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Editorial Board

The *Hong Kong Student Law Review* will maintain its position as a leading student-produced legal publication in Asia. The *Review* is tailored to the interests of students, academics and professionals both inside and outside the legal field.

In case of discrepancy between the English and Chinese texts, the former shall prevail. However, it should be noted that the English and Chinese editorial introductions are not the translated equivalents of the other.

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Foreword

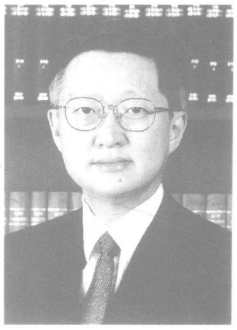
Message from the Chief Justice

It gives me much pleasure to write this Foreword for this Commemorative issue of the *Hong Kong Student Law Review*.

Over the past four years, through the publication of the Hong Kong Student Law Review, the Editorial Board has done an excellent job in promoting law students' interest in research. The articles published in the Review cover a wide range of topical issues and they demonstrate the enormous amount of effort that has been put into the preparation of this publication. The admirable achievements of all the students involved are to be congratulated.

1997 marks our reunification with the Motherland, with the establishment of the Hong Kong Special Administrative Region of the People's Republic of China. At this important moment in our history, young people with commitment, resilience, and perseverance are best placed to capitalise on the numerous opportunities before us with a view to building a better future. As young law students, you will have a specific responsibility in upholding the rule of law and in improving our legal system.

I take this opportunity to wish you every success in your endeavours.



The Honourable Mr. Justice Andrew Li
Chief Justice
Court of Final Appeal of the HKSAR
December 1997

Message from the Dean

It is my pleasure to offer my heartiest congratulations to the students and recent graduates of our Faculty of Law, who have now produced the third volume of the *Hong Kong Student Law Review*, which is also its first volume in the history of the Hong Kong Special Administrative Region of the People's Republic of China. The publication of this journal is a remarkable achievement of dedicated collaborative efforts on the part of our students. Its is all the more impressive given the fact that the whole endeavour has been entirely a voluntary one, not forming any part of the official curriculum or academic requirements of the Faculty.

This volume is entitled the *1997 Commemorative Edition*, and its content indeed reflects the unique circumstances of Hong Kong at this turning point in its history. Several articles published here deal with aspects of Hong Kong's Basic Law and the legal system of the new Special Administrative Region. I am also glad to find here articles on developments in mainland China, and those that adopt an inter-disciplinary approach to the study of socio-legal issues. Together the essays in this collection reflect the diversity of research interests and orientations among our students, and testify to the skills and standards of legal scholarship developed by our students in the course of their LLB studies.

Readers will find that each article is preceded by a Chinese introduction of its content. This is an innovation for the *Hong Kong Student Law Review*, and a particularly commendable one. Hong Kong is now an integral part of China; its legal system is becoming more bilingual day by day, and interactions between this system and that of mainland China are also increasing on many fronts. Lawyers of twenty-first century Hong Kong will need to be proficient in both English and Chinese (including Cantonese and Putonghua). Those who excel in both languages will not only be able to compete more effectively for jobs, but also better serve the needs of the community.

In preparation for the 1997 transition, our Faculty has introduced a course on the Use of Chinese in Law since the early 1990's, and a course on mainland Chinese law has been in existence since the 1980's. We have also attempted to broaden the curriculum by expanding the range of optional course, and by introducing inter-disciplinary elements such as the compulsory first-year course on Law and Society. Further reforms in the curriculum, mainly for the purpose of 'broadening' the knowledge base and strengthening language and information technology skills, will soon be introduced in line with the current University-wide curriculum reform exercise at the University of Hong Kong. Our aim is to provide education of the best quality for students who come here to study, and to do our best to prepare them for the interesting and challenging future that lies ahead.

As mainland China continues to develop its legal system and move towards the Rule of Law, Hong Kong's role in Chinese legal development will become even more prominent than before. Hong Kong's experience in operating a legal system which practises the Rule of Law, meets the needs of the business community, and protects the humans and fundamental freedoms of individuals, will be a valuable resource which legislators, officials, lawyers, judges, procurators and police officers in mainland China can draw on.

Hong Kong has been and will always be a meeting point between East and West, a bridge between China and the world. From the legal point of view, Hong Kong is the point of intersection between the Western legal universe, particularly the Common Law universe, and the mainland Chinese legal universe. This is our location in time and history; it also provides to us our identity, and reveals to us our mission and destiny.

Albert H Y Chen
Dean
Faculty of Law, University of Hong Kong
December 1997

Preface

In doing our part to mark this very special year, we publish this *1997 Commemorative Edition.* Although we have deviated from our normal cover design, readers should note that this issue is also Volume 3 of our regular series.

In this edition we focus on the transitional issues from a legal perspective. Thus readers will find that most articles were written with the effect of the reunification in mind. The Basic Law, Hong Kong's mini-constitution effective July 1st 1997, is the focus of two papers.

Another, more significant change in content is the introduction of Chinese in the *Review*. In recognition of the growing importance of Chinese in the legal process, readers will find that each article is preceded by a brief introduction, in both languages. On a grander scale we aim to play a role in the promotion of the use of Chinese in law.

This year, we are delighted to have the Chief Justice, the Honourable Mr Justice Andrew Li, accept our invitation to compose the foreword, and we wish him a successful tenure in office.

As always, we would like to thank the Faculty of Law at the University of Hong Kong, and in particular our Dean, Mr. Albert Chen, whose enthusiastic support for the *Review* provides us with inspiration. Indeed, the Faculty's moral, technical, and financial support has always been of great assistance. On that note, we would also like to acknowledge our generous donors, advertisers and, of course, the readers of this magazine, for providing the financial base from where we begin.

Finally, we salute the students, whose words and work have brought this publication into being.

Charles Mo
Editor-in-Chief
On Behalf of the Editorial Board
HKSLR
December 1997

RIGHTS OF SUIT UNDER SWITCHED BILLS OF LADING

轉換提單的訴訟權

THOMAS AU HING-CHEUNG*

Hong Kong's economic success today is due in no small part to the commercial and business ingenuity of her people. Bereft of any significant amount of natural resources or minerals, we would certainty not be where we are now without our success in international commerce. The vast majority of our exports (and re-exports) go to our estranged Chinese cousins on the two sides of the Straits. Our role as the middleman in this tripartite relationship often leads to conflicts and confusion, especially in the complexities of the methodology adopted by the traders to get around political and legal barriers.

In this article, we aim for an in-depth analysis on the particular problems surrounding the use of two bills of lading when engaging in three-way trade. Specifically, we look at common law legal remedies available to the aggrieved parties. The legal position of rights of suit under tort, contract, and bailment are examined in detail. Other corollary issues are also discussed, with focus on the more unique legal and political questions in cross-strait trade. This article concerns the right of suit under switched bills of lading.

中華人民共和國近年的經濟發展帶動了中、台兩地的貿易事業。然而，根據台法及其「三不政策」，台灣與中國進行直接貿易乃屬違法。於是，在涉及海上運輸的貿易上，便以轉換提單的方式進行，而香港更成爲當中兩份提單的轉換地。作者在文中討論了當買方、賣方或第二提單受讓人向承運人提出貨物損毀索償時，香港法院在合同法、侵權法及委託保管三方面對轉換提單的態度，並指出當涉案的合同準據法爲台法時該如何處理有關案件。

I. Introduction

Bills of lading are important documents in international trade.[1] They are accepted as documentary credits mainly because of the three functions that they serve: a receipt for goods, evidence of the contract of carriage, and a document of title.[2] It is these functions of bills of lading that allow parties to ascertain whether they have a contractual right of suit. Moreover, the terms of bills of lading may also affect causes of action in tort and bailment.

The growing economy of the People's Republic of China (PRC) has led to increasing trade between the PRC and Taiwan, with Hong Kong in the middle.[3] Recently, re-exports have

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1 Charles Debattista, *Sales of Goods Carried by Sea,*(London: Butterworths, 1990) pp 9-11.

2 As a receipt for goods: *Canada & Dominion Sugar* [1947] AC 46 (PC); as evidence to a contract of carriage: *Leduc v Ward* (1888) 20 QB 475 and *The Eurymedon* [1972] 2 Lloyd's Rep 544; and as a document of title: *Sanders Bros. v Maclean* (1883) 11 QBD 327 (CA).

3 *Hong Kong 1995* (Hong Kong: Government Printers, 1995) p 105 states: " Re-exports showed a very

increased in importance, accounting for 81% of Hong Kong's total exports in 1995, with China and Taiwan as her major re-export partners.[4] This resulted in increasing carriages of goods by sea amongst these trading partners.

On the other hand, under Taiwanese law[5] and her three "No's" policy,[6] direct trade or contact with the PRC is *prima facie* illegal, whereas there is nothing illegal under both PRC and Hong Kong law. As a result, it has become a common practice for traders between these countries (as well as in other various international trade areas) to issue two sets of bills of lading, switching one for the other, in order to avoid this prohibition of direct trade or shipments.[7]

A paradigm example of switched bill of lading would be as follows: A Taiwanese company (the "ROC Co.") as seller contracts with a Peoples' Republic of China company (the "PRC Co.") as buyer. The goods are loaded on board a vessel (the "V") which sails directly from Taiwan to the agreed PRC port. However, the ROC Co. and the PRC Co. agree for the carrier to issue a bill of lading (the first bill of lading) naming the ROC Co. as shipper and a Hong Kong company (the "HK Co.") as consignee. The ROC Co. sends the first bill of lading to the HK Co. The HK Co. then obtains a second bill of lading from the carrier's Hong Kong agent in exchange for the first bill, and sends it to the PRC Co. This second bill of lading names the ROC Co. as the shipper and the PRC Co. as a consignee. The PRC Co. obtains the goods from the carrier's agent in the PRC against presentation of the second bill of lading and finds the goods to be damaged upon arrival. At all material times, the HK Co. only allows its name to be used so as to give the appearance that goods are being shipped to PRC from Hong Kong and not from Taiwan.

If the carrier's vessel is arrested in Hong Kong and an action is brought against it for the damaged goods, the obvious questions to be considered by the Hong Kong courts are (1) who is the proper plaintiff: the ROC Co., the PRC Co. or the subsequent holder[8] of the second bill of lading ?; and (2) what causes of action does the plaintiff have, and against whom?

It will be argued here that Hong Kong courts could and should uphold the second bill of lading, despite its apparent fraudulent nature, and should support an action of contract by the holder of the second bill of lading against the carrier for the damages, as it will be legally sound and commercially practical to do so. Since an action in contract depends on the terms of bills of lading, it would be logical for this analysis to start by briefly examining their characteristics and

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significant increase in 1994, primarily because of China's buoyant economic development and the continued importance of Hong Kong as an *Entrepot* for China."

4 *Hong Kong 1993* (Hong Kong: Government Printers, 1993) p 89; *Hong Kong 1994* (Hong Kong: Government Printers, 1994) p 81; and *Hong Kong 1995* (Hong Kong: Government Printers, 1995) p 105.

5 "Temporary Regulation during the Period of Mobilisation for the Suppression of the Communist Rebellion", *The Complete Book of the Six Laws* [*Tsui-hsin liu-fa Ch'uan-shu*] (Taipei: San Ming Book Co., 1990) (in Chinese).

6 Meaning 'no negotiation', 'no compromise' and 'no contacts' between the PRC and the Republic of China government, private institutions, or persons.

7 In fact, one reason for Taiwanese traders' use of switched bills of lading is to procure confirming banks in Taiwan to release money to Taiwanese sellers, since bills of lading received by the banks must not show direct shipment between Taiwan and the PRC. I am greatly indebted to Mr M. Chiu of Distribution Services Ltd. (DSL) for providing me with this information.

8 In this article, the expression "holder of a bill of lading" refers to its legal holder such as an indorsee, and does not include mere physical holders, since they will not be entitled in law to the goods or any rights from the document. See Chan Leng Sun, "Holder of a Bill of Lading" 7 (1995) Singapore Academy of Law Journal 355.

functions and the effect of frauds and falsity on them. This article will also consider actions in tort and bailment by the PRC Co. and the effect of the switched bills on these actions.

II. The Nature and Functions of the Bills of Lading

There has never been a universally accepted definition of a bill of lading, given its historical development and the changing functions that it might have in different sales transactions.[9] One definition extracted from *Halsbury's* reads:

> A bill of lading is a receipt for goods delivered to and received by a ship, signed by the person who contracts to carry them, or his agent, and evidencing the term of the contract of carriage under which the goods have been so delivered and received. During the period of transit and voyage the bill of lading is recognised by the law merchant as the symbol of the goods described in it, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of goods.[10]

A bill of lading is defined by reference to its nature and the functions that it carries. At law, a document does not become a bill of lading simply because the parties refer to it as a bill of lading.[11] The law will regard a document as a bill of lading only if it carries one or all of the characteristics and functions described above.

A. A Receipt of Goods

The bill of lading will reveal the quantity of goods put on board a vessel, and their description and condition. It will be signed by an agent for the carrier, usually the master of the ship. Against the shipper, these statements in the bill of lading are *prima facie* evidence of the receipt of the goods described,[12] which is rebuttable by the carrier[13], as the shipper is assumed to know what was actually put on board. Against the consignee or indorsee of the bill of lading, the statements are conclusive evidence as to the goods on board, but only if he had acted in good faith.[14]

B. Evidence of Contract of Carriage

An express contract of carriage is often made between the shipper of the goods and the carrier before loading commences. In the absence of an express contract, it may be implied from the acts of the shipper in presenting the goods for loading and of the carrier in receiving them on

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9 Shane Nossal, "The Legal Status of Freight Forwarders' Bills of Lading" 25 (1995) HKLJ 84.

10 *Halsbury's Laws of England* (Vol. 41. 4th ed.) para 946.

11 *Carrington Slipsway Pty Ltd. v Patrick Operations Pty Ltd.* (1991) 24 NSWLR 745.

12 Julian Cooke, et al. (eds), *Voyage Charterers,* (London: LLP, 1993) pp 369 -375.

13 *Grant v Norway* (1851) 10 CB 665.

14 There is a difference in the evidential value of bills of lading serving as receipts of goods, dependant on whether the Hague or the Hague-Visby Rules have been incorporated. Under the Hague Rules, the bill of lading will only serve as *prima facie* evidence, while under the Hague-Visby Rules, the bill will serve as irrefutable evidence. See William Tetley, *Marine Cargo Claims* (Montreal: BLAIS, 3rd ed, 1988) pp 277-278.

board. Although a bill of lading issued after the receipt of the goods may not itself be the contract of carriage, it usually incorporates the terms of the carriage contract either because it has been so agreed by the parties in the booking note[15] or because it serves as cogent evidence of the terms of the contract.[16] In practice, it is generally taken that the bill of lading has accurately recorded the terms of the contract.[17] The shipper and the carrier may introduce evidence to show that there are other terms, including oral ones,[18] that supplement or even supervene those in the bill of lading. But consignees or indorsees who take the bill of lading in good faith will not be bound by terms agreed between the shipper and the carrier which were not set out in the bill of lading.[19] As a result, for the carrier and the indorsee, the bill of lading will in fact represent the contract of carriage.[20]

C. As Document of Title

The bill of lading has long been recognised by the courts[21] as a document of title. This means that the bill represents the goods and that the transfer of it to another party will be the same as the transfer of the goods, but only if this is the intention of both parties. This function of the bill of lading is important in international sales, especially in transactions involving bank credits, since it would allow the sellers to discharge their duty of sale by the transfer of bills of lading. Upon receipt of the bills of lading, banks will release money to the sellers, after ensuring that they are in conformity with the buyers' directions in a letter of credit. Since possession of the bill represents possession of the goods, the bill serves as security for the bank. This characteristic of bills of lading also enables subsequent sale of the goods through the transfer of them to indorsees by the original consignee while the goods are still in transit.[22]

Whether bills of lading could be documents of title and serve as "key to the floating warehouse" depends ultimately on the intention of the parties. Bowen LJ stated in *Sanders v Maclean*:

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15 *The Jalamohan* [1988] 1 Lloyd's Rep. 443.

16 *Sewell v Burdick* (1884) 10 App. Cas. 74, 105; and *Pyrene Co. Ltd. v Scindia Navigation Co Ltd.* [1954] 1 Lloyd's Rep. 321.

17 Note 10 above, p 375, giving the reasons why terms of carriage contracts are incorporated into the bills of lading: "(a) A term is implied into the original contract between shipper and the carrier that the goods will be carried upon the terms of the bill of lading customary in the trade. Shippers or their agents are usually well aware of the terms of bills of lading used in any regular trade, and usually have supplies of blank bills of lading which they fill in and present tot he carrier for signature: see *Heskell v Continental Express* (1950) 83 Ll.L. Rep. 438. (b) The bill of lading is usually filled by the shipper or his agent and present to the captain or some other agent of the carrier, who signs it. When this occurs, each party's conduct indicates that he assents to the terms of the bill of lading. (c) A shipper who receives a bill of lading and raises no objection to its terms will be bound by them (*Watkins v Rymill* (1883) 10 QBD 178) except those terms which are onerous and unusual (*Crooks v Allen* (1879) 5 QBD 38, 40)."

18 *The Ardennes* [1951] 1 KB 55.

19 For example, in *The Emilien Marie* (1875) 44 LJ Adm. 9, three bills of lading were issued on the understanding that the third would only be met if sufficient cargo remained. It was held that the indorsee of this third bill was entitled to demand the full quantity. See Charles Debattista, " The Bill of Lading as the Contract of Carriage - A Reassessment of Leduc v Ward" 45 (1982) MLR 652.

20 *Leduc v Ward* (1888)20 QBD 475.

21 *Lickbarrow v Mason* (1787) 2 Term Rep 63.

22 Paul Todd, *Bills of Lading and Bankers' Documentary Credits,* (London: LLP, 2nd ed, 1993) pp 11-13; and Charles Debattista, *Sale of Goods Carried by Sea,* (London: Butterworths, 1990) pp 15-18.

> A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods... It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be...[23]

The bill of lading is the symbol of the goods. Its transfer has the same effect as physical delivery of the goods. The holder of the bill can demand delivery pursuant to its terms.[24]

Although it is negotiable in the sense of effecting subsequent sales by its transfer, a bill of lading is not negotiable in the sense of a bill of exchange, under which a transferee who becomes the holder in good faith and for value may acquire a better title than its transferor. The transferee of a bill of lading cannot acquire title to the goods if the seller does not have it.[25] The type of possession that has been transferred is known commonly as constructive possession. With the transfer of constructive possession, the risks and liabilities of the goods are also transferred to the transferee of the bill of lading.

The three functions of the bills of lading enable the court to determine title, possession, liability as to the goods, and the terms of the carriage contract. Therefore, a valid and enforceable bill of lading is crucial to support an action in contract by a plaintiff against the carrier. For the switched bill of lading, validity and enforceability depend on how the court regards its apparently fraudulent nature.

III. Effects of Fraud on the Validity of Bills of Lading

A. Fraud and its Effect on Contracts

The common law relating to fraud was established by the House of Lords in *Derry v Peek*.[26] It was decided that in order to establish fraud, it is necessary to prove the absence of an honest belief in the truth of that which has been stated. Herschell LJ said: "fraud is proven when it is [shown] that a false representation has been made (1) knowingly, or (2) without belief in its truth,

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[23] *Sanders v Maclean* (1883) 11 QBD 341. Please also see: *The Future Express* [1992] 2 Lloyd's Rep. 279 where it was held that the transfer of the bill of lading to the buyer's bank was not intended to transfer the constructive possession of the goods, since the bank was aware that the goods had already been delivered to the buyer without production of the bill of lading.

[24] *Barber v Meyerstein* (1870) LR 4 HL. 317; *Barclays Bank v Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep. 81. It was also held in *The Future Express*, note 23 above, that even delivery to the person entitled to the goods will not exhaust the validity of the bill of lading as a document of title unless delivery is made against surrender of the bill.

[25] Note 12 above, p 388. This principle is subject to certain exceptions suggested in the text.

