THE USE AND ABUSE OF EMERGENCY POWERS BY THE HONG KONG GOVERNMENT

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The first attempt to obtain the right to exercise emergency powers was made by Sir John Davies, the second Governor of the colony. On 20 November 1844 the newly-formed Legislative Council passed Ordinance No 20 which empowered the Governor with the advice of the Executive Council to issue a proclamation placing any districts of the island of Hong Kong under martial law in case of emergency. 'Any such proclamation shall from and after the publication thereof have the full force and effect as of an ordinance passed by the Governor with the advice of the Legislative Council.' The preamble of the ordinance referred to the danger of armed and predatory parties landing on the island from the mainland of China and the lack of a considerable police force of sufficient ability to afford Her Majesty's subjects adequate protection.

The Colonial Office took objection to the ordinance as soon as it was received in London. A minute on the file described it as 'an extraordinary measure to enable the executive government to suspend all Law except only the Law of Superior Force.' By a despatch dated 24 May 1845 the Governor was informed:[1]

> This is an enactment of a very unusual nature and to be justified only by clear proofs of its indispensable necessity. But I do not understand how such a necessity could exist. If, as assumed in the preamble to this Ordinance, a predatory party should land on the island from the coast of China, it might then become your duty in the exercise of the Royal Prerogative to place that portion under Martial Law by a proclamation to be issued for that purpose, and it would afterwards remain for you to apply to the Legislature to pass an Act of indemnity for the exercise of power. But to grant powers of this extraordinary nature in anticipation of a necessity for their exercise is opposed both to constitutional practice and to sound principle. Under these circumstances I have thought it necessary to advise the Queen to disallow this ordinance. Her Majesty has been pleased to disallow it accordingly.

In 1856 the Second Opium War began and the colony was disturbed by strikes, riots, and arson, incited by the Chinese authorities in Guangdong. To deal with these acts of violence the Legislative Council passed the Peace Preservation Ordinance.[2] This authorised the arrest and deportation without

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1 CO129/7, pp 333–6 (Public Record Office, London).

2 No 2 of 1857.

warrant of any person who might reasonably be suspected to be an abettor of Her Majesty's enemies, the control of arms, the forcible entry and search of any premises, and other measures to control the Chinese population. By s 11, every person lawfully acting as a sentry or patrol between the hour of eight in the evening and sunrise may shoot to kill any Chinese he suspects to be about for an improper purpose and who does not answer to his challenge.[3] Soldiers and sailors of Her Majesty or her allies 'shall be deemed and taken to have such further and other powers for the better securing of the Public Peace and Order as they would have had if Martial Law had been proclaimed.' 'No act in pursuance of this ordinance shall be questioned in any court.'

The Colonial Office recognised the serious dangers faced by the Governor from the effects of disaffection among the lower classes of Chinese congregated in the colony, but as in 1845 the Secretary of State refused to allow the suspension of the normal processes of law, however great the emergency.[4]

> I have not thought proper to advise the disallowance of this ordinance, considering the circumstances under which it was proposed. But I have to instruct you to put in force the powers vested in you by section 1, by suspending its operation, and not to bring it into effect again without permission previously sought and obtained from Her Majesty's government ...
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> If the possession of this power [of deportation] is still insufficient to preserve the peace of the community from imminent danger, recourse might be had to the proclamation of Martial Law, as a less objectionable means in itself than an ordinance altering the ordinary law of the colony to so great an extent as that before me. Before however this is resorted to every expedient should be used to strengthen the civil power, such as to enrol as special constables all the residents who are worthy of confidence.
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> I transmit to you a copy of a Proclamation for bringing Martial Law into effect in Ceylon in 1848 and also of an ordinance passed on the termination of Martial Law, to indemnify parties who had acted in furtherance of it.

In 1857 an exchange of letters between Hong Kong and London took at least six months, so the requirement that the powers in this ordinance should only be invoked after consultation with London effectively rendered them useless.

In 1884 the war between France and China resulted in a strike in the Hong Kong dockyards, a boycott of French shipping, and a riot in which the police

[3] This notorious section was retained for a very short period only: see Peter Wesley-Smith, 'Anti-Chinese Legislation in Hong Kong' in Ming K Chan (ed), *Precarious Balance: Hong Kong Between China and Britain 1842–1992* (New York: M E Sharpe, 1994), p 97.

