**CITIZENS AND Criminal Justice**

**Lecture 2: Crime and its Commission**

**1 Introduction**

**1.1 General prevalence of crime in Hong Kong and reasons for offending/not offending**

Hong Kong is normally regarded as a safe city (although this has not always been the case historically) and this is reflected in the statistics which concerns this issue. This is seen in:

* The 2019 Global Study on Homicide which stated that Hong Kong has one of the lowest homicide rates in the world at 0.32 persons per 100,000 persons for circa (around) 2015.[[1]](#footnote-1) Homicide tends to be regarded as a very reliable comparable indicator of the level of violent crime.[[2]](#footnote-2)
* The most recent data from victims’ surveys demonstrates that Hong Kong has a comparably low crime rate internationally.[[3]](#footnote-3)
* The overall crime rate in Hong Kong fell from 78,469 reported cases in 2008 to 54,225 reported cases in 2018.[[4]](#footnote-4) Not surprisingly, there was a rise in reported crime to 63,232 reported cases in 2020, which was associated with a period of recent social unrest.

**2 What is Hong Kong doing right?**

A number of reasons have been put forward as to why Hong Kong has managed to remain a safe city with relatively low crime rates internationally:

* A Confucian culture based on a close, yet extended family system with strong family values
* A booming economy combined with a relatively protective welfare safety net
* A large police force which is generally free from corruption
* A high incarceration rate for offenders
* Prevention of cross-border crime through the use of the identity card system
* High numbers of private security personnel
* Strict gun laws
* Widespread presence of security cameras.[[5]](#footnote-5)

Nevertheless, there is still a degree of crime in Hong Kong and we will explore some of the factors that may lead to citizens breaking the law, both in general and in this jurisdiction.

**3 Reasons for committing crime**

Various reasons for committing crime have been identified. These include:

* [Poverty](http://www.statcan.ca/english/Pgdb/famil41h.htm)
* [Drug](http://sano.camh.net/infoline/line.htm#facts%20on%20drugs) and [alcohol](http://www.ccsa.ca/profile/cp99alc.htm) abuse
* [Violence](http://www.gov.mb.ca/abuse/contents.html) in the home
* [Mental disturbance](http://www.csc-scc.gc.ca/text/pblct/forum/e073/e073i_e.shtml)
* Lack of education/cognitive deficits
* Social learning and juvenile delinquency and gangs.

1. **Poverty**

**4.1 General**

Poverty is said to be one of the main reasons for crime. Someone who cannot afford to buy food, for example, may claim he or she had no choice but to steal food or, more often, money to buy food or something that can be converted into money for food; the argument of necessity. It has been suggested that some juveniles in public housing areas have been forced to shoplift food in order to feed their families.

Of course, people may live in what is regarded as a situation of poverty but yet still have enough to eat. Is there is a link between this level of material disadvantage and a propensity to commit crime?

**4.1.1 Poverty, as a causal factor in the commission of crime (in general)**

As a general principle, there is no incontrovertible causal link between poverty and crime and it would be unfairly prejudicial to allege this.[[6]](#footnote-6) Nevertheless, conditions of poverty may be such as to incentivize people to commit crime to get what they need to reduce poverty, especially if their basic needs are not being satisfied. Also, poverty can de-incentivize people to commit crime, in the sense that they have less to lose if they are caught.[[7]](#footnote-7)

While, anthropological research has found that poverty per se does not lead to crime (many tribes do not have much in the way of material possessions but have low crime rates) the gap between rich and poor has been described as a major cause as it leads to feelings of resentment (described as strain theory)[[8]](#footnote-8) - although, see later at 4.1.2.

Poverty may also be associated with family dysfunction and problems exercising adequate supervision which will be discussed in the context of violence in the home and juvenile delinquency.

Wells found a strong causal link between unemployment (usually linked to poverty) and criminal behavior.[[9]](#footnote-9)

There may also be a higher rate of crime in geographically poor areas. See further below at 4.2.

**4.1.2 Poverty as a causal factor in the commission of crime in Hong Kong**

Oxfam found in a study, conducted between 2011 and 2015, that around 18 per cent of the population in Hong Kong lived below the poverty line, although it was difficult to ascertain what this figure (constituting the poverty line) actually was.[[10]](#footnote-10) It seems to be the case, though, that there are large numbers of people in Hong Kong suffering significant financial disadvantage.[[11]](#footnote-11) This situation is likely to have worsened due to the Covid-19 virus, as unemployment rates have increased substantially, especially those on lower income levels.[[12]](#footnote-12)

The Census and Statistics Department found that the majority of victims of violent crime in Hong Kong lived in poorer circumstances.[[13]](#footnote-13) Rates of reported drug abuse as reported by District in Hong Kong closely correlate to areas of socio-economic disadvantage; poorer areas have much higher rates of drug abuse, but this might also be because they have larger populations.[[14]](#footnote-14) Also, crime rates in Hong Kong seem to be linked, at least partly, to general economic circumstances; when the economy is better or people are better off, crime goes down.[[15]](#footnote-15)

There is not a substantial body or work in Hong Kong directly examining this link between poverty and the commission of crime.[[16]](#footnote-16) One study by Ngai and Cheung is somewhat equivocal, finding that strain is not a factor in the commission of crime in Hong Kong, but that unemployment (which tends to be correlated with poverty – see above at 4.1.1), is.[[17]](#footnote-17)

**4.1.3 Preventative measures to reduce crime related to poverty and crime in Hong Kong**

As noted, poverty in Hong Kong has not, at least based on empirical research, been indisputably proven to have significantly crossed over into criminality. Still:

* It is likely that there must be a link (as noted above), at least to some degree, even if just indirectly, between poverty and some instances of crime in Hong Kong
* There should be no complacency as economic downturns (which are currently occurring) or unexpected inflationary pressures may provide a sudden tipping point in increasing crime in Hong Kong.

**4.2 Crime and the geographical environment**

**4.2.1 The geographical environment, as a causal factor in the commission of crime** **(in general)**

The geographical environment can be thought of in a number of contexts, ranging from the general level of its socio-economic circumstances (geographical locality) to physical characteristics of the environment, such as the prevalence of CCTV.

People’s lives are closely intertwined with where they live. Here we are referring to their geographic locality. Their geographical locality has a major effect on the way they live and their behaviour.[[18]](#footnote-18) Poor areas are closely linked with high crime rates. Lee found a close link between concentrated urban poverty and crime.[[19]](#footnote-19) Theorists have identified social disorganization, often present in newer and disadvantaged areas or pockets of urban decay, as the catalyst. Because the populations are transient, traditionally normal social controls of church, schools and family are not as strong as in areas of greater affluence.[[20]](#footnote-20)

In terms of the direct physical geographical environment, a significant area of criminology has been the “broken windows” theory. This theory, at least in part, is that the state of a communities’ immediate physical environment has a subconscious effect on people’s behavioural patterns. So, if a neighbourhood has a lot of graffiti and broken windows etc. then this gives subtle cues to residents that they can be lawless.

**4.2.2 The geographical environment as a causal factor in the commission of crime in Hong Kong**

Hong Kong, at a glance, is a relatively well-ordered and well-maintained city. So, from Hong Kong’s perspective, broadly speaking, the direct physical effects of the geographical environment are not directly causally linked to crime (in line with ‘broken windows’ type situations) in the way that they might have been in the somewhat lawless days of the Walled City of Kowloon, which had a very chaotic lay out.[[21]](#footnote-21) So, in this sense, the Hong Kong government has ensured that the state of the environment has not played as significant a role as it might have in the past or the way it does in broken urban centres in the USA.[[22]](#footnote-22) This would be partially consistent with the generally downward rates of crime in recent years in Hong Kong. See your lecture notes for Week 5 as to these figures. In fact, the Hong Kong government has been conscious of ensuring geographical environmental factors are shaped so as to minimise crime. This is especially noteworthy in relation to the MTR where platforms are designed in a very open and well-lit manner, so as to make any criminal behaviour very conspicuous.[[23]](#footnote-23)

Hong Kong is small geographically and it has an excellent and cheap transportation system. This means that large geographical pockets of poverty that trap residents within them are unable to be naturally formed, which is a feature of poverty related areas in the USA.[[24]](#footnote-24)

**5** [**Illegal drug**](http://sano.camh.net/infoline/line.htm#facts%20on%20drugs) **abuse**

**5.1 General**

Much crime is said to be due to illegal drug abuse. On the one hand, it is said to remove inhibitions, cloud judgment and make people less responsible. On the other hand, it supplies a ‘motive’ for committing crime. The drug dependent often steals or traffics drugs to feed their habit and so on.

Note that simply because someone is under the influence of drugs does not mean they have a defence to a crime, though the effect of drugs may mean that they did not and could not form the intent to commit a particular crime e.g. the intent to kill in murder.

**5.2 History of drug abuse in Hong Kong**

It is well known that Hong Kong was ceded to Great Britain by China following the Opium War of 1840-42. Hong Kong has always struggled with a serious drug problem. Prior to 1945, opium was the drug of choice with roughly 10% of the male population addicted to this substance. From the late 1940’s through to the 1970’s heroin began to take over as the main drug. By the early 1960’s the proportion of heroin versus opium use was about 60% and 40% of the drug using population respectively. The number of drug addicts was estimated to be between 150,000 and 250,000 in HK in 1959.[[25]](#footnote-25) The convictions which drug users at Victoria Prison received in 1961 revealed that about 25% were for property offences such as larceny and housebreaking.[[26]](#footnote-26) In 1972, 90.4% of drug addicts were heroin users. Interestingly, in 1979, among an estimated group of addicts of between 35,000 to 40,000 in a population of 4.6 million, less than 2% were thought to be users of a group of drugs listed as “amphetamines, synthetics...and cannabis”.[[27]](#footnote-27) By 1982, the number of estimated drug users abusing heroin was judged to be 96.1% [[28]](#footnote-28) and 20% of criminal convictions by drug-addicted females and males were non-drug related,[[29]](#footnote-29) perhaps secondary crimes to feed their expensive drug habits.[[30]](#footnote-30)

One reason for the greater use of heroin could have originated at the supply end because it is supposedly easier to peddle without detection.[[31]](#footnote-31) Presumably too, it was easier to consume (especially by smoking or ‘chasing the Dragon’ than consuming opium). While the numbers of newly reported drug users of heroin in 2020 in Hong Kong are currently relatively low at 123, there was a relatively high residual population of previously reported users of 2714 in 2020 there.[[32]](#footnote-32)

**5.3 Current illegal narcotic use in Hong Kong**

Recent detailed research into illegal narcotic consumption in Hong Kong is difficult to find. Some statistics produced by the Hong Kong Police Force provide some illumination on this area.

In the year 2020 there were reportedly:

* 2095 burglary offences
* 1149 serious drug offences
* 20,314 thefts.[[33]](#footnote-33)

In 2010 there were reportedly:

* 4543 burglary offences
* 2196 serious drug offences
* 34,343 thefts.[[34]](#footnote-34)

Therefore, there has been a reduction in serious drug offences (as well as the usual related secondary offences) between 2010 and 2020. Whether that is due to lesser use or trafficking of such substances or other reasons is not revealed by the figures.

