be in wrong face* when information is brought forth in some way about his social worth which cannot be integrated, even with effort, into the line that is being sustained for him. A person may be said to *be out of face* when he participates in a contact with others without having ready a line of the kind participants in such situations are expected to take. The intent of many pranks is to lead a person into showing a wrong face or no face, but there will also be serious occasions, of course, when he will find himself expressively out of touch with the situation. When a person senses that he is in face, he typically responds with feelings of confidence and assurance. Firm in the line he is taking, he feels that he can hold his head up and openly present himself to others. He feels some security and some relief - as he also can when the others feel he is in wrong face but successfully hide these feelings from him. When a person is in wrong face or out of face, expressive events are being contributed to the encounter which cannot be readily woven into the expressive fabric of the occasion. Should he sense that he is in wrong face or out of face he is likely to feel ashamed and inferior because of what has happened to the activity on his account and because of what may happen to his reputation as a participant. Further, he may feel bad because he had relied upon the encounter to support an image of self to which he has become emotionally attached and which he now finds threatened. Felt lack of judgmental support from the encounter may take him aback, confuse him, and momentarily incapacitate him as an interactant. His manner and bearing may falter, collapse, and crumble. He may become embarrassed and chagrined; he may become shamefaced. The feeling, whether warranted or not, that he is perceived in a flustered state by others, and that he is presenting no usable line, may add further injuries to his feelings, just as his change from being in wrong face or out of face to being shamefaced can add further disorder to the expressive organisation of the situation."[80]

Face, is therefore a quantitative concept which means that a person can possess a certain amount of face and the amount of face a person possess can vary by the acts of that person or those of others. Hsien Chin Hu described *face* as consisting of two criteria; *mien-tzŭ* referring "a reputation achieved through getting on in life, through success and ostentation", and *lien* referring to "the respect of the group for a man with a good moral reputation: the man who will fulfil his obligations regardless of the hardships involved, who under all circumstances shows himself a decent human being. It represents the confidence of society in the integrity of ego's moral character, the loss of which makes it impossible for him to function properly within the community. *Lien* is both a social sanction for enforcing moral standards and

80 Ibid, at pp. 8-9.

of the Peace Act 1968,[610] and under section 115 of the Magistrates' Courts Act 1980. The direction also gives guidance concerning the court's power to bind over parents or guardians under section 150 of the Powers of Criminal Courts (Sentencing) Act 2000[611] and the Crown Court's power to bind over to come up for judgment. The court's power to impose a conditional discharge under section 12 of the Power of Criminal Courts (Sentencing) Act 2000 is also covered by the direction.[612]

610 Section 1(7) of the Justices of the Peace Act 1968 provides as follows: "It is hereby declared that any court of record having a criminal jurisdiction has, as ancillary to that jurisdiction, the power to bind over to keep the peace, and power to bind over to be of good behaviour, a person who or whose case is before the court, by requiring him to enter into his own recognisances or to find sureties or both, and committing him to prison if he does not comply…"

611 Section 150 of the Powers of Criminal Courts (Sentencing) Act 2000 provides as follows: "(1) Where a child or young person (that is to say, any person aged under 18) is convicted of an offence, the powers conferred by this section shall be exercisable by the court by which he is sentenced for that offence, and where the offender is aged under 16 when sentenced it shall be the duty of that court – (a) to exercise those powers if it is satisfied, having regard to the circumstances of the case, that their exercise would be desirable in the interests of preventing the commission by him of further offences; and (b) if it does not exercise them, to state in open court that it is not satisfied as mentioned in paragraph (a) above and why it is not so satisfied; […] (2) The powers conferred by this section are as follows – (a) with the consent of the offender's parent or guardian, to order the parent or guardian to enter into a recognisance to take proper care of him and exercise proper control over him; and (b) if the parent or guardian refuses to consent and the court considers the refusal unreasonable, to order the parent or guardian to pay a fine not exceeding £1,000; and where the court has passed a community sentence on the offender, it may include in the recognisance a provision that the offender's parent or guardian ensure that the offender complies with the requirement of that sentence. (3) An order under this section shall not require the parent or guardian to enter into a recognisance for an amount exceeding £1,000. (4) An order under this section shall not require the parent or guardian to enter into a recognisance – (a) for a period exceeding three years; or (b) where the offender will attain the age of 18 in a period shorter than three years, for a period exceeding that shorter period. […] (8) A parent or guardian may appeal to the Crown Court against an order under this section made by a magistrates' court. (9) A parent or guardian may appeal to the Court of Appeal against an order under this section made by the Crown Court, as if he had been convicted on indictment and the order were a sentence passed on his conviction. […]." Also see the Criminal Practice Directions VII: Sentencing, available online at http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015.

