

I INTRODUCTION

In 1841 Hong Kong was ceded by Imperial China to Victorian Britain. She was a British colony for a century and a half thereafter: despite the founding of Republican China in 1911; through the Japanese Occupation during the Second World War; and for almost five decades after the founding of the People's Republic of China in 1949.

In 1997, at midnight when 30 June became 1 July, Hong Kong ceased to be a colony of Britain. And she became what she is today, a special administrative region of China. This is the event which we call "the handover".

What is the essence of Hong Kong's legal system, including the constitutional arrangements which underpin it? And what is the proper role of the Hong Kong Court of Final Appeal? For this is the Court which — standing above our High Court and Court of Appeal — occupies the apex of Hong Kong's legal system and is the ultimate guardian of her constitution.

It is to Hong Kong's great advantage that such questions receive the notice of distinguished legal gatherings like this one. We would undoubtedly benefit from the insights which you can offer. For this (among other) reasons, I am extremely grateful for this opportunity to address you on these and related questions.

Certainly, I could not ask for a better audience than one composed of New Zealand lawyers. The office of Solicitor General of Hong Kong and the post of Dean of our oldest Law School have been held by New Zealanders. New Zealanders practise at our Bar with success. As Hong Kong judges, they serve on our Bench with distinction. Lord Cooke of Thorndon was among the first judges to be appointed to the panel of overseas judges who sit with us on the Court of Final Appeal. Sir Thomas Eichelbaum is also on that panel. And the late Sir Edward Somers will be remembered with affection and respect not only in New Zealand but also in Hong Kong where he had served on that panel. With your permission, I pay tribute to his memory.

Reverting to 1841, I should give my reason for starting at that year. After all, the Treaty of Nanking by which Hong Kong was formally ceded to Britain, was entered into in 1842 and ratified in 1843. The reason for beginning at 1841 is that in January that year, by the so-called Convention of Chenpui, it had been agreed

in principle that Hong Kong would be ceded to Britain. Acting on that agreement in principle, Britain immediately entered into occupation of Hong Kong. And by a circular dated 20 January 1841, Captain Charles Elliot announced the cession of Hong Kong to Britain.

This brings us to two famous proclamations.¹ The first was made on 1 February 1841. It was made by Commodore Sir JG Bremer and Captain Elliot. The second was made on the following day, 2 February 1841. It was made by Captain Elliot alone. The Bremer-Elliot Proclamation told the Chinese inhabitants of Hong Kong that they were free to exercise their “religious rites, ceremonies and social customs”. Further it told them that, pending Her Majesty’s pleasure, they would be governed according to Chinese laws, customs and usages by village elders, subject to the control of a British magistrate. The Elliot Proclamation told British subjects and foreigners in Hong Kong that they would enjoy the protection of British law.

In 1843, by an exercise of prerogative power, Britain created a legislature for Hong Kong, the Legislative Council. And the position as proclaimed in 1841 soon came to be modified by local legislation. The effect of this legislation was that the same law governed everybody in Hong Kong, subject only to some room for ethnic Chinese domiciled in Hong Kong to resort to Chinese law and custom in certain spheres.

In colonial Hong Kong, the position was governed initially by the two 1841 Proclamations and later by a series of statutes. This series began with the Supreme Court Ordinance of 1844 and ended with the Application of English Law Ordinance, Cap. 88. The position was that English common law and equity applied in Hong Kong subject to three things. First, they applied so far as applicable to local circumstances or inhabitants. Secondly, they applied with such modifications as those circumstances required. And thirdly, they applied subject to any amendment by any Order in Council or Imperial Act applicable to Hong Kong or by any local Ordinance.

¹ The full text of these two proclamations are to be found in *Norton-Kyshe: The History of the Laws and Courts of Hong Kong from the Earliest Period to 1898* (1898), Vol. At pp 4-6.

II HONG KONG BILL OF RIGHTS

1991 is a highly significant year in Hong Kong's legal history. On 8 June that year the Hong Kong Bill of Rights Ordinance, Cap. 383, came into effect. Part II of this Ordinance consists of the Hong Kong Bill of Rights. This reproduces almost verbatim the International Covenant on Civil and Political Rights. Section 3 of this Ordinance repeals all pre-existing legislation inconsistent with the Bill of Rights.