According to recent statistics published by the Central Registry of Drug Abuse, cocaine, cannabis and methamphetamine or “Ice”, are currently three of the most abused drugs in relation to those newly reported drug users in Hong Kong aged 21 and over.[[35]](#footnote-35)

While not dismissing the harmful psychological and physical effects of cocaine,[[36]](#footnote-36) Ice is an especially highly addictive stimulant associated with aggressive, violent and psychotic behaviour. It has been linked to a number of homicides and rapes.[[37]](#footnote-37) Ice is a popular drug worldwide[[38]](#footnote-38) raising the importance of international cooperation in dealing with this especially menacing drug.

The issue of illegal drugs will be explored in more detail later in the semester.

**6 Family problems/domestic violence**

**6.1 General effect of family problems**

Aichorn, a follower of Freud, in a study of delinquent youths in an Austrian reformatory in the 1930’s, found that many had undeveloped superegos (the conscience that human beings possess), due to the absence of loving parents.[[39]](#footnote-39) Since that time, numerous other studies have found that juvenile delinquency is much higher, especially amongst adolescent boys, in single parent families.[[40]](#footnote-40) On the other hand, according to McCord,[[41]](#footnote-41) a significant trigger for deviance in broken homes is the absence of a loving mother. This absence is crucial to the ability of the offender to reform. It is especially significant in the upbringing of boys.

The divorce rate in Hong Kong increased from 6295 in 1991 (1.11 per thousand mid-year population of 1991) to (in the most recently published statistics) 17,196 in 2016 (2.34 per thousand mid-year population of 2016). This bucked an overall increasing trend which resulted in an all-time high of 22,271 (3.10 per thousand mid-year population of 2013) in 2013.[[42]](#footnote-42) Divorces are often a result of extramarital affairs,[[43]](#footnote-43) leading to a general worsening of family conflict in the lead up to dissolution. Maintenance of love between parents and children is of course harder to foster if there is serious family disharmony consequent upon divorce (so the issue is not necessarily divorce per se - but how the parties manage this process).[[44]](#footnote-44)

**6.2 Domestic violence in Hong Kong**

**6.2.1 Causes of domestic violence in HK**

Specific factors contributing to domestic violence have been identified as:

* Job stress
* Long hours at work
* More parents leaving to work in the Mainland
* Growing tolerance of domestic violence.[[45]](#footnote-45)

**6.2.2 Extent of direct domestic violence on children in HK**

In one study, Catherine So-kum Tang interviewed over 1000 families by telephone.[[46]](#footnote-46) Participants were asked whether they had engaged in acts of child abuse as measured by the modified Conflict Tactics Scale. In this case, two measures of violence:-

1. “Minor violence” encompassing acts such as “threw something at, pushed, grabbed or shoved; and slapped or spanked the other family member”.
2. “Severe violence”, including behaviours such as “kicked, bit or hit with a fist; hit or tried to hit with an object, beat up, threatened with a gun, knife or other weapon; and used a gun knife or other weapon.”

The results as published stated that:

1. Approximately ½ of the children aged 16 years or under suffered bouts of minor or severe violence in the year surveyed.
2. The perpetrators were primarily mothers.
3. The subjects of this violence were mainly boys aged between 3-6 years.
4. The most common form of child abuse was “slapping/spanking and hitting/trying to hit with an object”.
5. There were no reports from the subjects of use of a gun except to threaten which was recorded in less than 1% of the parents participating.

What might be regarded by liberal social researchers as child abuse might be considered in the general community in Hong Kong (and perhaps even so by those experiencing such acts) as appropriate discipline.[[47]](#footnote-47) This tension is not limited to Hong Kong of course. In the west there is an age old idiom, “Spare the rod and spoil the child”. However, it may be that the rather extreme parental expectations seemingly associated with child rearing in Hong Kong could have an unhealthy psychological effect over time.[[48]](#footnote-48)

Certainly, in Hong Kong there has been a significant increase in cases of domestic violence which go beyond cases of harsh corporal punishment. The UNICEF Study on Child Friendly Families found that in the year preceding the study that 21% of school students who were surveyed had been given corporal punishment and 14% had suffered physical violence.[[49]](#footnote-49) Most worrying, is a finding that there is often a thin line between corporal punishment and child abuse and one may lead to the other.[[50]](#footnote-50) This view has recently received some confirmation in reported comments by a Hong Kong social worker.[[51]](#footnote-51)

In Hong Kong, newly reported child abuse cases recorded by the Child Protection Registry cases numbered 940 in 2020, rising from 763 in 2005.[[52]](#footnote-52) Nearly, 60% of the perpetrators of this child abuse in these latest figures were parents.[[53]](#footnote-53)

**6.2.3 Effect of direct domestic violence on children in HK**

Children who are abused have been recorded as suffering from the following psychological and behavioural problems:

* Low self-esteem
* Poor school performance
* Concentration problems
* Delays in development
* Weak social skills
* Lack of interest in social activities
* Exhibition of disrespect toward parents
* Post-traumatic stress disorder in some cases.[[54]](#footnote-54)

As noted in other parts of this chapter, many of these problems, especially in the areas of cognitive development and poor educational results, can lead to criminal behavior. In addition, victims of domestic violence are more likely to engage in illegal drug abuse, which is both a crime of itself and can lead to other types of criminality.[[55]](#footnote-55) See also the commentary on illegal drug abuse in these notes and in the notes for Week 6.

**6.2.4 Extent of witnessing domestic violence in HK**

Another troubling area relates to the prevalence of inter-spousal domestic violence in Hong Kong. This violence, not only affects the direct victim, but also leaves psychological scars on the children who witness it.

A HKU studyon child abuse and spouse battering used a combination of household surveys involving face to face interviews and questionnaires (for more sensitive matters) to conduct a study on domestic violence in Hong Kong. It surveyed 10,000 households and had a 71% completion rate. In the 12 months leading up to the survey it found that the following percentages of children had witnessed inter-spousal domestic physical violence:

Minor by father 10.20

Minor by mother 11.40

Severe by father 5.69

Severe by mother 6.19[[56]](#footnote-56)

Newly reported spouse/cohabitant battering cases during 2020 present a different picture relating to gender balance, with 84.9% of victims being female and 15.1% being male.[[57]](#footnote-57)

**6.2.5 Effect of witnessing domestic violence in HK**

Children who have witnessed violence usually experience a number of behavioural psychological problems including:

* Aggression
* Anti-social tendencies
* Withdrawal
* Abnormal fears.[[58]](#footnote-58)

The kinds of behavioural and psychological problems identified above have been linked to a propensity by juveniles to engage in criminally deviant behaviour.[[59]](#footnote-59)

**7** [**Mental**](http://www.csc-scc.gc.ca/text/pblct/forum/e073/e073i_e.shtml) **disturbances**

**7.1 General**

There has long been a view that mental disorder leads to violence. However not all those who have a mental disorder commit crime, let alone violent crime. Nevertheless, there are some conditions which may have a bearing on levels of crime. We will have a brief look at the nature of psychiatric illness, certain types of psychiatric disorders and whether or not they can trigger criminal behaviour.

* 1. **Psychiatric explanations of crime**

The law defines people as guilty (if the actus reus and mens rea are proved) or not guilty (by reason of insanity which is a concept that will explained later in the Course). Mental illness may also provide a ground for reducing murder to manslaughter on the basis of diminished responsibility. If successful, the verdict will be manslaughter rather than murder.[[60]](#footnote-60)This is significant as a verdict of murder in relation to those who were 18 or over at the time of the act will lead to a mandatory sentence of life imprisonment,[[61]](#footnote-61) while the court has discretion to impose a life sentence following a conviction of manslaughter.[[62]](#footnote-62) Two common types of mental illness/disorders linked to crime are schizophrenia and anti-social behavioural disorders.

**7.3 Schizophrenia**

A sufferer’s mind is divided up into different parts which do not effectively work with each other, manifested by one or several symptoms, including paranoid delusional thoughts and sudden outbursts of rage which may lead to spontaneous attacks.

Crimes committed by schizophrenics range from minor offences such as criminal damage to serious assaults and homicide.

Estimates vary as to the number of people with psychoses in prison. Their prevalence seems to be related to the level of support services in the community; 10% of prisoners in NSW jails have an active psychosis,usually schizophrenia. There is a perceived link between a decrease in availability of beds for acute care and this large number.[[63]](#footnote-63)

**7.4 Anti-social personality disorder (“ASPD”)**

This is a personality disorder identified under psychiatric diagnostic criteria called DSM-V. People with this disorder tend to lack a conscience and engage in aggressive and compulsive behaviour.[[64]](#footnote-64)

Nearly 50% of prisoners interviewed in one sample of 728 in a jail in the USA exhibited symptoms consistent with ASPD.[[65]](#footnote-65)

ASPD appears to occur as a result of genetics and/or the following environmental influences including:

* Rejection, neglect and abandonment in childhood
* Passage into life as illegitimate children
* A high percentage of fathers (30%) who are criminals and alcoholics (50%).[[66]](#footnote-66)

A study published in 2013 found that oppositional defiant disorder was estimated to be as high as 6.8% among adolescents at high schools in Hong Kong.[[67]](#footnote-67) In other studies, there has shown to be a nexus between oppositional defiant disorder and later development of anti-social personality disorder.[[68]](#footnote-68)

**7.5 Correlation with criminality and mental illness in general**

A widespread survey was conducted in Hong Kong between 2010 and 2013 which included surveys of the prevalence of common mental illnesses and psychoses.[[69]](#footnote-69) It found that 13.3% suffered from general mental disorders such as depression and anxiety, and that more specifically, 6.9% of persons suffered from common depression. The study also found that 2.5% of respondents suffered from a psychotic disorder.[[70]](#footnote-70) A Hong Kong survey published in 2015 found that 40.4% of patients between 15-25 who have been treated for psychosis committed relatively serious acts of violence (acts using force with the intention of injuring or hurting someone else) toward other persons during a three year period after initial treatment. Substance abuse was a common factor amongst these persons and so this was regarded as an important area for intervention.[[71]](#footnote-71)

Few studies exist in Hong Kong as to the correlation between mental illness and incarceration. One study published in 2018 by KKW Chow and others of 245 prisoners (150 males and 95 females) on remand (in custody awaiting trial) in Hong Kong, found very high numbers of those remand prisoners had a lifetime history of drug abuse and /or mental illness. Breaking down the findings further, the study reported these percentage figures:[[72]](#footnote-72)

Male Female

Lifetime substance abuse 36.7% 43.3%

Lifetime mood disorder 21.6% 18.7%

Lifetime psychotic 5.3% 7.3%

Lifetime neurotic 3.7% 3.3%

**8 Lack of education**

**8.1 General**

It may be that a lack of education leads to a lack of opportunity, unemployment and idleness which provides a setting for crime, but to ascribe criminality simply to a lack of education overlooks the “white collar” criminal.