612 Also see section 1(6)(a) of the Powers of Criminal Courts (Sentencing Act 2000) which empowers a court to bind over an offender to come up for judgment when called upon where that court has decided to defer passing sentence on that offender in terms of the requirements of this provision.

The complete direction is included below:

Criminal Practice Direction [2015] EWCA Crim 1567

CPD VII Sentencing J: Binding over orders and conditional discharges

J.1 This direction takes into account the judgments of the European Court of Human Rights in *Steel v United Kingdom* (1999) 28 EHRR 603, [1998] Crim L.R. 893 and in *Hashman* and *Harrup v United Kingdom* (2000) 30 EHRR 241, [2000] Crim L.R. 185. Its purpose is to give practical guidance, in the light of those two judgments, on the practice of imposing binding over orders. The direction applies to orders made under the court's common law powers, under the Justices of the Peace Act 1361, under section 1(7) of the Justices of the Peace Act 1968 and under section 114 of the Magistrates' Courts Act 1980. This direction also gives guidance concerning the court's power to bind over parents or guardians under section 150 of the Powers of Criminal Courts (Sentencing) Act 2000 and the Crown Court's power to bind over to come up for judgment. The court's power to impose a conditional discharge under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 is also covered by this direction.

Binding over to keep the peace

J.2 Before imposing a binding over order, the court must be satisfied so that it is sure that a breach of the peace involving violence, or an imminent threat of violence, has occurred or that there is a real risk of violence in the future. Such violence may be perpetrated by the individual who will be subject to the order or by a third party as a natural consequence of the individual's conduct.

J.3 In light of the judgment in *Hashman*, courts should no longer bind an individual over 'to be of good behaviour'. Rather than binding an individual over to 'keep the peace' in general terms, the court should identify the specific conduct or activity from which the individual must refrain.

Written order

J.4 When making an order binding an individual over to refrain from specified types of conduct or activities, the details of that conduct or those activities should be specified by the court in a written order, served on all relevant parties. The court should state its reasons for the making of the order, its length and the amount of the recognisance. The length of the order should be proportionate to the harm sought to be avoided and should not generally exceed 12 months.

Evidence

J.5 Sections 51 to 57 of the Magistrates' Courts Act 1980 set out the jurisdiction of the magistrates' court to hear an application made on complaint and the procedure which is to be followed. This includes a requirement under section 53 to hear evidence and the parties, before making any order. This practice should be applied to all cases in the magistrates' court and the Crown Court where the court is considering imposing a binding over order. The court should give the individual who would be subject to the order and the prosecutor the opportunity to make representations, both as to the making of the order and as to its terms. The court should also hear any admissible evidence the parties wish to call and which has not already been heard in the proceedings. Particularly careful consideration may be required where the individual who would be subject to the order is a witness in the proceedings.

J.6 Where there is an admission which is sufficient to find the making of a binding over order and/or the individual consents to the making of the order, the court should nevertheless hear sufficient representations and, if appropriate, evidence to satisfy itself that an order is appropriate in all the circumstances and to be clear about the terms of the order.

J.7 Where there is an allegation of breach of a binding over order and this is contested, the court should hear representations and evidence, including oral evidence, from the parties before making a finding. If unrepresented and no opportunity has been given previously the court should give a reasonable period for the person said to have breached the binding over order to find representation.

Burden and standard of proof

J.8 The court should be satisfied so that it is sure of the matters complained of before a binding over order may be imposed. Where the procedure has been commenced on complaint, the burden of proof rests on the complainant. In all other circumstances, the burden of proof rests upon the prosecution.

J.9 Where there is an allegation of breach of a binding over order, the court should be satisfied on the balance of probabilities that the defendant is in breach before making any order for forfeiture of a recognisance. The burden of proof shall rest on the prosecution.

Recognisance

J.10 The court must be satisfied on the merits of the case that an order for binding over is appropriate and should announce that decision before considering the amount of the recognisance. If unrepresented, the individual who is made subject to the binding over order should be told he has a right of appeal from the decision.