The Bill of Rights was entrenched against repeal or derogation. I should explain how it was entrenched. Prior to the handover, Hong Kong's constitutional instruments consisted of the Hong Kong Letters Patent and Hong Kong Royal Instructions. On 8 June 1991 the Letters Patent were amended so as to prohibit the Legislative Council from making any law "that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with the International Covenant on Civil and Political Rights as applied to Hong Kong".² The Bill of Rights is the embodiment of the Covenant's application in Hong Kong. Thus colonial Hong Kong's judiciary, ultimately the Privy Council, acquired the power of constitutional review, by which I mean the power to strike down legislation as unconstitutional.

III BASIC LAW

On 4 April 1990 China's legislature, the National People's Congress passed the Basic Law. This was done for it to come into force as Hong Kong's constitution upon her reverting to Chinese sovereignty on 1 July 1997. The Basic Law, including all the fundamental rights and freedoms which it guarantees, is entrenched. This is because the Basic Law is a national law. As a national law, it is beyond the power of our Legislative Council, being a regional legislature, to repeal or amend. This is reflected in art. 73 of the Basic Law. Article 73 provides that the legislative power of the Legislative Council is: "To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". The Letters Patent lapsed on 1 July 1997. But Hong Kong's judiciary retained the power of constitutional review.

² Article VII (3).

he fundamental rights and freedoms entrenched under arts 25 to 37 the Basic Law include: equality — the right to vote and stand for election — freedom of speech, of the press and of publication — freedom of association, of assembly, of procession and of demonstration — the right to form and join trade unions and to strike — freedom of the person — freedom from arbitrary or unlawful arrest, detention or imprisonment — freedom from arbitrary or unlawful bodily search — freedom from torture — the right to life — inviolability of the home and other premises — freedom from arbitrary or unlawful search of, or intrusion into, homes or other premises — freedom and privacy of communication — freedom of movement, emigration and travel — freedom of conscience — freedom of religion — freedom of choice of occupation — academic freedom — the right to confidential legal advice and legal representation — the right to sue the executive — the right to social welfare — and freedom of marriage and the right to raise a family.

In addition, other rights and freedoms safeguarded by law are protected under art. 38. The Bill of Rights remains in effect entrenched by virtue of art. 39. And the lawful and traditional rights and interests of indigenous inhabitants of rural Hong Kong are protected under art. 40.

Hong Kong's pre-handover system is preserved under the principle of "one country, two systems". The one country is China. The two systems are the Mainland's system, on the one hand, and Hong Kong's system, on the other. This principle is spelled out in the Sino-British Joint Declaration on Hong Kong which was signed on 19 December 1984 and came into force upon the exchange of instruments of ratification on 28 May 1985. The preamble of the Basic Law makes express reference to the principle of "one country, two systems". It says that under this principle, the Mainland's "socialist system and policies will not be practised in Hong Kong".

Article 8 of the Basic Law deals with the laws previously in force in Hong Kong. It identifies these as Hong Kong's common law and equity, her primary and subordinate legislation and her customary law. And it says that these shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by Hong Kong's legislature.

IV COURT OF FINAL APPEAL

The Court of Final Appeal is both a court exercising general appellate jurisdiction and a constitutional court. This general jurisdiction includes, in certain circumstances, the application of Chinese law and custom. As a constitutional court, the Court operates in the challenging context of the “one country, two systems” principle.

For perhaps partly subjective reasons in my case, I propose to discuss Hong Kong’s legal system very much in the context of the Court of Final Appeal’s work. So I should say a word about the Court itself. This I do by respectfully adding a few details to what Lord Cooke of Thorndon said when he spoke here in December last year.³

I start with the Joint Declaration. It provided that the power of final adjudication in Hong Kong shall be vested in the Court of Final Appeal. And it provided that the Court may invite judges from other common law jurisdictions to sit.⁴ All of this is repeated in art. 82 of the Basic Law.

