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# CCPL Rights Bulletin

## Hong Kong Cases

### **Chan Kin Sum v Secretary for Justice**

Court of First Instance  
[2008] HKCFI 1081

*Basic Law* arts 24, 25, 26,  
39, 39(1), 39(2), 68, 79(6)

*BORO* (Cap 383) s 8 arts  
1, 1(1), 3, 5, 6(1), 6(3), 8(1),  
8(2), 14, 17, 21, 21(a), 21(b),  
22, s 13

*ICCPR* arts 25, 49

*Human Rights – Political rights – Right to vote – Unreasonable restrictions – Disenfranchisement of prisoners – Remanded persons not being able to vote*

A person who has been sentenced to imprisonment, where their term has not been fully served or they have not received a free pardon, or who is serving a sentence of imprisonment on the date of application for registration as an elector or on the date of an election, was disqualified from (a) being registered as an elector and (b) voting under the Legislative Council Ordinance (Cap 542). The applicants argued that the provisions were unreasonable restrictions on their right to vote as guaranteed by Article 26 of the Basic Law (BL) and Article 21 of the Hong Kong Bill of Rights Ordinance (Cap 383) (BORO).

The court granted the application and ordered that arrangements should be made to enable prisoners to vote.

The court found that Article 26 of the BL did not contain any built-in restrictions, and that it must be read together with Article 21 of the BORO, which provides that every permanent resident shall have the right, “without unreasonable restriction”, to vote. In determining whether such restriction is unreasonable or not, it is appropriate to apply the proportionality or justification test.

The arbitrary, automatic and indiscriminate restrictions could not be justified under the proportionality test. The provisions did not take into account the nature and gravity of the offence, the type and length of sentence imposed or the culpability and individual circumstances of the prisoner. It was also held that the lack of special arrangements enabling those on remand to vote on election day was indefensible.

**Secretary for Justice v Richard Ethan Latker**

Court of First Instance  
[2009] HKCFI 55

*Basic Law* art 39

*BORO* (Cap 383) arts 10  
and 11

*Human rights – right to silence – right to fair trial – whether involved derogation of rights – whether derogation justified by reference to proportionality test – whether proper balance between public interest and fundamental rights of individual*

Latker was the registered owner of a vehicle captured by a police camera for running a red light. The police issued him a “Notice Requiring Identity of Driver” under s 63(1) of the Road Traffic Ordinance, (Cap 274) compelling him to identify the driver at the material time. Latker did not respond to the Notice and was charged by the Police under the same section of the Ordinance.

Latker expressed that his decision was a matter of principle and that it would be “civil cowardice” if he agreed to provide particulars of the driver. He sought to challenge the offence on the grounds of the right to silence and the right to a fair trial protected under Articles 10 and 11 of the Hong Kong Bill of Rights.

The Court suggested that if a right is not absolute, a derogation or qualification may be allowed, subject to the proportionality test (*HKSAR v Lam Kwong Wai*).

Hon Ma CJHC held that although the right to a fair trial is absolute, it is clear as a matter of principle that certain facets of this right (e.g. the right to silence) are not absolute and are capable of derogation or qualification.

He went on to assess the offence using the proportionality test and stated that derogation is legitimate if a “fair balance” is struck between the public interest and the fundamental rights of the individual. The following four factors were suggested to be used in the balancing exercise:

- social objectives of the legislation
- extent of the interference with fundamental rights

“At the end of the day, the court must be satisfied that the derogation from the right to silence can be justified and that a fair balance has been struck, before upholding the constitutionality of legislation.”

**Ma CJHC**  
**Latker**

### **Secretary for Justice v Richard Ethan Latker cont'd**

- safeguards in place for the protection of the individual
- penalties involved in non-compliance—here the maximum was a fine of HK\$10,000 and a sentence 6 months' imprisonment

It was held that s 63 was constitutionally justified and the right to a fair trial was not infringed.

Hon Stock JA however took a slightly different approach in arriving at the same outcome. He commented that the “fair balance” approach runs the danger of undermining the primacy of fundamental freedoms which reflects the interests of the general community. Even where the freedom is not absolute, the starting point is always the freedom and any derogation from it must be fully justified.