J.11 When fixing the amount of recognisance, courts should have regard to the individual's financial resources and should hear representations from the individual or his legal representatives regarding finances.

J.12 A recognisance is made in the form of a bond giving rise to a civil debt on breach of the order.

Refusal to enter into a recognisance

J.13 If there is any possibility that an individual will refuse to enter a recognisance, the court should consider whether there are any appropriate alternatives to a binding over order (for example, continuing with a prosecution). Where there are no appropriate alternatives and the individual continues to refuse to enter into the recognisance, the court may commit the individual to custody. In the magistrates' court, the power to do so will derive from section 1(7) of the Justices of the Peace Act 1968 or, more rarely, from section 115(3) of the Magistrates' Courts Act 1980 and the court should state which power it is acting under; in the Crown Court, this is a common law power.

J.14 Before the court exercises a power to commit the individual to custody, the individual should be given the opportunity to see a duty solicitor or another legal representative and be represented in the proceedings if the individual so wishes. Public funding should generally be granted to cover representation. In the Crown Court this rests with the Judge who may grant a Representation Order.

J.15 In the event that the individual does not take the opportunity to seek legal advice, the court shall give the individual a final opportunity to comply with the request and shall explain the consequences of a failure to do so.

Antecedents

J.16 Courts are reminded of the provision of section 7(5) of the Rehabilitation of Offenders Act 1974 which excludes form a person's antecedents any order of the court 'with respect to any person otherwise than on a conviction'.

Binding over to come up for judgment

J.17 If the Crown Court is considering binding over an individual to come up for judgment, the court should specify any conditions with which the individual is to comply in the meantime and not specify that the individual is to be of good behaviour.

J. 18 The Crown Court should, if the individual is unrepresented, explain the consequences of a breach of the binding over order in these circumstances.

Binding over of parent or guardian

J.19 Where a court is considering binding over a parent or guardian under section 150 of the Powers of Criminal Courts (Sentencing) Act 2000 to enter into a recognisance to take proper care of and exercise proper control over a child or young person, the court should specify the actions which the parent or guardian is to take.

Security for good behaviour

J.20 Where a court is imposing a conditional discharge under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000, it has the power, under section 12(6) to make an order that a person who consents to do so give security for the good behaviour of the offender. When making such an order, the court should specify the type of conduct from which the offender is to refrain.

Current Application of Bind Over Orders in Hong Kong

The bind over order, as described in section 1(7) of the Justices of the Peace Act 1968 Chapter 69 of England and Wales, also applied in Hong Kong whilst Hong Kong was under British colonial rule. And unfortunately, despite the rich body of case law existing on the nature and scope of the bind over order, the Hong Kong Court of Appeal misdirected itself in the first reported Hong Kong decision on this topic. In *Queen v Lam Yat Suen* [1992] HKCFI 224; HCMA 1173/1991 (28 January 1992), Judge Kempster of the Hong Kong Court of Appeal allowed an appeal against a bind over order and discharged the appellant from the order, finding that the magistrate had no power to bind the appellant over in the absence of his consent, which the appellant had declined to give. The appellant in this case was acquitted of two charges; one of obstructing and the other of assaulting a police officer in the execution of his duty and the magistrate, having carefully analysed the evidence, nonetheless thought it appropriate to bind the appellant over in the sum of HK$750 for a period of twelve months pursuant to the Justices of the Peace Act 1361 and the common law.[613] Quoting passages from *Veater v Glennon* [1981] 1 WLR 567 Judge Kempster erroneously agreed that in the absence of the appellant's consent, the trial court had no power to bind him over. This, as was evident from the exposition of case law above, is incorrect as the appellant in this case was charged with two offences and was acquitted thereof. Thus, in terms of the ratio in *R v Lincoln Crown Court, ex parte Jude* [1998] 1 WLR 24, the trial court was allowed to bind over the appellant if the evidence reasonably made the court fear that, without recognisance, there might be a breach of the peace. And this may be done without specifically asking for the appellant's consent where that appellant was an acquitted defendant before the court, who had come to the court knowing and having

613 *Queen v Lam Yat Suen* [1992] HKCFI 224; HCMA 1173/1991 (28 January 1992) at para [1].