While not wanting to classify those lacking education as embryonic criminals it is important to honestly consider all matters that may influence the levels of crime, especially as improvements in the level of education or the provision of financial assistance to students to stay in school may be among the easier changes which can be made to lower crime.

One recurring feature in the commission of many crimes is a deficiency in cognitive ability among offenders.

* 1. **Cognitive learning theory**[[73]](#footnote-73)

Cognitive ability concerns the ability to:

* Understand concepts
* Solve problems
* Exercise self-control
* Make rational choices.

Cognitive learning theory suggests that criminality can result from an inability to cope and function in society.

Cognitive learning theory argues that criminality can be reduced by altering behaviour in multimodal programmes by providing training to improve:

* Information processing
* Problem solving
* General skills
* Social skills
* Emotional control
* Moral reasoning.

One Australian study of young incarcerated offenders found that 17% of offenders had cognitive disabilities that placed them on the scale of the intellectually disabled.[[74]](#footnote-74) Nearly all the offenders either left school early and/or got into serious disciplinary trouble there. A lack of education has been linked with poor neurobiological development.[[75]](#footnote-75) Similarly, frontal lobe areas of the brain, the part of the brain controlling judgment and impulsive behaviour, usually do not fully develop until a person is in their 20’s. Hence, this may constitute a possible reason for the high rate of offending by teenagers.[[76]](#footnote-76)

A particular concern which has come to light is that a correlation has been found between poor performance on cognition (including the ability to make decisions) and ingestion of drugs such as marijuana.[[77]](#footnote-77) The potential then exists for the creation of a vicious cycle in some teenagers; they are more susceptible to taking drugs because of poor cognition skills which then leads to a further diminution in them.

**9 Social learning theory**

Sutherland, in a landmark study of white collar crime, developed a theory called differential association. He found that association with others engaging in criminal behaviour, not only helped shape favourable attitudes toward such behavior, but enabled the development of the necessary skill sets to perpetrate illegal acts, in the same way a person might learn any kind of skill, be it golf or playing the violin.[[78]](#footnote-78) If the consequences are sufficiently favourable, either through monetary gain or peer approval, as compared to the negative consequences of punishment through the criminal justice system, proponents of differential reinforcement theory hold that this perceived outcome will reinforce this existing tendency toward crime.[[79]](#footnote-79) Clearly, this dynamic will have an impact in relation to juvenile delinquency and gangs considered below.

**10 Juvenile delinquency and gangs**

This brings us into concepts of guilt by association and peer pressure. The suggestion is that if you hang around with persons who commit crime you will be drawn into the criminality. A number of overlapping themes tend to exist here; youth, lack of opportunity and gang related behaviour.

**10.1 Nature of juvenile delinquency**

Teenage years involve a natural sense of rebellion, from adults not peers.

This is increased by other youthful tendencies:

* Desire to hang out together
* Conformity with peer values
* Changes in the teenage brain[[80]](#footnote-80)
* Hormonal influences.[[81]](#footnote-81)

**10.2 Situation in Hong Kong**

In Hong Kong, some youths join triad gangs. Triad gangs are involved in a number of criminal activities which include drug dealing, extortion/protection, prostitution and human trafficking. Youngsters work at the foot soldier level. Triads historically were organizations with complex rules which offered their recruits a strong sense of belongingness. There is less emphasis now on the traditional rituals in triad societies and the affiliation between those at the top and the bottom of the triad hierarchy is much looser. Generally, small triad gangs operate autonomously in the patches which they control. The predominant motive for joining triads in modern times is probably a financial one.[[82]](#footnote-82)

For various reasons relating to the evidence needed to prosecute triad related offences and the constituent elements of such offences,[[83]](#footnote-83) police statistics of triad-related offences probably do not constitute a reliable guide as to the size of the membership of these organizations. However, in 2009, Traver considered that there were tens of thousands of triad members in Hong Kong and “there still seems to be a steady stream of individuals willing to join the triad ranks.”[[84]](#footnote-84) In 2014, an article in Time Magazine suggested a similar number for triad members in Hong Kong, but noted that the activities of members are less obvious than in the past as they are concentrating on more invisible crimes such as drug dealing, prostitution and gambling and of course legitimate businesses.[[85]](#footnote-85)

A major study has found that youth in Hong Kong who had higher levels of social control and cognitive development and reduced levels of social learning and strain were less likely to be involved in delinquent behaviour.[[86]](#footnote-86)

The number of triad-related crimes rose from 1353 in 2019 to 1761 in 2020.[[87]](#footnote-87)

**CITIZENS AND Criminal Justice**

**Lecture 3: Models/Theories of Criminal Justice**[[88]](#footnote-88)

**1 Introduction**

The theories set out below comprise a number of major approaches to administering criminal justice, although of course,[[89]](#footnote-89) permutations and combinations of these may exist or be given different names.

**2 Crime Control Model**

The crime control model is primarily a punishment and deterrence approach.

We have the concept that the victim of crime wishes to see the offender punished; this satisfies the personal desire for revenge; the system takes over and exacts revenge and thereby the individual victim of crime is satisfied and will not exact personal revenge, which would bring about further disruption of society as might occur with a vendetta or a blood feud.

The emphasis is upon punishment and crime control. It is morally right and in the best interests of the society, and indeed of the offender, to impose punishment as this expresses the disgust of society for the disruption the offender has caused.

This brings us to concepts of:

* Individual deterrence - the punishment is such that the offender does not do it again; and
* General deterrence - a message is sent to society in general that this conduct will not be tolerated.

The criminal courts are seen as guardians of law and order. Hence, the defendant is punished and the authority of the law enforcement agency or agencies is upheld.

There is the desire here to avoid any impression of authority being weak in the sense of the law not being seen to do its job of punishing and deterring. If the law and the enforcement agencies are viewed as weak, more and more people will be tempted to indulge in criminal activity and there will be a breakdown of law and order, particularly where there are substantial rewards for criminality.

There is also the consideration that strong sentences from the courts reward the law enforcement agency for its efforts, encourages them to greater efforts and increases the overall morale and efficiency of the law enforcement agency.

Situations of substantial reward may be seen in corruption related activities, robbery and kidnapping for ransom. These are offences which are particularly disruptive of society. They adversely affect the image of society, both internally and externally.

The crime control model is often synonymous with lengthy maximum sentences for certain offences (which may be at levels that are regarded as harsh by more liberal societies). There will also likely be mandatory minimum sentences to guard against individual sentencers undermining the effectiveness of the system by imposing sentences which “society” would regard as too low and hence encourage the commission of those crimes. In some societies, we see many offences attracting life imprisonment and the widespread use of the death penalty for a wide spectrum of offences.

Even if a person is simply arrested and not brought before a court this experience can be so unpleasant, that it is itself an exercise in deterrence. In this regard, the crime control method is also associated with intensive policing.

Aside from more deterrent punishments/very long sentences, crime control can also take the form of:

1. Situational crime prevention publicity campaigns (e.g. educating the public about risks).
2. Enlistment of services of the community (e.g. creating a local culture that discourages crime)
3. Use of CCTV[[90]](#footnote-90)
4. Making concrete changes to the environment to deter crime or ‘target hardening’ such as locks, fences (e.g. made of razor wire), bars and car alarms.

We might ask ourselves whether the wholesale application of the crime control model is appropriate for a developed and complex contemporary society. In this regard, we might ask ourselves whether in these days of civil rights and freedoms, the crime control model meets the expectations of right-minded members of society. Does it pay too little attention to the individual? Does it give too much power to the police? Is it consistent with contemporary views and standards? Are its punishments too harsh? Can the crime control model effectively prevent crime amongst persons who are less able to control their actions (whatever consequences they may entail) such as certain people who are severely mentally ill or those addicted to illegal drugs such as ice?

This is not to suggest that an element of crime control and punishment should not be present in a criminal justice system. Crime control and deterrence by severe punishments is, arguably, a consideration in each model that we will examine.

**2.1 Operation of the Crime Control Model in Hong Kong**

Hong Kong’s courts have considered that deterrent sentences are necessary in other cases e.g. in robberies of taxi drivers, lift robberies and kidnapping. In *HKSAR* v *Pun Luen Pan and Li Kam Bun, Patrick,*[[91]](#footnote-91)the Court of Appeal remarked that sentences greater than 18 years imprisonment, particularly upon conviction after trial, were justified for kidnapping for ransom as the courts must provide adequate protection for those who enjoy the benefits of wealth in Hong Kong. While Hong Kong does not have the death penalty, it imposes a mandatory sentence of life imprisonment for those over 18 who have committed murder.[[92]](#footnote-92)

In relation to other aspects of the crime control model, Hong Kong employs relatively extensive use of CCTV,[[93]](#footnote-93) and target hardening, as readers can probably see for themselves in their daily observations.

It also has relatively intensive policing, an issue we will explore in more detail in Lecture 5.

However, the Hong Kong criminal justice system contains many other elements than simply crime control, as we can see from the discussion of other models below.

**3 Justice/Due Process Model**

This model/theory is said to provide a systematic and balanced process to resolve conflicts between the State and the citizen.

The State is still the guardian and brings criminal prosecutions. Again, the objective is to have a control mechanism and to prevent individual revenge taking place but the individual is provided with more safeguards and legal protections.

The State has to prove guilt with certainty and there are developed rules and procedures about the investigation of offences and the admissibility of evidence in a trial.

The presumption of innocence predominates.

The courts are viewed more as impartial fact finders. Judges have more freedom, especially when it comes to sentence and there is a greater role for lawyers.

This concept of the courts as impartial fact finders and being independent of the Executive arm of the State has considerable implications where a defendant pleads not guilty.

The advantage of having clearly defined rules and keeping to them is that participants in the system become familiar with the system and errors and anomalies in individual cases become apparent. Added to that is a developed and comprehensive appeal structure and there is said to be less chance of a ‘wrong’ decision or, in legal language, ‘a miscarriage of justice’.

We often see in this model rules regulating the amount of time suspects can be kept in custody, rules (or codes) about the conduct of interviews of the accused, with evidence being excluded if it is obtained in a way which breaches the procedural rules or codes.

There is more accountability on the law enforcement agency and the courts are less reluctant to criticize them if they fall below accepted standards of fair play.

There is greater emphasis upon individual rights. Law enforcement agencies often complain that the due process model gives the individual too many rights and considerations and erects too many barriers for the prosecution.

All this does not mean that offenders cannot be punished severely or that deterrent sentences cannot be imposed, but it does mean that more procedures have to be followed and there is a greater balance between the interests of the State (society) and the individual accused of crime.

In Hong Kong, we can note the rights and guarantees provided by Article 35 of the Basic Law:

(a) Access to lawyers;

(b) Confidentiality of communications between clients and lawyers; and

(c) Access to the courts.

There are also provisions in the Hong Kong Bill of Rights Ordinance (Cap.383) that also provide such rights and guarantees.[[94]](#footnote-94)

All of these contribute to what is often termed ‘due process’, which is simply another way of saying the system is not only fair but is generally seen to be fair.