[26] (1889) 14 App. Cas. 337.

or (3) recklessly, careless whether it be true or false."[27] Where a contract has been entered upon as a result of a fraudulent misrepresentation, it renders the contract voidable and the plaintiff can either rescind the contract or claim damages[28] or both.[29]

On the other hand, if the misrepresentation, whether fraudulent or not, affects the essence of the contract, it will render the contract void. In *Kwei Tek Chao v British Traders and Shipping Ltd*,[30] a bill of lading stated that goods had been shipped in October whereas they had in fact been shipped on November 3. The buyer had paid against it and collected the goods. The court held that the false dating, which was a fraudulent misrepresentation, would not render the contract a nullity since the alteration, although made fraudulently, did not go to the whole or essence of the instrument. Devlin J said:

> [I] think that the true view is that one must examine the nature of the alteration and see whether it goes to the whole or to the essence of the instrument or not. If it does, and if the forgery corrupts the whole of the instrument or its heart, then the instrument is destroyed; but if it corrupts merely a limb, the instrument remains alive, though no doubt defective... [A]ccordingly, in my judgment, the bills of lading in the present case were not a nullity... The question is simply this: is the transaction void *ab initio* or is it voidable? If it is void *ab initio*, the seller can avoid it or set it aside as well as the buyer. If it is only voidable, that gives an election to the buyer, who, if he wishes to reject, must do so within a reasonable time.[31]

Although fraudulent misrepresentations generally only give the victims a right to rescind the contract and damages, it could also result in rendering the contract void *ab initio* if the misrepresented facts go to the root of the contract. In *United City Merchants (Investments) Ltd v Royal Bank of Canada*[32], a freight forwarder fraudulently ante-dated a bill of lading to create the impression that the goods had been loaded before expiration of the shipping period in the letter of credit. The House of Lords emphasised that the bill of lading was not rendered ineffective or worthless by being ante-dated. Diplock LJ, in *obiter*, added that the position would have been different if the bill of lading were a forgery and hence a nullity. It is submitted here that Lord Diplock was referring only to the whole bill of lading being a forged document,[33] rather than merely stating false information.

It should be clear by now that fraudulent misrepresentation as to facts or information will only render a contract voidable unless the misrepresentation goes to the essence of the contract. Nevertheless, since fraud vitiates everything as a matter of public policy,[34] the court will not enforce a contract which is fundamentally forged or fraudulently made. But fraud, in general, has

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27 *Id*, p 374.

28 Although damages for fraud are not the same as damages for breach of contract; see *Chitty on Contracts*, note 29 below, at 6-032. The leading case is *Doyle v Olby* [1969] 2 QB 158.

29 *Chitty On Contracts* (London: Sweet & Maxwell, 27th ed, 1994) Vol. 1, 6-026.

30 [1954] 2 KB 459.

31 *Id*, pp 476-477.

32 [1983] AC 168. pp 183G-184B.

33 Legatt J. described a fraudulently made bill of lading as "a sham piece of paper" in *Raffaella* [1984] 1 Lloyd's Rep. 116.

34 *Halsbury's Laws of England* (Vol. 9, 4th ed) para 386.

always been difficult to prove in court.[35]

Given this, what would then be the attitude of the courts in dealing with switched bills of lading: are they only voidable documents subject to recission or would the court declare them void or unenforceable ? We must look at the substance of the switched bills in order to determine their validity.

B. The Switched Bills of Lading - Void or Voidable ?

As for the first set of bills of lading, the information that is misrepresented are: the name of the consignee (HK Co.) and the port of discharge (Hong Kong). For the second set of bills of lading, it could name the original seller as the shipper and state the correct port of loading since there is no need to falsify this information as it would not contravene PRC law. It *might* be ante-dated to its original date of issue.[36]

C. The First Bill of Lading

As discussed in the above sections, mere fraudulent representation as to the information carried in the bills of lading would render it a voidable document but not a nullity. There is no question that the first bill of lading carries misrepresented information as to the port of discharge and the name of the consignee with the intention to do so. It is submitted that the test laid down in *Kwei Tek Chao* would be applicable by the courts to determine whether it is a void or voidable document. That is, if the misrepresented information goes to the root of the contract, then it would destroy the document as a whole.

The falsely misrepresented port of discharge would not be essential to the formation of the carriage contract between the ROC shipper and the carrier. Firstly, as the seller and the carrier know that the port of destination is not the one represented in the first bill of lading, it could not be claimed that the contract was formed by relying essentially on the misrepresentation. Secondly, the understanding between the seller and the carrier of the true port of destination forms an oral contract supervening as a condition to the contract.[37] The first bill of lading serves only as evidence to the contract and is rebuttable. As a result, when there is a discrepancy between the terms notified at the time of conclusion of the contract and those represented or written in the bill of lading, it is the former that prevail. As put by Devlin J in *Pyrene Co Ltd v Scindia Navigation Co Ltd:*[38]

> When the parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain. Those terms must be in force from

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35 As noted in *Chitty on Contracts,* note 29 above, at p 352: "Strictly, the burden is the same as that in civil proceedings, namely, proof on the balance of probabilities, but it is well known that the burden of proof of fraud is not easily discharged in practice." In *Hornal v Neuberger Properties Ltd.*[1957] 1 QB 258, on proving fraud (*per* Denning LJ): "The more serious the allegation, the higher the degree of probability that is required." Also in *Mason v Clarke* [1955] AC 794, the Lordships said: "... charges of fraud should not be lightly made or considered..."

36 As it would usually be specified by the letters of credit for the date of loading of the bills of lading.

37 See an analogy decision by the House of Lords in *Moss Steamship Co Ltd. v Whinney* [1912]AC 254.

38 [1954] 2 QB 402.

> the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intend the terms of the contract to be changed when the bill of lading is issued.[39]

Therefore, the first bill of lading constitutes only partial evidence to the carriage contract between the seller and the carrier, and would also incorporate the binding oral condition that the PRC is the true port of destination, not Hong Kong (as it appears on the document). In fact, regarding the carrier, there is no practice of fraud since he is aware of, and is a party to the misrepresentation.

Since the misrepresented information in the first bill of lading could not have satisfied the test to destroy the contract, the courts should only find it a voidable document. As the carrier, in full knowledge of the actual facts, takes the goods and sails off, the right to rescind the contract is lost through affirmation by conduct. Therefore, the first bill of lading could still serve its functions as a receipt of the goods and evidence of the contract of carriage.

D. The Second Bill of Lading

The second bill of lading in fact reflects more closely and genuinely the actual sea carriage by showing the proper shipper, the correct ports of loading and discharge. The only defect is that it may be ante-dated. However, authorities[40] show that the courts have consistently regarded falsely dated bills of lading as voidable documents but not nullities. More importantly, this ante-dating *is* the actual date of loading rather than a falsity. It is ante-dated solely because the issue of the second bill of lading is much later than the loading date. As a result, there is only a technical breach rather than a factual fraudulent misrepresentation. Therefore, the indorsees only have, at the most, a right to reject the document or to claim damages or both.

Thus, by applying general contract law principles and authorities, we see that the switched bills of lading are only voidable documents representing the contract of carriage. Unless the plaintiffs could prove that the false representations are of essence to the contract, the courts would seek to enforce them, unless the buyers or indorsees have elected to rescind the contract by rejecting the documents and the goods.[41]

As the courts always strive to give effect to the intention of contracting parties, they should also have no hesitation in upholding the switched bills of lading despite its apparent fraudulent nature. There is no exception in judicial interpretation on the effects of bills of lading,[42] and many bills of lading of various falsities have been upheld previously.

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[39] *Id*, p 419. Please also see s IV of this essay, "Action in Contract".

[40] *James Finlay & Co Ltd. v NV Kwik Hoo Tong* [1929] 1 KB 400. In an action for damages due to failure to deliver a correct bill of lading for a falsely dated bill of lading, Wright J held that the true measure of damages was for damages *for the loss of right to reject*, thus treating the bill of lading as only a voidable document. This was later affirmed by the Court of Appeal. Also in *Kwei Tek Chao,* see note 30 above, Devlin J rejected counsel's submission that false dating would render the bill of lading a nullity and *void ab initio*, and held the bill to be only a voidable document, but not a nullity, giving its indorsee a right to reject.

[41] These are two separate rights of rejection as decided in *Kwei Tek Chao,* see note 30 above.

[42] *Sewell v Burdick* (1884) 10 App. Cas. 74. The House of Lords decided that the proprietary effect of the transfer of the bill of lading *depends on the intention accompanying the transfer.* In *The Future Express* [1992] 2 Lloyd's Rep. 94, Deputy Judge Diamond Q.C. stated that " ... it is always necessary to enquire

Although the switched bills of lading are capable of being enforced by the courts, there are still problems in ascertaining the functions[43] of the two bills of lading, neither of which truly and fully represent the transaction. This must be clarified in order to determine the proper cause of actions for the proper plaintiff. These issues will be discussed by considering the possibility of a successful suit under the three causes of actions: Contract, Tort and Bailment.

IV. Action in Contract

A. Could the ROC Company Sue the Carrier in Contract ?

As discussed in the above section, the ROC Co. as the shipper actually concludes the carriage contract with the carrier. Since the shipper and the carrier are the only parties to the contract under the privity rule in contract law, only the shipper would be able to sue the carrier. So the terms of the contract upon which the ROC Co. could sue the carrier for damaged goods would be those found in the first bill of lading, which partly evidence the carriage contract, supplemented with evidence of any other terms agreed between the two parties.[44] The second bill of lading, if it carries different terms, would not have been be relied upon by the courts to find the contract since it comes much later than the first bill of lading, consequent to the conclusion of the contract of carriage. Its function as evidence to the contract of carriage between the ROC Co. and the carrier cannot be valid in a court action, because of its longer and inconsistent time gap, and the technical difficulty of proving reliance by the shipper.

In international sales transactions, especially those involving contracts where the seller is under a duty to arrange delivery of goods via a carrier, the seller may be regarded (by statute and at common law) as making the contract of carriage on behalf of the buyer, thus acting as the buyer's agent.[45] Therefore, the seller (as shipper) is the agent for a disclosed principal, the consignee.[46] As such the seller has no status to sue. This analogy is drawn from s32(2) of the Sales of Goods Act 1979[47] and in the recent leading case of *Texas Instruments v Nasan Europe*.[48] Although this case involves an international sale by carriage by road, Tudor Evans J in his judgment applied the classical principles of the common law and held:

> [W]hen a seller is required to send goods to the buyer in a foreign country, the goods in transit being then at the buyer's risk, business efficacy requires that, when the seller makes a contract with a carrier for the carriage of the goods to the buyer, he does so on behalf of the buyer. This conclusion is

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whether it was the intention of the transferor and the transferee of the bill that a property or possessory title should pass by endorsement and delivery of the bill and only if it is found to be the intention of the parties that the transfer of the bill should pass a possessory title to the goods to the transferee..."

43 The functions of an ordinary bill of lading are as a receipt of goods, evidence of contract of carriage and document of title, as mentioned previously.

44 Please refer to the above section for the effect of fraudulent misrepresentation on the first bill of lading.

45 *Vancouver Milling and Grain Co Ltd v C.C. Ranch Co.* [1924] 2 DLR 573, *per* Stuart J in the Court of Appeal, later affirmed by the Supreme Court of Canada in [1925] 1 DLR 185.

46 *The Albazero* [1977] AC 841.

47 Which imposes upon the seller the duty to " make such contract with the carrier upon the seller on behalf of the buyer as may be reasonable...". Its Hong Kong equivalent is s34(2) of the Sales of Goods Ordinance, Cap 26, LHK.

48 [1991] 1 Lloyd's Rep. 146.

> supported by s32(2) of the Sales of Goods Act 1979, by subs.(i) of which it is provided that where the seller is authorised or required to send the goods to the buyer, delivery to the carrier is prima facie delivery to the buyer. Therefore, when the goods were in this case delivered to the carrier, prima facie that was delivery to the buyer. Common sense suggests that in these circumstances the carrier in this case was carrying the goods on behalf of the buyer pursuant to the contract of carriage made by the seller...It follows, in my view, that the sellers were obliged to make a contract of carriage on behalf of the buyers. They made the contract of carriage and I hold that when they did so the contract was made on behalf of the buyers.[49]

Therefore, under English and Hong Kong law, where A sells goods to B to be delivered to B via C, a carrier, the seller usually makes the carriage contract for the buyer as his agent. The buyer, rather than the seller, is the correct plaintiff for the purpose of suing upon the contract of carriage.[50] In practice, the seller would rarely be interested to sue since he would have already been paid for the goods.

B. Could the PRC Co. or the Indorsee Sue the Carrier in Contract?

As stated above, it would be likely that the buyer, who is in receipt of the damaged goods, would sue the carrier under the contract of carriage. In normal circumstances, the holder of the bills of lading would be able to rely on it as the contract of carriage to sue because by s4(1) of the Bills of Lading and Analogous Shipping Ordinance,[51] the lawful holder of the bills of lading is to be vested with all rights of suit under the carriage contract, as if he had been a party to that contract.

In the switched bills of lading situation, it might be difficult to invoke this statutory provision to provide the indorsee of the second bill of lading the rights of suit under the carriage of contract. It is so because neither the first nor the second bill of lading fully reflects the contract of carriage, and it would be too artificial to say that the indorsee is to be treated as party to the original contract- stepping into the position of the shipper.

On the other hand, it is submitted that the court should be able to apply the doctrine of implied contract laid down by the English Court of Appeal in *Brandt v Liverpool*[52] to enable a suit in contract for the holder of the second bill of lading. In *Brandt* the court held that the indorsee of a bill of lading could sue the carrier on the basis of a contract of carriage, which was implied by the delivery of the goods by the carrier on presentation of the bill of lading, and the indorsee's payment for freight.[53] The terms of the contract were those stipulated on the bill of

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[49] *Id*, p 152.

[50] Chris Cashmore, "Title To Sue On A Contract of Carriage in Anglo-American Law" 23 (1994) Anglo-American Law Review 500.

[51] Order No. 85 of 1993, basically a copy of the Carriage of Goods by Sea Act 1992. For bills of lading before the enactment of this ordinance, s2 of the old Bills of Lading Ordinance, which copied the Bills of Lading Act 1855, also vested in the lawful holder of the bills of lading the rights of suit under the contract of carriage as if he were party to it. However, this transfer of rights was linked with the transfer of property which created many problems in various cases. This difficulty is remedied by the new ordinance which does away with this linkage.

[52] [1924] 1 KB 575.

[53] However, it has also been held by the Court of Appeal in *The Elli 2* [1985] 1 Lloyd's Rep. 107 that a contract could still be implied even the freight was prepaid.

lading. In the switched bills of lading scenario, an implied contract of carriage is also entered into when the carrier delivers the goods to the holder of the second bill of lading upon its presentation.

It has been argued that since the case of *The Aramis,*[54] the application of *Brandt v Liverpool* has been severely limited.[55] In the former, an implied contract was pleaded and upheld at first instance.[56] However, the Court of Appeal reversed the decision and Bingham LJ held that the court was not entitled "to cast principle aside and simply opt for a commercially convenient solution."[57] The principles that Bingham LJ had in mind are the traditional requirements of offer, acceptance, intention (to create a legal relationship) and consideration in English contract law.[58] Nevertheless, the court did not go as far as to say that implied contract could no longer be invoked. Bingham LJ accepts that whether a contract is to be implied or not is *a question of fact*, and the court will do so when it is necessary.[59] What is required is the finding of the necessary intention to imply a contract.[60] Consideration would not be a problem: "Once an intention to contract is found, no problem on consideration arises, since there would be ample consideration in the bundle of rights and duties which the parties would respectively obtain and accept."[61]

Indeed, one year after *The Aramis,* the English Court of Appeal (led once again by Bingham LJ) upheld a claim on an implied contract in the *The Captain Gregos (No. 2)*.[62] Their Lordships were able to find on the facts that there was clear and explicit consent between the parties to the carriage of goods, with identifiable terms.[63] The court distinguished *The Aramis* in that there was no such clear intention to contract since the carrier and the consignee would have acted as they did whether they had a contractual relationship or not.[64]

The essence of *The Aramis* is that the finding of an implied contract is mainly a *question of fact*. In the context of switched bills of lading, the court would be able to find the necessary intention to imply a contract of carriage containing the terms represented on the second bill of lading, if the carrier knows that the switched bill of lading is not the genuine bill against which the goods are to be delivered (and one which the indorsee is entitled to reject). The carrier delivers the goods to the indorsee on the presentation of the second bill of lading, and had always understood his obligation as such. Thus the carrier is either found to have accepted the contract which is offered on presentation of the second bill, or the carrier is estopped from denying the effect of the contractual terms listed on the same bill. To use the test laid down in *The Aramis*, the parties' actions must not have been affected by the possibility of a contract. That

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54 [1989] 1 Lloyd's Rep. 213.

55 "Thus, the implied contract, as a device, has reached the end of the road.": Sir Anthony Lloyd in "The Bill of Lading: Do We Really Need It?" [1989] LMCLQ 53.

56 [1987] 2 Lloyd's Rep. 58.

57 Note 54 above, p 225.

58 Malcolm Clarke, "The Consignee's Right of Action Against The Carrier of Goods By Sea - *The Captain Gregos (No.2)*" [1991] LMCLQ 6.

59 Note 54 above, p 224.

60 The test laid down by Stuart-Smith LJ at p 230, note 54 above, is "... no evidence of the performance of any act which is explicable only on the basis that the terms of the bill of lading govern the relationship of [bill of lading holders and ship-owners] inter se." See also Prof. Treitel, " Bills of Lading and Implied Contracts" [1989] LMCLQ 168, on the analysis of *The Aramis* case.

61 Note 57 above.

62 [1990] 2 Lloyd's Rep. 395.

63 *Id*, p 403.

64 *Id.*

the carrier facilitated the operation of the switched bills and accepted them in delivering the goods are "extra" facts required by Bingham LJ to support the finding of an intention to form a new implied contract.

As mentioned above, the court has recognised that once intention is established, it would have no difficulty in finding consideration for the implied contract. Consideration from the carrier is obvious in its delivery of the goods. For the indorsee, even if he is not required to pay freight, consideration could be established in their cooperation in receiving the goods and allowing the ship to be turned around and put back quickly. This would have satisfied the practical benefit doctrine pronounced in *Williams v Roffey Bros. & Nicholls (Contractors) Ltd*[65] Also, as suggested by Clarke,[66] consideration could also be found if the implied contract between the carrier and the indorsee is seen not in isolation but as part of a tripartite relationship which includes the shipper. There is then no need to ascertain from where consideration moved, as long as there is sufficient consideration and all parties benefit.[67]

The courts have implied contracts in cases involving various relevant transport documents when the carriers deliver the goods in exchange for the documents.[68] There should be no legal difficulty for them in similarly implying a contract of carriage between the carrier and the holder of a switched bill of lading. Moreover, as there is the rule that a contract may be proved by usage of trade,[69] it would be of sound policy for the court to do so since switched bills of lading are common in the PRC and Taiwan shipping trade. It is of commercial practicality and of business efficacy to uphold such documents. Given that Hong Kong is an important international trade and shipping centre, the courts should, whenever possible, strive to give effect to the shipping documents which the traders rely upon to protect their rights and livelihood.[70] Certainty and predictability as to their rights and liabilities are of utmost importance to them, especially when the rights of innocent third parties (such as bona fide purchasers or indorsees without notice of the second bills of lading acquired through sub-sales by the consignees) are involved. If the courts refuse to imply a contract of carriage from the second bill of lading and thus defeat the contract action, the indorsees might find themselves without a proper remedy,

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65 [1991] 1 QB 1. Seen as a relaxation of the doctrine of consideration, Glidewell L.J. proposed a practical benefit notion of consideration in which he stated that consideration would be found if : " (I) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding."

66 Note 58 above, pp 9-10.

67 *Id.* On the analysis of *The Good Luck* [1990] 1 QB 818 (CA).

68 An implication that the documents are delivery orders, provided that they refer to the bill of lading: *The Dona Mari* [1974] 1 WLR 341. It can also be implied that the documents are a guarantee that the bill of lading will be presented in due course: *The Elli 2* [1985] 1 Lloyd's Rep. 107 (CA).

69 Moratta, Mustill, and Boyd. *Scrutton on Charterparties and Bills of Lading* (London: Sweet & Maxwell, 19th ed, 1984) 29.

70 To quote Pearce LJ in *Brown Jenkinson & Co v Perry Dalton (London) Ltd,* see note 71 below, p 639: "Trust is the foundation of trade; and bills of lading are important document. If purchasers and banks felt they could no longer trust bills of lading, the disadvantage to the commercial community would far outweighs any convenience provided by giving of clean bill of lading against indemnities."

having received the damaged goods and lost the right of rejection.