The Court’s statute is the Hong Kong Court of Final Appeal Ordinance, Cap. 484. Under its statute, the Court’s permanent membership consists of the Chief Justice and three Permanent Judges.⁵ The Court always sits as a court of five. Generally those sitting consist of the Court’s permanent membership plus a Non-Permanent Judge from what the statute calls “the list of judges from other common law jurisdictions”, but is commonly called “the overseas panel”.⁶ Under the Court’s statute, the persons eligible for appointment to the overseas panel are judges or retired judges of courts of unlimited jurisdiction in other common law jurisdictions who are ordinarily resident outside Hong Kong and have never otherwise served in Hong Kong’s judiciary.⁷ There is another panel

³ Lord Cooke of Thorndon, *Final Appeal Courts: Some Comparisons*, December 2001, Occasional Paper No. 7, Faculty of Law, Victoria University of Wellington.

⁴ Annex I, section III.

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⁶ Section 9(1).

⁷ Section 12(4).

of Non-Permanent Judges. It consists of eminent retired Hong Kong judges.⁸ Members of the retired Hong Kong judges panel normally sit — and render valuable service — if one or more permanent members of the Court are unavailable for any reason.⁹ There have only been one or two cases when no member of the overseas panel has sat.

In addition to Lord Cooke of Thorndon and Sir Thomas Eichelbaum, the present members of the overseas panel are, in order of appointment:

Sir Anthony Mason;

Sir Daryl Dawson;

Lord Nicholls of Birkenhead;

Lord Hoffmann;

Sir Gerard Brennan; and

Lord Millett.

The presence on the Court of overseas judges is universally welcomed by the judiciary, the legal profession, academics, the media and the general public in Hong Kong. On the one occasion when the value of their role was questioned, those who spoke in their favour included the Secretary for Justice. I hope that Hong Kong will find a place in our overseas judges' biographies. Certainly their names are indelible in our history.

I turn now — briefly and for limited purposes which I will soon explain — to a sampling of the cases which have reached the Court of Final Appeal. It is convenient to divide them into three categories: (i) general cases; (ii) cases involving Chinese law and custom; and (iii) constitutional cases.

⁸ Section 12(3).

⁹ Litton, Roberts, Huggins, McMullin, Cons, Silke, Fuad, Clough, Macdougall, Power, Nazareth & Mortimer NPJJ.

V GENERAL CASES

Starting with what I have termed “general cases”, I will mention cases on 10 different subjects.

First, in a copyright case the Court had to grapple with when the “willing licensor and licensee” method of assessing infringement damages was appropriate and when it was not.¹⁰ Three judges, being two permanent members and one overseas member, wrote. The principal judgment was that of the overseas member, Lord Cooke of Thorndon. In developing Hong Kong’s law on the point, cases from Australia, England, Hong Kong and New Zealand were considered.

Secondly, in a practice and procedure case the Court adopted the Privy Council’s practice in regard to concurrent findings of fact, subject to the difference that imperfect familiarity with local conditions would never be a factor.¹¹ On this point, a permanent member wrote. We examined the Privy Council’s practice, that of the House of Lords and that of the High Court of Australia. Lord Hoffmann — always influential whether or not he writes — was the overseas member.

Thirdly, in a sale of land case one of the questions was what, if anything, constituted an “open contract” in Hong Kong.¹² Two judges, both of whom were permanent members, wrote. In addition to English and Hong Kong cases, we looked at Irish academic writing. Again, Lord Hoffmann was the overseas member.

Fourthly, in an enforcement of arbitration award case three judges, being two permanent members and one overseas member, wrote.¹³ The principal judgment was that of the overseas member, Sir Anthony Mason. American, English, Hong Kong, Italian and Indian cases were considered.

¹⁰ *Oriental Press Group Ltd v. Apple Daily Ltd* (1997-98) 1 HKCFAR 208.

¹¹ *Sky Heart Ltd v. Lee Hysan Ltd* (1997-98) 1 HKCFAR 318.

¹² *Kwan v. Ozer* (1997-98) 1 HKCFAR 343.

¹³ *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd* (1999) 2 HKCFAR 111.