### **Secretary for Justice v Ocean Technology Ltd**

Court of Appeal  
[2009] HKCFI 1108,  
*leave to the CFA refused*

Court of Final Appeal  
[2009] HKCFA 54

*Basic Law* arts 27 and 39

*BORO* (Cap 383) art 16

*ICCPR* art 19

*Rights and freedoms – Freedom of Speech – Restriction of freedoms must be prescribed by law – Whether offence-creating provision an impermissible infringement of an established right – Whether defendant may raise constitutionality of statutory provision as a defence*

Ocean Technology Ltd operated “Citizens Radio Station”, and was charged with a variety of offences contrary to sections 8 and 20 of the Telecommunications Ordinance (Cap 106). These provisions make it an offence to establish or maintain any means of telecommunications save under and in accordance with a licence granted by the Chief Executive in Council. In September 2005, Ocean Technology applied for a licence to operate a non-profit radio station but their application was rejected by the Chief Executive in Council in December 2006. No judicial review was taken in regards to the licensing decision. It was alleged that from July 2005 to October 2006, the Citizens Radio station had broadcasted without a licence on numerous occasions.

When the case came before the magistrate, he held that the regime for radio licensing was unconstitutional as not being prescribed by law, and he dismissed the charges. The absence of statutory criteria meant that the power to grant a radio licence was unfettered.

“The entrustment of a broadcasting licensing system to a government organ is not a matter that of itself sits ill with the preservation of freedom of expression”

*Stock, JA  
Ocean Technology*

### **Secretary for Justice v Ocean Technology Ltd cont'd**

This reason together with the lack of independence of the decision-maker meant that the regime was not prescribed by law, according to the magistrate.

On appeal by case stated, the Court of Appeal reversed the magistrate's decision and held that it was an error for the magistrate to have considered the constitutional issue. The Court held that whether or not the licensing regime was constitutional could not provide a defence to the defendants for these charges. In other words the constitutionality of the licensing regime was irrelevant to whether or not the defendants had broadcasted without licence. The Court went on to consider whether it was justifiable to have an offence criminalizing unlicensed broadcasting even assuming there was an unconstitutional licensing regime. The Court answered this in the affirmative given the potential chaos that could result if anyone could freely broadcast without a licence pending corrective legislation. In obiter, the Court held that independence of the decision-maker was not relevant to whether the law was prescribed by law.

On 19 May 2009, the Court of Final Appeal refused Ocean Technology's application for leave to appeal.

### **Kong Yunming v The Director of Social Welfare**

Court of First Instance  
[2009] HKCFI 488

*Basic Law* arts 25, 36 and  
145

*BORO* art 22

*ICCPR* art 26

*Human rights – right to social welfare – equality before the law – seven year residence requirement for social assistance – whether policy satisfied justification test – restriction of rights where not absolute*

The applicant was born on the Mainland and was a Mainland resident before she came to settle in Hong Kong in 2005 with a one-way permit issued by the Mainland authorities. In 2003, the applicant married a Hong Kong permanent resident and recipient of the Comprehensive Social Security Assistance (CSSA) scheme from 1985 until he passed away in 2005. The applicant had earned her living by looking after an elderly person but was unemployed since early 2005. In 2006 the applicant applied for CSSA on the grounds of unemployment.

The Director of Social Welfare rejected the applicant's application for CSSA on the sole ground that she did not satisfy the requirement that all applicants for CSSA shall be residents of Hong Kong for at least

*“Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified.”*

*A Cheung, J  
Kong Yunming*

### **Kong Yunming v The Director of Social Welfare cont'd**

seven years. The applicant lodged an appeal to the Social Security Appeal Board against the Director's refusal to grant her CSSA and the appeal board dismissed the applicant's appeal on the grounds that she did not satisfy the residence requirement.

The appellant challenged the seven-year residence requirement under the CSSA scheme which, according to her complaints, contravened Articles 36 and 25 of the Basic Law.

