JUSTITIA

E R R A T A

On page 127, in the right column,

line 10 : 'His Honour Judge Scrivem' should read 'His Honour Judge Scriven'

line 17 : 'The Honourable Mr Justice Simon F S Li' should read 'The Honourable Mr Justice F S Li, JA'

The Editorial Board sincerely apologizes for the above misprints.

JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1982 - 84

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Published annually by Hong Kong University Law Association, Faculty of Law, Knowles Building, 5/F., University of Hong Kong, Pokfulam Road, Hong Kong.

Printed by Don Bosco Printing Company, Kowloon, Hong Kong.

To be cited as (1982-84) 9 Justitia

EDITORIAL BOARD

FOREWORD

Writing the Foreword annually for *Justitia* has become a welcome and a pleasant task and this is the first time that I do so in my capacity as Dean of the Faculty of Law.

On 1 July 1984, law teaching came of age in the University of Hong Kong: from our small beginnings as a Department in the Faculty of Social Sciences, we became an autonomous School of Law in 1978 and now, six years on, we can safely say that we have reached maturity.

Over the past fifteen years, the students have played a great part in this evolutionary process and the strength of the intellectual traditions built up over the years is evidenced by the annual publication of *Justitia.*

Hong Kong now stands at a particularly important time in its history and our law students, past, present and future, will have a unique role to play if the legal system and its laws as we know them today are to survive the years ahead. A legal system is only as good as its personnel and I see it as the Faculty of Law's vital task in these years to ensure the quality and integrity of those entering the profession, whether they enter practice in either the private or public sector, join the staff of the Faculty or go on to the bench in due course. Hong Kong is entitled to look to HKU law graduates to commit themselves to ensuring the orderly working and continuity of our legal system for the public good as circumstances change with the passing years.

With these serious thoughts in mind, I once more extend my good wishes to the Law Association, to the authors of the dissertations selected for publication and to all students of the Faculty of Law.

Dafydd Evans

PREFACE

The ninth edition of Justitia is a departure from the previous pattern of having the journal split into two parts. The journal used to comprise two parts, namely first, dissertations written by students of the Law Faculty (formerly the School of Law) of the University of Hong Kong; second, a piece of research material produced by the Editorial Board.

In this edition, the Board has concentrated its efforts in selecting and compiling outstanding and interesting dissertations written by LL.B. graduates of 1982 and 1983. Consequently, the present issue is doubly rich in its contents since we have a wide range of essays to choose from.

We had decided that we should present a wide spectrum of legal research. The dissertations selected therefore range from an academic study of the system of stare decisis of the Hong Kong Court of Appeal; to thought-provoking topics such as the duty to rescue; and to socially oriented proposals for legislation for the disabled and for solar energy.

In all respects, editing this issue has been an interesting and educating experience. We hope that this edition of Justitia will again prove to be a journal worthy of appreciation, and if possible, a stimulating source for legislative innovation.

EDITORIAL BOARD

PROPOSED LEGISLATION FOR THE DISABLED IN HONG KONG

by Bernardine Siu-yu Lam

INTRODUCTION

It is estimated that at least 6.5%[1] of the population of Hong Kong[2] are disabled people. They are comprised of: the profoundly deaf, the severely impaired of hearing, the moderately impaired of hearing, the blind, persons with psychiatric problems, the mentally retarded, slow-learning children, maladjusted children and the physically disabled.[3]

In the past few years, their needs have become more apparent and their rights have been more actively striven for. In Hong Kong as well as other jurisdictions, elaborate programmes have been introduced to cater for their needs. The central theme that runs through these programmes is the "rehabilitation" and the "integration" of these disabled people. To "rehabilitate" the disabled is to enable them to develop their physical, mental and social capabilities to the fullest extent which their disabilities permit.[4] Closely connected with and inseparable from this concept is the policy of "integrationism", which entitles the disabled to full participation in the life of the community without discrimination.[5]

Specific legislation has been introduced in various countries, especially in this, the "International Year of the Disabled People, 1981", to achieve the two abovementioned aims. In Hong Kong, however, little has been done in this direction. The purpose of this dissertation is therefore to consider the feasability of enacting similar legislation locally, especially in the areas of access to buildings and employment, which play the most prominent role in

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1 Hong Kong Government Information Service, *Rehabilitation In Hong Kong – A Better Life For Disabled People.* (Hong Kong, 1981) at p 3; see also Appendix I for the estimate number of each type of disabled.

2 According to Census and Statistics Department of Hong Kong, the population of Hong Kong as from 8 MARCH 1981 comes to 5,154,100.

3 Green Paper entitled "The Further Development Of Rehabilitation Services In Hong Kong" 1976.

4 Para 2.1 of Chapter Two of The 1977 White Paper entitled "Integrating The Disabled Into The Community: a United Effort" October 1977.

5 Jacobus tenbroek, *"The Right to Live in the World: the Disabled in the Law of Torts"*, 1966 54 Cal LR 841, 843.

the rehabilitation and integration of the disabled. Special attention will be given to practical limitations, delicate and intricate human factors and the economic policy, unique to Hong Kong, that may weigh against the practicability of implementating similar legislation here.

I ACCESS TO BUILDINGS

There are three aspects to the problem of access for the disabled: access within the home itself, access into and within public buildings and access through the streets. This section is devoted to considering the feasability of introducing legislation to solve the problems arising out of the former two aspects.

A. The Importance of Access

To demonstrate how important access is to the disabled, it is only necessary to quote some of the views expressed in this direction.

To deny the access to a person, is to restrict his or her movement. "Movement, we are told, is a law of animal life. As to man, in any event, nothing could be more essential to personality, social existence, economic opportunity – in short, to individual well-being and integration into the life of community – than the physical capacity, the public approval, and the legal right to be abroad in the land."[6]

Access is the "key" to most problems that need solving in the case of the disabled, it "comes into the integration, education, employment, housing, leisure activities, travel, prevention and independence of the disabled people."[7]

Not only is it "crucial to the enjoyment of a full and fulfilling life as all the aids and practical help with which disabled people can be provided by a caring society"[8], but the economic opportunity of a disabled person is also very much dependent on his mobility.

In view of the great impact the problem of access has on the life of the disabled, the United Nations made it a prime object in their resolution in the "International Year of the Disabled, 1981" to encourage study and research, projects designed to facilitate the practical participation of the disabled in daily life by improving their access to public buildings scheme.

B. The Right To Access – A Basic Human Right

In the United States of America, it is a fundamental, natural and social right not to be unjustly or causelessly confined.[9] This basic human right to equal access is guaranteed under the U S Constitution[10] and the various States' Statutes.[11]

It is thought that "if the disabled have the right to live in the world, a basic human right which everybody possesses, they must also have the right to make their way into it and incidentally must be entitled to use the indispensable means of access, and to use them on terms that will make the original right effective".[12] This right is one of "uninhibited and equal access to places of public accommodation to seek their ease, rest, sustenance and recreation".[13] It was even considered that a denial of such a basic right amounted to "an affront to human dignity"[14], "a

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6 Jacobs tenbroek, *"The Right to live in the World: The Disabled in the Law of Torts"*, 1966 54 CLR 841.

7 HL Debs Col 46, January 14 1981.

8 HC Debs Col 1140, July 3 1980.

9 "Having a doctoral degree is of little consequence if one cannot get from home to job." Goldenson, *Handbook on Rehabilitation*, USA, 124.

10 Chapter 39 of the Magna Carta and the due process of federal and state constitution.

11 s 1 Equal Protections of the Laws, 14th Amendment of the US Constitution Preamble of the Civil Rights Act 1964 recites "all persons are entitled to the full and equal enjoyment of privileges ..... and accommodations". 78Stat, 241, 243, 42, USC 2.2000(a) Under the Utah's Statute, "all persons within the jurisdiction of this State are free and equal and are entitled to the full and equal accommodations, advantages, privileges, goods and services in all business establishments and in all places of public accommodation of every kind whatsoever" UTAH CODE ANN 3.13-7-1 to 3-7-4 (Supple 1965); the Ordinance of Rockcille, Maryland, Ordinance 43-64, 1965, 9 Race Relations Rep 1895 (1964-65).
ARIZ REV STAT ANN Ch 27 (Supple. 1965).

12 Jacobus tenbroek, *"The Right to live in the World: the Disabled and the Law of Torts"* 1966 54 CLR 841, 848.

13 Ibid.

14 Senate Commerce Committee Report S Rep No 872, 88th Cong 2d sess 18(1964).

shocking refutation of a free society"[15] and "a social and moral wrong as well as a burden on commerce".[16]

In the United Kingdom, while protection of the right to equal access by the legislation or constitution is absent, the existence of such a right is generally accepted. The Parliament has said, often enough in its debates that the disabled "have the same right as all humanity to grow, to learn, to work, and to create, to love and to be loved".[17] Incidental to all these rights is, of course, the right to uninhibited and equal access to all buildings. Moreover, this right is also evident from the Preamble of the "British Standard Code of Practice"[18] which requires builders to design buildings accessible to all members of the public.

Can it be said that the disabled in Hong Kong are so much less human than their American or English counterparts that they have no dignity to be affronted and that they should be denied the right to live? Or, are moral standards here so much more lower than in the United States or the United Kingdom, that the denial of equal access will not amount to what is considered a social and moral wrong in these countries? Unless the answers to these questions are all in the affirmative, the disabled in Hong Kong are surely being denied the very basic right of equal access.

C. To What Extent is the Disabled's Right of Access to Public Buildings Denied in Hong Kong?

The acuteness of the access problem in Hong Kong is clear from the observations by some government officials. According to Dr. Harry Fang[19], over 90% of all buildings and public facilities in Hong Kong are inaccessible to the disabled.[20]

The Principal Government Architect[21] classified the problem as being "insurmountable" and the Assistant Director of Housing[22] even termed it as "almost impossible" to give the disabled access to most, if not all, of the accommodation, public buildings and shopping areas in Hong Kong. The latter was also astonished by how rarely disabled people are seen on the streets, not aware of the fact that these people are being kept away from the community consciously by the architectural barriers posed by the inaccessible buildings and transportation.

By way of illustration, I will mention but a few of the various types of buildings which are rendered inaccessible to the disabled (especially the ambulant and the wheelchair-bound disabled) because of the presence of architectural barriers.

1. Cultural Centres

The City Hall

* Right in front of the main entrance to the City Hall Lower Block there are 5 insurmountable steps *although a ramp has been installed at the rear exit of the building, there are no signs present on the harbour side to guide the disabled to the doorway *getting up the ramp is easy, but the doors are too heavy to be pushed opened *the two porched lifts in the Lower Block have at last been left unlocked and can be operated by the disabled without having first to ring a bell for an attendant to unlock them. But the lifts can only take the disabled to the Exhibition Hall and not the theatre cafe because a long flight of steps has still to be climbed in order to reach this.

The Arts Centre

* The door at the entrance is so close to the flight of steps that the wheelchair-bound will not be able to get inside on his own and if someone attempts to help him, he will have difficulty manoeuvring him and those doors at the same time *ironically inside the building there are toilets for the disabled though these are not in accordance with the Code of Practice

15 The House Judiciary Committee Report HR Rep No 914 Part 2, 88th Cong 1st sess 7 (1963).

16 *Heart of Atlanta Motel, Inc* v *United States*, 379 US 241, 257 (1964).

17 HC Debs Col 1140, July 3 1981.

18 CP 96 Part I.

19 Dr Harry Fang, the Chairman of the Joint Council for the Physically and Mentally Disabled, Rehabilitation Division.

20 Dr Fang's speech on "The Promotion of access for the Disabled in Hong Kong and the Access Survey".

21 Mr Joseph Lei, the Chairman of the Review Committee on the code of Practice on the Access of Buildings to the Disabled. Remark made during the interview conducted on September 25 1981.

22 Mr DH Yates, the Assistant Director of Housing (Estate Management), in the South China Morning Post, September 16 1981.

on Access to Buildings for the Disabled. (as to be mentioned later)

The King's Theatre (Central)

* an escalator leading to the theatre which is too narrow for a wheelchair.

The Queen's Theatre (Central)

* an insurmountable barrier of a long flight of stairs.

2. Schools

* although the Government has made it a policy that in every school net in Hong Kong, a school of each type (primary, secondary or special) must be adapted for the use of disabled students[23], the facts certainly do not show it *according to a survey conducted in June 1979, which covered 1,291 schools, only 36 schools had lift services, others had flights and flights of stairs leading to classrooms and other facilities in the schools.[24]

3. The Post Office

* a very high step at the front entrance *a side entrance with ramp provided, but the entrance is hardly visible from the front and the sign indicating it is in the wrong place, because it is right on top of the access *no automatic sliding doors, and the doors are too heavy to be pushed open *the special counter which is purported to be designated for the disabled is much too high for a wheelchair-bound *public telephone booths that are not usable by the disabled, especially the ambulant disabled who need a seat that can be pulled down, so that they can have their hands free when they make their calls.

4. The Banks

The Hongkong and Shanghai Banking Corporation (Central)

* insurmountable steps at the entrance

The Chartered Bank (Central)

* steps at the entrance and inside the bank

5. Fast Food Shops

Maxims (Central)

* only a very low step at the entrance, but the tables are too high for the wheelchair-bound

Gloucester Cake Shop (Central)

* a high step at the front *temporary ramp at the side of the building for hawkers' trolleys which is too narrow for a wheelchair

6. Housing

* the only category of buildings which are accessible to the disabled

The New Towns

* most of the new towns are designed with the needs of the disabled in mind, eg the Tuen Mun New Town has shopping, recreational, community and welfare facilities which are all accessible to the disabled.

7. Public Housing

* according to the Assistant Director of Housing, a sum of $13 million was set aside by the Housing Authority to modify the flats of the disabled. These adaptations include: *the replacement of asiatic type of water closet with a pedestal type *provision of handrails inside lavatory *raising balcony floor level to that of the living room *tiling of the raised floor to balcony *widening of doorway *providing new door *taking down toilet wall and door and replacing it with a folding plastic door[25] *although the facilities to each individual flats are amply provided, the Housing Authority fail to look into the problem of accessibility to the estate as a whole, eg in the Ngau Tau Kok Estate, there are poles at the entrance designed to keep out the hawkers which also keep the wheelchair-bound out![26]

8. Pedestrian subways

The Star Ferry subway (on Chater Road near the Star Ferry car park)

* the entrances are either blocked off by flights of

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23 Revealed by Mr Joseph Lei in an interview on September 28 1981.

24 Report on Survey of Physically handicapped pupils in ordinary primary and secondary schools, by the Statistic Section of the Education Department of Hong Kong, conducted on Dec 12, 80.

25 Information supplied during interview with Mr DH Yates conducted on September 26 1981.

26 Complaint expressed by Mr HM Wong, an employee of the Universal Optical Industries, Ltd during interview conducted on September 14 1981.

steps or the slope is so steep as to send wheelchairs propelling at too fast a rate

Pedestrian Subway en-route from Star Ferry to Nathan Road

* the gradient at the two entrances is too steep: 25-30 degree inclination with the ground *no dropped kerbs at pavement adjacent to subway.

As illustrated above the public buildings which are relatively more accessible to the disabled are the estates in which they are living. This, to a certain extent, is detrimental to the disabled, because they are kept within the confines of the living environment, thus resulting in segregation from the rest of the community. However, we cannot criticize the private sector for not providing accessible buildings when the Government is also making the same mistake. By 2nd February, 1981 of the 76 Government buildings under construction, only 35 had facilities for the disabled.[27]

In view of the adverse position into which our local disabled people are put, it is time to impose a duty, through legislation, on the private sector as well as the Government to provide access for the disabled to buildings. Human nature being what it is, the disabled will stand a far better chance of having their needs attended to, if the law is invoked.

D. Legislation on Accessibility to Buildings for the Disabled in other Jurisdictions

1. The Duty

The law-making bodies in many jurisdictions give recognition to the disabled's right of equal access by implementing statutory provisions in this direction. Some serve as reminders to and others as imposition of duties on, developers to consider the needs of disabled people while in the construction of new buildings. Some even go so far as to require adaptation of all existing buildings to suit the wants of the disabled.[28]

In the United States of America, for example, a code containing specifications for making buildings and facilities accessible to, and usable by, the physically handicapped[29], was prepared in 1961.[30] Architectural barriers legislation has consequently been adopted in twenty-one States[31], imposing invariably[32], a duty on developers to conform with the American Standard Specification Code.

Most[33] buildings (especially college campuses[34]) constructed, altered, leased or financed in whole or in part by federal funds are required to be so designed that they are accessible to the disabled.[35]

Moreover, in North Carolina, the curb and ramp standards are specifically spelled out in the Statute, which also expressly confirms the rights of the disabled to the use of public conveyances, public places, and guide dogs.[36]

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27 although included in the other 41 buildings, are 5 police stations and 18 military buildings.
The South China Morning Post, February 2 1981.

28 eg in States Code such as that of Massachusetts and Municipal Codes such as Chicago's, stipulate, with certain proviso, that any remodelling on buildings to which the public has access must be made barrier free. North Carolina has even made a US $20 million fund available for remodelling State facilities to make them accessible.

29 These include those with "non-ambulatory disabilities", "heavy disabilities", "disabilities of coordination" and "those manifestations of the aging process that significantly reduce mobility, flexibility, coordination, and perceptiveness ....." s 2 of the American Standard Specification Code.

30 by the American Standards Association.

31 Call Assembly Concurrent Resolution No 19(1965) Reg Sess; Conn Public Act No 216(Feb 1965, Sec Sess); Fla Stat ch 111 as amended by $B No 109, Ch 65-493(July 1, 1965); Ill, Rev, Stat, Ann, ch 111 s 11; Iowa Code Ann (Sen File 352 Supp 1965); Minn Stat Ann s 73, 57-63.61 (Supp 1965); Mont Rev Code Ann S 69-3701 to 69-3719 (Supp 1965); Nebs Sess Laws 1965, ch 430; NH Rev Stat Ann s 155 8-9 18(Supp 1965); Ohio Rev Code Ann s 1455.1-1455.4(Supp 1965); Okla Stat Ann tit 61, 11 (Supp 1965); Pa Stat Ann s 1455.1-1455 (Supp 1965); RI Gen Laws Ann s 37-8-15 (Supp 1965); SC Code s 1-481 to 1-490 (Supp 1965); Wis Stat Ann s 101.304, 101.36 (Supp 1965).

32 The duties imposed differ among themselves as to the types of buildings and facilities covered, permissible exceptions, the methods and agencies of enforcement, and the requirement for a public hearing when administrative agencies are delegated authority to establish standards by way of regulations.

33 Except residential and certain military structures.

34 s 2.504 Rehabilitation Act of 1973 PL 93-72.

35 Architectural Barries Act 1968 PL 90-480, amended by the Act of March 5, 1970 (PL 91-205).

36 The Legislation also requires 5% of the total of, or at least one toilet room, in publicly owned projects or privately owned hotels, motels, schools and institutional residential projects to conform to the minimum accessibility requirement.

In the United Kingdom, the only existing Statute which requires buildings to be made accessible to the disabled, is the Chronically Sick and Disabled Persons Act of 1970.[37] The Statute stipulates that a person undertaking the provision of a public building[38] or a university or other school building[39] has to make provisions for the disabled for access, both within and to the building or premises, and in the parking facilities and sanitary conveniences. Similarly, local authorities have also a duty under the Act to make provisions for sanitary conveniences at certain premises open to the public[40]. But in all the aforesaid cases, the duty only arises if it is in the circumstances both practicable and reasonable for the needs of the disabled.

In Chile, regulations were issued in January 1981 concerning accessibility of disabled persons to government buildings. Under these regulations, government buildings will in future have ramps or mechanical equipment to facilitate access from the sidewalk to the first floor. In existing buildings or those already under construction, this may be accomplished with removable equipment.

In Bombay, the Municipal Corporation of Greater Bombay, India, has recently made it obligatory to provide the following amenities in public buildings : handrails on both sides of staircases, ramps (with slope of 1:12) from ground level to entrance doors of lifts or staircases and adjusted wash basins in public toilet facilities. Moreover in Sweden, specific conditions[41] are laid down not only for new public buildings but also for all ordinary dwellings.

2. The Enforcement of the Duty

Before the imposition of a duty to provide equal access can be effective, there need be a complementary system for the enforcement of such a duty.

In the United States of America, little is said in most of the Statutes about enforcement. Usually the administrative officials responsible are identified but not much more.[42] In some isolated states however[43] work cannot be commenced on the construction and remodelling of State owned buildings until the fire marshal is satisfied that the plans and specifications include provisions for the accessibility of the disabled[44]. Some States[45] even go so far as to require the reconstruction of any building that is inaccessible to the disabled.[46]

It was not until 1973 that the Government of the United States took active steps to insist upon a barrier-free environment. This was evidenced by the establishment of an Architectural and Transport Barriers Compliance Board. The duties of this Board are to police the Architectural Barrier Legislation and to investigate and examine alternative approaches to the architectural, transport and attitudinal barriers confronting the disabled in public buildings, housing schemes, monuments, parks and parklands.

In the United Kingdom, the enforcement system is comparatively weaker. As mentioned earlier, the duty to provide access for the disabled is conditional upon it being in the circumstances both practicable and reasonable, thus giving a very good excuse for the developers to evade the law. Not only does the Act

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37 Ch 44.

38 s 4 Chronically Sick and Disabled Persons Act 1970, Ch 44.

39 s 8 Chronically Sick and Disabled Persons Act 1970, Ch 44.

40 s 6 Chronically Sick and Disabled Persons Act 1970, Ch 44.

41 Under s 42(a) of the building by laws, the entry to every house must not have any step. The doors must be of such measurements as to allow a wheelchair to go through and the toilets must be fitted at a lower level.

42 eg Mont Rev Code Ann tit 69-3719(Supp 1965); Neb Sess Laws 1965 ch 430; NH Rev Stat Ann, ch 86(Supp 1965); Okla Stat Ann tit 61512(Supp 1965); PA Stat Ann tit 71, s 14553(Supp 1965); SC Codes 1-49 (Supp 1965).

43 eg Minnesota.

44 Minn Stat Ann ch 73-60 (Supp 1965).

45 eg Wisconsin.

46 "The owner of any building who fails to meet the requirements of this section may be required to reconstruct the same by mandatory injunction in a circuit court suit brought by any interested person. Such person shall be reimbursed, if successful, for all costs and reimbursements plus such attorney fees as may be allowed by the court." Wis Stat Ann s 101 35(2) (Supp 1965).

fail to provide a standard of reasonableness and practicability, the Statute does not impose any sanction on those who do not abide by the law. Moreover, there are no means within the planning legislation, or in the building regulation procedures to ensure that the statutory duties[47] are pursued at critical stages of development of new buildings.

To remedy the inadequacies in the law, the following steps have been taken. First, the Disabled Persons (No 2) Bill[48] provides for the establishment of an independent panel to determine what is reasonable and practicable. Secondly, local authorities are made aware[49] of their statutory powers[50] to make planning permission conditional upon the provision of access for the disabled. Under Clause 3 of the Bill, it is made mandatory on every local planning authority when granting planning permission to developers, to draw to their attention their responsibilities under the 1970 Act and the Code of Practice for Access for the Disabled to Buildings.[51] Thirdly, the Bill deals generally with the need to improve the legislative framework securing access for disabled persons into and out of buildings to which the public have a right to access, their mobility inside such buildings and also the right of access to and from car parks.[52]

Having reviewed the nature of developers' duties to provide access for the disabled and the system for its enforcement, the next section is devoted to considering the feasability of implementing similar legislation locally.

E. The Tentative Proposal

1. The Duty – the Code of Practice on Access to Buildings for the Disabled

In Hong Kong there has been a steady growth in effort expended to secure access for the disabled. One of the significant events which expedited work in this area was the implementation of the Code of Practice on Access to Buildings for the Disabled in the year 1976.[53]

The objective of the Code of Building Practice is to minimize and, where possible, eliminate architectural barriers which render it impossible for the disabled to enter or to use buildings.[54] It is concerned especially with accommodating the needs of the wheelchair-bound[55] and the ambulant disabled.[56]

The Code, as it stands, is only intended to cover new constructions[57], but it affects a variety of buildings which the disabled might wish to use.[58] Not being a blanket Code, certain categories of buildings, for example, individual dwelling units, are exempted from compliance with it.[59]

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47 s 4, s 6(1) and s 8 of the Chronically Sick and Disabled Persons Act 1970, Ch 44.

48 The Disabled Persons (No 2) Bill had its third reading on July 3 1981.

49 The local authorities are unaware of their power until this year 1981, when it is brought to their notice by a circular issued in August 1981 by the Department of the Environment For England and Wales.

50 Under s 29 of the Town Planning Act of 1971.

51 NS 5810, 1979.

52 Clause 3 of The Disabled Persons (No 2) Bill.

53 In 1968, subsequent to the 4th Pan Pacific Rehabilitation Conference in Hong Kong, a Committee on Design Requirement for Handicapped Persons was formed under the aegis of the Public Works Department. They laboured for a full five years and produced a report and a Draft Code of Practice on Access for the Disabled to Buildings in November 1973. The Report and the Code were considered by the Public Works Department in April 1974 which then started collecting comments and opinions on the document from various other departments and concerned bodies. The result was the Code finally implemented in 1976.

54 para 1.1. of the Code.

55 para 1.7.1 – the wheelchair-bound are those people who are unable to walk, either with or without assistance, and who, except when using mechanized transport, depend mainly on a wheelchair for mobility.

56 para 1.7.2 – the ambulant disabled people are those who are able to walk on the level and negotiable suitably graded steps provided that convenient handrails are available.

57 para 1.6 of the Code.

58 op cit at para 1.4 – includes buildings for the purposes of health service, education and cultural activities, entertainment, employment, commerce, business, transport, refreshment or worship.

59 op cit at para 1.5.2 – other types of buildings eg rehabilitation centres for which higher standards or different requirement will necessitate special designs.

Detailed specifications for various facilities, for example, access[60], kerbs[61], ramps[62], risers[63], handrails[64] and doors[65] etc.[66] required of different categories of buildings are contained in the Code. There is also a recommendation section which specifies requirements which are necessary to render a building perfectly accessible to the disabled.

Despite the fact that clear instructions are set forth in the Code to facilitate designs for buildings suitable for the disabled, they are seldom resorted to by architects in the private sector : the reason being that the Code is merely expressed to be of recommended use and is to be adopted only where practicable.[67] In view of this problem, the Government purports to remedy the position by imposing as a condition in leases to the developers, a requirement to comply with the Code.[68] However, as compliance means no more than a consideration of the recommendations included in the Code, the condition in the lease can bring the Government nowhere. Naturally enough, uncaring developers defend their rigidity on the grounds of economy, structural difficulties and non-practicability.

Some developers may be very anxious to help the disabled to gain access, but they tend merely to adopt arbitrarily unsatisfactory designs which they think are well suited to the disabled. In other instances, much money is wasted by over-eagerness. People sometimes over do it, for example, they make lavatories which are supposed to be accessible, totally inaccessible by having too many rails put in.[69]

In order to remove the attudinal (as opposed to architectural) barriers set up by uncaring developers and to ensure that future buildings and facilities contained therein are both accessible and functional to the disabled, it is most apt to impose statutory obligations on developers in this direction.

Having previously mentioned the wide range of buildings affected by the Code and the detailed specifications it contains, much can already be done to improve the situation if the Code is given compulsory statutory effect. It is conceded that the proposed legislation is deficient in that it only applies to new buildings and no provision is made for alterations to existing buildings. A start, must however be made somewhere and more comprehensive legislation can be introduced progressively as the private sector gradually learns to accept this extra burden on it.

To give statutory effect to the Code is not a far-fetched or impossible idea. In fact, this is the main purpose for which the 1978 Review Committee on the Code of Practice on Access to Buildings for the Disabled[70] was set up. The Committee revised the requirements for building designs[71] and considered the feasability and possible consequences of giving statutory effect to the Revised Code. The following are the practical and technical difficulties that confronted the Committee during its working process. First, there is the problem of the administration of the law. The Building Ordinance Officer pointed out that as it is, there are enough problems in overseeing that developers will stick to their approved designs and depositions. If the Revised Code, which contains very detailed specifications, is made mandatory, a number of complications may arise. Not only must more site inspectors be employed, they will also have the more onerous burden of seeing that even small details of the Code[72] are complied with. Secondly, to require that all public buildings must satisfy certain structural requirements may be

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60 op cit at Part 4 Stem No A1-A9 : nature of access.
61 op cit at Item No B1-B3 : position and size of kerbs.
62 op cit at Item No D1-D8 : slope and measurements of ramps.
63 Ibid.
64 op cit at Item No E1-E4 : the diameter, position and shape of handrails.
65 op cit at Item No G1-G9 : the measurements and the opening mechanism of the doors.
66 op cit at Item No L1 : suitable signs for each type of facility.
67 op cit at para 2.1.
68 Note: It is the compliance with the Code and not the Specifications in the Code.
69 eg the lavatories in the Arts Centre.
70 The Revision Committee is comprised of 8 representatives from various Government departments, an occupational therapist, 2 architects and a representative from the voluntary bodies.
71 The Revised Code was completed around March 1981 and is presently under the consideration of several Government departments. It should be tabled at the Legislative Council towards the end of 1981.
72 These include particulars such as the size of ramps, the measurements of steps and staircases, the dimensions of toilets etc.

going a little bit too far. This is because some buildings are so located as to be out of the reach of the disabled anyway. Furthermore, there may be structural difficulties inherent in some buildings which render them impossible to be adapted in compliance with the Code.[73] The Committee's suggested solution is to have a Board or Committee formed under the Code to consider applications for exemptions from the operation of the Code, thus ensuring flexibility in its application. Thirdly, once the Revised Code is incorporated into the Building Ordinance[74] quite a number of Ordinances[75] specifying dimensions of common facilities[76] will have to be amended consequently. The reason is that the specifications under the Code are on the whole more stringent, so that tedious amendments must follow in order to bring the other Ordinances in line with it. Fourthly, developers in the private sector may accuse the Government of unjustifiably imposing on them obligations which result in extra expenses having to be incurred to provide facilities for the disabled. However this accusation is totally ungrounded, because according to an expert in this area[77] the cost increment in such special designs is at most 0.5%–1% of the original cost and in most cases, the increment is negligible. Lastly, the Committee considered the possible hindrance in passing the proposed legislation offered by those members of the Legislative Council who are themselves private developers. It is submitted however that as long as the principles of natural justice apply here, nothing of this sort can happen. However much difficulties in giving statutory effect to the Code, the Committee concluded that nothing could override the paramount importance of the basic human right of equal access. They then recommended the whole Revised Code to be incorporated into the Building Ordinance with part of it given mandatory effect[78]. According to a Government spokesman, the implementation of the Revised Code is "imminent".[79]

2. *The Enforcement of the Revised Code*

To impose a duty on private developers to provide accessible public buildings is no more than to pay lip-service to the needs of the disabled, unless some positive means of enforcement are implemented concurrently.

One of the suggested means is to empower the Director of Public Works to reject building plans that fail to comply with the Code enacted. This will have a great impact on the developers, since no occupation permits will be issued to buildings constructed without an approved plan.[80]

To ensure that developers will provide accessible facilities for the disabled as are undertaken in the approved plans, three possible measures are proposed: (i) That more site inspectors be employed to see that such facilities are included at the construction stage. (ii) That it be ordered that completed buildings found not to include facilities as are undertaken be altered or even demolished.[81] (iii) That registered contractors and/or authorised persons and/or registered structural engineers responsible for construction of buildings which contravene the Code be liable to disciplinary proceedings by the Building Authority.[82]

The Committee felt quite confident that if the above mentioned means of enforcement are employed, the Code can be implemented with great success.

F. An Alternative?

It has been suggested on a number of occasions that incentive schemes in the form of tax reduction and land compensation are to be preferred to giving statutory effect to the Code of Practice.

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73 eg for a building is situated 8 ft. above the ground level, it would be ridiculous to instal a ramp reading 8 ft. nor would it be possible to instal a lift or escalator.

74 Cap 123, LHK, 1974 ed.

75 eg reg 3 9(3)(c) Building (Planning) Regulations op cit, Clause 19(3) of the Code of Practice on Provision of Means of Escape in case of Fire (CPPMEF).

76 doors, lifts, lavatories and staircases.

77 Mr Joseph Lei, the Principal Government Architect.

78 According to Mr Joseph Lei, mandatory effect will be given to other parts of the Code gradually.

79 The South China Morning Post, September 15 1981.

80 s 21 Building Ordinance.

81 s 24(1) of the Building Ordinance.

82 s 72 of the Building Ordinance.

A tax incentive scheme is employed with success in North Carolina where tax credits are given to developers who make their new or existing buildings accessible to the disabled.

In Hong Kong, however, the position is very different. The Property and Profits Taxes to which developers, building owners and land-owners are subject are so much lower than in other jurisdictions that no reasonable reduction in tax will prove attractive to them.

Another suggested form of tax incentive scheme is to include the cost in providing facilities for the disabled in expenses "deductible" from the base sum for the purpose of assessing Profits Tax payable by developers.[83] There are, however, some drawbacks to such a scheme. It is not possible to isolate the sum so expended, and even if it is, the cost increment will be nominal. Moreover it is wrong to associate the provision of accessible facilities for the disabled with reductions in Profits Tax payable. This is because a tax reduction connotes a lowering of net assessable value of the land[84], which means in this context that buildings made accessible to the disabled would be deemed to be of lower values. This cannot be true. Finally, the administration of such an incentive scheme would not be easy. A number of Government departments[85] may be involved and they must constantly be on guard against "fake" claims from developers who may seek to reap the benefits of the scheme by "installing" the necessary facilities, only to remove them when they want their premises for other purposes.

The gist of the other type of incentive scheme, the land compensation scheme, is to compensate private developers with land, the area of which is 5 times that of the area used in facilities for the handicapped.[86] This scheme was considered but shortly abandoned by the Review Committee of the Code of Practice for the following reasons. It is technically impossible to assess the space lost as a result of installation of facilities for the disabled. There are practical difficulties in administering and devising such a scheme. Further, it is highly undesirable, as a matter of principle, to employ such an incentive scheme as to do so would be to negate the fundamental duty developers have towards the disabled as they have towards the able-bodied to provide accessible buildings.

In view of the unfeasability of adopting incentive schemes, it is submitted that the best solution to the problem of access is still to give statutory effect to the Revised Code together with the implementation of appropriate system of enforcement of the Code.

II THE EMPLOYMENT PROSPECTS FOR THE DISABLED

The crux of the whole process of rehabilitation is to assist the disabled to assume complete or partial support of themselves, through the community's acceptance, involvement and eventually, employment in their midst. In the following sections, the feasability of enacting legislation to improve the employment prospects for the disabled will be considered.

A. The Role Of The Employment Of The Disabled In Hong Kong

The engagement of the disabled in gainful employment to the extent of their capabilities, cannot only contribute to their social and economic well-being but also increase the productive capacity of the Colony as a whole. The latter can be achieved since public money "invested" in sponsoring other rehabilitation activities[87] can in turn provide economic gain in a form of services rendered by the disabled to the community.[88] Moreover, once the disabled become independent, that percentage of the population which is devoted to "nursing" the disabled will once again be able to work for and contribute to the economic success of the community.

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83 s 16 Inland Revenue Ordinance (Cap 112 LHK 1979ed).

84 s 5 Inland Revenue Ordinance (Cap 112 LHK 1979 ed).

85 eg the Inland Revenue Department, the Public Works Department, the Building Ordinance Office and the Director of Accounting Service.

86 In fact the land compensation scheme is an attempted extension of Regulation 22 of the Building (Planning) Regulations, under which developers will be compensated by 5 times the area of land which is dedicated for *public passage* specifically.

87 eg the provision of adequate accommodation, transportation facilities and education for the disabled.

88 It is interesting to note that in the USA, it is found that for every dollar the agency spends to rehabilitate the disabled, US$5 is returned to the society in form of taxes alone when the individual goes back to work.

From the point of view of the disabled, long term unemployment has the consequences of "disillusioning disabled persons whose hopes have been raised by the treatment and attention given to them and more serious still, of leading to the deterioration both of their morale and their physical condition".[89] [90] In view of this and of the benefit to the community as a whole, it is understandable why one of the major objects in the United Nations' resolution is that sufficient opportunities for suitable work should be given to the disabled in every part of the world where possible.

B. The Present Situation As Regards The Employment Of The Disabled In Hong Kong

On 2nd February 1981 the unemployment rate of the disabled in Hong Kong stood at about 90%. Although it has been shown that local employers prefer disabled with sensory impairments[91] to those with physical handicaps, the unemployment rate of the blind is still as high as 70%.

These figures seem inconsistent with the numerous manifestations of sincerity towards the employment of the disabled by the Government, the biggest employer in the Colony. These include : the recent implementation of Civil Service Regulation 145[92], which confers on the disabled a special privilege of preference over other applicants for appointment in the Civil Service; and specific invitations in Government advertisements for applications from the disabled to fill vacancies in the Civil Service.[93] The policy of the Government apart, its sincerity in helping the disabled is clearly not reflected by the actual number of disabled persons employed in the Civil Service. Statistics show that there are only 878 registered disabled persons working for the Government, which represents only 0.27% of the total number of Government servants.

The high unemployment rate of the disabled can also be accounted for by the unwillingness on the part of employers in the private sector to take in disabled workers. Some of the findings in a recent survey conducted by a South China Morning Post reporter clearly reflected this fact.[94] The total number of disabled workers on the staff list of the largest companies in Hong Kong are : The Telephone Company 50 out of 11,000 (around 0.5%); The Swire Group, 7; The Hutchison Group and The Jardine Matheson & Company, 1 or 2.[95]

Being aware of the slim chance of open-employment of the disabled by the private sector, the Government established in July, 1980 a coordinated and centralized Selective Placement Service for the physically disabled[96], in the Labour Department. The Service, however, seems to be receiving more criticisms than praise. It has been criticized for being inefficient, as only 22% of the total number of those registered have been placed after over a year since its establishment. Moreover, some of those who have been placed under the scheme complained that the Service failed to work up to its slogan "the right person in the right job".[97]

A great part of the failure of the Placement Service stems from the reluctance of employers to succumb to the Government's persuasion and from the refusal to depart from society's general rejection of the disabled. Moreover, they also have special

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89 KL Stumpf, "*Placement – the key to total integration*", 1978.

90 It has been said that "unemployment for the able-bodied can be soul destroying but long term unemployment for the disabled is devastating" HC Debs col 1178, December 9 1980.

91 ie blindness and deafness.

92 Regulation 145 of the Civil Service Regulation, which provides :–

(1) Disabled persons applying for appointment in the Civil Service should be considered on equal terms with other applicants. If they are found suitable for employment, they should be given *an appropriate degree of preference* for appointment over other applicants.

(2) A disabled person found suitable to carry out the duties of a particular post may be recommended for appointment even though he may not be able, on account of his disability, to perform the duties of every post in the same rank.

93 eg On 6th June 1980, the Government advertised in South China Morning Post for the blind to apply for the post of an analyst.

94 The South China Morning Post, April 16 1980.

95 The Personnel Manageress of the Wing On Co Ltd would not even bother to approach the Management about the application of two blind people because she knew that they did not like to have disabled people on the staff.

96 Including the blind and the deaf.

97 For the working system of the Placement Service see Appendix I.

employers' prejudices[98], which arise from the lack of understanding of the disabled workers. To remove these deep-rooted prejudices and to solve the acute problem of under-employment of the disabled, one may resort to legislation similar to that found in other jurisdictions.

C. Law – A Solution To The Problem?

It has been suggested on various occasions[99] that, a quotum system similar to those found in other jurisdictions, for example, the United Kingdom, Japan, Germany, etc.[1], should be adopted in Hong Kong. To such a system, there are essentially three limbs : the nature of duty, its enforcement and financial assistance from the Government.

1. The Nature Of Duty To Employ Disabled Workers

This duty may be similar to that in the United Kingdom, where the owner of any establishment with employees exceeding a certain minimum number[2], is compelled to employ from a specific Registry[3], a fixed percentage[4] of disabled workers.[5] Alternatively, a less onerous duty as is found in Japan may be adopted instead. There, the number of disabled workers an employer is obliged to take in, varies with the nature of work in question. (For the operation of the system, see Appendix II) This mode of computation is more reasonable, since disabled persons are not competent for all natures of work.

2. The Enforcement Of The Duty

In the United Kingdom, for example, it is made an offence to engage, without a permit[6], anyone other than a registered disabled person, if the employer has already got below the quota prescribed[7]. In Japan, a much milder means of enforcement is employed. The Minister Of Labour Ministry has a power to order all enterprises to submit plans for the employment of the disabled. Those enterprises which fail to comply with the Minister's orders after the given grace period, will have their reputation jeopardized, since they will be publicly denounced as infringers of the law. Moreover, Japan also has a "levy and grant" system, under which employers who fail to employ the full number of disabled workers, must make payment for the short number. The money so collected will then be used to promote employment of the disabled.

3. Financial Assistance From The Government

In order to make the quotum system more effective, some forms of financial assistance from the Government may be rendered to employers and to the disabled workers. The former may take various forms : tax rebates, direct reimbursement for costs incurred in providing extra facilities for the disabled

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98 The employers may feel, for example, that the disabled employee will somehow cost them more money; that insurance rate for workmen's compensation will go up or that the disabled employee will not fit in socially, or may foresee special problems in firing, promoting or transferring a disabled person.

99 KL Stumpf, '*Placement – the key to total integration*', 1976.
Tai-pin Khoo, 'Vocational rehabilitation' 1976.
Group Discussion Report, 'New trends and ideas in rehabilitation'.
Mr GH Yates, The Assistant Director of Housing, during an interview on September 26, 1981.

1 Holland and Thailand.

2 Under Section 9 of the Disabled Persons Employment Act of 1944, the minimum number is 20.

3 The Registry is established and maintained by the Minister For The Disabled Persons under Section 6 of the abovementioned Act.

4 The percentage fixed under Section 9 of the 1944 Act is 3%.

5 Similarly in Germany, in every business employing 16 or more persons, at least 6% of the work force must be comprised of disabled (at least 50% incapacitated) workers, under the 1971 Law.

6 A permit may be granted under s 11 of Disabled Persons Employment Act 1944 if it appears to the Minister to be expedient to do so having regard to the nature of the work for which the applicant desires to take a person or persons into his employment and the qualifications and the suitability for the work of any persons registered as handicapped by disablement who may be available therefor, or if he is satisfied that there is no such person or an insufficient number of such persons available therefor.

7 s 9(2) of the 1944 Act, provides that a person guilty of the offence is liable on summary conviction to a fine of not exceeding £100 or to imprisonment for a term not exceeding 3 months under s 9(5) of the same Act.

workers[8], bounty[9] and special legal preferential treatment in the repayment of the fixed property.[10]

To encourage the disabled to engage in open-employment the Government can make provisions to meet the transportation demands of the physically disabled[11] and the special needs of the blind[12]. Moreover, it can also provide for free practical training for disabled persons who are employed for the first time and give them living subsidies during the first two months of their employment.[13]

D. Quotum System In Hong Kong?

The general opinion towards the feasability of implementing a quotum system in Hong Kong seems to be negative, and there are objections directed at each element of the quotum system.

1. The Imposition of A Duty on Employers

If employers are required by law to take in disabled workers, one can be sure that relatively more job opportunities will be generated for the disabled. Moreover, such duties when not discharged, can be enforced through the Courts of Justice, thus giving the prejudiced handicapped job-seekers a channel to voice their grievance. But one must halt and ask, is this the right means to the desired end?

The Vice-Chairman of the Joint Council For the Physically and Mentally Disabled, Father John Collins[14], answers to the negative. In his opinion, Hong Kong being a laissez-faire community, it is of paramount importance that commercial activities be conducted without any substantial governmental control. Industrialists are, therefore, extremely sensitive to any legislation that has the effect of limiting free enterprise.[15] Even if employers will abide by the law to employ a fixed quotum of disabled workers, the law cannot require the employers not to bear any grudge against them.

The Principal Assistant Secretary on Rehabilitation, Mr Kevin Mak[16] opined that employers will accept the disabled "genuinely" only if they are convinced of the true abilities of the disabled and not through compulsory employment. It is, therefore, the policy of the Government to provide the disabled with adequate education to equip them with special skills so as to enable them to "compete" with non-disabled job-seekers.

Some think that to impose a duty on employers to take in disabled workers compulsorily is to shift the burden from the Government to the private sector, which is unjustifiable and unfair. To employ disabled workers is burdensome because of various reasons. According to the Personnel Manageress of Universal Optical Industries Limited[17], physically disabled workers engaged in mechanical assembling in their factory have a productivity rate of 50%–60% that of "normal" workers[18]. The disabled workers require longer training time, have lower attendance

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8 Such scheme is employed in the USA under the Federal Vocational Rehabilitation Act 1973, where the States vocational rehabilitation agencies are authorized to make Federal matching funds available to the employers for meeting the costs of constructing and equipping facilities, including the expansion and remodelling of existing working places and the purchase of workshop facilities for work evaluation and personal and work adjustments.

9 In Japan, under the Physically Handicapped Persons Employment Law 1960 (as amended in 1976) a bounty of US$43 per month is allowed to employers who employ disabled persons through the Employment Security Office, for a period of 18 months.

10 This special preferential treatment is available in Japan under the aforesaid Act. In addition, the same Act also allows a loan of 80% of the building fund to the employers who would like to build a model factory employing more than 50% disabled workers.

11 In Japan, under the Physically Handicapped Persons Employment Promotion Law 1960, a loan of US$2,300 at 3% interest is available to the physically handicapped for the purchase of an electrically propelled wheelchair.

12 In Japan, a loan at a very low interest rate is available for the blind for the purchase of a typewriter or a sewing machine.

13 In Japan, the moderately disabled are entitled to : US$200 per month for 6 months; while the severely disabled are entitled to US$200/month for 12 mons.

14 In an interview conducted on September 3 1981.

15 HMS Muitaredja, "Problem Concerning The Quotum System For The Disabled In The Local Market In Developing Countries" – Speech in the 2nd International Conference on Legislation Concerning the Disabled.

16 In an interview conducted on September 17 1981.

17 The Universal Optical Industries Ltd, at 133 Hoi Bun Rd, 12/F Piazza Industrial Building. It has employed 36 disabled workers out of a total of 700 workers. Amongst the 36 disabled, 28 are deaf and dumb; 1 hunch-back; 1 blind and 6 physically disabled.

18 The deaf and dumb and the blind workers have normal productivity rate, but still require longer training time.

rates and are slow to learn because of communication problems (especially in relation to the deaf and the blind). Moreover, employers have to incur extra expenses in providing suitable working environment for their disabled employees[19]

To secure job-opportunities for the disabled by a quotum system makes the disabled a seemingly special and privileged group of people to other members of society. This will give rise to two unwarranted results – the segregation of the disabled and the encouragement of disability. Public resentment towards the disabled may also be generated, thus disturbing the harmonious inter-relationship between man and his living environment.

Besides the objections cited above, there are a number of practical limitations to obliging employers to take in a fixed number of disabled workers:

First, it is necessary to establish an effective system of registration for all the disabled job-seekers. The insignificant number[20] of the disabled registered in the present register, which was established by the Selective Placement Service, reflects the inadequacy of the existing system. However, shortage of manpower and the reluctance on the part of the disabled to reveal their identities are some of the difficulties that must be overcome.

Secondly, even if a sufficient number of the disabled are registered, most of them will not be equipped with the skills and techniques necessary to meet the qualifications required in a particular job. This is because, at present, the number of available places in technical institutes and vocational training centres run by the Government are very limited[21].

Thirdly, if the immense problem of transportation is not solved, the disabled will not be able to reach his working place, let alone do his job.

Fourthly, employers of disabled workers may be exposed to greater risk of liability. In instance of fire, for example, not only are employers responsible for the injuries suffered by disabled workers which result from their inability to escape, they are also responsible for the co-workers' lowered chances of escape brought about by the obstructions of disabled workers.

2. *The Objection To The Enforcement Of The System*

As recent statistics show (see Appendix III), the quotum system in the United Kingdom is not working effectively. According to Mr D A Trippier[22] "its failing is not with the legislation but with its enforcement" (for the number of prosecutions under the 1944 Act since 1951, see Appendix IV). He opined that if the Government of the United Kingdom would actively enforce the legislation, by prosecuting every possible employer who contravened it, the quotum system would definitely regain its influence on employers. In Hong Kong, however, no matter how actively the legislation is enforced, this system will not work. As Miss Chen[23] pointed out very pertinently, most factory owners (especially of large concerns) would rather run the risk of paying a fine than to incur the extra expenses which would be required to provide special facilities and machinery for the disabled. Furthermore, factory owners may fear that hiring disabled workers may hinder productivity so that deadlines cannot be met and they may find themselves at the wrong end of the hefty late-delivery claim. Moreover, as the Head of the Technical Education Division of the Education Department, Mr Ribeiro[24], rightly pointed out, the enforcement of such legislation is like a "game of psychology". Human nature being intrinsically rebellious, to punish employers for failing to comply with the quota would only make things worse.