prepared to meet the nature of the case against him.[614] Likewise, in *R v Chan Tak Shing* [1996] HKCFI 194; HCMA 763/1996 (16 August 1996) the Supreme Court of Hong Kong rightly stated that a bind over order should not be handed down in conjunction with a fine, but again made the erroneous conclusion that, in this instance a convicted offender, cannot be bound over without his consent.[615]

Today, section 109I of the Criminal Procedure Ordinance (Cap 221), empowers a magistrate or a judge to bind over a person who or whose case was before the court, and irrespective of whether that person had been convicted or acquitted of the offence charged. Note must be taken, however, that where a court proposes to bind over an acquitted person, the court must give that person fair notice of its intention to make a bind over order and must then also afford the person an opportunity to make representations in this regard.[616] To ensure that the person upon whom a bind over order has been ordered will comply therewith, that person will usually be required to enter into his or her own recognisance or be asked to find sureties or both, and for the duration of the recognisance that person will have to keep the peace or be of good behaviour, as the case may be.[617] Failure to enter into a recognisance may result in contempt of court proceedings and in fixing the amount of the recognisance the sentencing court will have regard to the financial means of the person to be bound over. The duration of such a bind over order is usually one year and it may not exceed a period of more than three years.[618]

Section 109I Power to bind over to keep the peace

A judge, a District Judge or a magistrate shall have, as ancillary to his jurisdiction, the power to bind over to keep the peace, and power to bind over to be of good behaviour, a person who or whose case is before the court, by requiring him to enter into his own recognisances or to find sureties or both, and committing him to prison if he does not comply.

The previous misnomer by Hong Kong courts in *R v Lam Yat Suen* [1992] 1 HKCLR 175 and *R v Chan Tak Shing* [1996] HKCFI 194; HCMA 763/1996 (16 August 1996) was subsequently rectified by the Hong Kong Court of First Instance in *HKSAR v Lau Wai Wo* [2003] 2 HKC 195. The appellant in *HKSAR*

614 *R v Lincoln Crown Court, ex parte Jude* [1998] 1 WLR 24 at 26-27.

615 *R v Chan Tak Shing* [1996] HKCFI 194; HCMA 763/1996 (16 August 1996) at para [14].

616 Young, Simon 'Sentencing', in Chui, Wing Hong and Lo, Wing T (eds.) *Understanding Criminal Justice in Hong Kong* Oxford: Routledge (2008) p. 171.

617 Young, Simon 'Sentencing', in Chui, Wing Hong and Lo, Wing T (eds.) *Understanding Criminal Justice in Hong Kong* Oxford: Routledge (2017) p. 273.

618 Ibid, at p. 273.

v Lau Wai Wo [2003] 2 HKC 195 was charged with common assault and was acquitted by the magistrate at the end of the trial, but given the nature of the evidence led, the magistrate nonetheless found it necessary to bind over the appellant in the sum of HK$1,000 to keep the peace for a period of one year. The magistrate stated that "in view of the history behind the incident, she feared that sooner or later the appellant might cause some trouble which would have the effect of disturbing the peace."[619] The appellant appealed against this bind over order on the grounds that there was no sufficient factual foundation to justify the magistrate in ordering the bind over, and that she (the appellant) had not consented thereto.[620]

Judge Nguyen for the Hong Kong Court of First Instance stated that the power of a judge or a magistrate in Hong Kong "to make an order binding over a defendant to keep the peace is derived from the Justices of the Peace Act 1361 and is now exercised in accordance with section 109I of the Criminal Procedure Ordinance (Cap 221), which is in very similar terms to the wording of section 1(7) of the UK Justices of the Peace Act 1968."[621] In citing relevant case law on the legal-historical development of the bind over order in England and Wales, the Hong Kong Court of First Instance confirmed that a person can be bound over in the absence of his consent, under circumstances as was set out in the ratio in *R v Lincoln Crown Court, ex parte Jude* [1998] 1 WLR 24, where it was stated that a person can be bound over if the evidence reasonably makes the court fear that, without recognisance, there might be a breach of the peace. And this may be done without specifically asking for that person's consent where the person to be bound over was an acquitted or convicted defendant before the court, who had come to the court knowing and having prepared to meet the nature of the case against him.[622]