As an end note, one could anticipate that the carrier, when sued under an implied contract claim, might raise the defence that the second bill of lading is fraudulent and therefore unenforceable. But it is highly unlikely that the court would come to his assistance because there is no doubt that the carrier is a party to the "fraud" by issuing two sets of bill of lading. This defence is bound to fail.[71]

V. Action in Tort

An action in the tort of negligence against the carrier for the damaged goods may be brought on its own or in combination with the contract action. In view of the nature of the tort action in negligence in carriage of goods by sea, it would be more convenient to start with a discussion on the applicable common law.

A. The Law in General

Actions in tort in respect of the carriage of goods by sea have always been possible.[72] Nevertheless, to sue in tort is not without problems. That a consignee named in a bill of lading or its subsequent legal holder may sue the carrier in tort has been firmly laid down by the House of Lords in *The Aliakmon*[73], despite some conflicting authorities.[74]

In *The Aliakmon*, the plaintiff buyers contracted to buy a quantity of steel coil. The goods were duly loaded on the defendants' vessel, the Aliakmon. The goods were damaged due to bad stowage. The buyers brought an action against the shipowners in respect of the damage both in contract and in tort. The Court of Appeal denied the action in contract. Its decision was upheld by the House of Lords. The action in tort was also refused by the House of Lords. The contract action was basically denied as the result of an exceptional fact in the case: due to a problem in the buyers' bank in issuing credit document after the goods had been shipped, the seller varied

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71 One could draw an analogy from the decision of *Brown Jenkinson & Co v Perry Dalton (London) Ltd* [1957] 2 QB 621. In this case, the carrier, having been made liable under the bill of lading, sought to recover from the seller's indemnity. The seller refused on the ground that the letter of indemnity issued was tainted with fraud and therefore recovery was contrary to public policy. The court rejected the carrier's claim by holding that where a person deliberately makes a statement which would deceive another, with the intention to deceive (subject to an objective test), he could not look to a letter of indemnity to shield him from the consequences of his own doing.

72 FMB Reynolds, "The Significance of Tort in Claims in Respect of Carriage by Sea" [1986] LMCLQ 97. The author writes: "The first editions of both *Carver* and *Scrutton*, dated 1885 and 1886 respectively and of course well before a whisper of *Donoghue v Stevenson*, both make it clear that carriers may be liable in tort as well as contract, and subsequent editions have said the same in very similar wording, though with very little explanation."

73 [1986] 1 AC 785.

74 The minority is led by the decision of Lloyd J (as he was then) in *The Irene Success* [1982] QB 481 and a *dictum* in *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606, both of which favoured the more liberal approach. In where goods are damaged in the course of transit by the negligence of the shipowner, the buyer under c.i.f. contract may sue the shipowner in tort, even though he had not become the owner of the goods. The more conservative authorities follow the decision of Roskill J (as he was then) in *The Wear Breeze* [1969] 1 QB 219 and *The Elafi* [1981] 2 Lloyd's Rep. 679, which supported the view that such a claim was not available to a buyer who was not the owner of the goods when they were damaged during transit.

the contract by sending a cover letter with the bill of lading specifically stating that the sellers were to retain the title of the goods. As a result, under the then Bills of Lading Act 1855, which required title of property to have passed before rights in the contract could be transferred with the bills of lading, the Court of Appeal found that the consignee of the bill of lading was not entitled to sue in contract, nor in the related implied contract argument.[75] The House of Lords, in affirming the decision of the Court of Appeal, also held that the consignee had no cause of action against the carrier in negligence, as the risk (but not the property) had passed to the consignee under the contract of sale with the shipper. Brandon LJ upheld *The Wear Breeze,* overruled *The Irene Success*, and disapproved of the *dictum* in *The Nea Tyhi*:

> [T]he principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property... The conclusion which I had reached is that *The Wear Breeze* was good law at the time when it was decided and remains good law today.[76]

It was not elaborated or explained in *The Aliakmon* as to what would amount to a possessory title that would sustain an action in tort. Professor Treitel has suggested that it is likely that constructive possession is not sufficient while an immediate right to the actual possession of the goods is, at least, required.[77]

The Aliakmon decision has attracted much academic criticism[78] in that it imposed too strict a limit on the legal holders of bills of lading to the possibilities of a tort action. Still, it must be noted that most of the criticism came as a reaction to the hardships imposed by the Bills of Lading Act 1855. It was argued that if tort actions were so restricted, cargo owners who received the goods damaged during the transit would be unjustly deprived of remedies. This argument has now lost most of its weight with the passage of the Carriage of Goods Act 1992 in England and the Bills of Lading and Analogous Shipping Documents Ordinance in Hong Kong. This new legislation solved the main problem of the 1855 Act. Section 4(1) of the Ordinance abolished the link between the transfer of contractual rights of suit and the passing of property, which was provided for in the old legislation.[79] Holders of bills of lading are now in a much easier position as far as suing in contract is concerned. As Nossal suggests: "Thus, the party in the position of the plaintiff in *The Aliakmon* would be provided with a contractual right of action against the carrier under the ordinance and would not be entitled to sue in tort."[80]

Criticism also focused on the retreat by the House of Lords from the trend of extending

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[75] [1981] 1 QB 359 (CA).

[76] Note 74 above, p 809 and p 820.

[77] Treitel, "Bills of Lading and Third Parties" [1986] LMCLQ 299.

[78] For example: Adams & Brownsword, "The *Aliakmon* and the Hague Rules" [1990] JBL 23; Reynolds, "The significance of Tort in Claims in Respect of Carriage of Sea" [1986] LMCLQ 97; and Lloyd, "The Bill of Lading: Do We Really Need It?" [1989] LMCLQ 47.

[79] Shane Nossal, "The Bills of Lading and Analogous Shipping Documents Ordinance" 24 (1994) HKLJ 181; Reynolds, "Further Thoughts on The Carriage of Goods by Sea Act 1992 (UK)" 25 (1994) Journal of Maritime Law and Commerce 143.

[80] *Id*, p 184.

tort liability as seen in *The Junior Books*[81] and *Anns v Merton London Borough Council.*[82] This argument has become obsolete after the unusually strong House of Lords decision[83] in *Murphy v Brentwood D.C.*[84] It overruled *Anns v Merton*[85] and sent out a clear message that the criteria for proving tort liability for pure economic loss will not be easily relaxed and extended.

Despite the criticism, *The Aliakmon* may be regarded as the leading authority in tort claims against the carrier for negligence. As suggested by Treitel,[86] the restriction of tort claims resonates with sound policy and commercial considerations since it would enable carriers be certain as to their liabilities.[87] It also allows the application of the Hague-Visby Rules in qualifying the carrier's duty[88] and liability toward tort claims. Coupled with the new legislation, the role of tort actions will be limited "by means of restricting the claimant in a tort action to those who are not in any contractual relationship (either actually or constructively under the ordinance) with the carrier and who had the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred."[89] In other words, where there has been real, and not merely, pure economic loss.

A. Who Could Sue?

The difficulty in suing the carrier in the tort of negligence under *The Aliakmon* rule is that the plaintiff must establish that he had either legal ownership or a possessory title to the goods at the time of damage or loss. As it is always difficult to ascertain precisely when the damage actually occurred during the transit, it would be difficult to prove that it was the holder of the second bill of lading (the shipper) who had the necessary possessory title to the goods when they are damaged. Therefore, whether it is the ROC Co. or the PRC Co. who is entitled to sue against the

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81 [1983] 1 AC 520.

82 [1978] AC 728, *per* Lord Wilberforce at pp 751- 752: "[The] position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered positively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise..."

83 The House constituted the Lord Chancellor and six Lords of Appeal and the Lord Chancellor in reaching an unanimous decision.

84 [1991] 1 AC 398.

85 This is only the eighth time in which the House of Lords has invoked the 1966 Practice Direction to overtly overrule its own decision.

86 Note 77, pp 301-305.

87 *Id.* The author writes: "The main force of the argument of certainty is that the carrier should be able to anticipate the extent of his liability(rather than the person to whom he will be liable) and to make his insurance arrangements accordingly."

88 The Rules, which are usually incorporated into the bills of lading, set out the liabilities and duties of the carrier both in contract and in tort. Therefore, if to hold that there is no contract action but then to allow a successful tort claim based on the extended principle (which would not be limited by the Rules as to the extent of liabilities and damages), the carrier might be unjustly arbitrated as he entered the contract assuming that his liability and duty would be confined within the international rules.

89 Note 79 above.

carrier is wholly a matter determined by the weight of evidence and facts. The practical approach would be to join both parties so that whenever the goods were damaged, either the ROC Co. or the PRC Co. would have the necessary possessory title to support the tort action. However, as suggested by Cashmore, sometimes there may be difficulty in getting the other party, usually the seller, to join as a co-plaintiff. This is because:

> [I]f a party joins as a co-plaintiff in an unsuccessful action and the court holds that the risk and property in the goods is with such a co-plaintiff he will have made himself liable upon the contract of sale (whether it be non-delivery if he be seller or for the price if he be buyer), and he will, in turn, be without recourse against the carrier.[90]

Such were the facts of *The Aliakmon.*

Therefore, even though a switched bill of lading might not present further problems in bringing an action in tort of negligence against the carrier, the strict approach adopted by the courts in *The Aliakmon* (and with the policy considerations mentioned above), will make it more difficult for the holders of the second bill of lading to sue in tort than in implied contract.

Given the reluctance of the courts to relax the criteria for a tort claim and the unlimited liabilities that it may entail, it is submitted that a better approach for the courts would be to support an action found on implied contract. In so doing, interests of the different parties in the trade would be taken care of. The buyers and subsequent indorsees' rights would not be denied while the carriers' extent of liability and duties would also be protected through the Hague-Visby Rules which are usually incorporated into the terms of the bills of lading. Certainty will be safeguarded and no significant injustice will be done by simply invoking the familiar judicial device of implied contract.

Besides these possible actions to sue in contract and in tort, the potential plaintiffs may also be able to bring an action in bailment against the carrier for the damaged goods.

VI. Action in Bailment

A. The Law in General

There have been different theories to suggest what the formative elements in bailment are,[91] but Palmer[92] has pointed out that *possession of the subject matter in issue* is central to each of these theories. Thus, bailment has been defined as follows:

> Under the modern law, a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The

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90 Cashmore, "Title to Sue on a Contract of Carriage in Anglo-American Law" 23 (1994) Anglo-American Law Review 490.

91 Palmer's, Note 92 below, p 15, lists six theories as to the essential formative element in bailment: "They are: (1) That bailment requires a delivery of possession. (2) That it requires a contract giving rise to possession. (3) That it requires consensus or agreement giving rise to possession. (4) That it requires a voluntary possession. (5) That it requires a knowing (but not necessary voluntary) possession. (6) That it requires possession and no more."

92 N.E. Palmer, *Bailment,* (London: The Law Book Co. Ltd., 2nd ed, 1991).

> legal relationship of bailor and bailee can exist independently of any contract, and is created by the voluntary taking into custody of goods which are the property of another...[93]

As a result, the action of bailment against a bailee can be an action of its own arising solely from the possession of goods by the bailee.

The law regarding the finding of a bailment relationship under a maritime suit has been laid down in *The Pioneer Container*[94] by the Privy Council in hearing the appeal from Hong Kong.[95] Although the case concerned sub-bailment, their Lordships regarded that relationship as existing between the principal bailor and the sub-bailee as analogous to that of the bailor and the bailee. Lord Goff, in giving the judgment of the Privy Council, adopted the view expressed by Palmer and reasoned from first principles. He held that the creation of a bailment relationship resulted simply from the bailee's voluntary possession of the another's property.[96]

The action in bailment is particularly attractive when there is no effective contractual relationship in a transaction. Thus, in referring to the decision of the House of Lords in *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd,*[97] Goff LJ says:

> Such a conclusion, finding its origin in the law of bailment rather than the law of contract, does not depend for its efficacy either on the doctrine of privity of contract or on the doctrine of consideration.[98]

In carriage of goods by sea, there is bound to be a bailment relationship with the carrier as the bailee and the shipper of goods as the bailor from the mere fact that the carrier takes the goods on board for stowage and shipment. The carrier is required to exercise the common law duty of due diligence in looking after the goods as a bailee. This duty, however, could be subject to variation and modification by any supervening contract such as the bill of lading. To quote Goff LJ again:

> This is a case where goods have been shipped under bills of lading. Bills of lading are documents which operate as receipts for the goods, and which contain or evidence the terms of the contract of carriage. Such terms include provisions relating to the shipowners' obligations in respect of the goods while in their care, and so regulate their responsibility for the goods as bailees.[99]

A problem may arise when holders of the bills of lading pursue an action in bailment against the

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93 *Halsbury's Laws of England* (Vol.2, 4th ed, 1991) para 1801.

94 *The Owners of Cargo Lately on Board the Vessel K H Enterprise v The Owners of the Vessel Pioneer Container (The Pioneer Container)*[1994] 2 AC 324, [1994] 2 All ER 250.

95 The Privy Council dismissed the appeal and affirmed the decision of the Hong Kong Court of Appeal, which reversed the first instance decision. However, the Privy Council disagreed with some of the principles in the decision of the Hong Kong Court of Appeal. For a detailed analysis of the latter, please see Swadling, "Sub-Bailment on Terms - The Pioneer Container" [1993] LMCLQ 9.

96 [1994] 2 AC 341.

97 [1924] AC 522, [1924] All ER 135.

98 [1994] 2 All ER 250 at 259.

99 *Id,* pp 263-298.

carrier since the bailment relationship was originally formed between the shipper and the carrier only. The potential plaintiffs would have difficulty in asserting the existence of a bailment with terms between themselves and the carrier unless there is attornment[100] by the bailee to them. Attornment operates as an estoppel so that the bailee may not subsequently deny the attornee's title to the goods comprised in the attornment. It would require evidence to show that the bailee has directed to the alleged attornee that the goods are now held as that person's and that the attornor is now his bailee. The finding of ascertainable terms of bailment would be such evidence.

Having determined the general requirements for a suit in bailment, one may now proceed to see who could bring this action against the carrier in our switched bill of lading case.

B. Could the ROC Co. Sue in Bailment ?

As submitted above, as long as there is physical delivery of goods by the ROC Co. and the voluntary acceptance of the goods by the carrier, there will be a bailment relationship between them. Since the relationship and thus the action arise independently of finding an effective bill of lading, the fact that the first bill of lading is not a genuine one would not affect the ROC Co.'s rights as a bailor. Moreover, even though the first bill of lading carries false information, it still serves the purpose as a receipt of the goods and forms an evidence to the bailment relationship. If the court accepts the validity of the first bill of lading since it has not been rescinded, the bailment relationship would be subject to the terms contained in it. Even if the court does not accept its validity, the bailment relationship would not be affected except that the carrier could not rely on the terms to limit, and thus to anticipate, his extent and scope of liability. The result would be a bald bailment under the wider common law duty of the bailor which is undesirable in international sales.[101]

C. Could the PRC Co. or Indorsee of the Second Bill of Lading Sue in Bailment ?

An obstacle to the indorsee of the second bill of lading to suing the carrier in bailment is, as mentioned in the above section, in the proving of attornment as the original bailment was between the ROC Co. and the carrier. In *The Future Express*[102] at first instance, the counsel for the holders of bills of lading submitted that the transfer of the bill itself constitutes attornment. Since it is a document of title and gives its holder constructive possession of goods, the effect of attornment would be to effect a change in the identity of the bailor[103]. Deputy Judge Diamond

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100 Attornment is defined by Palmer, Note 92 above, p 1368, as "a method by which the relationship of bailor and bailee can arise without any form of physical transfer or delivery."

101 An analysis of the commercial undesirability of bald bailment can be found in: Shane Nossal, "Bailment on Term and The Carriage of Goods by Sea - '*The Mahkutai*'" 24 (1994) HKLJ 19. Nossal opines that because of the misinterpretation and non-application of *Elder v Paterson* [1924] AC 522, the Hong Kong Court of Appeal, in not accepting the bailment on terms, denied the legitimate commercial expectations of the shipowner in *The Makhutai,* by not allowing the respondent shipowners to rely on the exclusive jurisdiction clause incorporated in the charterer's bill of lading. On appeal, the Privy Council in a judgment delivered on 22 April 1996 (Privy Council Appeal No. 39 of 1994) affirmed the Hong Kong Court of Appeal decision. Disappointingly, the Privy Council's grounds for not accepting the bailment on terms argument were dealt with briefly.

102 [1992] 2 Lloyd's Rep. 79.

103 *Id,* pp 93-94.

QC accepted the submission but put a strict qualification to it. After reviewing the line of authorities, the judge stated that since constructive possession from the transfer of bills of lading was not automatic but rested upon the intention of the transferor and the transferee, attornment would also not be automatic upon transfer, unless clear intention could be shown to support it.[104]

It is submitted that when the carrier delivers the goods to the holders of the second bill of lading on its presentation, there is clear intention in the parties to have constructive possession transferred, and to effect the attornment. They have also assented the attorned bailment to be in the terms as evidenced by the second bill of lading. The carrier's knowledge of the false date of the second bill of lading and his delivery of the goods nonetheless should have carried weight on the finding of intention.

The switched bills of lading would not affect the suit in bailment against the carrier for the damaged goods as described above. In order to avoid a bald bailment or to effect attornment by way of transfer of the bills of lading, the court would still need to treat the sets of switched bills as an effective document of title and as part evidence to the terms of bailment. Would it, therefore, not be commercially more logical and legally more probable for the courts to adopt the implied contract analysis to support an action in contract which would best balance the rights of the potential plaintiffs against the protection of anticipated limitation to liabilities for the carriers?

In fact, the difficulty in relying on bailment on terms could be illustrated by *The Makhutai*[105] case. The facts of the case are complicated but for the purpose of the present discussion, it could be summarised: The defendant shipowners time-chartered the vessel to a charterer who had been given the right to issue its own bills of lading. The charterer sub-chartered the vessel to an Indonesian shippers to ship plywoods to Shantou in the PRC and issued its own bill of lading which contained an exclusive jurisdiction clause. The goods were damaged and the plaintiffs sued the shipowners in contract and alternatively in bailment in Hong Kong by arresting the ship. The shipowners applied to stay the proceeding permanently because they could rely on the exclusive juridiction clause either under a Himalaya clause incorporated in the bill by the principles established in *The Eurymedon*,[106] or alternatively on the principle of bailment on terms originated in the speech of Sumner LJ in *Elder, Dempster & Co Ltd*[107] Both the Hong Kong Court of Appeal and the Privy Council rejected the argument on bailment on terms although their reasons differed.[108] As indicated by Goff LJ in delivering the judgment, the pendulum of judicial attitudes towards the application of bailment on terms has been swinging and there is no clear indication of its wider application.[109] Judicial reality is that it is difficult to rely on bailment on terms to accommodate commercial reality and expectations. Moreover, even if it is possible, one would still need a valid and enforceable bill of lading to evidence the terms as suggested above. Thus it will always be a preferred choice for the courts to adopt the implied contract analysis in the switched bills of lading context in order to balance judicial reasoning and commercial practicality.

Interestingly enough, in *The Makhutai,* the cargo owners originally relied upon an apparently later issued bill of lading, the Hong Kong bill of lading, instead of the original Jakarta

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104 *Id,* pp 94-96.
105 Note 101 above.
106 [1975] AC 154.
107 [1924] AC 522.
108 Note 101 above.
109 [1996] 2 HKC 1.

bill of lading to sue the shipowners- this gave rise to a similar situation as when switched bills are used. On appeal, the plaintiffs did not rely on this second bill to resist a stay.[110] The reason why there should be a second bill was not explained in the interlocutory proceedings. Since the second bill was no longer relied upon in later proceedings, whether the courts would enforce it or not can only be speculated upon. It is, nevertheless, submitted that had it been relied upon, the courts should be able to adopt the above analysis and to uphold it by applying the implied contract doctrine if this second bill was not found to be a fundamentally fraudulent, and thus a void, document.

VII. Illegality of the Contracts

Illegality has often been pleaded as a defence to defeat actions for enforcement of contractual rights and the courts have always been willing to entertain it, especially if the performance of the contract would have been illegal under a friendly country. As Lindley LJ stated in *Scott v Brown, Doering, McNab & Co:*

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant had pleaded the illegality or whether he has not.[111]

There are various aspects of contractual illegality which will be considered by the courts in deciding whether on policy grounds that the contract shall not be enforced. It could arise by reasons of the proper law of the contract, the law of the forum, the law of the place of contractual performance and the law of the place where the contract is made.[112] So what kind of illegality may have been involved in our switched bills of lading situation ?