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19 eg for the physically handicapped, (especially the wheelchair bound) it is necessary to provide access to the factory buildings; lifts with necessary modifications, for example, the lowering of the buttons, to the working premises; lowered work-benches; lavatories with widened doors and handrails; and larger working spaces.

20 There are only around 900 disabled presently registered.

21 As from September 1979, there are only five technical institutes in operation: Haking Wong Technical Institute, Kwai Chung Technical Institute, Kwun Tong Technical Institute, Lee Wei Lee Technical Institute and Morrison Hill Technical Institute. But it is only the Lee Wei Lee Technical Institute which has been designed with the needs of handicapped students in mind, and only a small number of places are reserved for the handicapped students.

22 HC Debs Col 1130, July 3 1981.

23 Personnel Manageress of The Universal Optical Industries Limited.

24 In an interview conducted on September 20 1981.

To exert social pressure on employers by making known their failure to comply with the fixed quotum (as is done in Japan), is not going to work in Hong Kong. This is because righteousness and honour, which the average Japanese businessman considers as virtues, just do not seem to appeal to our Hong Kong counterparts.

As neither means of enforcement are proved to be effective, one may resort to the financial provisions from the Government as an indirect mode of enforcement. But to this suggestion, there are also a number of objections.

3. *Financial Assistance From The Government – A Means Of Enforcement?*

The Senior Assessor of the Inland Revenue Department, Mr Henry Kwan[25], opined that the chance of implementation of a tax rebate scheme in Hong Kong is very remote indeed. First, the scheme will not be attractive to employers because the Profits Tax payable is already extremely low in Hong Kong.[26] Secondly, a great deal of resources and manpower is necessary to devise and administer such an incentive scheme. Moreover, Father John Collins remarked that the idea of such a device is "psychologically unhealthy". In his view, some kind of nominal award at the end of one year for the employer who has employed the most disabled workers is to be preferred.

The idea of direct cash reimbursement (as is found in the United States of America) is now under the review of a specialist committee of the Rehabilitation Development Coordinating Committee established in 1980 by the Hong Kong Government.[27] The Sub-committee is considering the feasability of establishing a central fund by the Government, from which expenditure incurred by employers in provision of special facilities can be recovered. But according to a Government spokesman, if such scheme is to operate at all, it must not be in conjunction with any quotum system. It must exist independently for the purposes of ensuring a better and safer working environment and shifting the burden of providing working facilities for the disabled from the private sector to the Government.

4. *Conclusion*

Despite the great impact employment of the disabled has on the community's economic stability and the individual's well-being, in the light of the present state of public opinion and the policy[28] of the Government, it seems clear that Hong Kong is still not prepared for the implementation of any quotum system. One must be forced to draw such a conclusion, when one realizes how high the under-employment rate of the non-disabled people is. Though it was said that "to suggest to those in need of help that they must wait until the rest of the society is rich enough not to notice the sacrifice needed to provide aid is insulting"[29], this is one of the facts of life that one must accept.

E. Alternatives To Legislation Requiring Compulsory Employment

Failing to implement the quotum system through legislation, there are a number of steps which our biggest employer, the Government, can take to improve the employment situation of the disabled.

In the United States of America, all federal contractors with contracts worth over U S $2,500, are required to take affirmative action in employing and advancing qualified disabled individuals. All employers must submit affirmative action plans to the contracting agency for review, and they are under a duty to remove architectural barriers and to revise non-job related demands that would interfere with

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25 In an interview conducted on September 8 1981.

26 Under s 14 Inland Revenue Ordinance (Cap 112, LHK, 1979ed) the Profits Tax rates of 16½% is to be charged on a corporation for the year of assessing commencing on April 1 1980; Whereas in Japan, the tax rate is 55½% and the United Kingdom and the USA also have Profits Tax rates in the range of 40%.

27 The Rehabilitation Development Committee was established by the Government of Hong Kong for the purposes of advising on the development and phased implementation of rehabilitation services in Hong Kong.

28 As evidenced by the small budget the Government has designated to benefit the disabled under the Special Needs Scheme, the difficulty to meet the eligibility criteria thereunder and the insignificant sum of allowance, it seems clear that the Government will not incur great expenses to improve the employment prospects of the disabled (for the criteria of entitlement to the allowance, see Appendix V).

29 HC Debs Col 862, June 12 1980.

the hiring of disabled persons[30]. Penalties for non-compliance include court action by the Government for breach of contract and the withholding of payments due under the contract.

In Hong Kong, similar conditions can be incorporated in all contracts between the Government and the private sector, involving more than a fixed sum of money, to require the employment of the disabled. Failure to comply with the conditions can be enforced under the law of contract, without the implementation of any separate set of laws.

Moreover, instead of spending some ten million dollars yearly in the purchase of Government supplies, the Government can sponsor a firm designed specifically for the employment of the severely disabled for the manufacture of such. This firm can be modelled on the Remploy Limited in the United Kingdom, which is a British-Government sponsored firm, having 87 factories throughout England, Scotland and Wales. It provides employment for over 8,200 severely disabled people and manufactures products like furniture, travel bags, suitcases, protective clothing and orthopaedic aids and appliances.[31] By forming this firm, the Government of Hong Kong can offer more job-opportunities to the disabled and the products of the firm will serve as concrete evidence to the public that given the chance, the disabled are as productive as the able-bodied.

The above suggestions are but two among the many things that the Government can do for the disabled. Often enough we hear of education of the public. The present writer opines that it is time that the disabled should gather their forces in order to make the Government aware of how little it has done for them, not even in this International Year of The Disabled.

III CONCLUSION

It is at least comforting to see that the Government of Hong Kong has taken the initiative to solve the problem of access to buildings by attempting to give the Code of Practice on Access to Buildings for The Disabled in Hong Kong statutory effect. However, the implementation of legislation in other less problematic areas such as transport, housing and education will not be considered until some two or three years later. The reluctance of the Hong Kong Legislature to enact law in these areas arises primarily from considerations of the peculiar local circumstances. (Owing to the limited space available, it would not be feasable to further expand on the details of these circumstances and to comment on the correctness of the Legislature's conclusion.)[32]

As pointed out by Father John Collins, to enact specific legislation for the disabled may be "too mature" for Hong Kong, but nevertheless, general legislation, for example, a Bill of Rights, should be enacted in no time. "A man who is blind, or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world ....."[33]. "The right to live in the world certainly means something more than the right to remain in it."[34] It is hoped that the disabled's basic right to uninhibited and equal access, education and work, which the able-bodied takes for granted, can be given some kind of legal recognition. To leave the disabled in the position they are in now, is to deny their inalienable rights to life.

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30 Under s 503 of the Vocational Rehabilitation Act of 1973, the enforcement of the law in this area is the responsibility of the Employment Standards Administration Section of the Department of Labour.

31 The Remploy Limited supplies the United Kingdom market as well as markets in other countries such as the United States of America and Nigeria HC Debs Col 514, January 12 1981.

32 If the reader is interested in these inquiries, the writer is most willing to make available information she collected in the course of preparing this paper.

33 Op cit at 852.

34 Op cit at 853.

APPENDIX I

In Hong Kong, as in many other developing countries, comprehensive statistics on the disabled population are not available. However, estimates in 1980 are:

Deaf and partially hearing	35,000
Blind and partially sighted	8,000
Mentally ill	179,000
Mentally handicapped	
—mild	71,000
—moderate	19,000
—severe	3,000
Physically disabled	11,000

APPENDIX II

The working system of the Selective Placement Service:

1) The Service will carry out an in-depth interview with the disabled job-seeker to find out what he can do and what kind of handicap he has.
2) Documentation of the particulars and matching against employer's requirements.
3) To pay visits to employers promoting their services and soliciting vacancies.
4) To inspect the premises and study the jobs to see whether there are necessary improvements to be done.
5) To match the available vacancy with the capabilities of those on their register.
6) To give selected persons a pre-referral interview to find out if they are satisfied with the job offered.
7) To contact the employers regularly to check the progress of the disabled worker.
8) If the Service is unable to find someone on its register to fill a vacancy, it liases with the voluntary welfare organisations to see if they have someone suitable.

APPENDIX III

In Japan, the employment ratio is calculated by a mathematical formula for securing equal employment opportunity for the disabled workers:

$$\frac{\text{Working age disabled population with full time employment}}{\text{Disabled and non-disabled population of working age with full time employment}} + \frac{\text{Working age disabled population without full time employment}}{\text{Disabled and non-disabled population of working age without full time employment}} = \frac{\text{Employment rate of disabled employees}}{\text{Non-disabled population holding specific positions for only non-disabled workers.}}$$

The counting-out system is designed to allow for the fact that not all natures of work can be performed by the disabled with competence, for example, if the designated employment ratio for a hospital should be halved, the counting-out rate will then be 50%.

APPENDIX IV

The unemployment rate of the registered disabled in the United Kingdom from the year 1974 to the year 1981:

Year	No of Registered Disabled	No of Registered Disabled Unemployed	% of Registered Disabled Unemployed
1974	574,640	63,375	11.0
1976	543,064	75,857	11.7
1978	494,877	70,765	14.3
1981	460,178	73,424	15.9

APPENDIX V

Number of prosecutions under the Disabled Persons Employment Act, 1944 since 1951:

Year	No of Prosecutions	Relevant Section of 1944 Act	Total value of fines imposed
1964	1	ss 9(5) & 9(6)	£ 50
1973	1	– ditto –	£ 100
1974	1	– ditto –	Case dismissed
1975	3	ss 9(2) & 9(6)	£ 260

APPENDIX VI

To be eligible for a disability allowance under the Special Needs Allowance Scheme, the person must be severely disabled, meaning he is certified by the Director of Medical and Health Service as:

a) Physically injured or blind, ie
   i) loss of two limbs; or
   ii) loss of both hands, all fingers or thumbs; or
   iii) loss of both feet; or
   iv) total loss of sight; or
   v) total paralysis; or
   vi) injuries resulting in being bed-ridden; or
   vii) any other injuries causing total disablement.
b) Disabling physical or mental condition
c) Requiring constant attendance
d) Profoundly deaf

An eligible disabled will be entitled only to an allowance of $350 a month.

SEPARATION AND MAINTENANCE ORDERS ORDINANCE: A Commentary

by Patricia Joy W.M. Shih

INTRODUCTION

Our prehistoric ancestors did not go before a Registrar to be joined in marriage, nor did they go before a judge to be separated. Indeed marriage was regarded everywhere in Europe as late as the first half of the Middle Ages as a personal and purely secular matter almost entirely outside the scope of the law.[2] In China the situation was similar, and from the Han dynasty a Chinese customary marriage could always be dissolved by mutual consent.[3] But in England the influence of the Church in relation to marriage grew. The norm of indissoluability of marriage was slowly established. Custom became recognised as law. Divorce was available after 1660 but only by special parliamentary act with the sole ground being adultery. It was costly, complex and infrequently invoked. By the Matrimonial Causes Act 1857 the process by which a divorce was obtained was changed from a legislative to a judicial one. Adultery remained the only ground. Divorce, however, stayed out of the reach of the poorer classes due to its expense.

State regulation of marriage and its effects increased. By 1886[4] magistrates' courts in England were given power to make separation and maintenance orders in favour of a woman whose husband had been convicted of an aggravated assault on her, or who had deserted her and was wilfully neglecting to maintain her. The Hong Kong legislature followed suit and in 1905 passed the Married Women (Maintenance in case of Desertion) Ordinance.

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1 JM Synge, The Tinker's Wedding, in *The Complete Plays of John M Synge*, 180, 207 (1960) originally published 1907.

2 Mary Ann Glendon, *State, Law and Family* (North Holland Publishing Co 1977), ch 7.

3 VY Chiu, *Marriage Laws and Customs of China* Jamieson, *Chinese Family and Commercial Law* (1921), 54.

4 S4 of the Matrimonial Causes Act of 1878 gave a criminal court power to make an order that the wife be no longer bound to cohabit with her husband if he had been convicted of an aggravated assault on her. The Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1949 repealed this and gradually extended the grounds on which the wife could apply.

Basically it provided that a Magistrate could make a noncohabitation order, a weekly maintenance order and/or an order granting legal custody of the children of the marriage in favour of a defined "married woman"[5] if she could establish that her husband was guilty of persistent cruelty to her, or of wilful neglect to provide reasonable maintenance for her or for her infant children whom he was legally liable to maintain and by this have caused her to leave and live separately and apart from him. This improved the lot of the Chinese women as well as according to Ching law "harsh treatment even to the extent of beating or wounding (gave) no right of appeal to law for protection or separation, much less (was) it a ground for divorce". It was only when the husband had not merely deserted his wife but had "left her destitute that she could file a complaint with the local magistrate".[6]

The Separation and Maintenance Orders Ordinance repealed the Married Women (Maintenance in case of Desertion) Ordinance in 1935.[7] This rather peculiarly drafted ordinance was based on the English Acts[8] and is, with a few amendments (the more important of which include the broadening of the definition of "married woman"[9] in 1971 so that a wife in a Chinese modern marriage validated by the Marriage Reform Ordinance and a concubine in a union of concubinage as defined by section 14 of the Legitimacy Ordinance are within the scope of the definition and the transfer of jurisdiction for the Ordinance from the Magistrates' Courts to the District Courts in 1969) the Ordinance in force now. Both the 1905 and the 1935 Ordinances were designed to help ill-treated poor women, to deal with family relations during a period of breakdown that is not necessarily permanent or irretrievable by relieving the financial need which breakdown can bring the parties, by giving such protection to one or other of the parties as may be necessary and by providing for the welfare and support of the children.[10]

In 1978 the Domestic Proceedings and Magistrates' Courts Act revoked the Matrimonial Proceedings (Magistrates' Courts) Act 1960. The latter act has been much criticized as outdated and incongruous in the light of the reform of divorce law.[11] The Separation and Maintenance Orders Ordinance bears a strong resemblance to the 1960 Act both in its basic outlook and in its structure. In England, statistics[12] show a sharp drop in the number of applications made under the 1960 Act after 1968[13] until its repeal. The unpopularity of the 1960 Act has been attributed to[14] the growing popularity and social acceptance of divorce as a remedy for marital breakdown and also to the increasing awareness that such applications are an "essay in futility"[15] because of the low amounts awarded[16] and the impossibility of enforcement of orders.[17] However there has been a steady rise in the number of applications made under the Separation and Maintenance Orders Ordinance on behalf of legal aid recipients by the Legal Aid Department[18] from 1970 to 1981. It would appear therefore that the

5 S2.
6 Jamieson, op cit, 54 – see note 3.
7 See Appendix 2.
8 Summary Jurisdiction (Married Women) Act 1895; the Licensing Act 1902, the Married Women (Maintenance) Act 1920; the Summary Jurisdiction (Separation and Maintenance) Act 1925.
9 Because the court's jurisdiction was extended to cover a polygamous marriage this gives the District Court wider powers than it and the High Court possess under the Matrimonial Causes Ord. (s9 of the Matrimonial Causes Ord, limit its jurisdiction to monogamous marriages and customary marriages, and by s2 of the Marriage Reform Ordinance a party to a customary marriage does not include a concubine). Therefore it appears that the divorce court cannot make a ruling for a concubine.
10 Working Paper 53 para 24.
11 See Working Paper No 9 (Law Com); Cmnd 3123; Working Paper No 53 (Law Com); *Report of the Finer Committee on One-Parent Families* (Cmnd 5629); *Report on Matrimonial Proceedings in Magistrates' Courts* (Law Com No 77).
12 *Judicial Statistics for 1977* (Cmnd 7254); Susan Maidment, *Matrimonial Statistics 1977*, [1979] NLJ 199.
13 The Divorce Reform Act was passed in 1969 which made irretrievable breakdown the sole ground for divorce though this was evidenced by 5 factors, 3 of which were matrimonial offences – see s11A Matrimonial Causes Ordinance.
14 Maidment – footnote 12.
15 McGregor, *Divorce in England.*
16 Finer Report – footnote 12 – para 2.22.
17 To be discussed below.
18 No published or unpublished statistics as to the actual number of applications made and orders granted under the Separation and Maintenance Orders Ordinance are available. These statistics are unpublished statistics – courtesy of the Legal Aid Department. They may be taken as a fairly accurate indication of the number of applications as the Separation and Maintenance Orders Ordinance is chiefly designed for the poorer classes. The means test for the granting of legal aid is (i) disposable income not exceeding $1,000 per month (ii) disposal capital not exceeding $10,000.

Separation and Maintenance Orders Ordinance remains a vital piece of legislation despite all the criticisms that may be levelled against it. In the light of these statistics and developments it appears worthwhile to assess the value of this piece of legislation in the Hong Kong context. It is the purpose of this dissertation to describe, interpret and critically examine the main provisions of the Separation and Maintenance Orders Ordinance. A few of the Hong Kong cases on it will be discussed and emphasis will be put on the principles behind it, its practical utility and its place in the body of legislation dealing with family matters. Hong Kong case law, statistics and research will be relied on as far as possible but due to the dearth of local material on the subject, analogy will often have to be drawn with the English position.

WHO CAN APPLY

Both a husband and a wife can apply for an order under the Ordinance.[19] By s2 a "wife" and "married woman" mean the wife or partner of a man by –

"(a) a marriage celebrated or contracted in accordance with the provisions of the Marriage Ordinance;
(b) a modern marriage validated by the Marriage Reform Ordinance;
(c) a customary marriage declared to be valid by the Marriage Reform Ordinance;
(d) a union of concubinage as defined by section 11 of the Legitimacy Ordinance;
(e) a kim tiu marriage entered in accordance with Chinese law and custom applicable thereto in Hong Kong before the appointed day under the Marriage Reform Ordinance
or
(f) a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed."

"Husband" means the husband or partner of a married woman. The definitions of "husband" and "wife" cover all the possible forms of legally recognised marriages in Hong Kong, and, as mentioned earlier, the court has jurisdiction over concubines which the divorce court (possibly by a legislative oversight) does not have. Mistresses and parties to void marriages[20] do not have any right to apply.

GROUNDS FOR AN ORDER

A "married woman" may apply for an order under section 3(1) where her husband –

"(a) has been convicted summarily of an assault upon her which in the opinion of the convicting magistrate is of an aggravated character;
(b) has been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than $100 or to a term of imprisonment exceeding 2 months;
(c) has deserted her;
(d) has been guilty of persistent cruelty to her or her children;
(e) has been guilty of wilful neglect to provide reasonable maintenance for her or for her infant children whom he is legally liable to maintain;
(f) has, while suffering from a venereal disease, and knowing that he was so suffering, insisted on having sexual intercourse with her;
(g) has compelled her to submit to prostitution;
(h) is a habitual drunkard, or a drug addict."

By s4 the husband of a married woman who

"(a) has been guilty of persistent cruelty to his children;
(b) is a habitual drunkard or a drug addict."

may apply to the court for an order.

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19 But see below – the husband cannot get a maintenance order.

20 In *Wong Sau Ming* v *Cheung Ying* [1960] HKLR 141 the appellant and the respondent went through a form of marriage which was, as regards form and ceremonies, valid and sufficient for the purposes of Chinese customary marriage. But because the respondent was already married to someone else at the time of the marriage the applicant failed to get maintenance under the Separation and Maintenance Orders Ordinance. To do otherwise would have been to accept a bigamous marriage.

There are two problems in relation to grounds for an order. Firstly the concept of the matrimonial offence and secondly the blatant inequality of the sexes in the provisions – the wife has eight grounds for application whereas her husband has only two.

(1) Matrimonial Offences

> "Matrimonial fault" is an eccelesiastical concept adopted by the Matrimonial Causes Act (1857), which provided an answer, based on society as it existed in England a century and a quarter ago, to the question "for what reasons and on what terms ought the law to allow a spouse to end a marriage? ..... In the Victorian lawmaker's view, the economic interests flowing from marriage should be dealt with in much the same way that the law dealt with other significant economic interest : they should only be taken away for specific cause based on fault.
>
> Law Reform Commission of Canada (1976) Family Law Report, 13-14

It is beyond the scope of this dissertation to go into each of the mentioned grounds in detail. The law relating to matrimonial offences is often complex and imprecise. Rosen[21] notes that "the remark of Lord Greene, MR. 'the decided cases upon the matter of desertion do not present a very illuminating body of jurisprudence'[22] ..... is one of many similar remarks by judges in respect of the law of matrimonial offences." As an illustration of the uncertainty and technicality of the law in this area two cases (one local and one English) concerning the question of when illness is a good defence to charges of cruelty will be discussed.

Persistent cruelty is "cruelty continued over a period of time and persisted in".[23] The conduct must be "grave and weighty"[24] and must cause "actual or apprehended injury to the complainant's physical or mental health".[25] The House of Lords held in *Williams* v. *Williams*[26] that the test whether one spouse has treated another with cruelty is wholly objective and proof of insanity is not necessarily an answer to the charge.

In the first case *(Priday* v. *Priday*[27]*)* the wife developed schizophrenia and lapsed into a passive state of withdrawal. She refused to take medication. Her husband petitioned for divorce on the ground of cruelty. It was held by Cumming Bruce J that the wife was like an invalid who had suffered a physical disease, like paralysis from a stroke, and her behaviour could not be regarded as cruel. He referred to *Williams* v. *Williams,* and stressed that for one spouse to be guilty of cruelty to the other the word "treated" is of importance, and a passive condition cannot be said to be "treating".

In the second case *Kwok Lai King Wah* v. *Kwok Che-Kin*[28] the husband refused to have sexual intercourse. This was held to be cruelty although there was evidence to show that he was impotent. The correctness of this decision has been doubted by a commentator.[29] In *Sheldon* v. *Sheldon*[30] the English Court of Appeal reviewed the previous cases on impotence and concluded that impotence from physical or psychological causes did not amount to cruelty, even though injury was caused to the other party's health. Therefore if *Sheldon* v. *Sheldon* had been cited to the court *Kwok Lai King Wah* v. *Kwok Che-Kin* might, as the commentator argues, be decided differently.

However it is submitted that there is force in the contention that *Priday* v. *Priday* is incorrectly decided whereas *Kwok Lai King Wah's* case is correctly decided. If the result of *Gollins* v. *Gollins* and *Williams* v. *Williams* is, as Bromley[31] submits, that "culpability is no longer an ingredient of cruelty"[32] and that the rule is that "if the

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21 Lionel Rosen, *Matrimonial Offences* (Oyez, 3rd ed 1975), ix.
22 *Williams* v *Williams* [1939] p 365, 368.
23 per Lord Merrivale P in *Goodman* v *Goodman* (1931) 29 LGR 273, 275.
24 per Lord Pearce in *Gollins* v *Gollins* [1964] AC 644, 687.
25 *Russell* v *Russell* [1897] AC 395.
26 [1964] AC 698.
27 [1970] 3 All ER 554.
28 S Ct, DJA No 106 of 1969 (Briggs J; 6 July, 1970). reported in (1971) 1 HKLJ 96.
29 (1971) 1 HKLJ 96.
30 [1966] p 62.
31 Bromley, *Family Law,* (5th ed, 1976).
32 at p 190.

defendant's conduct injures the complainant's health or is likely to do so, it will amount to cruelty if it is grave and weighty and such that the complainant cannot reasonably be expected to tolerate it".[33] Thus the more important consideration appears to be the effect on the complainant and not the motivations of the respondent. Therefore it is arguable that abstinence from intercourse resulting in injury to the other spouse's health could amount to cruelty even though it resulted from physical or mental affliction[34], and similarly though "more latitude will be doubtless allowed to a spouse who does not know what he is doing"[35] it is difficult to see why negative conduct should be excused whilst positive conduct is not.

Therefore, as these two cases show what amounts to a matrimonial offence, for example, cruelty or desertion may well be ambiguous and over-technical.

Besides the inherent difficulty in the interpretation of the various offences which serve as grounds, there is the question of whether the long list of rather "squalid"[36] offences is necessary or indeed acceptable. The offences for which relief may be given vary widely in gravity. There is a remedy where the other spouse is a habitual drunkard or drug addict[37] though it has been held[38] that drug addiction like drunkeness per se is not cruelty, but if it is accompanied by other conduct and there is reasonable apprehension of danger to the health of the complainant it may amount to cruelty. Due to reform in 1972 in the divorce courts it is no longer necessary to prove a matrimonial offence in order to get maintenance in case of a divorce or a decree of judicial separation (which essentially has the same effect as a noncohabitation order[39]). The sole ground for which a petition for divorce may be presented to the court is that the marriage has broken down irretrievably.[40] Whilst this does not spell the end of the matrimonial offence in divorce proceedings[41] (because three of the five facts, one of which must be proved to establish irretrievable breakdown are matrimonial offences[42] or based on a matrimonial offence[43]) "the contrast between the two jurisdictions as they exist today is remarkable and has been heavily criticised." As the Law Commission pointed out[44] "the court of last resort (ie the divorce court) can give relief without evidence of a matrimonial offence, whereas the court offering first-aid cannot. Is this sensible, when one of the objects of the law is to encourage reconciliation – or, at the very least, settlement of family disputes without rancour in court or bitterness afterwards?"

These criticisms are well founded. Furthermore the District Court can make orders regulating the maintenance and custody of minors by virtue of the Guardianship of Minors Ordinance[45] without the proof of a matrimonial offence. It appears that the grounds for an order are inconsistent with the provisions of other local family law legislation. It is

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33 Bromley, op cit, 184.

34 suggested by Davis LJ in *P* v *P* [1964] 3 All ER 919.

35 Bromley, op cit, p 192.

36 per Lord Harris in the second reading of the Domestic Proceedings and Magistrates' Courts Bill in the House of Lords. The Earl of Mansfield agreed that "it certainly does not have a modern ring about it" – HL Proceedings – P579 30 Jan, 1978. See also the remarks of Lord Denning in *The Due Process of Law* (Butterworths).

37 s3(1)(h) and s4(b).

38 *Chan Woo Lai-Sheung* v *Chan Keong* [1970] HKLR 392.

39 By s4A(1) of the Intestates Estates Ordinance if while a decree of judicial separation is in force and the separation is continuing and either party dies intestate after 1 July 1972 "such property shall devolve as if the other party to the marriage had then been dead". s32(3) of the Matrimonial Causes Ordinance provides for the situation when the wife dies intestate before 1 July 1972. In contrast a separation order granted under the Separation and Maintenance Orders Ordinance does not affect intestate succession (see s4A(2) of the Intestates Estates Ordinance). Apart from this a noncohabitation order has the same effect as a decree of judicial separation e.g. desertion ends.

40 s11 Matrimonial Causes Ordinance.

41 'Although the matrimonial offence has been thrown out of the front door, it has crept in through the back door" – Rosen, op cit, page vi. see further: The continued relevance of the fault principle in matrimonial law – A Bisset-Johnson [1973] Fam Law 5.
The future of matrimonial offences – Lionel Rosen [1971] Fam Law 30.

42 Adultery – s11A(1)(a), desertion for two years – s11A(1)(c).

43 Intolerable conduct – s11A(1)(b). The other two facts are two years separation with consent – s11A(1)(d) or five years separation without consent – s11A(1)(e). The last two are the no-fault basis.

44 Working Paper no 53 para 30.

45 Cap 13, LHK.

submitted that reform is necessary.[46]

(2) Inequality of The Sexes

As mentioned above there are eight grounds for which a married woman can apply for an order but only two grounds for which her husband can apply. Either the husband or the wife can apply for a non-cohabitation order or for custody of the children of the marriage, but only the wife (and the children) have rights to maintenance.[47] There is no provision stating that the wife has an obligation to maintain the children. It is therefore not surprising that an average of 82% of applications from 1970 to 1981 under the Separation and Maintenance Orders Ordinance were taken out by the wife and only the remaining 18% were applications by the husband.

The fact that the wife has more grounds for an order and more orders that can be made in favour of her can be traced back to the purpose of the legislation and the state of society during the times when it was passed. The Separation and Maintenance Orders Ordinance was passed to aid poor women and the poor women did need all the legal assistance they could get. Before the two world wars "a wife had to depend on her husband for financial support during marriage and for the rest of her life (and she would normally have been kept by her father before marriage). Her lack of education, of legal capacity and of opportunities for self-support, her vulnerability to pregnancy and the fact that her husband controlled her property during marriage meant that her only participation in the economy was as his dependant.[48] Legal theory gave effect to the reality of those times. At common law the husband has a duty to maintain his wife.[49] The wife has no corresponding duty to maintain her husband. The Separation and Maintenance Orders Ordinance is a result of the times when it and its predecessor, the Married Women (Maintenance in case of Desertion) Ordinance were passed.

Times have changed. Women formed 43.6% of the labour force in Hong Kong according to the 1976 census.[50] Women have full legal status, equal pay (at least in theory) and equal education opportunities. In the divorce courts, the husband may apply for an order on the ground that the wife has wilfully neglected to maintain a child of the family or himself.[51] But with respect to a complaint of neglect to maintain himself the husband must establish some impairment to his earning ability before he can succeed.[52] The English Parliament has recognized that both spouses have an equal obligation to maintain each other whilst the marriage exists.[53] The Separation and Maintenance Orders Ordinance is based on "the sexual stereotypes of the husband as

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46 cf the Domestic Proceedings and Magistrates' Courts Act 1978
The grounds for an order were reduced to four (s1) namely
(a) that the respondent has failed to provide reasonable maintenance for the applicant
(b) that the respondent has failed to provide, or make a proper contribution towards, reasonable maintenance for any child of the family
(c) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent
(d) that the respondent has deserted the applicant
Also note some principles that have been suggested for reform:
1) Maintenance should depend neither on the crudity of the matrimonial offence, nor the refinement of an assessment of matrimonial behaviour – The Maintenance Quagmire – Cretney [1970] MLR 662.
2) "It would not necessarily be inconsistent in principle for the (District Court hearing a case under the SMOO) dealing with marriage breakdown which is not irretrievable ..... to investigate and take into account conduct other than that which is gross and obvious in determining liability and quantum of orders", David Bradley, *Reports of Committees* [1977] MLR 450.

47 See s5 Separation and Maintenance Orders Ordinance. There is no provision for the wife to pay maintenance.

48 Ruth L Deech, *The Principles of Maintenance* [1977] Fam Law 229.

49 Bacon's abridgement (7th ed, vol 1, tit. "Baron and Feme" p 713).
"A husband is obliged to maintain his wife, and may by law be compelled to find her necessaries, as meat, drink, clothes physic, etc, suitable to the husband's degree, estate, or circumstances" quoted by Lord Merrivale, P in *Dewe* v *Dewe* [1928] p 113, 118.

50 *Hong Kong Social and Economic Trends* 1967-1977, Census and Statistics Department. 1961-36.8%; 1971-42.8%.

51 s8 Matrimonial Proceedings and Property Ordinance.

52 s8(1)(b)(i) of the Matrimonial Proceedings and Property Ordinance.

53 see the Domestic Proceedings and Magistrates' Courts Act.

provider and the wife as full-time housekeeper and child rearer".[54] It has been left behind by social developments. Reform is again necessary.[55]

BARS TO RELIEF

(1) Adultery, Common Law Bars, Condonation, Connivance .....

> s6 (1) No order shall be made under this Ordinance if it is proved that the applicant has committed an act of adultery:
>
> Provided that the husband or, as the case may be, the wife, of the applicant has not condoned, or connived at, or by his or her wilful neglect or misconduct conduced to such act of adultery.
>
> s7 (2) If any person who has applied for an order and with respect to whom an order has been made under this Ordinance ..... commits an act of adultery, such order shall upon proof thereof be discharged.

At common law a wife who had committed adultery[56], or who was guilty of cruelty,[57] or was in desertion[58] would lose her right to maintenance. It was held in *Grey* v. *Grey*[59] that the common law rule that a wife in default was owed no duty to maintenance was also imported to the High Court in its jurisdiction under the Matrimonial Causes Act – even though there was no such express stipulation in the Act. Therefore it would appear by analogy that adultery is a statutory bar to any order whereas cruelty and desertion, the common law bars to maintenance are incorporated implicitly.

There has been a change in the attitude of law reformers towards the statutory bar. The Morton Commission accepted the existence of the bar quite contentedly in 1956. This was considered unsatisfactory by the Law Commission in their Report on Financial Provision in Matrimonial Proceedings in 1969 but no change was recommended. The Finer Committee (whose report came out in 1974) considered the situation quite shocking.

In their words:

> "Before 1969 the divorce court was in some cases bound and in other cases entitled to refuse a decree of divorce or judicial separation by what were known as "absolute" or "discretionary" bars. The absolute bars were connivance, collusion and condonation. The discretionary bars included conduct by the petitioner conducing to the offence charged against the respondent, or the commission of a matrimonial offence by the petitioner. All of these bars have been abolished in the divorce jurisdiction. This was the corollary of the principle embodied in the Act of 1969 that a decree of divorce or judicial separation no longer marks the guilt or innocence of the parties, but that their marriage has turned out to be not viable. On the other hand ..... all the traditional bars (other than collusion) operate in the magistrates' courts .....
>
> ..... When a petitioner applies in the divorce jurisdiction for a decree of divorce or judicial separation it is completely irrelevant to the entitlement that he or she has committed adultery. Again, when the petitioner comes to apply for financial relief, the entitlement to that relief, and the amount of it, will be unaffected by the petitioner's own matrimonial misconduct unless it is both "obvious and gross"; for, as the Court of Appeal has said, to hold otherwise would be "to impose a fine for supposed misbehaviour in the course of an unhappy married life".[60] But if a woman seeks a separation or maintenance order from the magistrates against a husband who makes a habit of beating her to within an inch of her life, they must reject her application if it is shown that at any time, even

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54 see footnote 47.

55 In the Matrimonial Proceedings (Magistrates' Courts) Act 1960 there is provision for the granting of maintenance to the husband as well as the wife (though he must prove some impairment to his earning ability). However Rosen, op cit, page 5, 6 states that there are no reported cases of applications by the husband and appears to think that "the provision that a husband may apply for an order is more of a gesture than of any likely utility". It is submitted that reform is nevertheless necessary as the current provisions are unacceptable in principle.

56 *Wright and Webb* v *Arrandale* [1930] 2 KB 8.

57 *Young* v *Young* [1964] p 152.

58 *Naylor* v *Naylor* [1962] p 253.

59 [1976] Fam 324.

60 *Wachtel* v *Wachtel* [1973] Fam 72.

> years previously she had committed a single act of adultery; just as they would have to revoke such an order if they had already made it. Such a state of the law seems to us to be indefensible."[61]

It appears that such a bar is now unacceptable and revision in the law is needed.

There are some peculiarities in the drafting of the sections relating to matrimonial offences forming bars to relief which results in some difficulty in interpretation.

Firstly, it is strange that adultery is not a ground for an order whilst it is expressly mentioned as a bar. There appears to be no logical or practical reason for this. It certainly is a ground in the English 1960 Act.[62]

Secondly, s6 (1) provides that "no order" shall be made if the applicant has committed an act of adultery. In *Naylor* v. *Naylor*[63] Lord Merriman P considered it axiomatic that this meant that "unless the proviso (applied), (the wife could) not even have an order committing the legal custody of the children to her, still less an order providing that the husband (should) pay her a weekly sum for the maintenance of such a child". However it must be emphasized that there must be an actual finding of adultery. In *Cooke* v. *Cooke*[64] it was held that reasonable belief in the wife having committed adultery did not fall into the category of a statutory bar. Marshall J said[65] "I find it difficult, whether it be in reason or in justice, to understand why it should be said that which properly may be a defence to desertion or failure to maintain a wife, namely, the misconduct of the wife should prejudice her and cause her to keep the child without maintenance from the husband, the husband being in a position legally to maintain the child." It was therefore held that the case should be remitted to the justices for re-hearing of the complaint of neglect to provide reasonable maintenance for the child because, though the fact that the husband reasonably believed in the wife's adultery provided an answer to her complaints that he had deserted her and had wilfully neglected to provide reasonable maintenance for her, it did not provide an answer to the complaint (which was in law a separate complaint) that he had wilfully neglected to provide reasonable maintenance for the child.[66] The distinction between the two cases is highly artificial, and the court in *Cooke* v. *Cooke* sidestepped the English equivalent to s6 by this distinction. And indeed it appears that the situation is quite unsatisfactory. The common law rule only denied maintenance to the wife in case of adultery so it appears strange that the statutory provisions should stipulate that no order, not even an order for the custody of the children should be made.[67]

Thirdly, s6(1) only mentions that adultery should be a bar. Yet s6A says that "adultery and cruelty shall not be deemed to have been condoned ....." by resumption of cohabitation for not more than three months. The effect of the two sections in combination is perplexing. There appears to this writer to be two possible interpretations of the sections (besides the obvious one that it is simply a case of bad drafting and legislative oversight).

The first is this. Cruelty is a common law bar, together with desertion. Therefore there was no need for the legislature to mention it expressly – the common law bars were implicitly incorporated into the Ordinance. S6A is a statutory deeming provision. It is therefore necessary to mention cruelty here for it to apply to cruelty, and the same goes for adultery. Desertion is not mentioned here as this deeming provision is of no relevance to it. However, there is a weakness in this explanation. As adultery is a common law bar as well, why did the legislature mention it alone in s6(1) and in the other relevant provisions? By the above explanation the common law bar would have been incorporated anyway and there should be no need to mention adultery explicitly.

Whilst the first interpretation is an explanatory type of interpretation, the second elucidation deals more with the effects of the juxtaposition of the two sections. The situation is as follows. If the applicant

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61 Cmnd 5629 para 4.65.
62 ie the Matrimonial Proceedings (Magistrates' Courts) Act 1960.
63 [1962] p 253, 274.
64 [1960] 3 All ER 39.
65 at page 46.
66 see headnote.
67 This will be discussed in greater detail under the heading Provisions Relating to Children.

is cruel and the respondent condones this the applicant is not barred. Similarly, if the applicant commits adultery and the respondent condones this adultery the applicant is not barred. If the respondent is cruel and the applicant condones it the result will be that the applicant is barred from applying. The problem now arises. The respondent is adulterous and the applicant condones it. What is the effect? Adultery is not a ground so it may appear that condonation of the respondent's adultery by the applicant has no effect. But surely the legislature must have intended that condonation of the respondent's adultery should not be of no significance. A possible solution is that, drawing an analogy with cruelty, adultery is brought in through the back-door as a ground for an order. The problem with this interpretation is that there is no way of telling what the legislature really did intend. So that it may well have been intended that the applicant's condonation of the respondent's adultery should be of no legal relevance at all.

(2) Residing Together

It is provided that no order shall be made whilst the parties are residing together.[68] "Residing with" was formerly interpreted as "living under the same roof as".[69] But in *Naylor* v. *Naylor*[70] the High Court held that it was self-contradictory to say that two spouses one of whom is in desertion are "residing with" each other; with the result that "residing with" means "cohabitating with". One can only guess at the number of applications refused on the ground that the parties were "living under the same roof" in the interim period in view of the gross shortage of housing in Hong Kong.

PROVISIONS RELATING TO CHILDREN

> "If children become, in a sense, a nation's most crucial resource, then one has to pay much more attention to what happens to children and to families with children".
>
> D. Bell, cited in Margaret Wynn, Family Policy (1970)

(1) Children Of The Marriage

Orders may be made in respect of "children of the marriage".[71] "The marriage" refers to the various unions described in s2, and a child of the marriage includes a child legitimated by the subsequent marriage of his/her parents.[72] The main weakness here is the narrowness of the definition. The divorce court can make orders in respect of a "child" and a "child of the family" which are defined in s2(1) of the Matrimonial Proceedings and Property Ordinance. The definition of "child" includes within it "an illegitimate or adopted child of that party ..... or of both parties"; whilst a "child of the family" means besides a child of both parties "any other child who has been treated by both those parties as a child of their family". It is anomalous that the court can make orders in respect of fewer children in the case of a separation or maintenance order than it can when the parties come before it for a decree of judicial separation which, as mentioned earlier, has substantially the same effect as a non-cohabitation order.

(2) Age

There are three problems relating to age in the Ordinance.

Firstly, one of the grounds for application for an order which can be relied on by both the husband and wife is that the other spouse is guilty of persistent cruelty to his/her children.[73] It is not clear whether this is confined to infant children or whether cruelty to any child of the spouse, whether that child be thirteen or thirty, would suffice.

Secondly, it is not quite clear to what age a custody order made before the child reaches sixteen year lasts. The English position is described by the Law Commission:[74] "A note in Stone[75] states that the custody order continues until the child is eighteen. This note was described recently by Sir George Baker P[76] as setting out what had been the settled practice". But this is said to be "by no means

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68 s6(2).
69 *Evans* v *Evans* [1947] 2 All ER 656.
Wheatley v *Wheatley* [1949] 2 All ER 428.
70 [1962] p 253.
71 s5(b).
72 *Colquitt* v *Colquitt* [1948] p 19.
73 s3(1)(d) and s4 (a).
74 Working Paper no 53 para 125.
75 Stone's Justices' Manual [1972] p 1429.
76 *C* v *C, The Times*, 5 July 1972.

free from doubt."[77] As the age of majority in England is eighteen and that in Hong Kong is twenty-one it could be that a custody order under the Separation and Maintenance Orders Ordinance lasts until the child reaches 21. This confusion is quite unnecessary and an express stipulation of age limits in both cases would be most helpful.

Maintenance obligations under this Ordinance last to the age of sixteen years and may be extended "if the child is or will be engaged on a course of education or training after attaining the age of sixteen years, or that child is suffering from a mental or physical disability"[78] but it can never be extended "beyond the date when the child attains the age of twenty-one years".[79] The Latey Commission[80] recommended that the courts should have power to make maintenance orders without age limit. It is therefore suggested that the fixing of an absolute age limit may well work unfairly in some cases, and that instead of having such a limit, reliance can be put on the court's discretion instead.

(3) Bars To An Order

As mentioned above, "no order" shall be made if one of the parties to the marriage commits adultery and "no order" shall be enforceable whilst the "married woman, and her husband, with respect to whom the order was made, reside together".[81] If there is any subsequent act of adultery or resumption of cohabitation the order will be discharged.[82] S7(2)(b) provides that in this event the District Court can make a new order "that the legal custody of the children shall continue to be committed to the wife" and that the husband shall pay maintenance for the children. "In making such an order the District Court shall have regard primarily to the interests of the children".[83]

Two problems arise in this area. The first is one of principle. It is unacceptable that the rights of children should stand or fall according to the intimate lives of their parents. It is true that as Lord Merriman P said[84] "it is well recognised that if the wife's complaint under the Act of 1895[85] fails for any reason it is customary, by consent, to allow the complaint under the Guardianship of Infants Act[86] to be issued forthwith and secured in court, so that the question of custody can be dealt with without further delay or expense". Therefore, although in practice this situation can be remedied by recourse to the Guardianship of Minors Ordinance it remains unsatisfactory in principle and conflicts fundamentally with the assertion of the Law Commission that "both spouses should have an absolute obligation to maintain their dependent children and that obligation should survive irrespective of the way they have behaved to each other."[87]

The second problem is one of interpretation. Either spouse can apply for an order for the custody of the children. If either spouse commits adultery after the order has been made it will be discharged. And as mentioned above, s7(2)(b) provides that the District Court may make an order that the legal custody of the children of the marriage shall continue to be committed to the wife. The question is therefore what the situation would be if the husband had committed adultery. In the absence of express statutory provision, it is submitted that the same should still apply as this is within the court's discretion.

(4) Need For Rationalisation

The Separation and Maintenance Orders Ordinance is just one of the ordinances that relate to the maintenance and custody of children. Others include the Matrimonial Proceedings and Property Ordinance, the Guardianship of Minors Ordinance and the Affiliation Proceedings Ordinance. The provisions relating to children in these ordinances may deal with the same situations yet offer different solutions. The inconsistencies and disparities are illustrated by Appendix 3 in which the various

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77 ibid.
78 s12(1).
79 s12(2).
80 Report of the Committee on the Age of Majority, Cmnd 3342 para 249.
81 s6(1) and s6(2).
82 s7(2).
83 s7(2)(b).
84 *Naylor* v *Naylor* – see footnote 62.
85 One of the ancestors of the Separation and Maintenance Orders Ordinance.
86 English equivalent to the Guardianship of Minors Ordinance.
87 Working Paper No 53.

ordinances are compared. The need for rationalisation is acute.

ORDERS THAT CAN BE MADE

If the grounds for an order are effectively established and no bars come into play the court still has a discretion whether or not to make the order.[88] The discretion of the court is not an absolute but a judicial discretion to be exercised in accordance with the rules of law. Consequently if all the requisite facts are proved the order must be made unless there is a compelling reason.

(1) Non-Cohabitation Order

> At present, man's inhumanity to man is matched only by his inhumanity to wife
>
> Michael D. Freeman
> The Phenomenon of Marital Violence and the Legal and Social Response in England

Wife battering is not something unique to the 1980's. Dickens described it clearly in Oliver Twist and the Chinese classical novel[89] Ching P'ing (written in the sixteenth century A.D.)[90] depicts several incidents of wife battering for very little reason. Recently it was said that "wife battering is a bigger problem in Hong Kong than many people realise".[91] The question is therefore raised: What is the effect of a non-cohabitation order and what aid does it give to a battered wife?

The background to this order and its limits are discussed by the Law Commission:[92]

> "The order owed its origin to the need to protect a wife from a violent husband and it now cannot be said that there is no need to have a power to restrain one spouse from molesting the other. The existence of an order of this type may be of psychological value to the wife who considers that it gives her some measure of protection from her husband. Yet if there is a need for one spouse to be protected from the other, the non-cohabitation order, as at present formed is not an adequate way of providing such protection. Unlike the injunction which can be granted by the divorce court, it is simply a declaration and is not enforceable. Furthermore it brings an end to desertion, which has caused difficulties for a wife who subsequently attempts to obtain a divorce in reliance on a period of desertion."

A non-cohabitation clause does not exclude the husband from the matrimonial home. It merely relieves the wife of the duty to cohabit with him. The protection given to a "battered wife" by an order under this Ordinance is minimal. The facts in *Bradley* v. *Bradley*[93] exemplifies this. In the words of Lord Denning:

> "(The wife) has given many allegations of violence against her. On two occasions she went to the magistrates ..... The magistrates made orders for separation on the ground of persistent cruelty and for maintenance. Despite the separation orders he came back. She had to let him in. There he was back in the house again. This violence continued. In February 1972 he threatened one of the children with a knife ....."

The Law Commission[94] accepted the need for a change in the law to provide an effective safeguard in Magistrates' Courts against physical violence. The proposals were implemented by the Domestic Proceedings and Magistrates' Courts Act 1978. It is submitted that reform along those lines is also necessary in Hong Kong to give the District Court more power when divorce is not sought to protect battered wife[96], or even husband[97] and children[98].

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88 *Dawson* v *Dawson* (1929) 93 JP 187.
Morton Commission : para 1007.

89 some say pornographic.

90 see CT Hsia, *The Chinese Classic Novel – A Critical Introduction*, (Columbia University Press, 1968).

91 by Mr Thomas Mulvey, Director of Hong Kong Welfare Society at a seminar organised by the Hong Kong Council of Women and the War on Rape Committee – reported in South China Morning Post – 25 October, 1981.

92 Working Paper No 53 para 44.

93 [1973] 1 WLR 1291.

94 see Law Commission No 77.

96 see E Pizzey, *Scream Quietly or the Neighbours will Hear* (1974); D Martin, *Battered Wives* (1976).
Michael D Freeman, *The Phenomenon of Marital Violence and the Legal and Social Response in England* – article found in Ekelaar and Katz, *Family Violence* (Butterworths, 1978), 73.

97 see (1979) Fam Law 90, Frank Bates, *A Plea for the Battered Husband.*

98 Kempe and Kempe, *Child Abuse* (1978).

(2) Maintenance Orders

(i) assessment of maintenance

"There is a remarkable dearth of modern authority on the assessment of maintenance"[1] under the Separation and Maintenance Orders Ordinance and its English equivalents. The general consensus seems to be that the approach of the divorce court should be followed.[2] This is so despite the fact that grounds are now based on different outlooks and foundations[3] both have the same object ie "to give financial protection to a spouse and the children when the marriage breaks down".[4] The "one-third"[5] rule is now the generally accepted approach in the divorce jurisdiction. In relation to periodic payments it means that the husband will be ordered to pay such sum as will bring the wife's income up to one-third of the couple's joint income.[6] Magistrates in England were instructed in *Gengler* v. *Gengler*[7] to adopt the one-third starting point laid down by the Court of Appeal in *Wachtel* v. *Wachtel.*[8] However it has also been said that the one-third rule is inapplicable where the parties belong to the lower income groups[9] – "one has to look at each party's needs and see what can be best done in the circumstances."[10] In addition to this, the court must bear in mind the statutory maintenance limits of $1000/week for the wife and $500/week for each child of the family.[11] It is suggested that these sums should be revised upwards so that a remedy under the Separation and Maintenance Orders Ordinance will become more attractive to people of greater financial means.