[4] CO129/62, pp 59–78.

opened fire on the mob. Following this disturbance the Legislative Council passed a new Peace Preservation Ordinance[5] through all its stages in one sitting. This was a comparatively mild measure. It forbade any Chinese to possess or carry arms and allowed the arrest without warrant of any Chinese suspected of carrying arms. The Governor's powers to order the arrest, detention, and deportation of any Chinese were extended. No posters in the Chinese language could be put up without the permission of the Registrar. There was little in this ordinance to which the Colonial Office might have raised objections (apart possibly from the discrimination against Chinese) but the ordinance was to remain in force for only six months, thus anticipating any adverse reactions from London.

After the unrest was over the Governor, Sir George Bowen, wrote to the Colonial Office suggesting that a permanent Peace Preservation Ordinance should be enacted in place of the temporary measure passed in 1884 which had now expired. He enclosed an opinion written by the Attorney General which recommended legislation modelled on an ordinance which was already in force in the Straits Settlements and had been approved by the Colonial Office.[6] In support of this recommendation he quoted from a despatch sent to Hong Kong by Lord Carnarvon in 1878 in which the following passage occurred: 'The Colony under your government has been regarded hitherto in this office as a place per se to be dealt with on principles which might not be sanctioned elsewhere.'

The Colonial Office signified its agreement, and the Peace Preservation Ordinance[7] was accordingly passed. The first part provided for the appointment of special constables and for the punishment of those who refused to serve. The second part of the ordinance empowered the Governor in Council to issue a proclamation '[w]henever it shall appear to be necessary for the preservation of the public peace of the Colony.' When such a proclamation was in force a Justice of the Peace was empowered to warn in an audible voice any persons riotously or tumultuously assembled to disperse. Anyone failing to disperse immediately might be taken into custody by any police officer or special constable. '[I]f any person or persons so warned to disperse, shall be hurt, maimed, or killed in the dispersing, seizing, or apprehending,... the persons hurting, maiming, or killing him or them shall be free, discharged, and indemnified from the consequences, except on evidence of gross carelessness, wantonness, or malice.'[8] The ordinance also imposed new penalties for the carrying or possession of arms and for combining to procure a stoppage of the sale or transit of provisions and preventing any person from purchasing or being

5 No 22 of 1884.
6 CO129/220, pp 296–306.
7 No 15 of 1886.
8 s 7.

supplied with such articles. This last provision was directed against a boycott such as had been used against the French ships in 1884.

This ordinance was sanctioned by the Colonial Office without difficulty. The provision making it an offence for any person to refuse to disperse after being warned to do so in an audible voice by a Justice of the Peace may have been suggested by the Riot Act. But in English law rioters were allowed an hour in which to disperse after the magistrate's proclamation (usually referred to as 'reading the Riot Act'). Nor did the Riot Act provide a wholesale indemnity for any injuries inflicted by the military or police in dispersing the crowd.

The next occasion when the colony was disturbed by serious rioting occurred in 1911 at the time of the revolution against the Qing dynasty. Crowds vandalised property, threw stones at the military and police, assaulted Europeans in the streets, and attempted to release prisoners under arrest. The Governor, Sir Frederick Lugard, issued a proclamation under the Peace Preservation Ordinance. He also convened a special session of the Legislative Council to pass an amendment to the ordinance by which anyone who committed an offence under a long list of other ordinances during the continuance of a proclamation should be flogged with the cat-o'-nine tails in addition in any other punishment prescribed in the ordinance.[9] This drastic measure together with the mobilisation of soldiers from the garrison to assist the police eventually brought the disturbances under control, and Lugard was able to rescind the proclamation before he left Hong Kong in March 1912.

