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CRIMINAL LAW IN HONG KONG

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Preface

The criminal law of the Hong Kong Special Administrative Region is founded on the same general principles that underlie English criminal law and the criminal law of other Anglo-based legal jurisdictions. Until recently, students and teachers alike of Hong Kong criminal law had easy recourse to established English textbooks for most of their needs. To a considerable extent, this still holds true, but increasingly it is the differences between Hong Kong and English law, and the distinctive features of Hong Kong criminal law that engage the attention of teachers and students and necessitate caution on the part of practitioners. This is all the more so, it could be added, since 1 July 1997, when Hong Kong formally dissolved its constitutional links with the United Kingdom and reconstituted itself as a Special Administrative Region under the sovereignty of the People's Republic of China. With the traditional reliance on English criminal law now less easily maintained, the challenge for Hong Kong's criminal lawyers and the judiciary of the SAR is to both reinforce fundamental principles of the criminal law and also fashion new law to meet the changing needs of Hong Kong's criminal justice system.

This book is intended as a step in that direction. It is a response to increasingly frequent suggestions, entreaties even, by numerous students in recent years for a textbook on Hong Kong criminal law. It has been written primarily with these students in mind, and follows the traditional format and approach of an undergraduate criminal law textbook. It involves first the exposition of the general principles of criminal liability, and then

This operates firstly at the level of the individual offender. Exponents of deterrence assert that the experience of punishment will prevent the individual from re-offending (known as 'recidivism'), provided that the punishment imposed on the wrongdoer is carefully chosen to have this desired effect. In some cases, this might even mean that no punishment is imposed, if the mere fact of accusation can be shown to have the required effect. This assumes that a wrongdoer can be effectively deterred from future offending by the imposition of punishment for his or her past transgressions, but this assumption has not held up under investigation. Studies done in overseas jurisdictions suggest the opposite may in fact be true: someone who has once offended and been punished may actually be less likely to be deterred in the future merely by the threat of further punishment. Furthermore, the deterrent effect of further punishment may well be seriously weakened in the case of multiple offenders. In other words, the deterrent effect of punishment has its most powerful hold on the minds of those who have not yet offended; those who have already offended are much less likely to be deterred. If so, then punishment cannot be justified on the basis that it will deter the offender in the future.

Deterrence theory thus shifts from an emphasis on the individual to an emphasis on the supposed effect of punishment on society in general. Punishment, it is asserted, deters members of society from offending in the first place; and this then becomes the justification for punishing individual offenders, even though punishment may thereby lose its deterrent effect for that individual. The individual offender suffers punishment as a means of reinforcing this general deterrent effect.

This view of deterrence theory is graphically illustrated by cases in which the offender is sentenced more heavily than that which either his or her personal circumstances or the normal tariff would dictate, in response to a perceived rise in the occurrence of that particular form of deviant behaviour.

General deterrence theory also has its critics. In simple terms, critics query the underlying assumption of deterrence theory, that the possibility of punishment in itself is enough to deter members of society from deviant behaviour. If this were so, it is said, why then do non-offenders commit offences in the first place? The very fact that they do, critics contend, illustrates the vulnerability of this assumption.

Critics also argue that the deterrent effect of punishment arises not simply from the possibility of punishment, but rather from a potential offender's belief that there is a high risk of detection leading inevitably to punishment. Where the likelihood of detection is perceived to be low, as is often the case, the deterrent effect of punishment is significantly reduced, no matter how heavy the punishment imposed on the unfortunate few who are detected and convicted may ultimately prove to be.

A further criticism of deterrence theory is that it assumes unduly rational offenders, presupposing both the ability to weigh up the relative merits and demerits of different prospective forms of behaviour and the actual use of this judgment. Reality, critics suggest, may be very different.