Fifthly, in a criminal evidence case only one judge, Sir Anthony Mason, wrote. Australian, Canadian, English and New Zealand cases were considered.¹⁴

Sixthly, in an international law case we were concerned with whether, and if so when, our courts would give effect to the orders of non-recognised courts.¹⁵ By that I mean courts sitting in foreign states the governments of which our sovereign does not recognise and courts sitting in territory under the *de jure* sovereignty of our sovereign but presently under the *de facto* albeit unlawful control of a usurper government. We said that our courts would give effect to the orders of non-recognised courts where:

- (1) the rights covered by those orders are private rights;
- (2) giving effect to such orders accords with the interests of justice, the dictates of common sense and the needs of law and order; and
- (3) giving them effect would not be inimical to the sovereign's interests or otherwise contrary to public policy.¹⁶

I wrote the principal judgment. It was powerfully supported by a judgment written by Lord Cooke of Thorndon. His judgment has the added attraction of containing a statement of the role of overseas judges on the Court.¹⁷

Seventhly, in an admiralty case, I wrote the principal judgment on the principal point.¹⁸ Other points were dealt with by another permanent member,

¹⁴ *Chim Hon Man v. HKSAR* (1998) 2 HKCFAR 145.

¹⁵ *Chen v. Ting* (2000) 3 HKCFAR 9. (This case is discussed in the First Supplement to the Thirteenth Edition of *Dicey & Morris on The Conflict of Laws* at paras 25-004, 30-017 and 31-068.)

¹⁶ At p.21 A-D.

¹⁷ At pp 22G-23B.

¹⁸ *The Resource 1* (2000) 3 HKCFAR 187. (This case is also reported in Lloyd's Reports — as *The Tian Shang No. 8* [2000] 2 Lloyd's Rep. 430.)

a member of the retired Hong Kong judges panel and a member of the overseas panel. Australian, English, Hong Kong and Singaporean cases were cited.

Eighthly, in a revenue case, we saw the *Ramsay* doctrine's debut in Hong Kong.¹⁹ Sir Anthony Mason gave the principal judgment. Sometime later Lord Millett, also a member of the overseas panel, gave a talk on *Ramsay* coming to Hong Kong. He said that initially he thought the Court's decision was wrong but that, upon further study, he had become convinced that it was right.

Ninthly, in an encumbrance case, the way in which Hong Kong law on the point had developed differently from the law on the point in other jurisdictions was affirmed in a joint judgment to which I had the honour of being a party with Sir Anthony Mason.²⁰

Tenthly, in a defamation case, an overseas member, Lord Nicholls of Birkenhead wrote a judgment with which the rest of us agreed.²¹ It removed a 150-year old misconception that malice bore the same meaning for the defence of fair comment as it did for the defence of qualified privilege. This judgment struck a blow for free speech. Lord Nicholls of Birkenhead explained that what mattered was that the defendant honestly believed in what he said or wrote.²² If so, the defence of fair comment was not defeated by actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it might be. Not even if it was the dominant or sole motive. This decision has been followed in England.²³

As you will have noticed, I gave you the actual points decided in the international law and defamation cases. I did so because I think that they are particularly important. But I have not troubled you with the actual points decided in the other cases. This is because my main purpose is simply to demonstrate that, with the help of the overseas members and with a great interest

¹⁹ *Shiu Wing Ltd v. Commissioner of Estate Duty* (2000) 3 HKCFAR 215.

²⁰ *Chi Kit Co. Ltd v. Lucky Health International Enterprise Ltd* (2000) 3 HKCFAR 268.

²¹ *Cheng v. Tse* (2000) 3 HKCFAR 339.

²² At p.360 I-J.

²³ For example, in *Branson v. Bower* [2002] QB 737.

in other jurisdictions, we have developed an eclectic jurisprudence. And this, far from losing us our own identity, has instead, I believe, given us something of a special quality of our own. I do not say this to indulge in boosterism. My aim is to demonstrate that we have learned from others, and benefited from that.

VI CHINESE LAW AND CUSTOM

Long after they have faded away in the Mainland, the ancient laws and customs of traditional China continue to enjoy some application in today's Hong Kong. Four cases involving Chinese law and custom have reached the Court of Final Appeal. One of them, being a case which involved a customary marriage, proved possible to dispose of without having to decide any point of Chinese law and custom.²⁴ Four members of the Court wrote: three permanent members and Sir Anthony Mason.