(ii) payment and collection of maintenance

S5(c) and s5(d) of the Ordinance provides that weekly payments should be paid by the husband to the "wife, or to the Registrar of the District Court or any third person on her behalf." The first difficulty in relation to these provisions is that it would appear to this writer[12] that most office workers are paid monthly and most factories pay their employees every fortnight so that weekly payments are hardly appropriate. The second problem relates to the situation whereby the Registrar of the District Court collects and pays out maintenance on behalf of the parties. By s8(2) of the District Court Suitor's Funds Rules[13] "payment out shall be made at the District Court on weekdays, except Saturdays and general holidays, between the hours of 10.00 a.m. and 1.00 p.m., and between the hours of 2.00 p.m. and 4.00 p.m." There is an advantage in the District Court collecting and paying out maintenance in that the spouses do not have to see each other (if the situation has deteriorated to such an extent) and also the fact that he is paying via the court may make the husband less tardy in his payments. The problem is that there appear to be no procedures whereby the money may be mailed to the wife or whereby the wife may be notified or a source from which the wife may enquire if her money has arrived. The District Court pays out this money in normal working hours so this may result in inconvenience to a working wife who will have to take time off to collect a payment

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1 Bromley, op cit, 516.
2 Bromley, op cit, 517.
3 ie the matrimonial offence under the Separation and Maintenance Orders Ordinance and irretrievable breakdown under the Matrimonial Causes Ordinance.
4 Bromley, op cit, 517.
5 re-introduced in *Ackerman* v *Ackerman* [1972] 2 All ER 420, 426 and confirmed and extended in *Wachtel* v *Wachtel* [1973] Fam 134 to cover capital assets as well as income.
6 Bromley, op cit, 545.
7 (1976) 1 WLR 275; overruled on another point by *Rodewald* v *Rodewald* [1977] Fam 192.
8 see footnote 5.
9 *Cann* v *Cann* [1977] 1 WLR 938.
10 per Hollings J, at 941.
11 s5(c) and s5(d).
12 There are no published or unpublished statistics in this area. This impression is gleaned from a reading of newspaper advertisements for white-collar and blue-collar workers.
13 Cap 336 E, LHK.

which may, or may not be available.[14]

(iii) enforcement of maintenance orders

There exists no equivalent of s86 to s91 of the Matrimonial Causes Rules (which deal with enforcement of orders in matrimonial proceedings in the divorce courts) in the Separation and Maintenance Orders Ordinance. Recourse must be taken therefore to the general provisions of the District Court Ordinance.[15] S21A, s21B and s21C[16] are not of much practical use here. S67 is more relevant and provides that "in the execution of a judgement or order for the recovery of money, the bailiff shall in the first instance, if practicable, levy execution on the goods, chattels and effects of the party against whom it is made and in the event of the bailiff not being able to find sufficient goods, chattels or effects ..... the bailiff shall enforce the judgement or order by personal arrest and imprisonment." As a maintenance order would seem to fall within the term "execution of a judgement or order for the recovery of a sum of money" the wife can probably bring such an action against her husband. No local statistics[17] are available as to how many unfortunate husbands are rotting in jail because of failure to meet a maintenance order imposed under the Separation and Maintenance Orders Ordinance, but in 1975, 2913 men were imprisoned for default in maintenance payments mostly by magistrates under the English equivalents to the Ordinance.[18]

The Finer Committee disapproved of this "inhuman and ineffective practice" which imports into family law essentially criminal penalties.[19] There is a further disadvantage in that "imprisonment is a burden on the taxpayer ..... because of the cost of keeping (the husbands) in prison", and since a man in prison "can only earn negligible sums"[19] the family will be forced to apply for social welfare. Therefore it would appear that the means of enforcing a maintenance order under the Separation and Maintenance Orders Ordinance are crude and often defeat their own purposes. Reform of the Ordinance to allow for lump-sum payments and secured payments should improve the situation considerably.[20]

CONCLUSION

> Laws and institutions ..... like clocks, must be occasionally cleaned and wound up, and set to true time
>
> BEECHER[21]

This dissertation has examined the provisions of the Separation and Maintenance Orders Ordinance and has found them sadly deficient. It would appear that proceeding under the Matrimonial Causes Ordinance and the Matrimonial Proceedings Ordinance would be more advantageous. There, it is open to either spouse to apply, even for maintenance.[22] There is power to order maintenance pending suit, secured payments, lump-sum payments or a transfer of property.[23] There is no need to prove a matrimonial offence[24] and the bars of collusion, connivance and condonation have been abolished

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14 There is no power to order lump sum payments or secured periodic payments. In *Cheung Yuk-lin (no. 4)* v *Hui Shiu-wing* [1970] HKLR 119, Blair-Kerr J said "there is much to be said in favour of lump sum awards in lieu of periodic payments, especially in a territory like Hong Kong where circumstances can change fundamentally and with remarkable rapidity". The great mobility of the population is well illustrated by the case of *Audrey Smith* v *Ernest Bernard Smith* [1978] HKLR 276 where the husband just left the colony overnight without any warning. If as suggested the ceiling to the maintenance amounts is raised such that more wealthy people find the Separation and Maintenance Orders Ordinance of use, there is much to be said for giving the court power to order lump sum and secured payments.

15 Cap 336, LHK.

16 These deal with the power of the court to impose charges on the land of a judgement debtor, the power to appoint a receiver and the attachment of debts to sums standing in a deposit in a bank. These are more of commercial remedies.

17 either published or unpublished.

18 ie the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

19 see (1976) 6 Family Law 33.

20 see footnote 14.

21 quoted in Family Law Report, Law Commission of Canada 1976.

22 s11 Matrimonial Offences Ordinance.

23 s6 Matrimonial Proceedings and Property Ordinance.

24 see footnote 22.

together with the bar of conducing of adultery though the common law bar of adultery may still be relevant.[25] The court has more powers in relation to more children.[26] The only apparent disadvantage of proceeding under these two Ordinances is that a defended petition must be transferred to the High Court.[27] The average cost is estimated to be around $1000–$1500 in the District Court (for straightforward cases) and $20000–$25000 in the High Court. The average delay is around 5-6 months for proceedings in the District Court and 12-16 months in the High Court.[28] The Separation and Maintenance Orders Ordinance does, however, offer a quick alternative for obtaining maintenance pending suit in proceedings, though when a divorce petition has been filed the court has a discretion whether to proceed with the case or to refuse to hear it and decide as a matter of public policy and general convenience which course to take.[29] This may account for its continuing popularity in Hong Kong.

It is submitted that if the State is to govern family life it must do so with laws that are just in relation to all parties concerned, laws that are easily understood by the parties themselves and laws that are in keeping with the mood and temper of the society these laws are to govern. Lengthy discussions have been made in relation to the difficulties arising from the interpretation of the sections and indeed it can be seen that the whole outlook of the Separation and Maintenance Orders Ordinance is antiquated and the Ordinance stands as a peculiar anachronism in the field of legislation governing family law. It is hoped that reform may be carried out to correct the anomalies in the Ordinance and to enable it to carry out its functions more effectively. It would be unfortunate if applicants had to have resolve to the final step of divorce merely because of the unavailability of a remedy under the Separation and Maintenance Orders Ordinance.

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25 *Grey* v *Grey* see footnote 60.
26 see Appendix 3.
27 s10A(a) Matrimonial Causes Ordinance.
28 courtesy of the Legal Aid Department.
29 *Lanitis* v *Lanitis* [1970] 1 WLR 503.

	Separation and Maintenance Orders Ordinance	Divorce-Matrimonial Causes Ordinance & Matrimonial Proceedings & Property Ordinance (M.P.P.O.)	Guardianship – Guardianship of Minors Ordinance	Affiliation – Affiliation Proceedings Ordinance
1. Custody – which children	children of the marriage – s5	child of the family – s5(2)(a) M.P.P.O.	minor	illegitimate children – mother has custody at common law
2. Custody – until what age	does not say	21 – s19, s20 M.P.P.O. in some situations may even be over 21 (see s18 M.P.P.O.)	under 21	16 – s8
3. Custody – to whom	to the husband or the wife – s5(b)	as the court thinks fit – s19(1)M.P.P.O.	at court's discretion – s10, s11	mother or someone other than mother – s15
4. Maintenance – amount	not over $500/week s5(d)	no limit	reasonable having regards to means of parent – s10 – but not over $500/week – s22(1)(b)	not over $120/week s5(2)(a)
5. Payable by whom to whom	by the husband to the wife, or the Registrar of the District Court, or any third party on her behalf – s5(d)	by either party to the marriage to such person as may be specified for the benefit of such a child – s5 M.P.P.O.	by parent(s) to the person named by the court – s20	father to mother or custodian s7
6. Type of payment	weekly s5(d)	periodic, secured periodic, lump sum, s5 M.P.P.O.	working or periodic sum – s10(2)	at such times as the court may direct s5(2)(a)
7. Maintenance – until what age	16 normally, but if child is or will be engaged on a course of education or training beyond 16, or if the child is suffering from a mental of physical dis-	21 – s10(b) M.P.P.O. but can extend beyond 21 if in training or if there are special circumstances s21(3)	21	16, but if engaged in education or if suffering from mental or physical disability – 21 s9

	ability can be beyond 16 but not after 21 – s12			
8. Security	not applicable	secured payments	attachment of wages – s20	attachment of pension or income to satisfy order s12. Recoverable as a civil debt/arrest s13
9. Court	District Court	District Court/High Court	District Court	District Court
10. Miscellaneous comments	s7(b) – in the event of the order being discharged the District Court can make a new order and in making such an order the District Court shall have regard primarily to the interests of the children s6 – No order made if parents reside together or if one commits adultery	s7 sets out factors court should consider in determining whether to exercise power	s3(1)(a) the court shall regard the welfare of the minor as the first and paramount consideration	
Penalty if change address without notification of proper persons	$250 – s10	not applicable	$500 – s15(4)	$500 – s11(2)

OBSTRUCTION OF SUNLIGHT AS A PRIVATE NUISANCE

by Joseph Lap-bun Tse

Few people would forget the oil embargo in 1973 which brought many countries in the world into an economic recession. Since then, the issue of energy shortage has been much discussed. It is a hard and undeniable fact that the earth's fossil fuel reserves are being consumed at a rate which far exceeds that of their production. In view of this energy crisis, countries over the world have been attempting to seek an alternative energy source on which they could safely depend in the future. The one which finds the greatest favour among the alternatives being explored is solar energy. Given the host of advantages inherent in the use of solar energy and the progress in solar technology, the widespread application of solar energy in the forthcoming decade can safely be predicted.

For a solar energy system to work efficiently, exposure to direct solar radiation is essential. However, the English common law, as it now stands, does not recognise a cause of action in private nuisance for the obstruction of sunlight. This dissertation is aimed at evaluating whether this long-time non-recognition is still sound in the light of the contemporary circumstances of Hong Kong.

Part I will examine the advantages of utilization of solar energy and its feasibility and application in Hong Kong. It is proposed that in order to promote the use of solar energy, a right to unobstructed access to sunlight should be established. Part II will discuss the form and content of the proposed solar right. Part III will go on to assert that the existing legal instruments are insufficient and ineffective to provide for the solar right. Then Part IV will analyse the classical nuisance action. It will be contended that the Court's refusal to recognise a cause of action for obstruction of sunlight is not based on nuisance law, but on the policy favouring land development, a policy which, it is submitted, is no longer valid in modern Hong Kong. Finally, this dissertation will conclude by saying that the nuisance action is a good supplement to, if not a total substitute for, the existing means of guaranteeing a solar right, and therefore actions for obstructed access to sunlight should be recognised.

PART I: THE FUTURE ENERGY SOURCE – SOLAR ENERGY

A. The Energy Crisis

The notion of conservation of energy seems never to have come across the minds of the policy makers over the world until early 1970s. This complacency largely stemmed for the over-optimistic estimate of the abundance of the earth's fossil fuel reserves and the rather unpredictable increase in the consumption of energy.

Since 1950's, myriads of modern concrete buildings, all depending on vast quantities of fossil fuels and electricity to make them work, have been constructed. Apart from this, with the advent of advanced scientific and technological skills, different varieties of novel machinery are being manufactured on a mass production basis, which, while allowing for more luxury and comfort, would inevitably consume more energy. The ever-growing population, worse still, extracted a heavy toll upon our limited energy reserves.

As a result, the traditional sources of energy, on which man has grown accustomed to rely, are rapidly diminishing. Both oil and coal deposits are finite and are being depleted at a geometrically increasing rate of consumption. It is forecast that "the known global reserves of natural gas and petroleum will last 38 and 31 years respectively, if their rate of consumption were to remain at the 1970 levels."[1] If an exponential index, which takes into account of the exponential growth of consumption, were used, it would give about 25 and 20 years for gas and oil respectively.[2] One may argue that there are unknown resources which can be utilized in the future, but a research on world oil production cycles will diminish this idea.[3] The rapidly diminishing reserves and the increasing demand for energy are expected to drive fossil fuel prices to an all time high. There will come the day when, regardless of the price consumers are prepared to pay, there will simply be no fossil fuels to be supplied.[4]

Besides, for the medium to longer-term future, there is an element of doubt over the trends in the supply and price of fuel energy as a consequence of increasing political controls over the production of fossil fuels. Examples can be seen in the limitations on the levels of oil production by member countries of OPEC and the decisions by Norway and Canada to limit the degree of exploration for oil and gas.

The Energy Crisis is imminent.

B. Search For Alternative Energy Sources

In the light of these worldwide energy difficulties, the need for new and different sources of energy has become glaringly obvious. Countries having the foresight to perceive the problem were jolted into action. Possibilities of utilizing nuclear energy have been vigorously explored and studies have proved it to be a feasible alternative. But despite its feasibility, nuclear energy is still considered by many too hazardous to be comfortably relied upon for more than a small fraction of the world's energy usage. The risk inherent in a nuclear system is tremendous and the consequences of a radiation leakage may even be catastrophic.

Primary among the remaining alternative energy sources being seriously developed is solar energy.[5] The combined factors of its universal accessibility, economic competitiveness in life-cycle costs, non-polluting nature and the fact that it is technologically feasible[6] make the use of solar energy singularly attractive. This is evidenced by the following recent developments in foreign countries. In the United States, Congress has declared the development of solar energy for heating and cooling buildings a

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1 United States Bureau of mines. Quoted in HW Lee, "Solar Efficient House" (1980) (a thesis prepared by a final year architectural student, University of Hong Kong) para 3.0 (i).

2 Ibid, para 4.1.2.

3 Ibid, para 4.1.2.

4 Petroleum rationing in some foreign countries eg USA some years ago is perhaps some indication of the coming of this day.

5 While all the earth's energy resources except nuclear energy are indirect forms of solar energy, for the purpose of this dissertation "solar energy" is limited to that energy radiated through the electromagnetic spectrum from the sun.
In addition, this dissertation focuses on the legal problems likely to be encountered by solar energy systems installed for personal use.

6 See post, 7-8.

national policy.[7] In 1976, Japan empanelled a Commission to draft a white paper on the validity of solar energy utilizations.[8] In the Federal Republic of Germany, the Institut fur Systemtechnik und Innovationforshung sent a representative to the United States to explore and evaluate alternative energy sources, including solar energy.[9]

C. Advantages of the Use of Solar Energy

1. Technologically Feasible

The fact that utilization of solar energy is feasible in such technologically pioneering countries as the United States, West Germany is well-known. The issue that remains is whether it is practicable in Hong Kong?

In 1977, the Urban Services Department requested the Public Works Department to investigate the feasibility of installing solar energy systems at public bathhouses and swimming pools. The study was carried out on a consultancy basis by Professor E A Bruges, then Head of Department of Mechanical Engineering, University of Hong Kong. Following the proposals by Professor Bruges, a solar energy system was installed at the Stanley bathhouse in November last year.[10] The project proved to be a great success – at least as far as technology is concerned.[11] This opens the door for future wider use of solar energy.[12] In fact, over 100 households in Hong Kong already have solar water heaters.[13]

It can be seen that utilization of solar energy IS feasible in Hong Kong.

2. Universal Accessibility

Sunlight is the only source of energy that is an incoming flow rather than a static supply. "The stable, long term supply of energy from the sun is more abundant than all other sources of energy as well as longer lasting. For example, the solar energy striking the earth's outer atmosphere in one month is equivalent to that estimated to be stored in all fossil fuel resources."[14] The primary limitations on the use of solar energy are its intermittent and diffuse nature.[15] These limitations, however, only serve to highlight the necessity to protect a right to "direct"[16] solar insolation.

3. Non-polluting Nature

Pollution is an unavoidable concomitant of the use of all fossil and nuclear fuels. Potential pollution from solar energy, on the other hand, is limited primarily to contamination of water supplies through a leakage of the heat transfer medium, such as ethylene glycol (antifreeze), employed in the collector.[17] In addition, the pollution caused by the energy required to produce and fabricate solar energy systems is only four percent of that which would be produced by using the fossil fuels saved by the system.[18]

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7 Solar Heating and Cooling Demonstration Act of 1974 para 2, 42 USC para 5501 (Supp V, 1975); Solar Energy Research, Development and Demonstration Act of 1974 para 2, 42 USC para 5551 (Supp V, 1975)

8 Japan Rep, Sept, 1976 at 8. Referred to in note 1 "The Right to Light: A comparative approach to Solar Access" [1978] 2 Brooklyn Journal of International Law 22.

9 Ibid.

10 See Editorial, Wah Kiu Yat Po on July 8, 1981.

11 The system, which supplements the existing hot water supply to the 33 showers in the bathhouse provided by an oil-fired boiler, cost $210,000 to install: ibid. See also South China Morning Post (hereinafter referred to as SCMP), July 2, 1981.

12 In fact, the Urban Council is seriously considering the possibility of installing solar energy systems in the bathhouses at Aberdeen and Lyemum. See SCMP, July 2, 1981.

13 See Hong Kong Standard, Sept 7, 1980.

14 (1973) 9 Stanford Research Institute, Energy Supply and Demand Situation in North America to 1900: Energy Technology 213 [hereinafter referred to as Energy Technology].

15 It does not necessarily mean that because of these limitations a solar energy system will be devoid of any utility at night or on a cloudy day, as the equipment invariably includes a storage system to store up the heat energy collected on a sunny day. See B Anderson, *Solar Energy : Fundamentals in Building Design* (1977), 215-234.

16 See post, 16-17.

17 See generally 1 Environmental & Resources Assessments Branch, Division of Solar Energy, Energy Research & Development Administration, Solar Program Assessment: Environmental factors – Solar Heating and Cooling of Buildings (1977).

18 Division of Solar Energy, Energy Research & Development Administration, Solar Energy in America's Future: A Preliminary Assessment, (1977) [hereinafter cited as Stanford Study] at 52-53.

4. Economic Competitiveness in Life-cycle Costs

While its competitiveness with traditional fuels is affected by a number of variables, two are of primary importance: capital cost and fossil fuel costs.

Although the sun provides an essentially free source of fuel, solar energy systems require a substantial capital investment for collectors and storage facilities.[19] Owing to its capital intensive nature, all comparisons of solar energy and traditional costs must be made in terms of the lifecycle costs of both systems. The cost of the initial investment and the projected cost of supplemental fuels must be averaged over the expected life of the solar energy system and be compared with the projected cost of traditional fuels over the same period. At the present stage of solar technology, a user of a solar energy system for ordinary household purposes is able to recover his initial outlay in 3 to 4 years' time.[20] Given the prospect of further reduction in the cost of solar energy systems made possible by a combination of technical innovations and mass production of the system components,[21] the "recovery period" is very likely to be shortened in the near future, and a solar energy user will thus begin to save on his electricity bill earlier.

Fossil fuel prices have been skyrocketing since early 1970s. Oil price increases are no longer news – in the true sense of the word – to most people over the world. Judged from the trend over the past 2 decades, fuel price increase is likely to trace a steep path[22] in the years to come. This has the consequence of rendering solar energy an increasingly economically competitive energy alternative.[23]

Economic factors may not, however, be the most important incentives inducing people to shift to solar energy. Among other factors that may play an important role are the decentralized, democratic nature of sunlight which fulfils the general desire to personally control technology[24] as well as ethical considerations.[25]

D. Solar Utilization in Hong Kong

Apart from the sun, wind, hydraulic power and geothermal[26] sources – to name but a few – are also free and inexhaustible power supplies. Some may therefore wonder if solar energy is the only possible alternative in Hong Kong. Studies,[27] however, have concluded that hydraulic power cannot be developed as there are no major river systems in Hong Kong. Wind power is not feasible as observations by the Royal Observatory indicate that the figures, direction and speed of the prevailing wind are not up to the required level. Nor is geothermal energy possible as there are no geothermal resources in the Colony. The only one left is solar energy, the feasibility of which in Hong Kong has been confirmed.[28]

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19 According to the President of a company distributing solar energy devices, the initial outlay of the installation of a flat-plate type solar energy system for ordinary household use in Hong Kong is about $15,000, which can be lowered if a house is pre-designed to accommodate a solar heater. See Hong Kong Standard, Sept 7, 1980.

20 Ibid.

21 A famous manufacturing company will establish a factory in Tai Po for the mass production of solar energy panels and associated components : HW Lee, op cit, para 6.0. See also SCMP Sept 9, 1980.

22 HW Lee, op cit, para 4.1.1 and the graph attached.

23 The degree of competitiveness, however, varies with the use to which solar energy is put; whereas solar wastes heating is approaching cost competitiveness, photovoltaic generation of electricity with silicons cells is far from being economically competitive. But with the increase in the total volume of production of silicon cells, their price is likely to drop significantly within the coming decade: See Division of Solar Energy, Energy Research & Development Administration, Photovoltaic Conversion Program: Summary Report 1, (1976). See also SCMP, Sept 9, 1980 (a company anticipated that eventually solar photovoltaic cells will be produced in Hong Kong).

24 "It is a pleasant sensation" is a remark by a solar system user. See Hong Kong Standard, Sept 7, 1980.

25 "Many persons perceive solar energy as ethically preferred to other energy sources. For this reason, they are willing to pay more and/or tolerate lower performance ..... Although this choice is difficult to quantify into system cost, it is nonetheless real.": Stanford Study, at 32.

26 Having something to do with the earth's interior.

27 The President of the Engineering Society of Hong Kong, Mr David Allingham has examined a host of free, inexhaustible power supplies, their possible applications and limitations: reported in HW Lee, op cit, para 5.5

28 See ante, 8.

The notion of utilization of solar energy as an alternative energy source in Hong Kong is made even more appealing by the fact that the geographical location of Hong Kong and local climatic conditions greatly favour solar energy use. Hong Kong lies roughly along the latitude of 22°N and is well included in the belt highly suitable for solar applications.[29] Meteorological statistics from the Royal Observatory provide a good support for the possibility of solar energy utilization in Hong Kong.[30]

E. Government's Policy on Solar Energy

The Government's policy on solar energy though far from being comprehensive, is highly encouraging.[31] Apart from the installations of solar energy systems at bathhouses,[32] swimming pools[33] and navigation beacons,[34] a solar energy exhibition was presented jointly by the Urban Council and the American Consulate General at the City Hall in March 1979 in order to publicise the use of solar energy. Public lectures were organised by the Urban Council libraries under the auspices of the Committee for Scientific Co-ordination.[35] Finally, an experimental solar water heating system developed in Hong Kong by a group of 15 university graduates, then undergoing a two-year engineering training programme in the Electrical & Mechanical Office of the Public Works Department, was exhibited in December, 1979.[36]

PART II: THE SOLAR RIGHT

A. No Right to Sunlight

Despite the social and economic advantages of solar energy, numerous impediments to its wider use remain.[37] Perhaps the fundamental legal impediment, however, is the lack of a guarantee of continuing access to incident solar radiation[38] in the absence of an easement or restrictive covenant.[39] Potential owners of solar energy systems are unlikely to make the substantial capital investment required to utilize solar energy unless they can prevent shadowing of the solar collectors by structures on the adjoining land. Therefore, if the increased use of solar energy is desired, a solar right[40] must be created.

B. Form and Content of a Solar Right

In order to determine the characteristics of a solar right, a short, technical digression is necessary. Without a basic knowledge of the nature of solar energy and the operation of solar energy systems, it is difficult to specify the essential nature of the light.

1. Characteristics of Solar Radiation

Legally, two aspects of solar radiation are of dominant importance: it is both variable[41] and diffuse.[42] The effect of the variable and diffuse

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29 HW Lee, op cit, para 4.3.1, Fig 8. Though Hong Kong is not within the best suited areas along the desert belt. For an expert's opinion on this point, see Hong Kong Standard Nov 26, 1979.

30 Ibid, Fig 9.

31 Some, however, still criticised the Government for not making more extensive use of solar energy: See Hong Kong Standard, April 1, 1979.

32 See note 11, supra.

33 The Morrison Hill Swimming Pool, for instance, is equipped with solar heating system to heat up the water in winter times: See Editorial, Wah Kiu Yat Po, July 8, 1981.

34 Ibid.

35 See Hong Kong Standard Nov 29, 1979.

36 HW Lee, op cit, para 2.3.

37 For example, present lending and security methods may be insufficient to finance solar installations. Lending problems may be particularly acute if there is no guarantee of solar access because lending institutions may refuse to lend funds for a potentially unusable solar energy system. See generally B Anderson, op cit, 19-27.

38 *Bury* v *Pope* 1 Cro Eliz 118, 78 Eng Rep 375. This problem is beginning to attract comment. See eg F Gevurtz, "Obstruction of Sunlight as a Private Nuisance" (1977) 65 California Law Review, 94; RE Becker, "Common Law Sun Rights: An Obstacle to Solar Heating and Cooling?" (1977) 3 Journal of Contemporary Law 19; Moskowitz, "Legal Access to Light: The Solar Energy Imperative", (1976) 9 Natural Resources Law 177; Eisenstadt & Utton, "Solar Rights and Their Effects on Solar Heating and Cooling", 16 Natural Resources Journal 363.

39 See post, 18-28.

40 "Solar right" is herein to mean right to "direct" solar insolation. See post, 14-17.

41 The energy content of solar radiation, while almost constant above the earth's atmosphere, varies greatly at the surface in both intensity and availability. These variations are dependent primarily upon 5 factors: the hour of the day, the day of the year, the atmospheric conditions, the latitude and the altitude of the collector. See A Meinel & M Meinel, *Applied Solar Energy: An Introduction*, (1976).

42 Even under optimum Conditions, solar energy is extremely diffuse. The intensity of direct sunlight is less than 1% of that obtained in fossil-fuel-fired boilers: Energy Technology, supra, at 214.

nature of solar radiation that in order to collect enough energy to be practical, the collecting surface must be exposed to maximum amount of available sunlight.[43] Thus, access to solar energy throughout the major part of the winter days is required if this energy resource is to contribute significantly to the energy requirements of the structure which it is to serve.

2. *Requirements of Solar Energy Systems*

Solar energy systems are designed to capture the energy in solar radiation and transform it into heat or electricity. This requires four components: access to direct insolation, a mechanism to capture and convert the energy into the desired form,[44] a medium for transporting the product[45] and a method of storing the energy.[46]

From a legal perspective, the most important requirement of a solar energy system is the necessity of access to direct insolation. Thus to be effective, the collector must be ensured of a continuing supply of "direct" solar radiation.

3. *The Analytical Basis of a Solar Right*

There is no natural right to light,[47] either in respect of land in its natural state or in respect of buildings,[48] a landowner may so build on his land as to prevent any light from reaching his neighbour's windows,[49] unless his neighbour has an easement of light[50] or some other right such as a restrictive covenant against building.[51] However, a landowner has a right to receive light that reaches the surface vertically,[52] which is protected by the law of trespass,[53] and often also by the law of nuisance.[54] But the insolation that falls vertically is, in most instances, diffuse rather than direct insolation because direct insolation reaches the surface at an oblique angle. A landowner thus has a right to only a limited amount of illumination.

Light as illumination, however, must be distinguished from light as an energy source. While diffuse light is acceptable as illumination, for example, it is unacceptable as a source of energy. It is this requirement of direct insolation that differentiates a solar right from other property interests in light. This distinction is also of primary limitation on the utility of current legal theories which guarantee rights to light. Doctrines applicable to light as illumination are often inapplicable to light as an energy resource. But the amount of direct insolation at any location and time is limited. Scarcity thus imposes upon society the necessity of a choice, one primarily based on policy consideration. If solar energy is to be encouraged rather than retarded by the property rights structure, a right to receive direct insolation should be created.

PART III: EXISTING MEANS OF SECURING A RIGHT TO LIGHT

As stated above,[55] a landowner has no right to light in the absence of easements or some other rights such as a restrictive covenant. Numerous problems, however, are adhered to the use of these instruments as an effective means of guaranteeing a solar right.

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43 This accounts for the substantial collector surface area and hence the substantial space occupied by a solar energy system.

44 B Anderson, op cit, 91-97.

45 Ibid, 142-145.

46 Ibid, 98-109.

47 Gale, *Law of Easements,* (14th ed, 1972), p 6.

48 Megarry & Wade, *The Law of Real Property,* (4th ed, 1975), p 815. An easement of light can be acquired for a building however: ibid, 875.

49 *Tapling* v *Jones* (1865) 11 HLC 290.

50 See generally, Megarry & Wade, op cit, 805-822, 827-872, 875-878.

51 See generally, ibid, 742-775.

52 Ibid, 815. This conception is embodied in the common law maxim: *Cujus est solum, ejus est usque ad collum et ad infernos* (he who owns the soil also owns to the heavens and to the depths): W Blackstone, *2 Commentaries,* (Lewis ed, 1902) 18.

53 eg *Kelsen* v *Imperial Tobacco Co (of Great Britain and Ireland), Ltd* [1957] 2 QB 334.

54 eg *Lemmon* v *Webb* [1895] AC 1.
The distinction between trespass and nuisance may be on certain facts an exceedingly fine one, as was apparent is the case *Southport Corp* v *Esso Petroleum Co, Ltd* [1954] 2 QB 182, [1956] AC 218. For difference between trespass and nuisance generally, see *Clerk & Lindsell on Torts,* (14th ed, 1975), para 1316 and 1412. 1412.

55 Ante, 14.

A. Easements[56]

An easement of light can exist only in respect of a building,[57] and defined windows or other apertures in the nature of windows in that building,[58] and not of openings not primarily intended to admit light, such as a doorway[59] or a piece of open ground.[60] This immediately poses the question: Can an easement of light be acquired in respect of a solar energy system? There is no direct authority on this issue.[61] Arguably, a solar energy system is so substantially attached to the building which it is to serve that it can be regarded as part of the building; and since a solar collector is primarily intended to admit light, there is a strong case for the proposition that an easement in respect of a solar energy system can exist. For the purpose of the analysis that follows, an affirmative answer to the issue is assumed.

Even if there exists an easement of light, not all obstructions are actionable. The amount of light to which the dominant owner is entitled is such amount of light as is sufficient, according to the ordinary notions of mankind, for the comfortable use of the premises as a dwelling, or, in the case of business premises, for the beneficial use of the premises as a warehouse, shop or other place of business.[62] An easement for a greater amount of light than that required for ordinary purposes[63] cannot be acquired even if for twenty years the dominant owner has enjoyed that quantity of light and has used the premises for purposes requiring an extraordinary amount of light.[64]

As the courts have all along been concerned with the amount of light for illumination purpose, it is highly unlikely that the use of solar energy would be regarded as an "ordinary purpose". The amount of light allowed under this "ordinary user" test is inadequate to allow a solar energy system to operate efficiently. Thus if the Court is to recognise an easement in respect of a solar energy system, they would have to modify the traditional test regarding quantity of light to which a dominant owner is entitled. One way to achieve this is to treat houses equipped with solar energy systems as a separate and distinct category of premises (not merely dwelling houses) and thus an extra amount of sunlight can be accorded to the systems under the easement.

Easements of light are acquired in respect of a light beam coming through a certain defined aperture at a certain angle. Hence if a solar energy user desires to expand substantially the size of the solar collector (for more sophisticated uses), the easement would not extend to that addition. For the same reason, a change in the collector's location would necessitate the re-acquisition of the easement.

By its very nature, an easement is a relationship between two parcels of land, typically adjacent.[65] It does not bind other owners of neighbouring parcels of land. Assume that property owner A installs a solar collector on his house and acquires an easement over the land of his adjacent neighbour B. The erection of a much taller building blocking the sunlight incident onto A's land on the other side of B's property by C will completely destroy the value of the easement acquired. This situation is likely to occur in all but the most rural areas. Acquisition of easements over more distant neighbourhood, on the one hand, may prove costly and cumbersome, while, on the other hand, may even offend the rule requiring that the servient tenement must be close enough to the dominant tenement to confer a practical benefit on it.[66]

Apart from the above problems that are common to all kinds of easements, each particular category of easements has its own shortcomings as a safe guarantee of solar right.

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56 Note 50, supra.

57 *Colls* v *Home and Colonial Stores* [1904] AC 179, per Lord Lindley at 205; *Harris* v *de Pinna* (1886) 33 Ch D 238.

58 *Tapling* v *Jones*, supra, 305, 306.

59 *Levet* v *Gas Light and Coke Co* [1919] 1 Ch 24.

60 *Potts* v *Smith* (1868) LR 6 Eq 311, 318.
Roberts v *Macord* (1832) 1 Mood & R 230.

61 Learned writers of articles on solar right usually do not face the issue. They simply assume that such an easement can be acquired.

62 *Colls* v *Home and Colonial Stores*, supra, 208, per Lord Lindley.

63 It will be noticed that what are "ordinary purposes" within the meaning of the test propounded in Coll's case depends on the type of premises in question.

64 *Ambler* v *Gordon* [1905] 1 KB 417 (architect's office).

65 This does not mean that a right cannot exist as an easement unless the dominant and servient tenements are contiguous; provided they are near enough for the dominant tenement to receive some benefit as such: *Pugh* v *Savage* [1970] 2 QB 373.

66 *Bailey* v *Stephens* (1862) 12 CB (NS) 91.

1. Easements by Prescription[67]

The basis of prescription is that if long enjoyment of a right is shown, the Court will strive to uphold the right by presuming that it had a lawful origin[68] eg by presuming that there was once an actual grant of the right.[69] However, for a claim by prescription it is not enough to show long user by itself; there must have been continuous user[70] "as of right"[71] before the Court will go so far as to presume a grant, and even then the Court will not presume a grant except in fee simple.[72]

There are 3 methods of prescription, namely, i) prescription at common law,[73] ii) under the "Doctrine of Lost Modern Grant"[74] and iii) under the Prescription Act 1832.[75] It is not the purpose of this dissertation to go into a deep analysis of each of these 3 methods. Suffice it to say that "the law of prescription is unsatisfactory, uncertain and out of date, and that it needs extensive reform".[76] In Hong Kong, where a leasehold system of tenure is adopted, it is still doubtful whether an easement of light can ever be prescribed against a Crown lessee,[77] due mainly to the controversy over whether the "fee simple requirement" is necessary under the "Doctrine of Lost Modern Grant" and the 1832 Act.[78]

Even assuming that an easement of light can be prescribed against a Crown lessee, easements by prescription, when used as a solar access control, suffers from the following drawbacks.

At any point during the running of the time necessary to fulfil the prescriptive period, the owner of the servient tenement would be completely free to obstruct the dominant owner's solar access purely for the purposes of interrupting the flow of years necessary to acquire the prescription.[79] In heavily urbanized areas, where air rights are valuable, landowners could be expected to do everything in their power to prevent prescriptive easements from encumbering the property. This leaves the solar energy user without a remedy for blocked access that occurs during the prescriptive period.[80] In view of the substantial investment required to install a solar energy system, the lack of security would work to discourage any wholesale reliance on solar energy.

Even though the dominant landowner may acquire the easement after the prescriptive period has run, his actual right has yet to be proven. To have his right declared, the landowner will have to turn to the Court. Without some indication of the existence of the easement in the Land

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67 See Megarry & Wade, op cit, 841 et seq.

68 *Clippens Gil Co, Ltd* v *Edinburgh and District Nates Trustees* [1904] AC 64, at 69 and 70.

69 *Gardner* v *Hodgson's Kingston Brewery Co, Ltd* [1903] AC 238, at 239.

70 Megarry & Wade, op cit, 846.

71 User as of right means user *nec vi, nec clam, nec precario* (without force, without secrecy, without permission) See ibid, 842-844.

72 See ibid, 844-846.

73 See ibid, 846-848.

74 See ibid, 848-850.

75 2 & 3 Will 4 C 71. See ibid, 850-865.
The Prescription Act 1832 as amended by Statute Law Revision (No 2) Act 1888 51 & 52 2 Vict C 59 applies to Hong Kong by virtue of s 4(1)(a) of the Application of English Law Ordinance (Cap 88 LHK 1971 ed). The Rights of Light Act 1959 7 & 8 Eliz 2 C 56, which supplemented the 1832 Act, does not apply to Hong Kong.

76 14th Report. The Law Reform Committee, Commd 3100 (1966). See also Megarry & Wade, op cit, 841.

77 The leading case of *Foo Kam-shing* v *Local Printing Press* (1953) 37 HKLR 208 held that one Crown lessee could not prescribe against another but could only prescribe for the Crown. But see Susan Kneebone, "Aquisition of Easements By Prescription: The Anomaly of the Leasehold System of Tenure", (1977) 7 HKLJ 373.
See also Delaney, "Lessees and the Doctrine of Lost Grant" (1958) 74 LQR 82.

78 As far as the 1832 Act is concerned, it is submitted that the "fee simple" requirement is not necessary. This must have been the intention of the legislature, for when it is expressly provided that the 1832 Act is to apply to Hong Kong, it, presumably, well knew that a leasehold system of tenure had been adopted in the Colony. The court, moreover, is at liberty to so decide by virtue of s4 of the Application of English Law Ordinance, supra, where it is provided that English Acts shall apply to Hong Kong subject to such modifications as the circumstances of Hong Kong or its inhabitants may require.

79 See eg *Mayor, etc, of Paddington* v *Att Gen* [1906] AC 1.

80 See Becker, note 38, supra, 25.

Registry, a prospective purchaser of a solar equipped building would be required to gamble on whether he would later have to bring a suit to prove the easement.

2. Express Easements

An easement of light can be created by express grant or reservation.[81] Creators of express easement may stipulate height limitations not to be exceeded or angles of sunlight exposure not to be blocked by structures. Unfortunately, in Hong Kong where airspace is valuable for construction purposes, the expense of acquiring an easement (by grant) may be prohibitive and thus impairs the competitiveness of solar energy with other energy sources. Therefore this means is not likely to be capable of safely guaranteeing a solar right.

3. Implied Easements[82]

a) Intended easements

Easements required to carry out the common intention of the parties will be implied in favour of either party.[83] It is , however, essential that the parties should intend that the servient tenement should be used in the particular way claimed as an easement: an intent that there should be user which might or might not involve the user claimed as an easement is not enough.[84] In the present context, therefore, the parties must have intended that the dominant owner shall have a right to direct insolation for the purpose of solar energy use. This intention, presumably, is to judge objectively. Yet since the use of solar energy is at present still not prevalent, it is doubtful whether the parties, viewed objectively, would have so intended. Moreover, if the "dominant owner" only switches to solar energy use after the conveyance of the property – which is the ordinary case – such an intention can hardly be implied.

b) Easements of necessity

Easements may be implied in some cases of necessity. For such an easement to be implied, it is essential that the necessity should exist at the time of the conveyance of the land and not merely arise subsequently.[85] Thus a subsequent shift to solar energy would be fatal. Also, an easement of necessity is one "without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property".[86] As long as fossil fuels remain a viable source of energy, solar energy is not likely to be considered a necessity.

Thus the utility of implied easements in its application to protect damaged solar energy user is extremely limited.

B. Restrictive Covenants[87]

Restrictive covenants against building have long been recognised by the Courts.[88] Creating restrictive covenants specifically for solar energy use therefore should not present any difficulties.[89] The covenant could describe the restriction by limiting the height of a structure in the servient tenement or by marking out light angles which could not be obstructed by adjoining landowners.

Large-scale development schemes represent the best opportunity of utilizing restrictive covenants for the protection of solar rights. Where land is to be sold or let in lots according to a plan, restriction could be imposed on the purchasers of each lot for the benefit of the estate generally. This could be achieved by making use of the special characters of schemes of

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81 See generally Megarry & Wade, op cit, 828-830.

82 See generally ibid, 830-835.

83 Although the court is readier to imply easements in favour of the grantee than in favour of the grantor: *Richards* v *Rose* (1853) 9 Exch 218.

84 *Pwllbach Colliery Co, Ltd* v *Woodman* [1915] AC 634, 647.

85 *Midland Ry* v *Miles* (1886) 33 Ch D 632.

86 *Union Lighterage Co* v *London Graving Dock Co* [1902] 2 Ch 557, per Stirling LJ.

87 See generally Megarry & Wade, op cit, 720-775.

88 The classical case is the well-known case of *Tulk* v *Moxhay* (1848) 2 Ph 774.

89 Such covenants are bound to be negative in nature and are invariably made for the protection of the dominant tenement. See Megarry & Wade, op cit, 753-757.

development.[90] If such a scheme exists, the covenants given on the sale of each flat are enforceable by the owner for the time being of any flat on the estate. As soon as the first disposition under the scheme has been made, the scheme crystallizes and all the land within the scheme is bound.[91]

However two principal consequences of the rule that the burden of the covenant runs only in equity[92] restrict the utility of this instrument for the purpose of guaranteeing solar access. First, only equitable remedies are available. This means in practice that the case must be remediable by injunction, which is the only equitable remedy appropriate to a negative covenant. Like other equitable remedies, an injunction lies in the discretion of the Court. This gives rise to uncertainty. If a plaintiff is refused an injunction, he cannot be awarded damages instead.[93] Thus a solar energy system user is given only an all-or-nothing remedy. Second, a restrictive covenant, as are all equitable interests, is not enforceable against a bona fide purchaser of a legal estate[94] for value without notice of the covenant[95] or someone claiming through such a person.[96]

Moreover, schemes of development are inapplicable to developed neighbourhoods. An individual landowner may find it excessively cumbersome, if not totally impossible, to secure restrictive covenants over parcels of neighbouring land, which is essential for an unobstructed access to direct sunlight.[97]

C. Statutes

There are no comprehensive zoning regulations in Hong Kong. A number of statutory provisions, however, operate, directly or indirectly, to impose height limits on different types of building, and hence indirectly provide for a certain degree of protection of access to sunlight.

Under s 3 of the Town Planning Ordinance,[98] the Town Planning Board undertakes the "systematic preparation to draft plans for future lay-out of such existing and potential urban areas as the Governor may direct as well as for the types of building suitable for erection therein". By providing that a certain zone is to be used for, say, residential purposes,[99] the Board is indirectly limiting the height of the buildings that can be built in that zone.

The Building (Planning) Regulations[1] restrict the height of a building through the instruments of street shadow areas,[2] site coverage[3] and plot ratio.[4] Access to light is also facilitated by the requirement that there is to be some open space about domestic buildings.[5] Another instance of height restriction can be seen in the Hong Kong Airport (Control of Obstruction) Ordinance.[6]

As these statutory provisions are enacted mainly for the purpose of setting height limits on buildings, with no regard to providing an access to sunlight, they are often ineffective as a measure of securing a right to light for solar energy use. They do not give a landowner a property interest in sunlight. Those contravening the statutory provisions would only incur criminal liability,[7] and would not be subject to a suit by the obstructed solar energy user who is then left without any compensation for the damage done.

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90 See ibid, 768-772.
91 *Brunner* v *Greenslade* [1971] Ch 993, 1003.
92 Megarry & Wade, op cit, 758-760.
93 Ibid, 126.
94 *London & South Western Ry* v *Gomm* (1882) 20 Ch D 562, 583; *Osborne* v *Bradley* [1903] 2 Ch 446, 451.
95 Ibid.
96 *Wilkes* v *Spooner* [1911] 2 KB 473. See Megarry & Wade, op cit, 125.
97 See ante, 20-21 for similar problem in the case of easements.
98 Cap 131 LHK (1974 ed).
99 See ibid, s 4(1)(b).
1 enacted under s 38 of the Buildings Ordinance (Cap 123 LHK, 1974 ed).
2 r 16.
3 r 20.
4 r 21.
5 r 25.
6 Cap 301 LHK (1978 ed) s 4.
7 eg Building plans have to be submitted to the Buildings Authority for approval: s 14(1) and (2) of the Buildings Ordinance, supra. These plans shall include a plan showing the height, plot ratio etc of the building: r 8(1)(h), Building (Administration) Regulations. Any deviation from the approved plan will constitute an offence under s 40(2A)(b) of the Buildings Ordinance, supra.

D. Conclusion

It can be seen from the above analysis that the present legal instruments, while perhaps sufficient for procuring light for illumination purpose, are far from being effective as a means of ensuring unobstructed access to sunlight for solar energy purpose. A more effective means is thus called for.

PART IV: THE ACTION OF NUISANCE[8]

A. No Nuisance for Obstruction of Light

A private nuisance is, basically, an interference with the beneficial use or enjoyment of another's land.[9] Whether the activity complained of constitutes a nuisance depends on the unreasonableness of the defendant's use of his property in relation to the rights of surrounding landowners. In deciding what is "unreasonable", the courts will have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the plaintiff to the undisturbed enjoyment of his property.[10]

These general principles can easily be applied to the obstruction of light, making an unreasonable interference with a landowner's ability to receive light the basis for a nuisance action. Yet in spite of the seeming applicability of nuisance principles to obstructions of light,[11] English Courts have long refused to recognise such a nuisance action, relying on the maxim *cujus est solum, ejus est usque ad coelum et ad infernos.*[12] The scope of this maxim, however, has been considerably restricted by modern statutes which limit the height of buildings[13] and therefore loses much of its force in modern times. It is thus submitted that the courts' persistent refusal to recognise a cause of action for obstruction of light is not dictated by the principles of nuisance law, but by the Courts' conclusion that full development of land is desirable. Thus before a case to create a solar right is put forward, it is necessary to examine whether such policy of favouring land development over access to light remains a sound one in the light of the modern circumstances of Hong Kong.

B. Policy Consideration

It cannot be denied that Hong Kong Government does favour a land development policy.[14] New areas are being explored and developed on a large scale basis.[15] Land sale proceeds constitute a significant portion of the public revenue. This policy is understandable. Considerable amount of space is needed to house the Colony's expanding population. This need has been intensified in recent years by the continual influx of illegal immigrants and refugees.

However, in 1980s, there is a competing policy – that of widespread utilization of solar energy. As is pointed out in preceding paragraphs,[16] the earth's known fuel resources are diminishing at a disquieting rate. Unless some immediate steps are taken, we might soon find ourselves caught up in the energy crisis. In Hong Kong, it seems that the most practical and viable solution is to switch to solar energy. The Courts, in deciding on a claim in nuisance for obstruction of sunlight, must not overlook this competing consideration. Energy shortage is no less a social issue than housing. There is no point trying to house a person, only to find that there is no electricity to light up his house! It is submitted, therefore, that the Courts should recognise a property interest in direct sunlight, and protect it by the law of nuisance.

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8 In this dissertation, the word is used to mean private nuisance.

9 An exact definition of an actionable nuisance is impossible: *Pwllbach Colliery Co, Ltd* v *Woodman* [1915] AC 634, 638-639. See also Clerk & Lindsell, op cit, para 1391.

10 *Sedleigh-Denfield* v *O'Callaghan* [1940] AC 880, per Lord Wright at 903.

11 This is apparent if a comparison is made with water rights. "Every riparian proprietor is entitled to the water of his stream, in his natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.": *Young* v *Bankier Distillery* [1893] AC 691, per Lord Macnaghten at 698. See generally Clerk & Lindsell, op cit, para 1437-1443.

12 Note 52, supra, *Bury* v *Pope* 1 Cro Eliz 118.

13 Ante, 28-29.

14 See generally the Report of the Special Committee on Land Production (March, 1981). One of the terms of reference of the Committee is to recommend targets for the production and for the sale of land: ibid, para 1.1.

15 eg Junk Bay and Ma On Shan are among the targets. See ibid, p 12, para 2.29.

16 Ante, 5.

While the creation of a property interest in sunlight will necessarily restrict some uses of superjacent space, the fear that the recognition of a right to light will substantially impede land development is perhaps not rigidly grounded. The Government is well endowed to embark on an even more vigorous land development programme to make up for the reduced production of space as a consequence of pursuing a solar energy policy. Population growth rate, on the other hand, can be more effectively controlled through an all-out campaign on family planning. With the likely advent of improved technology on solar energy, we would be able to install solar energy systems in high-buildings in the near future.[17] Most uses of land will then remain unaffected. In addition, in exchange for a slightly limited development potential, the landowner will receive a guaranteed source of energy. The policies of promoting the use of solar energy and of allowing land development are therefore not incompatible.