The appellant in *HKSAR v Lau Wai Wo* [2003] 2 HKC 195 subsequently appealed to the Hong Kong Court of Final Appeal on the following certified point of law: "Whether a person before the court can be bound over without his consent."[623] Lord Scott of Foscote for the Hong Kong Court of Final Appeal, in delineating the practice of bind over orders in Hong Kong law, reaffirmed much of the dicta and legal development of this peculiar tool – the bind over order - in a court's armoury of preventive justice, but also, unfortunately, made some inferences and assumptions that may not be instrumental in how bound over orders are effected in Hong Kong, but that are nonetheless incorrect from a legal-historical perspective. Lord Scott of Foscote for the Hong Kong Court of Final Appeal stated that in respect of every challenge to a bind over, there will always be two broad questions:

619 *HKSAR v Lau Wai Wo* [2003] 2 HKC 195 at 83, para [1].

620 Ibid, at para [1].

621 Ibid, at para [2].

622 Ibid, at paras [9]-[10].

623 *Lau Wai Wo v HKSAR* [2003] HKCFA 13; [2004] 1 HKLRD 372; (2003) 6 HKCFAR 624; FACC 5/2003 (19 December 2003) at para [13].

"[F]irst, did the court have power in the particular circumstances of the case to order the bind over, and, secondly, was the procedure adopted by the court fair to the individual who was bound over?"[624] He also held that both these two questions must be answered in the affirmative for the bind over order "to stand".[625]

Lord Scott of Foscote then confirmed that the present section 109I of the Criminal Procedure Ordinance (Cap 221) is derived from section 1(7) of the Justices of Peace Act 1968. And the court also noted section 61 of the Magistrates Ordinance (Cap 227) which provides as follows:

> **61 Exercise on complaint of power to bind over to keep the peace**
>
> **Recognisances etc.**
>
> (1) The power of a magistrate, on complaint of any person, to adjudge a person to enter into a recognisance and find sureties to keep the peace or to be of good behaviour towards such first-mentioned person shall be exercised by an order upon complaint, and the provisions of this Ordinance shall apply accordingly, and the complaint and defendant and witnesses may be called and examined and cross-examined, and the complainant and defendant shall be subject to costs, as in the case of any other complaint.
>
> (2) The magistrate may order the defendant, in default of compliance with such last-mentioned order, to be imprisoned for six months.

This provision deals specifically and exclusively with the requiring of recognisances by a magistrate and on complaint of a person. In other words, while it may be relevant to the more general power to bind over which originally derives from the English Justices of Peace Act 1361, specifically where a recognisance is required, it actually deals more generally with situations where a complaint has been made before a magistrate by another person, and the magistrate finds it necessary to bind over a person appearing before the court based on the complaint received and in order to keep the peace. It is furthermore important to note that section 61 of the Hong Kong Magistrates Ordinance (Cap 227) does not derive from the English Justices of the Peace Act 1968 on which section 109I of the Criminal Procedure Ordinance (Cap 221) is based, but rather derives from section 25 of the English Summary Jurisdiction Act 1879; a provision which was considered in the preceding parts of this Chapter.[626] Suffice it here to refer to *Veater v Glennon* [1981] 1 WLR 567 where it was held that "[s]ection 91 was intended to deal with 'inter-party' disputes, whereas orders under the Act of 1361 and

624 Ibid, at para [16].

625 Ibid, at para [16].

626 Also see *Everett v Ribbands and another* [1952] 2 Q.B. 148 and *Veater v Glennon* [1981] 1 WLR 567.

Commission were much wider in scope, involving as they did an eventual recognisance towards 'the King and his people'".[627] Thus, section 61 of the Hong Kong Magistrates Ordinance (Cap 227) is based on section 91 of the Magistrates' Courts Act 1952, and was originally intended to deal with civil cases and not criminal cases per se.

With no reference or regard to this legal-historical background on section 61 of the Hong Kong Magistrates Ordinance (Cap 227), Lord Scott of Foscote for the Hong Kong Court of Final Appeal nonetheless rightly held that it was not a power conferring provision, it merely regulated the exercise by magistrates of a power which they already have.[628] And, where a magistrate out of his or her own accord proposes to make a bind over order in the absence of any other person having raised a complaint, section 61 Hong Kong Magistrates Ordinance (Cap 227) "should be regarded as constituting statutory guidance to the magistrate as to the manner in which he should exercise his power."[629] This, it was held, also applies to sections 62 and 63 of the Hong Kong Magistrates Ordinance (Cap 227).[630] With regard to the certified question of law on which the court had to pronounce, the finding of the Hong Kong Court of Appeal was confirmed with regard to the issue of consent and bind over orders: a bind over order can most definitely be made without the person concerned consenting thereto, but *consent* in the context of bind over orders certainly requires of that person being bound over to be adequately informed of the intention of the court to have him or her bound over, and that person must also be afforded adequate opportunity to address the court in this regard.[631]