**4 Rehabilitation/Social Crime Approach Model**

The emphasis here is on finding out why crime was committed and seeing what response will best take away the cause or reason for the individual committing the particular crime.

Leading on from this is the thought that the individual is not wholly responsible for their actions; society has an impact upon the individual’s actions and rather than simply punishing e.g. by locking people up, the object is to find a way of removing the cause of the offending.

The object is to restore the offender to a situation where they will be able to cope with the demands and problems of society and avoid offending again.

We perhaps see this approach with the treatment of juvenile offenders. The Juvenile Offenders Ordinance (Cap.226), places an emphasis upon reform and rehabilitation. There are special ways of dealing with juveniles.

For offenders between 16 and 21 there are further restrictions upon imprisonment. With young offenders we tend to go much more for probation, helping them get their lives together, or if liberty has to be taken away by Detention Centre Orders (the short, sharp, shock approach) or Training Centre (“TC”) Orders (which are custodial sentencing options for younger offenders and which will be considered in more detail later in this Course) with the emphasis on the acquisition of employment skills and learning a trade and so installing a sense of purpose and responsibility.

Another example of the rehabilitation approach is seen with Drug Addiction Treatment Centre (“DATC”) Orders. Where a person is convicted of simple possession of dangerous drugs, courts cannot send the offender to prison without first obtaining a report as to their suitability for treatment in an addiction treatment centre. This is on the basis that if you remove the dependency on drugs, you remove an underlying reason for crime. Statistics show that many drug dependents steal to obtain easily saleable items and finance their addiction.

Furthermore, the Hong Kong Correctional Services (in general) promotes rehabilitation through the provision of psychological services, training for future employment and placement in jobs.[[95]](#footnote-95)

A criticism of this model is that a reformative approach may be seen as a soft option, and hence a weakness, both by offenders and by society in general. This is particularly pertinent to a society where crime is seen to be on the increase.

Conversely, sending an 18 years old boy to a TC, means loss of liberty for up to 3 years.

An additional problem is that this model of criminal justice is resource intensive; problems need to be investigated, solutions need to be devised, and often there will be intensive supervision and after care. At times of economic stringency, governments and society in general may be reluctant to fund the system sufficiently for it to work.

Even in good financial times many sections of society may be reluctant to see resources that it considers could be used more profitably elsewhere used for the benefit of criminals.

Schemes that attempt to prevent crime include the Police Superintendent’s Discretion Scheme (“PSDS”), Junior Police Call (“JPC”), Police School Liaison Scheme (“PSLS”), Personal Encounters with Prisoners Scheme (“PEPS”) and Youth Ambassador Against Internet Piracy Scheme (“Youth Ambassador Scheme”) and various other attempts to stop triad recruitment and school bullying.

Wong and Tu have recently postulated that government sponsored comprehensive outreach programmes in housing estates and social work programmes in schools have been an important factor in reducing delinquency.[[96]](#footnote-96)

Ultimately, while it is difficult to obtain direct empirical evidence of the value of the rehabilitation model, its low crime rate and relatively low recidivism rate provide some evidence that it works.

**5 The Management/Bureaucratic Model**

This may be seen as close to the Due Process Model.

Society has always had processes of various kinds for dealing with those accused of criminal acts. Following the end of World War II, Great Britain and the governments in its colonies increasingly adopted a greater policy of homogenization and bureaucratization of the provision of services, including administration of the main planks of the criminal justice system.

Furthermore, since the 1980s there has been an increasing trend in relation to the rationalization of scarce resources as demand for these has increased by different lobby groups in the modern pluralistic society that is the developing world. This is part of a sea change called “modernization”.[[97]](#footnote-97)

If the criminal justice system is to function properly it needs to be permanent, independent of political conflicts and to treat each defendant in the same way in the sense of there being defined substantive and procedural rules. This model applies standardized procedures in an almost machine-like operation to deal with cases.

This approach places emphasis upon saving time and expense, record keeping, discouragement of procedures that prolong cases and sanctioning of time wasting and inefficiency. It is attractive if you like a cost-effective accountancy approach.

This model may be attractive in that it enables governments to allocate resources based on material considerations.

In Hong Kong, we have seen over recent years the closing of a number of magistracies and a concentration of cases in less magistracies. Similarly, we have seen the District Court concentrated in Wan Chai. This may be seen as saving resources as buildings are more intensively used, allowing the disposal of surplus accommodation.

A concentration of magistrates, in theory, allows for a greater case load in the sense that if one or more magistrates finish their cases early, cases can be transferred to them from other courts in the same building. This reduces waiting time and speeds up the overall administration of justice.

Particularly in times of financial constraint the bureaucratic model may be attractive to governments. The government simply puts up a sum of money and leaves it to the Judiciary to allocate it. If the funding is less than is actually needed, economies or improvements have to be made to keep the system going.

The government is not seen as directly responsible for these economies or cost savings as they are carried out by the system itself.

The difficulty with the bureaucratic model is that it may not take proper account of the interests of those who use the courts or who are brought before them. Closing some magistracies may lead to lawyers, witnesses, court staff and defendants having to travel longer distances to court. That may add to their expense.

**6 Status Passage Model**

**6.1 General**

This model stresses the function of the criminal courts as institutions for denouncing and shaming defendant/s, reducing their social status, and in that way, setting the defendant/s apart from law abiding members of the community and so reinforcing the social value of being a law abiding and useful member of society.

There may well be something in this as we all like other people to think well of us. We do not like to be held up to ridicule in public, we are uncomfortable when other people stare at us or are apparently talking about us.

If you look at the criminal justice process it does single out wrongdoers. The mere fact of someone being taken to the police station for investigation raises questions about their qualities, their fitness, and their position in the community.

Let’s now look at the trial process. The courts are open to the public. The public includes representatives of the news media. The defendant is either in the dock, a secure place in the courtroom and set aside from other persons or, if on bail, stands in a prominent place in the court whilst the plea is taken. The defendant is named as the court must be sure it has the right person before it.

If the defendant pleads guilty, a short summary of the facts is read out to him.

There is then the disclosure of any relevant previous convictions before the defendant or their lawyer addresses the court in mitigation. This mitigation invariably amounts to public acceptance of the criminality charged with that being attributed to personal problems or weaknesses. Again, this is a further undermining of the defendant’s stature in society.

Courtrooms provide news reporters with ready, public interest material. With some qualifications there are no restrictions on what may be reported in the news media.

All this may be seen as part of the deterrent element; the individual is deterred from committing offences again and concentrates upon re-integration into society, whilst other persons who might be minded to commit crime are deterred by the element of public shaming and denunciation. Consideration of the effectiveness of this approach brings us to a discussion of the concepts of labeling and reintegrative shaming.

**6.2 Labeling Theory**[[98]](#footnote-98)

Labeling theory is based on the premise that the commission of crime can be influenced by the way that society labels behavior and people who commit crimes. For instance, some actions may be allowed, or otherwise, at different times in different countries, such as prostitution.

Once convicted, offenders may begin to see themselves as criminals and tend to act out in that way. Also, labeling can reduce a convicted person’s ability to find work or the types of persons who may associate with that person. This might cause the convicted person to turn to crime in order to get money or he or she may find that the only other people who will associate with him or her are other criminals, thereby leading to a peer induced propensity to commit crime.

It is difficult to employ this theory as a general proposition as other factors such as addiction, may be the reason. Therefore, it is difficult to test empirically. Maybe, it is more relevant in regard to impressionable people who are still developing psychologically like teenagers.

In order to police crime and enforce order a level of stigmatization is unavoidable. However, a more nuanced approach may assist in reducing the effects of this problem and act as a tool to lessen recidivism.

**6.3 Dealing with the problem - Braithwaite’s model of reintegrative shaming**[[99]](#footnote-99)

John Braithwaite has probably been the leading criminologist writing on the notion of reintegrative shaming. This concept is described below.

* Reintegrative shaming
* Expression of disapproval while maintaining respect for the individual
* Termination ceremonies certifying deviance followed by ones decertifying deviance
* Labeling of the act rather than the person as ‘evil’
* Preventing the deviance to assuming a master ‘status trait’.

This is to be contrasted with:

* Stigmatization
  + Personal humiliation
  + Failing to terminate ceremonies certifying deviance by ceremonies decertifying it
  + Labeling of the person rather than the act as ‘evil’
  + Permitting the deviance to assume a master ‘status trait’.

Examples of reintegrative shaming in the criminal justice system are programs where an offender is shamed by meeting the victim. This shaming can occur in the presence of those close to the offender such as his family who provide support in his reintegration.

**6.3.1 General relevance of reintegrative shaming**

* Society needs to think carefully about what it legislates as criminal
* There is value in diversion schemes or addressing acts at an earlier level e.g. cautioning.

**6.3.2 Empirical support for reintegrative shaming**

Surprisingly, comparatively little substantive research exists to prove the validity of reintegrative shaming per se in the criminal context (although see further below as far as its application to the use of restorative justice) especially as it seems to be an enormously attractive one from a variety of standpoints in dealing with crime. Having said that, Braithwaite has described the essence of reintegrative shaming as follows; “The real power of reintegrative shaming is at the level of prevention – conscience building”.[[100]](#footnote-100) In this sense then, the argument is a fairly self-evident one.

Even those who have little sympathy for criminals may be persuaded about the merits of reintegrative shaming over conventional harsher punishments, if for no reason other than it is likely to be more cost effective.[[101]](#footnote-101)

Of course, such an approach is unlikely to act as a panacea to deal with all offenders. Sadly, human experience demonstrates that some people appear to ‘have no shame’, especially those with anti-social behavioural disorders. Nevertheless, it seems to be a tool worthy of greater utilization by those involved in policy making in the criminal justice system. This leads us into a consideration of the use of restorative justice.