Moreover, that an obstruction can be found to constitute a nuisance does not mean that it must be, or that an injunction must be granted if it is. Only when the interference is unreasonable in all the circumstances of the case would a defendant contract liability.[18] And an injunction would not be granted if damages is considered the more appropriate remedy.[19]

Arguably, the "unreasonable interference" test may create uncertainty about the legality of a proposed construction that has the potential to block a neighbour's sunlight. Such uncertainty, however, exists and is accepted in the case of other recognised nuisances. For example, a developer of factory runs the risk that vapour from the factory may constitute a nuisance.[20] Moreover, this uncertainty may provide an incentive to avoid unreasonable and unnecessary obstruction of a neighbour's access to light.[21]

C. Basis of Liability

The central issue of the whole law of nuisance is the question of the unreasonableness of the defendant's conduct "according to the ordinary usages of mankind living in ..... a particular society".[22] Reference must be had to all the circumstances of the particular case?[23] Thus the character of the neighbourhood, inter alia, must be taken into account. "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsay."[24]

In the context of obstruction of sunlight, the Court should therefore consider the extent of development in the neighbourhood in question. Is it an undeveloped rural area? Or is it a built-up urban district? Obstruction of light in Stanley may be a nuisance but may not be so in the Central. Professor G Calabresi and A Douglas Melamed have developed a set of principles governing nuisance actions[25] that may be applicable in the solar energy context.

Under principle one,[26] if the social utility of solar use so far outweighs the conflicting use of the airspace, the Court would protect the solar user by enjoining the nuisance. Injunction would be granted under special circumstances where damages could not sufficiently compensate the solar user or further the public policy of promoting solar energy utilization.

Injunctive relief, however, would not be appropriate when the use complained of has beneficial aspects, as for example, where a prosperous party's

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17 In fact, Professor Bruges was of the view that installation of solar energy systems on some highrise hotels in Hong Kong is feasible. See Editorial, Wah Kiu Yat Po, July 8, 1981.

18 Ante, 31.

19 eg In the recent decision of *Miller* v *Jackson* [1977] QB 966 the Court of Appeal divided on the issue as to whether to grant an injunction or to award damages. In the outcome, the injunction granted by the trial judge was discharged. See post, note 30 and accompanying text.

20 eg *St Helen's Smelting Co* v *Tipping* (1865) 1 HLC 642.

21 F Gevurtz, "Obstruction of Sunlight as a Private Nuisance", note 38, supra. at 112.

22 *Sedleigh-Denfield* v *O'Callaghan*, supra, per Lord Wright, at 903.

23 *Stone* v *Bolton* [1949] 1 All ER 237, per Oliver J, at 238-239.

24 *Sturges* v *Bridgman* (1879) 11 Ch D 852, per Thesiges LJ, at 856.

25 See Calabresi & Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harvard Law Review 1089, at 1093-1102, 1106-13, 1115-23.

26 Ibid, 1118.

construction of a highrise luxury apartment building blocked light access to an extant collector of an adjacent tenement building. In such a case, under principle two,[27] construction of the apartment building would be allowed to proceed and compensatory damages would be assessed against the party impeding solar access. This principle, however, may be in conflict with English authorities. In UK, where the defendant's activity is up to a point when serious damage is being done to the plaintiff's property or livelihood, the Court will not accept the argument that the plaintiff should put up with the harm because it is beneficial to the community as a whole, for that would amount to requiring him to carry the burden alone of an activity from which many others benefit.[28] Nor have the Courts in such cases shown willingness to adopt the device of awarding damages in lieu of an injunction, for that would amount to expropriation without the sanction of Parliament.[29] However, in a recent decision of the English Court of Appeal, it is expressed that "as between ..... conflicting interests, ... the public interest should prevail over the private interest."[30] Therefore, it is submitted that the principle propounded by Professor Calabresi could be adopted by the Courts. The imposition of liability for damages, in contrast to injunctive relief, would not result in the forfeiture of a large investment in the apartment building or in decreased economic productivity and employment.

Principle three,[31] under which the interference with solar access continues with impunity, would apply where recognition of solar access would stifle private enterprise, land development and economic expectancies in the reasonable use of the property as a whole. No nuisance would be found, for instance, in a commercial district where owner of land in the zone constructed a fifty-two storey office building that obstructed the collector on the roof of a two-storey residence adjacent to the site.

Principle four[32] would apply in districts where airspace is not at a premium and the solar user is able to purchase a right to access from the owner of the airspace. The price would be set by reference to the value of the relative utility of the airspace to the two sites. This principle would control when a potential obstructor has fewer financial resources than the solar consumer, as for example, where a proposed low-income housing project would shadow the future collectors of prosperous neighbouring houseowners. The architect of the project would be compelled to modify the plans to avoid solar access occlusion, but the costs of modification would be charged to the more affluent solar consumers. This in actuality is a form of compensatory relief, in which the solar energy consumer would be required to, in effect, purchase the right to enjoin the interference.

Where the dispute is between two similarly situated property owners who have acted reasonably in the use of their land resources, costs should be shared, thus suggesting a fifth principle. Such a "concurrent conflict"[33] would arise if an owner of land adjacent to an undeveloped parcel placed the collector on a platform at the edge of his property, and the access to that collector became blocked when a house was built on an adjoining lot. It would be less costly in this instance for the solar user to relocate the collector than for the other party to remove the obstruction. The relocation costs of the solar user would be divided equally between the owner of the collector and the party who caused the interference.

By adopting these principles, the Court would be able to balance the competing rights of neighbours on a case-by-case basis, without seriously hampering land development.

D. Drawbacks of the Action

In considering what is reasonable, the law does not take account of abnormal sensitivity in either persons or property,[34] for a man cannot increase the

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27 Ibid, 1116.

28 See Bohlen, *Studies in the Law of Torts*, 429. But cf the dissenting judgment of Lord Denning MR in *Miller* v *Jackson*, supra.

29 *Shelfer* v *City of London Elęctric Co* [1895] 1 Ch 287; *Munro* v *Southern Dairies* [1955] VLR 332.

30 *Miller* v *Jackson*, supra, per Lord Denning MR at p 982. Similar view was shared by Cumming-Bruce LJ at 988. See Buckley, "Cricket and The Law of Nuisance", (1978) 41 Modern Law Review 334.

31 Calabresi & Melamed, supra, at 1116.

32 Ibid, at 1116-22.

33 See Note, "An Economic Analysis of Land Use Conflicts", (1969) 21 Stanford Law Review, 293, at 298-303, 308, 310-11.

34 *Robinson* v *Kilvert* (1889) 41 Ch D 88.

liabilities of his neighbour by applying his own property to special uses.[35] At the present stage of solar energy development, it may be argued that the use of a portion of one's property for solar collection purposes is a hypersensitive use. Yet if the policy of encouraging widespread use of solar energy is to be pursued, the Court, it is submitted, should regard the use of solar energy system as one of the "ordinary usages of mankind".

It may be contended that by the very nature of an action of nuisance, there would be no security for collector owners until they have actually installed a collector and have won a nuisance suit; if one tried to sue before going to the expense of installing a collector, the suit may be dismissed as not being ripe. Moreover, each individual solar utilizer in the community would be required to sue to secure the right, thus raising the costs of installing a solar energy system.[36] This would discourage the development and use of solar energy. However, these arguments apply with equal strength to any means of securing a solar right. Whenever a dispute arises between the parties, resort would be had to the Court. Until the Court gives a decision, which may still be subject to appeal, uncertainty as to the parties' respective rights would still exist.

PART V: CONCLUSION

The lack of a recognised property interest in the use of sunlight is an impediment to widespread conversion to solar energy. Current legal theories which treat sunlight as a source of illumination rather than as an energy resource are not capable of resolving the potential problems. Zoning laws, although essential to overall urban planning, are ineffective at resolving specific disputes between adjacent landowners over access to direct sunlight as they cannot possibly provide for all the possible contingencies.[37] Also, they are too rigid, and would hence unduly hamper land development which is so essential to the economic growth and progress of Hong Kong.

Nuisance law, with its inherent flexibility, is a valuable supplement to, if not a total substitute for, the existing means of protecting access to sunlight. Nuisance actions are well suited to adjust particular conflicts between private interests and can provide more flexible remedies according to the merits of each individual case. A Court considering a nuisance action can permit a use and at the same time require the user to compensate those injured by it. This remedy forces parties creating nuisances to internalize their costs. The free market can then determine if the benefits of the use outweigh its cost. It is therefore submitted that a cause of action for obstruction of sunlight should be recognised.

> One authority has commented:
> "There's going to be a tremendous need for reversion of the legal system soon. That is, if we are serious about the economy and the need to find new form of energy such as solar, the legal policies and institutions are going to have to be considerably reshaped and revamped ....."[38]

Now is the time to begin.

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35 *Eastern and SA Telegraph Co* v *Cape Town Tramways* [1902] AC 381, at 383.

36 See Marc Cohan, "The Right to Light: A Comparative Approach to Solar Access" [1978] 4 Brooklyn Journal of International Law 221, at 232.

37 See Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls", (1974) 40 University of Chicago Law Review, 681, at 695-96.

38 American Bar Foundation, Proceedings of the Workshop on Solar Energy and the law, (1975) 16, at 22.

R v *SANG* [1980] AC 402: A Commentary

by John Mang-yee Yan

INTRODUCTION

R v. *Sang*[1] is the latest House of Lords decision on two extremely controversial areas of the criminal law – the law relating to entrapment and the law relating to the judicial discretion to exclude relevant evidence in a criminal trial. It gives conclusive answers to the questions whether a defence of entrapment exists in English law and whether a judge has a discretion to exclude evidence on grounds that it was obtained through entrapment. The answer given to the question whether a judge possesses a general discretion to exclude relevant evidence in criminal trials and the scope of such a discretion is however answered much more vaguely and leaves much room for further judicial development. That these areas of the law are controversial there can be no doubt as the same questions would invoke different answers in different parts of the common law world.

It is the object of this paper to review and appraise the decision in the light of existing authority and principles. This will be done in two parts. The law relating to entrapment will first be looked at, followed by a discussion of the general discretion to exclude evidence. A few preliminary matters such as the true definition of entrapment will first be looked at. The development of the law in other jurisdictions will also be traced. Ultimately of course, it is the object of this paper to look at the law in the local context.

DEFINITION

In order to more fully appreciate the decision and the law involved, it is necessary to first attempt a definition of the term "entrapment" for otherwise, an attempt at a clear understanding of the law may be clouded by a misunderstanding of what the very basis of the problem is. Two definitions have been put forward. The first, and the narrower definition equates entrapment with the use of an agent

1 [1980] AC 402.

provocateur.[1A] An agent provocateur is in turn defined as "a person who entices another to commit an express breach of the law which he would not otherwise have committed, and then proceeds or informs against him in respect of such an offence".[2] This definition of agent provocateur was approved and accepted by the Courts-Martial Appeal Court of Northern Ireland in *R* v. *Murphy*[3] where it was further noted that the words "which he would not otherwise have committed" makes the definition wide enough to cover both those who are predisposed to commit the offence enticed and those who may have no such predisposition. The second, and wider definition, sees "entrapment" as including the use of an agent provocateur in the strict sense as well as other forms of police involvement in crime such as the use of informers and the actual commission of an offence by a policeman.[4] Proponents of this definition however recognise that not all cases of entrapment merit a court's intervention but merely instances of actual encouragement by an agent provocateur. This being so, it is submitted that we should restrict ourselves to the narrower definition.

This approach is indeed supported by the cases. Modern courts now generally treat the term as embracing illegal, improper or otherwise unfair acts of official solicitation only. In *Sneddon* v. *Stevenson*[5] and *R* v. *Birtles*,[6] the English Court of Appeal drew a distinction between merely providing the opportunity for the commission of an offence and actually encouraging the commission of an offence. Lord Parker stated[7]

> "It is vitally important to ensure so far as possible that the informer does not create an offence, that is to say, to incite others to commit an offence which those others would not otherwise have committed. It is one thing for the police to make use of information concerning an offence that is already laid on ..... but it is quite another thing, and something of which this court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character which he would not otherwise commit."

Cases decided subsequent to these decisions[8] have all accepted the distinction and applied the metaphor that the police must "tread the somewhat difficult line"[9] between the two and must not "trespass across the line".[10] Only where the police methods "fall on the wrong side of the line" would the court intervene.

Bearing this definition in mind then, we may look at the decision itself.

THE QUEEN V. SANG

THE FACTS

The appellant was charged with conspiring to utter forged U.S. banknotes and unlawful possession of the same. He pleaded not guilty to both charges but at the beginning of the trial, before the Crown opened its case, counsel for the appellant invited the trial judge to allow a trial within a trial. The purpose of this was to establish that the appellant had been incited into the commission of the offences by an agent provocateur.[11] Counsel argued that if this was established, the trial judge would be obliged to

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1A See for example NLA Barlow, Recent Developments in New Zealand in The Law Relating To Entrapment [1976] NZLJ 304 and KJM Smith, The Law Commission Working Paper No.55 on Codification of the Criminal Law, Defences of General Application: Official Instigation and Entrapment, [1975] Crim LR 12.

2 Report of the Royal Commission on Police Powers, Cmnd 3297/1928, 40.

3 [1963] NI 138,140. See also *R* v *Mealey & Sheridan* (1975) 60 Cr App R 59,61.

4 Proponents of this definition are: JD Heydon, The Problems Of Entrapment (1973) 32 CLJ 268 and The Law Commission in their Report No. 83. Defences of General Application, Para 5.1.

5 [1967] 1 WLR 1051.

6 [1969] 1 WLR 1047.

7 ibid at 1049.

8 *R* v *McCann* (1972) 56 Cr App R 359; *R* v *Foulder, Foulkes & Johns* [1973] Crim LR 45; *R* v *Burnett & Lee* [1973] Crim LR 748; *R* v *McEvilly* [1974] Crim LR 239; *R* v *Mealey & Sheridan* op cit; *R* v *Willis* [1976] Crim LR 127; *R* v *Ameer & Lucan* [1977] Crim LR104.

9 *R* v *Mealey & Sheridan* op cit at 62.

10 *R* v *McCann* op cit at 363.

11 The facts alleged were that whilst in prison, the appellant had been approached by a police informer and agent provocateur, Scippo, with a view to procuring that Sang, on his release, would become involved with members of the police force posing as ready and willing purchasers of Sang's forged banknotes, thus ensuring that he first committed and then be arrested for and ultimately convicted of the offences charged. Lords Salmon and Diplock rightly pointed out that it was only fair to note that the trial within a trial was not in fact held so that the facts alleged were not proved.

disallow any evidence of the accused's guilt to be called by the Crown or alternatively, that the trial judge had a discretion to reject evidence of the offence because it had been unfairly obtained and was bound to exercise that discretion in favour of the appellant by the authorities. The trial judge doubted these contentions and after hearing long argument, ruled that he did not possess such a discretion and rejected counsel's submissions.[12] The appellant then pleaded guilty to the first charge and was sentenced to 18 months imprisonment. He appealed to the Court of Appeal where his appeal was dismissed. Leave to appeal was granted and the Court of Appeal certified that the following point of law of public importance was involved:

> "Does a trial judge have a discretion to refuse to allow evidence – being evidence other than evidence of admission – to be given in any circumstances in which such evidence is relevant and of more than minimal probative value."[13]

The appellant further appealed to the House of Lords.[14]

THE DECISION OF THE HOUSE : A BRIEF PREVIEW

The House unanimously dismissed the appeal. Their Lordships held that there was no defence of entrapment in English Law and that a trial judge had no discretion to exclude admissible evidence on grounds that the crime had been instigated by an agent provocateur. The answer given to the certified question was in the following terms:

> "(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
>
> "(2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means."[15]

This was the answer suggested by Viscount Dilhorne which was incorporated in Lord Diplock's speech. The other Lords all purported to agree with it but as will be seen below, there was no real agreement.

ENTRAPMENT

THE POSITION IN ENGLAND AFTER R V SANG

Entrapment Is Not A Defence

Although the point was not argued, all five of their Lordships went out of their way to approve the Court of Appeal decisions in *R* v *McEvilly*[16] and *R* v *Mealey & Sheridan*[17] that there is no defence of entrapment under English law. The basis given for this was two-fold. First, as Lord Fraser pointed out,[18]

> "An assertion by an accused person that he has been induced by some other person to commit a crime necessarily involves admitting that he has in fact committed the crime. Ex hypothesi he must have done the necessary act and have done it intentionally in response to the inducement. All the elements, factual and mental, of guilt are thus present and no finding other that guilty would logically be possible."

The second argument again is well expressed by Lord Scarman as follows,[19]

> "Incitement is no defence in law for the person incited to crime ..... It would confuse the law and create unjust distinctions if incitement by a policeman or an official

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12 In the Court of Appeal, Roskill LJ (at 407), delivering the judgment of the court said that whilst approving of what the trial judge did, the basic principle that trial judges should not rule on admissibility of evidence without first hearing the evidence to which exception is sought to be taken must be re-emphasized. In the House of Lords, only Lord Scarman mentioned the point (at 456).

13 This same question was certified by the Court of Appeal in *R* v *Willis* op cit but in that case, leave to appeal was refused.

14 By the time the judgment of the House was delivered, the appellant had already finished serving his sentence – see per Viscount Dilhorne at 438.

15 op cit at 437.

16 op cit.

17 op cit.

18 op cit at 451.

19 op cit at 451.

> exculpated him whom they incited to crime whereas incitement by others – perhaps exercising much greater influence – did not."

These same two reasons were put forward by the Law Commission in their Report No. 83 on Defences of General Application[20] in which they concluded that a defence of entrapment ought not to be introduced in England.

The first reason has been attacked.[21] Critics say that in duress situations, the actus reus and mens rea are also present so there is no reason why the presence of these two elements should preclude a defence of entrapment. The Law Commission answers this criticism by distinguishing duress and entrapment. In duress, it is pointed out, there is an element of "overwhelming pressure" directed against the accused, which is absent in entrapment. Lord Salmon in his judgment[22] takes a different approach. Instead of seeking to distinguish duress and entrapment, he opined that the law relating to duress was unsatisfactory and ought to be reformed by statute. He agreed with Sir James Fitzjames Stephen that "compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most though not all cases".[23] The law then ought to be reformed to bring it more in line with the law relating to entrapment and not vice-versa.

Of the second reason, the Law Commission stated that whether the accused was incited by a policeman or by someone else created "no moral distinction in his behaviour".[24] Supporting Lord Scarman's view cited above,[25] a learned writer,[26] said that had Lord Scarman's view not prevailed,

> "there would be a temptation for police officers to use lay entrappers rather than entrap the accused themselves; to the extent that the practice is ever proper, lay persons are more likely to exceed the bounds of propriety than police officers – more likely to cease observation of a potential criminal and hold out positive encouragement to him."

It is submitted that this comment is based on a misunderstanding of the argument in the passage cited from Lord Scarman. The distinction drawn is between the source of the inducement and not the actual person who induces. Hence, even when a lay entrapper is used, the source is official.

The Discretion To Exclude Admissible Evidence On Grounds That It Was Obtained Through Entrapment

Having affirmed that there was no defence of entrapment, their Lordships went on to deal with counsel's submissions that a trial judge has a discretion to exclude evidence on grounds that the accused was entrapped. The authorities facing their Lordships were conflicting. Of the thirteen cases dealing with entrapment cited in argument, six[27] made no mention of the discretion at all. The other seven merit comment. In *R* v *Murphy,*[28] Lord MacDermott L C J intimated that a trial judge had such a discretion. In *Foulder, Foulkes and Johns*[29] and *R* v *Ameer and Lucas*[30] decisions at first instance, evidence was actually excluded in exercise of the discretion. In *R* v *Burnett and Lee,*[31] evidence was excluded and the case withdrawn from the jury on the "general ground of unfairness". It is not clear if this was done in exercise of the discretion. The three remaining cases were all decisions of the Court of Appeal. In the first,[32] it was held that "in the view

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20 Cmnd 556 at para 5.37.
21 AJ Ashworth, Law Commission Report No 83, Entrapment, [1978] Crim LR 137, 138; GF Orchard, Unfairly Obtained Evidence and Entrapment, [1980] NZLJ 203, 204.
22 op cit at 444.
23 Stephen, History of The Criminal Law of England (1883), Vol 2 108.
24 See also GF Orchard, Unfairly Obtained Evidence & Entrapment, op cit at 207. "The moral guilt of one who succumbs to temptation is not affected by the unknown identity of the procurer."
25 at 12 above.
26 JD Heydon, Entrapment and Unfairly Obtained Evidence in The House of Lords, [1980] Crim LR 129, 130.
27 *Brannan* v *Peek* [1948] 1 KB 68; *Browning* v *JWH Watson (Rochester) Ltd.* [1953] 1 WLR 1172; *Sneddon* v *Stevenson* op cit; *R* v *Macro & Ors.* [1969] Crim LR 205; *R* v *Birtles* [1969] 1 WLR 1047; *R* v *McCann* op cit.
28 op cit.
29 op cit.
30 op cit.
31 op cit.
32 *R* v *McEvilly* op cit.

of the court, the evidence objected to in *Foulder* and *Burnett* were admissible and should have been admitted". It was far from clear whether the Court of Appeal was denying the existence of the discretion or merely saying that on the facts of the two cases, the discretion ought not to have been exercised in favour of the accused. In *R* v *Mealey and Sheridan,*[33] however, it was quite conclusively held that there was no discretion in cases of entrapment as these have "nothing to do with evidence unfairly obtained". Finally, in *R* v *Willis,*[34] the Court doubted the existence of the discretion but assumed its existence. Faced with these conflicting decisions, the Law Commission, writing in 1978, admitted that the position was unclear.[35]

All doubts were swept away by their Lordships who held unanimously that there was no such discretion. Lord Diplock spoke for all their Lordships when he said,[36]

> "I understand your Lordships to be agreed that whatever be the ambit of the judicial discretion to exclude admissible evidence, it does not extend to excluding evidence of crime because the crime was instigated by an agent provocateur."

There were several grounds on which this conclusion was based.

The one agreed to by all their Lordships was that to recognize the discretion would be to allow the substantive law that there was no defence of entrapment to "be evaded by the procedural device of preventing the prosecution from adducing evidence of the ..... offence."[37] Lord Diplock said,[38]

> "this submission goes far beyond a claim to a judicial discretion to exclude evidence that has been obtained unfairly ..... What it really involves is a claim to a judicial discretion to acquit an accused of any offences in connection with which the conduct of the police incurs the disapproval of the judge."

and Lord Scarman,[39]

> "this would amount to giving the judge the power of changing or disregarding the law."

This can be criticised because their Lordships assumed that in exercise of the discretion, all evidence of the offence would have to be excluded and not merely evidence unfairly obtained through entrapment. If their Lordships' assumption were wrong, then independent evidence such as that of an observer who has nothing to do with the police entrappers or a voluntary confession made by the accused may still be adduced towards proving the offence. Exclusion of entrapment evidence would hence not be equal to a defence of entrapment. The point is however now academic.

A second ground for refusing to recognize the discretion in this context was accepted only by Lords Fraser and Scarman. This was that a distinction must be drawn "between evidence being unfairly obtained and activity being unfairly induced."[40] The latter case "does not truly raise a question of evidence at all" because "the evidence against the accused would not have been obtained improperly and would not be open to any objection as evidence."[41] To further elaborate: as will be discussed in the second part of this dissertation, the cases have in a variety of situations recognized the existence of a discretion in a trial judge to exclude relevant and admissible evidence. However these are all situations where the evidence has been elicited or obtained at some stage after the commission of the offence. "(I)t is always the mode of obtaining or the consequences of admitting this evidence which are judged to be unfair or unduly prejudicial",[42] hence meriting exclusion in exercise of the discretion. "In cases of entrapment, however, the conduct about which complaint is made takes place before, indeed is the cause of, the commission of the offence."[43] This is the vital distinction which led the Law Commission to conclude that the discretion to exclude evidence is

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33 op cit.
34 op cit.
35 op cit.
36 op cit at 433.
37 Per Lord Diplock, op cit at 432.
38 op cit at 432.
39 op cit at 443.
40 Per Lord Scarman, op cit at 455.
41 Per Lord Fraser, op cit at 446.
42 Law Commission Report No 83, op cit, at para 5.9.
43 Loc cit.

not relevant in cases of entrapment.[44] It would hardly be a bold assertion to say that Lords Fraser and Scarman probably had in mind the Law Commission Report when expressing their views thus. The Law Commission pointed out that this distinction first emerged in *R* v *Mealey and Sheridan*[45] and it was the failure to elucidate on this that led to the confusion in the law discussed above.[46] This, in the writer's view, is a very cogent argument.

A further comment may be made of their Lordships' handling of authority. It is strange to note that their Lordships neither cited nor discussed the Court of Appeal decisions[47] which expressly discussed the discretion in support of their decision on this point. Three[48] in fact cited no authority at all. The two Lords[49] who did cite authority relied on *Brannan* v *Peek*[50] and *Browning* v *J W H Watson (Rochester) Ltd,*[51] saying that the fact that there was no mention by Lord Goddard C J of a discretion despite expressions of strong disapproval of police methods went to show that such a discretion did not exist. This, it is submitted, is rather strange. Why did their Lordships not rely on cases which expressly discussed the discretion, were more recently decided and were decided by a court higher in the hierarchy?[52] Besides, it has never been the law that silence means consent or dissent.

The decision means in the result that *R* v *Ameer and Lucas,*[53] *R* v *Foulder, Foulkes and Johns*[54] and *R* v *Burnett and Lee*[55] are overruled. So too are *R* v *Murphy*[56] insofar as it assumed the existence of the discretion.

Mitigation Of Sentence

Having denied the existence of the defence of entrapment and the discretion to exclude evidence on this ground, the House went on to decide that entrapment would only be relevant in regard to a mitigation of sentence. This was most vividly expressed in Lord Fraser's speech when he said,[57]

> "so when Eve, taxed with having eaten the forbidden fruit, replied, "The serpent beguiled me", her excuse was at most a plea in mitigation and not a complete defence."

Their Lordships all agreed that "(t)here are circumstances in which an accused's punishment in such a case might be mitigated and sometimes greatly mitigated".[58] It was noted that this may go as far as to grant the defendant an absolute discharge without any order as to costs against him.[59]

The House's decision is in accordance with the authorities. The Court of Appeal had in several cases[60] before *R* v *Sang*[61] held that entrapment was relevant in mitigation and in *R* v *Birtles*[62] and *R* v *McCann*[63] had actually reduced the sentences imposed. *R* v *Sang* therefore confirms these cases.

It is however unclear on what basis sentence is reduced. Is it as a sign of disapproval of police conduct as Lord Diplock seemed to suggest when he said,[64]

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44 "The defendant's allegation is, not that the evidence has been unfairly obtained, but that a conviction for the offence is "unfair", in that it would not have occured but for the pressure or persuasion of the State's own law enforcement officers or their agents. In our view, the extension of the discretionary power relating to admission of evidence to the case where *what is really in issue is whether it is "fair" that the proceedings should have been instituted at all* is wholly illogical, and, indeed, *raises issues going far beyond the merely evidential."* op cit at para 5.29.

45 op cit.

46 see 14-15 above.

47 *R* v *Mealey & Sheridan,* op cit; *R* v *McEvilly,* op cit; *R* v *Willis & Ors.,* op cit.

48 Lords Diplock, Salmon and Scarman.

49 Viscount Dilhorne (at 440) and Lord Fraser (at 446).

50 op cit.

51 op cit.

52 *Brannan* v *Peek* and *Browning* v *Watson* were 'only' decisions of the King's and Queen's Bench Division respectively.

53 op cit.

54 op cit.

55 op cit.

56 op cit.

57 op cit at 446.

58 Per Lord Salmon, op cit at 443.

59 Per Viscount Dilhorne & Lord Fraser (op cit at 440, 446) both citing *Browning* v *Watson,* op cit, in support. Lord Salmon said so without citing the case.

60 *R* v *Birtles,* op cit; *R* v *McCann,* op cit; *R* v *Mealey,* op cit.

61 op cit.

62 op cit.

63 op cit.

64 op cit at 433.

> "The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence."

or is it an acceptance that the accused, if entrapped, may be less morally guilty as Lord Fraser intimates,[65]

> "The degree of guilt may be modified by the inducement and that can appropriately be reflected in the sentence."?

It is unfortunate that their Lordships did not state clearly what was the true basis as different considerations must be taken into account if one or the other basis is the more relevant. If it is the conduct of the police which is relevant, what must be considered is how far beyond permissible limits such conduct went. If, however, it is a question of the moral guilt of the accused, the effect on the accused of police conduct, and not the police conduct itself, must be considered. The Court of Appeal decisions are equally vague on this point. The present position is unsatisfactory because judges are required to consider a mitigation of sentence but are not given guidelines as to what is truly relevant.

Liability Of The Entrapper

Only three of their Lordships[66] expressed their opinions on whether an entrapper is himself liable. All three were of the view that the entrapper should be held liable as a counsellor or procurer of the offence committed. Lords Diplock and Salmon pointed out that as counsellor or procurer, the entrapper could, by virtue of the Criminal Law Act 1967,[67] be charged as a principal offender.

This view conflicts with the view of the Law Commission who, in their Working Paper No 43[68] and in their Report No 83[69] argued that the entrapper ought not to be guilty as an accessory. The main reason for this was that an entrapper, whose activities are aimed at stultifying the offence, ought not to be liable to the same maximum punishments as the actual offender. This argument is open to the objection that the maximum penalty need not necessarily be imposed. The entrapper's "laudable" motives may go to the mitigation of his sentence. In a commentary on *R* v *Sang*[70] in the Criminal Law Review,[71] a learned writer further stated that

> "This seems sound; there would be problems in granting a defence to an entrapper, for superior orders or virtuous motives are not normally defences, and in our constitutional system, there is normally no official immunity unless statute so provides."

How does their Lordships' view stand in the light of existing authority? There is no conclusive modern English authority either way.[72] The cases[73] which are said to hold that the entrapper is not liable as an accomplice are all cases on the corroboration of accomplices. The ratio of these cases is that "for the purpose of the rule which requires corroboration of accomplices", agents provocateurs are not accomplices. This is a very important limitation because the definition of an accomplice for the purposes of the evidentiary rule requiring corroboration of accomplices is somewhat different from the strict definition of an accomplice for the purposes of criminal liability under s.8 of the Criminal Law Act, 1967.[74] Furthermore, in *R* v *Mullins*[75] and *R* v *Heuser*,[76] the courts were not dealing with agents provocateurs in the true sense but with spies.

The cases which are cited in support of the opposite view are equally inconclusive. *Brannan* v

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65 op cit at 446.
66 Lords Diplock, Salmon & Scarman op cit at 432, 443, 451 respectively.
67 Section 8 of the Act finds its equivalent in s 89 of the local *Criminal Procedures Ordinance*, Cap 221, LHK, 1978 ed. See Appendix II
68 The Law Commission. Working Paper No. 43, Codification of the Criminal Law. General Principles. Parties, Complicity & Liability For The Acts Of Another at 51.
69 op cit at para 5.46.
70 op cit.
71 JD Heydon, op cit at 130.
72 It is not proposed to look at foreign authorities as the law relating to entrapment has developed differently in different jurisdictions so it will be dangerous to rely on these. For a list of these cases, see Heydon. The Problems of Entrapment, op cit at 274, footnotes 34 & 35.
73 *R* v *Mullins*, (1848) 3 Cox CC 526; *R* v *Bickley*, (1909) 2 Cr App R 53; *R* v *Heuser*, (1910) 6 Cr App R 76; *Sneddon* v *Stevenson*, op cit.
74 Cross on Evidence, (5th ed 1979), 197-199.
75 op cit.
76 op cit.

Peek[77] is the case most often cited but there, when Lord Goddard C J expressed disapproval of the police committing offences in order to entrap an accused,[78] he was referring to the commission of an independent offence for the purpose of entrapment and not secondary liability of police officers inducing the commission of an offence.[79] *R* v *Smith*[80] is again not on point as the inciter (entrapper) there was not an official but a private individual.

This leaves us with what Radinowicz termed "The Blood Money Conspiracies" in his History of the English Criminal Law (London, 1956), Volume II, 326-337. In these cases,[81] police officers[82] incited others to commit crimes and then arrested them. "Their clear intention was that the felony should be discovered, yet there was another intention, not inconsistent with the former ie that the felony should at all events be committed."[83] Thus far, it would seem that the situations envisaged would fall under the modern day definition of entrapment. One distinction however, was that these activities were aimed at earning for these "agents provocateurs" rewards for the apprehension and conviction of criminals.[84] They were successfully prosecuted, inter alia, "for being accessories before the Fact; for that same Robbery (the crime counseled), that is, for contriving it, and directing how it should be done, in order to draw in (the entrapped), and to get the reward."[85] It is submitted that these cases support their Lordships' view. The one distinction – that of aiming to receive the reward – is a question of motive for the commission of the offence and does not affect the mens rea which is based on intention. (It is trite law that in the criminal law, intention and motive are two different things.) The view in *R* v *Sang*[86] is therefore well supported historically.

Summary Of The Law Relating To Entrapment After Sang

The position in England in true entrapment situations then may be summarised as follows. There is no defence of entrapment nor is there a discretion to exclude evidence on the grounds of entrapment. The plea may however be a factor to be taken into account in sentencing. It is unclear on what basis the trial judge should proceed when mitigating sentence – on the moral guilt of the defendant or on the reprehensiveness of police conduct. The entrapper may moreover be held liable as an accomplice to the entrapped accused.

THE POSITION IN OTHER JURISDICTIONS

No discussion of the law relating to entrapment would be complete without reference to the law in other common law jurisdictions as this area of the law has developed differently in different parts of the common law world. A brief review of the position in the United States of America, New Zealand, Canada and other Commonwealth jurisdictions will hence be undertaken before a final appraisal will be made with reference to how the law has developed in Hong Kong.

The United States of America

In the U.S.A. the defence of entrapment is recognised in almost every state jurisdiction.[87] The defence was first recognized as long ago as in 1879[88] but the theoretical basis for the defence was not formulated by the Supreme Court until 1932 in the landmark case of *Sorrells* v *United States.*[89] In this case, the majority[90] held that the defence would be

77 op cit.
78 ibid at 72.
79 This point is accepted by the Law Commission in their Report No 83, op cit, at para 5.46.
80 [1960] 2 QB 423.
81 *R* v *Dannelly & Vaughan* (1816) 2 Marsh 571. See also "The Whole Four Trials of The Thief-Takers & Their Confederates ..... Convicted At Hick's Hall & The Old Bailey, Sept. 1816, of A Horrible Conspiracy To Obtain Blood Money, & Of Felony & High Treason" (1816) at 16.
82 There were also lay-men, known as "thief-takers" but we are not concerned with them here.
83 op cit at 334.
84 Set at forty pounds each.
85 Cox, A Faithful Narrative of ..... That Bloody-Minded Gang of Thief-Takers. alias Thief-Makers (1756) 20-21; also 19 St Tr 766.
86 op cit.
87 Heydon, The Problems of Entrapment, op cit at 279, notes that the only apparent exception is Tennessee.
88 *O'Brian* v *State* (1879) 6 Tex App 665. See also *Woo Wai* v *United States* 223 Fed 412.
89 287 US 435.
90 Hughes, Devanter, Sutherland, Butler & Cardoza JJ.

available where "the criminal design originates, not with the accused, but is conceived in the minds of the Government officers". The matter was treated as one of statutory interpretation, the majority saying that,[91]

> "Fundamentally, the question is whether the defence, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that Congress intended that the letter of its enactment should be used to support such a gross preversion of its purpose..... We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation of government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of this statute."

As the basic consideration is where the criminal design originated, important questions are whether the defendant "is innocent and law-abiding"[92] and whether the offence is one "of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to commit it".[93] This meant that the highly prejudicial evidence of a defendant's past conduct and predisposition is admissible. This was accepted in two subsequent Supreme Court decisions – *Sherman* v *United States*[94] and *United States* v *Russell*.[95]

It can be seen that this is far from satisfactory – the primary objection being that such highly prejudicial evidence of past conduct should be held admissible to an issue which, the majority held, was to be decided by a jury. The preponderance of academic opinion[96] therefore prefers the approach of the minority who held that the majority approach was a fictitious adoption of "a form of words to justify action which ought to be based on the inherent right of the court not to be made the instrument of wrong".[97] The notion of entrapment exists, the minority held, because the methods used to secure conviction cannot be countenanced when they fall below accepted standards for the proper use of governmental power. It is a rule of public policy, applied by the court for "the protection of its own functions and the preservation of the purity of its own temple".[98] The innocence of the accused or his predisposition ceases to be important[99] and the test becomes whether the police acted in a sufficiently disgraceful manner to merit the court's intervention.

The Model Penal Code in the United States incorporated a defence based on the minority approach. (See Appendix I) The Law Commission in their Working Paper No 55[1] and Report No 83[2] were far from enthusiastic about the possibility of statutorily introducing a defence even along the lines of the already improved formulation of the defence in this Code. The primary objection is the uncertainty of application though the necessity recognised in the Model Penal Code of limiting the defence to offences other than those involving causing or threatening actual bodily harm is also a point of objection.[3]

New Zealand

The law in New Zealand is in some respects similar to and in other respects different from the law in England. Like in England, the New Zealand courts clearly do not recognise a defence of entrapment.

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91 op cit at 448.
92 op cit at 445.
93 op cit at 444.
94 356 US 369 (1958).
95 411 US 423 (1973). *Russell* was confirmed in *Hampton* v *United States* 48 L Ed 113 (1976).
96 JD McClean, Informers & Agents Provocateurs [1969] Crim LR 527; JD Heydon, The Problems of Entrapment, op cit; J Temkins, Police Traps, (1974) 37 MLR 102; The Law Commission, Report No 83, op cit; The Law Commission, Working Paper No 55, Codification of The Criminal Law. General Principles. Defences of General Application.
97 op cit.
98 op cit at 457, per Roberts J.
99 and the prejudicial evidence of previous conduct no longer admissible.
1 op cit at para 73.
2 op cit at para 5.24.
3 For a more detailed study of the US position, see Heydon, The Problems of Entrapment, op cit at 279-285 and NLA Barlow, Entrapment & The Common Law: Is There a Place For The American Doctrine of Entrapment (1978) 41 MLR 266.

Further, in *R* v *Phillips*[4], the New Zealand Court of Appeal after discussing the English cases on the point[5], held that agents provocateurs are not to be treated as accomplices for the purpose of the rule requiring corroboration of accomplices. It relied on two early 20th century decisions of *McGrath* v *Vine*[6] and *Smith* v *O'Donovan*[7]. In the latter case, the Court warned of the dangers of receiving the evidence of undercover police officers. Furthermore, like the majority of their Lordships in *Sang*[8], the New Zealand Court of Appeal has held that an agent provocateur is particeps criminis and himself liable.[9]

In the area of judicial discretion to exclude evidence on grounds of entrapment however, the New Zealand courts have deviated in holding that a judge does have a discretion in such circumstances. In *R* v *Capner*[10], McCarthy P., delivering the judgment of the court, noted doubts in England about the existence of the discretion[11] and went on to say that "in this country we have not hesitated to develop the use of this discretion and we think that it is a desirable attitude. To deny the discretion would be to take away something which acts very much in the interests of accused persons."[12] The Court cited *R* v *O'Shannessy*[13] where the Court of Appeal once again said "This Court has been most anxious not to restrict this discretion reposing in the trial judge." *R* v *Capner* is confirmed in *Police* v *Lavalle*,[14] *R* v *Climo*[15] and *R* v *Pething*.[16] The discretion exists in theory but the learned editors of Criminal Law & Practice in New Zealand[17] which include both past and present members of the judiciary, have concluded that the Courts appear to "show little inclination towards a ready exercise of such a discretion".

Other Commonwealth Jurisdictions

The defence is recognised by decisions in Ghana[18] and by dicta in Southern Rhodesia.[19] In Canada, there are two approaches. The Provincial Court of British Columbia has recognised the defence in certain situations[20] whilst some lower courts in Ontario have ordered a stay of proceedings in entrapment situations based on the inherent jurisdiction of the court to prevent proceedings which are "oppressive and an abuse of the process of the court".[21] Heydon[22] casts doubt on these decisions as the Canadian Supreme Court has held that there is no such inherent jurisdiction in any case – whether or not involving entrapment.[23]

THE POSITION IN HONG KONG

The local reported cases on the subject seem to deal less with the question of the consequences of a finding of entrapment than with delimiting acceptable boundaries for police conduct. The term "agent provocateur" is often used indiscriminately and not in the strict sense given to it by the Royal Commission in their Report on Police Powers.[24] The courts however are unanimous in condemning the actual inducement of persons who are not predisposed to crime into the commission of criminal acts. It seemed further to be accepted that if a police officer reasonably suspected that a person was habitually committing crime, he could "employ persons, whether police officers or members of the public, for the purpose of verifying (his) reasonable suspicion".[25] This idea was first recognised in *R* v *Sze Shing-chuen*[26] where Mills Owens J referred to the Royal

4 [1963] NZLR 855.
5 *R* v *Mullins*, op cit; *R* v *Heuser*, op cit; *R* v *Bickley*, op cit; discussed above at 22-23.
6 (1909) 12 GLR 480.
7 (1908) 28 NZLR 94.
8 op cit.
9 *R* v *Phillips*, op cit.
10 [1975] NZLR 45 (CA).
11 *R* v *Capner* was of course, decided after *Sang* – hence the remark about clarity.
12 op cit at 414.
13 Unreported, Wellington, 8th October 1973, 78/73.
14 [1979] 1 NZLR 45 (CA).
15 [1977] Recent Law 287.
16 [1977] NZLR 448.
17 Adams (2nd ed) para 1052.
18 *Ahenkora* 1968 Ghana CC 133.
19 *Clever*, 1967 (4) SA 256; *Chando*, 1968(3) SA 119.
20 *R* v *Haukess* 1976 5 WWR 420.
21 *Shipley* [1970] 2 OR 411 per McAndrew Co Ct. J. at 415 relying on *Osborn* [1969] 1 OR 152 which was reversed 1970 15 DLR (3d) 85, (Supreme Court of Canada).
22 The Problems of Entrapment, op cit at 279.
23 *Osborn* op cit.
24 op cit see 4-5.
25 *Assandas Chimandas Danani* v *R* [1963] HKLR 50, 55 (Full Ct).
26 [1960] DCLR 18.

Commission's Report On Police Powers[27] which stated that as a general rule, "the Police should observe only without participating in the offence",[28] subject to the exception that

> "participation in offences may be resorted to by the police ..... in cases where there is good reason to believe that the offence is habitually committed in circumstances in which observation by a third party is, ex hypothesi, impossible".[29]

Other cases taking a similar approach are *R* v *Tam Fung*[30] and *R* v *Ngai Kam-chung.*[31] In *R* v *Woo Sum*[32] however, the Full Court criticised this approach, saying,[33]

> "The suggestion sometimes made that a trap is permissible when the police have reason to suspect that the accused will commit the offence in question is open to the criticism that this is to invite the court to lift the screen properly protecting an accused from prejudice, in an endeavour to ascertain the full background, in the result that the court will find itself dealing with matters which should be withheld under the rules of evidence applicable in criminal cases."

This is a valid comment and insofar as this approach[34] appears to allow police to entrap a habitual offender, such conduct falls within the true definition of entrapment discussed above and is wrong.[35]

As to the consequences of a finding of entrapment, only one reported case deals with such matters. In *R* v *Woo Sum,*[36] the court held that entrapment "would not make lawful that which was otherwise unlawful"[37] thus rejecting the defence.[38] Further, it was held that a judge has a discretion to exclude evidence on grounds of entrapment and that the sentence might be mitigated. The discretion was also impliedly accepted in *R* v *Fan Chung-yuen*[39] and *R* v *Phromanonta & Others.*[40] (The most recent decision in this area of the law is the decision of the Court of Appeal in *Ip Chi-kan* v *R*[41]. Unfortunately, the report of the case was not, at the time of writing available yet. Informed sources however have it that *R* v *Sang*[42] was cited in argument.)

APPRAISAL : THE PATH AHEAD FOR HONG KONG

The law in Hong Kong then is in some respects different from the law in England after *R* v *Sang*[42] (This is on the assumption *Ip Chi-kan*[43] did nothing to change the law after *R* v *Woo Sum.*[44] The following discussion completely ignores this most recent case.) Should we therefore adopt the English approach where there are differences and further, ought the existing law be changed in favour of the approach taken in other jurisdictions?

Discretion

The question of course is – should we reject *R* v *Woo Sum*[44] in favour of *R* v *Sang?*[42] The first point to be made is that the decisions of the House of Lords on an area of the common law is not strictly binding on the Hong Kong courts but is of very high persuasive authority.[45] This recognises that a particular area of the law may have developed differently in the two jurisdictions. Looking at the decisions, it is submitted that this is an area of the law in which the local courts have closely adhered to

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27 op cit.
28 op cit at para 108.
29 op cit at para 111.
30 [1965] HKLR 464.
31 [1965] HKLR 941.
32 [1968] HKLR 475.
33 ibid at 485.
34 The one criticised in *Woo Sum.*
35 However in *Fan Chung-yuen* [1973] HKLR 516, counsel submitted that the prosecution should have led evidence of a predisposition to commit an offence of this kind, in the absence of which, counsel contended, it was to be assumed that the appellants would not have committed the offence without police temptation. It is unclear from the report if this was accepted.
36 [1968] HKLR 475.
37 op cit at 484.
38 The defence seems to have been accepted *Sze Shing-chuen & Poon Ying-lun* [1965] HKLR 790.
39 op cit.
40 [1977] HKLR 226.
41 Unreported, South China Morning Post, Sept 10, 1981 Cr App 723/81.
42 op cit.
43 op cit.
44 op cit.
45 *deLasala* v *deLasala* 1979 2 All ER 1146.

the English approach unlike in New Zealand where there has clearly been a deviation. Local courts when deciding cases on this area of the law have constantly cited and relied on English authorities. In fact, in *R* v *Woo Sum*[46] the court relied on *R* v *Murphy*[47] and *Sneddon* v *Stevenson*[48] in concluding that the court had the discretion and in a later case, *R* v *Phromanonta & Others,*[49] the court relied on *R* v *Ameer & Lucas.*[50] Now that *R* v *Murphy* and *R* v *Ameer & Lucas* have been overruled by Sang, it is submitted that from the point of view of authority, *R* v *Woo Sum* and the other cases relying on these cases rest on much more shaky ground and ought likewise to be overruled insofar as they accept the discretion. The writer is further convinced of this view by the fact that the local courts have never discussed the juristic basis of the discretion but have been satisfied to blindly adopt the English approach. Besides, the local cases were decided at a time when there was confusion in the English law on the point.

In addition to the two grounds discussed above for rejecting the discretion,[51] a point may very validly be made that its recognition would lead to inconsistencies. These would arise because it is unclear what basis the courts ought to adopt in exercising the discretion. Is it a question of the accused's moral guilt or is it a question of punishing bad police methods? As was pointed out by the Law Commission,[52] it may well take many years before the guidelines upon which the courts are to act will be laid down.

For these reasons, it is submitted that *R* v *Sang*[53] should be adopted in preference to *R* v *Woo Sum.*[54] It must further be said that it is highly unlikely that the local courts will not follow *R* v *Sang.*

Defence Of Entrapment

It is submitted that in view of the difficulties faced by the American courts in applying the defence, the criticisms that have been levelled at the defence by academics and jurists alike and the difficulties of formulating an acceptable alternative to what exists in America, the defence should not be introduced here. There is force in their Lordships' views which were very similar to the views of the Law Commission.[55] It is submitted that whether we take the basis for intervention of the court to be unfairness to the accused or punishment of the police, the defence is not appropriate. To do justice to the accused, it is sufficient that his sentence be mitigated because, as their Lordships argued, the accused had in fact committed a crime. As punishment of the police, it is illogical, as the Law Commission pointed out,[56] to try to penalise the law enforcement agencies by absolving the defendant.

Furthermore, the recognition of the defence here, where such "victimless crimes" as drugs offences, prostitution, the use of premises for immoral purposes, illegal practising of medicine and dentistry, corruption and employment of under-aged girls in vice establishments are widespread and difficult to detect without the use of informers and agents provocateurs would greatly affect the detection and control of crime.

Mitigation Of Sentence

This seems to be the most appropriate measure to be kept if we take the basis of the court's intervention to be fairness to the accused. Whilst recognising that the accused has committed a crime, it allows the court flexibility and discretion which may go as far as to grant an absolute discharge without an order as to costs.[57] Further, it is more appropriate at the sentencing stage than at the trial stage to explore more thoroughly the background of the case because there will no longer be the danger of prejudice to the accused in adducing evidence of a predisposition nor will there be the danger of the court being led away from the main issue which has to be decided – the proof of commission of the offence. The problem remains, of course, that it is unclear whether the court is to reduce the sentence as a sign of disapproval of police misconduct or as a sign of

46 op cit.
47 op cit.
48 op cit.
49 op cit.
50 op cit.
51 see 16-18 above.
52 Report No 83, op cit at para 5.37.
53 op cit.
54 op cit.
55 see 12-14 above.
56 Report No 83, op cit, at Para 5.37.
57 *Browning* v *Watson*, op cit. See also 20 above.

acceptance that an accused, if entrapped, is less morally guilty. As has been discussed above,[58] the factors to be taken into account differ as according to which ground the court takes as the basis of mitigation.