The enforcement of switched bills of lading to enable direct trade between Taiwan and mainland China is not illegal under both PRC law[113] and Hong Kong law. The main reason behind the practice of switched bills of lading is to avoid the so called three "No's" policy pronounced by the ROC government; meaning no negotiation, no compromise and no contacts with PRC private or public institutions and personnel. Under this policy and through a long-standing statute (the Temporary Regulations Effective During the Period of Communist Rebellion), any direct or indirect trade with mainland China is regarded as a seditious act of financially aiding the Chinese Communists.[114] Therefore, even if the court accepts the implied

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[110] In fact, both the trial judge and the Hong Kong Court of Appeal doubted the authenticity of the Hong Kong bill of lading and the Appeal court regarded it right that the cargo owners no longer relied on it for their submissions.

[111] [1892] 2 QB 728.

[112] For a detailed examination of contractual illegality and its application in the conflicts of law, see D Chong Gok Sian, "Contractual Illegality and Conflict of Laws" 7 (1995) Singapore Academy of Law Journal 303.

[113] I am indebted to Dr. Peter Feng and Dr. Nan-ping Liu of the Faculty of Law of The University of Hong Kong for their advice on the relevant PRC and ROC laws.

[114] Note 5 above.

contract argument and upholds the switched bills of lading, it may not do so, if by so doing , it will *prima facie* be enforcing an illegal carriage contract directly, and the sales contract indirectly, under Taiwanese law.

The circumstances under which a contract would be affected by illegality have been summarised by Staughton LJ in *The Amazonia*[115] when he referred to the *Euro-Diam Ltd. v Bathurst*[116] case, he regarded that:

> [T]he four circumstances in which a contract is directly affected by illegality under the rules of conflict of laws, and I do not detect that the Court of Appeal disagreed with me. They are, briefly, (1) where the law is the proper law of the contract, (2) where it is the law of the place of performance, (3) in some but not all instances, where it is the law of the forum, and (4) in some cases where the contract involves a currency related by the law in question.[117]

The third and fourth circumstances mentioned by Staughton LJ do not apply in the present situation. For the issue of illegality under the law of the place of performance, it is also unlikely to apply as the test for the performance of the contract is one of substantive performance, it is always possible to argue that the substantial part of the carriage contract, as evidenced by the switched bills, does not fall into the Taiwanese jurisdiction. The hurdle of illegality under the proper law of the contract would only arise if it has been expressly provided in the switched bills, or if the court finds that Taiwanese law is the governing law. Even if it is the case, there may still be two possible ways to get around the problem. The first is that the holders of the second bill of lading may argue that the carrier is estopped from relying on the illegality issue to bar the potential plaintiffs from suing it. In *The Amazonia*, a charterer argued that an London arbitration clause incorporated in the bill of lading was illegal and thus null and void under Australian law as the bill expressly provided that a relevant Australian Act governed the carriage contract. The English court at first instance and the Court of Appeal both found that, although the proper law of the contract was Australian law and thus the arbitration clause was void for illegality, the charterer was estopped from relying on the illegality because, under mistake of law, the charterer had formed an agreement with the cargo owner, the plaintiffs, to appoint an arbitrator. This agreement, found be be governed by English law, operated as an estoppel. It is submitted here that as the carrier in the switched bills situation knows that the bills are not genuine and voidable but still facilitates their operation and accepts them in delivering the goods, they are estopped from denying the rights of the cargo owners by relying on the illegality. If a mistake could be found to support the estoppel, it is then *a fortiori*.

Secondly, when one examines this *prima facie* illegality with a more pragmatic approach, taking into consideration the current practical and judicial attitudes in Taiwan towards trade between Taiwan and the PRC, it is certain that the attitude of the Hong Kong Court would be affected.

Since 1988, there has been a departure from the "Three No's" policy in Taiwan, mainly in reaction to the reality of economics. The Taiwanese government has announced that indirect imports of certain commodities from the mainland would be permitted and, since then, numerous policy statements have been issued with varying messages on the degree to which

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[115] [1990] 1 Lloyd's Rep. 236.

[116] [1988] 1 Lloyd's Rep. 228.

[117] Note 115, p 245.

indirect trade would be permissible.[118] Both the Executive Yuan and the Judicial Yuan[119] have condoned indirect trade with the mainland. Then in 1989, the Judicial Yuan, in response to a conviction of two Taiwanese businessmen on the ground of seditiously financing the Chinese Communists, issued a ruling to clarify the meaning of "financially aiding the Chinese Communists".[120] It stated that Taiwan business persons will *normally* not be charged with the sedition for dealing with the mainland enterprises if the transactions are solely for personal gain and do not involve strategic material. In other words, it reasoned that drive for personal profit *may* negate criminal intent ![121]

As a result, direct trade and contact between mainland China and Taiwan is still technically illegal, at least under Taiwanese law, but in practice, this illegality is overlooked by the Taiwanese authorities. The Hong Kong courts should still enforce the switched bills despite of its apparent illegality under Taiwanese law, having considered practical realities. However, since the relations across the Straits fluctuate from time to time, as is clearly reflected by the increased tension between PRC and Taiwan in recent months triggered by the Taiwan presidential election and her pragmatic foreign relationship approach, the administrative and judicial laxities mentioned above may change with the prevailing political winds. Thus, it is of no less significance for the Hong Kong courts to have regard the estoppel doctrine found in *The Amazonia* if they find the carriage contract is to be governed by Taiwanese law, and forbid a possible plea under illegality.

VIII. Conclusion

Although switched bills of lading *appear* to be fraudulent documents, the courts could and should adopt a legal position to enforce them in order to strike a legally sound and commercially viable balance between the rights of the legal holders of the bills of lading and those of the carrier. On one hand, it has to respect and enable the rights of the legal holders of the switched bills as against the carrier while, on the other hand, it has to protect and honour the legitimate expectation of the shipowners in regard to the extent and scope of liability under the terms of a bill of lading. The implied contract approach should best provide the courts with the most legal and logical mechanism to achieve the balance. Under the implied contract doctrine, the first bill of lading could be regarded as valid, unless rescinded, as a receipt of goods and as part evidence of the contract of carriage, while the second bill of lading could be treated as a valid document of title and evidence of the contract of carriage for its holders. It is a device familiar to the courts as it provides the greatest certainty in regard to the expectations of the various parties in the dispute, having incorporated the terms which were known to them. This element of certainty is highly desirable in the commercial and international trading world.

As a result, the courts would be able to serve both justice and commercial practicality through the notion of voidability of the switched bills of lading and the application of the doctrine of implied contract.

Other possible actions in tort and bailment would either result in an inflated and

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[118] M.A. Silk (ed), Taiwan Trade and Investment Law, (Hong Kong: OUP, 1994) pp 287-289.

[119] That is, the executive and the judicial institutions respectively.

[120] "Profits Not Seditious" Free China Journal, 15 May 1989. From note 118 above.

[121] One has to bear in mind that it does not mean that the law is now being abolished. Direct trade and investment would still be illegal, except that the courts in examining the issues might consider other factors in determining criminal liability.

bolstered liability for the carrier, which is against Hong Kong and English judicial attitudes. There needs to be a more drastic approach by the courts to assault the privity rule or to liberate the neighbourhood principles.[122] Moreover, in order to strike the balance (mentioned above) through these actions, it will still be necessary for the courts to indirectly enforce the switched bills so as to bring in the agreed terms of liability.

Since Hong Kong serves as an important international trade and shipping centre as well as a significant entrepot for the PRC and Taiwan trades, it would be of good business sense if the local courts would uphold the switched bills of lading, documents which are vital in the carriage of goods by sea and in international sales, whenever possible.

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[122] As argued by Adams and Brownsword, "The *Aliakmon* and the Hague Rules" [1990] JBL 23. At the opening passage, the authors declared: "The real difficulty with the privity problem lies in finding a satisfactory accommodation between the potentially competitive considerations of certainty and justice. The decision by the House of Lords in The *Aliakmon* seems clearly to represent a similar tack in the direction of certainty, and a further retreat from *Junior Books*... In this paper it will be argued that an assault on the rule can be justified in the special context of bailments."

THE CONTROL OF MONEY LAUNDERING IN HONG KONG: THE IMPACT OF NATIONAL AND INTERNATIONAL INITIATIVES

香港對「洗黑錢」的管制：宗主國及國際間採取的行動所帶來的影響

LIONEL R YIP*

Laundering of illicit funds (or "dirty money") is a serious problem in many economies with a modern tax base. The mysteries of accounting often protect ill-gotten gains from the vigilant but overworked eyes of the law. The proceeds of organised crime are usually the targets of legal initiatives against money laundering. It is perhaps the most common form of white-collar crime.

In this article, the author assesses the effectiveness of Hong Kong and international attempts to prevent money laundering. The international aspect is of particular importance, given the border-less nature of this type of crime. The article then discusses the feasibility of adapting for Hong Kong the measures tried elsewhere. It is suggested that the SAR government keep an open mind when dealing with this problem, which will only increase with the globalisation of the world's economies.

爲了隱瞞非法收入的來源而將該收入轉變成表面合法，便是俗稱的「洗黑錢」。隨著「洗黑錢」的不斷擴展及複雜化，國際間也對這個問題越來越關注，而聯合國亦確認了這個問題的重要性及緊迫性。現在各個國家、地區及國際間的有關當局在處理此問題方面,都表現出前所未有的迅捷及一致性。

隨著貿易國際化及電子貨幣轉賬服務的發展，要追查非法款項的流動便更加困難。爲了避免留下線索及證據，「洗黑錢」通常都涉及跨國操作，因此要有效打擊「洗黑錢」的活動，國際間的合作及金融界的配合是必須的。

身爲世界金融及貿易中心，香港每天要處理大量國際業務，而香港銀行密集，並且沒有中央銀行，貨幣轉換也不受監控。此外，香港也是毒品販賣中心及有組織犯罪集團活躍的地方。這些原因都使它成爲一個「洗黑錢」的中心。

香港在打擊「洗黑錢」方面的有關政策大部份都是取自英、美。其實質內容符合《維也那公約》(Vienna Convention)，但政策的執行則有待改善。香港制定這些政策的動力來自英、美及國際社會，其進展是樂觀的，而國際監管制度也將繼續影響香港。

在一九九七年香港主權回歸中國後，英、美對香港的影響會相對減弱，中國也不會輕易在國家主權及國內經濟政策的修訂方面作出妥協。這些改變對香港未來打擊「洗黑錢」的政策有何影響，現在還未能肯定，不過政府對此斷不能坐視不理。

I. Introduction

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* LL.M (HKU). Research paper submitted in May 1996 for International Commercial Transactions course.

"Money laundering" is the transformation of illegally obtained currency into that which appears legitimate, in order to conceal the original illegal source of the income.[1] The term itself is reputed to have originated in the 1920s, when American gangsters such as Al Capone and Bugsy Moran allegedly set up laundry companies in Chicago as a means to "clean" their "dirty" (i.e. illegally-obtained) money.[2] The scale and volume of this financial subterfuge have increased dramatically in the past two decades, as have the proceeds of criminal activity which require "laundering".

Money laundering is not a new phenomenon. People through the ages have resorted to countless methods to disguise and hide their wealth in order to obscure the source (and nature) of their income and wealth.[3] Nevertheless, the rapid growth and increasing sophistication of money laundering has made it a major and pressing international concern, its importance measured not only by the amount of money involved but also by the possible and actual consequences of its generation and circulation.[4] The significance attached to the problem of money laundering by the international community is reflected by the unprecedented level of consensus and speed with which the problem has been acted upon by national, regional and global authorities.

This research paper will examine domestic and international efforts to prevent and control money laundering, with particular reference to Hong Kong and, where possible, will provide an assessment of their effectiveness. To a great extent, the measures taken in Hong Kong have been adopted or modified by other jurisdictions, particularly the United States and Britain. Rather than conduct a detailed analysis of Hong Kong legislation, this paper will consider the broader issues of the control of money laundering in the context of global regulation. The globalisation of regulation coincide with the globalisation of trade and the development of an international trading system, administered primarily by the World Trade Organization (WTO), based on the General Agreement on Tariffs and Trade (GATT).

The impetus for the regulation of numerous matters on an international basis arose from globalisation, which has had a profound impact on economic affairs throughout the world. The efforts to regulate money laundering are a good example of the harmonization of legislation introduced in response to the development of an international regulatory regime, and of changes brought about by globalisation.

This paper will not attempt to explain the methodology of money laundering because of length constraints.[5] The myriad of methods and techniques used to launder illicit proceeds is constantly growing, and becoming increasingly complex in order to avoid detection.[6] Though

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1 Lyman, T. *Gangland* (Springfield: C. Thomas, 1989) p 135. The 1984 President's Commission on Organized Crime and Racketeering defined money laundering as "the process by which one conceals the existence, illegal source or illegal application of income, and then disguises that income to make it appear legitimate."

2 Saltmarsh, G. "Tracking Dirty Money Down to the Cleaners", *Police Review*, 8th June 1990, p 1148.

3 Rider, Barry A.K. "Fei Ch'ien Laundries: The Pursuit of Flying Money", *Journal of International Planning*, 1 (2), pp 77-152, cited in Rowan Bosworth Davis and Graham Saltmarsh, *Money Laundering: a Practical Guide to the New Legislation* (London: Chapman & Hall, 1994) p 79.

4 South, Nigel "On 'Cooling Hot Money': Transatlantic Trends in Drug-related Money Laundering and its Facilitation", *Criminal Organizations*, vol. 10, no. 1, Winter 1995, p 1.

5 Charles Hill, "Money Laundering Methodology," in Parlour, Richard (ed.) *Butterworths International Guide to Money Laundering: Law & Practice* (London: Butterworths, 1995) pp 1-13. See note 3 above, pp 79-106, for a comprehensive account of the laundering process.

6 From the Coordinated Law Enforcement Unit (CLEU), *Money Laundering: The Need for Currency*

some launders may still smuggle cash in suitcases, money laundering has mainly gone electronic: most money is now cleaned through multiple transfers between various accounts around the world, in split seconds. Legislative and regulatory efforts therefore attempt to deal with the problem of money laundering comprehensively and decisively, although authorities have recognised that the fight against money laundering is a never-ending battle. The number of variations on laundering methods is "virtually infinite and limited only by the creative imagination and expertise of the criminal entrepreneurs who devise such schemes."[7]

II. Money Laundering as an International Phenomenon

There have been numerous attempts to quantify the amount of money being laundered on a national and international scale but, not surprisingly, these estimates are, for the most part, mere guesses. By some estimates, money laundering qualifies as the third largest business in the world.[8] At U.S Congressional hearings in 1991, experts estimated that US $500 billion of drug money was being laundered annually world wide, $150 billion in the United States alone.[9] Others have considered these estimates to be outdated, and claim that the figure for international drug proceeds was in reality closer to US $1 trillion annually, $400 billion in the United States.[10]

One of the main techniques used to estimate the volume of money laundering and to examine trends is the analysis of currency surpluses. Under normal circumstances bank deposits and withdrawals will tend to balance out in a jurisdiction in the long run. The existence of a large currency surplus tends to indicate that there are significant deposits of cash from informal or illicit sources. For example, the cash surpluses in local banks in Florida in 1976 increased from $576 million to $1.5 billion over the course of one year.[11] Federal Reserve Bank statistics indicate that, in 1985, the cash reserve of Miami banks reached $6 billion. However, by 1988, it had dropped to $4.8 billion, while the cash surplus in the Los Angeles area over the same period jumped from $165 million to $3.8 billion. This increase corresponded with a noticeable shift in drug money laundering westward to Southern California in the mid-1980s.[12] Currency analysis would later be used to highlight suspicious money flows from Hong Kong to the United States.

With the growth of money laundering as an international underground industry, the level of interest among governments, law enforcement agencies, scholars, bankers and criminals has increased considerably. Money laundering has become very topical in recent years and the subject of dozens of conferences, intergovernmental meetings and publications. One writer wryly noted:

Transaction/Transportation Reporting in Canada (Vancouver: British Columbia Ministry of Attorney-General, 1992) p 4.

7 See note 3 above, citing 1985 Interim report of the U.S. President's Commission on Organized Crime and Racketeering, p 78.

8 Robinson, J. *The Laundrymen: Inside the World's Third Largest Business* (London: Simon & Schuster, 1994).

9 See note 3 above, p 46.

10 *Id.*

11 *Id,* p 28. Also see note 4 above, p 2.

12 See note 4 above.

> If the number of conferences, both governmental and otherwise is an indication of the importance with which a topic is regarded, then those recalling this period will be justified in thinking that money laundering was one of the greatest problems facing mankind towards the end of the second millennium.[13]

Hyperbole aside, the United Nations has identified money laundering as an important international issue requiring urgent action, along with the associated problems of drug trafficking and organised crime, all of which contain an international dimension. A Canadian study of police investigations of money laundering found that 80% of the cases had an international component.[14] The percentage of international cases may be higher in Canada because of its banking system and geographical proximity in relation to the United States, but it is at least indicative of the ease with which funds are transferred to other countries. In 1992, the UN Secretariat noted:

> The strategy of criminal organizations is to manipulate their illicit proceeds, usually but not always through the legitimate financial sector, in such a manner as to make those proceeds appear to have come from a legitimate source. Thus money laundering is a vital component of all financially-motivated crime. More importantly for the international community, since obfuscation any evidentiary will invariably involve transborder operations, often including many border crossings in the course of a laundering transaction.[15]

III. The Role of International Finance in Money Laundering

The development and rapid growth of money laundering has been facilitated by profound changes in the international financial system. The liberalisation and integration of the world's financial markets, the removal of barriers to allow free movement of capital, and the speed and efficiency of electronic money transfers between countries have made money laundering easier by making it more difficult for authorities to trace the flow of illicit funds.[16] Money laundering is a vital component of major criminal operations as they need to cleanse illicitly obtained funds in order to benefit from the proceeds of their criminal activity. The use of financial institutions is preferred since that is where the criminal wants his or her proceeds to end up, and thus appear legitimate.[17] The U.S. Senate Committee on Government Affairs noted in 1985:

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[13] See note 3 above, p 79-80. The vast amount of money laundering conferences has been criticized by the likes of Rowan Bosworth-Davies and Graham Saltmarsh, who noted in their book at page 80: "the development of a new intellectual sub-culture which appears to exist for the primary function of allowing academic theorists with no practical experience of criminal investigation, to travel the world, from academic conference to financial forum, discussing and debating a topic with which very few of them have any hands-on knowledge at all..."

[14] Evans, John. *International Money Laundering: Enforcement challenges and Opportunities* (Vancouver: International Centre for Criminal Law Reform & Criminal Justice Policy, 1994) (From the internet), p 13.

[15] See note 3 above, p 195.

[16] Brian Harte. "The Role of Banks" in Parlour, Richard (ed.) *Butterworths International Guide to Money Laundering: Law & Practice* (London: Butterworths, 1995) p 244.

[17] *Id*, p 244.

> Money laundering is now an extremely lucrative criminal enterprise in its own right. The Treasury's investigations have uncovered members of an emerging criminal class – professional money launderers who aid and abet other criminals through financial activities. These individuals hardly fit the stereotype of an underworld criminal. They are accountants, attorneys, money brokers and members of other legitimate professions. They need not become involved with the underlying criminal activity except to conceal and transfer the proceeds that result from it. They are drawn to their illicit activity for the same reason that drug trafficking attracts new criminals to replace those who are convicted and imprisoned – greed. Money laundering, for them, is an easy route to almost limitless wealth.[18]

Banks and bankers have been identified as active and passive participants in several major money laundering operations and as such have become targets for further regulation and additional legal duties and, in some cases, prosecution. Robert Morgenthau, the New York District Attorney who prosecuted the notorious Bank of Credit and Commerce International (BVI), outlined his reasons for pursuing banks and bankers who had facilitated the realization of drug profits:

> The nexus between drugs and money means that to combat the use and damage of illegal drugs in our society, we must be as vigorous in our prosecution of rogue bankers as we are in our prosecution of street dealers... It would be devastating to our efforts if our battle against crime were ever to be viewed as solely a struggle against crimes committed by the poor and the underprivileged. There is no faster or more certain way to erode respect for the law – respect that ultimately must be the cornerstone for a society governed by laws – than to allow even the impression that the laws are enforced against certain groups, while others may commit crimes with impunity. If officials in the banking industry or in public life violate their special trusts, they must be brought to justice.[19]

Hong Kong is widely considered to be one of the major money laundering centres in the world. As a rising major international financial centre, the recent increase in the volume of international transactions has certainly contributed to its development as a money laundering centre. Over the past two decades, a highly sophisticated international banking sector has developed in Hong Kong, with the third largest number of banks represented, including 85 of the world's top 100 banks.[20] In addition to this concentration of banks and cosmopolitan bankers, Hong Kong has a number of accountants and lawyers with experience in

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[18] See note 3 above, p 53.