Unfortunately, this is where the judgment goes adrift. Lord Scott of Foscote writing for the Hong Kong Court of Final Appeal, then proceeded to conflate bind over orders and absolute and conditional discharge which were discussed in preceding part of this Chapter. Lord Scott of Foscote said:

> "The other statutory provisions regarding bind overs to which reference should be made are section 36 of the Magistrates Ordinance (Cap 227) and section 107 of the Criminal Procedure Ordinance (Cap 221). These sections apply where a defendant has been convicted…These statutory provisions should, in our opinion, be regarded as providing analogous statutory guidance as to the exercise of the bind over power in cases where there has not been a conviction of the person bound over. If in these cases a magistrate is exercising the power the HK$2,000 limit should be regarded as applicable. In none of these cases should the three year bind over period be exceeded."[632]

627 *Veater v Glennon* [1981] 1 WLR 567 at 569.

628 *Lau Wai Wo v HKSAR* [2003] HKCFA 13; [2004] 1 HKLRD 372; (2003) 6 HKCFAR 624; FACC 5/2003 (19 December 2003) at para [21].

629 Ibid, at para [21].

630 Ibid, at para [22].

631 Ibid, at para [33].

As it was already indicated in the preceding part of this chapter, section 36 of the Magistrates Ordinance (Cap 227) and section 107 of the Criminal Procedure Ordinance (Cap 221) do not derive from the original English Justices of Peace Act 1361 but rather from the erstwhile English Probation of Offenders Act 1907 Chapter 17. The rational and objective of absolute and conditional discharge orders are therefore wholly different from that of bind over orders as described above. For example, the aim of a bind over order is to ensure that the person so bounded over, irrespective of whether that person has been charged, acquitted, or convicted of any offence, do not breach the peace or commit a misdemeanour or any other offence. And the aim of an absolute discharge or conditional discharge is to offer a convicted offender a reprieve, including that the offender not receive any criminal record and be released without or under certain conditions. The conditions in the context of a conditional discharge or release, furthermore have probative goals and is not necessarily exclusively aimed at ensuring that the offender do not breach the peace of commit some misdemeanour or other offence.

Lord Scott of Foscote writing for the Hong Kong Court of Final Appeal, also muddied the waters somewhat with regard to recognisances in the context of bind over orders, and in doing so, wrongly accused Judge Auld in *R v Lincoln Crown Court, ex parte Jude* [1998] 1 WLR 24 of having "muddied the waters".[633] Without fully having considered the legal development of the various instances where recognisances may be required and which have already been alluded to above, and without having regard to the important dicta in *Willes v Bridger* 106 E.R. 368 (1819), *Reg v Justices of Cork* (1882) 15 Cox C.C. 78 and *Everett v Ribbands and another* [1952] 2 Q.B. 198, the judges of the Hong Kong Court of Appeal failed to fully analyse how and when a failure to enter into a recognisance or to produce the requisite sureties may result in the imprisonment of the person so being bound over. For the Hong Kong Court of Final Appeal it was as simple as to state that where a person bounded over and of whom it is required to enter into a recognisance or to provide sureties fail to do so, the court will be justified to impose a sanction of committal to prison if he does not comply.[634] The Hong Kong Court of Final Appeal even went as far as describing such action upon the part of the person being bound over as "in contempt of court".[635] As was evident from the legal-historical exposition above, a clear distinction has always been made in this regard between a person bounded over for having had a mere apprehension or intention to breach the peace or to commit a misdemeanour or some other offence, and a person, of which the facts reasonably show, had indeed already committed that act. In addition, it was