Stay Of Prosecutions

This approach, taken by some of the lower courts in Canada is still at its conception stage and there seems to be indications that it may turn out still-born.[59] The approach almost amounts to a defence and is therefore open to the same objections. It is submitted therefore, that it ought not, and will not, be adopted.

Liability Of The Entrapper

It has been seen that both the English[60] and New Zealand[61] courts have held that an entrapper is himself particeps criminis and liable as an accomplice. It has further been observed that such a view is correct in principle and well supported by authority.[62] It is submitted therefore that the local courts should adopt this same approach.

THE GENERAL DISCRETION TO EXCLUDE RELEVANT EVIDENCE

In this part of the paper, it is sought to look at what their Lordships said in respect of the existence and, more importantly, the scope of the discretion and appraise this in the light of authority and principle. Once again, the practice adopted in other jurisdictions will be looked at as will the local situation before a final appraisal will be made.

THE POSITION IN ENGLAND AFTER *R* V *SANG*

Existence Of The Discretion

Their Lordships all agreed that "evidence that is admissible in law may, in certain cases, be excluded by the judge in exercise of a discretion which he undoubtedly possesses".[63] It was "a clear principle of law"[64] which was "now established beyond all doubt".[65] In so firmly recognising a discretion, their Lordships acknowledged that recognition of a discretion had "grown up piecemeal"[66] such as from the cases dealing with similar fact evidence and with s 1(f) of the Criminal Evidence Act 1898 (which has its equivalent in s 54 of the Criminal Procedures Ordinance, Cap 221, L H K, 1978 ed) The leading cases in these areas, *Noor Mohamed* v *R*,[67] *Harris* v *Director of Public Prosecution*,[68] and *R* v *Selvey*[69] were cited in support.

In the face of such firm statements from their Lordships and from the general trend of judicial growth, it is submitted that there can no longer be doubts as to the existence of a discretion (the exact scope may be doubtful but this will be discussed later). However, from a very academic point of view, it may be shown that their Lordships' views were not supported by very strong "authority".

Taking the cases on s 1(f) of the Criminal Evidence Act 1898 first. The first case in which it was suggested that the discretion existed was *R* v *Watson*.[70] As authority, it is most unsatisfactory because the dictum of Pickford J[71] alleging the existence of such a discretion was made without citation of authority and without argument from counsel on the point. Nor did he identify the juristic basis for the discretion. In *R* v *Fletcher*[72] decided a year later, however, counsel argued that the discretion existed. This time, Bankes J said[73]

> "With this contention the Court does not agree. Where the judge entertains a doubt as to the admissibility of evidence, he may suggest to the prosecution that they should not press it, but he cannot exclude evidence which he holds to be admissible."

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58 See 19-21, 25 above.
59 See Heydon, The Problems of Entrapment, op cit at 279 and discussion at 31 above.
60 See 21-25 above.
61 See 29 above.
62 See 21-25 above.
63 Per Lord Fraser, op cit at 446.
64 Per Lord Salmon, op cit at 444.
65 Per Viscount Dilhorne, op cit at 438.
66 Per Lord Diplock, op cit at 433.
67 [1949] AC 182.
68 [1952] AC 694.
69 [1970] AC 304.
70 (1913) 8 Cr App R 249.
71 ibid at 254-5.
72 (1914) 9 Cr App R 53.
73 ibid at 56.

R v *Fletcher*[74] therefore, denies the existence of a discretion but recognises the judicial influence which a judge may exert.[75]

The point did not come up for consideration again until 1935 in *Maxwell* v *Director of Public Prosecutions*[76] and *Stirland* v *Director of Public Prosecution.*[77] In these cases again, the discretion was recognised without explanation of its source or basis. (*Maxwell* was cited in *Stirland,* to be exact) Following these were *R* v *Jenkins,*[78] *R* v *Clark,*[79] *R* v *Cook*[80] and *Jones* v *Director of Public Prosecution,*[81] all cases in which the discretion was recognised in obiter dicta and citing *Maxwell* v *D P P,*[82] *Stirland* v *D P P*[83] and/or *R* v *Jenkins* as authority for the proposition but as has been said above, even in these cases themselves, the discretion was recognised only in obiter comments.

Last in line came *R* v *Selvey*[84] in which the discretion was closely looked into. Their Lordships' views in this case are best reflected in Lord Hodson's dictum at 346:

> "Where then, he asks, is there room for discretion to be exercised.....? The answer is twofold. First, there is a line of authority to support the opinion that there is such a discretion to be exercised under this subsection. In the second place, what is I think more significant, there is abundant authority that in criminal cases there is a discretion to exclude evidence ....."

The "abundant authority" referred to were, however, merely the dubious dicta from the cases already discussed above. Furthermore, some of their Lordships[85] cited a dictum of Lord Moulton in *R* v *Christie*[86] and of Viscount Simon L.C. in *Harris* v *Director of Public Prosecutions*[87] in support of the existence of the discretion. Furthermore *R* v *Fletcher*[88] was brushed aside by their Lordships and Lord Guest did not even mention it. In relation to s 1(f) of the Criminal Evidence Act 1898, then, it can be seen how recognition of the discretion grew up and propagated from mere obiter dicta which were unsupported by authority.[89]

The cases on similar fact evidence also illustrate the point. The first case which seemed to recognise the discretion in this area was *Noor Mohamed* v *R,*[90] an appeal to the Privy Council from British Guiana. A dictum of Lord du Parcq[91] delivering the opinion of the Judicial Committee is often cited as supporting the existence of the discretion and undoubtedly does. However, three years later, in *Harris* v *D P P,*[92] Viscount Simon in the House of Lords said of the discretion,[93]

> "It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for ..... (It) follows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of "similar facts"

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74 (1914) 9 Cr App R 53.

75 *Fletcher* op cit was admittedly not a case on s 1(f) but it is here included because of its proximity in time to *Watson,* op cit, by a differently constituted Court of Appeal also held that there was no discretion. In *R* v *Cargill* (1913) 8 Cr App R 224, Channel J said, at 229 "It is better to apply the rules of evidence strictly than to allow it to be thought that a judge has a discretion to relax them if he thinks they will work an injustice.

76 [1935] AC 309.

77 [1944] AC 315.

78 (1946) 31 Cr App R 1.

79 [1955] 2 QB 469.

80 [1959] 2 QB 340.

81 [1962] AC 635, per Lord Denning at 671.

82 op cit.

83 op cit.

84 [1970] AC 304.

85 Viscount Dilhorne at 340-1; Lord Guest at 351-2; Lord Pearce at 358; Lord Hodson only cited *Harris* and recognised that Lord Moulton's dictum in *Christie* did not support the discretion.

86 [1914] AC 545, 559.

87 [1952] AC 694, 707.

88 op cit.

89 For a more thorough examination of this area of discretion, see B Livesy, Judicial Discretion To Exclude Prejudicial Evidence, [1968] CLJ 291, in which the learned writer also concludes that *R* v *Selvey,* op cit, was based on dubious authority.

90 op cit.

91 ibid at 192.

92 op cit.

93 ibid at 707.

> affecting the accused, though admissible, should not be pressed because its probable effect "would be out of proportion to its true evidential value" (per Lord Moulton in *D P P* v *Christie).* Such an intimation rests entirely within the discretion of the judge."

As can easily be seen, this militates against the existence of a discretion to exclude evidence but accepts the proposition in *R* v *Fletcher*[94] that the judge can suggest to counsel not to press for admission of the evidence. The discretion was also recognised in two other similar fact cases – *R* v *Straffen*[95] and *R* v *Robinson.*[96] However, in the former case, the point was conceded by counsel and not argued and in *R* v *Robinson*[97] the court cited, inter alia, *Harris* v *D P P*[98] which as we have seen, does not support the proposition.

There are also dicta from numerous cases[99] outside the above two areas of the law which support the existence of the discretion. However, there are invariably cross-references to cases from these areas – cases which already have been seen not to be well founded (and in the case of *Harris* v *D P P,* even contradicts the proposition). One case which must be mentioned together with these cases is *R* v *Christie*[1] which, (as has been seen above), is sometimes cited as supporting the existence of the discretion. Here Lord Moulton said in a much-cited passage,[2]

> "The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable."

This of course supports the *Fletcher*[3] and *Harris* v *D P P*[4] approach and denies the existence of the discretion. In the same case, Lord Halsbury L.C. interjected during argument by counsel that he

> "must protest against the suggestion that any judge has the right to exclude evidence which is in law admissible, on the ground of prudence or discretion, and so on."[5]

Against this there are two cases, *R* v *Court*[6] and *R* v *Payne*[7] (discussed in their Lordships' speeches,[8]) in which evidence was actually excluded. However, there was no reference whatsoever to authority or a discussion of the principles involved.

If we take all the cases so far discussed in their chronological order, it will be seen that in the early 1900's, the majority of cases[9] denied the existence of the discretion and favoured the *R* v *Christie*[10] approach. Then only in 1935 in *Maxwell* v *D P P*[11] did the question re-emerge and suddenly, the majority of the cases favoured the discretion. There is a conceptual jump which is inexplicable. In *R* v *Sang*[12] Lord Scarman was the only one to notice and mention this but all he could say was that *R* v *Christie*[13] "is, therefore, only a staging-post in the development of the law".[14] This certainly is of no

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94 op cit.
95 (1952) 36 Cr App R 132.
96 (1953) 37 Cr App R 95.
97 op cit.
98 op cit.
99 *R* v *Kuruma* [1955] AC 197; *R* v *M* (1961) The Times, Oct 27; *Callis* v *Gunn* [1964] 1 QB 495; *Myers* v *DPP* [1965] AC 1001; *King* v *R* [1969] 1 AC 304; *Jeffrey* v *Black* [1978] 1 AB 490.
1 op cit.
2 ibid at 559.
3 op cit.
4 op cit.
5 (1914) 10 Cr App R 141, 149.
6 [1962] Crim LR 697.
7 [1963] 1 WLR 637.
8 op cit.
9 *R* v *Christie,* op cit; *R* v *Fletcher,* op cit; *R* v *Cargill* op cit; against *R* v *Watson,* op cit.
10 op cit.
11 op cit.
12 op cit.
13 op cit.
14 op cit at 454. Lord Hodson in *Selvey* also tried to deal with the problem but was merely able to say, quite incorrectly (and unsupported by authority) it is submitted, that from *R* v *Christie* onwards, the position had been accepted that there was a discretion to exclude evidence in all criminal cases notwithstanding the guarded approach by Bankes LJ 9 Cr App R 53, 56 and Lord Moulton [1914] AC 545, 559.

help towards explaining why in a span of twenty years nothing appeared in the cases and when it did, the law had already changed. Perhaps we may assume that development was there but it merely was not recorded in the reported cases.

One final point is that even before the early 1900's, there was no trace of such a discretion. Grose J, in 1790, dreaded "that rules of evidence shall ever depend on the discretion of the Judges."[15] Stephen, in his famous Digest of the Law of Evidence published in 1877, made no reference at all to any discretion, whilst Best recognized a discretion only in relation to regulation of "the manner of offering, accepting and rejecting evidence."[16]

From the above discussion, we may conclude that there is no very strong "authority" supporting the existence of the discretion – only dicta which go both ways and two cases (*R* v *Payne*[17] and *R* v *Court*[18]) in which the discretion was exercised but no authority cited. From a practical point of view however, the discretion seems too well established in the law for any suggestion that it does not exist to be tenable.

The Scope Of The Discretion

What is sought to be shown here is that although all five Lords appeared to agree with the two point answer given to the certified question, their speeches show that they did not in fact agree. Their Lordships' speeches will hence be examined in detail and the reasons for their views discussed.

Lord Diplock noted that the discretion had grown up piecemeal from different areas of the law. After looking briefly at the cases[19] from these areas he concluded that they all supported the view that the trial judge had "a discretion to exclude evidence which though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value."[20] However, he noted that "the comparatively recent dicta"[21] seemed to go further than this but he opined that "the fountain head" of all this dicta was the dictum of Lord Goddard C J in *Kuruma* v *R*[22] in which the Lord Chief Justice said,

> "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasized before this Board in *Noor Mohamed* v *R* 1949 A C 182, and in the recent case in the House of Lords, *Harris* v. *D P P* 1952 A C 694. If, for instance, some admission of some piece of evidence eg a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

His Lordship explained that what the Lord Chief Justice meant in the passage before the sentence underlined was merely to adopt the formula propounded in the cases cited that the judge has a discretion to exclude evidence where its prejudicial effect outweights its probative value. The sentence underlined, he went on to explain, was merely an illustration of another well recognised principle – that no man can be required to be his own betrayer – or the maxim, nemo debet prodere se ipsum. In *R* v *Payne*,[23] his Lordship continued, the evidence was excluded as this principle had been infringed.[24] He then concluded that the passage cited

> "was not in (his) view, ever intended to acknowledge the existence of any wider discretion than to exclude (1) admissible evidence which would probably have a prejudicial influence upon the minds of the jury that would be out of proportion to its true evidential value; and (2) evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had

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15 *R* v *Inhabitants of Eriswell* (1790) 3 Term Rep 707, 711.
16 Best on Evidence, 9th ed (1902) 95.
17 op cit.
18 op cit.
19 *R* v *Watson*, op cit; *R* v *Selvey*, op cit; *Noor Mohamed* v *R*, op cit; *Harris* v *DPP*, op cit; *R* v *Christie*, op cit.
20 op cit at 434.
21 op cit at 434, Lord Diplock was referring to dicta in, inter alia, *Jeffrey* v *Black*, op cit and *Callis* v *Gunn*, op cit in which it was suggested that evidence may be excluded where "unfairly obtained".
22 op cit.
23 op cit.
24 A fortiori in *R* v *Court*, op cit which was relied on in *Payne* although none of their Lordships cited this.

> the like self-incriminating effect."[25]

He pointed out that "(a)s a matter of language, although not as a matter of application, the subsequent dicta go much further than this"[26] but insofar as they did, he felt that this was based on a misunderstanding of *R* v *Kuruma.*[27]

Compared with the "official" answer given,[28] it becomes obvious that his Lordship did not agree with the second limb of the answer which goes much wider than the second limb reached in his own analysis. This is further illustrated by his saying that,

> "there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair"[29]

Surely, "evidence discovered as the result of an illegal search" is "evidence obtained from the accused after the commission of the offence" (see the second limb of the "official" answer) so why is his Lordship contradicting himself? Simple – because the "official" answer given was not what he meant.

Viscount Dilhorne's general analysis of the law and especially of *R* v *Kuruma*[30] was very much similar to that of Lord Diplock. The only apparent difference was that he emphasized the "prejudicial effect outweighing the probative value" formula much more than did Lord Diplock and he seemed not to acknowledge the self-incrimination point. This led him to say that he was not decided as to whether *R* v *Payne*[31] was correctly decided. He did, however, say that the observations of Lord Parker in *Callis* v *Gunn*[32] that

> "..... in considering whether admissibility would operate unfairly[33] against a defendant, one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused person. That is the general principle."

and[34] that the overriding discretion

> "would certainly be exercised by excluding the evidence if there was any suggestion of it having been oppressively obtained, by false representations, by a trick, by threats, by bribes, anything of that sort."

as well as similar observations of Lord Widgery C J in *Jeffery* v *Black*[35] were incorrect. If *R* v *Payne*[36] was decided on the principles put forward in *Callis* v *Gunn,*[37] he said, then it was wrongly decided.

Viscount Dilhorne therefore took a similar if not slightly narrower view of the scope of the discretion as Lord Diplock and once again therefore, his agreement with the "official" answer was in language but not in substance.

Lord Salmon's approach was much more vague. He opined that[38]

> "the decision as to whether the evidence may be excluded depends entirely upon the particular facts of each case and the circumstance surrounding it – which are infinitely variable."

and that the discretion was to be exercised if justice so required, and further that,[39]

> "The judge has a discretion to exclude admissible evidence procured, after the commission of the alleged offence, which although technically admissible appears to the judge to be unfair. The classical example of such a case is where the prejudicial effect of such evidence would be out of proportion to its evidential value."

He went on to say that the category of cases in which the discretion could be exercised was not and could never be closed except by statute. His agreement with the "official" answer was subject to the condition

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25 op cit at 436.
26 ibid.
27 op cit.
28 See 9-10 above.
29 op cit at 436.
30 op cit.
31 op cit.
32 op cit.
33 Lord Parker was referring here to "operate unfairly" in Lord Goddard CJ's dictum in *Kuruma.*
34 op cit at 502.
35 op cit.
36 op cit.
37 op cit at 501.
38 op cit at 444.
39 op cit at 445.

that it accepted "the proposition" which he stated. Lord Salmon's views were so vague that it is not easy to tell what the proposition he referred to was. Perhaps it was that the scope of the discretion was not limited and everything depended on the facts. To this extent, it would be even wider than that recognised in the "official" answer.

Lord Fraser's analysis of the law accorded most closely with the "official" answer. He accepted, after discussion of the relevant cases[40] that there was a discretion to exclude evidence whose prejudicial effect outweighed its probative value. However, he opined that it extended further than that. His analysis of the dictum of Lord Goddard C J in *Kuruma* v *R*[41] differed from that of Lord Diplock and Viscount Dilhorne. The latter part of the dictum (underlined above) in his view illustrated the principle of fairness to the accused applied by Lord Guthrie in *H M Advocate* v *Turnbull,*[42] a principle which was same as that stated by Lord Widgery C J in *Jeffery* v *Black*[43] where the Lord Chief Justice said that judges in England,

> "have a general discretion to decline to allow evidence to be called by the prosecution if they think it would be unfair or oppressive to allow that to be done."

The evidence which could be excluded in exercise of the discretion was "evidence (which) has been obtained by conduct of which the Crown ought not to take advantage".[44] However, these principles were limited to evidence obtained from the accused himself or from premises occupied by him. As Lord Fraser noted, the principles are correctly stated and included in the second prong of the "official" answer.

The judgment of Lord Scarman, though appearing to favour the very hazy concept of a discretion to exclude evidence based on "unfairness to the accused" in fact supported the narrower view of Lord Diplock and Viscount Dilhorne. His Lordship said that "the discretion is based upon, and is co-extensive with, the judge's duty to ensure that the accused has a fair trial according to law".[45] "Fair" in this context meant that certain principles were not to be infringed. What then are those principles? They are that "No man is to be compelled to incriminate himself: nemo tenetur se ipsum prodere" and that "No man is to be convicted save upon the probative effect of legally admissible evidence."[46] (ie he must not be convicted because of the prejudicial effect of evidence but on its probative value so that if the prejudicial effect of evidence outweighed its probative value, it must be excluded). How does this differ from the views of Lord Diplock and Viscount Dilhorne?

His Lordship further discussed the dicta of Lord Parker C J and Lord Widgery C J in *Callis* v *Gunn*[47] and *Jeffrey* v *Black*[48] and of Lord Goddard C J in *Kuruma* v *R*[49] that evidence obtained by deception, by trick etc may be excluded in exercise of the discretion. He said that the dicta of these three successive Lord Chief Justices were not to be lightly disregarded but said that "always provided that (they) are treated as relating to the obtaining of evidence from the accused",[50] he would not necessarily dissent from them because "(i)f an accused is misled or tricked into providing evidence, ... the rule against self-incrimination – nomo tenetur se ipsum prodere – is likely to be infringed".[51]

As can be seen from the above discussion, the answer given to the certified question does not reflect the true views of their Lordships. Indeed, parts of the answer, as a learned writer opined[52] "have the air of being inserted in order to get an appearance of unanimous agreement which does not exist". If we leave aside the so called unanimous answer to the certified question, the majority view will then of course be the view taken by Lords Diplock and Scarman and Viscount Dilhorne.

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40 *Noor Mohamed* v *R*, op cit; *Harris* v *DPP*, op cit; *R* v *Christie*, op cit; *R* v *Selvey*, op cit.
41 op cit.
42 1951 JC 96.
43 op cit at 497-8.
44 *King* v *R* [1965] 1 AC 304, 319 per Lord Hodson.
45 op cit at 454.
46 op cit at 455.
47 op cit.
48 op cit.
49 op cit.
50 op cit at 456.
51 op cit at 956.
52 Heydon, Entrapment & Unfairly Obtained Evidence In the House Of Lords [1980] Crim LR 129, 133.

Basis For Their Lordships' Views

The reason for the difference in the opinions between their Lordships lay in their varying conceptions of a judge's role and the extent of control he exercises over the criminal process. As Lord Scarman pointed out, answering the certified question involved looking into these questions as well as the meaning a judge attributes to the phrase "a fair trial".

Those of their Lordships who took the narrower view of the discretion[53] took rather a narrow view of a judge's role. His function, in their view, is "confined to the forensic process"[54] so that what he is concerned with "is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial".[55] He is concerned with ensuring for the accused "a fair trial according to law".[56] "Fair" in this context means that certain principles are not to be infringed. "No man is to be compelled to incriminate himself; nemo tenetur prodere se ipsum. No man is to be convicted save upon the probative value of legally admissible evidence. No admission or confession is to be received in evidence unless voluntary".[57] Furthermore, the jury must not hear evidence "which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value"[58] of such evidence. A corollary of this view is that "(i)t is no part of a judge's functions to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at trial is obtained by them".[59] There are other ways of controlling improper methods used in obtaining evidence such as an action in the civil law or disciplinary proceedings imposed by the authority governing the infringing law-enforcers.[60]

Of their Lordships who took the wider view, it is impossible to elucidate from the short discussion of the discretion in Lord Salmon's speech why he gave the discretion such wide scope. Lord Fraser was however, clearly attracted by the wider principles of fairness recognised by the Scottish courts and reflected in comparatively recent dicta in English cases. On this view, there are no fixed principles which must not be infringed as in the view of their Lordships favouring the narrow approach. Instead, the judge must simply decide whether to admit evidence would be "unfair or oppressive" or whether evidence sought to be admitted "has been obtained by conduct of which the Crown ought not to take advantage".[61] This last quotation clearly indicates that the way in which law-enforcement officers acted is of some relevance – a view rejected by the "majority" Lordships. What a judge goes by are largely subjective judgments of "what is unfair or oppressive or morally reprehensible".[62]

One final point is that their Lordships in the "majority" were clearly moved by a recognition of the need for clear and certain guidelines to be laid down. Lord Diplock noted[63] that "those who preside over or appear as advocates in criminal trials are anxious for guidance as to whether the discretion really is so wide ..... and, if not, what are its limits" and Lord Scarman said[64] that "one must, however, emerge from the last refuge of legal thought – that each case depends on its own facts – and attempt some analysis of principle".

STATEMENT OF PRINCIPLES

A learned writer, Weinberg,[65] noted that in the area of judicial discretion to exclude relevant evidence, "a general distinction can be made at the outset between the exercise of the discretion with respect to evidence which was improperly obtained before the trial, and evidence which, although obtained in an entirely proper manner, would be extremely prejudicial to the accused if admitted during the course of the trial". He further pointed out that the rationales for exercising the discretion to exclude differed accordingly.

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53 Lords Scarman & Diplock and Viscount Dilhorne.
54 Per Lord Scarman, op cit at 454.
55 Per Lord Diplock, op cit at 436.
56 Per Lord Scarman, op cit at 454.
57 Per Lord Scarman, op cit at 455.
58 Per Lord Diplock, op cit at 437.
59 Per Lord Diplock, op cit at 436.
60 ibid
61 op cit at 449.
62 op cit at 450.
63 op cit at 431.
64 op cit at 452.
65 MS Weinberg, The Judicial Discretion To Exclude Relevant Evidence, (1975) 21 McGill LJ 1,25.

In the case of improperly obtained evidence, evidence is excluded (a) to deter public officials from future impropriety; (b) to safeguard "judicial integrity" so that the court will not be seen as being a party to the impropriety; and (c) to safeguard the principle of privilege against self-incrimination.

In the case of properly obtained evidence, it must be excluded if "its prejudicial tendency outweighs its probative value in the sense that the jury may attach undue weight to it or use it for inadmissible purposes".

It is submitted that this is a most valid distinction to be drawn and it is the failure to draw this distinction which has often led to mis-statements and misconceptions. It is further submitted that this distinction can also be drawn from their Lordships' judgments in *R* v *Sang*.[66] It is apparent from the two-pronged "official" answer as well as in the actual discussion of the discretion in their Lordships' speeches. Their Lordships all agreed on the "prejudicial effect outweighing the probative value" formulation and hence appear to be agreed on the basis for the exclusion of "properly obtained" evidence. It is submitted that the majority and minority views differ only in the area of "improperly obtained" evidence. The majority, with their narrow view of the judge's role, accepts only the third ground listed by Weinberg. It is more difficult to state which of the three grounds listed by Weinberg the minority accepted, though Lord Fraser's reference to "conduct of which the Crown ought not to take advantage" seems to accept the first and second of the three grounds.

A second related statement of principle to be made here is that there are three views of a court's functions. The first view sees the functions as limited to determining the truth of criminal charges according to legal principles so that so long as the evidence is relevant and these legal principles regulating the trial process are adhered to, there is no ground for exclusion of evidence. This was the view taken by the majority in *R* v *Sang*. We may call this the "forensic process approach" to borrow the expression used by Lord Scarman.[67] The second view admits that the primary function of the court is to determine the criminal charge as under the "forensic process approach" but sees the court's functions as going beyond this to the control of the conduct of law-enforcement officials. Evidence, if improperly obtained, ought to be excluded so as to deter future improper conduct on the part of these officials. We may call this the "disciplinary approach". The third and final view is that in addition to the primary functions under the "forensic process", the court is also charged with the protection of the right of citizens to be free from arbitrary interference from law-enforcement officials. Advocates of this view argue that "if a legal system declares certain standards for the conduct of criminal investigation – whether they are enshrined in the constitution, detailed in a comprehensive code or scattered in various statutes and judicial precedents – it can be argued that the citizens have corresponding rights to be accorded certain facilities and not to be treated in certain ways".[68] Infringement of these rights,[69] ought to be protected against by the court which should exclude evidence which has been obtained as a result of such infringement. We may call this the "protection approach".[70]

The point to be made is that these three views form the bases for the exclusion of evidence in exercise of the judicial discretion to do so and in looking at the approach taken in other jurisdictions, we must bear in mind what basis (or bases) is being adopted so that we can appraise them in the light of principle. As it is in the area of improperly obtained evidence that controversy and disagreement have arisen, we shall concentrate on the approaches taken in other jurisdictions in respect of such evidence only.

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66 op cit.

67 op cit at 454 See also 57.

68 AJ Ashworth, Excluding Evidence As Protecting Rights, [1977] Crim LR 723, 725.

69 and a fortiori of rights which are expressly provided for and not merely derived.

70 Learned writers in this area of the law adopt a slightly different terminology from that used by the present writer. Instead of the "forensic process approach", the "disciplinary approach" and the "protection approach", the more generally accepted terminology is the "reliability principle", the "disciplinary principle" and the "protection principle".

THE POSITION IN OTHER JURISDICTIONS

The United States of America

In the U S A, the Fourth Amendment to the Constitution provides that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.....". The provision does not however provide whether evidence obtained by a breach of this Amendment would be excluded. The courts have however, introduced an exclusionary rule of evidence in this area. In 1886 in *Boyd* v *United States,*[71] the Supreme Court held that when any seizure of papers or things was "unreasonable" under the Fourth Amendment, they could not be received by any Federal Court in evidence against the person from whom they were seized. This was confirmed in 1914, in *Weeks* v *United States,*[72] the Supreme Court explaining that if such evidence could be used, "the protection of the Fourth Amendment ..... (would be) of no value and ..... might as well be striken from the Constitution".[73] In 1949, however, in *Wolf* v *Colorado*[74] the Supreme Court refused to hold that the exclusionary doctrine by which the Federal Courts were bound also applied to the State Courts. The reason for this, the Court held, was that the States were entitled to rely on other effective means of enforcing the Fourth Amendment if they wished and that many of the States did not in fact operate the exclusionary rule. A little over ten years later, however, the Wolf case was overruled in *Mapp* v *Ohio.*[75] This time, the Supreme Court extended the exclusionary rule to State Courts, the reason being that experience had shown that alternative methods used to enforce the Amendment were ineffective and most of the States had by then adopted the exclusionary rule. Learned writers[76] have noted that this development does not seem to be the last we will hear of the exclusionary rule and future developments are likely.

Two points can be made of the position in the United States. First, it must be pointed out that evidence is excluded under an exclusionary rule. This means that, unlike in England, where the evidence first has been found admissible and then excluded in exercise of the discretion, the evidence is actually held to be inadmissible and there is no question of the judge exercising a discretion – he must exclude the evidence if it had been obtained in violation of the Amendment. The second point is that the American position reflects the "protection approach" discussed above – citizens' rights under the Fourth Amendment are protected against violation by law enforcement officers.

Canada

The modern position in Canada is diametrically opposite to the American approach. In *R* v *Wray,*[77] a majority[78] of the Supreme Court of Canada held that evidence can only be said to operate unfairly against an accused and be excluded in exercise of the judge's discretion if it is (a) gravely prejudicial to the accused, (b) of tenuous admissibility and (c) of trifling probative force in relation to the main issue before the court.[79] This decision was arrived at after a review of the English authorities and the formula was derived from criteria laid down in the opinion of Lord du Parcq in *Noor Mohamed* v *R.*[80] Further, Martland J distinguished "between unfairness in the method of obtaining evidence, and unfairness in the actual trial of the accused by reason of its admission".[81] The discretion was said to be relevant only in the latter situation. This, of course, was the distinction drawn by Weinberg[82] and implicitly by their Lordships in *R* v *Sang.*[83] However, unlike Weinberg and their Lordships, Martland J (and the majority in *R* v *Wray*) did not lay down criteria in which the discretion was to be exercised in the former case of unfairness in the obtaining of evidence and seemed actually to deny the existence of any discretion in such circumstances. The Canadian position then seems to be a strict application of the "forensic process approach".

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71 116 US 616 (1886).
72 232 US 383 (1914).
73 Ibid at 393, per Day J.
74 338 US 25 (1949).
75 367 US 643 (1961).
76 PV Baker, Case Note On *King* v *R,* (1968 3 WLR 391), (1969) 85 LQR 157, 158-9; Heydon, Illegally Obtained Evidence, 1973 Crim LR 603, 610.
77 (1970) 11 DLR (3d) 673.
78 Martland, Fauteux, Abbott, Judon, Ritchie, Pigeon JJ.
79 Per Martland J, op cit at 690.
80 op cit.
81 op cit at 691.
82 op cit and see 59-60.
83 op cit.

Scotland

The juristic basis of the law relating to exclusion of improperly obtained evidence in Scotland was laid down in *Lawrie* v *Muir*[84] where the Lord Justice General, Lord Cooper, said,

> "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts of law on any merely formal or technical ground. Neither of these can be insisted upon to the uttermost. The protection of the citizen is primarily protection of the innocent citizen against the unwarranted, wrongful and perhaps high-handed interference; and the common sanction is an action in damages. The protection is not intended as protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interests of the State cannot be magnified to the point of causing the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular means."[85]

As can easily be seen, this approach incorporates all three views of a court's functions – the protection of the citizen points to the "protection approach"; the "forensic process approach" comes out in the proof of crimes and the consequential conviction of criminals in the interests of the State; and the "disciplinary approach" appears in the deterrance of law enforcement officers from proceeding by irregular means.

All these approaches are applied at the admissibility stage where a number of factors are considered to determine if the interests of the citizen ought to take precedence over the interests of the State so that evidence will be held to be inadmissible. These factors, listed below, grew up step by step, case by case:[86]

(a) Did the irregularity occur as a vital part of a deliberate attempt to get the evidence or did it happen accidentally? – *H M Advocate* v *Turnbull*[87]
(b) How serious was the illegality? – *People* v *O'Brien*[88]
(c) Were there circumstances of emergency or urgency? – *H M Advocate* v *Hepper*,[89] *Hay* v *H M Advocate*;[90] *Bell* v *Hogg*,[91] *McGovern* v *H M Advocate*[92]
(d) Were those responsible for the illegal conduct public officials or mere private individuals? – *Lawrie* v *Muir*[93]
(e) Were there special procedures prescribed in detail which had to be followed? – *Lawrie* v *Muir*
(f) How easy would it have been to obey the law? – *McGovern* v *H M Advocate; Fairley* v *Wardens of the City of London Fishmongers*[94]
(g) The seriousness of the offence being inquired into. – *People* v *O'Brien*
(h) How important were the particular means used in the detection of the type of crime committed? – *Hopes* v *H M Advocate*[95]

Australia

The Scottish approach has been adopted in Australia recently by the High Court of Australia in *Bunning* v *Cross*[96] which confirmed *R* v *Ireland.*[97] Stephen and Aickin JJ, delivering the majority judgment, noted that the law in Australia had deviated from the English position. They noted that

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84 1950 SLT 37.
85 Ibid at 41.
86 For a more comprehensive study of the Scottish position, see Heydon, Illegally Obtained Evidence, op cit; G Williams, Evidence Obtained By Illegal Means, [1955] Crim LR 339; 347-9.
87 1951 SLT 409.
88 [1965] IR 142.
89 1958 JC 39.
90 1968 SLT 334.
91 1967 SLT 290.
92 1950 SLT 133.
93 op cit.
94 1951 SLT 54.
95 1960 JC 104.
96 (1978) 19 ALR 641.
97 (1970) 126 CLR 321.

the objects of exercising the discretion were different in the two jurisdictions. Whilst in England, it was to ensure fairness to the accused (they were of course speaking before the House of Lords' decision in *R* v *Sang*[98] so the "fairness" criterion was still prevalent), in Australia it was "to resolve the apparent conflict between the desirable goal of bringing to conviction the wrong-doer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law".[99] The discretion in Australia, they noted, "is ..... concerned with the broad questions of high policy, unfairness to the accused being only one factor which, if present, will play in the whole process of consideration".[1] They emphasised that the discretion only applies "when the evidence is the product of unfair or unlawful conduct on the part of the authorities"[2] as it was aimed at protecting "society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right of immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired".[3] They then went on to list a number of factors – similar to those adopted in Scotland – which must be considered in exercising the discretion.

The point to be made here is that whilst the Australian High Court adopts an approach very much similar to that in Scotland, there is a difference in emphasis in its view of the function of the discretion. Whilst the Scottish courts seem to consider the "protection, disciplinary and forensic process" approaches, the Australian High Court in *Bunning* v *Cross*[4] comes down very heavily in favour of the "protection approach".

THE POSITION IN HONG KONG

In Hong Kong, the only authorities on the point are two unreported decisions of the Court of Appeal in *Cheung Kwan-sang and Wong Kam-ming* v *R*[5] and *Chan Muk-ching* v *R*.[6] In the former case, a majority of the Court of Appeal[7] citing *R* v *Wray*[8] limited the scope of the discretion to where the prejudicial effect of the evidence outweighed the probative value of such and rejected the wider formulation of the discretion based on unfairness to the accused. Huggins J was clearly moved by the uncertainty a discretion based on "fairness" would import into the law. "Lord Chancellors," he said, "are not the only judges who do not necessarily all wear the same size of shoe".

In *Chan Muk-ching* v *R*, however, a differently constituted Court of Appeal decided in favour of a wide formulation of the discretion. Huggins J A maintained the view he held in *Cheung Kwan-sang and Wong Kam-ming* v *R*, saying that *Jeffrey* v *Black*,[9] which was not available at the time *Cheung Kwan-sang & Wong Kam-ming* was decided, did not very much affect his view. Further, as a matter of principle, he said that the court ought not to allow "misuse of the law of evidence to punish the police for conduct for which the law has provided other ample remedies". In so saying, he was clearly rejecting the "disciplinary approach" but it is unclear whether in addition to the "forensic process" approach, he was willing to adopt the "protection approach".

Pickering J A in a long judgment reviewed the authorities for and against the wide formulation of the discretion as well as the principles involved, and concluded that,

> "there exists a general discretion to exclude admissible evidence in circumstances in which it appears to the court that it would be unfair or oppressive to admit the evidence."

From the point of view of authority, the learned judge cited and quoted extensively from English,[10] Irish,[11] Scottish[12] and Australian[13] cases and said

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98 op cit.
99 op cit.
1 ibid.
2 ibid.
3 ibid.
4 op cit.
5 1976 Criminal Appeal No 1049.
6 1977 Criminal Appeal No 444.
7 Huggins J; Briggs CJ; McMullin J dissented.
8 op cit.
9 op cit.
10 *Noor Mohamed* v *R*, op cit; *Kuruma* v *R*, op cit; *Callis* v *Gunn*, op cit; *R* v *Court*, op cit; *R* v *Payne*, op cit; *Rumping* v *DPP* (1962) Cr App R 397; *Myers* v *DPP*, op cit; *King* v *R*, op cit; *Jeffrey* v *Black*, op cit.
11 *R* v *Murphy*, op cit.
12 *HM Advocate* v *Turnbull*, op cit; *Lawrie* v *Muir*, op cit.
13 *R* v *Ireland*, op cit; *R* v *Demicoli*, [1971] Qd R 358.

that

> "(t)here (was) thus a not inconsiderable body of authority at different levels and various jurisdictions"

which supported his view. Like their Lordships in *R* v *Sang,*[14] the conclusion he arrived at depended very much upon his interpretation of *Kuruma* v *R*[15] which he said restated and expanded[16] the scope of the discretion stated in *Noor Mohamed* v *R*[17] and *Harris* v *D P P.*[18] The reference to these cases in the much cited dictum of Lord Goddard C J[19] was in his view, "by way of illustration only". His interpretation of *Kuruma* v *R*[20] hence differed from that of the "majority" in *R* v *Sang.* After discussing the cases supporting his view, the learned judge expressed his disagreement with and criticisms of *Cheung Kwan-sang & Wong Kam-ming* v *R*; *R* v *Sigmund, Howe, Defenda & Curry*[21] and *R* v *Wray*[22] which supported the narrower view of the discretion.

The learned judge accepted that from the point of view of principle, the court is primarily concerned to ensure that an accused person is convicted only upon relevant evidence "but felt that it cannot, in a grave case, shut its eyes to the manner in which that evidence was obtained". In a most illuminating passage, he said,

> "The administration of justice, of which a fair trial is but one very important facet, should burn like a pure flame but that flame does not come into existence at the door of the courtroom in an act of spontaneous combustion. It had, or should have had, its existence..... throughout the enquiry which led to the courtroom and if during that enquiry it was quenched by heavious on the part of the enquirers so excessive that it ought not in consequence to be relied upon by the Crown, that excess is not necessarily cured by the fact that the flame is rekindled in the courtroom in the sense that nothing actively oppressive occurs within its walls."

The court's function then, in his view, is not limited to ensuring a fair trial but extends to the wider question of the administration of justice. Furthermore, "a trial is (not) necessarily a fair trial solely because nothing untoward happens in the courtroom".

McMullin J took a similar view of the discretion which he felt was supported by *Jeffrey* v *Black.*[23] He also agreed that the primary function of the court was to "see that an accused person is convicted only upon relevant and admissible evidence" but denied that the court "can be wholly unconcerned with the methods employed by the officers of the executive." "It might be a dangerous casuistry" in the learned judge's view, "to make a sharp distinction between the executive and judicial functions when it comes to the issue of justice." Therefore, in extreme cases, the court must exercise its "declaratory moral function in order to keep the wells of justice sweet" by excluding evidence in exercise of its discretion. Furthermore, to say that an accused had a fair trial" "simply because the court had fairly applied its own rules" would be a "hollow claim" as "a trial cannot begin to be fair where citizens' rights are grossly disregarded".

The majority decision in *Chan Muk-ching* v *R,*[24] it is submitted, must not be taken to be the final word on the discretion. It is opined that the position in Hong Kong remains unclear. What is clear, however, is that it would be a futile exercise to try to lay down the scope by reference to authority because as can be seen from the above discussion, the authorities have been variously discussed, cited, approved, disapproved and interpreted. The best approach to the problem is from the point of view of principle and good sense which may be gleaned from the views of jurists and academics and from the experience of the workings of the various forms of the discretion in different jurisdictions. With this in mind, we can now attempt at an appraisal of the discretion.

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14 op cit.
15 op cit.
16 "In my view, *Kuruma* went, and was intended to go considerably further than *Noor Mohamed.*"
17 op cit.
18 op cit.
19 See 50 above.
20 op cit.
21 1968 1 CCC 92.
22 op cit.
23 op cit.
24 op cit.

APPRAISAL

The English Approach

The most obvious comment that can be made of the English approach is that it is quite unclear what the English approach is after *R* v *Sang*. What we have is the two-point answer is *R* v *Sang* with which their Lordships did not[25] themselves agree and the different approaches taken by their Lordships. What we may therefore do is to look at and comment upon the majority and minority approaches and their underlying principles.

The majority approach has the clear merit of certainty whilst maintaining a degree of flexibility. Their Lordships laid down clearly the principles which have to be safeguarded without unduly limiting how these principles were to be applied. "It avoids the mushiness and unpredictability of a general doctrine of exclusion for "unfairness"."[26] Moreover, there is much to be said in principle for the narrow view of the judge's role and the "forensic process" approach on which the majority's formulation of the discretion depended. The approach is supported by both Wigmore[27] and Andrews.[28] Both learned writers argued that it is most proper and desirable for there to be a clear separation of functions between the criminal court and the disciplinary tribunals whose function it is to control law enforcement officers. There are, as Lord Diplock pointed out,[29] other methods of controlling these officers such as civil actions in damages, internal disciplinary proceedings or expressions of disapproval from the court. Further, it is pointed out that if the court is involved in looking at improper police methods and disciplining such, this might confuse the trial, the main function of which is to determine whether a charge of crime is proved. Besides, the argument continues, the mere fact of impropriety in obtaining evidence does not prevent the court from reaching a fair and impartial judgment.

Against this, it may be argued that this is too narrow a view to take. The alternative means of controlling improper police methods mentioned by Lord Diplock are illusory for a variety of reasons. A civil action may never be taken because of lack of resources, fear of victimisation, ignorance of the law and such similar factors. Even if suits are taken, often the individual officers are immunised from liability as any damages which will be awarded against them will be paid out of police funds. The prospect of police prosecutions and internal disciplinary proceedings are even less realistic. The police will surely take a much more sympathetic view of practices which they accept as routine. Furthermore, it is unlikely that the police will fear criticism from the bench. As Holmes J once said, "I can attach no importance to protestations of disapproval (of improper police methods)..... if it (the court) knowingly accepts and pays, and announces that in future it will pay, for the fruits." Acceptance of improperly obtained evidence will, it is also argued, amount to judicial acceptance and condonation of improper methods.[30] Against this, it is argued that acceptance of the evidence is not condonation – merely acceptance that the court is not the proper tribunal to deal with such matters.

The minority view, insofar as it continues to be based on the vague concept of "fairness" is open to the objection that there is a distinct lack of clarity. Such a wide discretion is whimsical and dependant on the individual idiosyncrasies of a judge. Further, there is the danger that such a wide discretion may allow the judge to exercise it as according to whether he thinks the accused is guilty of the crime charged.

Two criticisms can also be made of some of the observations of the minority judges. Lord Salmon's view that "the decision as to whether evidence may be excluded depends entirely upon the particular facts of each case and the circumstances surrounding it"[31] is open to the criticism that the facts must be applied to principles and a discretion based solely on

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25 With the apparent exception of Lord Fraser.

26 Heydon, Entrapment and Unfairly Obtained Evidence In The House of Lords, op cit.

27 Wigmore, Treatise on Evidence, (3rd ed 1940), paras 2183-2184.

28 JA Andrews, Involuntary Confessions & Illegally Obtained Evidence [1963] Crim LR 15, 77.

29 See 58 above.

30 Judge Downey, writing before his call to the Bench, said that this could be avoided if the judge, whilst accepting the evidence states that his hands are tied by the rules of law to admit the evidence but that he thoroughly disapproves of the practice.
Judicial Discretion And The Fruit of The Poisoned Tree (1978) 8 HKLJ 43, 52.

31 op cit at 444.

"fairness" lacks these guiding principles. Lord Fraser also noted[32] that whilst his formulation of the discretion left judges to decide on highly subjective concepts like "unfair", "oppressive" and "morally reprehensible", he did not "think there is any case for anxiety in that" because judges would have, inter alia, the "benefit of the decision in this House fixing certain limits beyond which they should not go".[33] Cold comfort for the judge who has to glean the limits of the discretion from the speeches of their Lordships. Three academic writers commenting on the case took three slightly different views of their Lordships' speeches.[34]

The conclusion to be drawn then is that both the majority and minority approaches are in their own way undesirable. The majority is unnecessarily narrow, taking into account only the "forensic process" approach whilst the minority approach is too vague to be applied.

The American Approach

Research in America[35] has shown that the exclusionary rule has some effect in improving police training in civil liberties matters. However, a contrary view was taken in ***Bivens*** v ***Six Unknown Names Agents***[36] where Burger C J said,

> "some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society – the release of countless guilty criminals ..... But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officers."

The objection taken in this passage – that the rule leads to the release of guilty criminals is one of the main objections to the exclusionary rule. The argument goes that it is wrong that the public at large should suffer (in dangerous criminals being set free for lack of evidence against them) and not the policeman himself. As Wigmore caustically said[37]

> "our way of upholding the Constitution is not to strike at the man who breaks it but to let off somebody else who broke something else."

The counter argument is that it is wrong to emphasize only the fact that the guilty may profit, because the exclusionary rule has the effect of deterring improper police methods so that innocent citizens' constitutional rights are better safe-guarded. Another criticism of the American approach is that it is too extreme. An unconscious or trivial illegality would bring the rule into operation. This, it is submitted, is a natural corollary of the heavy emphasis placed upon the "protection approach". The rule is not concerned with the "disciplinary approach" so that the nature and circumstances of the illegality cease to be relevant. Only the fact that the individual's right have been infringed is relevant.

It is submitted that the above discussion shows that the American approach is far from satisfactory. Too much emphasis is placed on the "protection approach". If in the United States, with its clear written Constitution, the rule causes difficulties, it is submitted that these difficulties would be magnified in Hong Kong where there is no written constitution.

The Canadian Approach

As we have already seen the Canadian approach takes too narrow a view of the discretion and seems to completely deny the existence of a discretion in the area of improperly obtained evidence with which we are concerned. We may therefore conclude that the Canadian approach will not assist us.

The Scottish And Australian Approaches

Our discussion above shows that the Scottish and Australian approaches are very similar. The only difference seems to lie in the emphasis on the basis of the discretion. The Scottish approach, as we have seen, takes all three bases whilst the Australian

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32 op cit at 450.
33 ibid.
34 Heydon, Entrapment And Unfairly Obtained Evidence In The House Of Lords, op cit; GF Orchard, Unfairly Obtained Evidence & Entrapment op cit; DK Allen, Entrapment & Exclusion Of Evidence, (1980) 43 MLR 450.
35 DH Oaks, Studying The Exclusionary Rule In Search And Seizure, (1970) 37 U of Chi LR 665.
36 403 US 388, 416.
37 Wigmore, op cit, at para 2184.

approach seems to stress very much the "protection approach". Insofar as it does, it is submitted that the Scottish approach is preferrable as being more rounded and not biased towards one consideration only. Like the Australian approach, it has the further attraction that there are certain clear-cut factors which may be considered. These give the added advantage of clarity and flexibility.

The Scottish approach therefore has everything to commend it. In fact, the preponderance of academic opinion favours this approach to all other approaches.[38] Given the clash of authority in Hong Kong and the lack of clarity from our usual guiding light – the House of Lords (which, as was pointed out in *deLasala* v *deLasala*[39] shares the same membership as the Privy Council) it is submitted that the Scottish approach ought to be adopted here. Failing this, the majority approach in *R* v *Sang*[40] is to be preferred.

ADDENDUM

In the case of *Ip Chi-kan* v *R*,[41] only Leonard JA delivered a written judgment. The facts of the case need not be stated here. In a very short two page judgment, the learned judge held that, contrary to the finding of the trial judge, the appellant had in fact been incited into the commission of the offence charged by an agent provocateur. In consequence, he allowed the appeal against sentence, reducing the original sentence of nine months imprisonment and a $200,000 fine to one of four months imprisonment only.

This decision confirms, of course, that entrapment is a ground for mitigation of sentence. As this was only an appeal against sentence, there was no necessity of considering other issues related to entrapment. However, one passage in the judgment merits comment. The learned judge said,

> "We are driven to the conclusion that the actions of the complainant amounted in fact and in law to an invitation by the complainant to the appellant to commit a crime. We cannot condemn such behaviour too strongly. It is quite wrong to endeavour to persuade another to commit a crime unless that other has given a clear indication of his willingness to do so if the opportunity is offered. There was nothing of that kind in this case."