A third aspect of deterrence theory asserts that punishment is justified because it reinforces the 'habit' of compliance with the criminal law that is inculcated in most of us from an early age and which operates at a subconscious level to deter us from criminal behaviour. A failure to punish, it is asserted, would lead to a breakdown in these unconscious inhibitions on our behaviour.[25]

Incapacitation

Incapacitation is of limited scope as a justification for punishment. It operates primarily in relation to offenders who are both dangerous and likely to re-offend, and asserts that the imposition of an extended period of detention is justified, even though it may be longer than the maximum period which could normally be justified. It applies, for example, to persons who are mentally disordered, and to certain classes of sexual offender (especially those who suffer irresistible impulses to commit sexual offences against the young or weak). Incapacitation theory asserts that although this type of offender may be neither deterred nor rehabilitated by their experience of punishment, their prolonged detention is nonetheless justified at a purely practical level — locking them up limits the threat of further harm by the offender.

An example of this in Hong Kong law is the so-called 'hospital order' that may be (in some instances, must be) imposed upon persons found 'not guilty by reason of insanity'.[26] This orders the 'offender' to be admitted to the Correctional Services Department Psychiatric Centre or a mental

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25 See, for example, Hyman Gross, *A Theory of Criminal Law* (1979), pp. 400–1: 'There is a third version of deterrence … According to this theory, punishment for violating the rules of conduct laid down by the law is necessary if the law is to remain a sufficiently strong influence to keep the community on the whole law-abiding and so to make possible a peaceable society.'

26 See sections 74 and 76(1) of the Criminal Procedure Ordinance (cap. 221).

hospital where he or she may be detained for an indeterminate period for treatment.[27]

Incapacitation theory thus elevates the need to protect the public from future harm to a justification for extended detention, instead of being merely one of the purposes served by punishment.

Rehabilitation

According to rehabilitation theory, the purpose and principal object of punishment is the rehabilitation, or re-education, of offenders so that they can fit back into society more easily and pursue a more useful and productive lifestyle than that which previously led to their offending. Since this is thought to be a worthwhile and desirable objective, its achievement through punishment is thereby said to be justified.[28]

Rehabilitation theory gained prominence in England and elsewhere in the eighteenth and nineteenth centuries as an integral aspect of the developing humanitarian movement's programme of prison reform. One of the principal advocates for humanitarian prison reform, Bentham, believed, for example, that by undergoing a period of punishment, offenders would see the error of their ways and reform themselves into better persons. This particular view of rehabilitation theory (that punishment would encourage inner rehabilitation) was later superseded by the view that the purpose of punishment is to afford the state an opportunity to re-educate offenders and provide them with a selection of vocational and social skills which they can use to function more effectively and productively in the future.

This second view of rehabilitation theory gained considerable support during the twentieth century and led to experimentation both overseas and in Hong Kong with various types of rehabilitative programmes, especially during the 1960s and 1970s. It finds expression, for example, in Hong Kong's criminal and penal legislation. Article 6(3) of Hong Kong's Bill of Rights, for example, which deals with the rights of prisoners, provides that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'

27 Subject however to section 45 of the Mental Health Ordinance (cap. 136), which stipulates that the period of detention 'shall not be greater than the sentence which the court or magistrate could have imposed in respect of the offence with which such person was charged.' Discussed further below, pp. 235–6.

28 This differs from expiation since it looks to the future welfare of the offender, not his or her past misdeeds, as expiation does.

Similarly, several of the special sentences that can be imposed on young offenders — including reform school[29] and training centre[30] — were expressly enacted with rehabilitative or reformative objectives in mind.

Despite its humanitarian appeal, rehabilitation theory has often been criticized. Critics have pointed to studies casting doubt on the supposed effectiveness and value of custodial vocational and training programmes. Such programmes, they have pointed out, operate within an environment which has many negative influences operating on prisoners, and these influences, it is suggested, may do more harm than any good that can be done by rehabilitative programmes. Critics have also queried the assumption made by rehabilitation exponents that the state is entitled to try and reform an offender. They have also pointed to the conflict that exists between the rehabilitative ideal and general perceptions of what is a 'just' punishment. If, as rehabilitation theory asserts, reform is truly the purpose of and justification for punishment, then, according to critics, this would justify an extended period of 'reform' (i.e. punishment) as a means of achieving this objective, even though this might exceed any period which could be considered 'just' having regard to what the offender actually did.