[19] Robert Morgenthau, from a paper presented to a conference in May 1993, cited in note 3 above, p 215. Morgenthau went on to quip "In short, we had to pursue the BCCI case because of its relationship to drug money and because of our obligation to prosecute 'crime in the suites' as well as 'crime in the streets'".

[20] Overholt, William. *China: the Next Economic Superpower* (London: Weidenfield & Nicolson, 1993) p 142. Also, *Hong Kong 1996.* (Hong Kong: Government Printer) 1996, p 70.

international transactions, whose services money launderers may require for their more complex transactions.

The absence of a central bank and currency exchange controls in Hong Kong are two important reasons for the popularity of money laundering here, as well as its relatively strict bank secrecy laws. In the past, the Hong Kong banking sector rapidly expanded without much guidance or supervision. The government faced a dilemma – loose regulation attracted foreign financial institutions and increased prosperity but at the same time, "permitted inequalities, corruption and actions detrimental to the public interest".[21] One commentator asserted that the government has "an appalling record of supervision and surveillance of the financial sector."[22] In 1993, the office of the Commissioner of Banking and the Monetary Affairs Branch of the Government Secretariat merged to form the Hong Kong Monetary Authority (HKMA).

Hong Kong law regarding banking secrecy and confidentiality is based on the law of England. Put simply, a duty of confidence or secrecy is owed by the bank to its customer and that duty belongs to the customer and not the bank. There is an implied term of contract between a bank and customer that the bank will not divulge any information regarding the customer, his transactions, or the status of his accounts to a third party, except with the consent of the customer; by compulsion of law; and where the public interest requires disclosure.[23] Up until 1989, there were few instances in which bankers in Hong Kong were obliged to disclose confidential information, and even after money laundering legislation was enacted, there was a reluctance on the part of the banks to disclose such information.[24]

The cooperation of financial institutions is crucial as they and their employees are in the best position to note suspicious transactions and report them. Detection of money laundering activity early in the process is necessary since it is increasingly difficult if not impossible to trace multiple transfers of funds through different countries. The United States Senate Foreign Relations Committee, Sub-committee on Narcotics and Terrorism defined money laundering as "the conversion of profits of illegal activities into financial assets which appear to have legitimate origins" and proposed a generic model which identified three stages to the money laundering process.

1. Placement, which is the physical disposal of cash derived from illegal activity;
2. Layering, the process of transferring funds through various accounts in order to disguise their origins and prevent detection through audit; and
3. integration, the movement of laundered funds bank into the economy, into legitimate organisations with the appearance of normal business funds.[25]

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21 Scott, Ian, *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong: Oxford University Press, 1989) p 232.

22 Scott, *id*, p 232, citing Y.C. Jao (ed.), *Hong Kong's Banking System in Transition: Problems, Prospects and Policies* (Hong Kong: The Chinese Banks Association Ltd., 1988) p 207.

23 Revell, Susan and Holmes, John, "Hong Kong" in Parlour, Richard (ed.) *Butterworths International Guide to Money Laundering: Law & Practice* (London: Butterworths, 1995) p 95. These principles were established in the British case *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461.

24 Sections 20 and 23 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) (DTRPO) requires and permits disclosure of confidential information by bankers without the consent of the customer.

25 United States Senate Foreign Relations Committee, Sub-committee on Narcotics and Terrorism (SFRC,

All three stages typically involve financial institutions, although non-bank institutions, such as brokerage houses and insurance companies, are increasingly being used as the banking sector have grudgingly complied with the changes to the regulation of money movements.

IV. Drug Trafficking and Organised Crime in Hong Kong

The tremendous increase in money laundering throughout the world correlates with the expansion of the international narcotics trade during the 1970s and 1980s. Drug trafficking has become one of the most lucrative businesses in the world. Not surprisingly, Hong Kong's growth as one of the major money laundering centres in the world has coincided with its development as one of the major outlets for the trafficking of heroin. In the 1960s much of the opium grown in the so called "Golden Triangle" was refined in Hong Kong, but now this role has expanded to include being the financial centre for the region's narcotics trade.[26]

The Golden Triangle is an unmarked region between Thailand, Myanmar (Burma) and Laos, where a large quantity of opium poppies, from which heroin is derived, are grown and harvested. The region has displaced the "Golden Crescent" of South-West Asia as the major source of heroin in North America and Europe, presumably because of the higher quality (i.e. potency) of the drug. Hong Kong's proximity to the Golden Triangle has undoubtedly made it a convenient staging point for the distribution of heroin, largely due to the control of the regional drug trade by Hong Kong-based triad societies.

Hong Kong is widely regarded as the home of most of the triad societies active throughout the world and the headquarters of a highly sophisticated international network of drug trafficking.[27] Triad societies were established and have been active in Hong Kong even before the British arrived in 1841.[28] The original Triad Society was a secret society formed in the early 19th century to oppose Manchu domination in China but, before the establishment of the Republic of China in 1911, it had fragmented into numerous, related triad societies which were often more interested in criminal activity than patriotic causes. The secretive nature and structure of triad societies made detection and control of their activities extremely difficult for the authorities. By 1986, a government advisory body on crime estimated that there were between 70,000 and 120,000 members of at least 50 triad societies who were involved in a wide range of illegal activities, including money laundering.[29]

Hong Kong began to attract the attention of American authorities in the 1980s when large scale money flows from Hong Kong to the United States were noticed. 1984 the U.S. President's Commission on Organized Crime requested that the Treasury Department analyse

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SNT) (1990), *Drug Money Laundering, Banks and Foreign Policy (A Report to the Foreign Relations Committee).* (Washington, DC: US Government Printing Office) pp 8 and 12. Cited in South (1995) p 2. Please see note 4 above.

26 Gaylord, Mark, "The Chinese Laundry: International Drug Trafficking and Hong Kong's Banking Industry", in Traver, Harold and Gaylord, Mark, *Drugs, Law and the State* (Hong Kong: Hong Kong University Press, 1992) p 84.

27 Bosworth-Davies, see note 3 above, p 40.

28 Morgan, W.P, *Triad Societies in Hong Kong,* (Hong Kong: Government Press, 1960) p 60.

29 Chin, Ko-lin, *Chinese Subculture and Criminality* (New York: Greenwood Press, 1990) pp 31-32. Apparently a reference to the Fight Crime Committee's 1986, *A Discussion Document on Options for Changes in the Law and in the Administration of the Law to Counter the Triad Problem* (Hong Kong: Government Printer, 1986) pp 16-17.

all available data on financial transactions between Hong Kong and the United States.[30] The analysis disclosed that unusually large quantities of U.S. dollars, particularly in small denominations, were being repatriated from Hong Kong. In 1982, the transfer of U.S. currency to and from Germany and France totaled $12 million and $8.8 million respectively, while transfers from Hong Kong amounted to more than $100 million with a minimal flow of U.S. currency to Hong Kong when compared to the reverse flow of U.S. currency from Hong Kong.[31] According to U.S. law enforcement officials, the movements of small denomination banknotes were "a telltale sign of drug trafficking and money laundering".[32] The consistent increase in the flow of U.S. dollars from Hong Kong to the United States between 1982 and 1984 "strikingly" correlated with the increase in the Southeast Asia heroin in the U.S. market from 1981 to 1983.[33]

Between 1980 and 1984, according to the U.S. Treasury Department, the amount of cash (not just U.S. currency) transferred to the United States from Hong Kong increased ten-fold to more than U.S. $1.7 billion, of which almost 70 percent is believed to have gone to the San Francisco area. Beginning in 1981, after consistently running a cash deficit for a decade, the Federal Reserve Bank in San Francisco accumulated a large surplus, which had tripled by 1985 and represented the second largest cash surplus in the San Francisco Federal Reserve system, surpassed only by Miami, the largest drug trafficking and money laundering centre in the United States.[34]

Hong Kong, a city of six million people, had become the second largest repatriator of American currency in the world. In 1991, the amount of U.S. currency transferred from Hong Kong to the U.S. was over $3.8 billion, while the flow in the opposite direction was $1.2 billion.[35] A significant percentage of this huge surplus of U.S. currency was believed to be generated by criminal enterprises.[36] These currency imbalance figures were based on currency transaction reports filed under the Bank Secrecy Act; however, actual money flows from Hong Kong may be far greater since an unknown number of transactions go unreported. For example, in August 1985, California's Crocker National Bank was fined U.S. $2.5 million for violations of the Bank Secrecy Act. Over the previous five years, the bank had failed to report thousands of large cash transactions totalling US$3.89 billion, nearly all of which come from six Hong Kong banks.[37]

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30 Gaylord, note 26 above, p 85.

31 Gaylord, *id*, pp 85-86. Gaylord noted that although there may be other logical explanations for the transfer of hundreds of millions of U.S. dollars in small denominations from Hong Kong, the President's Commission on Organized Crime concluded that little credible evidence was available to explain this repatriation of currency in any other way.

32 Gaylord, *id*, p 85. These suspicions are based on the belief that drug syndicates attempt to evade law enforcement by diverting cast from drug transactions – usually small bills – to overseas banks which transfer the funds into U.S. bank accounts by wire transfer. The overseas banks then ship the large amount of small denomination notes bank to the United States in exchange for larger bills.

33 Gaylord, *id*, pp 85-86. Despite the lack of evidence upon which to base the Treasury Departments conclusion that the surplus of U.S. dollars in Hong Kong results from drug trafficking, Gaylord acknowledged that conclusion "is a logical and most compelling explanation for the inordinate surplus".

34 Gaylord, *id*, p 86.

35 U.S. Senate Permanent Subcommittee on Investigations, *Report: The New International Criminal and Asian Organized Crime* (U.S. Senate, December 1992) p 38.

36 U.S. Senate Permanent Subcommittee on Investigations, *id.*

37 Gaylord, see note 26 above, pp 84-95. Gaylord noted that the six banks involved in the unreported

Outside the commercial banking system, there exists a long established "underground" or "natural banking system" that is estimated to be responsible for the transfer of significant amounts of drug money throughout the region and around the world. The system, which is referred to as "chit" or "chop shop" banking, operates through a network of gold shops, trading companies and money changers often controlled by members from the same clan or family.[38] Recording-keeping procedures in this system are nearly non-existent, as "chits," coded messages and telephone calls are used to transfer funds. The system provides simplicity, anonymity and little risk of detection or interception and most importantly, seizure by authorities. Furthermore, it is virtually immune to traditional anti-money laundering measures.[39]

American concerns about Hong Kong as an international money laundering centre have resulted in periodic meetings between governments to implement and enforce legislation. For years money laundering was viewed by most government officials as "too-difficult-to-handle," and only after intense pressure from foreign governments has the government acknowledged that large-scale money laundering may indeed be occurring in the territory.[40] In 1987, Hong Kong's acting Commissioner for Narcotics told reporters: "The U.S. is very keen and concerned about this problem and has been urging us to implement legislation as soon as possible. The U.S. Consul General has held meetings with us at a policy-making level. We have been trying to get across the message that Hong Kong is trying to do something."[41]

These meetings have continued and Hong Kong has indeed responded to this pressure. In December 1994, the head of the U.S. Drug Enforcement administration (DEA) met with the assistant Commissioner of the Customs and Excise Department to discuss efforts against drug trafficking and money laundering. After briefing the DEA official, the Custom official told reporters: "we have been co-operating with them in this area for a long time and we have, while not perfect, a complete legislation for action in respect of money laundering. So that too will be part of the review."[42] Clearly the Hong Kong government was influenced on this issue by external powers, so at this point, this paper will examine both national and international initiatives against money laundering that have had an impact on the development of Hong Kong's legislation.

V. American Initiatives Against Money Laundering

The United Stated has been the leader in formulating policies and laws to counter money laundering, partly because of its efforts to combat organized crime through racketeering laws, and from its experience with currency transaction reporting.[43] The United States was the first

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transactions were Hang Seng Bank, the Wing Hang Bank, Hong Kong Industrial & Commercial Bank, Wing Lung bank, Hang Lung bank and the Overseas Trust Bank. The latter two banks collapsed in the space of several months in 1983 and 1984, and the executives of both banks were charged for misappropriation of funds.

38 Gaylord, *id*, p.87.

39 For more on the underground banking systems in Asia see Gaylord, *id*, p 87, and Bosworth-Davies, see note 3 above, pp 74-77.

40 Gaylord, *id*, p.90.

41 Gaylord, *id*, p.90, citing Dear, Justin, "Move to Hit Traffickers Where it Really Hurts" *Hong Kong Standard*, October 1987.

42 Bishop, Karin, "DEA chief meets Customs," *South China Morning Post*, 1 December 1994, p 4.

43 MacDonald, Scott and Zagaris, Bruce (ed.), "Money Laundering: An International Control Problem",

country to make money laundering itself a specific crime and was also one of the first to prohibit the laundering of non-drug-related funds.[44] American influence on the global regulation of money laundering cannot be understated. In addition to its powerful legislation on criminal and civil forfeiture, financial transaction reporting, and money laundering, the United States has been very active in attempting to project its approach onto other jurisdictions.

Since 1970, the Bank Secrecy Act (BSA) in the Untied states has required records be kept of the identities of persons having a bank account or authorized to act in respect of an account in the United States.[45] The most important part of the legislation for the purposes of the control of money laundering is a procedure known as "currency transaction reporting", which requires all financial institutions to verify and record the identity of all persons seeking to transfer or convert U.S. $10,000 or more.[46] The effectiveness of currency transaction reporting has been a matter of debate; however, it has remained one of the cornerstones of American efforts to deter the laundering of suspect funds.[47]

Also in 1970, the U.S. Congress enacted two criminal forfeiture statues: the Racketeer Influenced and Corrupt Organization Act (RICO) and the Controlled Substances Act, Continuing Criminal Enterprise Offense (CCE). The Controlled Substances Act (CSA) provided civil forfeiture provisions which authorized *in rem* proceedings against property involved in the drug trade. These statutes and more than 200 other federal civil and criminal forfeiture statutes enable American authorities to seize almost anything and have it forfeited if it was used to facilitate the commission of a wide range of crimes, or if the asset is shown to have been acquired with the proceeds of crime.[48] However, the U.S. Supreme Court has in recent years indicated that they are troubled by the degree of latitude the government has exercised: "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture states an the disregard for due process that is buried in these statutes."[49]

In 1986, the U.S. Congress enacted the Money Laundering Control Act (MLCA), which made it a crime to conduct a financial transaction involving proceeds of "specified

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International Handbook on Drug Control (Westport, CT: Greenwood Press, 1992) p 21.

44 Rudnick, Amy, "United States," in Parlour, Richard (ed.) *Butterworths International Guide to Money Laundering: Law & Practice* (London: Butterworths, 1995) p 236.

45 The *Bank Records and Foreign Transactions Act* and the *Currency and Foreign Transaction Reporting Act* are commonly referred to collectively by the misnomer "Bank Secrecy Act" (BSA), per Bosworth-Davies, see note 3 above, p 113.

46 Bosworth-Davies, *id*, p 113. The regulations apply to the international transportation of currency, travellers cheques and cash-equivalent instruments, as well as the cash sale of travellers cheques, money orders, bank drafts, cashier's cheques of U.S. $3,000 to U.S. $10,000. Per Rudnick, see note 33 above, pp 227-228.

47 For a discussion of the effectiveness of measures see Levi, M., *Customer Confidentiality, Money Laundering and Police-Bank Relationships – English Law and Practice in a Global Environment* (London: The Police Foundation, 1991). In September 1994, the BSA was amended by the *Money Laundering Suppression Act,* which sought to reduce the burden on financial institutions by exempting certain customer transactions from reporting requirements, while at the same time increased the federal government's supervision of money transmitting businesses. These amendments were intended to reduce the number of reports by at least 30%. Rudnick, *id*, p 240.

48 Evans, John. *International Money Laundering: Enforcement Challenges and Opportunities* (Vancouver: International Centre for Criminal Law Reform & Criminal Justice Policy, 1994) p 2. (From the Internet)

49 *United States v. All Assets of Statewide Auto Parts*, 971 F. 2d 896 (2d cir. 1992), cited in Evans, *id.*

unlawful activity" knowing the criminal nature of the property involved.[50] The MLCA substantially increased fines and jail terms for violations of the BSA, and this applied to both negligent and willful violations of the reporting and record-keeping requirements.[51] The Money Laundering Prosecution Improvements Act 1988 extended the scope of the MLCA so that it was no longer limited to drug money or to currency transaction violations. Money laundering was redefined "so that a nexus to tainted money was no longer required, and made the mere act of laundering money a crime."[52] In 1989, law enforcement agencies were also authorized to track and claim ownership of laundered drug money and to freeze assets of suspected drug traffickers pending forfeiture procedures.[53]

The impact of this American legislation has been far-reaching. Because of the wide definition of activities in the legislation, it has placed significant duties and burdens on financial institutions. The onus on making a value-judgment, in whether to report a transaction, is placed firmly on the institution, which faces considerable penalties for non-compliance. Such an environment invariably leads to defensive reporting, otherwise known as "aggressive compliance" which British legislators have tried to avoid.[54] The United States has gone to considerable efforts to have its approach adopted in other countries, and in both regional and international bodies.

In the absence of effective international enforcement and prosecution, the American government and courts have also made it clear that it will act unilaterally and give extra-territorial effect to its own laws in situations where American market structures and regulatory standards are threatened or flaunted, such as in the investigation and prosecution of the Bank of Credit and Commerce International (BCCI).[55] Not surprisingly, American money laundering legislation contains provisions purporting to assert extraterritorial jurisdiction over certain prohibited conduct, if the alleged act was committed by an American citizen, or where part of the act occurs in the United States.[56]

An example of American judicial attitudes on extra-territoriality involved orders against the Standard Chartered Bank to pay over money in one of its Hong Kong branches in a 1988 insider dealing case, *SEC v. Wang and Lee,* in which the District Judge Owen stated:

> If the United States has found what are, arguably illegally gotten assets in violation of United States criminal laws and those assets happen to be in your possession, innocently as they are to you, and I have on behalf of the United States courts said 'do not pay', it doesn't seem to me that I should be sitting still when some Hong Kong judge says 'pay'; and then you say 'sorry Judge Owen, we have got to pay'... This is not funds in a Hong Kong bank, this is

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50 The MLCA was part of the Anti-Drug Abuse Act of 1986. "Knowledge" for the purposes of the BSA included "wilful blindness, deliberate ignorance, and conscience avoidance." See note 44 above, p 236.

51 See note 43 above, p 21.

52 See note 3 above, p 203. Amendments also reduced the threshold reporting requirements to $3,000 in geographical areas where substantial money laundering was suspected.

53 Jamieson Alison, "Global Drug Trafficking" in Jamieson Alison (ed.), *Terrorism and Drug Trafficking in the 1990s* (UK: Dartmouth 1994) p 101.

54 See note 3 above, pp 114-5.

55 See note3 above, p 202.

56 See note 3 above, p 113. Section 1956(f) and 1957 of *Money Laundering Control Act* 1986. There are numerous other areas in which the Untied States has attempted to project its laws and standards onto the rest of the world, such as export controls.

> funds in your bank, which is here and over which this court has jurisdiction and by pushing a computer button, you can cause this to be kicked anywhere you want.[57]

Given the international nature of money laundering transactions and operations, it is very important that a state is in a position to prosecute an individual for involvement in an act in its jurisdiction. This is important even when the criminal activity which generated the proceeds in question took place elsewhere, or otherwise the effectiveness of domestic and international efforts to combat money laundering would be reduced. Extraterritorial reach of money laundering provisions has now been incorporated in European Union and the Organization of American States measures.[58]

The 1988 legislation also required the Secretary of State for the Treasury to negotiate with other countries to ensure they had adequate records of currency transactions comparable to the mandatory reporting requirements in domestic U.S. legislation, and to establish an international currency control agency.[59] The U.S. has attempted to persuade other countries to adopt these procedures without much success. Bruce Zagaris commented that:

> In effect, these well-intentioned, but misguided, provisions attempt to impose U.S. currency transaction and related laws on foreign governments. However, after three years of attempting to cajole and browbeat countries in Latin America and the Caribbean to finalize such agreements, the United States has succeeded in concluding only one of these agreements: an agreement with Venezuela, which was signed on November 5, 1990.[60]

American efforts to shape the international regulatory framework continue, as does its pressure on other jurisdictions to "conform to international standards" as defined by the United States. An October 1995 briefing by Robert Gelbard, Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, indicated that President Clinton had instructed members of the cabinet to identify and notify the states "most egregious in facilitating criminal money laundering of all kinds" that if these nations did not enter into arrangements to conform to international standards and implement them after an appropriate amount of time, a recommendation would be made "whether economic sanctions should be applied".[61] Gelbard went on to elaborate on possible sanctions that might be imposed:

> There is a range of possibilities involved in this, but they could include, among other possible sanction, prohibiting the use of electronic fund transfers and

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57 See note 3 above, p 203.