It is clear that what the learned judge was saying was that if someone shows an inclination towards the commission of an offence, there is nothing wrong in enticing him towards its commission. It is submitted that this is wrong. Such enticement falls clearly within the definition of entrapment and has been expressly disapproved by the Full Court in *R* v *Woo Sum*.[42]

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38 The Australian Law Commission recommended the adoption of the approach in its Report No 2, Crilinal Investigation, (1975), para 287-98 as did the New South Wales Law Reform Commission Working Paper: Illegality And Improperly Obtained Evidence (1970).

39 Op cit.

40 Op cit.

41 Criminal Appeal 723 of 1981.

42 [1968] HKLR.

THE DOCTRINE OF PRECEDENT AND THE HONG KONG COURT OF APPEAL

by Andrew Kui-nung Cheung

INTRODUCTION

The doctrine of precedent is sometimes described in the Latin phrase of "stare decisis". In short, this phrase denotes the general idea of keeping to what has been decided previously. [1] The doctrine springs into three "rules of precedent" as conveniently expressed by Professor R Cross as follows:[2]

1. all courts must consider the relevant case-law;
2. lower courts must follow the decisions of courts above them in the hierarchy; and
3. appellate courts are generally bound by their own decisions.

The Hong Kong Court of Appeal is a recent creature of the legislature,[3] its predecessor being the Full Court which has its history back to 1912.[4] The present court exercises both civil and criminal jurisdiction and though occasionally cases may be brought up to the Privy Council in London, the local court is in most cases the de facto last appellate court in our legal system. Perhaps in some sense it is still true that the present court is a mere continuation of the old Full Court, yet it is inadequate to say that all the practice and procedure of the old Full Court is inherited by the present court. So while previous case law on these matters are clearly relevant, it does not necessarily represent the present court's position.

In the recent case of *Ng Yuen-shiu* v. *Attorney General*[5] concerning the principles of natural justice with respect to aliens, the Court of Appeal expressly departs from a previous Full Court decision in the area of stare decisis[6]:

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1 Cross, *Precedent in English Law* (1977), 4.

2 'The House of Lords and the Rules of Precedent" in *Law, Morality and Society* (1977), PMS Haker and J Raz(ed), 145.

3 *Supreme Court Ordinance* (cap 4, LHK 1975 ed).

4 The Full Court was set up by the now repealed *Full Court Ordinance* (cap 2, LHK 1971 ed) in that year. Before then, one could appeal from one judge to two (so long as there were two judges available).

5 [1981] HKLR 352.

6 Ibid, 370.

> "The position, both as to authority and as to the present constitution of the appellate court in Hong Kong has altered very considerably since the decision in *Dataprep* [1974] H K L R 383.[7] ..... the time has come when we should, in civil matters, consider that we are bound by our own previous decisions on points of law subject to the three exceptions[8] stated in *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] LRKB 718."

The new rule so propounded is in conformity with the third rule of precedent as mentioned above. The decision is surely a policy one. The pros and cons of the new rule are very much in dispute.[9] Usually it boils down to the battle between certainty and flexibility. However, policy may change from time to time. A rule which is apt for one period of time may prove unworkable in another. Changes are inevitable. Yet people seem to have accepted that changes in rules of precedent can be effected by pronouncements such as that in *Ng Yuen-shiu.* On the other hand, modern analytical jurisprudence has revealed that the process of changing a rule of precedent is much more complicated (at least in strict theory) than it is traditionally conceived. This is largely due to the somewhat mysterious nature of the precedent rules, and those related concepts such as ratio decidendi, and rules of recognition etc.

The object of this paper is a limited one. Instead of drilling into the ever-fluctuating policy arguments, it is intended that an analysis be made of the nature of the precedent rules, in order to discover what legally valid ways are open to the present legal structure to change any rules of precedent. In other words, this paper hopes to provide some theoretical basis and guidelines for those who feel the need to effect any change in existing precedent rules, after concluding that policy has once again shifted from one rule to another. Policy varies very often, but the nature of these rules remains more or less the same. This paper will concentrate mainly on the third rule of precedent, though the three rules are to a great extent interrelated.

THE MEANING OF THE THIRD RULE OF PRECEDENT

As a general statement, it is unsatisfactory to assert merely that the Hong Kong Court of Appeal (as an appellate court) is bound by its own previous decisions. What one really means is that the Hong Kong Court of Appeal, subject to a number of defined exceptions, is bound to follow the rationes decidendi of its previous decisions, of facts which cannot be distinguished reasonably from the instant case, and which have not been overruled or abrogated by the legislature.

The term "ratio decidendi", together with its counter-part "obiter dictum", have been the subject of an enormous volume of legal literature.[10] Various attempts have been made to define these two terms but so far no single definition is totally satisfactory. Cross suggests that[11]

> "the ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."

But Dr A L Goodhart asserts that the ratio decidendi of a case is to be found by adding the facts which the judge treated as material to the conclusion he drew.[12] In between these two well-known definitions, there are numerous suggestions. So Mr A W B Simpson thinks that the word "sufficient" should replace "necessary" in Cross's definition.[13] The American Realists even maintain that the ratio-obiter distinction is merely a device employed by a

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7 Huggins and Pickering JJ laid down the rule for the Full Court that it was not bound by its own previous decisions if they were manifestly incorrect.

8 The three exceptions are:
1. where there are two conflicting decisions of its own;
2. where the previous decision of its own cannot stand with a House of Lords decision; and
3. where the previous decision is reached per incuriam.

9 See for example Rickett, "Precedent in the Court of Appeal" (1980) 43 MLR 136, 148-158.

10 See for example Cross, op cit; Goodhart, "Determining the Ratio Decidendi of a Case" in *Essays in Jurisprudence and the Common Law* (1931); J Stone, "The Ratio of the Ratio Decidendi" (1959) 22 MLR 597.

11 Supra, at n 1, 76.

12 Op cit.

13 *Oxford Essays in Jurisprudence* (First Series) (1961). AG Guest (ed.), 148, 164.

subsequent court at its liberty to either follow or disregard any previous decision.[14] No matter the merits of these controversial definitions, it is hardly fruitful to go deeper into the controversy for the purpose of this paper.

However, one significant thing emerges. Given the great variety of definitions available, there are actually many leeways through which judges can avoid unfavourable precedents without violating the precedent rules. By employing a suitable definition, most supposed "precedents" can be regarded as not governing the factual situation of a subsequent case. As Professor J Stone rightly demonstrates, the acceptable definition of ratio decidendi is very narrow, after taking into account and reconciling various judicial opinions expressed in the past about the term.[15] So actually one is dealing with a very small group of situations where, notwithstanding the number of leeways available, the subsequent court still fails to "distinguish" a binding precedent. But the situation should not be exaggerated. Most judges in practice tend to stick to one definition or another and consider the intentional exploitation of the uncertainty of definition a professional dishonesty.[16] Thus Professor H L A Hart wrote,[17]

> "there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt. The headnote is usually correct enough. ..... there is no authoritative or uniquely correct formulation of any rule to be extracted from cases ..... [but] there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate."

Therefore, in practice as in theory, a study on the precedent rules is still essential and meaningful.

The word "binding" connotes "an obligation to distinguish or follow a previous case".[18] Distinguishing, in short, is a process by which a subsequent court refuses to follow the ratio decidendi of a previous case by pointing to one or more material difference(s) between the two cases: "material" in the sense that it is justifiable by "morality, justice, social policy or commonsense which is external to the law".[19] If a previous case is clearly different from the subsequent case, there is no need to expressly distinguish it at all, for there will be too many obvious material differences between them. Only if the previous case is reasonably similar to the subsequent case need a judge fulfil his obligation to distinguish or follow. If it is indistinguishable, the precedent rule obliges (binds) the judge to follow the previous case i.e. to decide the instant case according to the ratio decidendi of the previous case.

NATURE OF THE PRECEDENT RULES

An analysis of the nature of the rules of precedent is essential in that it gives an insight as to what kind of "rules" one is talking about; how rigidly one is supposed to adhere to the rules; and what kind of sanction will result in breaking them; and perhaps most important of all (for the present purpose) what measures are required to alter them if such need is indeed felt.

It is convenient to re-state at this point several assumptions one has made before discussing the nature of the rules. First of all, the present writer has assumed that the classification by Cross of precedent into the three rules mentioned above is generally accurate, which there seems no reason to doubt.[20] Secondly, it is assumed that the meanings of such phrases as "ratio decidendi", "obiter dictum", "distinguishing" are more or less certain; and that given a certain previous case, one can tell quite definitely what the ratio decidendi and obiter dicta are, or whether it is distinguishable from a subsequent case. Thirdly, it is assumed that the concept of precedent is universally the same throughout the common law jurisdictions, so that despite the inevitable differences in the structure of courts between them, what is true in the United Kingdom about the nature of the precedent rules is equally true in Hong Kong.

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14 For a brief account, see Cross, supra, at n 1, 50-53.

15 "On the Liberation of Appellate Judges-How Not to do it!" (1972) 35 MLR 449, 469-473.

16 Consequently, one very often finds statements of "judicial regrets" in the law reports: see Cross, supra, at n 1, 35-37.

17 *The Concept of Law* (1961), 131.

18 *Simpson*, op cit 150.

19 Ibid, 175.

20 This classification is also adopted by Rickett, op cit.

A discussion of the nature of precedent rules usually considers whether these rules are rules of law or rules of practice. However, it has been pointed out that these two categories are by no means mutually exclusive. In between, there is a gradation of rules which are more than mere practice yet lack the status of legal rules. Nevertheless, it is still fruitful to deal with the traditional categories first, before one is more equipped to discuss the third one which is the most promising category.

Rules of Law

The orthodox view is that rules of precedent are simply ordinary rules of law. However, to assert such rules as law, one must usually be able to point to a particular source of law from which the rules derive their authority.

It is clear that precedent rules do not derive their authority as law (anyway) from any piece of legislation. The Judicature Acts, 1873–1875 do not mention the rules of precedent at all. Nor does the local Supreme Court Ordinance (1975) contain any reference to such rules. Actually, these rules have already appeared in history years before these enactments.[21]

Another possible source of law is common law which is taken to mean judge-made law: the orthodox meaning of which is that it comprises the rationes decidendi of all the previous cases of the relevant jurisdiction, which have not been subsequently abrogated by the legislature or overruled by competent courts. The view that precedent rules are ordinary common law has been widely held after the decisive pronouncement by Lord Halsbury in *London Tramways* v. *London City Council*[22] that the House of Lords was bound by its own previous decisions. It has been taken as authority for the saying that the House of Lords is so bound. Similarly, the 1944 Court of Appeal case *Young* v. *Bristol Aeroplane Co.*[23] is generally considered as laying down a rule of law that the Court of Appeal is bound by its own previous decisions subject to three defined exceptions. As Lord Simon of Glaisdale strongly put[24],

> "It is clear law that the Court of Appeal is bound by ..... a previous decision of the Court of Appeal itself. Any change in this respect would require legislation."

This view has its attraction in that it explains the coercive force felt by most lawyers of the precedent rules, yet it presents an almost insurmountable problem of its origin.

The objection to this view is based on the orthodox understanding of the ratio-obiter distinction. No matter which definition one adopts, the very nature of the ratio decidendi makes it extremely rare (if indeed possible) to have rules of precedent as the ratio of a case.[25] For almost always when one invokes the precedent rules, one is not invoking the rules to decide the particular case, but rather using them as a justification for the court to invoke a certain rule of law of a previous case to decide the instant case. So it is the rule of law of the previous case which qualifies as the ratio decidendi, rather than the precedent rules themselves.

Nevertheless, as suggested by Mr CEF Rickett, it is at least in theory possible to imagine a situation in which the rules of precedent can become the ratio of a case: a person might be conceded locus standi to apply to the court for a decision on the point of rules of precedent alone.[26] No matter whether such ruling can properly be called ratio or not, one thing is certain: so far as the relevant cases are concerned, there has never been any case in which statements on precedent rules can qualify as a ratio decidendi on the traditional understanding of the term.

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21 The precedent doctrine was already fairly firmly established in the 1850s and 1860s, particularly in a series of judgments by Lord Campell: *Bright* v *Hutton* [1852] 3 HLC 341; *AG* v *Dean and Canons of Windsor* [1860] 8 HLC 369; *Boannish* v *Boannish* [1861] 9 HLC 274.

22 [1898] AC 375, 380.

23 [1944] KB 718, 725-726 (per Lord Greene MR).

24 *Miliangos* v *George Frank (Textiles) Ltd.* [1976] AC 443, 470-471.

25 Cross explains that the precedent rules "are always in the same form, ... in no way dependent on the facts of the case, and ..... can never be solely determinative of the issue of law on which the parties are litigating", supra, at n 2, 154.

26 Op cit, 145; cf *AG of St Christopher, Nevis and Anquilla* v *Reynolds* [1980] AC 637 where the Privy Council expresses the view that "the opinion of their Lordships' Board and of the House of Lords on this question can, however, be only of persuasive authority ..... it cannot be of binding authority because the point can never come before this Board or the House of Lords for decision."

Once this is recognised, two points become apparent. Firstly, one cannot say that the source of legal authority of precedent rules come from judges in deciding cases, for what they say are not rationes, but obiter dicta only, and as such, they fall short of the status of legal rules. Secondly, one cannot cite as authority a previous case where statements about precedent rules are uttered, for saying that a subsequent court is bound to follow such rules, for what is binding on a subsequent court by the basic concept of precedent is the ratio decidendi of a previous case, but not an obiter dictum.[27]

Beside this objection, a general objection based on logic first suggested by Professor Glanville Williams[28] has often been raised against this orthodox view. Williams's view can be explained as follows: if one tries to use a precedent to support a rule of precedent, one is pulling "oneself up by one's own bootstrap". The logical issue in question is whether a subsequent court can rely on a previous court's ruling on a particular precedent rule. This obviously requires a rule which obliges the subsequent court to follow the previous court's ruling. Before the existence of this rule is established, the precedent rule propounded in the previous court is no binding rule on the subsequent court. The fallacy of the orthodox view in citing London Tramways or Young's case as authority is that it treats the precedent rules propounded there as being the rules which oblige the subsequent courts to follow the very cases from which the precedent rules claim their origin. It therefore involves the logical fallacy that it assumes what it seeks to prove. As demonstrated by Dr L Goldstein, any statement of a court saying that all previous decisions of its own are binding on the court itself is necessarily a non-statement. Being a kind of "self-referring product expression", it alone cannot be used as authority for the rule.[29]

It can be seen that the orthodox justification has actually two lines of arguments in relation to the Court of Appeal:

(1) Rules of precedent are rules of law because it is so held in previous Court of Appeal cases (eg Young's case);
(2) Rules of precedent are rules of law because it is so held in the House of Lords[30] (or the Privy Council[31] for Hong Kong).

It should be apparent that, in relation to argument (1), Williams's point is that whether the subsequent court is "bound" to follow a previous Court of Appeal's statement on precedents. He has proved that the binding authority cannot come from the statement itself. What he has not proved is that precedent rules are legal rules, for the legal status (if any) of the statement may derive its authority from other external sources other than from itself.

In relation to argument (2), Williams's objection does not apply. For what one is assuming, is not that the rule as laid down by the court in the higher tier has already exerted its effect, but the existence of another rule that a court in the lower tier is bound by that in the higher tier (ie the second rule of precedent). There is no logical fallacy involved.

As a whole, the objection to the orthodox view that precedent rules are legal rules because of some previous authorities is that they never were rationes decidendi, and therefore they are not law. Moreover, authorities on precedent rules cannot on their own be used to debar a subsequent court of the same tier to alter the rules (Williams's argument[32]).

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27 This is the view of Lord Denning in *Davis* v *Johnson* [1978] All ER 841, 855.

28 *Salmond on Jurisprudence* (11th ed 1957) (ed G Williams) 187-188.

29 "Four Alleged Paradoxes in Legal Reasoning" (1979) 38 CLJ 382-391; cf Hicks, "The Lier Paradox in Legal Reasoning" (1971) 29 CLJ 257; RL Stone, "The Precedents" (1968) 26 CLJ 35.

30 For example, *Davis* v *Johnson* [1978] 1 All ER 1132 (HL).

31 For example, *AG of St Christopher, Nevis and Anquilla* v *Reynolds*, op cit.

32 For an attack on Williams's view based on logic, see RL Stone, "Logic and Law: The Precedence of Precedents" 51 Minn L Rev 655 (1967) where the learned writer was of the opinion that on the calculus view of the law, the *London Tramways* decision is a statement in the logic system itself and not a metastatement about the system, which means that the rule in the decision is a rule of law and that the House of Lords could not have decided otherwise without being paradoxical. Stone's thesis is critically examined by Hicks, op cit, whose view is in turn criticised by Goldstein, op cit. The present writer does not pretend in knowing too much about logic and it seems that the controversy between these logicians is beyond his competence to comment on. But anyway, one is concerned primarily with the legal rather than the logical status of precedent rules.

It is apparent that the whole argument of the ratio-obiter distinction is based on the orthodox meaning of common law, viz., the Positivist insistence that common law consists of rules consciously laid down: common law must come from the ratio decidendi of a case. However, this Austinian assumption has been criticised as "too narrow and incomplete: it fails to recognise the role played by custom in the creation of law".[33] One obvious example is the rules relating to the recognition of statutes, which are clearly part of the common law yet they never were the rationes decidendi of any case. Simpson thus wrote that,[34]

> "the common law consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts".

And Cross maintains that,[35]

> "statements about the rules of precedent are statements about the way in which courts should act with regard to the rationes decidendi of other courts and they fall outside the ratio-obiter distinction".

It is interesting to note that though both of them are eager to deny the ratio-obiter classification as the exhausive description of common law, they arrive at opposite conclusions as to the nature of precedent rules. It is Simpson's view which gives an important contribution to the traditional view of precedent rules as legal rules.

Simpson asserts that the House of Lords has a power to make rulings about the status of its own decisions, whether they are binding on subsequent cases or not. Once the power is exercised, the ruling (though may not be any ratio) has the status of law, until and unless the power is exercised again in the future.[36]

This solves the logical problem concerning the status of any decision propounding a new rule of precedent. The decision itself, though being contrary to the precedent rule prevailing then, is not invalid because it owes its validity and authority to the higher power. Moreover, any subsequent court following this particular decision is in no way trapped in logic, for it is the higher power which obliges the subsequent court to follow the precedent rule propounded in the previous decision, which is a valid exercise of that higher power.[37]

So a case may be binding at one point of time according to the then existing ruling, but not binding at a later point of time according to the later ruling. Of course, the power only effects de futuro changes, so that there is no self-contradiction that "the House, by ruling that its own decisions are not binding, can make it the case that its decisions were not binding at a time when a contrary ruling prevailed".[38]

Simpson justifies his assumption by the factual observations that the rulings made in purported exercise of the power have as a matter of fact[39]

(1) been recognised as obligatory by judges, legal profession, to a limited extent of other members of society; and
(2) there is no substantial body of opinion which denies the obligatory quality of the rules.

As such, Simpson seems to assert that there is in common law (neither ratio decidendi nor mere obiter dictum) a power, presumably legal, to make rulings on precedents which in turn also enjoy the status of law.

However, Simpson's theory is incomplete. It is not known whether this power of making rulings is a privilege of the House of Lords alone, or exists in other courts as well. It is not known what kind of manner and form is required in exercising the power: presumably such rulings need not take the form of rationes decidendi. Most important of all, the justification for the existence of such power is not

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33 See the general discussion by Dr Wesley-Smith in "English Practice and Procedure in Hong Kong" (1979) 9 HKLJ 255, 257-260.
34 *Oxford Essays in Jurisprudence* (Second Series) (1973) (ed Simpson) 77, 94.
35 Supra, at n 2, 154.
36 See generally Simpson, supra, at n 13, 150-155.
37 Simpson, supra, at n 13, 152-155.
38 See PJ Evans, "The Status of Rules of Precedent" (1982) 41 CLJ 162, 173-175; cf Goldstein, op cit 389-390.
39 Supra, at n 13, 155.

wholly satisfactory: the justification by factual observations is question-begging. What one is doing here is to justify the orthodox view that the precedent rules are rules of law by saying that the orthodox view is correct because it is the orthodox view (ie traditionally believed by most lawyers to be correct). It is not uncommon that what everyone believes to be true may turn out to be false.

Moreover, "obligatory" is simply a matter of degree and it is not difficult to employ Simpson's factual observations to justify an argument that the rules so made are all rules of mere practice, which most lawyers would feel obligatory to follow unless there are good reasons not to do so.[40] Perhaps more significantly, there does exist a substantial body of both judicial and academic opinion which denies the obligatory quality of the rules, which will be examined in this paper later.

Simpson's theory is elaborated and developed by Mr PJ Evans. He follows the Simpson approach by postulating as "the relevant part of the rule of recognition, not the rules of precedent themselves, but a rule which either stipulates, or justifies as a particular conclusion, that judges may from time to time settle the rules of precedent".[41] He goes on to explain this particular rule by contending that,[42]

> "the basic commitment in the common law, so far as the use of cases as a source of law is concerned, has never been just to a specific set of rules but has always included, as at least a residual element, a commitment to that solution on novel points as best promotes the common good".

In short, the rule is that "on points of difficulty, we must look to the answer which reason requires, for it is precisely this to which our tradition commits us". So in Evans's theory, "reason" is the higher rule of recognition. Any ruling on precedents which "best promotes the common good" will be a valid rule of precedent having the status of law.

Evans suggests that there is no particular form in making changes in precedent rules, for "there seems no reason why there shall be any restriction". So it can be by a simple majority, or be it in the course of judgment, or be it ratio decidendi or obiter dictum, or any practice statement etc. On the point of which court has the said power, Evans argues that reason suggests rules concerning the Court of Appeal can be made by itself (since it is in best position to judge), or by the House of Lords (as the general supervisor of law).

Yet even if one accepts that there is a higher power in courts to make rulings on precedents, it does not necessarily follow that the rulings so made must be legal. There are many mere practice rules which are supported by very good reasons. Simpson justifies the assertion by the matter-of-fact argument which is not convincing. Evans justifies the argument by a more subtle reasoning. He explains that sometimes a ratio decidendi of a previous case may lack any merits at all, so that if the case is decided again, such rule of law will never be made. Yet because and only because of the rules of precedent, it becomes binding on the courts of a lower or the same tier. The latter courts are bound by the precedent rules to apply the ratio decidendi as law. But there is no reason to doubt that this particular ratio decidendi is just an ordinary rule of law. The conclusion that Evans draws is that since it is solely because of the precedent rules which make the principle contained in the previous case an ordinary rule of law, so the precedent rules themselves must be ordinary rules of law as well.[43]

It is apparent that Evans's argument is based on the premise that the legal effect of the ratio decidendi of a case comes from the fact that it is binding on a later court according to the relevant rule of precadent. It is submitted that this is a misconception. The legal status as a rule of law of the ratio decidendi of a case comes from the fact that it is the ratio decidendi of a case. Once a principle is used to decide a case and

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40 The present writer's view is also shared by A Blackshield in an unpublished paper "'Practical Reason and 'Conventional Wisdom': The House of Lords and Precedent" (1973) which bears the citation ASLP/IVR/56a where the learned writer says that "at the level of 'power or competence' [Simpson] is driven back to rely on 'facts' and professional 'recognition', resorts clearly smacking of 'practice' both. And while this ..... does not preclude an answer in terms of 'law' and not of 'practice', it certainly does nothing to support an answer in terms of 'law'." (at n 61).

41 Op cit, 173.

42 Op cit, 176.

43 Op cit, 165-167.

satisfies the definition of ratio decidendi, the principle is part of the existing law. Whether it binds or not a later court is quite irrelevant.[44]

Evans's reasoning will obviously lead to the situation that the rationes decidendi of all Court of Appeal cases do not represent part of the existing law vis-ā-vis the House of Lords, for none of them is binding on the House. The situation will become more absurd by considering each successive tier of courts, so that the legal system has different sets of common law according to one's position in the hierarchy of courts, with each set of law diminishing in quantity as one climbs up the hierarchy. This is, "as a matter of fact", contrary to most lawyers' conception of what the common law is.[45]

It is submitted that the true picture is that once a case is decided according to a certain principle satisfying the definition of ratio decidendi, it automatically becomes a legal rule. If according to the relevant precedent rule that it binds a certain court, this only means that the court is obliged not to or refrains from (according to whether precedent rules are legal or not) employing a different rule to decide the instant case. If the ratio is not binding, it merely means that the subsequent court is at liberty to employ a contrary rule to decide the case, thus expressly or impliedly overruling the previous case and changing the existing law, or creating a conflict of legal rules at certain point awaiting to be resolved by higher authority. So what precedent rules at most do is to take away a court's liberty to employ a contrary rule and thus introduce the new rule as part of the existing law.

As such, the Simpson-Evans approach fails to prove that precedent rules are legal ones. At best they can maintain that there may be a higher rule of power ("reason") which enables the courts to make rulings on precedents the status of which is uncertain. So though the legal approach is attractive in explaining the coercive force of the rules, it fails to explain the nature of such force.

Mere Practices

The term "practice" is a source of puzzlement whenever it appears in legal theory. Principally, it can have two different meanings:[46]

(1) precepts which are not considered legal; or
(2) precepts which, whether legal or not, are identified by reference to their function.

The practice referred to here is the former one: a certain behavourial regularity which lacks the status of legal rule. It is descriptive of the past and partially prescriptive of the future.[47]

Williams in 1957 first suggested that precedent rules are mere practice rules in the above sense. He came to this conclusion by pointing out the logical difficulties mentioned above in citing any case-law for supporting rules of precedent. He offered as an escape from this dilemma in logic by asserting that the rules of precedent are mere practices. At first sight, "it is difficult to see, employing Williams's own logic, how the binding force of a rule of practice can be based on some earlier practice, any more than the binding force of a rule of precedent can be based on an earlier precedent laying down such a rule".[48] It seems that the vicious circle is independent of the nature of the rule itself.

However, Williams, by suggesting precedent rules are rules of practice, is able to rely on the nature of "practice" to argue that: when citing a previous case, one is not assuming the content of the general

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44 This view is shared by RWM Dias, *Jurisprudence* (1976): "the special characteristic of common law lies in treating precedents in certain circumstances as possessing law quality in themselves and also binding, which means that they have to be followed or else distinguished. Quotability as 'law' applies to the principle of a case, its ratio decidendi, ... Bindingness, on the other hand, depends on the hierarchy of courts ..... The two aspects are independent. A decision of the High Court, for example, is 'law' although it is not binding on any court other than those inferior to itself." (at 162).

45 After all, the ratio-obiter distinction and the authority of a ratio decidendi were established in the 17th Century, long before the doctrine of precedent developed: see Cross, supra, at n 1, 40; *Bole* v *Horton* Vanghan 360, 382.

46 Wesley-Smith, op cit, 256-257.

47 cf Goldstein, op cit, who maintains that practice is a record of historical fact only. He suggests that precedent rules are statements of intention or resolution which, though normally adhered to, are broken when exceptional circumstances so demand. This kind of statements, it is submitted, is in fact the legal meaning of "practice".

48 Lord Lloyd of Hamstead, *Introduction to Jurisprudence* (1979) 827.

practice has already had any effect on the subsequent court; one is only saying that the content is followed for the mere sake of judicial comity. It should be noted that as such, one is not citing the previous case as an authority for the precedent rule concerned, for one will otherwise fall back into the logical trap again. One is only using the previous case to illustrate what the prevailing practice is and then exercises one's liberty to conform to this practice. This way of using authorities should be contrast sharply with the one discussed above.[49]

Though Williams's solution offers an easy escape, it is by no means the only possible escape. The Simpson-Evans approach by-passes the logical problem by saying that if one accepts the existence of a higher power of making precedent rules, authorities can be cited as instances in which the higher power was lawfully exercised in laying down rules of precedent, which claim their validity through the proper exercise of the power in the authorities so cited.[50] This way of escape means that Williams's suggestion does not necessarily prove that precedent rules are mere practices.

Cross also asserts that precedent rules are mere rules of practice. In his theory, statements concerning these rules are neither rationes decidendi nor obiter dicta. As already quoted,[51] they fall short of the ratio-obiter distinction.

It should be noticed that once one contends that precedent rules are mere rules of practice, ie they lack legal force, the ratio-obiter distinction, which troubles so much the orthodox view of legal rules, presents no obstacle. The distinction enables statements on precedent rules to be classified as obiter dicta, which fits exactly with the idea that mere practice rules lack legal force. Yet Cross abandons this distinction. Presumably, he is dissatisfied with the Austinian assumption that common law consists of rationes decidendi only. But incidentally, he weakens the argument of mere practice: for once the distinction is regarded as irrelevant, one is unable to rely on the obvious advantage provided by the distinction by classifying statements on precedent rules as obiter dicta.

Moreover, and perhaps quite unfortunately, Cross simply asserts that precedent rules as practice without making any effort to justify his claim. He does refer to the validity of such rule comes from "the court's inherent power to regulate its practice".[52] But it seems that the "practice" referred to here should bear the second meaning of the word, viz, precepts which, whether legal or not, are identified by reference to their function, as opposed to substantive law. As such, whether the practice is a legal one or not depends on what kind and how the "inherent power" is being exercised. Cross's theory can as well lay down rules of law.[53]

Mr CEF Rickett also talks of precedent rules as rules of practice. But he is talking about some different thing:[54]

> "In terms of Hart's theory of law one cannot ask whether rules [of precedent] are rules of law, since they are ..... parts of the ultimate rule of recognition by which rules of law are recognised. .....To say that [they] are "valid" as part of the rule of recognition can

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49 Supra, 12-13.

50 Supra, 15-16; Simpson, supra, at n 13, 152-155; Evans, op cit, 173-175.

51 Supra, 15.

52 Supra, at n 2, 157.

53 For discussions on the court's "inherent power" to regulate its practice, see Wesley-Smith, op cit, pp 271-276; Blackshield, op cit, Parts II-IV. This latter paper also includes a thorough discussion of treating statements on precedents as laying down "conventions" in the court's power to overrule its previous decisions, which is first suggested by Lord Simon in *R* v *Knuller (Publishing Printing & Promotions) Ltd* [1972] 3 WLR 143, 175. Speaking in relation to the 1966 Practice Statement [1966] 3 All ER 77, Blackshield observed that "neither the interests of individual citizens, nor the 'public good', nor even (to be realistic) the interests of inter-institutional comity" has been served by the new "Practice Statement", which is contrary to the essential characteristics of any constitutional conventions. Moreover, the way in which it is worded makes it impossible to breach the Statement which is again contrary to the idea that "every ..... convention ..... is accompanied by the hope that it will not be infringed. But this very hope presupposes a possibility of infringement". So despite the (rather artificial) acceptance by the executive, judiciary and legislature (so it is argued), Blackshield concluded that this approach has many insolvable doubts. Anyway, since "not all 'practices' are 'conventions', but every 'convention' is a 'practice'", so any argument on precedent rules as conventions must stand and fall together with the argument on practice.

54 Op cit, 144.

> only mean that they exist as particular forms of social practice. ..... They would cease to be valid (and binding) parts of the rule of recognition if judges and other officials ceased to have a generally shared internal attitude of acceptance of them."

In comparison with Evans, Rickett is treating precedent rules as part of the rule of recognition, instead of being the products of a rule of recognition (the higher rule). This theory has its attraction that the authority of precedent rules needs not depend upon the ratio-obiter distinction or any other authority, but simply upon their acceptance as part of the ultimate souce of authority of the legal system.

But as Evans points out, this would lead to the result that rules of precedent cannot be changed ordinarily, for a rule of recognition cannot be so changed easily:[55]

> "As the rule of recognition of a system is the ultimate test of legal validity within the system, if a different rule of recognition is asserted there can be no criterion by virtue of which it is valid. Vis-a-vis the old rule of recognition it must be invalid. Thus any change of a rule of recognition must be revolutionary."

Rickett also recognises his difficulties. Thus he asserts that such revolutionary "change in the 'rules of precedent' will occur very slowly, and it will probably be impossible to pinpoint clearly a single moment of change".[56]

This at first sight seems puzzlying, because it is difficult to see why revolutions cannot occur quickly: they usually do. However, since rules of recognition are by definition generally and internally accepted by the whole legal profession, it must follow that changes in idea towards the acceptance of a particular rule amongst the profession cannot occur simultaneously: some will be more radical or progressive, while others will be relatively conservative. So any change must be gradual until the point is reached that even the most conservative has given up his allegiance to the old rule. To call the process a "revolution" is perhaps misleading: "evolution" may be a more suitable word.

However, Rickett's assertion that changes will occur slowly does not represent the reality. Though here and there one can find some sort of suggestions or another, one can certainly pinpoint London Tramways, Young's case and the 1966 Practice Statement[57] as representing sudden and decisive changes in the precedent rules. They are all generally and internally accepted as valid relatively quickly and without dispute. One would not expect these changes of rules of recognition (if indeed they were) could be effected so abruptly. Of course, the absence of any distinctive opposition does not necessarily mean that the changes are not "revolutionary"; but as a theory put forward to explain certain existing phenomenon, this defect greatly undermines its validity.

As a whole, the mere practice approach has its attraction in that it provides an escape from the logical difficulties, and explains the ease with which a rule of precedent can be changed (especially the validity of the Practice Statement). It also provides a very promising and relative simple way of changing undesirable rules of precedent (except Rickett's theory).

One major criticism of the approach is that if it is mere practice for the House of Lords to follow its own decision, logic requires that all other rules of precedent are mere practices and that it shall be true from the top to the bottom of the hierarchy. "Deny authority to the London Tramways case and we end by losing all authority." And finally the same problem arises with the rule that the courts must accept the law as laid down by Parliament, which if denied, will give rise to a major constitutional crises.[58]

Another failure of this approach is that it cannot explain the coercive force which is so strongly felt by most lawyers of these rules. Perhaps all these defects

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55 Op cit, 172-173.

56 Op cit, 144-145, and the lengthy n 41.

57 [1966] 3 All ER 77.

58 PJ Fitzherald (ed) *Salmond on Jurisprudence* (12th ed 1966) 159-160. This may be a little exaggerated, for a practice does contain an element of prescriptiveness so that one will not end by losing all authority if the practice is indeed followed. However, the practice approach does place the country's constitution on a rather shaky basis.

stem from the failure to recognise that even customary practice can one day turn into law quietly, as J Stone has recognised long ago.

A Hybrid

When one is arguing that the Austinian assumption that law is "posited" is too narrow and therefore leaves out some residual power (be it higher power, inherent power, or "rule of recognition"), yet at the same time insisting on a neat distinction between law and non-law or legal rule and practice, one has already fallen silently back into the trap of the Austinian assumption again. Once the positivist insistence that common law must be the product of judicial decisions as rationes decidendi is denied, one must also concede that there are other paths through which a non-legal rule becomes legal. And in the process of "legalization", these rules may have a characteristic as being a hybrid of legal and non-legal rules.

This kind of argument enables J Stone to account for the change undergone by the ruling on precedent in the London Tramways case:[59]

> "the conduct of their Lordships and the lower courts, the reference to the rule of London Tramways, and the related conduct of other judges and lawyers, which had between 1898 and 1966 given that rule its binding force. The rule which, immediately on its enunciation in 1898, faced the difficulties described by Glanville Williams, might by 1966, by reason of that practice, have become a rule both descriptive of past practice, and also prescriptive of a rule of law binding in the future."

In short, Stone is arguing that when a precedent rule is first laid down, it is only a mere practice rule. But by a process of maturation, the rule may at some point reach the status of legal rule.[60] Meanwhile, it will as suggested by Dr P Wesley-Smith, remain within the "infinite series of gradations, which a large area of overlap, between what is plainly non-legal practice and what is plainly law".[61]

Stone regards the regularities of behaviour conforming to the rules as the criteria that such rules have matured:[62]

> "Such regularities might include a steady manifestation of an opinio necessitaties by lower courts in regard to them, as well as behaviour of superior courts which indicates them by acts of reversal, deference of lower courts to these reversals, and also longstanding acquiescence by the legislature in all of this."

It is also apparent that judicial conformity and deference of reversals and judicial submissions thereto, as well as the acquiescence by legislature, also form the catalyst by which a mere practice is promoted into a legal rule. But the most crucial element in such a process is the feeling by the relevant bodies that the rule is supported by good reason so that it ought to be followed.

This approach explains why precedent rules are generally felt as having legal force for they in fact are legal rules after maturation. So for example, the first and second rules of precedent have no doubt attained the status of law.[63] It also explains the orthodox view that considers the rule in London Tramways has the force of law. Moreover, the ghost of the ratio-obiter distinction is also buried.

Equally important is that the theory solves the logical problem posited by Williams. When a rule is first suggested, it is a mere rule of practice. Following the rule by a subsequent court does not mean more than a matter of judicial comity, rather than assuming the content of the rule to be binding. As the rule is followed more and more frequently and accepted internally and generally, it matures into a rule of law. By then, when one is quoting the first case in which the rule is suggested, one is still not assuming the content of the rule is already binding, but rather that

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59 '1966 and all that! Loosing the chains of Precedent' (1969) 69 Colum L Rev 1162, 1168.

60 This view is shared by JM Eekelaar: "it is not uncommon for comparatively weak normative propositions to gain in strength so that 'practices' are said to 'harden into rules of law' ": 'Principles of Revolutionary Legality' in *Oxford Essays in Jurisprudence* (Second Series) (1973) (ed Simpson); Blackshield, op cit; Wesley-Smith, op cit.

61 Op cit, 260.

62 Supra, at n 59, 1165.

63 Cf Wesley-Smith who treats precedent rules as an example of mere practice, despite the recognition that there is a category of hybrid rules: op cit, 261.

the process of maturation has created a law (which has its origin from the first case so cited) which is binding in the subsequent case. One is bound by the process of maturation of which the first case is a start.

It is of interest to note that the Simpson-Evans approach also talks of people's recognition and good reason. Simpson uses the general recognition by the legal profession of precedent rules as obligatory to justify the existence of a higher order rule, while Evans postulates "reason" as the ultimate rule of recognition of precedent rules. If one combines their concepts with Stone's, it can be realized that all these approaches are actually merely different in degree, if not the same in substance. For what the "process of maturation" is in fact is only a few steps removed from a rule of recognition or any higher order rule. They are all some secondary devices inherited in the common law from which rules of precedent claim their validity. To these devices one can easily add Cross's "inherent power of court". The only vital difference between the present approach with those discussed above is that the latter err in the belief that precedent rules can at one stroke be created and attained (or retained) its nature forever (be it legal or non-legal in nature).

However, there is one major difficulty. In explaining the effect of the Practice Statement, Stone suggests that it has no legal effect at the very date of its pronouncement. Like London Tramways, it will attain its legal status when there is "a degree of conformity to it, and the opinio necessitatis grounding this, became manifest in the behaviour of courts".[64] But if one remembers that Stone has argued that by 1966 the rule in London Tramways has already matured into a legal rule, it is very difficult to imagine the legal validity of those decisions, which purport to follow the Practice Statement, which is still a non-legal rule. If the House of Lords is bound by a legal rule to follow its previous decision, the first House of Lords decision employing the new rule will be in conflict with the existing law and thus wrong. This means that there cannot be any correct decision employing the new practice, and lacking this, the process of maturation simply cannot start working. Stone fails to explain this.

It is submitted that a distinction must be drawn between those rules originated from being rationes decidendi, and those precedent rules originated from mere practices. To alter the former, a rule having legal status is needed. But the latter, it is submitted, can be altered by a mere practice. This needs elaboration.

If one views the latter kind of rules as contained in a spectrum with the two (upper and lower) ends being legal rules and mere practices respectively, there will be rules, not only moving from the bottom upward, but also from the top downward. Just as a mere practice can mature into a legal rule, a legal rule can equally degenerate back down the spectrum.[65] The factors effecting such degeneration are, one believes, the reverse of those promoting maturation. So when a matured rule is first challenged by a contrary rule of practice supported by good reason etc., its status as a legal rule is immediately shaken. The very act of pronouncing the new rule incidentally lowers the previous rule's status. The degree the status is affected depends on the force of the contrary rule, as well as the acceptance it receives. Once it falls short of the status of law, it presents no obstacle for the process of abiding to the new rule and the process of maturation goes on until the point that the new one has taken up the status of law. Meanwhile, both rules remain competing hybrid rules.

The time taken for a change will vary according to the general acceptance of and the rationale behind the rule etc. This accounts for the Practice Statement's legal status itself as well as the somewhat "revolutionary" change it brings about.[66]

As a theory, this approach has the merits of best explaining and solving the difficulties present to the academics by the existing phenomenon, as well as doing least violence to the validity of existing facts. It is suggested that this view best represents the nature of precedent rules.

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64 Supra, at n 59, 1165.

65 It has been suggested that like the growth of a person, once grown up, a person cannot degenerate back to a child again. This analogy is of dubious value. But anyway, the analogy is only true for the physical body. A person's knowledge on a particular subject may degenerate after he has given up learning.

66 For a brief account of the whole incident, see Stone, supra, at n 59, 1162-1163; London Times, July 27, 1966, 10.

FROM THEORY INTO PRACTICE[67]

After the analysis of the nature of precedent rules, one's next task is to determine in what way a change in precedent rules can be effected.

The orthodox view of treating precedent rules as ordinary rules of law requires that a law is needed to alter a law. Thus Lord Simon talks of "change by legislation alone". But the possibility of changing case-law by case-law has also been suggested. So Salmon L.J. speaks of overruling Young's case by a unanimous court;[68] while Lord Denning in calling upon a Full Court to hear *Davis* v. *Johnson*,[69] obviously intends to use a Full Court decision to liberate the Court of Appeal.[70] The chief obstacle of course is the ratio-obiter distinction and the logical difficulty. The most liberal view of Evans suggests that since reason requires, changes can be brought about in any form: ratio, obiter dicta, practice statement, House of Lords or Court of Appeal decisions regarding precedents in the Court of Appeal.[71]

The mere practice approach obviously contemplates the easiest ways to effect changes: nearly all kind of methods whether judicial or extra-judicial, in expressing a court's change of attitude towards a mere practice. Of course, to make an effective change, at least a simple majority of all the members in the court concerned is required.

Since in the hybrid approach a new rule when pronounced is only a mere practice rule, it follows that any method mentioned above in the mere practice approach will suffice as a starting point to effect a final change. For by the nature of mere practice, it is only a descriptive statement of a body or person's future intention, there is no definite restriction on the ways in which one is to express one's intention publicly: provided that it is within the customarily accepted channels.

Practically, it seems that a Practice Statement issued by the Court of Appeal is the most adequate method. First of all, it avoids any injustice done through any restrospective overruling. More important is that, it is a statement by all or at least most of the members of the Court. It at least, in the case of no unanimous consensus, ensures that all members of the Court are informed of the proposed change and the various views expressed and debated before a voting is conducted. Being a majority view of the court, it has the advantage over effecting a change by a three-member court, for the practice pronounced will no doubt obtain a greater degree of support.[72]

However, such is only a beginning. The minority as well as the rest of the legal profession is still at liberty to withstand the change. In order to have an effective change, the status of the new rule must at least be higher than that of the old one in one's imaginary spectrum. Sometimes it will be very difficult to tell, which is what happened to the House of Lords before 1898.[73] Nevertheless, there may eventually come a time when it is generally recognised that a certain rule is the prevailing one. By then, the rule will approach the status of law. But one thing is certain, it is for the judges of the relevant or the highest court to start the change, for they are the only persons who have the (inherent) power to lay down their own rules of practice.[74] The view of the rest of the legal profession only serves to affect the "ups and downs" of the rules in the spectrum.

It may be noted that the Simpson-Evans approach, the mere practice approach and the hybrid approach, whatever their conceptual merits, all

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67 In the laymen's sense of "reality".

68 *Gallie* v *Lee* [1969] 2 Ch 17, 49.

69 Supra, at n 27.

70 Cf *Young's case*, op cit, per Lord Greene: a Full Court has no greater power than an ordinary three-member Court of Appeal.

71 Op cit, 178-179.

72 The 1966 Practice Statement provides an excellent 'precedent'.

73 See Cross's general account: supra, at n 1, 107-109; cf supra, 9, n 21.

74 The present writer here adopts Evans's reasoning, supra, 18, that a court should have inherent power to lay down its own rule of practice because it is in the best position to judge for practices concerning itself, as well as the highest court in the jurisdiction acting as the general supervisor of law (the practice may turn into law) of the legal system concerned. The existence of a secondary order rule/power in courts to lay down their practices is beyond dispute: see the works cited in n 53. Cf supra, 23, where Cross is being criticised, not for his failure to discuss the existence of the "inherent power", but for his failure to discuss the nature of the "practice" so laid down: legal practice, mere practice, or a practice capable of maturing into a legal rule.

converge to the same conclusion that precedent rules can be changed judicially or extra-judicially. Perhaps one may begin to doubt the significance of all these academic debates which, after all, come down to the same practical result, and which is the only single thing which matters to the practitioners in the field!

THE HONG KONG COMPLICATION

So far the theoretical analysis of the nature of precedent rules is under the assumption that the English position is the same as that in Hong Kong. Unfortunately, there is one local provision which tends to complicate matters.

Section 17 of the Supreme Court Ordinance reads as follows:

> "Subject to rules of court, the practice of the practice of the Supreme Court of Judicature in England for the time being in force therein shall be in force in the Supreme Court."

"Rules of court" are those rules made by the Rules Committee under the delegation in section 54 of the same Ordinance. The "practice" here means precepts which, whether legal or not, are identified by reference to their function.

Cons J. in the local case of *Fong Shing Cotton Mills (Hong Kong) Ltd* v. *Chan Hing*[75] decided obiter that the section means that unless there is a contrary rule of court made by the local committee, the English court practice is automatically applicable to Hong Kong. This interpretation, it is submitted, is quite a correct one on the face of the wording of the section.

If so, this creates a difficult problem for our present purpose in Hong Kong. Precedent rules, being rules which relate to the procedure of the courts and the way one goes about the application and enforcement of substantive law, are clearly "practices" within the sense of the section. Moreover, the local Rules Committee has never made any rule on precedent. These two facts mean that the English precedent rules are automatically in force in Hong Kong by the statutory force of s 17. The proper equivalent of the Hong Kong Court of Appeal is the English Court of Appeal.

There seems no problem arising from the first and second rules of precedent. They are generally accepted as valid in both England and Hong Kong. But with the more controversial rule three, there is a serious complication. Under the Application of English Law Ordinance,[76] section 3 enables the local court to modify or reject any English common law if it is unsuitable for local adoption.[77] This exception makes the question whether rule three is a legal rule or not a crucial one, for if the English precedent rule is a legal one, then it can be modified or rejected by the local courts,[78] while if it lacks the status of legal rule, the Application of English Law Ordinance will have no application.[79]

In order to solve the dilemma, the first thing is to ascertain the English Court of Appeal's position in relation to rule three. Young's case is probably the most vital step in laying down a rule three of practice in the English Court of Appeal. It is then generally accepted. Its status rises and approaches the status of law. But after the appointment of Lord Denning as the Master of Rolls and the pronouncement in the 1966 Practice Statement, the one man (or more) "crusade" headed by his Lordship turns vigorous in liberating the Court of Appeal from rule three.[80] This whole series of cases, reaching its climax in 1978 with the Full Court of Appeal in *Davis* v. *Johnson*, though more than once condemned by the House of Lords especially in the last one,[81] does go a long way in undermining the status of rule three in the spectrum. So it may be suggested that as long as the debate continue, rule three in relation to Court of Appeal is still in the status of a hybrid rule and lacks the force of a rule of common law.[82]

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75 (1976) H Ct, MP No 566 of 1976.

76 Cap 88, LHK, 1971 ed.

77 ie the adoption will cause injustice or oppression: *Wong Yu-shi (No. 2)* v *Wong Ying-kuen* [1957] HKLR 420, 443.

78 This is based on the assumption that the Application of English Law Ordinance is the governing Ordinance.

79 For a full discussion of the implication of s 17 see Wesley-Smith, op cit.

80 See generally Denning, *The Discipline of Law* (1979) 285-314; H Carty, "Precedent and the Court of Appeal: Lord Denning's views explored" (1981) 1 LS 68, 340.

81 See especially the leading speech of Lord Diplock in *Davis* v *Johnson* in the House of Lords, op cit, at 1136-1140.

82 See infra, 37-38.

Apparently, this means that the local court lacks any power to modify the application of rule three in Hong Kong. However, a strong case can be made against this unfortunate conclusion. It is clear that the nature of rule three remains the same in Hong Kong as in England. All that the section 17 does is to import it automatically as the Hong Kong practice. So it will remain as hybrid rule when it is "in force" in Hong Kong. Falling short of a legal rule, the Hong Kong Court of Appeal is at liberty to depart from the rule whenever situations seem justifiable. Of course, the strength of the justification needed will vary with the status of rule three in the spectrum. This will do no violence to section 17: for only by laying down a different precedent rule will the local court go against the statutory force of the section. What may happen is that the local court is free to develop a large set of exceptional circumstances in which the hybrid rule is not followed. This, it is submitted, is as good as laying down a modified Hong Kong precedent rule.