29 See Reformatory School Ordinance (cap. 225).

30 See Training Centres Ordinance (cap. 280).

of the course of justice, and contempt of court), and offences against the security of the state (mainly treason and official secrets). Like most modern legal systems, Hong Kong's criminal law also includes a large number of regulatory offences dealing with almost every field of human activity and endeavour, from road traffic to liquor licensing to pollution control.

SOURCES OF HONG KONG'S CRIMINAL LAW

Since 1 July 1997, the root source of all law in Hong Kong, including the criminal law, is the Basic Law of the Hong Kong SAR enacted by the National People's Congress (i.e. legislature) of the People's Republic of China (PRC) (see generally Yash Ghai, *Hong Kong's New Constitutional Order*, Chapter 8, Hong Kong: Hong Kong University Press, second edition, 2001). Article 18 states that the laws of Hong Kong include 'the laws previously in force as provided for in Article 8'. Article 8 provides:

> The laws previously [i.e. as at 30 June 1997] in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this [Basic] Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

In accordance with Articles 18 and 8, Hong Kong's criminal law continues to have two principal sources, the 'common law' and legislation (i.e. ordinances and subordinate legislation). It differs in this respect from those legal jurisdictions, such as that of the PRC itself, which have attempted to enact a comprehensive criminal code (i.e. a single piece of legislation), and are usually described as having a 'civil law' legal system.

Common Law[2]

'Common law' here refers to law made by judges, i.e. the body of legal principles laid down by judges in cases decided by them, as recorded in reports of their decisions. In this context, 'common law' refers to decisions

2 For an introduction to the development of the common law, see Roebuck Derek, *The Background of the Common Law*. Hong Kong: Oxford University Press, second edition, 1991.

of judges in both the 'common law' courts and also the courts of 'equity' (compare Article 8 of the Basic Law, which refers to 'the common law' and 'rules of equity' separately as part of the law remaining in force in Hong Kong after 1 July 1997).

Prior to 1 July 1997, this body of law comprised the 'common law of England'[3] as formally received in Hong Kong in 1844 (subject to subsequent modification in England), as applied to Hong Kong or modified by decisions of the courts of Hong Kong or by legislation (see section 3 of the Application of English Law Ordinance; this ordinance lapsed on 1 July 1997, having been declared to be in contravention of the Basic Law of the HKSAR). As mentioned above, Article 8 of the Basic Law maintained this body of law as the 'common law' of the SAR (except to the extent that it might contravene the Basic Law, and subject always to any subsequent amendment by the SAR's legislature; for the effect of this provision, particularly the meaning of 'maintained', see *HKSAR* v *David Ma Wai-kwan* [1997] 2 HKC 315).

Until the nineteenth century, English criminal law (which provides the basis of Hong Kong's criminal law) was largely a product of the common law, meaning judge-made law, and this remains true of a large part of the general principles of criminal liability discussed in the following chapters.

Some offences also remain a matter of common law. In other words, some activities in Hong Kong are offences because judges at some time in the past decided that the activities were crimes (and neither later judges nor the legislature have adopted a contrary view). Examples of this in Hong Kong's criminal law include murder, manslaughter and common assault. In these cases, it is possible to determine what exactly is prohibited only by reading previous judicial decisions. This power to recognize or declare new offences may still exist as part of Hong Kong's common law, but it is not often exercised, in recognition of the convention that the task of creating new offences should nowadays be left to the legislature and other bodies to whom legislative power has been delegated.[4] Even so, on occasion, this power has been exceptionally exercised in relatively recent times, especially in relation to various forms of 'immoral' conduct. This is illustrated by *Shaw* v *DPP* ([1962] AC 220), in which the House of Lords was invited to rule that the publication of a booklet containing the names and contact numbers of female prostitutes and, in some instances, photographs and

3 See section 3 of the Interpretation and General Clauses Ordinance prior to its amendment on 1 July 1997; section 3 now refers to 'the common law in force in Hong Kong'.