**7 Restorative Justice**

A very basic definition of restorative justice has been expressed by Howard Zehr as follows: “Restorative Justice requires, at a minimum, that we address victims’ harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process.”[[102]](#footnote-102)

The restorative justice model operates as a practical application of Braithwaite’s theory of reintegrative shaming, by providing a forum for the use of “positive shaming.”[[103]](#footnote-103)

According to Braithwaite, the system of restorative justice was the predominant form of justice operating historically throughout the world, until it was supplanted in England by the Norman invasion. After this event, crime was regarded more as a wrong against the king rather than to the victim of it.[[104]](#footnote-104) Restorative justice re-empowers victims as actors in the criminal justice process.[[105]](#footnote-105)

**7.1 New Zealand**

The use of restorative justice, in the form of family group conferences, has formed a key component in dealing with youth offenders since 1989. However, adults can participate in the system. An important characteristic of the New Zealand system is that there are no restrictions on the types of offences which may be dealt with under this system. Victims tend to attend around 50% of conferences. Participation in the process of restorative justice can lead to a lesser sentence.[[106]](#footnote-106)

An important feature of the New Zealand system is that it extends beyond a process of reconciliation to the possibility of an agreement between the offender and the victim as to agreed outcomes, “To put right the offending.”[[107]](#footnote-107) If the agreed outcomes generally reflect sentencing practices, then they may be considered in relation to the sentence imposed.[[108]](#footnote-108)

A study undertaken by the Ministry of Justice of New Zealand found that the reoffending rate for those who had participated in restorative justice was 7.5% less than those who had not participated over a three-year period. In the group of offenders aged between 17-19, the reoffending rate was 8.9% less for non-participants over three years. These figures provide particularly strong support to the argument that restorative justice reduces recidivism, as the restorative justice scheme in New Zealand operates across a wide range of offences.[[109]](#footnote-109)

New Zealand continues to embrace and extend the ambit of restorative justice. On 6 December 2014, s.24(a) of the Sentencing Act was introduced. This amendment provides that a court is required to adjourn proceedings to determine if it is suitable to employ restorative justice, after taking into consideration the victim’s views. As a result of this change there have been delays in the court system in determining matters, including matters which are relatively simple. Some lawyers have also stated that they have advised certain clients to attend restorative justice conferences even if they are not interested in participating in order to obtain a lower sentence.[[110]](#footnote-110) Perhaps in order to address the issues relating to the backlog, the New Zealand Government announced in June 2016 it would invest NZD16.2 million in restorative justice schemes.[[111]](#footnote-111)

**7.3 Hong Kong**

Hong Kong has not implemented the use of restorative justice conferencing as a formal part of its criminal justice system, particularly in relation to victim participation. The question of introducing such a form of restorative justice was reported on by the Legislative Council Panel on Administration of Justice and Legal Services in April 2007.[[112]](#footnote-112) It did not recommend introducing such a system for a number of reasons, including:

* There is a lack of empirical evidence to support the value of such a scheme.
* Offenders’ needs were already being sufficiently addressed through the Police Superintendent’s Discretion Scheme, as the recidivism rate following the use of it was less than 20%. In this case, the recidivism rate is measured on the basis that the cautioned person is post-caution, either rearrested or reaches 18 years of age, whichever occurs first.
* Rather than satisfying victims’ needs, victims might feel that offenders were being let off lightly and/or they were under pressure to undertake the process or they might be criticized by the offenders.
* Many offences by juveniles were not committed against individuals e.g. shoplifting or the offences are ‘victimless crimes’ such as illegal drug use.
* Juvenile crime was falling.[[113]](#footnote-113)
* Culturally, Hong Kong families like to resolve family issues within that context.[[114]](#footnote-114)

Other concerns which have been raised are:

* Some victims, such as those victimised by triad members, may not feel comfortable engaging with these individuals.[[115]](#footnote-115)
* The government does not have sufficient resources to fund this system.[[116]](#footnote-116)
* Incarceration rates increased significantly in countries (such as New Zealand and England and Wales) where restorative justice is being employed.[[117]](#footnote-117)

Some of these points are perhaps more valid than others. The HKSAR government (for the most part during that period) had been running large surpluses in recent years, so (subject to resolution of the long-term situation concerning major social discontent) there should be sufficient resources to fund such a scheme. Admittedly now, the situation has changed.

As far as rates of incarceration increasing in England and Wales and New Zealand is concerned, this may be due to a multiplicity of issues. Furthermore, the increase may have been higher if restorative justice had not been employed. There is now relatively robust empirical data supporting the value of restorative justice. A telephone survey of Hong Kong residents found that nearly 90% of Hong Kong residents were in favour of direct conferencing, refuting the notion that Hong Kong residents are culturally averse to this notion.[[118]](#footnote-118) Also, a report of the restorative justice programme in Taiwan found that more than 60% of victims participating in it considered that justice was done under it.[[119]](#footnote-119)

Vagg[[120]](#footnote-120) has argued that Hong Kong’s criminal justice system could more fully embrace the Braithwaitian restorative justice approach. According to Vagg, Hong Kong’s society deeply embraces the concept of shame through the dynamic of ‘loss of face’.[[121]](#footnote-121) This has two aspects:

1. Prestige through social success.
2. Integrity through moral standing.

While the actions of the criminal justice system in Hong Kong diminish moral standing, little is done in terms of reintegration. When a form of restorative justice is employed such as police use of cautioning for youths, it tends to be fairly low; although there has been some rise, in 2020, it was 17.1% of those arrested.[[122]](#footnote-122) Such harshness of policing, rather than acting as a deterrent effect, would, following a Braithwaitian analysis, tend to drive young offenders away from a disapproving conventional society and into the arms of organizations which approve of such behaviour like triads. This view is backed by the belief that some youths join triads at the pre-delinquent stage in pool halls and games parlours,[[123]](#footnote-123) but recruitment levels are much higher among juveniles who have committed their first offence.[[124]](#footnote-124)

Interestingly, though, a proportion of cautioned offenders are referred to NGOs, some of whom offer a form of restorative justice in the form of direct or indirect mediation to offenders and victims; evaluations by participants in this scheme was high. In particular, victims were less concerned about future victimization.[[125]](#footnote-125) Although not a formal part of the criminal justice system, a relatively widespread and successful form of restorative justice in Hong Kong has involved victims of school bullying meeting offenders. It has found that, compared to a control group, participation in this programme led to a significant reduction in bullying.[[126]](#footnote-126)

What does seem clear is that the success of restorative justice is contingent on the nature and cultural suitability of the any such programme,[[127]](#footnote-127) and that would need to be worked through in some detail before implementing it in Hong Kong.

**CITIZENS AND Criminal Justice**

**Lecture 4: HK’s legal system and discussion of what a crime** **is**

**1 Definitions of crime**

Courts will determine if a matter is considered to be a crime based on the following:

(1) The classification of the offence under domestic law.

(2) The nature of the offence; and

(3) The nature and severity of the potential sanction.

In *Chan Kin Shing Sonny* v *Insider Dealing Tribunal and Another,*[[128]](#footnote-128) it was held that although certain proceedings for insider trading were classified as civil in nature by the legislature (e.g. the breach did not result in a criminal record) this was not determinative of the issue. The presence of a substantial penalty for a breach of the governing provisions, and the serious and evil character of insider trading, led to the classification of the proceedings as criminal in nature.

**2 Sources of Hong Kong’s criminal law**

* Hong Kong’s criminal law is based upon the criminal law of England and Wales brought to HK when the British came to Hong Kong and developed it up until 1997.
* The previous statutes and common law (judge made law which has remained binding) applies here despite the reversion of sovereignty in 1997, because the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China provides for the previous law to continue to apply to Hong Kong.
* The criminal law is then simply the body of law found in the statutes and at common law:
* which determines whether
* an act or an omission to act is
* or is not, a crime.
* Some offences are still common law offences. Murder is an example, as is kidnapping. Murder is not defined in an ordinance in Hong Kong. We find its definition in the cases.
* Most criminal law is in the ordinances enacted by the Hong Kong legislature. These ordinances will usually follow an English ordinance, certainly up to 1st July 1997.
* Statutes, if they are constitutionally valid and properly enacted, will override the common law.
* In determining whether a statute is valid, it must be consistent with the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap.383). See further at 5.4 below.

When we are dealing with a question of criminal liability, for example whether a theft has been committed we will go to the source material; in this case, the Theft Ordinance (Cap.210). We see there in section 2 the definition of theft:

*(1) A person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.*

*(2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.*

**3 The elements of a crime**

The prosecution generally needs to prove all elements beyond a reasonable doubt, including the mens rea and the actus reus.

The basic principle is that an act does not make a person legally guilty unless the mind is also blameworthy. If you like, the concept that the mind must go with the act or that persons are only punished for acts which come about voluntarily.

This means that two elements are *generally* required before a crime can be committed. These elements are:

1. The *actus reus*, the act or omission on the part of the defendant; and
2. The *mens rea*, the mental state required for the commission of the crime.

A might kill D, for example. In that situation there is the actus reus of murder: the killing of a person in being. The fact of a death however does not automatically mean there will be a conviction for, or even a charge of, murder.

Paraphrasing the definition of murder in Hong Kong, it is:

* Unlawful
* Killing
* Of a person in being e.g. not a fetus (the *actus reus*)
* With intent to kill;
* Or to cause serious bodily harm (*the mens rea*).[[129]](#footnote-129)

The *actus reus* and the *mens rea* must coincide if there is to be a conviction for murder.

D could not be convicted of murder if the act was an accident as there is an absence of the necessary guilty (or criminal) intent. We will leave aside for the time being whether an accidental killing might be manslaughter. We are simply making the point about the need for the *actus reus* and the *mens rea* to coincide.

**4 Strict liability**

Strict liability offences are ones where the prosecution does not need to establish the *mens rea*.[[130]](#footnote-130)

These are often present in food and public type safety offences (where the mens rea is hard to prove).

**5 Proving criminal liability**

**5.1 The presumption of innocence**

It is a fundamental principle, although subject to certain exceptions as set out below, that a defendant is innocent until proven guilty: *Woolmington* v *DPP.*[[131]](#footnote-131)

In this case, Reginald Woolmington was a farm laborer whose wife had left him. The defendant took a shotgun with him to visit his wife, alleging that he was going to threaten to commit suicide as a means of getting her to come back to him. According to the defendant, the gun went off accidentally, killing his wife.

The trial judge ruled that is was incumbent on the defendant to prove in the circumstances that the death was an accident. In other words, that he was presumed to be guilty of murder unless he could establish this was not the case. On appeal to the Court of Criminal Appeal, the decision of the trial judge was upheld.

The defendant appealed to the House of Lords which reversed the decision of the Court of Criminal Appeal and quashed the conviction, on the basis that (consistent with the presumption of innocence and subject to any exceptions) the prosecution has to prove the guilt of the defendant.

Viscount Sankey delivering the unanimous decision of their Lordships stated at 481-482 that:

*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 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 it down can be entertained.*

The common law presumption of innocence in Hong Kong has been confirmed by the Privy Council[[132]](#footnote-132) in *Kwan Ping-bong.*[[133]](#footnote-133) In that case, the defendants picked up some jade stones from the airport in Hong Kong, some of which had been hollowed out and had morphine inserted into them. The defendants were charged with trafficking in dangerous drugs. They gave evidence that the person who sent the drugs, a Mr Fong in Bangkok, inserted the morphine into the jade stones without the defendants’ knowledge. The defendants were found guilty by a Hong Kong jury. Their conviction was upheld by the Court of Appeal in Hong Kong. The defendants appealed to the Privy Council. The central point of the defendants’ appeal was that the presiding judge had misdirected the jury. Namely, by directing that the defendants had the onus of proof in establishing that they did not have knowledge of the drugs. Simplifying the facts somewhat, it was held by Privy Council that the defendants were not required to prove that they did not have knowledge that the drugs were in the jade stones. Rather, the prosecution had this onus and prosecution’s burden was beyond reasonable doubt.