But since the English position is more or less settled after the vigorous reaction of the House of Lords in *Davis* v. *Johnson,* together with the perhaps more significant fact that the great crusader has at last retired from the arena after a remarkable twenty years of leadership in the Court of Appeal, it may be an intelligent guess that rule three may in the absence of strong opposition attain the status of legal rule in the near future in England. If so, the local court is at liberty to modify it as any English common law rules. But since any purported modification will initially be a mere practice rule, it may take quite a long time and several pronouncements to back up the new rule before it can take over the English rule one day.

It may seem that once a new rule is postulated, it will immediately lower the status of rule three into a hybrid rule. This will instantly prohibit any further maturation of the new rule: being only a hybrid rule, rule three becomes unmodifiable as the previous paragraphs suggested. Any purported attempt to back up the new rule will be in conflict with section 17.

To argue so is to confuse the real function of the section. This unfortunate provision only "imports" the English rule into Hong Kong and once imported, the rule becomes a local rule. The introduction of a new rule and the process of maturation only diminish the status of the Hong Kong rule but leaves its English identity unimpaired. The English rule three still has the status of law. Being still an English common law rule, it continues to enable the local court to modify it with the new rule.

This whole solution may seem quite complicated[83] and indeed absurd. However, the absurdity does not come from the nature of precedent rules. Any absurdity stems solely from the rather mischievous section 17 itself.

CONCLUSION

The operation of rules of precedent to a great extent depends on the precise definitions of such terms as "ratio decidendi" and "obiter dictum". With the uncertainties surrounding the exact meanings of these terms, the actual applicability of the third rule of precedent is very narrow. Only in very few cases is the question whether rule three is binding on a certain court a crucial one. However, this is more a factor of policy in deciding whether rule three should be strictly applied, rather than a jurisprudential question which is the concern of this paper.

Any approach in explaining the nature of precedent rules is inevitably a theory only. One important criteria of a theory is that it should explain as much as possible the existing facts which most people believe as true. But this does not mean that every fact must be explained. A theory is entitled to reject certain existing phenomenon as wrong. Somehow, a compromise has to be made between these two processes of explaining and rejecting. The "hybrid" approach is so far the best theory in explaining the nature of precedent rules. It explains adequately what has been happening to the precedent doctrine for the past hundred years. It also conforms to the contemporary idea of common law. Perhaps most important of all, the theory explains as well as promotes "certainty" and "flexibility" in the rules of precedent, which are the most valuable contributions of the whole doctrine to the development and operation of common law.

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83 It should be noted that the "legal approach" will solve this dilemma by a simple application of Cap 88; while the "mere practice approach" will content itself with the court's liberty in laying down a large set of exceptional circumstances in which the practice rule is not followed.

A discussion on legal theory will inevitably get involved with one's conception of the legal system as a whole. So as the late Mr RL Stone wrote,[84]

> "to the theory that law is fact, alternatives are the command theory of Austin, the normative theory of Kelsen, the predictive theory of the American Realists, the Primary and Secondary Rule theory of Hart, and [R Stone's] "calculus" view. Each of these interpretations of foundations of law will yield different interpretations of the role any rule plays in the legal game."

Nevertheless, suffice it to say any coherent concept of law should accomodate the theory of precedent rules suggested in this paper which is so far the best one, while leaving the fascinating job of defining the ultimate legal system to the hands of the much more competent jurists.

Logic demands a change of conventional attitude towards citing cases to justify a rule of precedent. Cases per se are no valid authorities. The citation of a case in supporting precedent rules only means that the case is a valid exercise of an internal common law process (of maturation) to postulate a rule which by the same process may mature into a rule of law.

The traditional view of "legal rules" demands a more rigid method of changing precedent rules than the "non-legal" rule approach. However, the new theory of Simpson and Evans in supporting the traditional view does go a long way to lessen the differences between these various views in changing precedent rules. No matter which approach one adopts, the method of changing will not differ much, which is the only thing which concern most practitioners. However, it is only by means of an investigation into the nature of precedent rules can one arrive at such a conclusion. No serious jurist will be satisfied with the question "How?", without asking the perhaps more significant one: "Why?"

The Hong Kong situation is more complicated because of the unfortunate section 17 of the local Supreme Court Ordinance. This, at first sight, presents an almost insurmountable hurdle for the reformers of precedent rules. However, a detailed application of the hybrid theory solves the apparent problem. Perhaps this is another observable benefit one gains in conducting the rather academic task of lifting the veil of the rules of precedent.

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84 Supra, at n 32, 666.

THE GOOD SAMARITAN OBLIGATION: A Study of the Duty to Rescue and the Liability of the Rescuer

by Johnson Man-hon Lam

INTRODUCTION

Lord Reid had said in *Home Office* v. *Dorset Yacht*[1], ".....when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty."[2]

This seems to suggest that under the present legal framework, there is no general duty to put oneself into the shoes of a good Samaritan. This statement also reflects the judicial recognition of the existence of a chasm between law and morality, whether it is due to practical difficulties or not. The purpose of this paper is to attempt to re-examine the law in this area and to evaluate the present legal position. It is not intended to formulate a well-drafted legislative bill for enactment. Rather it is hoped that by going through the various analyses, a most appropriate direction for the future legal development in this respect can be extracted.

In the first part of this paper, a brief survey of the common law rules in this area will be conducted. The legal solutions applied to this issue in other jurisdictions will also be considered. A contrast between the American approach and the European approach will be drawn. Several legislative attempts in Hong Kong pointing towards the direction of affirmative duties will be studied. In the second part, the underlying philosophy of the legal rules will be examined from two different perspectives. In the private aspect of the issue, basing on the fault principle, the distinction between misfeasance and nonfeasance will be analysed. As to the public aspect, the subject is studied in the context of individual liberty. Questions about the relationship between law and morality will be explored. Lastly, in the conclusion, some suggestions for the legislature will be

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1 [1970] AC 1004.

2 Ibid at p 1027 C. Similar statements were expressed by other lawlords. See Lord Morris at p 1304F; Viscount Dilhorne at p 1042G, H; Lord Diplock at p 1060F.

made. But it has to be stressed again that these proposals are only offered as some navigational guidelines. The exact formulation of the statute, with considerations of the practical administration of it, is not within the scope of this paper.

THE PRESENT COMMON LAW POSITION

It is quite beyond dispute that English law as it stands does not recognise the existence of a duty to rescue unless there is a special relationship between the potential rescuer and the person in danger which justifies the imposition of such duty.[3] Perhaps it should be explained at the outset that the concept of duty, being one fundamental notion of the law, is not to be read as one just limited to the law of negligence. One must recognise that behind every legal sanction, the individual's liberty is, in one way or another, restrained. The individual is required by an external institution — the law — to behave in a particular manner. In this sense, a duty is imposed by the law upon the individual in regard to his behaviour.[4] In respect of the rescue situation, there is no duty, both in the context of the criminal law and the sphere of tort law, for one to take action to save his fellow citizen from peril, even if he is well-aware of the fatal nature of the danger facing the other. This attitude is reflected in the judgments of decided cases. In respect of tortious liability, a dicta from the Canadian case of *Horsley* v. *MacLaren, the Ogopogo*[5], provides a good illustration of the common law in regard to the existence of the affirmative duty to rescue. Jessup JA, speaking in the Court of Appeal of Ontario, observed that,

> "Conceived in the forms of action and nurtured by the individualistic philosophies of past centuries, no principle is more deeply rooted in the common law than that there is no duty to take positive action in aid of another no matter how helpless or perilous his position is .....It is a principle which is not reached by the doctrine of *Donoghue* v *Stevenson* since that case leaves open only the categories of neighbours to whom there is owed a duty not to cause harm; its ratio has not yet been extended to enlarge the class to whom there is owed a duty to confer a benefit. So, despite the moral outrage of the textwriters, it appears presently the law that one can, with immunity, smoke a cigarette on the beach while one's neighbour drowns and, without a word of warning, watch a child or blind person walk into certain danger."[6]

In the criminal aspect, in the recent case of *R* v *Miller*[7], the Court of Appeal has this to say,

> "..... unless a statute specifically so provides, or the case is one in which in the criminal context the common law imposes a duty upon one person to act in a particular way towards another, as a parent to his or her child, then a mere omission to act, with nothing more, cannot make the person who so fails to do something guilty of a criminal offence."[8]

However, the situation is different if there is a special relationship between the parties. Duties to rescue have been held to be owed by parents to their children, husbands to wives, employers to employees, shipmasters to the crew members, persons engaged in public callings like innkeepers and carriers to their respective customers, and institutions which have custody over people like hospitals and schools to those under their control.[9]

Furthermore, if one does attempt to give help to those in peril but unfortunately, deals with the situation negligently, ie his well-intentioned efforts worsen the injured person's position, legal liability will entail. He has stepped from the sphere of non-

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3 See Clerk & Lindsell *on Torts* (14th ed) § 48 & 864; Winfield & Jolowicz *on Tort* (11th ed) at p 77-81; Prosser, *The Law of Torts* (4th ed) 1971 § 56 at p 338-350; Linden, *Canadian Tort Law* at p 271-304.

4 Of course, this argument presupposes that there is a duty for the individual to obey the law.

5 [1970] 1 Ll Rep 257. See also *Dorset Yatch* v *Home Office*, supra n 1.

6 ibid at p 265. See also *Osterlind* v *Hill* (1928), 263 Mass 73, 160 NE 301 in which the defendant was held not liable notwithstanding that he had rented a canoe to an intoxicated man, and as the canoe was overturned with the man calling for help, the defendant did nothing but to let him drown.

7 [1982] 2 WLR 937.

8 ibid at p 944.

9 See Prosser, op cit, at p 338-43; Clerk & Lindsell, op cit § 864; Linden, op cit at p 275-6; Second Restatement of Torts § 314A&B.

feasance to that of misfeasance. Thus, Prosser has observed,

> "The result of all this is that the Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing..... [And this] operates as a real, and serious, deterrent to the giving of needed aid."[10]

Thus doctors in the United States have offered the fear of malpractice suits as their reason for not responding to the need for assistance of roadside accident victims.[11]

Once a rescuer has taken up the task of helping the imperilled, is he bound to carry on? The decisions of the House of Lords in *East Suffolk Rivers Catchment Board* v *Kent*[12] and the Ontario Court of Appeal in the *Ogopogo*[13] suggest that a rescuer would incur no liability unless what he does worsens the condition of the rescued. A rescuer who, after some unsuccessful attempts, decides to abandon his effort altogether would not be legally liable. *Zelenko* v. *Gimbel Brothers*[14] seems to be a case suggesting the contrary. Justice Lauer of the Supreme Court of New York stated that, "if a defendant undertakes a task, even if under no duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing the task." In that case, the defendant kept the deceased, who was taken ill in the defendant's store, in the infirmary without any medical care for six hours. This case, reading together with the cases of criminal omissions such as *R* v *Instan*[15] and *Stone & Dobinson*[16], can lead to the conclusion that the proper test for the defendant's liability should be, as suggested by Professor Alexander, "Can the volunteer be said to have gone so far in what he has done as to have taken charge of the situation?" If he has, he would owe the imperilled person a duty to use reasonable care to effect a rescue.[17]

However, these two arguments can be reconciled. Considering the hypothetical case of a drowning child, a man on the beach sees the accident and swims towards him. Yet before the man reaches the child, for some reasons unknown, he decides to withdraw his help. What wrong has he committed? Prosser has suggested an explanation.

> "In most of the cases finding liability the defendant has made the situation worse, either by increasing the danger, or by misleading the plaintiff into the belief that it has been removed, or by depriving him of the possibility of help from other sources, as where he is induced to forego it."[18]

Turning back to our drowning child, the man, by swimming towards the victim, may in fact represent to others that he has undertaken the task of rescuing and thus mislead the others to leave the job to him. (Assuming that there are only a few people at the scene of the accident and they are not good at swimming.) Hence, his abandonment of the rescue operation will deprive the victim of the earliest possible help. In *Zelenko* v *Gimbel Brothers,* the defendant, by segregating the plaintiff, made it impossible, or unlikely, for another bystander to summon an ambulance. The same reasoning applies to most cases where the defendant has taken charge of the situation.

Before any analysis of the common law is conducted, it is rather helpful to make a comparative study of the laws of other jurisdictions in this respect. They may provide a basis for the evaluation of the common law, and cast some light on how the common law, or the English law as a whole, may develop in the future. There are two major legal systems in the Western World – the common law system and the civil law system. In the common law world, considering the unsatisfactory development in the area of affirmative duties, there have been some legislative interventions in North America. In the civil law world, the postwar years have also witnessed a major boom of legislative activities in the same area. However, two different directions have been piloted by the legislatures of the two Continents.

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10 Prosser, op cit, at p 344.
11 See Gray & Sharpe, *Doctors, Samaritans and the Accident Victim* 11 Osgoode Hall Law Journal 1.
12 [1941] AC 74.
13 supra n 5.
14 (1935) 287 NY 134.
15 [1893] 1 QB 450.
16 [1977] QB 354.
17 Alexander (1972)2 TLJ98 at p 104-5.
18 Prosser, op cit at p 47.

THE AMERICAN APPROACH – NEGATIVE LEGISLATION

Owing to the anomaly of the common law situation, one is discouraged from being a good Samaritan. It is notorious that in the United States, many doctors would refuse to stop to render assistance at an accident scene.[19] According to a survey conducted in 1961, 50% of the responding doctors said that they would not stop to help if they saw somebody lying injured along the road.[20] In order to promote the altruistic instinct of the potential rescuer in giving help to those imperilled, legislative intervention was necessary. In 1959, the California legislature enacted a statute designing to encourage doctors to act as Good Samaritans by exempting them from civil liability in the emergency rescue situation. It provides that,

> "[No doctor or physician] ..... who in good faith renders emergency care at the scene of an emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care."[21]

In 1963, a similar protection was given to nurses who rendered help in emergency situation.[22] Since then, similar Good Samaritan statutes, as they were came to be known, have been enacted in about forty states, including Texas, Virginia, Massachusetts, New York, Pennsylvania, Georgia, Michigan, Illinois etc.[23] In Canada, the same has happened in the Province of Alberta.[24]

Though basically these Good Samaritan Statutes were drafted with a common objective, ie to resolve the disagreeable result of the common law by absolving the rescuers from civil liabilities, they appear to be varied in their scope of application. Some of them protect only medical practitioners or para-medical personnel,[25] while some extend their protection to every rescuer.[26] Also there may be different interpretations, or even different wordings, of some crucial terms which define the circumstances in which the statutes are applicable. Requirements like "emergency", " at the scene of accident", "good faith" may present problems of construction: eg whether these words should be considered in a subjective or an objective sense? In some statutes, the immunity does not cover situations of "gross" or "wilful" or "wanton" negligence. Such terms are again not clearly defined.[27]

It has been suggested that the New York state legislation is a relatively satisfactory one.[28] It reads, "Any duly licensed physician or surgeon who voluntarily and without the expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident or other emergency, outside of a hospital, doctor's office or any other place having proper and necessary medical equipment, to a person who is unconscious, ill or injured, shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of first aid or emergency treatment unless it is established that such injuries were or such death was caused by gross negligence on the part of such physician or surgeon"[29].

The effectiveness of these statutes has been subjected to examinations and the remarks are not of a favourable nature.[30] The comment of Professor Gray and Professor Sharpe is a typical attitude of the commentators,

> "Probably the Scottish verdict of 'not proven' still applies to the question of the usefulness of these statutes; but there is at least some evidence that after a dozen years of trial of the 'negative' approach, a North American change of direction to a 'positive' one may now be appropriate"[31].

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19 See supra n 11.
20 Newsweek, September 4, 1961, at p 41. See also the case of the skier in the Sierra Madre mountains and the case of the motorist on the Bronx Whitestone Bridge, referred to in Note, (1964) 64 Col L Rev 1301.
21 Cal Bus & Prof Code § 2144.
22 Cal Bus & Prof Code § 2727.5.
23 See Gray & Sharpe, op cit, at p 3 n 9.
24 Emergency Medical Aid Act, S Alta 1969, s 3.
25 Eg California, Maryland.
26 Eg Texas, Wyoming.
27 For a more comprehensive criticism of these statutes, see Gray & Sharpe, op cit, at p 5-9; Norman S Oberstein, *Torts: California Good Samaritan Legislation* (1963) 51 Cal L Rev 816; Note 75 Harv LR 641; Note (1964) 64 Col L Rev 1301 at p 1308-1312.
28 Gray & Sharpe, op cit, at p 8.
29 NY Educ Law #6513 (10) Mc Kinney (1964).
30 See supra n 27.
31 Gray & Sharpe, op cit, at p 9.

There is indeed an inherent defect in these Good Samaritan statutes. In preserving the individual's autonomy in connection with conduct for the benefit of others, the law has retained its basic attitude that positive duty should not be imposed. Thus, in all these statutes, attempts are only made to absolve the Good Samaritan from liabilities but not to require the Levites and the priests to lend their hands to those in need. Such a negative approach cannot be very effective because the individual can still decide against giving help to those imperilled without having to incur liabilities. Removing one discouraging factor – the possibility of incurring liabilities – does not necessary bring forth the encouraging effect. There is still an absence of inertia to act in regard of those who have refused to act as Good Samaritans. If the only obstacle is the fear of civil claims against oneself, these statutory resolutions may provide the solution. But this is an over-simplistic view in regard of the problem of reluctance to offer help to those in need. The real problem is one of inter personal relationship which is best described by Rosenthal, who called this urban apathy,

> "This apathy was indeed a big-city variety. It is almost a matter of psychological survival, if one is surrounded and pressed by millions of people, to prevent them from constantly impinging on you, and the only way to do this is to ignore them as often as possible. Indifference to one's neighbour and his troubles is a conditioned reflex of life in New York as it is in other big cities."[32]

If it has been decided that a certain kind of conduct is socially desirable, why does the law insist against the imposition of a positive duty in that respect?

Another possible criticism against the American approach is that it fails to recognise a significant implication of absolving the incompetent rescuers from civil liabilities. In the common law framework, why would these rescuers be liable? The answer is quite simple, just because they are negligent. In assessing whether the rescuers have breached the duty of reasonable care, the court will take into account of the emergency situation, as well as the expertise knowledge of the defendant.[33] Certainly, the law will not demand the standard of a doctor from a layman. Thus, there will not be any unduly harsh burden laid onto the rescuer. If he is still adjudged as negligent, he is liable only to the extent that additional harm has caused to the plaintiff by virtue of his faulty rescue operation. This is fair. The legislative intervention in United States, on the other hand, deprives the suffered victims of their justifiable claims without any compensation. The legislature, in so doing, seems to overlook that an incompetent rescuer may be as undesirable to the imperilled person as the selfish Levites and the priests.

THE EUROPEAN APPROACH – POSITIVE LEGISLATION

The civil law countries adopt a different solution. Legislation has been passed to give effect to the spirit of the Good Samaritan parable. People are required to give aid to those in distress. This is particularly evidenced by the post-war development of the criminal codes in the European world[34] – both in the Western societies and the Communist Bloc. Article 330c of the German Criminal Code is a typical example,

> "Anyone who does not render aid in an accident or common danger or in an emergency situation, although aid is needed and under the circumstances can be expected of him, especially if he would not subject himself thereby to any considerable danger, or if he would not thereby violate other important duties, shall be punished by imprisonment not to exceed one year or a fine."[35]

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32 Rosenthal, Thirty-Eight Witnesses (1964) at n 92. The same can be aptly applied to the situation in Hong Kong.

33 See Note 75 Harv LR 641. As Linden has commented, 'Where someone takes risks in order to save life in an emergency, allowances are made because of the social value of the end to be achieved. Rescuers are not expected to act with textbook perfection in situations of peril.' Linden, op cit, at p 90.

34 Although similar provision had already appeared in the criminal codes of some countries in the nineteenth century, eg Russia (1845), Tuscany (1853), The Netherlands (1881), Portugal (1867) etc, the post war development is more vigorous.

35 See Feldbrugge, Good and Bad Samaritans : A Comparative Survey of Criminal Law Provisions concerning failure to rescue. 14Am J of Comp L 630. Also see Note (1964) 64 Col L Rev 1301 at p 1317-19.

Similar provisions can be found in other European criminal codes.[36]

In all these statutory provisions, qualifying conditions are inserted to define their scopes of application. In general, these statutes are laid down with a purpose to ensure help to those whose lives are endangered. In some countries, the danger has to be "immediate" (Netherlands), "evident" (Denmark), "direct" (Poland), "imminent and grave" (Ethiopia).

Another question is on whom does the duty to rescue fall. There are two approaches to this question. A more restrictive view is that the defendant has to be present at the scene and witness to the danger. This is derived from the Dutch Criminal Code[37] which was passed in 1881. The modern approach is represented by the Belgian provisions introduced in 1961.[38] This Article applies regardless of whether the defendant has witnessed the imperilled person's position himself or he has learned of that from the person who summoned his aid. Some of the statutes use words like "any person who wilfully fails ....." (France), "whoever intentionally ....." (Ethiopia, Greece), "whoever knows ....." (Finland), "if the offender knew ....." (Russia). The Belgian approach should be applicable to these statutes as their wordings are wide enough to yield such interpretation. Some statutes just leave the issue open by using open-ended expressions like "any person", "whoever", "anybody".[39] However, since these are all criminal offences, mens rea is required to establish the guilt of the defendant[40]. The awareness of, or at least recklessness[41] as to, the factual situation of the endangered person should be a minimum standard for a finding of guilt. On the whole, the Belgian approach is to be preferred because it would be futile to require someone who has discovered the misery of the victim to render help while a doctor is not legally bound to attend to the victim if the first person decides the best thing to do is to call a nearby doctor.

The possible defences available to the defaulted rescuers are also dealt with in these provisions. The rescue operation is required only when "such was possible without danger to himself or others" (France). Generally, the defendant will be exonerated from the task if he can prove that by rescuing the one in danger, he may expose himself to the risk of serious injury. However, giving aid does not necessarily mean that the rescuer has to perform the rescue operation himself. He may discharge his duty by informing the authority concerned about the accident or by obtaining other sources of assistance for the victim. Thus, this defence of risk of injury will not defeat the purpose of the statutes.

A possible situation is where several people are eligible, under the statutory provisions, as potential rescuers. The European courts seem to maintain a basic rule that all designated rescuers who have satisfied the statutory requirement, but failed to render help, are duty-bound and thus liable.[42]

Similar to the American statutes, these European legislations also raise the problems of interpretation. Terms like "danger to oneself", "assistance", "endangered person" are left to the courts to construe. The question of whether the courts should apply the subjective standards or objective standards in determining the scopes of the statutes is another source of litigious disputes. But these are inevitable whenever a novel legal principle is promulgated. It is the task of the courts to construe the statutes in a

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36 See (1966) 14 Am J of Comp L 630, from Feldbrugge, op cit.

37 Article 450. See also the Romania Criminal Code (1936) Article 489(3). In the Turk and Italian codes, the wordings are 'any person who finds .....'.

38 Art 442bis. (1961).

39 Eg Czechoslovakia, Germany, Denmark, Spain, Poland etc.

40 See Feldbrugge, op cit p 641 where he remarked, 'There is a fairly general consensus that failure to rescue is an offence which can only be committed intentionally. This means that criminal liability arises only where the offender acted intentionally with regard to the elements of the offence: knowing that somebody was in specific danger, that he was able to help, and that this help would not entail specific danger to himself, he consciously refrained from extending aid.' Yet he also noticed that there were conflicting interpretations by the courts which left the issue with much uncertainty and he concluded that the matter was best left to judicial discretion and slight negligence should exculpate but not gross negligence, see ibid p 642.

41 There has been conflicting opinions as to the meaning of the word 'recklessness'. See *R* v *Caldwell* [1981] 1 All ER 961 per Lord Diplock and *R* v *Lawrence* [1981] 1 All ER 974. For the opinions of the commentators, see [1981] Crim LR 658-661, & 743 and [1982] Crim LR 97-106.

42 See Feldbrugge, op cit, p 641, especially n 43.

manner which can satisfy the needs of the society. The main consideration is whether those statutes have provided a correct direction for the courts to manoeuvre in order to solve the problem at hand. Since positive duties are imposed, a direct legal impetus is introduced to correct the undesirable social phenomenon of the selfish Levite. If there are any difficulties, they should be related to the administrative aspect – ie whether in practice, these statutes can be enforced, a study of the French experience in this area can alleviate these doubts. Under Article 63 of the Penal Code, prosecutions have been brought and convictions have been obtained.[43] Eg A man was held liable for failure to hand to his drowning son-in-law a pole lying on the bank of the river.[44]

As one may notice, all these European legislations are criminal in nature. However, since generally civil liability follows criminal liability in European countries[45], the victim may well have a civil claim against the defendant. Under English law, if there is a similar statutory provision, civil claims can be sustained on the basis of breach of statutory duties. Yet, there could be problem in establishing any causal link between the breach and the injuries suffered by the victim which may be solely attributable to the original accident rather than to the defendant's failure to rescue. Even though civil liability can be escaped by means of an argument basing on causation, the defaulted rescuer will still be subject to punishment as laid down by the statute. The fear of criminal sanction provides another social force to oblige the individual to act in a socially desirable manner.

The discrepancy between the European legislatures and the American law-makers has a more important implication. The American statutes, aiming at absolving the negligent rescuers from civil liability, have assumed that the issue of the duty to rescue is primarily a matter for the civil jurisdiction. On the other hand, by imposing criminal sanction on the duty to rescue, the European approach is more community oriented. It assumes that the question is one of public concern and whenever an individual breaches his duty, the state has suffered harm and thus it is entitled to punish him. This, in turn, reflects[46], at least in respect of the rescue situations, the liberal individualistic philosophy of the Americans vis-a-vis the European notion of collective social responsibility.[47]

The European approach has been adopted in some common law jurisdictions. In the United States, there is one state which has followed the European footstep. Vermont enacted its "Duty to Aid the Endangered Act" in 1967[48]. It is in fact a combination of the American approach and the European approach. In Australia, the State of New South Wales has imposed a duty to render professional services on the medical practitioners to those in need of urgent attention. This is achieved by the Medical Practitioners Act in 1963[49].

LEGISLATIVE ATTEMPTS IN HONG KONG

Basically, the present position in Hong Kong is governed by the common law. However, there are several areas in which duties to rescue, or at least affirmative duties, are statutorily required. According to section 27 (1) (b) of the Road Traffic Ordinance[50], the driver of a vehicle involved in road accident which has resulted in personal injury is

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43 See Note (1952)52 Col L Rev 631 at p 640-1 n 71-75. See also Feldbrugge, op cit at p 632 n 7, p 640 n 38, p 642 n 48. Thus Gray & Sharpe have commented, 'What is very clear is that the European "positive" statutes are not a dead letter.' op cit at p 16.

44 Trib corr Aix March 27, 1947 [1947] Dalloz Jurisprudence 304.

45 See Gray & Sharpe, op cit at p 15; Note (1964) 64 Col L Rev 1301at 1318 n 136; Note (1952) 52 Col L Rev 631 at p 640 n 68 citing Tunc, Absention Delictueuse §34, [1947] Dalloz Nouyeau Repertoire 8.

46 As Harry Calvert has commented, 'The philosophy prevailing in a given society at any particular time profoundly influences its social objectives. These objectives are, in turn, a determinant of social policy. The law is one of the chief instruments whereby social policies are implemented.' H Calvert, *Social Security Law*, at p 1.

47 ibid at p 3, it is said, 'It is inherent in the objectives set by the philosophy of welfare that adequate provision is a function not merely of individual initiative but also of social organisation and the notion of collective social responsibility necessarily involves that where individual initiative fails to ensure provision, in spite of the mechanisms of economic law, the state itself should intervene positively .....'

48 VT STAT ANN, tit 12§519 (Supp 1971) See Franklin (1972) 25 Stan L Rev 51.

49 Medical Practitioners Act s 27(2)(c). See ibid p 55 n 27.

50 Cap 220 LHK.

under a duty to report the accident to the police as soon as possible. Otherwise he will be guilty of an offence under section 27 (2) of the same ordinance. Although this is not a duty to render direct medical aid, the report of the accident will usually summon help from the authority concerned, thus indirectly, medical attendance to the victim is ensured.

Another example can be found in the Essential Services (Civil Aid Services) Corps Regulations rule 3 3 (c) (iv) which was enacted under section 7 of the Essential Services Corps Ordinance[51]. This regulation requires a person in the vicinity of a disastrous occurrence to co-operate with the officer of the Civil Aid Services in any manner. This may well include the provision of necessary assistance, like the help to fetch some water in case of fire, by the person. Those who refuse will be again guilty of an offence.

Under sections 25, 26 and 27 of the Offences Against the Person Ordinance[52], affirmative duties like the provision of necessary food, clothing and lodging are imposed upon masters towards their apprentice and servants. Those in charge of children are also put under similar duties and they would be guilty of misdemeanors if they ill-treat, neglect, abandon or expose the children to unnecessary injuries. Unnecessary injuries may include additional injuries suffered by a child owing to the failure of the adult in charge of the child to rescue the child in an endangered position.

In regard of those engaged in public services like fireman and policeman, there are statutory duties to help those endangered. Section 7 (d) and (e) of the Fire Services Ordinance[53] provide that the duties of the fireman include that of assisting any person who appears to need prompt or immediate medical attention. Any fireman who neglects or without good and sufficient cause fails to perform his duties. including that of section 7 (d) and (e), promptly and diligently, will be subject to disciplinary action[54]. However, there is no such duty when the fireman is off-duty. With regard to the policeman, it is one of his duties to prevent injury to life and to assist in the protection of life at fire[55] and he is deemed to be on duty when his service is required[56]. Any neglect of duty may again lead to disciplinary actions.[57]

Although these are only isolated provisions which may not be sufficient to sustain a civil claim against the defaulted rescuer, they show that the Hong Kong legislature is not so hostile against the imposition of criminal, or at least disciplinary, liability for the failure to perform some affirmative duties, given that the circumstances justify such legal sanction.

ANALYSIS OF THE PRESENT LEGAL POSITION – THE RISK CREATION THEORY

The rationale behind the common law rules is based on the distinction between misfeasance and nonfeasance. In the case of misfeasance, the wrongdoer has done an act which inflicts some harm on another. In regard to such an activity, the common law has not been slow to attach liability. Thus, in the case of an incompetent rescuer, legal liability is accrued. On the other hand, in the situation of nonfeasance, what the "wrongdoer" has "done" is merely a failure to confer a benefit upon others. In this area, the common law, as Professor Linden has aptly described, has adopted a "hand-off" policy[58]. Liability will only be imposed on the basis of the breach of an affirmative duty which arises only when there is a special relationship between the parties to justify the existence of such a duty.

Since the failure to rescue one in peril can, at the most, only be a nonfeasance, the crucial question for determining whether the defendant is liable is whether there is such a special relationship recognised by the common law to compel the defendant to act. The relevant question is what are the nature of these special relationship?

Professor F H Bohlen in his classic essay pointed out that "misfeasance differs from nonfeasance in two aspects; in the character of the conduct complained of, and second, in the nature of the

51 Cap 197 LHK.
52 Cap 212 LHK.
53 Cap 95 LHK.
54 ibid s 12, First Schedule s 4.
55 s 10 Police Force Ordinance, Cap 232 LHK.
56 ibid s 21.
57 r 3(2)(h) Police (Discipline) Regulations made under s 45 of Police Force Ordinance, Cap 232 LHK.
58 Linden, op cit, at p 271.

detriment suffered in consequence thereof"[59]. The first distinction is, at least theoretically, quite obvious. But it seems to be of little significance in the light of what is going to be discussed in the next few paragraphs. About the second distinction, misfeasance would always result in the worsening of the victim's position by creating a positive loss or new harm to him while nonfeasance would not have such effects. In the latter case, the alleged wrongdoer just leaves the victim in his already miserable position without making any efforts to help him.

This distinction may be related to the concept of causation. In the misfeasance situation, it is quite clear that the tortfeasor causes the injury of the victim. However, in regard to the nonfeasance situations, one would not be so certain in alleging that the failure to help an imperilled person is the cause of that person's injury. From the legal point of view, applying the "but-for" test to nonfeasance cases, the question will be but for the omission, whether the victim will suffer that complained injury. It is not always possible to prove to the satisfaction of the court that the rescue operation, if launched, will be successful. Thus, omissions will be less likely to be attributed as the cause of injury than acts[60]. Yet, a distinction has to be drawn between two kinds of nonfeasance. If the alleged wrongdoer fails to warn the victim about a potential danger which is later materialised and lead to the injury of the victim, the causal connection between the omissions and the damages suffered by those victims can easily be established, eg The defendant, seeing that the plaintiff – a blind person – is walking to a pothole, does not warn the plaintiff. Subsequently, the plaintiff is tripped and suffers injury. It is quite easy to prove that if the defendant had warned the plaintiff, the latter could have escaped his misfortune. This is different from the case where the victim is already in a miserable state, though he may not have suffered any injury, the wrong on the defendant's part is the failure to relieve or rescue the victim from his peril; eg The defendant sees the plaintiff drown but does nothing to save him. It is this type of omission that the above comment in relation to causation is made and this is also the main concern of this paper – the rescue situation.

It must also be noted that the failure to do something is not necessarily a nonfeasance. It can be a misfeasance. Consider the following hypothetical situation. A producer manufactures sterilised milk and sells it in small packets. The milk has to be consumed within a certain period after its sterilization. Normally a date is printed on the packet to show the last possible date of consumption. On one occasion, however, due to some mishaps, the manufacturer fails to put on the date and the consumer drinks that packet of milk after the safe period and thus suffers from illness. This would clearly be a misfeasance rather than nonfeasance notwithstanding that one can describe the manufacturer's fault as the failure to warn the consumer about the last possible date of consumption. This is similar to the situation where a driver fails to apply his brake in time wounds a pedestrian. The proper test for distinguishing between misfeasance and nonfeasance is by assessing the role of the defendant in creating the risk of injury to the plaintiff.[61] If the defendant's activity is a factual cause of the risk of injury that the plaintiff suffers, that would be a misfeasance.

In applying such test, one should also bear in mind the principle enunciated in *Newton* v *Ellis*[62]. In that case, the plaintiff sued for the injuries received at night when his carriage ran over a hole which the defendant had excavated but failed to light. The court considered the digging of the hole and the failure to light it as one single transaction

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59 Bohlen, *The Moral Duty to Aid Others as a basis of Tort Liability*, 56 U Pa L Rev 217 at p 220.

60 However, one must agree with a learned commentator who has written that, 'It may be harder to establish a "but-for" relation between an omission and the death than between an act and the death. But even in the case of acts, the relation is based on probabilities; the estimation of probabilities may be easier than in the case of omissions, but the difference is one only of degree.' See Note (1952) 52 Col L Rev 631 at p 645.

61 This test is suggested by Ernest J Weinrib in 'The Case for a Duty to Rescue' (1980) 90 YLJ 247. But I have elaborated on it. Note that it is only the creation of the risk that is relevant but not the materialization of the risk. Thus, in a case where the defendant has played no part in the creation of the potential danger, notwithstanding that he has knowledge about it and yet fails to give a warning to the plaintiff, that would not be a misfeasance though it can be said that he is a factual cause of the materialization of the risk. The neglect of a chance to decrease a risk, or to reduce it to safety, is not equivalent to the increase of the risk.

62 119 Eng Rep 424. See also *Faqan* v *Metropolitan Police Commissioner* [1969] 1 QB 439.

rather than as two separate events. Thus, in the example of the milk manufacturer, his wrong is constituted by two elements:

(a) his production and distribution of milk which has to be consumed within a particular period;
(b) his failure to print the relevant date on that particular packet.

But they are only two different elements of a single tortious act – supplying the milk without a sufficient warning to ensure the safety of the consumer. When he is selling the milk, he is also failing to warn the buyer. The same reasoning applies to the driver's case. When he is failing to brake his car, he is at the same time driving. *Oke* v *Wiede Transport Ltd*[63] is another illustration of the application of this risk-creation principle. Without negligence on his part, the defendant collided with a traffic sign-post and left it bent over. The plaintiff was fatally injured when he was impaled by this post. Freedman J A recognised that the defendant was not in the same position as the other motorist with regard to the dangerous sign-post since he had participated in the creation of the hazard.[64] The failure of the defendant to warn others and his creation of the dangerous position would be the basis of his liability. Thus, Professor Linden has commented,

> "These situations are not ones of simple failure to act or nonfeasance; rather, the defendant is held liable for the positive creation of danger to the plaintiff."[65]

This empirical analysis shows that the categorisation of an alleged wrongful conduct into acts or omissions is not entirely satisfactory[66]. However that does not imply that the distinction between misfeasance and nonfeasance is meaningless. The real distinguishing feature between the two is, as indicated by the risk-creation test, the role of the alleged wrongdoer in bringing about the risk of injury of the victim. Hence in situations where the defendant's conduct has been responsible for the plaintiff's suffering, even if it is so caused without any negligence on the part of the defendant, the failure of the defendant to rescue or relieve the plaintiff with a reasonable effort can be taken as a misfeasance[67].

Very often, it is suggested that a distinction has to be drawn between causes and conditions. In a misfeasance situation, the implication of that distinction is that from a wide range of sine qua non, the court has to choose those relevant causes for the attachment of legal responsibilities and discard other unimportant ones as mere conditions. Factually speaking, one can always give an endless list of causes for a particular incident if the reasoning of "one would never be killed if one were never born" is appreciated. Thus, lawyers have tried to formulate rules to distinguish between causes and conditions. "Proximate cause", "the question of remoteness", "legal causation" are the various names given to that formula[68]. Similar tasks are performed by the courts in face of nonfeasance cases.

Although conditions are not relevant in determining whether legal liabilities should be imposed, still, as a matter of fact, they have contributed to the happening of the incidents in which legal liabilities are incurred. Eg Though the mechanics of a motor car is legally irrelevant to a negligent driving case solely attributable to the driver's not paying any attention to a traffic signal, it does play a part in the vehicle's movement and thus is instrumental to the knocking down of the victim. Also, these conditions may, in the situations of omissions or inactions, be relevant, to some extent, to the imposition of legal liabilities. Applying the risk-creation test, although one is only

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63 (1963) 41 DLR (2d) 53 (Man CA) See also *McKinnon* v *Burtatowski* [1969] VR 899, (1970)44 ALJ 286.

64 Though it is a dissenting judgment, it has often been referred to.

65 Linden, op cit, at p 278.

66 That is why Atiyah has commented, 'It must be admitted at the outset that there are situations in which it is impossible to draw any logical line between affirmative and negative conduct, or, that is, between misfeasance and nonfeasance.' Atiyah, *Accidents, compensation and the Law* (2nd ed) 1975 at p 92.

67 See *Johnson* v *Rea* [1962] 1 QB 373 in which the negligence of the defendant was their failure to obviate the danger rather than the creation of the slippery condition of the floor (at least the judges did not give any ruling on the fault of the defendant, if any, in the creation of the danger). Still, the Court of Appeal treated it as a misfeasance and liability was imposed. See also *Oke* v *Wiede Transport Ltd*, supra n 59.

68 For the test that the court apply in determining the issue of legal causation; See *The Oropesa* [1943] 1 All ER 211; *The Wagon Mound No 1* [1961] AC 388; for recent developments in this area, see *Lamb* v *London Borough of Camden* [1981] 2 All ER 408.

responsible for the creation of a condition, and not legally speaking the cause, of the accident, his failure to render help may then be suffice to attach liability to him. At this point, it has to be made clear that, according to the definition expounded above, these situations should be classified as misfeasance[69] and it is constituted by two elements:

(a) the factual creation of the risk which eventually lead to the injury of the victim;
(b) the failure to render assistance to the victim when the risk-creator is aware of, or is negligent in not being aware of, the miserable position of the victim.

When these two elements are put together, the causal link between the omission and the suffering of the victim is clear. Legal causation, which is after all only a matter of public policy, should also be affirmed. It is the failure to view the incident from a comprehensive perspective, with the consequent segregation of a series of causal links as "mere conditions", which make some legal affirmative duties seem exceptional.

In the case of the parental duties, it has been held that such duties do not arise from the blood relationship between the parents and their children. Rather they stem from the fact that the parents have, under those particular situations, assume the responsibility to control and take care of their children[70]. In order to be responsible, the parent has to take charge of the child and usually he would have to be physically present with his child. In the rescue context, this means that the parent is one way or another, accountable for the presence of the child at the scene of the accident or for the activity engaged by the child at the time of the accident. (Otherwise the child would not be under his charge.) This will satisfy the first part of the risk-creation test – the parent is somehow connected with a condition of the accident. Thus, even if the parent is not negligent in the supervision of his child[71], he would be liable if he fails to help the child out of the dangerous position that the child has fallen into after he should be aware of the misery of the child. In this way, the parent is put under a duty to rescue his child[72]. This reasoning can be extended to the other special relationships where duty to rescue is imposed.

Would this be too onerous to require the risk creator, no matter how small the role he plays in the creation of the risk, to render assistance? The answer is no. There is the requirement that the defendant should be aware of, or at least negligent in not being aware of, the misery of the victim. Thus, in *Grimes* v *Hettinger*[73], it was held that the duty of a private swimming pool owner to rescue arises only from actual knowledge of facts which would cause a reasonably prudent person to assume that the guest was in peril.

The risk-creation test, as an explanation for the legal sanction of the duty to rescue, reflects the working of the fault principle as the basis for imposing liabilities. The breach of the duty has caused harm to others. But in the first place, why should there be a duty? According to the risk creation theory, the duty stems from two elements,

(a) the involvement of the defendant in the creation of the risk;
(b) the awareness, either actual or constructive, of the defendant about the victim's suffering.

In fact, this is just an application of the reasonable foreseeability test to a special circumstance. The creation of the risk and the awareness of the materialization of the risk in the victim's suffering, is being viewed as a single "act" done by the defendant[74]. This can then satisfy the ordinary requirement for the imposition of liability. Since there is not any act done by the alleged wrongdoer which has created the risk of injury in the other cases of nonfeasance, even the risk creation test applies, no

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69 In fact the classification is not so crucial, what is important is whether liabilities could be attached in such situations. Still, such classification may help to explain and rationalise why should the defaulted rescuer be liable under such circumstances.

70 See Barwick CJ in *Hahn* v *Conley* [1971] ALJR 631; Turner J and McCarthy J in *McCallion* v *Dodd* [1966] NZLR 710.

71 It is important to note that one does not have to be negligent to be a risk creator.

72 One can argue that the duty to rescue does not arise until the parent is actually aware of the misery of the child because if he is negligent in not being aware of such, he would be liable for negligence in his supervision of the child rather than for the failure to rescue.

73 (1978) 566 SW 2d 769, 775. See also Second Restatement of Tort §314 A (e).

74 See the single transaction test, supra p 23-24.

liability can be attached. "Act", in its wide sense, should include an act which factually creates a risk of injury, no matter how small the risk is, and then followed by an omission after the risk is materialised. The distinction between "act", in its wide sense, and omission is the real distinction between misfeasance and nonfeasance. The present state of law is that no legal liability is attached to nonfeasance.

AN ALTERNATIVE ANALYSIS – FREEDOM OF CONTRACT

The distinction between misfeasance and nonfeasance can also be explained by the concept of freedom of contract. At common law, one is free to enter into a contract or not. The law does not provide that one has to make any contract. It even protects individuals from being forced to sign a contract by the doctrine of duress. This is different from tortious liabilities where obligations are defined and imposed by the law, whether the parties agree to it or nor. Affirmative duties have been regarded as a subject within the realm of contract law rather than that of tort law. The rationale behind this is that the law should not force one individual to benefit another, otherwise it would be a form of slavery or "an exalted form of socialism"[75] which is contrary to the laissez-faire spirit of English law. Yet, if there is a contract between the parties, the situation will be different. If the wrongdoer, who has under his own volition made an agreement with the other party who has provided sufficient consideration for the promise, wants to break his promise, there are ample justifications for the law to intervene. Thus the binding effect of the contract is enforced by the law. In this way, affirmative duties, supported by agreement and consideration, are imposed. Thus, Professor Weinrib has commented,

> "The common-law position on nonfeasance generally relies on contract law, and hence on the market, to regulate the provision of aid to others for independently existing dangers."[76]

He also tries to use the contract-value analysis to explain those special relationships in which affirmative duties are imposed. In his opinion the individual's liberty can be represented by the value of contractual liberty[77]. In those exceptional cases where duties to rescue are imposed, the law refuses to recognise those rescuers as market agents and they, in the eyes of the law, are not entitled to contractual liberty in those situations because the social value in the liberty to contract is absent. Thus, ultimately, his argument is based on the social values of various acts, that is, the interest of the society as a whole.

In the parent and child relationship, society's interest is found in the upbringing of the next generation of society. Within our present social framework, this task is delegated mainly to a social institution –the family – in which the parents take up the responsibility of looking after their children. The law recognises, and in fact enforces, such delegation. Direct legal duties are imposed upon the parents by statutes[78]. At common law, the parents are under a duty to afford physical protection and maintenance to their child[79]. The parents are also treated by the law as the supervisors of their child and if, owing to their negligence, the child is given an opportunity to injure others, they would be liable[80]. Thus, it is not surprising that a legal duty to rescue one's child is recognised by the court.

In regard to other special relationships, explanations basing on some of their inherent characteristics,

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75 Minor, *Moral Obliqation as a basis of Liability*, 9 Va L Rev 421 at p 422.

76 Ernest J Weinrib, op cit, at p 268.

77 ibid at p 268, he said, 'Contract law gives practical application to a market society's reliance on consensual private ordering, and thus provides the principal embodiment in the law of the ideal of individual liberty. It both gives individuals the means to exercise their liberty and restricts liberty where, for either practical or ideological reasons, the circumstances are not appropriate for its exercise. In particular, the law of contract presupposes a certain social equality of those who engage in the bargaining process. In thus giving shape to the ideal of liberty in its application to specific circumstances, contract law can be looked to for evidence of the extent to which, and the situations in which, the law prizes individual liberty.'

78 See ss 26 & 27 of Offences Against the Person Ordinance, Cap 212 LHK, and Part VII of Education Ordinance (ss 73-78), Cap 279 LHK.

79 See *R* v *Chattaway* (1922)17 Cr App Rep 7; *R* v *Bubb* (1850) 4Cox CC 455; *R* v *Gibbins and Proctor* (1918)13 Cr App Rep 134; *R* v *Downes* (1875) 1 QBD 25.

80 See *Newton* v *Edgerley* [1959] 3 All ER 337, contrast with *Donaldson* v *McNiven* [1952] 2 All ER 691. See also *Smith* v *Leurs* (1945)70 CLR 256.

similar to the contractual features of agreement and consideration, have been advanced. A typical one is,

> "Affirmative duties are imposed only in situations where the one under a duty to act has voluntarily brought himself into a certain relationship with others from which he obtains or expects benefit. There is in a sense a "consideration" moving to the person under the affirmative duty, although that "consideration" need not move from the one asserting the right correlative to the duty."[81]

At first sight, this seems to be a satisfactory account. But a further analysis will show the fallacy of this line of argument. To use the actual or potential benefits accrued by the defendant from the plaintiff as justification for the imposition of affirmative duties would be working on the same premise as dealing with contractual situations. However, there is an important element in the contractual situations which is absent in the present context – ie the freedom of the parties to agree on the terms of the contract. The individual's liberty is only deprived to the extent that he has voluntarily agreed to. It is thus, impossible, on this basis, to require the defendant to act as the Good Samaritan, which is the same as requiring him to do something more than that he has promised to do. The benefit that he reaps from the plaintiff is, in law, the consideration of the contractual services that he has provided to the plaintiff; eg in the case of the innkeeper, the provision of accomodation. Hence the possibility of benefit cannot be a ground for distinguishing these particular classes of persons as more susceptible to the duty to rescue. In fact, in every kind of contractual relationships, the reasoning of this "benefit explanation" is applicable. Yet, the positive duty to rescue is not imposed on everyone who has made a contract with the imperilled person.

It may be argued that there is an implied term in these special contracts that the defendant will give necessary aid to their customers when they run into dangerous situations. It would then follow that the plaintiff's claim will be based on contract instead of tort. Moreover, the defendant should be able to exclude, by express provisions in the contract, such liability[82]. But neither of these represents the present legal position.