4 There are occasional exceptions; see, for example, *Shaw* v *DPP* [1962] AC 220, *Knuller* v *DPP* [1973] AC 435.

particulars of sexual perversions they were willing to undertake, breached public morals and should be declared a criminal conspiracy. The Lords accepted this invitation, with Lord Simonds stating (at 267):

> In the sphere of criminal law I entertain no doubt that there remains in the courts a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for.

This may be contrasted with *Knuller (Publishing) Ltd.* v *DPP* ([1973] AC 435), another decision of the House of Lords, this time involving an alleged conspiracy to breach public morals (in this case, an agreement to publish advertisements facilitating the commission of homosexual acts between adult males in private, conduct that had previously been expressly decriminalized). In this case, Lord Simon attempted to deny the existence of any such residual power to extend the criminal law of conspiracy merely to enforce morality. All that the courts can do, he stated (at 490), 'is to recognise the applicability of established offences to new circumstances to which they are relevant.'

One of the central objections to the exercise of this power is that it purports retrospectively (i.e. after the fact) to criminalize conduct not otherwise thought to be criminal at the time of its commission. Apart from this general objection, the purported exercise of such a power in the SAR may also be amenable to challenge under Article 12(1) of Hong Kong's Bill of Rights, which *inter alia* states: '(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed. …'

Some matters of excuse and justification recognized by Hong Kong's criminal law — i.e. criminal defences — continue to be common law in origin (although they may have been expressly or impliedly modified by statute). Examples include the defences of duress, insanity and self-defence (although the principles of self-defence have been treated as impliedly modified by statutory amendments to the related defence of crime prevention). Courts continue to expand and develop defences in response to new circumstances; on occasion, they have even recognized new defences (see, for example, 'duress of circumstances'; below, Chapter 7) at common law. There is less reason for objection to judicial 'lawmaking' of this type, since it usually operates in favour of defendants. Exceptionally, the courts have also abolished existing defences or immunities. An example of this is

R v *R* ([1992] 1 AC 599), in which the House of Lords held that a husband could be convicted of raping his wife, contrary to existing authority holding that a husband was immune from prosecution for raping his wife (see Chapter 12, pp. 605–6). In *C* v *DPP* ([1996] AC 1), on the other hand, the House of Lords refused to abolish the traditional common law presumption that a child aged 10 to 14 (presently 7 to 14 in Hong Kong; see Chapter 6, p. 214) is incapable of committing an offence.[5] In giving judgment, Lord Lowry set out (at 28) five guiding principles that should be followed by courts when invited to undertake 'judicial lawmaking':

> (1) if the solution is doubtful, the judges should beware of imposing their own remedy; (2) caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched; (3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems; (4) fundamental legal doctrines should not be lightly set aside; (5) judges should not make a change unless they can achieve finality and certainty.

One of the central features of all 'common law' legal systems (such as Hong Kong's, but also including other countries that originally derived their legal systems from English law, including Australia, Canada, New Zealand and the USA) is the doctrine of judicial precedent.[6] A 'precedent' is a prior judicial decision that contains a 'binding' statement of legal principle. Insofar as that statement of principle is taken to express the legal basis of the decision, it is called the 'ratio' of the decision, and a later judge in a court at the same or lower level in the judicial hierarchy must follow it in a similar case. This feature of common law legal systems — that precedents are 'binding' on later courts — enables the body of judicial decisions to be described as 'law'.

Statutory Sources

The second source of Hong Kong's criminal law is statutory sources, including ordinances, regulations and other forms of subordinate legislation.

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5 This presumption was subsequently abolished in England by statute; see section 34 of the Crime and Disorder Act 1998.

6 See further, Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (third edition, 1998), Chapter 9.

Most offences under Hong Kong's criminal law are statutory in origin; that is, the source of the prohibition on the activity is a statutory provision, whether it be in an ordinance,[7] in regulations or in some other form of subordinate legislation. An illustration is provided by section 60(1) of the Crimes Ordinance (cap. 200), which expressly enacts an offence of criminal damage to property (punishable by up to ten years' imprisonment; section 63(2)). It states:

> Any person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged *shall be guilty of an offence* [emphasis added].