Quoting from the decision of the Privy Council which was delivered by Lord Diplock,[[134]](#footnote-134) “There is no principle in the criminal law of Hong Kong more fundamental than 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 higher than proof on a mere balance of probabilities.”

As noted then, the common law proceeds on the basis, that in an adversarial system, the defence generally has nothing to prove and the accused is presumed to be innocent until proved guilty. The advantage of this constitutional protection is it makes less likely an ‘innocent’ person will be imprisoned. The disadvantage is that it is more likely a ‘guilty’ person will go free. In relation to this, an old saying that many lawyers are familiar with, is that, synonymous with the presumption of innocence, it better that 9 guilty people go free, than 1 innocent person is convicted.

**5.2 Exceptions to the presumption of innocence**

It should be noted that some exceptions exist to the presumption of innocence. The best known of these is the common law defence of insanity: *McNaghten’s case*.[[135]](#footnote-135) Here, a person is presumed to be sane and the burden lies on the defence to prove insanity (on the balance of probabilities), rather than the prosecution prove sanity. As to statutory exceptions, see 5.4 of these materials.

**5.3 The prosecution’s burden of proof**

The tribunal of fact (judge or jury) must be satisfied of the guilt of the person accused of the crime beyond reasonable doubt in respect of each and every element of the offence charged.

Denning J in *Miller v Ministry of Pensions*,[[136]](#footnote-136) has described the concept of what constitutes reasonable doubt as follows:[[137]](#footnote-137)

*It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice.*

Although various misgivings have been expressed about the sufficiency of this type of definition as a means of providing juries with a useful means of determining guilt, attempts by judges to clarify or elaborate this test only tends to lead to more confusion.[[138]](#footnote-138)

In this regard, the following is the standard direction given to juries in Hong Kong:[[139]](#footnote-139)

*How does the prosecution succeed in proving the defendant’s guilt? The answer is – by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of “Guilty”. If you are not sure, your verdict must be “Not Guilty”.*

Judges have the option of using the phrase, “beyond reasonable doubt” in their summing up if they wish to (but do not have to); except, if it has been used in the case prior to that summing up[[140]](#footnote-140) e.g. where counsel in the case has used this phrase. Then the presiding judge must state, “The prosecution must make you sure of guilt, which is the same as proving the case beyond reasonable doubt.”

In some cases, this test may amount to a clear one, allowing the jury to be “sure” whether or not the defendant is guilty. Say, for instance, where there is a charge of murder, the defendant is caught on CCTV:

* Going up behind a person (“the victim”) on an uncrowded platform of the MTR .
* Then stabbing the victim in the back with a knife.

Now further assume that:

* The defendant is arrested immediately afterwards by a police officer who witnessed the crime.
* The victim dies a few minutes later as a result of being stabbed by the defendant.
* The defendant simply denies committing the crime.
* There is no evidence that the CCTV evidence has been unfairly edited.
* There is no evidence (say from a facial imaging expert for the defence)[[141]](#footnote-141) that the image of the person committing the crime is not the defendant.
* The prosecution leads evidence from its facial imaging expert that the person stabbing the victim is the defendant.
* There is no evidence that the defendant was insane, according to the test under the McNaghten Rules. Rather, the evidence is that, the defendant cold bloodedly stabbed the victim in order to rob him.

You can also assume that there is no credible evidence that the defendant was suffering from diminished responsibility[[142]](#footnote-142) (a mental condition such as severe bipolar disorder/manic depression), or was provoked[[143]](#footnote-143) (say the victim had previously raped one of the defendant’s children), which could result in a finding of manslaughter, rather than murder. It is beyond the scope of this paper to discuss in detail the difference between murder and manslaughter, except to note that murder carries a mandatory life sentence for those who commit it if aged 18 or above,[[144]](#footnote-144) while manslaughter carries a discretionary life sentence.[[145]](#footnote-145)

In these circumstances, then the jury could be “sure” (whether or not also relying on the term “beyond reasonable doubt”) that the defendant was guilty of this crime of murder.

In other cases, the answer may not be so straightforward. In this regard, you will be involved later in this course in a simulated jury case where you, as part of a jury, will have to apply the test “sure”/“beyond reasonable doubt”. In this case, (without giving too much away) although the prosecution’s case will be strong, the defendant’s guilt is probably not as sure as in the case of murder described above. This exercise should help you gain direct insight into the challenges of formulating this test as a juror.

**5.4 Constitutional protections in Hong Kong in relation to** **the presumption of innocence**

In Hong Kong, a special position exists concerning the reversal of the presumption of innocence.

Here, the common law presumption of innocence has found statutory recognition in Article 11(1) of Hong Kong’s Bill of Rights Ordinance (Cap.383) (“BORO”). This states that: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

Article 87(2) Basic Law (“BL”) also states: “In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained…Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.”

Furthermore, Article 10 BORO states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. This provision has been interpreted to also confirm the right to the presumption of innocence.

Accordingly, this means that, because the presumption of innocence enjoys constitutional protection through Article 87(2) BL and Articles 10 and 11(1) BORO, the Department of Public Prosecutions may be unable to successfully prosecute defendants who are in breach of legislation that would reverse the burden of proof from the prosecution to the defendant.[[146]](#footnote-146) This is a very significant protection for people in Hong Kong. If there are no constitutional protections governing an area where LegCo passes legislation, then that is generally the end of the matter as far as effectively stopping the operation of the legislation.

It is beyond the scope of this course to discuss the constitutional principles involved in detail, except to say that (to use simple language), from a societal perspective, any new laws reversing the presumption of innocence could be challenged in the courts because they were not a rationale and proportionate response to the problem they sought to remedy.[[147]](#footnote-147) So, to put it simply, if any such laws were challenged in the courts, the courts would need to be satisfied that there are compelling reasons (that the legislation overturning the presumption of innocence was a rationale and proportionate response to an issue) to set aside the presumption of innocence. These rationality and proportionality tests do not exist in relation to other legislation passed by LegCo or under the common law i.e. which are not governed by the BL or BORO.

**6 Criminal and civil liability**

The criminal law punishes the offender.

The same act can be a crime and a civil wrong. A civil wrong is one which entitles the wronged person to bring an action for compensation.

A victim of an assault, for example, could bring an action in the civil courts seeking compensation for any loss they have sustained as a result of the assault, for example, wages lost through time off work, pain and suffering etc. Similarly, a road accident can result in the prosecution of the vehicle driver for careless, dangerous driving causing death and a subsequent civil claim for compensation by the injured person, or by dependents in a death situation.

The criminal courts do not normally get into awards of compensation because its procedures are not appropriate for working out compensation, the offender may not have the means to pay or the punishment for the crime may deprive the offender of the source of income, although there is limited provision for this under s.73 Criminal Procedure Ordinance (Cap.221).

Victims of crime are therefore generally not compensated by orders made in criminal proceedings but they can pursue a claim for compensation in the civil courts.

In recognition that many offenders simply do not have resources to make them worth suing, there are such schemes as the Criminal Injuries Compensation Board where the State puts up limited compensation for victims of violent crime.

Civil claims for compensation do not depend upon the offender being convicted, though a conviction in a criminal court makes the proof in the civil courts so much easier.

**7 Exceptions**

There are a number of instances in which a person will be absolved from criminal liability, if proved, including those concerning necessity, duress, crime prevention and self-defence.

We will look at necessity and self-defence in this week’s lecture,

**8 Self-defence**

A person may lawfully use reasonable force against another person to lawfully defend himself. Because an essential element of all crimes of violence is that the violence or threat of violence should be unlawful, if led in a criminal trial, it must be disproved by the prosecution beyond reasonable doubt.

**8.1 The elements of self-defence**

Two major questions are asked here.[[148]](#footnote-148)

1. Did the defendant believe or may he have honestly believed that it was necessary to defend himself?
2. Taking the circumstances as the defendant honestly believed them to be, was the amount of the force reasonable?

Reasonable force can be used in circumstances that the defendant honestly believes them to be. In *Scarlett,*[[149]](#footnote-149) S ejected the victim from a bar. S threw the victim down the stairs when he thought that victim was going to hit him. The victim died and S was charged with manslaughter. It was held that S’s honest but mistaken belief as to the extent of force required in self-defence, whether it was on an objective view reasonable or not, was justified. Beldam LJ:

*"They ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he was not to be convicted even if his belief was unreasonable."*

As noted before, later in the semester (as has been flagged), you will form part of a jury in which self-defence will be considered.

**9 The defence of necessity**

The defence of necessity is one that applies where a person commits an offence to avoid a greater evil occurring. For example, speeding in a motor car to get to a hospital to seek treatment where an injury is serious and time is scarce.

**9.1 “Eating the cabin boy” case**

A compelling example of such behavior arose in the case of *R* v *Dudley & Stephens*.[[150]](#footnote-150) Set out below is a modified extract of the case.

*The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th of July 1884.*

*In this regard, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also a cabin boy, between seventeen and eighteen years of age, the crew of an English yacht, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. In this boat they had no supply of water and no supply of food. The boat was drifting on the ocean, and was probably more than 1000 miles away from land. On the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no food or drink came, and suggested that someone should be sacrificed to save the rest, but Brooks dissented, and cabin boy, was not consulted. On the 24th of July Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused consent, and it was not put to the boy, and in point of fact there was no drawing of lots.*

*On that day the prisoners spoke of their having families, and suggested it would be better to kill the boy if their lives could be saved, and Dudley proposed that if there was no vessel in sight by the next morning the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. The boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved.*

*Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; and the three men fed upon the body and blood of the boy for four days; on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration.*

*They were carried back to England and committed for trial there. If the men had not fed upon the body of the boy they would probably not have survived to be picked up and rescued, but would within the four days have died of famine. The boy, being in a much weaker condition, was likely to have died before them. At the time of the act in question there was no sail in sight, nor any reasonable prospect of relief.*

*Under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation.*

*There was no appreciable chance of saving life except by killing someone for the others to eat. From these facts, stated with the cold precision of a special verdict, it appears that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man and try the conscience of the best. It is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving him of any possible chance of survival.*

*Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called “necessity.” But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it.*

*There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment.*

*It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.*

***The Court then proceeded to pass sentence of death upon the prisoners.***

Necessity then was not a defence to charge of murder.

Following an outpouring of public sympathy toward Dudley and Stephens, their sentence of death was later commuted to six months imprisonment.[[151]](#footnote-151)

**9.2 Subsequent case law**

However, in a more recent and sad English case of (*Re A (Children*),[[152]](#footnote-152) there were two twins that were conjoined (otherwise known as Siamese twins), *Jodie* and *Mary*. If there was no operation to separate them, then both would have died. However, it was clear that if there was such an operation, the stronger one *(Jodie)* would live and the weaker one *(Mary)* would die.

The question before the court was whether or not it might be permissible to operate to separate the twins. The court held it was permissible.

Thiscase, though, not a criminal case, suggests that necessity may be a defence to a criminal charge if:

1. The act is necessary to avoid inevitable and irreparable evil.

2. No more should be done than is reasonably necessary for the purpose to be achieved; and

3. The evil inflicted must not be disproportionate to the evil avoided.

Ultimately, the weaker twin Mary died but the stronger twin Jodie survived.