Hence, from the potential rescuer's point of view, there has to be other ground to justify the deprivation of his individual autonomy in deciding whether to rescue the imperilled person in the special relationships circumstances. Professor Atiyah has offered a different explanation[83]. He sees no logical distinction between misfeasance and nonfeasance and attributes such dichotomy to the ordinary man's use of their intuitive reasoning of cause in the daily speech. Thus he explains the imposition of non-feasance liability on the ground of administrative reason – in these situations, the defendant more readily identifies himself. This would imply that there is no material ground, at least from the theoretical point of view, for discriminating the potential rescuer involved in special relationships with the victim against the general public. If it is so, every time the defendant is brought before the court, provided that the plaintiff can prove to the court's satisfaction that the defendant is present but has offered no help when the plaintiff is imperilled, there is no reason for the court to deny remedy to the plaintiff because the plaintiff has already borne the burden of the administrative difficulties which is the only obstacle to a general duty to rescue[84].

AFFIRMATIVE DUTIES TO RESCUE – STATE INTERVENTION OF INDIVIDUAL LIBERTY?

The reason behind the present state of law is the fault principle. In cases of misfeasance, by subjecting the victim to an unreasonable risk of harm, the

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81 Note 64 Col L Rev 1301 at p 1317; similar opinions are expressed in Prosser, op cit, at p 339; Linden, op cit, at p 275; Winfield & Jolowicz, op cit, at p 77-78.

82 Unless one is prepared to argue that the law, by virtue of public policy, forbid such exclusion. Yet, this would beg the original question, ie what is the basis for such public policy?

83 Atiyah, op cit, at p 98-99, he said, 'The truth appears to be that there is no really satisfactory reason for distinguishing between misfeasance and nonfeasance in the great majority of cases, and that this distinction is based on irrational and instinctive misconceptions about causal principles on the one hand and an exaggerated fear of the burdensomeness of affirmative obligations, on the other hand.'

84 The administrative difficulties in implementing a duty to rescue has also been offered as an excuse for the absence of a general duty to rescue by the judges. See *Home Office* v *Dorset Yacth*, op cit, per Lord Reid at p 1027 C.

defendant is at fault and should be held liable if the victim is thereby injured. But what is unreasonable? Is it not just what an ordinary prudent man would not do in the every-day life? It is in fact a standard set by the majority of the society. One cannot deny that the reasonable man standard is related to the prevailing moral standard of the society. Thus, Lord Atkin, in the famous case of *Donoghue* v *Stevenson*[85], had said,

> "The liability for negligence ..... is no doubt based upon a general public sentiment of moral wrong-doing for which the offender must pay."[86]

But the establishment of a relationship between law and morality does not necessarily lead to the conclusion that legal principles should have an exactly parallel development with that of morality. Otherwise, every immoral act should be legally punished. Even Lord Devlin recognised that there was a gap between the two and the law was concerned with the minimum standard only[87]. This is inevitable, as explained by Professor Tunc,

> "A judgment passed from the moral point of view would imply praise or blame towards an act or behaviour, and towards a person ..... Such a judgment would need to take into consideration all the factors constituting "the personal equation" of an individual. Obviously a man cannot assess the part that heredity education, environment, and mere circumstances have played in the formation of a character or even in the commission of an act. The function of a human court of justice cannot be to judge a man, but only to maintain a certain order within society – an order as consistent as possible with the dictates of justice and morals. The function performed by the judge is fundamentally a social one."[88]

Still one has to agree that the law should, at least basically, proceed in the same direction as morality. The extent to which the law should enforce morality is to be determined by striking a balance between the interest of the society and that of the individual. This is also the fundamental question in regard to the duty to rescue.

There have been some explanations of the judicial attitudes towards nonfeasance in terms of the individualistic philosophy of the common law – ie its stress on the individual's freedom and autonomy[89]. It is considered as violating or infringing the personal liberty of the subjects if the state imposes affirmative duties on the individuals. The duty to rescue is regarded as a matter for private decision – ie one within the sector of privacy of conscience. However, personal liberty has never been given an absolute rule in any society. J S Mill had given an explanation for this,

> "..... every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest ....."[90]

In fact, in a society which consists of individuals with conflicting private interests, it is impossible to have unrestrained liberty for every individual. As A Lincoln did, one has to concede that, "This is a world of compensation and he who would be no slave must consent to have no slave."[91] Thus, he who wants to have personal freedom must respect the others' personal freedom by subjecting himself to some restraints. In a state which pledges its loyalty to the concept of rule of law, the law is the guardian for freedom. Though restraints are imposed, they are not the ends of the law but are rather the means to achieve the ends – to preserve freedom. Members of the society are, by virtue of their living together in the same society, subject to the social duties imposed upon them by the law.

Immanuel Kant had recognised that physical integrity is the basic stuff in man[92], since it is necessary for the accomplishment of any human aim – including the exercise of one's freedom. Anyone who argues on the ground of freedom must, owing to

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85 [1932] AC 562.
86 ibid at p 580.
87 Devlin, *The Enforcement of Morals*, at p 19.
88 Andre Tunc, *Tort Law and the Moral Law* (1972) 30(2) CLJ 247 at p 251.
89 See Note 52 Col L Rev 631 at p 632.
90 JS Mill, *On Liberty*, Ch 4 at p 132.
91 *Sandburg's Life of Lincoln*, vol 2 p 182.
92 I Kant, *The Metaphysical Principles of Virtue*, at p 112.

his living in a society, also concede to the other the same freedom which implies a recognition of the others' right to their physical integrity. But this reasoning can support a general duty of beneficence whenever the lives and health of the beneficiaries are imperilled while the physical integrity of the benefactors is unaffected. Thus it would require a rich man to feed the starved. The answer to this can be provided by setting up social institutions like taxation and social security schemes to discharge this general duty of beneficence. Thus under normal circumstances, the burden is borne by the society as a whole. These institutions also perform the task of coordination to ensure that no person is singled out unfairly either for burdens or for benefits. However, in regard to the rescue situations, owing to its emergency characteristics, the one in distress cannot wait for the assistance from those social institutions and the case is out of the reach of the general duty of beneficence. Under those circumstances, the individual, who happens to be at the scene of the accident, has to perform his social duty to respect another individual's physical integrity by performing the task of rescue. This is a duty which everyone who claims freedom within a society must obey because it is implicit in the right to freedom that one must affirm the physical integrity of the others which would in turn require the recognition of a duty to rescue.

Then, from the social interest point of view, should there be a general duty to easy rescue as it is enforced in the civil law countries? It is clear that morality does require one to take some action in those circumstances. But the question is should legal sanction be imposed? What is being involved in these occasions is the personal safety of the accident victims. If the European legislations are to be followed, the duty only arises when the life of the victim is being endangered. The sanctity of life has always been respected by the law and in most of the cases, personal freedom is sacrificed in favour of it. Another qualification for the duty to rescue is that it is confined to emergency situations. The need for help has to be so urgent that any delay would be fatal, or at least likely to cause further injuries. This would eliminate the possibility of subjecting doctors to the onerous duty of attending to every sick person they encounter.

These conditions, ie the sanctity of life and emergency, are similar to the underlying principle of the defence of necessity. Violation of proprietary rights or even abortion had been justified in law in order to preserve lives[93] and as Edmund Davies L J had observed in the case of *Borough of Southwark* v *Williams*[94], cases of necessity are those that deal with urgent situations of imminent peril. Since the nature of the defence is a choice of a lesser evil which requires a judgment of value, the law as it stands reflects its high regard for the value of human life. Are there any reasons that the law should refrain from taking one step further to impose a duty to save human life in cases of emergency? Would it be oppressive?

In fact, the duty imposed on the potential rescuer would not be a burdensome one. There is no obligation to subject oneself to any risk of physical harm. A person who does not know how to swim is not required to thrash for fifty metres to save a drowning child. In fact, in setting the standards for the rescuer, one can draw an analogy with the occupier's liability to a trespasser. The House of Lords' decision in *British Railway Board* v *Herrington*[95] established that a humanitarian duty is owed by the occupier of premises to a trespasser. The harsh rule of *Addie* v *Dumbreck*[96] was abrogated. The test for such duty is, as outlined by Lord Reid,

> "whether a conscientious humane man with the occupier's knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it."[97]

The House of Lords clearly expressed that the duty is less onerous than the common duty of care[98]. There

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93 See *Mouse's* case (1608)12 Co Rep 63; *R* v *Bourne* [1939] 1KB 687.

94 [1971] 2 All ER 175 at p 181.

95 [1972] 1 All ER 749.

96 [1929] AC 358. According to this decision, a trespasser enters other's premises at his own risk and the occupier owes him no duty other than not to inflict injury on him intentionally or recklessly.

97 [1972] 1 All ER 749 at p 758 f.

98 The common duty of care is owed by the occupiers to the licensees and invitees. See s 3(2) of the Occupiers Liability Ordinance, Cap 314 LHK.

is in fact one important similarity between the occupier's position vis-a-vis the trespasser and the rescuer's relationship with the rescued. Both of them do not voluntarily assume the relationships. The relationships are forced upon them by the trespassers and the accident victims. Hence the usual justification for the impostion of an objective standard will not be applicable. That justification holds that if a person chooses to assume a relationship with members of the public; the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources would do. If he cannot attain that standard he ought not enter into that relationship. Yet this is not the case for the occupier and the rescuer for they have no choice of whether to enter into that relationship or not. Hence their duties should be more subjective in nature. In respect to the occupier, his duty, as defined by the House of Lords in the Herrington case[99], will vary according to his own knowledge, ability and resources. The same should apply to the rescuer and the accident victim should also take his rescuer as he finds him.

Having regard to all these qualifications on the duty to rescue, the balance is clearly tipped in favour of society's interest in upholding the sanctity of life. It has to be noted that the duty to rescue is not the same as the general duty of beneficence. Epstein, in his criticism against a Good Samaritan duty, has pointed out that,

> "Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty."[100]

Professor Weinrib has provided a good reply to that by adopting the absence of contract values as the criteria for the distinction between the duty to rescue and a general duty of beneficence[101]. In fact, as Lord Devlin has stated in his classic work, the question of how far the law should enforce morality is a matter for decision in the merits of each case[102].

CONCLUSION

From the previous analytical studies, two different points of view have emerged. In the light of the risk-creation analysis, owing to the operation of the fault principle basing on the notion of causation, no liability should be attached to the selfish Levites. On the other hand, in terms of social value, there seems to be no reason why there should not be a general duty to rescue in the closely defined emergency situations. This apparent divergence can be resolved.

In the risk-creation premise, the major consideration is the relationship between the parties themselves. Basically, it is within the province of tort law and the primary concern is the compensation of the plaintiff, ie the shift of the loss incurred in the accident. In this area, the fault principle has its dominance and since there is hardly any causal link between the conduct of the defendant and the injury of the plaintiff, there should not be any tortious liability imposed upon the defendant.

When the matter is examined from an individual liberty perspective, the social interest is at stake. The wrong of the defendant is his disrespect for the sanctity of life of his fellow citizen. His conduct is regarded as anti-social. What he has committed is in fact a social wrong – an offence against the state. What is posed as the standard is a socially desirable humanitarian conduct. Hence it is indeed concerned with the relationship between the society as a whole and the individual himself – a matter which falls within the province of criminal law. Following from that analysis which is fundamentally a balancing operation weighing the freedom of the individual against the social interest, a criminally sanctioned duty to rescue, as defined in that analysis, should be established.

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99 Supra n 95.

100 Epstein, *A theory of strict liability*, 2 J of Legal Studies.

101 Weinrib, op cit, at p 272-74. In the rescue situation, as it is defined with an element of emergency, it is clear that the law of contract cannot be adopted as a means to foster the desirable social goal because the basic assumption of social equality in bargaining cannot be sustained where one party, the victim, is at the verge of his death. He is in fact at the mercy of the rescuer. For details of the argument, see the work of Professor Weinrib, op cit, where he explains that market force cannot be relied on to govern emergency situations.

102 Devlin, op cit.

Since the basic aim for imposing a duty to rescue is to ensure that accident victims can get the necessary help from their fellow citizens in cases of emergency, rather than to enable the victims, who may be negligent in the first place and thus cause the accidents, to squeeze compensation from the third parties who just happen to appear at the scene, the suggestions depicted above are quite sensible. Practically, to adopt such proposals, legislation can be passed to create an offence arising out of the breach of the duty to rescue and at the same time expressly state that no civil liabilities are to be entailed. The definition of the duty should, as mentioned in the foregoing analysis, possess the following characteristics,

(a) the victim's life has to be endangered;
(b) the situation has to be one of emergency;
(c) the rescuer is not required to engage himself into any risk of personal injury;
(d) the standard is one of the humanitarian standard similar to that of the occupier's duty owed to a trespasser.

There may be problems in defining the various terms but the legislature can have some reference from the European experience. Furthermore, as in the European cases, the court can be entrusted with the task of refining the various possible issues in each individual action brought under the legislation.

After all, the law is just a social institution established to regulate the interpersonal relationships in a community. In accomplishing its tasks, it also reflects the values which the society puts on different matters. Each judgment of the court is at the same time a value judgment pronounced by the society. Since the right to live is a basic human right, our society, as well as other civilised societies, has placed a high regard for it. Then, in a modern world where men are increasingly dependent upon each other, is it not correct to include into the right to live a right to be rescued as well ? By virtue of the fellowship of mankind, is a man who suddenly falls into peril not entitled to the helping hands of another person? Although there are other means to affirm the moral values of the society, when these means – some lawyers labelled them as the "higher law", "the voice of the conscience" – are plainly ineffective, should the society stubbornly refrain from the adoption of a more direct instrument, ie the law, to reinforce its moral decree? These questions could be redundant in a Utopian society, but until our society has reached such a stage, the legislature has to answer them.

A COMPARATIVE STUDY OF THE TRADE MARKS ORDINANCE (1954), CAP 43 AND THE TRADE MARKS ACTS (1938)

by Ariel Sui-mei Yeung

I INTRODUCTION

This essay attempts to evaluate the similarities and dissimilarities between the Trade Marks Ordinance, Cap. 43 and the Trade Marks Act 1938,[1] and also their implications on the local law in three main areas, namely, the weight of English precedents, the problem regarding Chinese language and the effect of sections not appearing in the 1938 Act. The main reference is to Hong Kong case law.

With a few exceptions,[2] the laws in Hong Kong are modelled after the English legislation. Most Acts are adopted without significant modifications. Sometimes, "Colony" in replacement of the word "United Kingdom" is all that is needed to adopt the section.[3] Indeed, the present subject matter, the Trade Marks Ordinance, establishes an essentially similar scheme to the 1938 Act. Many sections are similar in wording though not identical to the English provisions. Where the wording of both legislations is identical, it is thought that English decisions should be naturally applied in Hong Kong. However, where there is slight variation, should the courts of Hong Kong still routinely refer to decisions of English Courts? Is regional variation necessary to adapt to the local situation?

Though the two legislations are essentially similar, trade marks law in Hong Kong is complicated by the existence of two official languages. Whether the wording of the sections is identical or not, the implications on the local ordinance created by Chinese language mark a difference from the English Act.

While adopting the Trade Marks Act at large, a few sections in the Ordinance are not based on the

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1 For a general comparison of the 2 legislations, see Appendix I.

2 eg The Landlord and Tenant (Consolidation) Ordinance Cap 7 LHK is quite different from the English Act. This is mainly a response to local problems.

3 See eg s37(2) and s41(4) of the Ordinance and s26(2) and s22(4) of the 1938 Act.

1938 Act. Indeed, two of the sections are based on the old legislation, the 1909 Trade Marks Ordinance[4] and one is based on the 1919 Trade Marks Act.[5] The newly added section 13A, though also based on English legislation is not part of the 1938 Act. What are the effects of such provisions on our law?

These questions have not yet been fully worked out in the local case law. The purpose of this essay is to outline as far as possible the probable implications of each of the above three areas on the local law.

II ENGLISH PRECEDENTS

"Whilst acknowledging that the United Kingdom decision does not bind him he says that the policy of the Registry is to follow that of the United Kingdom Registry so far as possible in administrating the virtually identical provisions".[6] No doubt, it seems to be the usual practice for most registrars and judges in Hong Kong to treat the English decisions as indisputable precedents. To quote two examples: The test whether a word is "publicis juris" set out in *Ford* v *Foster*[7] was applied in *Tong Wai-han* v *Lai Wai-ling,*[8] similarly, the rationale of *Crosfield's Application*[9] that a laudatory epithet was not registrable as invented words was applied in *Re Benus Watch Application.*[10] However, the statement made is not without reservation – the policy is to follow 'as far as' possible. It will be seen that there were cases where the Hong Kong courts declined to follow the same line as our English counterpart though the provisions are virtually identical.

A English Decisions not Followed When Wording is Identical

The case *re Bausch and Lomb Incorporated*[11] may be cited as an illustration. It concerned an appeal from the decision of The Registrar of Trade Marks refusing an application by Bausch and Lomb for the registration of the trade mark "SOFLENS" in respect of one of its product which had been available in Hong Kong since 1972. Zimmern, J upheld an appeal against the refusal to register on the grounds of distinctiveness acquired abroad.

It was argued in a number of English cases that distinctiveness required by section 9 (2) of the 1938 Act (which is identical to section 9 (2) of the Ordinance) refers only to distinctiveness acquired in Britain only. Accordingly, evidence that it was used or registered abroad by the applicant had little significance, if any.[12] In *Impex Electrical Ltd* v *Weinbaum,*[13] for example, the motion by defendant to rectify the word "Dario" in respect of thermionic valves was refused. Tomlin, J at p 420 of his judgement said:

> "It seems to me that the whole contention rests on a misapprehension. For the purpose of seeing whether the mark is distinctive, it is to the market of this country alone that one has to have regard. For that purpose foreign markets are wholly irrelevant, unless it be shown by evidence that in fact goods have been sold in this country with a foreign mark on them, and that the mark so used has thereby become identified with the manufacture of the goods."

And similarly in *Ford-werkes' Application,*[14] a case where registration of the letter F and K in interlaced ovals was in question, extensive use abroad was held irrelevant. On this, Lloyd-jacob, J made the following comment:

> "In my submission, since the Applicant do not claim registration by virtue of a prior use of the mark sufficient to show that it has acquired a distinctive meaning, I must examine the mark as an unused trade mark so far as the United Kingdom is concerned ....."[15]

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4 Ss 23 and 53 of the Ordinance.
5 S 10 of the Ordinance.
6 In *re Bausch and Lomb Incorporated* (1979) HKLR 309 at p 310.
7 (1872) LR 7 Ch App Cases 611.
8 (1970) DCLR 41.
9 (1910) 1 Ch 130; 26 RPC 837 (CA).
10 (1962) DCLR 218.
11 [1979] HKLR 309.
12 The proposition is also put forward in Cornish, *Intellectual Property – Patents, Copyright Trade Marks and Allied Rights* (Sweet and Maxwell) 1980 at p 520.
13 (1927) 44 RPC 405. Decision was applied in *Gaines' Application* (1951) 68 RPC 178.
14 (1955) 72 RPC 191.
15 Ibid at p 192.

Despite the above authorities, Zimmern, J found support of his decision in Kerly's authoritative book on Trade Marks which states that in determining whether a mark limited to use for export is adapted to distinguish, evidence as to use and distinctiveness abroad is admissable and should be taken into consideration.[16] As a matter of law, the basis for this decision seems a little weak. However, this divergence perhaps demonstrates the fact that the need to maintain a trading harmony among all friendly Commonwealth countries sometimes outweighs the need to adhere strictly to English precedents.

Another case where English decision was not followed was in *re Chung Fai Trading Company's Application.*[17] In that case, the applicant's former partner brought an action against the applicant for the infringement of a trade mark registered in the name of the former partner's firm. In her defence, the applicant pleaded, inter alia "honest concurrent use" and in reliance upon section 22 of the Trade Marks Ordinance. She filed an originating motion whereby she applied to the court to register the trade mark also in the name of the firm. The applicant contended that section 22 gave original jurisdiction to the court to permit registration of a trade mark in certain circumstances. It was further contended that by reason of section 80(a) of the Ordinance, she must make application to the court rather than to the Registrar since there was an action pending between the parties.

It was held that the Court had no original jurisdiction under section 22 to entertain the motion. Section 22 did not give an option to make application either to the Court or to the Registrar as those words are used in context of section 80(a) of the Ordinance, as it only applied to those sections that clearly states that such option existed viz. sections 37, 48, 49, 57 and 68(2).

Section 22 which is in term similar to section 12(2) of the 1938 Act reads as follows:

> "In case of honest concurrent use, or of other special circumstances which in the opinion of the Court or of the Registrar may permit the registration of trade marks that are identical or nearly resemble each other in respect of the same goods or description of goods by more than one proprietor subject to such conditions and limitations, if any, as the Court or the Registrar, as the case may be, may think it right to impose."

In *Electrolux Ltd* v *Electrix Ltd and Another,*[18] the Court held that it had jurisdiction under section 12(2) of the Act to permit registration and it should not in its discretion entertain any application for registration not properly defined in a formal application. This was unaccepted by Briggs, C.J. in the local case and he said:

> "In view of the way in which the point was dealt with I am not persuaded that I should follow the decision of Lloyd-jacob, J. I do not think that section 22 of the Ordinance confers an original jurisdiction on the Court."[19]

The judge was of the opinion that section 22 did not enable an applicant to by-pass procedure laid down in the Ordinance for registration of a trade mark. However, it is submitted that this was in no way conflicting with the decision in the *Electrolux Ltd's case.* What was being stated was that section 12(2) of the Act did confer original jurisdiction on the Court with a true discretion to permit registration, but the Court in exercise of its discretion should if possible, in the light of the general public interest, secure an initial ruling by the Registrar. The decision in *re Chung Fai Trading Company's Application* may well be apt and correct, however, it is respectfully submitted that the point on the interpretation of section 22 deserves much reconsideration!

Declining to follow English decision has always been a rare case in the courts of Hong Kong, especially when both provisions are identical. It is

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16 10th *Kerly's Law of Trade Marks* at p 146 para 8-67. On this point, it is worth noting that in the *'sovereign' case* (1962) DCLR 218, the Registrar in citing the unreported case of *'Royal Command'* did say that due consideration and respect must be paid to registration obtained in other British Commonwealth countries though he was never bound by these decisions.

17 [1977] HKLR 583.

18 (1953) 70 RPC 127.

19 [1977] HKLR 583 at p 586.

believed that some consistency in law is worth upholding unless and until there are some good and valid reasons for such divergence, such as the policy reason illustrated by *The Bausch and Lomb's case.*

B The Weight of English Precedents When There is Subtle Difference

When the provisions of the two legislations are different, the weight of English precedents depends very much on the construction of each provision as well as reference to other factors.

1 Section 12(1)

In *re "Excello" Trade Mark,*[20] the Hong Kong Court drew a difference between the English Act and the Ordinance. In that case, the applicant sought to register the mark "Excello" in Part B of the Register. The applicant was opposed on the basis of section 12(1) of the Ordinance by the proprietors of a common law mark which was not registered under the Ordinance, "Excel". The learned Registrar set out the construction of section 12(1) as follows:

> "It shall not be lawful to register as a trade mark.....
> (1) any matter the use of which would be –
> (a) likely to deceive; or
> (b) disentitled to protection in a court of justice; or
> (c) contrary to law or morality;
> (2) any scandalous design."[21]

He said that if the matter was to be considered under the 1938 Act, the questions would necessarily be phrased in a different way. The questions would only be whether the Applicant's mark would be disentitled to protection in a court of justice by reason of:

(a) it being likely to deceive; or
(b) it being likely to cause confusion; or
(c) otherwise being disentitled to protection.[22]

He listed two main differences to the approach of the provisions.

(1) Under the Ordinance, the Registrar did not have to consider the whole matter upon the hypothetical basis of the protection that would be given in a court of justice. He must consider as a separate issue the question of whether the proposed mark was likely to deceive.
(2) The factor of "confusion" was not explicitly referred to in the Ordinance, thus the issue was only one of deception.

Because of the above differences, English authorities on this point must be regarded cautiously. The Registrar, however, did adopt some comment of the English decision. For example, the difference between deception and confusion as alluded to by Salmon, L J in *re GE Trade Mark*[23] was accepted by him to illustrate the fact that the Applicant under our present legislation did not have such a difficult task in having to establish that its proposed mark was not likely to deceive as it would have if it had to establish that its mark was not likely to confuse the public. Yet, he did admit that English decisions should not be totally applied and he said:

> "The difference between section 11 (UK) and section 12(1) of the Ordinance is such that the current section in Hong Kong is now largely severed from the historical evolution of the law in the United Kingdom so that although in the 'Bali'[24] case the specific answer as to the meaning of 'disentitled to protection in a court of justice' was asked and answered, the answer does not go far to assist in finding an answer to the same question in relation to section 12(1)."[25]

This interpretation is supported by a New Zealand case called *Pioneer Hi-Bred Corn Co* v *Hy-Line Chicks Pty Ltd.*[26] Section 16 of the New Zealand Trade Marks Act 1953 is similar to section

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20 (1972) DCLR 67.
21 Ibid at p 71.
22 Ibid at p 72.
23 (1970) 87 RPC 339 at 364. "The words 'or cause confusion' were, I think, added to the Act of 1938 to dispose of the possible argument that the use of a trademark, although likely to confuse by leaving in doubt, was not likely to deceive and therefore did not come within the old s11."
24 (1969) 86 RPC 472. The House of Lords went to some length to trace the history and analyse the meaning of s11 of the UK Act.
25 (1972) DCLR 67 at p 83.
26 (1979) RPC 410.

12(1) of our Ordinance. Section 16 of the New Zealand Act reads as follows:

> "It shall not be lawful to register as a trade mark or part of a trade mark any scandalous matter or any matter the use of which would be contrary to law or morality or would otherwise be disentitled to protection in a court of justice."

In the *Pioneer* case, Richmond P stated that:

> "At this point, it is convenient to note that section 16 is worded in a different way from its statutory predecessors, the last of which was section 13 of the Patents, Designs, and Trade Marks Amendment Act 1939. That section, in common with section 11 of the United Kingdom Act of 1938, prohibited registration of any matter the use of which would 'by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice'..... It is however clear that in 1953 the legislature in New Zealand deliberately departed from the previous wording as found in section 13 of the 1939 Amendment Act. The result is that in this country the words "the use of which would be likely to deceive or cause confusion" are no longer governed by the words 'would..... otherwise, be disentitled to protection in a court of justice'. They should accordingly be given effect in accordance with their ordinary and natural meaning."[27]

Nevertheless, the law is not well settled. The two latest Hong Kong cases expressed a different view. In *re "Crown Brand and Device" Trade Mark*,[28] which concerned an application by the Wall Paper Manufacturers Limited to the Registrar for the rectification of the Register by the removal of the "Crown Brand and Device" Trade Mark, it was decided that though section 12(1) of the Ordinance is not identical to section 11 of the 1938 Act, they are in actual fact the same. The reasons stated were that:[29]

(1) The marginal note to our section 12(1) refers to section 11 of the 1938 Act as its source notwithstanding the differences in wording.
(2) The "Objects and Reasons" appendix to the Trade Marks Bill 1954 states inter alia "The Bill repeals and replaces the existing Trade Marks Ordinance (Cap 43) and follows closely the lines of similar legislation in the United Kingdom..... In view of a number of changes in fundamental principle attention is invited to the clauses mentioned hereunder." However, no reference is made to clause 12(1) as being different in principle from section 11 of the UK's 1938 Act.
(3) The Goschen Committee's Report recommended revision of section 11 to clarify the wording,[30] which they regarded as "cumbersome" and not for the purpose of introducing any substantive change. The recommended rewording is almost exactly the same as our present section 12(1). Though when the 1938 Act was drafted, the recommendation was not implemented, this was implemented in our Ordinance. Like the Goschen Committee, our legislators thought that the rewording was for the purposes of clarification and did not involve any departure from the substantive provision of section 11 of the 1905 Act as repeated in section 11 of the 1938 Act. Thus, it was intended that our section should embody the same provision as section 11 of the 1938 Act.

On this basis, it was decided that the United Kingdom decisions on section 11 were suitable precedents to follow regarding section 12(1) of the Ordinance.[31]

Also, in *re Hong Kong Caterers Limited's Application*[32] which concerned the application of the trade mark "MAXIM'S 美心", it was argued by the counsel that in section 12(1), inter alia, "would be likely to deceive" and "would be disentitled to protection in a court of justice" were alternatives for refusing registration, but in section 11 of the 1938 Act, "disentitled to protection" hinged on

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27 Ibid at p 412.
28 Unreported, File Ref No 1725/75 (1981).
29 Ibid at p 15-18 of the judgement.
30 Cmd 4568, 1934, para 65.
31 The *GE Trade Mark* case (1973) RPC 271 was applied in the decision regarding the consideration of circumstances subsequent to registration at p 41 of the judgement.
32 Unreported, File Ref No 71/71 (1982).

"by reason of its being likely to deceive or cause confusion". However, the court held that there was no compelling reason for it to depart from the interpretation of section 12(1) in the *Crown's Trade Mark* case (which stated that section 12(1) was in effect the same as section 11 of the 1938 Act) and therefore it could regard the United Kingdom decisions on section 11 as being suitable precedents to follow.[33]

In both of the unreported judgements, there is no mention of the *Excello* case. But, it seems clear that the four cases contradict with each other. It is, however, submitted that the interpretation of section 12(1) in the latter two cases is to be preferred. This is because when the *Excello* case was decided, there was no reference to the "Objects and Reasons" in the Trade Marks Bill as well as the Goschen Committee's Report, thus a strict literal interpretation on the provision may not be appropriate. Moreover, though this literal approach was adopted in the *Pioneer Hi-Bred* case, it is not clear what is the intention of the New Zealand's legislature. Does the legislation have the same objects as our Ordinance, namely to follow closely the lines of similar legislation in the United Kingdom?

It is highly probable that our legislators were aware of the criticism in United Kingdom of the wording of section 11 when drafting the Ordinance and made the necessary amendment. An example to illustrate this can be given by comparing section 13(1) of the Ordinance with section 17(1) of the 1938 Act. Section 13(1) of the Ordinance reads as follows:

> "Any person claiming to be entitled to be registered as the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it must apply in writing to the Registrar in the prescribed manner for registration either in Part A or Part B of the register."

The only difference of the two provisions is between the phrases "claiming to be entitled to be registered as the proprietor" and "claiming to be the proprietor" (which appears in the Act). In the *Crown Trade Mark* case already considered, the court, on interpretation of section 17(1) of the 1938 Act, cited Kerley's Law of Trade Marks which states that "the words in this section really mean no more than 'claiming that he is entitled to be registered as the proprietor'."[34] Thus it found that there was no substantial difference in meaning between the two provisions. This interpretation of section 17(1) of the Act was further supported by judicial decision. In *re Cheryl Playthings, Ltd,*[35] which concerned the registration of the mark "Rawhide", Cross, J, in an invaluable comment on the meaning of section 17(1) said:

> "Presumbly all that is needed in such a case is that the applicant should claim in good faith to be entitled to be registered as proprietor of the mark."[36]

From the above illustrations, it seems to confirm that though there are differences in the provisions of the two legislations, in effect, they are the same. Is this principle applicable to the whole Ordinance? Perhaps, the following discussion may establish an answer.

2 Section 55(1)

The marginal note of section 55 of the Ordinance refers to section 27 of the 1938 Act. Section 55(1)(a) states:

> "Where a trade mark consisting of an invented word or invented words, or a device or devices, or a combination of them, has become so exceptionally well-known..... that the use thereof in relation to other goods would be likely to detract from its distinctive character in respect of the first-mentioned goods, then notwithstanding that such use would not be likely to be taken as indicating a connexion in the course of trade between those other goods and a person entitles to use the trade mark in relation to the first-mentioned goods and that the proprietor registered in respect of the first-mentioned goods does not use or

33 Ibid at p 3 of the judgement.
34 At section 4-02 p 44.
35 1962 1 WLR 543.
36 Ibid at p 549. A discussion can be found in LWN, *Cowboys & Trade Marks,* 106 Sol Jo 928.

> propose to use the trade mark in relation to those other goods, ..., on the application, ..., be registered in his name in respect of those other goods as a defensive trade mark and, while so registered, shall not be liable to be taken off the register in respect of those other goods under section 37."

The English provision differs in that:

(1) registration is limited to invented words, and not extended to cover devices.
(2) the requirement in the Act is "well known" as oppose to "exceptionally well known" in the Ordinance.
(3) the test in the Act is whether the use in relation to other goods "would likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first-mentioned goods" and not whether the use "would likely to detract from its distinctive character" as in the Ordinance.

Defensive registration in Hong Kong, as seen from these differences, differs quite a lot from the English provision. Indeed, the scope of our Ordinance is much larger. English precedent on this area was limited, the most important was *re Ferodo's Application*.[37] What was in issue there was the meaning of the test "to be taken as indicating a connection in the course of trade". Since there is no local judicial decision on this point, should the decision be applied in Hong Kong?

It was stated that the Goschen Committee purposely restricted defensive registration to invented words:[38]

> "76..... Having regard however to the exceptional nature of the privilege contemplated by this proposal, we think that the registration of such marks should be restricted to invented words, as we are apprehensive as to the results that might follow from the registration of ordinary words, surnames or devices under these proposed provisions."

This seems to show that it is the clear intention of our legislature when drafting the section to depart from the United Kingdom in this very aspect. This perhaps was due to the fact that there was a long history of infringement which plagued foreign businessmen dealing in Hong Kong,[39] thus, the provision might provide some sort of safeguard. Moreover, though there is no large difference between "well known" and "exceptionally well known", the wording of the test to be applied in the two provisions is very different. Thus whether the strict test designed in the *Ferodo* case should be applied is highly doubtful!

Indeed, though it is shown that in most cases where there is difference in the provisions, English decisions are regarded still as precedent to follow, it does not mean that it is a tautology. Every case must be examined by reference to judicial decisions, the intention of the legislature, relevant books and reports in its own light.

III PROBLEM RAISED BY EXISTENCE OF CHINESE LANGUAGE

The existence of two official languages undoubtedly gives rise to problems which would never be encountered by the English Registry. Though both languages are meant to be acceptable generally under the Ordinance, it will be demonstrated in the following discussions that in some areas discrimination arises. Apart from this, registration of a trade mark in Hong Kong is made doubly complicated by the existence of Chinese language.

A Section 9(1)(b)

Unlike the 1938 Act, section 9(1) (b) excludes, for whatever reason, a signature in Chinese character from being deemed distinctive though registration under other provisions are permitted, for example, registration of Chinese names under section 9(1) (a) of the Ordinance. There is no valid explanation given for this, except perhaps for the reason of better administration in the Registry.

37 [1945] 2 Ch 95.
38 Cmd 4568, 1934 para 76.
39 See FW Kendall, *Brand Problems in Hong Kong*, 53 TMR 545.

In principle, there is no reason why Chinese character signature should be excluded. The requirements for registration of a signature are that it must be:

(1) a genuine signature as normally used in business (not an artistic creation devised for the purpose of registration);
(2) distinctive; and
(3) used as a trade mark, not merely in correspondence.[40]

If all these requirements are satisfied, why should a genuine Chinese signature be excluded? However absurd it may be, there does not seem to be any real need for reform. This is because of the fact that modern practices have made signatures virtually obsolete particularly as corporations have become more important than firms. Whilst a firm may have a signature, a company cannot.[41] The signature of an employee, or a member of a firm, or an officer of a company, is not registrable under this provision, it must be the signature of "the applicant".[42] Thus, be it English or Chinese signatures, in practice, the relevance is relatively small.

B Section 9(1)(c)

Another absurdity in our Ordinance created by Chinese language is that of section 9(1) (c). It states that an invented word may be registered as a trade mark under Part A of the Register. What is to be considered an invented word is not governed by the provision but by judicial decisions. Whether a word is invented or not depends upon two factors, one subjective, the other objective: The word must have been newly coined and it must convey no "obvious meaning to the ordinary Englishmen".[43]

When the two tests are applied to a Chinese word, then most certainly the first test will fail. While an English word or other foreign word may be invented by the re-arrangement of letters, it can never be the case of a Chinese word. Though a Chinese character is formed by the combination of horizontal and vertical strokes, the number of Chinese character is closed. Indeed, there is no such thing as an invented Chinese word, except may be by the combination of a few characters which perhaps gives a new meaning. Say words like Kodak is registered as an invented word under this section, and its Chinese translation in Chinese characters 柯達 is also registered under the Ordinance though not under the same section. To any ordinary Chinese, the characters 柯達 may convey no obvious meaning, indeed one would certainly say that it is invented. However, each character, say '柯' is never an invented word in itself.

Thus, there is no Chinese words registered under this part of the provision. For Chinese words, though the objective test may well be passed, one can never succeed in passing the subjective test.

While in principle, the provision is to be applicable to both Chinese and English, in practice, it only offers protection for registration of an invented word which is composed by combination of letters. Should they allow regional variation in this aspect so as to extend its protection to cover Chinese characters? The tests for invented words are not laid down in statute, could the Hong Kong Courts just adopt the objective test in order to do so?

One reason to support such extension is that because there can be no invented Chinese words, accordingly, no Chinese word can be registered under section 55 of the Ordinance for defensive registration no matter how well-known and inventive the word may be. However, it is submitted that though in principle, the provision is somewhat awkward because of the existence of Chinese language, in practice, there are reasons why the law should not vary.

(1) Each Chinese character has independent meaning of itself, unless the word is very rare and seldom used, the combination of a few characters will always mean something to any ordinary Chinese, so in reality, there are not many.

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40 Here is no judicial authority on this point but such guidelines are laid down in the *Guidebook to Australian Trade Marks Law*, CCH Australia Limited, p 62. The Australian provision is identical to the United Kingdom provision.

41 *British Milk Products Co Ltd's App* (1915) 32 RPC 453; [1915] 2 Ch 202.

42 See *Parison Fabrics Ltd's App* (1949) 66 RPC 217.

43 Parker, J, *Phillipart* v *William Whiteley* [1908] 2 Ch 274 at p 297; approved in *de Cordora* v *Vick* 68 RPC 103 at p 108.

(2) Goods produced in Hong Kong are mostly for export, thus in most cases, their trade marks will be in English instead of in Chinese.

Since the catagory of possible Chinese invented word is very small, and it has long been the practice of the Registry to refuse such application in the first instance, it would be unadvisable to alter the present practice.

From the above two discussions, it seems that the problem created by Chinese language is in principle only, in real practice, the effect is slight. Yet the following case will illustrate the other side of the picture.

C The Test for Deceptive Resemblance

In *re Galway International Ltd's Application,*[44] the applicant, an Irish Company, applied through their Hong Kong agent for the registration of the word "Vica" in Part A of the Register in Class 5 in respect of therapeutic multi-vitamin-mineral tablets. The application was opposed on the ground of deceptive resemblance by the proprietors of the trademark "Vicks" registered in the same class but in respect of different goods. The applicant testified that the word "Vica" was derived from the anglicised pronunciation of the Chinese characters "Wei Ca" which means "strong body" and that the mark was specifically designed for South East Asian markets. The Acting Registrar General was of the opinion that although there was little likelihood of a purchaser obtaining the wrong product, there was a risk that customers of the opponents, already acquainted with the "Vicks" trade mark, would be misled into thinking that the "Vica" trademark on the products were manufactured by the manufacturers of the "Vicks" products.

Though he stated that since neither parties had registered the Chinese characters of their marks in question, he did not think that a combination of the characters or their pronunciation was relevant to the present proceeding,[45] yet he did admit that the common feature of Chinese speech in pronunciation of the word would lead to possible confusion between the two marks, thus he said:

> "Mr. Litton also maintained that Chinese people tend to add "a" or "u" to the ends of words, and that to the Chinese tongue. "Vica" might be understood to be "Vick-a", the "a" being something added in colloquial speech. Judging from my own observation, I am satisfied that this is a common feature of Chinese speech, and in my opinion it does increase the possibility of confusion between the two marks."[46]

Accordingly, it will be seen that registration in Hong Kong is much more difficult than in Britain because in some cases, an applicant has to jump two hurdles before he could satisfy the Registrar that his mark is not deceptive or likely to cause confusion.

IV EFFECTS OF SECTIONS NOT BASED ON THE 1938 ACT

The three sections under this are sections 10, 23 and 53. Section 10 is based on the 1919 Trade Marks Act (repealed)[47] and sections 23 and 53 are originally sections 21 and 42 of the Trade Marks Ordinance 1909. Sections 23 and 53 of the Ordinance mainly concern the protection of marks registered in country of origin while section 10 governs the registration of mark in Part B.

A Section 10 – Imperative Duty or Discretion?

It has already been mentioned that registration in Hong Kong is much stricter than in Britain since deceptive resemblance in either English or Chinese will render a mark unregistrable under the Ordinance. However the existence of section 10 which is not present in the 1938 Act makes it easier to register a mark in Part B than in Britain. Section 10 reads as follows:

> "10(1) Where any mark has for not less than two years been bona fide used in the Colony upon or in connexion with any goods (whether for sale in the Colony or exportation abroad), for the purpose of indicating that they are goods of the proprietor of the mark by virtue of manufacture, selection, certification, dealing with or offering for sale, the person claiming

44 [1962] HKLR 228.
45 Ibid at p 234.
46 Ibid at p 240.
47 Section 2 of the Act.

> to be the proprietor of the mark may apply in writing to the Registrar in the prescribed manner to have the mark entered as his registered trade mark in Part B of the register in respect of such goods."

In *re Bausch and Lomb Incorporated* which facts have already been mentioned,[48] it was decided that there is material difference between the Act and the Ordinance vis-a-vis applications for registration in Part B both provided by section 10. (The Hong Kong section follows the 1919 Act and not the 1938 Act). The difference is set out in 10th Kerly's Law of Trade Marks at page 153.

> "Under the Act of 1919 which created Part B of the Register, bona fide use as a trade mark for two years prior to the date of the application was a condition precedent to registration. If this condition was fulfilled, and the Registrar was satisfied that the mark was capable of distinguishing the goods of the proprietor and was not open to objection under section 11 or 19 of the Act of 1905, he was bound to accept the application. Under section 10 of the 1938 Act, on the other hand, no actual use is required; but there is no positive direction to accept a mark, so that there is a discretion as in case of Part A applications."[49]

This proposition is also supported by judicial decision. In *re Davis's Trade Marks,*[50] which concerned the registration of the mark "Ustikon" in Part B under the 1919 Act, Lord Hanworth M R said:

> "I may say in passing that, if it is established that they have been used for two years for the purpose of indicating that they are the goods of the proprietor, it would almost seem to follow that such a mark is capable of distinguishing the goods of the applicant."[51]

Thus in this respect, the position in Hong Kong is much better off than in Britain because a practitioner will not have the difficulty in advising his client as to the possibility of registration which wholly depends on the discretion of the Registrar.[52]

B Too Much Foreign Protection

Another two sections of the Ordinance which do not appear in the 1938 Act are sections 23 and 53. Section 23 reads as follows:

> "The Registrar may refuse to register any trade mark if it is proved to his satisfaction by the person opposing the application for registration that such mark is identical with, or so nearly resembles as to be calculated to deceive or cause confusion, a trade mark which is already registered in respect of the same goods or description of goods in a country or place from which such goods originate: ....."

Section 53 has similar effect and it states how any person aggreived by such application may oppose the registration.

The Combined effect of the two sections is such that wide protection is extended to marks registered in their country of origin. The purpose is to prevent it from being copied or imitated in Hong Kong. These two sections survive the repealed Ordinance[53] and are purposely retained in the Ordinance perhaps for the following reasons:[54]

(1) It was a notorious fact that many small manufacturers in Hong Kong made their living by producing spurious brand name products.
(2) Over the 18,000 trademarks on the Hong Kong Registry, it is known that a number of these are infringements – almost exact copies of trademark registered in the United States of America.
(3) It should be evident from all of the foregoing, that a passing-off action in Hong Kong, in case of an unregistered mark, is both expensive and inadequate, even if successful, since the offending manufacturer is often a man of straw and damages may be uncollectable.

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48 Supra p 3
49 Cited in [1979] HKLR 309 at p 310.
50 (1927) 44 RPC 412.
51 Ibid at p 422.
52 s10 of the 1938 Act confers on the Registrar a discretion rather than an imperative duty to register.
53 The Trade Marks Ordinance 1909.
54 FW Kendall, *Brand Problems* in *HK*, 54 TMR 545.

However valid these reasons may be, it seems unfair in some cases as the case *re Hong Kong Caterers Limited's Application*[55] illustrates. In 1971, Hong Kong Caterers Limited, a company incorporated in Hong Kong, applied to register the mark "MAXIM'S 美心" (label) in Part B of the Register. The application was opposed by Maxim's Limited, a British company, on the ground that the use of the applicant's mark would be likely to deceive having regard to the close resemblance of the applied-for mark. The opponents had acquired world-wide reputation and the mark was registered in France prior to the date of the Hong Kong company's application. However, there was little evidence that the opponent was actually carrying on business in Hong Kong. Indeed, it was not open to objection that the reputation acquired by the applicant in Hong Kong was far greater than that of the opponent. Yet, the Deputy Principal Solicitor, in exercise of his discretion, refused registration. This case is going on appeal to the High Court, but for the present purpose, it is clear that the law is somewhat harsh on the local businessmen.

Foreign traders are further protected by s 13A of the Ordinance. There is no corresponding provision in the 1938 Act. This gives a foreign applicant for registration of a trade mark a priority date which relates back to the date of his application in any convention country specified in the Schedule, though it is subject to the application in Hong Kong filed within six months of the date of the application in the convention country. Apart from this aspect of protection, it is worth noting that since the Trade Description Ordinance Cap 362 extends protection to trade marks which include marks registered in Convention countries capable of registration in Hong Kong, protection is further reinforced. The problem is: a local trader could, in no way, be sure that his registered trade mark has priority unless a period of six months has passed after his registration!

V CONCLUSION

Though on the face of it, the Ordinance is very much similar to the 1938 Act, divergences are, as seen, unavoidable. To appreciate these differences, indeed may help us to have a correct understanding of our trade marks law (not being just a duplicate of the United Kingdom model). Thus, it is submitted that a balance between consistency and flexibility in law is very much needed. While it is undeniable that English decisions should be followed as far as possible, (especially when the interpretations on the two provisions are the same), it is also important to realize that regional variations (especially strong policy reason, be it right or not) will undoubtedly occur in some cases. It is submitted that cautious approach to these questions should be maintained and continued. While it is true that Chinese language is in practice not a great problem on the trade marks law in Hong Kong, this is a regional characteristic which we should bear in mind when applying the English law.

Apart from this, it is submitted that it may be necessary to re-consider the present law in regard to foreign protection in the trade marks law. Indeed, Hong Kong has long passed the stage of flagrant piracy and it is evident that Hong Kong's legislature and judiciary have already done a great deal to extinguish the pirate trading image. Should the law still continue to give wide protection when it is utmostly unfair to local businessmen who have used their very own effort to build up their business? It is true that because of Hong Kong's early history as imitator and pirate and its insecure position in international trade negotiations, it is hard to cut the foreign protection the law at present offers, however, should the law just steps a little bit towards our local businessmen's side?

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55 Unreported, File Ref No 71/71 (1982).

* Sections 10, 29(2), 38 (Sheffield marks), 39, 41, 45, 53, 56, 64A, 66, 67 (repealed), 70 are not incorporated in the Ordinance.

Appendix I

The major differences between the Trade Marks Act (1938) and the Trade Marks Ordinance (1954)

Hong Kong section	United Kingdom section	Major Differences
2	68	– definitions of 'the appointed day', 'the Court', 'the rules' 'United Kingdom' not appearing in the Ordinance. – additional definitions in Ordinance: "seal" and "tribunal". – s68(3) omitted in the Ordinance.
10	/	– it is based on the 1919 Act.
12(1)	11	– the crucial difference is in the words 'by reason of its being ..... or cause confusion or otherwise' which do not appear in the Ordinance.
13(1)	17(1)	– additional words of 'entitled to be registered as' in the Ordinance.
13A	/	– it is based on 7 Edw 7c29s91.
17(1) proviso	19(1) proviso	– different wording with substantially the same meaning.
23	/	– based on the 1909 Ordinance.
41	22	– s22(6) of the Act omitted in the Ordinance.
53	/	– based on the 1909 Ordinance.
78	51	– the words 'Except when expressly given by the provisions of this Ordinance or the rules there shall be no appeal from a decision of the Registrar' added in the Ordinance.
84	57	– s57(2) of the Act omitted in the Ordinance.
86	59	– s59(2) of the Act omitted in the Ordinance.
87	60	– s60(3) of the Act omitted in the Ordinance.
90	40	– s40(2) to (5) of the Act omitted in the Ordinance.

ACKNOWLEDGEMENTS

The Editorial Board wishes to thank the following for their generous sponsorship of this review:

The Honourable Mr Justice T L Yang, JA
Mr Denis K L Chang, QC
Mr J K Connor
Mr Francis H B Wong
Mr Warren C H Chan

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Mr Ngan On Tak
Mr Brian van Buuren
Mr Richard W Davies
His Honour Judge Anthony G T Wane
Mr Michael Kempster
The Honourable Mr Justice Power
Mr Andrew Liao
Mr John Necholas

and all those who have preferred to remain anonymous.