The court found that the 7-year residence requirement did not contravene the right given under Article 36 to social welfare as the right was not an absolute right but one that might be restricted. Article 36 should be interpreted together with Article 145 in the sense that Article 145 obliged the Hong Kong Government to formulate policies on the "development and improvement" of the "previous social welfare system", "in the light of the economic conditions and social needs". Hong Kong's welfare system had always contained an element of residency requirement and the Basic Law was not to be seen as to intend to do away with that requirement. The crux of the challenge therefore lay in discrimination (Article 25).

On the issue of discrimination, the Court found that length of residence was not intrinsic to a person, and could not be equated with discrimination based on race or sex. After careful comparison with foreign jurisprudence, the court rejected the appellant's argument that permanent residency was an invidious or suspect ground of discrimination. Furthermore, given the competing interests and limited resources in the local context, the court valued the long term sustainability of the social welfare system and concluded that the 7-year residency requirement satisfied the justification test, especially due to the Director's discretion to waive the residency requirement. The court held that there was therefore no violation to rights under Article 25.

### **M v Secretary for Justice**

Court of Appeal  
[2008] HKCA 450

*Disability Discrimination Ordinance (Cap 487) ss 12 (2)(i) and 12(2)(c)(i)*

*Human Rights - Disability Discrimination - Defence of inherent requirements of particular employment - Whether defence requires employer to alter the nature of employment - Employer need not know of disability; sufficient if employer discriminated because of manifestation of disability*

This was an appeal by the plaintiff, a former probationary administrative officer, against the dismissal of his claim against the Government for damages for direct discrimination under s 6(a) of the Disability Discrimination Ordinance (Cap 487) (DDO).

*"Knowledge of the manifestation of a disability is knowledge of disability itself."*

*Tang, VP  
M v Secretary for Justice*

### ***M v Secretary for Justice cont'd***

The plaintiff was asked to resign from the government due to poor performance as he had difficulty settling into the job and lacked motivation. However, the plaintiff claimed he was dismissed by reason of his psychiatric or psychological illness, which neither party was aware of at the material time.

The court held that ignorance of the employee's disability was not a defence. It found that knowledge of the manifestation of a disability is knowledge of the disability itself. This ran contrary to the finding in Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening) [2008] 1 AC 1399 (HL), where it was held that an alleged discriminator's lack of knowledge that a complainant was suffering from a disability precluded making that person liable in tort for resulting disability discrimination.

However, the court dismissed the appeal on the ground that the plaintiff had been unable to carry out the inherent requirements of his job under s12(2)(i) of the DDO. The court noted that it was necessary to confine this defence to the employee who would be unable to carry out the inherent requirements of the job either at all or without the provision of services or facilities which would impose an unjustifiable hardship on the employer. Moreover, the defence did not require the employer to alter the nature of the particular employment so as to accommodate the disabled employee. The court held that the unchallenged evidence showed that no existing post could have provided the structured and supportive environment the plaintiff needed. On this basis, the government could rely on the defence provided by s12(2)(i).

### ***Lam Siu Po v Commissioner of Police***

Court of Final Appeal  
[2009] HKCFA 24

BORO art 10

ICCPR art 14(1)

*European Convention on  
Human Rights* art 6(1)

*Human rights - right to fair hearings - whether Article 10 of BORO applies to disciplinary proceedings - whether legal representation permitted in disciplinary proceedings*

The appeal concerned the constitutionality of a statutory ban on professional legal representation at police disciplinary hearings. Regulations 9(11) and 9(12) of the Police (Discipline) Regulations provided that no barrister or solicitor may appear on behalf of a police officer charged with a disciplinary offence. The appellant was a police constable who made unsuccessful speculations in the stock market and incurred heavy debts. He was declared bankrupt upon petition. He was charged with the offence of contravening a police

*"In my view, disciplinary proceedings - whether in respect of professions, disciplined services or occupations - are determinations of rights and obligations in suits at law within the meaning of article 10."*

*Bokhary, PJ  
Lam Siu Po*

**Lam Siu Po v Commissioner of Police cont'd**

order made by the Commissioner of Police. According to the order, “serious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer’s operational efficiency will result in disciplinary action”. Upon conviction by a police disciplinary tribunal, the appellant was compulsorily retired from the Police Force with deferred pension rights.