58 Gilmore, "International Initiatives" in Parlour Richard (ed.), *Butterworths International Guide to Money Laundering: Law & Practice* (London: Butterworths, 1995) p 20.

59 See note 3 above, p 114.

60 See note 43 above, p 22. An earlier example of American pressure on other nations on related measures is the efforts made by the U.S. in the mid 1980's to persuade Caribbean countries to sign exchange of tax information agreements in order to participate in the Caribbean Basin Initiative. See Bruce Zagaris, "The Caribbean Basin Initiative," Special Report, *Tax Notes*, 26 August 1985.

61 Robert Gelbard, Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, briefing to foreign press, 30 October 1995 [Federal News Service, Washington, DC].

> dollar-clearing mechanisms to financial institutions in the subject country. We understand fully that these could be and would be, if implemented, very dramatic measures, but we feel that it is a measure of the seriousness of the problem and the dire state to which the money laundering problem has risen, that it is important to try to find ways to solve this problem and develop cooperative mechanisms around the world to prevent this problem from spreading any further.[62]

VI. International Initiatives Against Money Laundering

The initial impetus for coordinated international action against money laundering arose in the 1980s, from international efforts against drug trafficking which had become a major and pressing concern.[63] The development of a "narco-economy" and "narco-terrorism" was perceived as a significant threat to the economic and political stability of several nations and regions, since drug traffickers had gained considerable power and financial resources.[64] Predictions that "the very survival of national governments and the international order" were dependent on the ability to deprive organised drug traffickers of their business became common.[65]

These concerns were acted upon in December 1988 at a United Nations Convention in Vienna on narcotics, from which a significant amount of international regulation emerged. The United Stated was dominant in the drafting of the Convention, which effectively institutionalised the American approach to the issue internationally.[66] The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (commonly referred to as the Vienna Convention) spoke of the threat posed by drug trafficking to the health and welfare of human beings, and its adverse effects upon the economic, political and cultural foundations of society. The Convention recognised the link between drug trafficking and other organised criminal activity which undermine national economies and threaten the stability, security and sovereignty of states. The need for international cooperation to combat drug trafficking and money laundering was also recognised, and member states were called upon to remove the incentive to commit crime by depriving the criminals of the proceeds of their illegal activities.[67]

Confiscation of the proceeds of drug trafficking had been identified as one of the most

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62 *Id.*

63 See note 58 above.

64 "Narco-economy" describes the interface between organised crime, drug trafficking and terrorism, which are viewed as an "unholy trinity" that recognises the part each plays support of the other's mutual aims and objectives. See note 3 above, p 25. "Narco-terrorism" is the term used to describe the role played by drug trafficking in international politics.

65 See note 43 above, p 20, and Bosworth-Davies, *id*, p 25, and R.T. Naylor, *Hot Money and the Politics of Debt* (New York: Linden Press, 1987). Naylor described drug trafficking profits as "feeding the growth of narcocracies whose financial power overwhelms the economy of small countries, undermines the fiscal integrity of large countries and subverts the political and judicial process everywhere it reaches. Cited in Bosworth-Davies, *id*, p 44.

66 Evans, *op cit.*, see note 48 above, p 24.

67 The Hon. Mr. Justice Leonard, "Recent development in the Law Relating to the Recovery of the Proceeds of Crime" in *Law Lectures for Practitioners 1995*, p 196.

effective means of reducing the influence of drug traffickers.[68] The American experience in combating the Mafia with RICO legislation since the 1970s demonstrated that powerful organised crime syndicates could be controlled and curtailed through criminal forfeiture measures. The philosophy behind confiscation of proceeds of crime was to:

> [I]ncapacitate, by depriving a person of the physical or financial ability, power or opportunity to continue to engage in proscribed conduct, to prevent offenders from unjustly enriching themselves, by eliminating the advantages and benefits which the offender has gained through his or her illegality, to deter the offender and others from crime by undermining the ultimate profitability of the venture and do to protect the community by curbing the circulation of prohibited items.[69]

In the past, the massive revenue from drug trafficking usually escaped detection due a the lack of regulation and political complacency. Many smaller countries could not exercise adequate control over their own financial markets.[70] Until 1986, only the United States had mandatory reporting of currency transactions, and money laundering itself was not illegal anywhere in the world. In 1986, the United States and the United Kingdom became the first countries to make money laundering an offence; France followed the year after. Italy and Australia have also instituted mandatory transaction reporting, and have gone far in emulating the American approach.[71] With Western developed countries at the forefront, an international consensus on concerted action against money laundering began to develop.[72]

A. International Consensus: The Vienna Convention

The signing of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) on December 19 1998 by 80 countries was the first major advance in international efforts to combat money laundering. The Convention is a law enforcement treaty to combat international drug trafficking on several levels. It contained provisions on mutual legal assistance, extradition, cooperation between law enforcement agencies, asset forfeiture, control of chemicals and crop eradication; more importantly, it obliged signatories to criminalise a comprehensive list of activities related to drug trafficking, including money laundering.[73]

The Vienna Convention established binding rules on member states, and required an amendment of domestic laws for compilation before ratification. This involved a loss of national sovereignty, but most states were prepared to submit to international regulation of this pressing concern. The treaty required money laundering to be established as a criminal and extraditable offence in each participating country and, within the bounds of the respective

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68 See note 3 above, p 197.

69 See note 3 above, p 197, citing J. Freierg, "Criminal Confiscation, Profit and liberty," *The Australian and New Zealand Journal of Crime* (1992) vol. 25, no. 44.

70 See note 53 above, p 98.

71 Evans, *op cit*, see note 48 above, p 24.

72 See note 53 above, p 98. Luxembourg and Italy criminalised laundering in 1989, and Switzerland, the traditional capital of bank secrecy, did so in July 1990 after a protracted political battle.

73 See note 43 above, p 32.

constitution, to criminalise "the acquisition, possession or use of property, knowing, at the time of receipt" derived from drug trafficking.[74] It also specifically declared that parties must take domestic action and cooperate internationally in the area of bank secrecy.[75]

The Convention was hailed as "revolutionary" at the time since it represented an unprecedented occasion when a large number of countries had agreed to act on public interest, over and above domestic commercial considerations.[76] The documents have now been signed by over 100 countries, including many of the key drug producing, transit and consumer states, and is widely considered to constitute the minimum standard of conduct required of members in the international community.[77] Nevertheless, by the end of 1995, according to an American official, only 54 percent of the membership of the United Nations had ratified the Convention and only half of those had "really implemented it fully."[78]

The Vienna Convention was concerned primarily with drug trafficking. Further regional initiatives, particularly in Europe, have bound signatory countries to extend their money laundering legislation to cover other criminal offences. The criminalisation of money laundering with respect to non-drug related illegal activities has gained wide support in the international community and by law enforcement officials. By 1993, ten countries had introduced measures making it an offence to launder the proceeds of any serious crime or any crime which generates significant proceeds, while a further eight were in the process of following suit.[79] The UN Secretariat recognised the practical and policy disadvantages of the narrow approach to money laundering offences:

> The international community, through the adoption of the 1988 Convention, has expressed its universal abhorrence of drug-related money laundering. However... there would seem to be little justification for the proscription of money laundering arising from some profit-generating criminal activities and not others. Double standards, particularly in criminal law, are not conducive to the maintenance of the rule of law or to international cooperation, and there may be difficulties in proving that particular proceeds are attributable to particular predicate offences. In any event, drug trafficking may not remain – or for that matter still be – the most profitable form of trans-border criminal activity.[80]

Since the signing of the Vienna Convention, a plethora of regional, international and intergovernmental arrangements has been negotiated, and cooperation against international organised crime has intensified. These arrangements include the 1988 Basle Committee on

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74 Art 3(1)(c)(i), Vienna Convention

75 Art 5(3) and 7(5), Vienna Convention

76 See note 3 above, p 198. Citing M. Stewart who commented: "The Convention is one of the most detailed and far-reaching instruments ever adopted in the field of international criminal law and, if widely adopted and effectively implemented, will be a major force in harmonizing national laws and enforcement actions around the world."

77 Gilmore, see note 58 above, p 16.

78 Robert Gelbard, Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, briefing to foreign press, 30 October 1995 [Federal News Service, Washington, DC].

79 Gilmore, see note 58 above, p 191. Citing the 1993 report of the FATF.

80 United Nations (1992), *op cit.*, pp 22-23. Cited in Gilmore, see note 58 above, p 20.

Banking Regulations and Supervisory Practices, the establishment of the Financial Action Task Force in 1989, the 1990 Council of Europe Convention (on laundering, search, seizure and confiscation of proceeds of crime), the 1991 European Community Council Directive (on prevention of the use of the financial system for the purpose of money laundering), and the 1992 Organization of American States Model Regulations and Draft Mutual Legal Assistance Treaty.[81]

B. Financial Action Task Force Recommendations

The single most influential international organisation in respect of the formulation of anti-money laundering policy and enhancement of initiatives has been the Financial Action Task Force (FATF). The group was established in July 1989 by the Heads of State of the seven major industrial nations (Group of Seven) and its membership quickly expanded to include 26 Organization of Economic Cooperation & Development (OECD) jurisdictions, including Hong Kong. It is not part of any other international organisation but a free-standing body which concentrates on the international fight against money laundering.[82] The Task Force was created:

> For the purposes of assessing the results of the cooperation already undertaken to prevent the utilization of the banking system and financial institutions for the purposes of money laundering and to consider additional preventive efforts in this field, including the adaptation of the statutory and regulatory systems to enhance multilateral legal assistance.[83]

In February 1990, the FATF issued its Forty Recommendations which the United Nations has since regarded as constituting "a comprehensive strategy for dealing with money laundering and with proceeds... and appear to have the capacity to be a blueprint for a programme of action for the international community as a whole."[84] The Forty Recommendations, along with the Vienna Convention, has become the international standard member and non-member states are expected to meet.[85] The first recommendation calls on members to fully implement the Vienna Convention, and it further recommends extending the definition of money laundering to other criminal offences. The Task Force monitors the implementation of the Forty Recommendations by FATF members, and keeps track of developments in money laundering methods, examines counter-measures, and promotes world-wide action against money laundering.[86] The membership to FATF is presently closed but regional FATFs are being established to implement the Forty Recommendations.[87]

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81 Evans, *op cit*, note 48 above, p 18.

82 Gilmore, see note 58 above, pp 24-5.

83 Bosworth-Davies, note 3 above, p 204. Citing 1990 report of the FATF.

84 Gilmore, see note 58 above, p 25, citing UN Report (1992), p 14.

85 Synopsis of the forty recommendations from Parlour, Richard, see note 5 above, pp 317-323. See also Bosworth-Davies, see note 3 above, pp 1-13.

86 Gilmore, see note 58 above, p 25. Citing 1993 report of the FATF.

87 Gilmore, see note 58 above, p 25.

C. The Effectiveness of International Initiatives of Money Laundering

The international initiatives on money laundering are part of a larger regime of international cooperation on criminal matters. At the World Ministerial Conference on Organized Transnational Crime in Naples, Italy in November 1994, representatives of 113 countries and dozens of international organisations unanimously agreed to a political declaration and a "Global Action Plan" that included measures to further control money laundering and the proceeds of crime.[88] The convergence of the numerous international and regional treaties, meetings, declarations and resolutions has created a "sub-regime of cooperation in regulating international money movement."[89] Nevertheless, it is because of the efforts of the FATF and the persistence of countries such as the United States, that this sub-regime has begun to take shape. In 1990, only seven countries had legislation against money laundering, but by late 1995, 25 countries had such legislation.[90]

Dr. William Gilmore concluded that "major progress has been achieved at an international level in a relatively brief period of time... The degree to which a consensus has emerged in an area which impacts so directly on domestic criminal justice systems and economic policy is unprecedented."[91] Yet it is also a reality that money laundering methods will continue to become even more sophisticated as a result of this apparent success. The United Nations pointed out: "As governments succeed in coordinating their preventative efforts through increased co-operation... organised crime will find that the best response is to tighten its own cooperative efforts around the globe."[92]

Some academics nevertheless are not as optimistic about the effectiveness of international efforts to control money laundering taken thus far. Nigel South commented:

> The range of interventions, strategies and international agreements developed to break the money laundering chains are wide-ranging and quite sophisticated – however they are not working. Or at least, not very well... Illegal markets may reflect many characteristics of legal ones but do not necessarily conform to the (often stereotypical) models of organization which regulators and law enforcers may adopt. Money laundering is very big business but it is not necessarily easily controlled by "very big" "international agreements", "enforcement stings", or "revenue & taxation strategies". It is an interstitial phenomenon and it takes advantage of, and integrates into, legitimate systems of commerce which are necessary to the functioning of economic societies. Money laundering cannot therefore be controlled as if it were simply an unwanted slice of the pie that can be cut out and discarded.[93]

International regulation of money laundering is steadily growing but so are the money laundering networks and drug trafficking enterprises. Serious practical problems in the enforcement of anti-money laundering provisions remain, and will always exist in such a

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88 Evans, *op cit.*, note 48 above, p 18.

89 Zagaris, see note 43 above, p 31.

90 "FATF changes its approach," *Financial Times – Business Reports*, 1 October 1995, p 17.

91 Gilmore, see note 58 above, p 27.

92 Gilmore, see note 58 above, p 27. Citing UN Report (1993), *op cit.*, pp 14-15.

93 South, see note 4 above, p 4. South cited Reuter, 1983; Ruggiero & South, 1995.

dynamic process. The U.S. Senate Foreign Relations Committee, Subcommittee on Narcotics & Terrorism in 1990 identified many problems: the lack of coordination between the multiple agencies involved (both national and international); the limited intelligence sharing; and a critical shortage of human resources involved in the "labour-intensive and time-consuming work" of investigating suspected violations.[94]

Despite the practical difficulties, the deterrent effect of the fear of detection and prosecution may be its greatest value. If the measures cause organised crime groups to spend significant resources and time to devise new methods to launder their proceeds, then that is at least some consolation. Furthermore, if effective enforcement of money laundering laws encourages the retirement of older drug traffickers or money launderers, it will have achieved some success.[95] U.S. Treasury Under-Secretary Ronald Noble, the current head of FATF said: "We are trying to make money laundering a more expensive and riskier undertaking... We want to force the money launderers out of the mainstream financial institutions."[96]

VII. The British Approach to Money Laundering

American and international initiatives against money laundering have had a major impact on the development of similar legislation in Britain and Hong Kong, but Britain has taken a somewhat different approach. Britain has been less aggressive and more reactive than the pro-active American approach. The first British legislation concerning money laundering was the 1986 Drug Trafficking Offences Act (DTOA) which had been drafted partly in response to a controversial House of Lords decision in 1980 in the case of *R v. Cuthbertson.*[97] Section 27 of the 1971 Misuse of Drugs Act purported to authorise a court to order the forfeiture of property found in the possession of a person convicted of drug offences; however, the accused in *Cuthbertson,* who had made enormous profits from the manufacture and supply of drug over several years, were allowed to retain their assets as they were convicted of conspiracy to traffic in narcotics, which was not considered a drug offence. The House of Lords held that the trial judge had no power to forfeit the proceeds, and also concluded that the section gave no authority to trace bank accounts.[98]

The DTOA took a different approach to the verification of financial transactions from the American legislation, by placing the obligation to disclose "suspicious transactions" on anyone handling finances on behalf of a third party, be they accountants, lawyers, banks, or other financial institutions.[99] The main advantage of the U.S. system is also one of its biggest problems: currency transaction reporting operating automatically without to reliance on the banking staff. This automation creates a mountain of paperwork in which illicit transactions

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94 United States Senate Foreign Relations Committee, Sub-committee on Narcotics and Terrorism (1990), *Drug Money Laundering, Banks and Foreign Policy (A Report to the Foreign Relations Committee)* (Washington, DC: US Government Printing Office) pp 35-40. Cited in South (1995), note 4 above, p 9.

95 Zagaris, see note 43 above, pp 41-2.

96 "FATF changes its approach," *Financial Times – Business Reports*, 1 October, 1995, p 17.

97 [1981] AC 470; 3 WLR 89; 71 Cr App R 148. The Hodgson Committee was established to inquire into ways to fill the legal vacuum caused by the House of Lords ruling. The legislation followed the deliberations of the Home Affairs Select Committee on the report. Bosworth-Davies, see note 3 above, p 109.

98 Bosworth-Davies, see note 3 above, pp 108-9.

99 Jamieson, see note 53 above, p 101.

can undoubtedly be concealed.[100] The British emphasis on suspicion-based reporting instead of mandatory-transaction reporting relies on the cooperation and diligence on the part of financial institutions.

The DTOA was targeted specifically against the activities and assets of drug traffickers. It contained provisions for the investigation and freezing of drug-derived assets prior to and upon arrest, and the making of a confiscation order following conviction. Section 24 is the key section since it makes it an offence to assist a drug trafficker to retain the benefits of his drug proceeds. The offence is committed by anyone who, knowing or suspecting a person to be a drug trafficker, holds or controls, or provides any assistance in investing those proceeds. The legislation provides protection to individuals and financial institutions who disclose their knowledge or suspicions to authorities in certain circumstances.[101] The Hong Kong Drug Trafficking (Recovery of Proceeds) Ordinance enacted in 1989 is almost identical to this legislation.[102]

In 1989, a parliamentary committee undertook a review of the DTOA after concerns were raised about the perceived increase in the importation of hard drugs into Britain, and that the country continued to be a major centre for money laundering despite the 1986 legislation.[103] The Home Affairs Committee concluded that the disclosure system was working reasonably well with approximately 1,000 reports of suspicious transactions filed by November 1989, primarily by the major banks; however, smaller financial institutions, building societies and foreign banks operating in Britain were felt as less cooperative.[104] The committee's report noted problems encountered in prosecuting money laundering in Britain:

> There have been few prosecutions of money laundering offences under Section 24 (of the DTOA), despite investigations, identifying individuals whose conduct falls within the section. The lack of prosecution arises from: difficulty in proving the drug trafficking origin of the assets; frequent lack of evidence relating to the *mens rea* of the launderer – knowing or suspecting the origins of the funds; in some instances, difficulty in proving actual "retention or control" of the funds.[105]

Some of the difficulties in prosecution had to do with the requirement in the British legislation that the money be traced to "a particular unlawful act". This requirement differs from that of the United States where the crime of money laundering involves concealing the source or origin of money derived from [any] "unlawful activity."[106] The committee acknowledged that changes to the legislation would be required in order to ratify the Vienna Convention since:

> [A]rticle 3 of the Convention requires legislation to make the concealment or disguise of the true nature or source of property derived from drug trafficking

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100 Jamieson, *id*, p 101.