Interpreting statutory provisions such as this often involves the common law. For example, section 60(1) above does not define 'damage', 'destruction', 'property', 'intending' or 'reckless'. The meaning of these terms must instead be sought in the common law.

Some of the general principles of criminal liability as well as some of the defences recognized under Hong Kong's criminal law are also statutory in origin (e.g. diminished responsibility; section 3 of the Homicide Ordinance (cap. 339)), or have been wholly or partially statutorily codified (e.g. the defences of crime prevention (see section 101A of the Criminal Procedure Ordinance) and provocation (see section 4 of the Homicide Ordinance)).

Interpreting criminal law statutes and regulations

Where an offence, defence or general principle is statutory in origin (whether wholly or partially), this does not necessarily exclude the need for the consideration and application of common law principles. Statutory provisions by their nature must be expressed in general terms, and this means that they will have to be interpreted and applied by judges in particular cases in order to decide the case. Sometimes, the statute itself may provide relevant definitions; in other instances, a general definition may be available elsewhere (e.g. in the Interpretation and General Clauses Ordinance (cap. 1)). However, often neither applies.

[7] Major criminal ordinances include Crimes Ordinance (cap. 200, Laws of Hong Kong), Offences Against the Person Ordinance (cap. 212, Laws of Hong Kong), Theft Ordinance (cap. 210, Laws of Hong Kong), Summary Offences Ordinance (cap. 228, Laws of Hong Kong), Prevention of Bribery Ordinance (cap. 201, Laws of Hong Kong), and the Gambling Ordinance (cap. 148, Laws of Hong Kong).

When interpretation becomes necessary, the general approach that judges should adopt in Hong Kong is set out in section 19 of the Interpretation and General Clauses Ordinance (cap. 1):

> An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.

The meaning and effect of this provision in relation to criminal legislation has never been clearly decided (see generally Peter Wesley-Smith, *The Sources of Hong Kong Law*, p. 239, Hong Kong: Hong Kong University Press, second edition, 1994). One view is that it requires judges to adopt what is commonly called a 'purposive' approach for both non-criminal and criminal legislation (see *A-G* v *John Lok* [1986] HKLR 325; see also *A-G's Reference (No. 1 of 1988)* [1989] AC 971, in which the House of Lords adopted a 'purposive' approach with regard to criminal statutes). Another view offered by Wesley-Smith is that it requires criminal or penal statutes to be interpreted 'as though [they] were remedial, thus abrogating any common law notion that penal legislation should receive a strict construction'. Wesley-Smith has suggested (at 247) that 'the most sensible view is that … section 19 "does no more than remind a court that it should construe a statute so as to give effect to the intention of the legislature".'

In addition to section 19, there are a number of other matters that a judge should, or at least may, take into account in interpreting criminal statutory provisions, particularly those actually creating offences. These include:

Ordinary meaning

Where possible, the court should give the words used in a statutory provision their 'ordinary meaning' (see, for example, *R* v *Feely* [1973] QB 530; *Brutus* v *Cozens* [1973] AC 854). Unless a word has a special legal meaning and is a legal term of art, it is permissible to look up a word's meaning in a dictionary.

Use of legislative background

If there is ambiguity, then the court may have regard to the legislative background of the statutory provision in question, including pre-legislative materials such as the reports of law reform committees and commissions

that reviewed the existing law. Materials such as these may be used to ascertain the general purpose of the statute or a relevant part of it, but there are limits on the use of such materials in determining the intended meaning of a particular provision (see *Pepper* v *Hart* [1993] AC 593).

Presumption of strict construction

If, after considering the ordinary meaning of the word or words used in a statutory provision, and the legislative background, a judge remains unclear about the statutory provision's interpretation, then he or she should adopt the interpretation 'favouring' the defendant. This is the so-called presumption or rule of 'strict construction' referred to by Wesley-Smith in the passage mentioned above. Courts no longer adopt a strained interpretation of the words used in a statutory provision (contrary to the plain meaning of the words) solely because it will benefit a criminal defendant, but it seems still to be the case that where there is a reasonable interpretation which will avoid the imposition of a penalty, preference should be given to this interpretation. The weight of this presumption should increase where the potential penalties are heavy.