The Court unanimously held that Regulations 9(11) and (12) were unconstitutional because they violated the right to a fair hearing under Article 10 of the Bill of Rights Ordinance (BORO). Article 10 provides, *inter alia*, that everyone shall be entitled to a fair hearing in the determination of his rights and obligations in a suit at law. In reaching its holding, the Court undertook a substantial review of the jurisprudence of the European Court of Human Rights at Strasbourg (Strasbourg jurisprudence) on an equivalent Article, i.e. Article 6(1), of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) alongside with the General Comments and Communications of the UN Human Rights Committee (HRC) on an equivalent Article, i.e. Article 14.1, of the International Covenant on Civil and Political Rights (ICCPR).

Relying on the Strasbourg jurisprudence, the Court held that disciplinary proceedings have a direct and highly adverse impact on the appellant’s civil rights and obligations, and Article 10 was clearly engaged in relation to the disciplinary proceedings facing the appellant. The Court adopted the approach taken by the ECHR in the decision of *Vilho Eskelinen v Finland* in determining whether the protection of Article 10 can be excluded on the basis of the applicant’s status as a civil servant. Under the *Eskelinen* approach, the State must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusions must be justified on objective grounds in the State’s interest. Ribeiro PJ stated that while the first condition was satisfied, the second condition had not been met because the Commissioner had not provided sufficient justification for excluding Article 10 protections.

On the issue of whether the requirement of a fair hearing had been complied with, the Court stated that the common law principles of procedural fairness would apply. Therefore an arrangement which satisfies the requirements of the common law would almost certainly conform to the fairness requirements of Article 10. While there was no absolute right to legal representation, it was a matter to be dealt with at the tribunal’s discretion. The blanket restriction on professional legal representation imposed by Regulations 9(11) and (12) prevented the tribunal from exercising its discretion in favour of allowing legal representation. Therefore the regulations were unconstitutional and invalid. In the absence of any exercise of discretion by the tribunal, the appellant was deprived of a fair hearing and his disciplinary findings and penalties must be quashed.

*“The factors to be taken into account in deciding whether fairness requires such representation to be permitted include the seriousness of the charge and potential penalty; whether any points of law are likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned.”*

*Ribeiro, PJ  
Lam Siu Po*

**Cho Man Kit v Broadcasting Authority**

Court of First Instance  
[2008] HKCFI 383

*Human rights – freedom of speech – equality before the law – prohibition of discrimination on grounds of sexual orientation – permissible restrictions*

*Basic Law* art 25

*BORO* arts 1 and 16

The applicant of this judicial review was a young gay man featured in a TV documentary programme called “Gay Lovers” produced by Radio Television Hong Kong (RTHK), a public broadcaster. After the broadcast of the programme, the Broadcasting Authority issued a ruling that the content of the programme and the time of its broadcast had violated its code of practice that regulate broadcasting standards in Hong Kong. The applicant sought a court order to quash the ruling on the grounds that it was discriminatory towards homosexuals and therefore constituted an impermissible restraint on the freedom of expression of RTHK and the interviewees in the programme.

The programme, broadcast twice in prime time slots, focused on the day-to-day lives of two gay couples. In the course of the programme, the applicant and two young women who were in a same-sex relationship spoke of their hopes that one day the Hong Kong law would be changed to recognise same-sex marriages.

Upon receiving complaints from the public, the Broadcasting Authority made the finding that the programme had the effect of promoting same-sex marriages by not including opposing views on the issue, and therefore it failed to meet the impartiality requirement. The Authority made a second finding was that the programme was unsuitable for broadcast during family viewing hours.