101 Zagaris, see note 43 above, p 28.

102 The Hon. Mr. Justice Leonard, see note 67 above, p 190.

103 Bosworth-Davies, see note 3 above, pp 115-6.

104 Jamieson, see note 53 above, p 101.

105 House of Commons Home Affairs Committee, Minutes of evidence, Vol. II, 5.10 (iv).

106 Jamieson, *id*, p 101.

> an offence, irrespective of the notion in section 24 of 'facilitating' or 'assisting' the drug trafficker. It also requires the establishment of an offence of handling the proceeds of drug trafficking which is wider than the offence of assisting another to retain the benefit of drug trafficking under the same section.[107]

The Home Affairs Committee recommended amendments to the DTOA and commitment to further international and regional initiatives, but reaffirmed Britain's approach. It was notably defensive towards American pressure to adopt similar legislation to that of the United States:

> We believe the mandatory reporting of all financial transactions above a certain value would not represent a worthwhile reform of the British law to combat money laundering. Consequently, we hope and expect that the United States Treasury and Congress will consider the Drug Trafficking Offences Act 1986 and the bilateral treaty recently agreed between the United Kingdom and the United States under Section 26 of the Act to be satisfactory indications of the determination of the British Government to take the necessary action to prevent money laundering within the United Kingdom.[108]

Nonetheless, the DTOA contains two important aspects that reflect American innovations in this area. Firstly, the reversal of the onus of proof onto the defendant when it comes to satisfying the court as to the source of identified funds, and the lowering of the knowledge standard to "suspicion", which traditionally has not been sufficient grounds for criminal liability in Britain.[109]

The 1991 Directive on Money Laundering, issued by the Council of the European Community (now the European Union, of which Britain is a member), represented the most demanding international initiatives yet on money laundering. The Directive required member states to make a series of changes in domestic criminal law, an area normally reserved exclusively to individual states. In this case it was declared to be within the competence of the European Community. The extraordinary measures, another example of the globalisation of regulation, were thought to be necessary in order to implement a Community-wide banking license.[110] The Directive required members to extend their money laundering legislation to include the proceeds of other criminal activities, such as organised crime and terrorism. It also called on the extension of legislation to include other professions whose activities were likely to be used for money laundering purposes. In response to the directive, Britain enacted the Criminal Justice Act 1993 which created a series of new offences prohibiting the laundering of money regardless of its source.

Prior to the 1993 amendments to the DTOA, the British approach towards anti-money laundering measures had been viewed as the "lowest common denominator" among the new regulatory provisions enacted around the world.[111] Even the regulations implementing the latest amendments have been criticised as having been "diluted" as a result of lobbying efforts

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[107] Statement of the House of Commons Home Affairs Committee, in the Committee Report, 1989, cited in Bosworth-Davies, note 3 above, p 118.

[108] *Id.*

[109] South, see note 4 above, p 3.

[110] Bosworth-Davies, see note 3 above, p 119.

[111] Zagaris, see note 43 above, p 39.

and opposition from the financial industry.[112] Rowan Bosworth-Davies and Graham Saltmarsh, in the conclusion of their book detailing the British legislation, concluded:

> [T]he British distaste for firmly-enforced, sound regulatory provisions and its preference for "supervision with a light tough" has got to change if the money-laundering provisions are to mean anything, and, more importantly, international banking is to clean up its act.[113]

VIII. The Regulation of Money Laundering in Hong Kong

The impact of national and international initiatives on money laundering in Hong Kong is obvious. Hong Kong was not a signatory to the Vienna convention but Britain's ratification of the treaty in 1991 was extended to Hong Kong. The legislation enacted thus far was largely borrowed from Britain, almost word for word, though it has not gone as far as Britain in some respects. Nevertheless, Hong Kong's efforts thus far represent substantial compliance with the UN Convention's goals and objectives.[114] Hong Kong is a member of the FATF and its anti-money laundering measures were reviewed by FATF representatives on a periodic basis.

The impetus for anti-money laundering regulations in Hong Kong did not come exclusively from within, however. Indeed, measures against money laundering had been contemplated and recommended years before the first law, the Drug Trafficking (Recovery of Proceeds) Ordinance (DTRPO), was enacted in July 1989 (Cap 134). The idea of confiscating the proceeds of drug traffickers was first mentioned publicly in a report prepared by an advisory body in 1986 dealing with the "triad problem". The Fight Crime Committee (FCC) was the government's main body for coordinating efforts against crime, with District FCCs set up in each of the 19 districts in Hong Kong. In the mid-1980s, in response to public concern on triad activity, the committee examined the problems posed by triad societies and organised crime, and proposed a number of options to reduce the power and influence of triads, and to more effectively combat organised crime syndicates.[115] Drug trafficking in particular was perceived to be contributing to the wealth and power of the triad societies:

> Drug trafficking is organised to earn huge profits. The tendency of most enforcement measures has been to apprehend and to imprison drug offenders and seize the dangerous drugs, if any, with a view to forfeiture. But the profits made by the offenders have been largely ignored. Yet the vast profits made from drug offences are often in the hands of triad members. With these funds the triads are able to buy silence from witnesses to perpetuate the cycle of violence and crime by building up other criminal activities and indeed to

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[112] Bosworth-Davies, see note 3 above, p 168.

[113] Bosworth-Davies, *id*, p 216.

[114] Revell, Susan and John Holmes. "Hong Kong" in Parlour, Richard, (ed.) *Butterworths International Guide to Money Laundering: Law & Practice* (London: Butterworths, 1995) p 85. Also, Revell, Susan and John Holmes, see note 23 above, p 85.

[115] Fight Crime Committee, *A Discussion Document on Options for Changes in the Law and in the Administration of the law to Counter the Triad Problem* (Hong Kong: Government Printer, 1986) pp 1-2.

channel the funds into legal outlets.[116]

The Dangerous Drug Ordinance at the time had provisions for the forfeiture of money or property received by any person as a result of a drug trafficking offence, but it only applied where it was directly related to the specific offence with which a person was charged (Cap 134). The FCC report recommended enacting provisions similar to those proposed in Britain with respect to drug-related proceeds. It also contemplated a wider scope for such measures: "if the measures for forfeiture are successful, consideration could be given to extending the measures to other areas of triad activity".[117] The idea was strongly supported during a public consultation process and, after three drafts, legislation was introduced in the Hong Kong Legislative Council in March 1989.

The Drug Trafficking (Recovery of Proceeds) Ordinance was passed in July 1989 and substantially reproduced the provisions of the Drug Trafficking Offences Act (DTOA) in Britain, with minor modifications.[118] It provided law enforcement with the power to trace, restrain, and confiscate the proceeds of persons convicted of trafficking in narcotics. The key provision was section 25, which made it a criminal offence to assist a drug trafficker to retain or dispose of drug money, and compelled financial institutions to assist authorities in their investigation. Under the Ordinance, employees could be held personally liable for their failure to report information to the authorities.

The Ordinance was the first piece of bilingual criminal legislation in Hong Kong, and some problems were encountered in its passage. During the debate on the Bill, Miriam Lau, who chaired the Chinese Text sub-committee explained:

> The English text of the Drug Trafficking (Recovery of Proceeds) Bill was drafted by making reference to the Drug Trafficking Offences Act 1986 of the United Kingdom. A number of provisions in the Bill borrowed word for word from the United Kingdom legislation. Apparently, a characteristic of the United Kingdom statutes is that most of them have been drafted in the archaic style and the legal principles are expressed in a circumlocutory or convoluted manner. As a result, the provisions of United Kingdom legislation appear to be very complicated.[119]

A substantial number of amendments were made to the Chinese text to ensure that it reflected the legal meaning of the English text. One major difference from the British legislation was the amendment of the requisite level of knowledge in section 25 for reporting transactions to the authorities, from "suspecting" to "having reasonable grounds to believe" that a person was a drug trafficker. This amendment was sought by the financial industry, particularly the Hong Kong Association of Banks, which was concerned about the liability of its members and their employees. Although the government agreed to the amendment, representatives of the bankers still had a number of objections to the Bill.[120] At the request of the financial industry, the Government agreed to delay the proclamation of section 25 for three months. Although the

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116 Fight Crime Committee Discussion Document, *id,* p 77.

117 Fight Crime Committee Discussion Document, *id,* p 79.

118 Cap 405. Leonard, see note 67 above, p 190.

119 *Hong Kong Hansard,* 12 July 1989, p 2149. Legislative Council, Hong Kong (1988-89 PT. 2)

120 David Li, *id,* p 2147.

DTRPO was essentially a copy of the British legislation, its adoption in Hong Kong was the result of public demands for stronger action to reduce the power and influence of triad societies.

Investigation and prosecution of money laundering suffered a serious setback in August 1992, when section 25 of the DTRPO was declared to be of no force and effect. Until the ruling, the joint police and customs Financial Investigation Unit (FIU) had confiscated HK$132 million in drug money, and court orders for HK$65 million had been issued, while HK$90 million was held pending prosecution.[121] The FIU had been receiving an average of 30 reports per month of suspicious account transactions; but reports dropped to almost zero after the ruling as a result of advice from the Hong Kong Association of Banks.[122] Mr. Justice Gall ruled in *Attorney General of Hong Kong v Lo Chak-man* that the section violated Article 11(1) of the Bill of Rights Ordinance, which guarantees that a person shall be deemed innocent until proven guilty.[123]

The decision was subsequently overruled in May 1993 by the Privy Council, which held that section 25 of DTRPO did not conflict with the Bill of Rights. The Law Lords commented that the purpose of section 25 was to make it more difficult for those involved in the drug trade to dispose of their proceeds from their illicit activities, and "rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime."[124] Following the Privy Council ruling, reports of suspicious transactions increased significantly.[125]

Efforts against money laundering did not end with the passage of the DTRPO in 1989. In 1991, the government White Paper on the Organised Crime Bill proposed the extension of money laundering to specified offences relating to organised crime, including loansharking, gambling, prostitution, extortion and other illegal businesses that generate large profits for the organised crime syndicates.[126] The draft Bill circulated for discussion was admittedly modelled on the DTRPO provisions on confiscation, investigative powers and money laundering.[127] After the confiscation measures received wide public support in July 1992, a Bill was introduced which proposed a general money laundering offence covering the proceeds of all crime, recognising that "it would be anomalous not to have such legislation applicable to crimes which produce significant financial benefit to the perpetrator, but which fall outside the categories of drug trafficking and organised crime."[128]

The measures were contained in the Organised and Serious Crime Bill, which also sought to enhance investigative powers and sentencing provisions relating to offences involving triad members and organised crime syndicates. The Bill was delayed for over two years after changes to the Hong Kong Legislative Council, and by impact of the Bill of Rights Ordinance, which came into effect in 1991. The Organised and Serious Crime Ordinance

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121 Revell, note 114 above, p 86

122 Revell, *id*, p 86.

123 [1993] AC 951, [1992] 2 HKCLR 186 Bill or Rights Ordinance 1991, Cap 383.

124 [1993] AC 975

125 Leonard, note 67 above, p 192.

126 Hong Kong Government, *Explanatory Notes on the Organized Crime* Bill (Hong Kong: Government Secretariat, 1991) p 3.

127 *Id*, p 12.

128 *Id*

came into force in December 1994 and extended similar powers under the DTRPO to other criminal offences. The money laundering offences in both the DTRPO and OSCO were subsequently amended in August 1995 to create offences for dealing with property known or believed to represent proceeds of drug trafficking or an indictable offence. The amendments which gave effect to Articles 3 and 5 of the Vienna Convention made reporting of suspicious transaction a statutory obligation, and made it clear that a drug trafficker could be charged with money laundering.[129]

The Organised and Serious Crime Ordinance was not a direct copy of British legislation, but its origins may be traced to the Criminal Justice Act 1987 as amended in 1988.[130] The differences are to a large extent the result of changes during the protracted legislative process, in which concerns about its conflicts with the Bill of Rights Ordinance were raised. The Ordinance takes a similar approach to organised crime as that of the United States. But the suitability of the American approach has been questioned:

> It may well be that the devices, legal and otherwise, that have been developed in, for examples, North America for combating organised crime on the traditional model of the Cosa Nostra are inappropriate... [L]egislation has recently been enacted in Hong Kong to combat Triad activity which is largely based on the Racketeer Influenced and Corrupt Organization Statute (RICO) in the USA. This statute was passed by the US Congress twenty years ago to deal with the special problem of Mafia crime. The criminal structures involved were and are in the main still particular to the USA. Whether the RICO model is a satisfactory device for dealing with Triad gangs in Hong Kong, which are organised and operate in a very different way to the Italian gangs in the USA, remains to be seen.[131]

These comments also apply, to an extent, to the adoption of Anglo-American money laundering provisions in Hong Kong; however, the growing international consensus on the issue of money laundering and the ongoing development of global regulation in this area have encouraged Hong Kong to enact domestic legislation which follow the British approach.

IX. Assessing Hong Kong's Efforts against Money Laundering

Representatives of FATF completed an audit of Hong Kong's anti-money laundering infrastructure in August 1994, and issued a good report on the territory whilst making recommendations for improvements in three areas. The FATF was largely impressed with the effort and sincerity of the government in combating money laundering, but recommended changes to DTRPO and OSCO to plug loopholes in the legislation, enhancing the awareness of bank staff of the provisions, and bringing remittances houses and money changers under regulation.[132] In response to these recommendations, in October 1994, the Hong Kong Association of Banks introduced a new package of controls to improve the level of awareness

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129 Leonard, note 67 above, p 191.

130 *Id*

131 Rider, previously cited in Bosworth-Davies, note 3 above, pp 31-32.

132 Noel Fung, "Curbs Urged on Money Laundering" *South China Morning Post*, 11 August 1994, p 3.

of front-line bank staff, and procedures for reporting suspicious transactions and the 1995 amendments to DTRPO and OSCO addressed many of FATF's concerns.[133]

The Hong Kong Monetary Authority (HKMA) has been active in encouraging financial institutions to implement improved training and procedures to detect and report money laundering. In July 1993, it issued guidelines on money laundering, replacing those issued in 1989. The guidelines incorporated the principle of "know your customer" adopted by the Basle Committee on Banking Regulation and Supervisory Practices in 1988. The guidelines applied to all banking and deposit taking activities by "authorized institutions", which meant those licensed as banks, restricted license banks or deposit taking companies. The guidelines applied to all suspicious transactions, not just those related to drug trafficking.[134] Violations of the guidelines do not carry any criminal or civil penalties, but the HKMA has indicated that it would view negatively a failure to introduce internal policies and procedures when reviewing an institution's status.[135]

Other bodies have also taken steps towards implementing procedures to comply with the new legislation. Both the Securities and Futures Commission (SFC) and the Hong Kong Stock Exchange have expressed concern about third parties using brokerage firms to launder money. The SFC has issued guidelines for internal controls at brokerage houses to prevent money laundering and fraud, and has committed itself to implementing the FATF recommendations.[136] The Hong Kong Stock Exchange has in turn issued a Code of Conduct which called on its members to take all reasonable steps to ensure that its members' employees act in compliance with the DTRPO.[137]

Reports from financial institutions have gradually increased from August 1994, from 26 to 71 in November, to 113 in December 1994. This was in contrast to the 22 reports in December 1993.[138] In 1994, transactions totalling HK$13.8 billion were reported by banks as suspicious. In the first four months of 1995, received reports exceeded the total for all of 1994; in March alone, HK$ 3.8 billion in transactions were reported.[139] By September 1995, the FIU had received over 1,130 reports of suspicious transactions involving HK$48 billion.[140] This dramatic increase in reports was largely attributed to the efforts of the Hong Kong Association of Banks to raise the awareness of bank employees.[141] Prior to the training efforts, the number of transactions report had remained around 400 a year since the enactment of the legislation, except for the period pending the appeal of the controversial ruling in *Attorney General of Hong Kong v. Lo Chak-man*.[142]

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133 "Hong Kong Cartel Helps Banks Combat Money Laundering" *Asian Wall Street Journal*, 25 October 1994, p 4.

134 Revell, note 23 above, p 87.

135 *Id*, p 93.

136 Dusty Clayton, "SFC Calls for Closer Watch on Launderers" *South China Morning Post*, 29 July 1995. See also Revell, *id*, p 87.

137 Revell, note 23 above, p 88.

138 Darren Goodsir, "'Dirty cash' Law Change" *South China Morning Post*, 2 February 1995, p 2.

139 John Liden, "Hong Kong Launches Effort to Weed Out Dirty Money" *International Herald Tribune*, 18 May 1995, p 20

140 Emma Batha, "Banks See Soaring Interest in 'Dirty Money' Accounts" *South China Morning Post*, 13 September 1995, p 3.

141 Darren Goodsir, note 138 above.

142 See note 133 above. Figures supplied by Alasdair Sinclair, Commissioner for Narcotics.

The reporting of suspicious transactions, however, is only one part of enforcing the legislation. It was not until October 1995 that the first people were convicted of a money laundering offence in Hong Kong. In the six previous years only four people had been prosecuted.[143] This "remarkable lack of success" was attributed by John Carlson, a senior government lawyer, partly to a failure to get hold of money launderers and partly to clumsy legislation.[144] When the prosecution did succeed, the amount of money involved was impressive but was certainly only the proverbial "tip of the iceberg".

The first and only successful prosecution under section 25 of either DTRPO or OSCO was the conviction in the case of *R. v. Lo Chak-man & Tsoi Sau-ngai* in October 1995.[145] Billed as the "world's largest money laundering case," the two company directors were convicted of helping a triad drug trafficker to launder at least US$93 million (HK$718 million) through over 300 bogus accounts in banks in Hong Kong, most of them at the Bank of Credit and Commerce.[146] There was considerable evidence of blatant malpractice by bank management, none of whom were prosecuted. Nonetheless, Mr. Justice Brewley commented that at least four of the BCC bankers "should consider themselves lucky they were not in the dock."[147] The accused transferred US$56 million out of the Hong Kong bank accounts to Taiwan through an underground operation operated by a jewellery shop after the drug trafficker had been arrested. Both men were sentenced to 12 years imprisonment, just short of the maximum sentence of 14 years.

In that particular case, the government was able to recover approximately HK$150 million of the drug trafficker's proceeds, none of which was designated for the law enforcement agencies involved, unlike the practice in the United States, Britain and other Western countries.[148] This is one aspect of Hong Kong's legislation that deviates from the American and British approach, and it is perhaps one of the most significant in that the Hong Kong government directly benefits from the proceeds of crime while the law enforcement agencies fund these expensive and time consuming cases from their limited budgets. The absence of a pecuniary incentive may well have some impact on the morale and effectiveness of law enforcement agencies in pursuing money laundering investigation.[149]

Since the introduction of money laundering legislation in Hong Kong in 1989, HK$117 million had been confiscated by the end of 1995, and a further HK$162 million had been placed under constraint pending conviction.[150] However, some of this money may never be recovered. For instance, one convicted drug trafficker, Chun Yuen, was ordered to pay HK$57 million based on statements he gave to police of his estimated drug proceeds in the six year period prior to his arrest. If he does not come up with the money, Chun will face an

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143 Emma Batha, see note 140 above.

144 *Id.*

145 *R. v. Lo Chak-man & Tsoi Sau-ngai*, unreported, October 27, 1995 (HKHC). Note that the accused were the same persons involved in the earlier controversial Bill of Rights Ordinance ruling.

146 Emma Batha, "Pair Guilty in Drug Cash Case" *South China Morning Post*, 28 October 1995, p 1.

147 Emma Batha, "Judge Blasts Bankers" *South China Morning Post*, 28 October 1995, p 4.

148 Emma Batha, "Drug cash Launderers Jailed for 12 years" *South China Morning Post*, 1 November 1995, p 4.

149 For a discussion of this issue see "Coming Clean Over 'Dirty' Drug Money" *South China Morning Post*, 16 November 1992.

150 *Hong Kong 1996* (Hong Kong: Government Printer, 1996) p 165.

additional 7 years in jail in addition to the 23 year sentence for trafficking.[151]

Another significant aspect of international cooperation on money laundering is in the enforcement of confiscation orders Under section 28(1) of DERPO, designated countries may ask Hong Kong to register and enforce confiscation orders against proceeds of drug trafficking in Hong Kong, as well as to make restraining orders pending confiscation proceeding abroad.[152] Hong Kong has signed mutual assistance agreements with Australia, Canada, Gibraltar, Malaysia, United States and United Kingdom. As a result of international cooperation regarding confiscation orders, a total of HK$207 million had been seized from local drug traffickers in the 6 years DTRPO has been in effect.[153] To some extent, in a turn on the adage that "crime doesn't pay," it can be said that international cooperation and regulation of crime can indeed "pay".

X. Conclusion and Prospects after 1997

The legal and regulatory framework of Hong Kong's anti-money laundering policies has been largely inspired and adopted from both the United States and Britain. The legislative provisions are now in substantial compliance with the Vienna Convention and many of the subsequent arrangements that Britain was a party to; however, the regulation and implementation of the policy, particularly from an enforcement perspective, still needs considerable improvement before a significant impact on money laundering activities in the territory will be felt. The progress made thus far in a relatively short time is promising, although the impetus has been provided by obligations to and pressure from Britain, the United States, FATF and the international community. The developing international regulatory regime to prevent and control money laundering will almost certainly continue to influence Hong Kong's domestic measures as it has similarly affected many if not most of the states in the world, including the People's Republic of China, which has introduced its own regulations dealing with money laundering.[154]

With the return of Hong Kong to Chinese sovereignty, it is unlikely that the administration of the Special Administrative Region (SAR) will be as receptive to British and American influence on its anti-money laundering measures as before. China's attitude towards compromising national sovereignty and amending domestic economic policies, much less its criminal law, to international regulation and standards cannot be described as liberal, if its

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151 Glen Perkinson, "Attempt to Recoup Drug Cash Begins" *Hong Kong Standard*, 24 January 1996

152 Leonard, note 67 above, p 195.

153 *Hong Kong 1996*, note 150 above.