As yet in Hong Kong, the law of necessity is yet to be fully developed and you should bare this in mind when considering the scenario in the exercise you will work on in the forthcoming tutorial.

**CITIZENS AND Criminal Justice**

**Lecture 5: The police force, their role and functions. Police powers of stopping, detaining, searching, bail, questioning, the rights of the suspect/accused, identification parades and identification evidence.**

**1. Present**

Overall crime in Hong Kong has been declining significantly. There were 62,232 cases of crime recorded in 2020. This amounted to a rise of 6.8% from the 2019 figure of 59,225. The number of reported cases of crime was 75,930 in 2012. As previously noted, in Hong Kong, the increase in the number of recorded crimes in 2020 was probably largely due to the social unrest.[[153]](#footnote-153)

**2 Police powers – competing considerations**

These follow the due process/crime control model:

* A system of checks and balances exists between the rights of the prosecution and the defence
* Relatively certain rules exist to ensure that the chances of justice being achieved in a criminal matter are realistically maximized.

**3 Police duties**

These are:

* Police have a duty and an obligation to apprehend offenders
* Police have a responsibility to further investigate the circumstances surrounding offences.

**4 Citizen’s rights**

These are:

* Not to be unnecessarily/arbitrarily/unlawfully/stopped and detained[[154]](#footnote-154) and searched
* Not to be unlawfully arrested
* Not to have confessions extracted by threats, deception or promises.

**5 Police powers of stopping and detaining and searching and arrest**

It is not possible, nor is it necessary, for the purposes of this course, to set out in detail all the remaining applicable aspects of the law of criminal procedure in relation to police powers of stopping and detaining and searching and arrest.Some rudimentary commentary isset out belowto provide an insight into how these powers essentially follow the due process model of criminal justice, with elements of the crime control model, which were both canvassed in Week 3. The general principles governing residents of Hong Kong against mistreatment by authorities and arbitrary arrest and detention are set out in Article 28 of the Basic Law and in Article 5(1) of the Hong Kong Bill of Rights in Section 8 of the Hong Kong Bill of Rights Ordinance (Cap.383) (“BORO”).

Article 28 Basic Law

*The freedom of the person of Hong Kong residents shall be inviolable.*   
  
*No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.*

**Article 5(1) BORO**

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

**5.1 Power to stop, detain and search**

The specific powers of the Hong Kong Police to make preliminary enquiries, prior to arrest, generally arise in section 54 of the Police Force Ordinance (Cap.232) (“PFO”).[[155]](#footnote-155) Under section 54(1) PFO, a police officer (“PO”), broadly may, where a person acts in a suspicious manner in a variety of instances:

* Stop that person and demand he or she produce proof of identity for inspection by the PO
* Detain that person for a reasonable period to determine whether or not the person is suspected of having committed any offence
* Detain (as needed) and search a person to determine if he or she may have something which constitutes a danger to the police officer e.g. a weapon.

Furthermore, under section 54(2) PFO, where a PO reasonably suspects a person of committing or being about to commit an offence, the PO has (as well as having the powers mentioned above in relation to stopping a person to produce their identification and detain them for a reasonable period to determine whether or not the person is suspected of having committed any offence) additional powers to those prescribed in section 54(1) PFO, including to:

* Search that person for anything of value to the investigation; and
* Detain that person for a reasonable time in order to carry out that search.

The PO must hold a suspicion in order to act pursuant to section 54(1) PFO, although the belief can be entirely subjective. On the other hand, the test under section 54(2) PFO (“reasonably suspects”) is a more objective one.[[156]](#footnote-156)

We can see then, that, consistent with the due process model, the rights of police to search suspects are rationally regulated, depending on the extent of the evidence that they have before them that a crime has been committed. If the evidence is stronger (based on the more objective test in section 54(2) PFO) then their powers to search are greater (in that they can search a person for anything of value to the investigation). If the evidence is only based on their subjective belief, in accordance with section 54(1) PFO, then their capacity to search is limited to searching for something which might constitute a danger to the PO, like a weapon. This due process model is also consistent with Article 28 of the Basic Lawand Article 5(1) BORO. Further, again consistent with the due process model, some safeguards exist as to a PO’s ability to stop and detain a person because there must at least be a subjective belief on behalf of the PO that the suspect is behaving suspiciously. Then, a PO is not (at least in theory) permitted to stop people randomly and ask them questions.

**5.2 Arrest**[[157]](#footnote-157)

An arrest is the restriction of an individual’s right to go where the person wants to go. Anyone who is arrested must be informed of the reasons for that person’s arrest at the time the arrest takes place and must also be promptly advised of the charges against him.[[158]](#footnote-158)

**5.3 Police powers of arrest**

**5.3.1 Arrest with a warrant**

A magistrate may issue a warrant for a person’s arrest if that person is suspected of having committed an indictable offence.[[159]](#footnote-159)

**5.3.2 Arrest without a warrant**

A PO may arrest any person he reasonably believes will be charged with, or whom he reasonably suspects has committed, an offence for which the sentence is fixed by law, or punishable by imprisonment, (on a first conviction for that offence) or on whom it would be impracticable for various reasons to serve a summons or whom he believes may be liable to deportation.[[160]](#footnote-160)

The PO must tell the person arrested the reasons for the arrest as soon as possible.[[161]](#footnote-161)

The PO can use reasonable force when making the arrest.[[162]](#footnote-162)

We can see then, that under the due process model, the circumstances under which a suspect can be arrested are regulated and constrained by, absent a magistrate’s warrant, the PO having a reasonable belief that a particular type of offence has been committed and other circumstances. Also, pursuant to that model, certain protections are afforded to the arrested person in relation to the amount of force a PO may use and the information that the PO must give the arrested person at the time of the arrest.

The PO may also:

* Enter buildings to make an arrest of such a suspect[[163]](#footnote-163)
* If the suspect has been arrested, remove documents or things either on the person or in the environment of the offender, if it is relevant to the investigation.[[164]](#footnote-164)

**5.3.3 Post-arrest**

Section 51 PFO provides that every person arrested must be taken to a police station immediately. The person may be questioned at the police station.[[165]](#footnote-165) However, a person may not be compelled to come to a police station unless arrested.[[166]](#footnote-166)

**6 Bail**

Section 52(1) PFO provides that:

* Unless the PO considers the offence to be of a serious nature or that the person should be detained, then the person should be released on bail
* Otherwise, the person should be brought before a magistrate generally within 48 hours.

**7 Searching premises**[[167]](#footnote-167)

Article 29 of the Basic Law provides:

*The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.*

Article 14 of Section 8 of BORO deals with, amongst other things, the right to privacy and provides:

*(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

A PO (unless invited by the occupier) may enter and search premises under a search warrant issued by a magistrate pursuant to s.50(7) of the PFO.

**8 Right to silence – pre-arrest**

The common law right to silence exists for all offences, both before and after arrest, except if abolished by statute.[[168]](#footnote-168) For example, under the Organised and Serious Crimes Ordinance (Cap. 455).

**8.1 Questioning of Suspects**

The *Rules and Directions for the Questioning of Suspects and the Taking of Statements* promulgated by the Secretary for Security in 1992 governs the interrogation of suspects. If the rules are not followed, then the evidence gathered from this record of interview may be inadmissible. Certainly, if a confession is not made voluntarily then it will be excluded.[[169]](#footnote-169) In *Ibrahim v R*, voluntariness was defined by Lord Sumner as follows:

*“It has long been established as a positive rule of English Criminal law, that no statement by the accused is admissible against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.”*

Rule II of the Rules states:

*As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions or further questions relating to that offence.*

The caution shall be in the following terms:

*‘You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.’*

When after being cautioned a person is questioned, or elects to make a statement, a contemporaneous record shall be kept, so far as it is practicable, of the time and place at which any questioning began and ended and of the persons present.

Rule III(a)

Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

*‘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.’*

Rule III(b)

It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimizing harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms*:*

*‘I wish to put some questions to you about the offence with which you may 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 and used in evidence’.*

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or, if he refuses, by the interrogating police. In essence, the right to interrogate a suspect post-charge is very limited, except if there is a matter relating to Rule III(b).

The common law position is that no adverse inferences may be drawn about the failure of the accused to give an out of court denial in relation to the offence with which the accused is charged.[[170]](#footnote-170)

**9 Provision of facilities for the defendant**

The defendant is entitled to legal representation when being questioned in custody.[[171]](#footnote-171) As yet, there is no publicly funded legal representation for defendants in this situation, but there have been recent proposals by the Legal Aid Services Council to fund this type of service on a pilot basis.[[172]](#footnote-172) This would be part of a 2 year pilot programme at 4 police stations.[[173]](#footnote-173) As at 26 November 2018 (seemingly the last publication on this initiative) the pilot programme was still in the process of implementation.[[174]](#footnote-174) Subsequent informal enquiries indicate that it still has not been implemented.

**10 Identification parades**[[175]](#footnote-175)

This is done as a means of fairness to the accused as it is much fairer than other methods of identification such as identification in the dock. Essentially, the suspect will stand in a parade with (usually) eight actors and the witness will try to point the accused out. If the suspect does not consent to participation in such a parade then the prosecution may use less favourable methods of identification such as in-court identification, confrontations, group identifications and photographs.

However, the processes used are designed in Hong Kong to maximize the accuracy of the identification process. So, this increases the reliability of the identification.

In Hong Kong, the ID parade is conducted in a uniform manner throughout all police stations. There is no actual legislation covering the use of ID parades. However, on the basis of the procedures specified in the Hong Kong Police Handbook and custom based on basic common sense and fairness:

* ID parades are conducted by a chief inspector or a senior officer of the rank above chief inspector who is not connected to the case. They are called the O/C Parade.
* There are many other safeguards to ensure that no clue is given to the witness as to who the suspect is. There must be a prescribed number of eight other persons of similar appearance in the line-up (known as “actors”) and the suspect may note objections (about the manner in which the parade was held) in the Handbook used by the police to record what has happened.
* The suspect is told by the O/C Parade that he/she may exercise his/her right of silence, that he/she may stand in any order in the line-up that he/she wishes or object to any of the actors.
* Steps are taken to decrease the distinctiveness of suspects e.g. a suspect may have the opportunity to swap clothes with another person in the line-up, a suspect’s mustache might be covered by tape or their hair covered by a cap if they have a Mohawk etc.
* Strict rules apply as to the entry of the witness into the viewing room to ensure that the witness does not see the suspect in the waiting room and is thus able to identify him or her beforehand.
* The parade is normally video recorded and a copy given to the suspect.
* The suspect has a right to have a solicitor present to monitor what has happened.