Immediately after the outbreak of the war in Europe in August 1914 the Governor issued a proclamation bringing into operation the Order in Council of 26 October 1896. This Order authorised the Governor to make regulations to requisition property, require persons to perform any service, control prices, and generally to do anything necessary for securing the public safety and the defence of the colony.[10] This power to make regulations was further extended by an Order in Council of 21 March 1916, which was proclaimed in Hong Kong on 12 May 1916.[11] The Order listed the classes of subjects on which regulations might be made as follows:

(1) Censorship, and the control and suppression of publications, writings, maps, plans, photographs, communications, and means of communication;

(2) Arrest, detention, exclusion, and deportation;

(3) Control of the harbours, ports, and territorial waters of the colony, and the movements of vessels;

(4) Transportation by land, air, or water, and the control of the transport of persons and things;

(5) Trading, exportation, importation, production, and manufacture;

9 CO129/381, pp 343-60.
10 Hong Kong Government Gazette, 5 August 1914, pp 275-7.
11 Hong Kong Government Gazette, 12 May 1916, pp 246-51.

(6) Appropriation, control, forfeiture and disposition of property, and of the use thereof.

The Hong Kong government made use of these sweeping powers only on one occasion. In 1917 a proclamation fixing maximum retail prices of certain staple commodities was made under sub-clause 10 of clause 3 of the 1896 Order. All other wartime enactments were effected by the normal processes of legislation such as the Trading with the Enemy Ordinance 1914.[12]

The 1896 Order in Council provided that, after the Governor had issued a proclamation bringing it into operation, it should continue in any colony 'until the Governor shall by Proclamation declare that it has ceased to be in operation therein.' At the end of the war no such proclamation was issued until 20 July 1922. So these extraordinary powers to rule by regulation continued to be available to the Governor of Hong Kong for four years after the end of hostilities. The proclamation to rescind the operation of the Order was issued only after the Emergency Regulations Ordinance had been passed on 28 February 1922.[13]

This ordinance proceeded through all its stages at one sitting of the Legislative Council, at the height of a general strike called in support of the seamen's union. On the same day nine regulations were issued giving the government wide powers to censor communications, requisition property, search premises, impress labour, and arrest anyone suspected of contravening any regulation. Further regulations were issued on 2 March. Section 2 of the ordinance provides that '[o]n any occasion which the Governor in Council may consider to be an occasion of emergency or public danger he may make any regulations whatsoever which he may consider desirable in the public interest.' The section goes on to list various classes of subjects on which regulations may be made '[w]ithout prejudice to the generality of the provisions.' The classes then listed repeat the classes of subjects enumerated in the Order in Council of 12 May 1916, together with other matters listed in the 1896 Order.

It is surprising that the Attorney General of Hong Kong did not make use of the Emergency Powers Act 1920 as a model when drafting the local ordinance. The preamble to this Act states that it was designed to make exceptional provision for the protection of the community in cases of emergency. It empowers the government by Order to make any regulations it 'may deem necessary for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transit or locomotion, and for any other purpose essential to the public safety and the life of the community ...' The power to make regulations under this Act comes into force only after a proclamation has been made declaring that a state of emergency exists. 'No such proclamation

[12] No 25.
[13] No 5.

shall be in force for more than one month, without prejudice to the issue of another proclamation at or before the end of that period.'[14] Under the Emergency Regulations Ordinance no proclamation is necessary. The Governor in Council may make regulations 'on any occasion which the Governor in Council may consider to be an occasion of emergency or public danger.' Such regulations may then continue indefinitely 'until repealed by order of the Governor in Council.'[15]

The main difference between the Emergency Powers Act and the Emergency Regulations Ordinance is that, immediately after a proclamation of emergency has been made, a meeting of Parliament must be summoned within five days if it is not already in session. All regulations made under the Act must be laid before Parliament, and they cannot remain in force unless a resolution of both Houses is passed within seven days providing for their continuance.

There is no such provision in the Emergency Regulations Ordinance for the Legislative Council to meet and approve regulations. This is surprising since the unofficial members of Legislative Council had in the years before 1920 made a number of complaints about the way in which regulations made by the Governor in Council were being used to bypass the Legislative Council. In October 1919 the Attorney General had given an assurance that in future all ordinances which gave the Governor in Council power to make regulations would include a clause providing that such regulations should be laid before the Legislative Council at the first meeting after they had been made; and that any regulation could be annulled if a resolution to that effect was passed at the next meeting.[16] This promise was fulfilled in all ordinances passed thereafter during the 1920s except for the Emergency Regulations Ordinance.[17] However, in 1937, the Interpretation Ordinance 1911 was amended to provide that:

> All regulations shall be laid on the table of the Legislative Council at the first meeting thereof after the publication in the Gazette of the making of such regulations, and if a resolution be passed at the first meeting of the Legislative Council held after such regulations have been laid on the table of the said Council resolving that any such regulations shall be rescinded or amended in any manner whatsoever, the said regulations shall, without prejudice to anything done thereunder, be deemed to be rescinded or amended, as the case may be, as from the date of publication in the Gazette of the passing of such resolution.[18]

[14] s 1(1).
[15] s 2(3).
[16] Proceedings of the Legislative Council, 31 October 1919, p 114.
[17] See eg s 4(6) of the Vaccination (Consolidation) Ordinance 1922.
[18] s 5, Ordinance No 26 of 1937 (see now s 34, Interpretation and General Clauses Ordinance).

This amendment unintentionally ensured that all regulations made under the Emergency Regulations Ordinance could be amended or rescinded by the Legislative Council, if it chose to pass the necessary resolution. But there is no provision that the Legislative Council must be summoned to meet if it is not sitting at the time when any emergency regulations are made.

The Emergency Regulations Ordinance was passed on 28 February 1922, but a copy of it did not reach the Colonial Office until 11 May. By that time the seamen's strike had long since been settled and all regulations made under the ordinance had been rescinded on 9 March. Winston Churchill was at the time Secretary of State for the Colonies, but he was away and the ordinance was seen by the Under-Secretary, Mr E F L Wood (who later became Lord Halifax). He wrote on the file, 'Would it be possible, in view of the very wide powers proposed, to insert in clause 2 the concurrence of the Secretary of State?' A civil servant, Sir George Grindle, advised against this: 'I fear this would rather detract from the value of the Ordinance, as, at best, it would mean some little delay in a serious crisis and at worst, if there were an interruption of cable communication, might defeat the object.' So the Governor was informed that the ordinance would not be disallowed.[19] The despatch continued:

> I note that the powers conferred on the Governor in Council under this ordinance are very wide, and of course they will only be exercised in a grave emergency. In any such emergency I must trust to you to exercise these powers with all discretion, and to keep me fully informed of the action taken, and the reason for it.

The injunction to keep the Colonial Office fully informed of any action taken was totally ignored by all subsequent Governors. Clause 28 of the Royal Instructions provides that copies of all bills must be transmitted to London 'accompanied by such explanatory observations as may be required to exhibit the reasons and occasions for passing such Ordinance or Bill.' Regulations made under an ordinance were not required to be so submitted. They were published in the Hong Kong Government Gazette, copies of which were regularly sent to London along with all other publications by the colonial government. But it is highly unlikely that these gazettes were ever closely perused by the overworked civil servants in the Colonial Office. So the Hong Kong administration was left free to issue any regulations it wished under the Emergency Powers Ordinance without any fear of check or censure from London.

No more emergency regulations were made for the next three years after the regulations of 28 February and 2 March were repealed on 9 March 1922. In June 1925 a general strike and boycott of the colony, directed by the Guomindang

[19] CO129/474, pp 329–337.

government in Canton, began. This lasted for fifteen months until October 1926 and nearly ruined Hong Kong's economy. At the outset a proclamation was issued bringing into effect the Peace Preservation Ordinance 1886, and emergency regulations were made to impose censorship, requisition goods and supplies, search buildings, and arrest anyone with no regular employment. An emergency regulation of 30 July 1925 gave special constables all the powers, privileges, protection, and immunities referred to in s 3 of the Peace Preservation Ordinance. Regulations were also made under the Importation and Exportation Ordinance 1915[20] to control exports of food, fuel, gold, silver, and banknotes. This wartime ordinance was still in force, though it had not been used since 1919. The official end of the general strike in October 1926 did not lead to the repeal of these emergency regulations. The Hong Kong government continued to fear subversion by the Guomindang and the communists. In 1927 regulations were made banning 'any organization whatever which in the opinion of the Governor in Council is used to promote a general strike or disorder of any kind or the spread of sedition.'[21] The same regulation made it an offence 'to say anything which if reduced to writing would be seditious.' All property belonging to any prescribed organisation could be confiscated. The police were empowered to forbid any meeting or procession.