632 Ibid, at paras [23]-[24].

633 Ibid, at para [32].

634 Ibid, at para [33.2].

635 Ibid, at para [33.4].

later also recognised that any person before the court - witnesses, victims and complainants – may be bounded over and that for these persons, it will be especially necessary for the court to ensure that they are informed of the court's intention to have them bound over and that they are afforded the opportunity to address the court in this regard. Then, a recognisance and/or sureties may also be required in the context of a convicted offender who is receiving some reprieve in terms of punishment by way of an absolute or conditional discharge. These varying circumstances under which a bind over order may be imposed also entail varying requirements as to the extent to which the person to be bound over must be informed and invited to respond to the intended order being made. In addition, committal to prison for failure to enter into a recognisance or to produce sureties is essentially not a lawful consequence in those instances where the person bound over had previously merely showed an intention or apprehension to breach the peace or to commit a misdemeanour or some other offence. Such persons have, in effect, not committed any offence and sending such persons to prison for mere failure to find sureties or to enter into a recognisance can, in terms of the general safeguards of the rule of law and due process, hardly be justified. Lord Denning in *Everett v Ribbands and another* [1952] 2 Q.B. 198 had therefore made it clear that such imprisonment must be founded on something actually done by the person being bounded over. Lord Denning explained:

> "It would be contrary to all principle for a man to be punished, not for what he has already done but for what he may hereafter do. Hence there must be something actually done by him, such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law. It is this conduct which is the subject of the complaint and which must be proved before an order for sureties can be made."[636]

In other words, and as was stated above, a court cannot commit to prison a person who had been bound over and is in default of finding or presenting the requisite sureties where that person had not been found guilty of an offence and had not actually committed that offence but merely manifested an intention to break the peace or commit some form of violence and had for that reason been bound over. Committing a person to prison for failing to provide the requisite sureties in terms of a bind over order is only possible where that person so bound over had indeed acted out the intention to break the peace or commit some form of violence.

Finally, Lord Scott of Foscote in *Lau Wai Wo v HKSAR* [2003] HKCFA 13; [2004] 1 HKLRD 372; (2003) 6 HKCFAR 624; FACC 5/2003 (19 December 2003), stated as follows with regard to whether a bind over order to keep the peace or to be of good behaviour meets the yardstick of legal certainty in terms of the Hong Kong Bill of Rights Ordinance (Cap 383) and the

636 *Everett v Ribbands and another* [1952] 2 Q.B. 198 at 204-206.

incorporated articles of the International Covenant on Civil and Political Rights:

> "The principle of legal certainty requires that a law must be sufficiently precise to enable a citizen to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail. [Thus] [a] court order, breach of which may lead to either pecuniary or loss of liberty consequences or to both, must, for the same reasons, have the same quality of precision. A bind over order requiring the object of the order to 'keep the peace' or to 'be of good behaviour', without any additional description of what it is that the individual must refrain from doing in order to avoid being in breach raises obvious questions about legal certainty."[637]

In this regard, the historical context of bind over orders is again important. As was evident from the discussion above, the bind over order came into being at a time when justices of peace were assigned the duty of keeping the peace. Of this, Lord Scott of Foscote rightly stated that times have changed; whilst the original bind over order served an executive function as a form of preventative justice, such maintenance of public order and the prevention of breaches of peace are now the responsibility of the executive and the police.[638] The power of the judiciary to make bind over orders against persons who have been acquitted or against witnesses or other litigants is therefore anomalous with its contemporary role and normal judicial function.[639] The Court was careful with this acknowledgement, however, not to place into question the continued value of bind over orders in Hong Kong law, "but [rather] to emphasise the importance that exercises of that power should comply with current standards of legal certainty and natural justice and that tradition, no matter how longstanding, and convenience cannot justify practices that fall short of those standards."[640] Some limit must therefore be placed on the conduct that, in the twenty-first century, could be held to justify the imposition of a bind over order, and that bind over order must be expressed in terms that make it clear what the person so bound over is prohibited from doing.[641]

As to what conduct would justify a bind over order, Lord Scott of Foscote for the Hong Kong Court of Final Appeal relied on the decision in *Steel and others v United Kingdom* App No 24838/94 decided on 23 September 1998, a case in which bind over orders were made subsequent to arrests for breach of peace. While the consideration of what would constitute a breach of peace in the context of the common law arrest for breach of peace was therefore

637 *Lau Wai Wo v HKSAR* [2003] HKCFA 13; [2004] 1 HKLRD 372; (2003) 6 HKCFAR 624; FACC 5/2003 (19 December 2003) at para [36].

638 Ibid, at para [37].

639 Ibid, at para [38].

640 Ibid, at para [40].

641 Ibid, at para [46].