The three cases which turned on Chinese law and custom involved ancestral worship trusts, temple ownership and concubinage. In the ancestral worship trust case, I alone wrote.²⁵ The temple ownership case was disposed of by a joint judgment which I wrote with another permanent member.²⁶ The concubinage case was disposed of by a judgment which I wrote and with which the Chief Justice, a Permanent Judge and a member of the retired Hong Kong judges panel simply agreed.²⁷ Lord Millett wrote a concurring judgment, which was a particularly valuable contribution on the issue of domicile which arose.

Even in this quintessentially local area of the law, overseas members sit, and the Court works in a way comparable with the way it generally works.

²⁴ *Leung v. Leung* (1999) 2 HKCFAR 94.

²⁵ *Re Lau Wai Chau* (2000) 3 HKCFAR 98.

²⁶ *Secretary for Justice v. To Kan Chi* (2000) 3 HKCFAR 481.

²⁷ *Suen v. Yau* (2001) 4 HKCFAR 474.

VII CONSTITUTIONAL CASES

I come now to constitutional cases.

The best known aspect of constitutional law in Hong Kong consists of three things. First, the Court of Final Appeal's judgments in the first two right of abode cases. Second, the Standing Committee of the National People's Congress's Reinterpretation of certain right of abode provisions of the Basic Law involved in those two cases. Third, how the Court has dealt with "right of abode" cases since the Reinterpretation.

What I have called the first two right of abode cases are *Ng Ka Ling v. Director of Immigration* and *Chan Kam Nga v. Director of Immigration*.²⁸ The Court handed down its judgments on 29 January 1999. The Reinterpretation was made on 26 June that year. In *Ng Ka Ling's* case, we were concerned with persons in the Mainland who had acquired Hong Kong permanent resident status by virtue of art. 24 of the Basic Law. We held that they did not require approval to leave the Mainland for Hong Kong so as to exercise their right of abode. But the Reinterpretation said that they needed exit approval even for the purpose.

In *Cha Kam Nga's* case, we were concerned with children who relied on art. 24 of the Basic Law to derive Hong Kong permanent resident status through at least one parent. We held that it mattered not whether the parent acquired such status before the child's birth or thereafter. But the Reinterpretation said that it was necessary that the parent had acquired such status before the child's birth.

I must pause here to mention art. 158 of the Basic Law. I should outline art. 158's scheme and effect. The power of interpreting the Basic Law is vested in the Standing Committee. But the Standing Committee authorises the Hong Kong courts when adjudicating cases to interpret on their own the provisions of the Basic Law which are within Hong Kong's autonomy. And the Hong Kong courts are also empowered to interpret other provisions of the Basic Law when adjudicating cases. But the Hong Kong courts are required to seek and follow the Standing Committee's interpretation where the provisions to be interpreted concern affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and Hong Kong. However,

²⁸ (1999) 2 HKCFAR 4. (1999) 2 HKCFAR 82.

subsequent Standing Committee interpretations do not affect judgments previously rendered by the Hong Kong courts.

The Reinterpretation was not made on the Standing Committee's own initiative. It was not made upon a reference by the Court. Instead it was made pursuant to a request by the Hong Kong Government, which had been the losing party in the right of abode cases. Some find that ironic.

Not surprisingly, the Reinterpretation caused very considerable anxiety in Hong Kong and abroad. The fear was expressed that the Court may become overly disposed to make art. 158 references to the Standing Committee. This has not happened. Indeed the Court has never made a single such reference. The fear was expressed that the Standing Committee may develop an appetite for making interpretations or reinterpretations. This has not happened. Never has the Standing Committee ever taken the initiative to make an interpretation or reinterpretation. The fear was expressed that judicial independence had been compromised. But I can assure you that the judiciary in Hong Kong is independent. In an interview which I gave to a legal publication in Hong Kong earlier this year, I said in regard to the Reinterpretation that: "Perhaps the analysis should be made in terms of judicial autonomy. But in any event there have been no further interpretations, and hopefully there will never be another one".²⁹

There remains anxiety that the Hong Kong Government would again, after losing before the Court, approach the Standing Committee. That has not happened since the Reinterpretation. Might it happen in future? All that I can say is that, since the Reinterpretation, the Hong Kong Government has lost Basic Law cases before the Court without seeking a reinterpretation. In *Chong Fung Yuen v. Director of Immigration* the Chief Justice gave the judgment of the Court (consisting of its permanent members and Sir Anthony Mason).³⁰ The Court rejected the Government's submission that the Basic Law point involved should be referred to the Standing Committee. The Court confined the Reinterpretation to what it actually decided. And the Court decided the case, which involved a major point on the Basic Law, against the Government. No reinterpretation was

²⁹ "Hong Kong Lawyer", February 2002, at p.96.