The Court, with Hartmann J sitting alone, held that impartiality is a broad concept. While it encompasses the concept of being balanced, of not favouring one side more than another, the word also means unprejudiced, unbiased, and fair. In the context of the Author-

*“[I]t is now settled law that any restriction on freedom of speech is to be narrowly interpreted.”*

*Hartmann, J  
Cho Man Kit*

**Cho Man Kit v Broadcasting Authority cont'd**

ity's code of practice, a presentation may be regarded as impartial simply because it is fair and not prejudiced either for or against the issues raised. The Court made the finding that the programme was impartial, it was not in itself about same-sex marriage, neither was it a political programme to advance a public cause.

The Court stated that it is settled law in Hong Kong that any restriction on freedom of speech is to be narrowly interpreted. The Authority's ruling constituted a restriction on the freedom of speech. In order for this restriction to be legally valid, it must be justified on the basis of proportionality. Having found the programme impartial, the Court came to the view that the Authority's finding that the programme failed to be impartial and promoted a controversial issue was based solely on the fact that homosexuality was the subject matter. The Authority based its finding on the premise that homosexuality may be offensive to certain viewers. The Court stated that sexual orientation is a protected ground on the basis of sex under Hong Kong anti-discrimination laws. While the Authority should be guided by public opinion when determining what constitutes proper broadcasting standards, public opinion must be the opinion of reasonable members of the Hong Kong community. Reasonable members were those who understand that in a democratic society a restriction of fundamental freedoms can never be justified by a consensus of opinion based on "prejudice, personal aversions and dubious rationalisations". The premise that homosexuality may be offensive was discriminatory in the sense it was a supposed consensus among certain people based on prejudices, personal aversions and dubious rationalisations. The Court concluded that the Authority wrongly justified a restriction on freedom of speech by relying on a discriminatory premise.

On the second finding by the Authority that the programme was not suitable for broadcasting during family viewing hours, the Court held that it was a lawful decision open to a reasonable decision-maker. The reason was that the protection of the sensibilities of young viewers is a permissible restriction on freedom of speech and expression, considering the fact that young viewers without sufficient maturity may be watching without the benefit of parental guidance.

The Court quashed the Authority's ruling and awarded costs to the applicant.

*"I am satisfied that the Authority's finding ... has resulted in an impermissible restriction on the freedom of speech, a restriction founded materially on a discriminatory factor; namely, that homosexuality, as a form of sexual orientation, may be offensive to certain viewers."*

*Hartmann, J  
Cho Man Kit*

International Jurisprudence**Soratha Bandaranayake v Sri Lanka**

Human Rights  
Committee

CCPR/C/93/  
D/1376/2005

ICCPR arts 14 and 25

*Human rights – right to fair and public hearing –  
right of equal access to public service*

The author was an appointed District Judge of Negombo. On 17 October 1998, he and his friend were stopped at a checkpoint and abused by the police. He had presented his identity card to the policeman. By Judicial Service Commission (JSC) order of 24 November 1998, he was sent on compulsory leave without disclosing the nature of the complaint or the complainant. On 1 April 1999, it was alleged on the disciplinary charge sheet by the JSC that he had “impersonated” a High Court Judge and he was charged with interfering with the performance of the police officers’ duties, making a false statement and of having exceeded his authority. A Committee of Inquiry was appointed by the JSC to investigate the matter and the author was found guilty of the charges in question without any reason being given for the finding, despite his repeated request for access to those investigation files, including certified copies of the proceedings and the reasons for the Committee of Inquiry’s findings. The author was notified of his dismissal from office by the JSC in November 2000. His appeals to the Court of Appeal and the Supreme Court were dismissed.

The Committee first considered that whenever a judicial body is entrusted with the task of holding a disciplinary enquiry and deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in Article 14(1), and the principles of impartiality, fairness and equality of arms implicit in this guarantee. The Committee concluded that the JSC is a tribunal within the meaning of Article 14(1), of the Covenant and the proceedings before the JSC and the subsequent appeals through the courts constitute a determination of the author’s rights and obligations in a “suit at law” within the meaning of Article 14(1). The

*“Judges may be dismissed  
only on serious grounds of  
misconduct or incompetence,  
in accordance with fair  
procedures ensuring  
objectivity and impartiality  
set out in the constitution or  
the law.”*

*Human Rights  
Committee  
Soratha Bandaranayake  
v Sri Lanka*

### ***Soratha Bandaranayake v Sri Lanka cont'd***

concept of a “suit at law” is based on the nature of the right in question, rather than on the status of one of the parties.