In contrast, courts have occasionally veered towards the contrary position, adopting a somewhat strained view of the words of a statutory provision in order to secure the conviction of the 'obviously guilty'. One example of this is in relation to theft, where the courts have adopted an interpretation of 'appropriation' — the central conduct element of theft — that is morally 'neutral' in character, leaving the question of criminal liability to depend essentially on a determination of whether or not an alleged thief acted 'dishonestly', which in turn depends largely on whether or not ordinary honest people would so characterize his or her conduct (see Chapter 13). Ashworth has noted this 'conviction-minded' approach to interpretation, and has commented as follows (A. Ashworth, 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) 107 LQR 419, at 443–4):

> If one of the aims of the criminal law is to convict those who culpably cause harm, this constitutes a policy goal which should form part of the doctrine of criminal law and which may properly enter into decisions on interpretation. The claim here is not that criminal laws should be extended retrospectively to citizens' conduct, but rather that people who knowingly 'sail close to the wind' should not be surprised if the law is interpreted so as to include their conduct.

Presumption of mens rea

One particular rule relevant to criminal statutes is that whenever a section creating an offence is silent as to the need to prove criminal intent (mens rea), then such a need for mens rea should be presumed. This is discussed further below (see Chapter 4).

Bill of Rights

Judges should also keep the provisions of Hong Kong's Bill of Rights in mind (see Hong Kong Bill of Rights Ordinance (cap. 383) (BORO)). As already mentioned, a number of the articles in the Bill of Rights directly or indirectly relate to the criminal law. These include:

- Article 2, which deals with the right to life and imposes restrictions on the imposition of capital punishment;
- Article 3, which prohibits torture and cruel, inhuman or degrading treatment or punishment;
- Article 5, which provides that no one shall be subjected to arbitrary arrest or detention (5(1)), that a person who has been arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her (5(2)), and that a person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release (5(3));
- Article 6, which deals with the rights of persons deprived of their liberty, i.e. imprisoned; and
- Article 12, previously mentioned, which prohibits retrospective criminal offences or penalties.

Article 11 deals in some detail with the rights of persons charged with or convicted of a criminal offence and is worth setting out in full:

> (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
> (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) to have adequate time and facilities for the preparation of his

defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

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

(3) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(4) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(5) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(6) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong.

Article 11(1) has had a significant impact on the recent development of the criminal law in Hong Kong, in particular in relation to burdens of proof, and is discussed more fully below (p. 42).

THE FOUNDATIONS OF HONG KONG'S CRIMINAL JUSTICE SYSTEM

Criminal law is only one part of Hong Kong's criminal justice system (see

Chapter 1).[8] It is therefore important to keep several fundamental notions in mind, for these provide the historical foundations of much of Hong Kong's criminal justice system and as such underpin the body of criminal law doctrine that has evolved as the basis of Hong Kong's criminal justice system.

The Presumption of Innocence and the Burden of Proof

At the heart of Hong Kong's criminal justice system is the presumption of innocence. This presumption dictates that in every criminal case, it is for the prosecution to prove an accused's guilt, not for the accused to prove his or her innocence. If guilt is not proved to the requisite standard, then the accused is entitled to be acquitted — that is, he or she *must* be acquitted.

Nature of the presumption of innocence

This presumption is a product of the common law. The best-known statement of the common law position is that of Lord Sankey LC, in *Woolmington* v *DPP* ([1935] AC 462) where he stated (at 481–2):

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner [on a charge of murder] killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle [i.e. cut] it down can be entertained.