³⁰ (2001) 4 HKCFAR 211.

sought. This is a healthy sign, even though the Government has stopped short of giving a categorical general assurance that it would never in any circumstances seek a reinterpretation in future.

I should now refer to a case which the Court recently decided in the aftermath of the 26 June 1999 Reinterpretation. This is the case of *Ng Siu Fung v. Director of Immigration*.³¹ As I have mentioned, art. 158 of the Basic Law provides that “judgments previously rendered shall not be affected” by Standing Committee interpretations. The Government argued that the “previous judgments unaffected” clause meant no more than that the named parties in *Ng Ka Ling’s* case and *Chan Kam Nga’s* cases retained their benefit under the judgments in those cases. The question was not an easy one. In the result, the Government’s argument was accepted by the majority (consisting of the Chief Justice, two Permanent Judges and Sir Anthony Mason). But I respectfully dissented. I held that the word “judgment” had to be interpreted in the context of “constitutional litigation about an entrenched right”.³² And I held that “[a]ny person whose circumstances existing prior to the [Reinterpretation] fit the law as stated in *Ng Ka Ling’s* case and *Chan Kam Nga’s* case acquired crystallised Hong Kong permanent resident status under the judgments in those two cases”.³³

If my view had prevailed, all the abode seekers would have been wholly successful. That did not happen. But the majority did give a considerable number of the abode seekers a measure of relief under the doctrine of legitimate expectation. Here, too, I respectfully felt the need to go further than the majority went. Even on legitimate expectations alone, I would have decided in favour of all the abode seekers. There will be a further hearing early next year on legitimate expectations. So I will say nothing more now.

Many other constitutional issues have reached the Court of Final Appeal. They include: the continuation after the handover of treaty obligations entered

³¹(2002) 5 HKCFAR 1. (For a commentary on this case, see Christopher Forsyth and Rebecca Williams, *Closing Chapter in the Immigrant Children Saga* (2002) 10 *Asia Pacific Law Review* 29.)

³²Page 97B.

³³Page 97F-G.

into before the handover³⁴; free speech³⁵; the right to participate in public life³⁶; mandatory life sentences for murder³⁷; and freedom to travel.³⁸ In dealing with these issues, the Court looked at cases decided by the courts of Australia, Britain, Canada, Germany, Hong Kong, Italy, New Zealand and the United States — as well as cases decided by the European Court of Human Rights. For as Lord Steyn has put so well: “There is now a dialogue between Supreme Courts of constitutional democracies, notably in respect of human rights issues”.³⁹ We also looked, as we often do, at academic writings in Hong Kong and from elsewhere. And we always adhered to the principle laid down in the judgment of the Court delivered by the Chief Justice in *Ng Ka Ling’s* case. This is that constitutional rights and freedoms must be given a generous interpretation.⁴⁰

VIII CONCLUSION

It has been an honour and a pleasure to address you. Perhaps I have sufficiently stimulated your interest in us to look at what we are doing, write about it, and let us have the benefit of your views. If I have managed to do that, then I am content. Thank you — very, very much indeed.

³⁴ *Re Yung Kwan Lee* (1999) 2 HKCFAR 245.

³⁵ *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442.

³⁶ *Secretary for Justice v. Chan Wah* (2000) 3 HKCFAR 459.

³⁷ *Law Cheong v. HKSAR* [2002] 2 HKLRD 612.

³⁸ *Gurung Kesh Bahadur v. Director of Immigration* [2002] 2 HKLRD 775.

³⁹ Lord Steyn, *Human Rights: The Legacy of Mrs Roosevelt* [2002] Public Law 473 at p.481.

⁴⁰ (1999) 2 HKCFAR 4 at pp. 28]-29A