Article 25 (c) of the Covenant confers the right of equal access to public service, which includes the right not to be arbitrarily dismissed from public service. The Committee recalled its jurisprudence on the objective and reasonable standard called for in relation to access, in respect of both the criteria and the procedures for appointment, promotion, suspension and dismissal. A procedure is not objective or reasonable if it does not respect the requirements of basic procedural fairness.

In the current case, the JSC failed to provide the author with all of the documentation necessary to ensure that he had a fair hearing, in particular its failure to inform him of the reasoning behind the Committee of the Inquiry’s guilty verdict, on the basis of which he was ultimately dismissed. This amounted to a dismissal procedure which did not respect the requirements of basic procedural fairness and thus was unreasonable and arbitrary. The Committee thus found that the conduct of the dismissal procedure was conducted neither objectively nor reasonably and it failed to respect the author’s right of access, on general terms of equality, to public service and therefore violated Article 25(c).

### ***Dissanayake v Sri Lanka***

Human Rights  
Committee

CCPR/C/93/  
D/1373/2005

ICCPR arts 9, 19 and 25 (b)

*Human rights – equality before the courts– right to liberty and security– right to vote and to be elected*

The author was originally a member of the Sri Lankan Freedom Party, to which the President of Sri Lanka belonged. Due to differences of opinion, the author joined the opposition, the United National Party and was not only elected to Parliament, but also appointed as the Minister of Agriculture. On 3 November 2003, the author stated at a public meeting that he would not accept any “disgraceful decision” of the Supreme Court, in relation to a pending opinion on the exercise of defence powers.

On 7 December 2004, he was found guilty of contempt of court and was sentenced by the Supreme Court to two years imprisonment. On 15 February 2006, the President remitted the remainder of the author’s sentence. Before his release, the author had for-

*“[T]he imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of “arbitrary” deprivation of liberty.”*

*Human Rights  
Committee  
Dissanayake v Sri Lanka*

### ***Dissanayake v Sri Lanka cont'd***

feited his seat in Parliament on the basis that he had absented himself from parliament for a continuous period of three months. The President did not grant a pardon to remove his disqualification to vote or seek election.

The Committee observed that the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of “arbitrary” deprivation of liberty, within the meaning of Article 9 (1), of the Covenant. In the current case, neither the Court nor the State party provided any explanation of why summary proceedings were necessary, particularly in light of the fact that the incident leading to the charge had not been made in the “face of the court”. Neither did they provide any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court’s power to maintain orderly proceedings. The Committee thus concluded that the author’s detention was arbitrary, in violation of Article 9(1) and Article 19 of the Covenant as the sentence imposed upon the author was disproportionate to any legitimate aim under Article 19(3).

### ***Hassam v Jacobs NO and Others***

Constitutional Court of  
South Africa  
[2009] ZACC 19

*South African Constitution*  
art 9(3)

*Human rights – equality before the law – discrimination on grounds of religion – justification under limitations clause*

The applicant was in a polygamous marriage concluded according to Islamic rites. The applicant’s husband died intestate, and she sought to inherit his estate following his death. The executor of the husband’s estate refused to regard her as a surviving spouse for the purposes of the Intestate Succession Act. The applicant succeeded in receiving from the High Court a declaration that s 1(4)(f) of the Intestate Succession Act 81 of 1987 (the Act) was inconsistent with the Constitution to the extent that it provided for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husbands.

On appeal by the executor to the Constitutional Court, the applicant further argued that widows in her position were unfairly discriminated against on the grounds of religion, marital status, and gender. The Constitutional Court upheld unanimously the High Court’s declaration.

“In assessing the constitutional validity of the impugned legislative provisions in this case, regard must also be had to the diversity of our society which provides a blue print for our constitutional order and influences the interpretation of our supreme law – the Constitution”

*Nkabinde, J*  
*Hassam v Jacobs NO and Others*