This presumption is part of the common law of Hong Kong, as recognized by the Privy Council in *Kwan Ping-bong* ([1979] HKLR 1), on appeal from Hong Kong. Lord Diplock observed (at 5):

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8 See further, Mark Gaylord and Harold Traver, eds., *Introduction to the Hong Kong Criminal Justice System*, Hong Kong: Hong Kong University Press, 1994.

> There is no principle of the criminal law of Hong Kong more fundamental than that the prosecution must prove the existence of all essential elements of the offence with which the accused is charged — and the proof must be 'beyond all reasonable doubt', which calls for a degree of certainty considerably higher than proof on a mere balance of probabilities.

The presumption of innocence now has an additional statutory foundation in Hong Kong in Article 11(1) of Hong Kong's Bill of Rights (cap. 383), which reads: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

However, this presumption is not absolute in nature, either at common law or as manifested in Article 11(1). Firstly, at common law, as Lord Sankey LC acknowledged, there may be exceptions to the presumption, whereby the burden of proving matters relevant to guilt or innocence may be placed on the accused. One such exception noted by Lord Sankey relates to the common law defence of insanity. Since the common law presumes all persons to be sane, the legal burden of proving that a particular defendant is not sane (or was not sane at the material time), i.e. was insane, is placed at common law on the defendant, proof being on the balance of probabilities (see Chapter 6, p. 225). A second common law exception, not mentioned by Lord Sankey, relates to what are called 'negative averments' and is discussed more fully below. A third general exception, the second category mentioned by Lord Sankey, concerns statutory exceptions. Hong Kong, like England, has long had a practice of enacting statutory provisions that expressly or impliedly place the legal burden of proving a matter on the accused. This category of exception is discussed more fully below.

Secondly, in relation to Article 11(1), the phrase 'according to law' allows for exceptions, whereby the burden of proving matters relevant to guilt or innocence may potentially be placed on a defendant.

The burden and standard of proof in a criminal trial

In accordance with the presumption of innocence, the general rule is that the prosecution bears the burden of proving the accused's criminal liability or guilt 'beyond reasonable doubt'. This means that the prosecution must prove all the elements of the offence(s) charged, including disproving credible defences, beyond reasonable doubt. This is called the 'legal burden', or sometimes the 'persuasive burden' since it requires the prosecution to persuade the jury or judge (or magistrate) that the alleged facts giving rise

to the prosecution occurred. If the prosecution fails to persuade the trier of fact, then the matter is treated as not proven, and the accused is entitled to be acquitted. This burden remains on the prosecution throughout the whole trial; this means that even if the accused presents a defence that is rejected by the jury or judge, the accused may still only be convicted provided the judge or jury is satisfied that all the elements of the offence have been proved by the prosecution.

The 'standard of proof' is concerned with how much evidence must be adduced by the prosecution (or defendant where the burden of proof is placed upon the defendant) to convict the accused. In relation to the prosecution, the standard of proof in a criminal trial is proof 'beyond reasonable doubt'. This is commonly expressed as requiring the jury or judge to be 'sure' that each particular fact or event or state of mind (to be proved for a particular offence) existed or occurred.

Where the burden of proof is placed upon the defendant, then, in the absence of any express statutory provision to the contrary, the standard is the lower 'civil' standard of proof 'on the balance of probabilities'. This is commonly said to require the jury or judge to be satisfied that the particular fact or event or state of mind in issue is 'more likely than not' to have existed or occurred.

Exceptions: reversing the burden of proof

As already mentioned, there are exceptions to the presumption of innocence, whereby the legal burden is placed on the defendant. Where this is so, the standard of proof is generally the civil standard: that is, proof on the balance of probabilities (i.e. the fact is 'more likely than not' to have existed).

Common law

Two common law exceptions exist. The first is insanity: the legal burden of proving that a particular defendant is not sane (or was not sane at the material time), i.e. was insane, lies at common law on the defendant, proof being on the balance of probabilities (see Chapter 6, p. 225).

The second common law exception relates to what are called 'negative averments'[9] (although it should be emphasized that this category of

9 See generally, John Rear, 'The Pearl and the Golden Thread: The Proof of Negative Averments I and II' (1972) 2 HKLJ 169, 298.