**11 General reliability of eyewitness** **testimony**

Eyewitness testimony is very persuasive if confidently delivered and not shaken or destroyed on cross-examination. It will serve as a very effective weapon in the armoury of a skilled prosecutor.[[176]](#footnote-176)

It has been estimated that eyewitness testimony is the single most common cause of wrongful convictions in the US. This is becoming increasingly apparent with the greater use of DNA to overturn incorrect convictions.[[177]](#footnote-177) The Innocence Project has estimated that 75% of wrongful convictions occur as a result of false eyewitness testimony, outnumbering mistakes in forensic evidence, false confessions and those relying on informants.[[178]](#footnote-178) Many of the problems identified by the Innocence Project relating to line up parades have been stamped out in Hong Kong but other inherent flaws in eyewitness testimony itself cannot be eradicated here. There is no reason to believe that mistakes in eyewitness testimony do not occur in Hong Kong.

Line up suggestiveness is a critical factor in identification of suspects. The more distinctive a suspect is e.g. if they have very bushy eyebrows, compared to the other persons in the line-up, the more likely that person will be identified.[[179]](#footnote-179)

Eyewitnesses, even in a properly conducted line up may identify the person who looks most like the culprit, if the culprit is not in the line-up.[[180]](#footnote-180) Although this phenomenon would usually be consistent with the identification of the actual offender, if the police simply arrested someone who looked like the culprit then there is a possibility of injustice.

Issues arise in ID parades in HK as to the ability of the police to sufficiently homogenize this aspect of the process. Problems lie in getting another person who looks sufficiently like the others in the line-up and the suspect, beyond just basically being the same height, weight, age etc.

Personality factors, such as self-monitoring, can have an effect on perception. Self-monitoring refers to a person’s willingness to adapt to his or her environment. High self-monitors supposedly are better eyewitnesses than low self-monitors. This is because high-self monitors are reputably more vigilant about attuning themselves to their environment.[[181]](#footnote-181) A problem resulting from this phenomenon, assuming it to be true, is that witnesses are not administered with a personality test, let alone with any other type of test, to check their perception and/or recall.[[182]](#footnote-182)

The memory process consists of three factors:[[183]](#footnote-183)

1. Encoding

This relates to the selection of the information which is stored in the brain which can vary according to the nature of what takes place. If the robber is holding a gun in a bank robbery the witness may focus on this instead of other features of the robber.

1. Storage

This concerns the information which is stored, but it can be altered by other events, particularly post-event misinformation, both oral and visual.

1. Retrieval

This is the recovery of the information. We all know from life experience that different people are able to remember things better than others.

**11.1 Unconscious transference**

It can happen that the witness can mistakenly identify an innocent bystander when asked to later identify a suspect.[[184]](#footnote-184)

**11.2 Use in court of eyewitness evidence**

Where necessary, the presiding judge in a criminal case will administer the Turnbull Directions to the jury or warn himself about them if he is sitting alone.[[185]](#footnote-185) These set out a number of warnings/questions about the possible unreliability of eyewitness testimony when the case against an accused depends largely or totally on identification evidence which the accused alleges is mistaken, such as:

* How long was the accused under observation?
* At what distance was the accused under observation?
* What was the light like?
* Was anything obstructing the view of the witness?
* Had the witness previously seen the accused? If so, how often?
* How long was the period of time between the alleged observation and the later identification to the police?
* Was there any significant difference between the description given by the witness at the time of identification and the actual appearance of the accused?
* Any other relevant matters casting doubt on the identification evidence?

The judge should also withdraw a case from the jury if the eyewitness evidence is fleeting unless there is other evidence to corroborate.

Advocates can cross-examine on the unreliability of eye witness testimony in a similar manner to the Turnbull Directions. The effectiveness of the eyewitness testimony can depend on the ability of the advocate and the witness.

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132. When Hong Kong was a colony, appeals from the Court of Appeal in Hong Kong were made to an English Court, called the Privy Council. This right of appeal to the Privy Council was abolished in 1997. Appeals from the Court of Appeal are now to the Court of Final Appeal. [↑](#footnote-ref-132)
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143. Section 3 Homicide Ordinance (Cap.339) states, “Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.” [↑](#footnote-ref-143)
144. Section 2 of the Offences Against the Person Ordinance (Cap.212) (“OAPO”) states, “Any person who is convicted of murder shall be imprisoned for life. However, if it appears to the court that a person convicted of murder was under 18 years of age at the time of the offence, the court has a discretion as to whether the person should be sentenced to imprisonment for life or to imprisonment for a shorter term.” [↑](#footnote-ref-144)
145. Section 2 of the OAPO states, “Any person who is convicted of manslaughter shall be liable to imprisonment for life and to pay such fine as the court may award.” [↑](#footnote-ref-145)
146. See the judgment of Sir Anthony Mason NPJ in *HKSAR* v *Hung Chan Wa and Another* [2006] HKCFA 85; [2006] 3 HKLRD 841; (2006) 9 HKCFAR 614; FACC 1/2006 (31 August 2006) at para 38(2). [↑](#footnote-ref-146)
147. Ibid para 75. [↑](#footnote-ref-147)
148. These two questions are quoted from the Specimen Direction to Juries, Number 38, available at legalref.judiciary.gov.hk/lrs/common/sd/Specimen\_Directions.jsp. [↑](#footnote-ref-148)
149. [1993] 4 All ER 629. [↑](#footnote-ref-149)
150. Queen's Bench Division, (1884) 14 Q.B.D. 273. The judgment of the Court was delivered by Lord Coleridge, C.J. [↑](#footnote-ref-150)
151. Anthony Chase, Book Review of A W Brian Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (1985) 94 (5) *The Yale Law Journal* (April 1985) 1253-1269, 1260. [↑](#footnote-ref-151)
152. [2001] 2 WLR 480. [↑](#footnote-ref-152)
153. Hong Kong Police Force website, *Statistics* (n 4). [↑](#footnote-ref-153)
154. “Stopping” can be characterized here basically as being asked to stop to produce evidence of identification and “detained” as being required to stay with the police officers after the stopping to determine if the person has committed an offence and/or to search them. [↑](#footnote-ref-154)
155. There are some other legislative provisions allowing for certain specific enquiries to be made. For example, a police officer or immigration officer or any other authorized individual may demand to see a person’s identity card per section 17C Immigration Ordinance (Cap.115). [↑](#footnote-ref-155)
156. Amanda Whitfort, *Criminal Procedure in Hong Kong. A Guide for Students* (Third Edition (Student) Hong Kong: Lexis Nexis 2020) 22. [↑](#footnote-ref-156)
157. The law in this area is governed by section 50(1) PFO. [↑](#footnote-ref-157)
158. Article 5(2) Hong Kong Bill of Rights Ordinance (Cap.383) (“BORO”). [↑](#footnote-ref-158)
159. Section 72 Magistrates Ordinance (Cap.227). [↑](#footnote-ref-159)
160. Section 50(1)(a) and (b) PFO. [↑](#footnote-ref-160)
161. Article 5(2) BORO. [↑](#footnote-ref-161)
162. Section 50(2) PFO; section 101A(1) Criminal Procedure Ordinance (Cap.221). [↑](#footnote-ref-162)
163. Section 50(3) and (4) PFO. [↑](#footnote-ref-163)
164. Section 50(6) PFO [↑](#footnote-ref-164)
165. Section 52(1) PFO. [↑](#footnote-ref-165)
166. The *Rules and Directions for the Questioning of Suspects and the Taking of Statements* Note (b). [↑](#footnote-ref-166)
167. Adapted from material in the Criminal Procedure Course in the CityU SLW. [↑](#footnote-ref-167)
168. Whitfort (n 156) 22. [↑](#footnote-ref-168)
169. *The Law Reform Commission of Hong Kong Report on the Procedure Governing the Admissibility of Confessional Statements in Criminal Proceedings* paragraph 2.5, available at http.www.info.gov.hk.hkreform. [↑](#footnote-ref-169)
170. Simon N M Young, *Hong Kong Evidence Casebook* (Sweet and Maxwell 2011) 217-218. [↑](#footnote-ref-170)
171. Rule 8 of the Directions in the *Rules and Directions for the Questioning of Suspects and the Taking of Statements.* [↑](#footnote-ref-171)
172. Legislative Council, Panel on the Administration of Justice and Legal Services. *Legal Aid Services Council’s Proposals on the Provision of Legal Advice Services for Persons Detained in Police Stations.* *LC Paper No.CB(4)1386/16-17(05)* (July 2017), available at [www.legco.gov.hk/general/english/members/index.html](http://www.legco.gov.hk/general/english/members/index.html). [↑](#footnote-ref-172)
173. Panel on Administration of Justice and Legal Services, *Minutes of Meeting Held on Tuesday, 18 July 2017*, paragraph 57, available at https://www.legco.gov.hk/yr18-19/english/panels/ajls/.../ajls20181126cb4-230-6-e.pd... [↑](#footnote-ref-173)
174. Panel on Administration of Justice and Legal Services, *Background Brief on Community Legal Assistance in Hong Kong. LC Paper No.CB(4)230/18-19(06)* paragraph 15, available at https://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20170718.pdf. [↑](#footnote-ref-174)
175. Much of the following information on identification parades is drawn from Lister Howell, Desk Book on Criminal Litigation Practice Chapter 6. [↑](#footnote-ref-175)
176. FTP Prosecutions Committee, *The Path to Justice. Preventing Wrongful Convictions. Report of the Provincial/Territorial/Heads of Prosecutions Subcommittee on the Prevention on Wrongful Prosecution* (Fall 2011) 55. [↑](#footnote-ref-176)
177. A Daniel Yarmey, “Eyewitnesses” in David Carson and Ray Bull (eds.) *Handbook of Psychology in Legal Contexts* (Second Edition Chichester; New York: J. Wiley 2003) 493. [↑](#footnote-ref-177)
178. The Innocence Project, *Re-evaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification.* ***Executive Summary* (Circa 2009).** [↑](#footnote-ref-178)
179. K Ask and P A Granhag, “Perception of Line-Up Suggestiveness: Effects of Identification Outcome Knowledge” 7(3) *Journal of Investigative Psychology and Offender Profiling* (2010) 213-219, 214. [↑](#footnote-ref-179)
180. State of Wisconsin. *Office of the Attorney General Website*, available at www.doj.state.wi.us. [↑](#footnote-ref-180)
181. Gary L Wells, Edward F Wright and Amy L Bradfield, “Witnesses to Crime. Social and Cognitive Factors Governing the Validity of People’s Reports” in Ronald Roesch, Stephen D Hart and James R P Ogloff, *Psychology and Law. The State of the Discipline* Volume 10 (New York: Kluwer Academic/Plenum Publishers 1999) 62. [↑](#footnote-ref-181)
182. Ibid 59. [↑](#footnote-ref-182)
183. Irwin A Horowitz, Thomas A Willging and Kenneth S Bordens, *The Psychology of Law. Integrations and Applications* (Second Edition New York: Longman 1997) 170 -171. [↑](#footnote-ref-183)
184. Ibid 178-179. [↑](#footnote-ref-184)
185. *R* v *Turnbull and Others* [1977] QB 224 at 228-231. [↑](#footnote-ref-185)