The torrent of regulations somewhat diminished after April 1927. None was issued in 1928. But existing regulations continued in force. The anti-Japanese riots of 1931 provoked by the invasion of Manchuria caused a proclamation to be issued bringing into force the Peace Preservation Ordinance, and further regulations were issued under the Emergency Regulations Ordinance. In October 1931 all existing regulations were repealed and a new edition was substituted which improved the wording of all regulations issued since 1925 and incorporated them into a systematic code. This was further elaborated upon on 28 September 1938 when all existing regulations were re-enacted in a comprehensive code of 33 regulations.

The Hong Kong administration soon found that emergency powers could conveniently be used in crises which did not threaten public security. In July 1929 Emergency (Water Storage) Regulations were brought into force empowering the Director of Public Works to take possession of any source of water, any vessel, and any land, reservoir, and pier, and to regulate how much water might be drawn from any tap. This was at a time of severe drought when the rainfall in 1928 was the lowest ever recorded. But this water shortage was hardly the kind of grave emergency and public danger which the Emergency Regulations Ordinance was originally intended to deal with. In July 1932 emergency regulations were made for the prevention and mitigation of cholera which prohibited the sale of ice cream, aerated drinks, or jellies without a permit, and

[20] No 32.
[21] Regulation of 28 January 1927.

required all fresh fruit on sale to be whole and uncut. These regulations were rescinded in October when the disease appeared to be under control, but were then reimposed in 1937 and 1938 when cholera reappeared in the colony as refugees from the war in China begun to flood into the colony. Similarly in 1935 a case of rabies led to the enactment of emergency regulations to forbid the movement of horses out of the New Territories and to regulate their grazing.

On the outbreak of the Second World War in 1939, an Order in Council was made extending to Hong Kong and all other colonies the powers conferred on the British government by the Defence of the Realm Act of 1939.[22] The power to make defence regulations was conferred upon the Governor of Hong Kong, and not on the Governor in Council. This Order remained in force until 1946, when an Order in Council under the Supplies and Services (Transitional Powers) Act 1946 empowered the Governor to declare that certain defence regulations should continue in force. In 1958 the Defence Regulations (Continuation) Ordinance[23] was passed to provide for the continuation of certain defence regulations by an annual resolution of the Legislative Council. This ritual continued until 1973. So, during the war and for some years afterwards the Governor had the power to rule by decree, making use either of the powers conferred by the Emergency Regulations Ordinance 1922 or the Order in Council made under the Defence of the Realm Act 1939. Full use was made of these powers.

After the war was over, and the power to make regulations under the Defence of the Realm Act was rescinded, the Secretary of State for the Colonies sent out a circular despatch to the Governors of all colonies, protectorates, and mandated territories.[24] This noted that Governors had retained considerable powers under various Acts of Parliament and local ordinances.

> I am anxious that none of the temporary provisions shall be retained longer than is absolutely necessary. I should be grateful if you will cause such powers retained under the provisions of the Order in Council or by special ordinance to be kept under regular and careful review, with the object of ensuring that, instead of being allowed to remain in existence until it automatically expires, such regulation should be revoked as soon as you are satisfied that it is no longer essential for the special purposes for which it was retained.

Governors were instructed to prepare a consolidated edition of Defence Regulations and other emergency laws, and to send returns to the Colonial Office every six months showing whether any, and if so which, regulations had been revoked on review.

22 Hong Kong Government Gazette Extraordinary, 26 August 1939.
23 No 37.
24 CO854/137, dated 18 July 1946.

In obedience to this directive six-monthly returns were sent to the Colonial Office at least up to 1962. Only a few of these returns have survived and are available for inspection at the Public Record Office. Mostly they report that no new emergency regulations had been made and none had been revoked in the preceding six months. Occasionally the Colonial Office politely suggested to the Governor that tranquil conditions in the colony rendered emergency regulations unnecessary, and might attract unwelcome attention in Parliament. Hong Kong officials replied assuring the Colonial Office that consideration was being given to the embodiment of the substance of the regulations in substantive law. A minute by an official at the Colonial Office noted in 1962 that 'Hong Kong, with the possible exception of Singapore, is the only colonial territory which gives such powers to the Governor without first requiring him publicly to declare a state of emergency.'[25]

The 1946 circular despatch did not deter the Hong Kong government from continued and extended use of the Emergency Regulations Ordinance. In 1949 the ordinance was amended to make clear that a regulation could be used to amend any enactment or to suspend the operation of any enactment.[26] This power was used not only to amend regulations but to make minor routine amendments to existing ordinances. For example in 1951 the Merchant Shipping Ordinance 1899 and the Penicillin Ordinance 1948 were amended in this way.

The original ordinance enacted in 1922 imposed a standard penalty for any infringement of an emergency regulation of a fine not exceeding one thousand dollars and imprisonment for any period not exceeding one year. In 1949 this clause was amended to allow a regulation to impose any punishment.[27] A regulation might impose the death penalty, but any such regulation would require an affirmative vote of the Legislative Council. In October 1950 a new emergency regulation was made imposing the death penalty for the possession of any bomb, grenade, mine, or other apparatus capable of being used as a bomb.[28] The motion was passed by the Legislative Council without any debate. In 1954 the Colonial Office suggested to the Governor that this regulation could be revoked. Sir Alexander Grantham demurred. It was only in 1956, after a vote against the death penalty in the House of Commons, that the Governor agreed to revoke the regulation, explaining that it had been done only to avoid adverse publicity which might in due course prejudice consideration of the death penalty for murder in Hong Kong.[29]

Throughout the 1950s the government continued to make use of emergency regulations to deal with any unexpected crisis. Some of these crises posed real

[25] CO1030/1427, Emergency Regulations Hong Kong 1960–62.
[26] Emergency Regulations (Amendment) Ordinance (No 8 of 1949).
[27] s 3, Ordinance No 40 of 1949.
[28] Hong Kong Government Gazette Supplement No 2, 13 October 1950, pp 540–1.
[29] CO1030/6, Emergency Regulations in Hong Kong 1954-56.

threats to public security. In 1949-51 the advance of communist troops to the border and the reinforcement of the British garrison made it necessary to requisition land and buildings and to put the colony in a state of readiness to resist a possible invasion. The 1956 Tsuen Wan riots resulted in emergency regulations to permit the indefinite detention of those arrested who could not be deported to China or Taiwan. But on other occasions the government seems to have resorted to emergency powers to deal with a relatively minor inconvenience. In September 1950 the Emergency (Small Change) Regulations were approved by the Executive Council, to deal with a shortage of small coins. These regulations made it an offence to have possession of small change in excess of reasonable requirements, and to demand a premium for the transfer of change. They remained in force for four years until August 1954. The Emergency (Agricultural Poisons) Regulations were made in July 1955 and remained in force until 1970, when they were repealed after the controls had been incorporated in the Pharmacy and Poisons Ordinance.

The year 1961 was the first since 1945 in which no new emergency regulations were promulgated. During the 1960s a number of regulations were revoked after their provisions had been incorporated in other ordinances, such as the Public Order Ordinance. But most of the regulations were codified into the Emergency (Principal) Regulations and could be brought into force at any time. The Cultural Revolution riots of 1967 saw full use made of these powers. Emergency powers were also used in the banking crisis of February 1965, forbidding banks to pay out a sum in cash of more than $100 to any depositor in one day. The Emergency (Bank Control) Regulations remained in force for four months before they were revoked in June. The devaluation of sterling led to the declaration of a public holiday to close all banks on 19 November 1967.

The last significant use of emergency powers was in December 1973. The oil crisis which followed the war between Israel and the Arab states resulted in regulations to control the use of oil and motor fuel, to limit advertising displays and floodlighting, and to impose summer time by altering the clocks from 30 December. All these regulations were revoked by the end of 1974. The threatened police mutiny of 1977 did not lead to any use of emergency powers. It was dealt with by public announcement of an amnesty and, belatedly, by the passing of a special ordinance through all its stages at one sitting of the Legislative Council.[30] The same procedure was used to deal with the bank failures of the 1980s. All remaining emergency regulations were revoked by the Executive Council in June 1995. These comprised the Emergency (Deportation and Detention) Regulations, the Emergency (Principal) Regulations, and the Emergency (Requisition) Regulations.[31] None of these had been invoked during the previous twenty years.

30 Ordinance No 9 of 1978. See Note, (1978) 8 HKLJ 241.
31 LN254 of 1955.