154 Bosworth-Davies, note 3 above, p 206.

efforts to join the GATT/WTO are any indication. Whether a less flexible, less dependent approach towards the harmonization of Hong Kong's legislation will help or hinder efforts to combat money laundering remain to be seen, but retrenchment or inaction on this difficult and rapidly changing problem is not an option.

THE LAW OF INTESTATE SUCCESSION TO LAND IN THE NEW TERRITORIES, HONG KONG - WHERE "EAST AND WEST SIMPLY DO NOT MEET"

新界土地承繼法 —— 中國習慣法與英國普通法的分歧

SUSANNA WONG NGA-YIN*

The law of intestate succession to land in the New Territories has always been an anomaly in Hong Kong's otherwise modern legal and political system. Originally introduced (or maintained) to satisfy powerful landowners in the New Territories, customary law preventing inheritance of property by women now appears outdated. Has the time come for a change ? Or should the history and culture of the indigenous country people be respected ?

The following research provides a summary of the relevant Chinese customary law and common law principles which relate to intestate succession to land in the New Territories. The political and sociological dimensions are discussed as are the legal remedies. The author is critical of the secondary role of women in Chinese customary law, which was sacrificed by the colonial government for political gain. Finally, the author concludes that reform should be brought in line with China's domestic laws, which provide equal succession rights for women.

香港作爲英國殖民地，在引入英國的法律制度的同時，亦保留了中國傳統的文化風俗。因此，差不多整整一世紀，香港新界地區的無遺囑土地繼承問題都是處於中國習慣法與英國普通法共存的尷尬情況下。中國習慣法最顯著的一個特點就是不允許女性擁有土地，而且土地可以獨特的公有方式被一些名爲「祖」、「堂」的特定機構擁有。

香港大多數法官都在英國受教育及長時間生活，他們對中國習慣法的內容及範圍都不熟悉，對習慣法與英國法律間的相互關係更不了解。因此，他們在這個複雜、紊亂的法律問題上處理得不成功。政府一直未採取措施消除新界無遺囑土地繼承問題上所產生的法律混亂。直至一九九四年六月，政府才因政治理由進行法律改革，主要目的在於糾正習慣法中具有性別岐視的部份，而非解決因兩種法制互相抵触而產生的問題。

本文將會首先概述中國習慣法之歷史背景及內容，其後根據兩件案例闡釋習慣法的法律複雜性，最後則會探討近期改革的經過及影響。

I. Introduction

"Borrowed time, borrowed place"[1] is almost a tailor-made description of Hong Kong- a city on a unique international lease which will come to an end in less than 300 days. Despite its unpredictable future, Hong Kong has evolved remarkably from a fishing village to one of the world's foremost financial centres, with growth slightly levelling off for the first time in the last few years. However, her legal development seems barely able to match the economic

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* LLB (Hons) University College London.

1 *Good Morning China*, GEO Special - Hong Kong, 31 August 1995, p 20.

growth. One of the consequences is that for almost a century, there has been an awkward co-existence of Chinese customary laws and English common law (subject to a few local adaptations) in relation to intestate succession to land in the New Territories. The salient features of the century-old Chinese customary laws are that women were not allowed to own any land, and that there are unique forms of communal land-holding by special institutions, called *Tsos* and *Tongs*, which are essentially unincorporated associations.

The judges, most of whom come from an English background, have groped their way in this maze of legal complexities without much success, as they were mostly unfamiliar of the nature and extent of the Chinese customary laws, let alone their interrelation with English law. The government seemed unperturbed by the uncertainty and complexity of the situation, and never had any incentive to eradicate the utter chaos. Long overdue reforms of the law did not take place until as late as June 1994. Although the reforms were politically motivated and targeted solely at curing the sexually discriminatory aspects of the customary laws, many problems were unintentionally cured merely as a by-product of the reforms. In this essay, after an overview of the historical background and contents of such customary laws, the legal complexities of the customary regime will be illustrated through the analysis of two cases. The convoluted process and impact of recent reform will then be discussed.

II. Historical Background

The New Territories consist of the land lying north of Boundary Street[2] to the Shenzhen River[3] and the 235 outlying islands, most of which are barely inhabited. This area of land was leased to Britain in 1898 for 99 years under the Second Convention of Peking after the Second Opium War for the "proper defence and protection"[4] of the colony,[5] particularly Victoria Harbour.[6] Whether as a gesture of goodwill and respect for local customs, or as an attempt to win the New Territories landed squires' recognition of the government,[7] the then Governor Sir Henry Blake issued a Proclamation in 1899 and assured the indigenous inhabitants in the area that their traditional property and commercial interests would be unaffected by the vesting of the New Territories land title in the Crown.[8] This proclamation formed the basis of what became the New Territories Ordinance ("NTO").[9]

Whereas in Australia the aboriginal native's title to land was only given formal recognition for the first time in as late as 1992,[10] the customary property rights in the New

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2 This street divides the New Territories from the Kowloon Peninsula, hence its name.

3 This river marks the China-Hong Kong border.

4 Lease of the New Territories as contained in the Convention of Peking 1898.

5 The colony then consisted of the Hong Kong Island and the Kowloon Peninsula, which were originally ceased to Britain in perpetuity in 1843 and 1860 respectively. Nonetheless, China and Britain signed the Joint Declaration in 1984, agreeing that the whole of the territory of Hong Kong will revert to Chinese rule on 1 July 1997.

6 The harbour is situated between the Hong Kong Island and the Kowloon Peninsula.

7 Suggested by Hon Mr. Frederick Fung in the Legislative Council ("Legco") on 22 June 1994. *Hong Kong Hansards: Reports on the Meeting of the Legislative Council*, Hong Kong Government Printer, 22 June 1994 ("Hansards 2") p 4547.

8 Hong Kong Sessional Papers 1900, p 280.

9 Laws of Hong Kong, Cap. 97.

10 *Mabo v Queensland* (1992) 66 ALJ 408. Note the radical change in approach from *Millirrpum v Nabalco Pty Ltd.* (1971) 17 FLR 141, where Blackburn J decided that the recognition of native title was

Territories land were readily accepted by the colonial administration from the very outset. The policy of the early colonial government in Hong Kong was to make as few changes to the pre-existing laws of the New Territories as possible, especially those relating to land-holding.[11] Such an administrative framework was established on the basis of the unique features of the New Territories at the turn of the century. The area was then largely rural and sparsely populated by unsophisticated villagers, who were accustomed to an entirely different set of laws and customs and were naturally resentful of the British take-over. Land played an integral part in the inhabitants' agricultural lives[12] and was the unmistakable social symbol of wealth and stability. The feudal family ways and social values of these indigenous inhabitants were reflected by the way they lived in small close-knit communities,[13] where the village elders who reigned highest in the family hierarchy had the greatest decision-making power in virtually all aspects of village life.

International leaseholds of this kind were invented "mutant creatures" of the law which had virtually no precedents and "their status and effect in international law had not been carefully worked out",[14] and the colonial government was uncertain as to what was required for compliance with the non-expropriation clause in the Second Peking Convention. Accepting the suggestion that "a land system quite different from that which had long existed in the ceded portions of the colony"[15] might possibly be the answer, the colonial government encouraged the resolution of disputes by local elders using Chinese laws and customs,[16] under the supervision of the District Officer as a symbolic presence of the government. It was not until 1961 that NTO was amended so that the Supreme Court and District Court acquired jurisdiction over New Territories land disputes.

S 13 of the NTO now provides that:

> In any proceedings in the High Court or the District Court in relation to land in the New Territories, the court shall have power to recognise and enforce any Chinese custom or customary right affecting such land.

In conjunction with this, the Intestates' Estates Ordinance[17] ("IEO") and the Probate and Administration Ordinance[18] ("PAO") excludes New Territories land from its respective scope so that all rights of succession to land in the New Territories are similarly governed by Chinese customary laws and not by the general English law prevailing in the rest of the

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not compatible with the development of common law.

11 S Selby, *Everything You Wanted to Know About Chinese Customary Law (But Were Afraid To Ask)*, (1991) 21 HKLJ 45 at p 46.

12 The primarily agricultural uses of the land were in stark contrast to the present day situation.

13 D M E Evans, *The New Law of Succession in Hong Kong*, (1973) 3 HKLJ 7 (hereafter "*NLS*") at 39. See also a similar point made by Simon Ip in Legco on 13 October 1993. See *Hong Kong Hansards: Reports on the Meeting of the Legislative Council*, Hong Kong Government Printer, 13 October 1993 ("Hansards 1") at p 252.

14 Peter Wesley-Smith, *Unequal Treaty 1899-1997 - China, Great Britain and Hong Kong's New Territories*, Oxford University Press Hong Kong, 1980 at p 90.

15 The Hong Kong Island and the Kowloon Peninsula, note 5 above.

16 Selby, *op cit.*, note 11 above at p 46.

17 Cap 73.

18 Cap 10.

colony.[19]

Prima facie, s 13 NTO is merely *permissive* in giving the court the power to recognise and enforce customary rules, but it was held in the *Tang* case (1970)[20] that s 13 is *mandatory*.[21] Mills-Owens J held (having special regard to the development of and the language used in the various New Territories legislation since the inception of the original 99-year lease) that the "necessary corollary" being that any conflicting English legal rules must be disregarded.[22]

Consequently, it is essential to discuss the nature and extent of such Chinese customs in order to better understand the full implications of the NTO regime.

III. Chinese Customary Laws in Relation to Land Succession

A. Introduction

It was held in *Wong Ying-kuen v Wong Yu-shi*[23] that the correct law to apply for the purposes of s 13 NTO is the law and custom of the Qing Dynasty (1644 - 1911) as it existed in 1843,[24] together with any local modifications in custom and in the interpretation of the law since then.

The task of determining the relevant Chinese customs is fraught with difficulty, particularly because Hong Kong has changed and developed considerably both economically and socially over the past 100 years. The 'barren rock' at the turn of the century has become now a modern economic wonder. At the same time, many of the traditional values have changed under Western influence while urbanisation replaced agriculture with industry and commerce, as can be seen in the infiltration of free-market capitalism, the weakening of family ties and the growing concern of sexual equality.[25] Meanwhile, China can no longer be used as an external reference point, because the laws in the mainland have changed beyond recognition[26] after the various revolutions and reforms, the most important upheavals being the overthrow of the Qing Dynasty in 1911 and the rise to power of the Communist Party in 1949.

The gradually diminishing significance of the old traditions within the territory, especially in the urban areas, is also reflected in the decreasing number of surviving experts on the customary laws which are at least a century old. The difficulties of identifying the relevant Chinese customary laws are further exacerbated by the fact that there was never a detailed unified code for such customs,[27] nor any established rule for legal recognition of a custom.[28] Customs vary not only from province to province, but sometimes also from clan to

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19 S 75 of the PAO and s 11 of the IEO.

20 *Tang Kai-chung v Tang Chik-shang* [1970] HKLR 276.

21 Followed in *Tsang Wing-lung v Tsang Lun* [1992] 2 HKC 440.

22 *Tang* case 1970, note 20 at p 295.

23 HCt, MP No. 19 of 1956. See also *Kan Fat-tat v Kan Yin-tat* [1987] HKLR 516. There is general consensus that customary law refers to customs dating back at least to the Qing dynasty, but not so much as to the exact content of those customs.

24 When the Hong Kong Island was proclaimed a British Crown Colony.

25 These various social changes in particular may have provided the impetus for the recent reform in relation to the NTO regime.

26 Evans, note 13 above at p 9.

27 Valerie Ann Penlington, *Law in Hong Kong*, (Federal Publications Ltd., 2nd ed., 1986) pp 20-22.

28 Unlike the position in English law where there are established criteria for judicial recognition of customary rights, e.g. the custom must be certain and of "immemorial antiquity", see *New Windsor*

clan in the same neighbourhood, which is often the case in large countries such as China.[29] The Qing Code of Law, the *Ta Tsing Lu Li*,[30] was essentially penal even where civil rights were concerned[31] — going to the courts invariably meant begging the judge for his most gracious mercy. As a result Chinese people tend to resolve their disputes by negotiation and compromise as much as possible, especially in relation to family differences — "to litigate is regarded as a disgrace".[32] There are two further reasons why the courts never became the major forum for the resolution of family disputes.[33] First, a judicial decision is essentially all-or-nothing, which necessarily excluded the Confucian notion of compromise, of "giving a little". The prevailing sentiment can be described by the following: "parties rarely insist on their strict legal entitlement. They do not 'go for the jugular when trouble arises.'"[34] They far prefer the amicable settlement of disputes to confrontational litigation. Second, since the family is supposed to be an "internally self-regulating system with its own norms and its own dispute-settling mechanism",[35] solutions imposed on the family from the outside (e.g. the court) may well create tensions within the group, which would only in turn give rise to further disputes.

Even where a case is taken to court, "the idea that the [Chinese] magistrate is the father of his people prevailed, and the inclination to deal with a particular case upon its merits rather than upon strict principles of law persisted."[36] This mode of reasoning has been curiously acquired by the English judges in Hong Kong too, who perhaps placed more emphasis on the justice on the case rather than the difficult development of alien legal principles.[37]

Accordingly, there is little guidance as to the determination of Chinese customary rules as they existed over 100 years ago. In fact not even the Strickland Committee, which was set up to investigate into Chinese law and custom, could claim that their statement of customary law was always accurate ![38] Indeed, when determining the nature and extent of the applicable customary law, most of the judges have to rely heavily on expert witnesses, who may not always be unbiased as they are usually called upon by counsel with a view to support the latter's particular arguments.

Corporation v Mellor [1975] 1 Ch 380; and Strickland Committee, *Chinese Law and Custom in Hong Kong*, Hong Kong Government Printer, 1953 (hereafter "*Strickland Report*").

29 *Strickland Reportv, id*, at p 13.

30 Literally meaning "The Laws and Regulations of the Great Qing Dynasty".

31 D M Emrys Evans, *The Common Law in a Chinese Setting - The Kernel or the Nut?* (1971) 1 HKLJ 9 (hereafter "*CLCS*") at pp 11-12.

32 Penlington, *op cit*, note 27 above at p 22.

33 Evans, *CLCS*, note 31above at p 21.

34 Roger Halson, *The Modification of Contractual Obligations*, (1991) 44 CLP 111 at 113. The statement relating to modification of contracts, taken out of context, oddly provides an apt description of the traditional Chinese sentiment towards settling of disputes extra-judicially.

35 Evans, *CLCS*, note 31 above at p 21.

36 *Strickland Report*, note 28 above at p 13.

37 This can be seen from the style of judgments in the law reports. A typical judgment usually consists of mostly findings of facts, with very little explicit articulation and development of the legal principles involved.

38 See the 'disclaimer' in the *Strickland Report*, note 28 above, at p 14, where it states that "The Committee does not profess that in the following paragraphs or in the opinions included in the Appendices Chinese law and custom ... is always accurately stated."

B. Main Outline of Chinese Customary Law in Relation to Succession

The general rule was that land was to be kept within the male line of the family.[39] The original purpose of the rule was to keep clan[40] land intact so that future generations would have land on which to farm for a living. Women were denied any land, because it was feared that otherwise the clan land would fall into the hands of their husbands, who invariably bore different surnames and were from other villages.[41] The *quid pro quo* was that women were entitled to be kept under a roof and supported for life by men — their fathers, husbands, sons or brothers — and so the apparent injustice of denying them ownership of land was rather well mitigated. At the same time, since women were supposed to be supported by their husbands' families, strictly speaking they had no need for agricultural land back in their natal village.[42] Indeed, the family name has traditionally been such an important symbol of clanship and unity that a married woman, adopting her husband's name on marriage, is almost taken to have severed all her previous nexus to her natal family. This male-only rule of land ownership was always strongly upheld, especially when the assets of a clan consisted almost entirely of land-holdings, which were "considered to be the soundest form of investment".[43]

Accordingly, only sons, whether natural or adopted, are entitled to land upon death of their father.[44] Land is usually distributed *per stirpes*, i.e. it is usually divided equally among the sons, and the grandsons divide equally among themselves land from their respective fathers.[45]

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39 *Ho Tsz-tsun v Ho Au-shi* (1915) 10 HKLR 69; *Wong Yu-shi v Wong Ying-kuen* [1957] HKLR 420.

40 Generally speaking, a 'clan' is an extended family with its members all bearing the same surname. The familial links among the members of a 'clan' may be more remote and thus more laborious to trace than those within a 'family', a smaller unit within a clan.

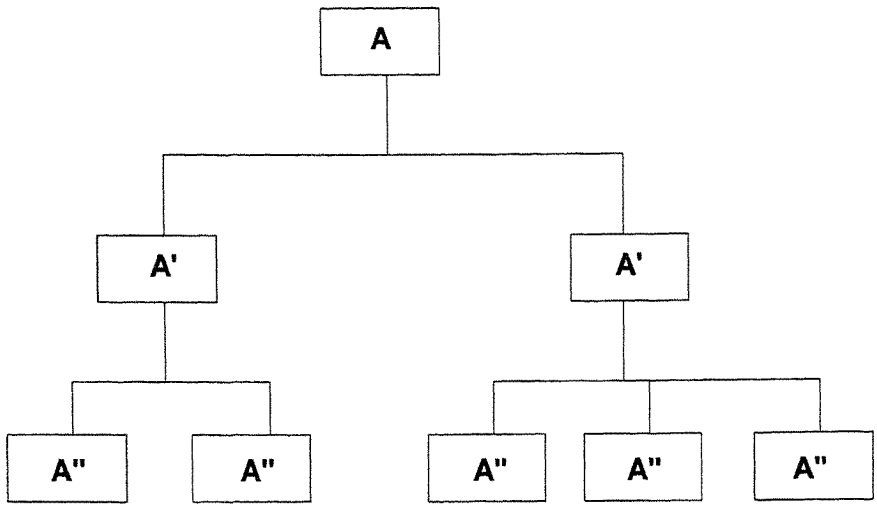
41 Selby, *op cit*, note 11 above, p 54.

42 The village in which they were born and brought up.

43 Selby, *op cit*, note 11 above at p 72.

44 This male-only succession practice is almost undisputed. References can be found in the *Strickland Report*, note 28 above at p 16; *Li Tang-shi v Li Wai-kwong and the Attorney General* [1969] HKLR 367; and Evans, *NLS*, note 13 above at p 16.

45 This is markedly different from the English rule of *primogeniture*, whereby the eldest son generally succeeded to all the land of his father dying intestate to the exclusion of all his siblings. Although the Chinese customary practice of equal division of land among sons may appear to be less economically sensible, in that it is more costly to farm many plots of small plots of land after consecutive divisions than one large piece of undivided land, this may be mitigated by the abundance of communal land owned by *Tsos* and *Tongs*.



Key: A' = A's sons
A = A's grandsons

Widows are not entitled to any land as such, but are generally entitled to a lifelong maintenance, which would cease if she chooses to re-marry.[46] If a widow is also a mother, she can withhold her consent to a distribution of the estate among her children, in which case she has great *de facto* control of the land. Or if her children are under age,[47] she will be entitled to manage the land for them during their minority. The widow would then be acting in a capacity similar to that of a trustee under English law, apart from the fact that she would not possess the legal title to the land, which remains in the name of her deceased husband. As the legal title cannot be in a woman's hands, it would only go straight from the deceased to his heirs when they become eligible. Indeed it is unclear what the implications are when a 'widow-trustee' manages the land and collects rent in the absence of any legal title in her hands. Presumably she would have to rely on some extra-legal means, such as social pressure within the village, to enforce any obligations owed to her by others.

Similarly, daughters are not entitled to any share of land but to maintenance,[48] which ceases on their marriage. In addition, they are usually provided with a dowry upon marriage. However, this does not entitle her any rights in the English sense, but, rather, a "necessary aspect of the complex process of marriage within the Chinese family system."[49] The purpose of the dowry is not so much providing for the daughter but as an ostensible display of wealth on the part of the family, towards both the in-laws and the rest of the community. "[The status of the natal family] is at stake; a bride-giving family must, in order to assert itself against the

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[46] *Tang Choy-hong v Tang Shing-mo* (1949) 33 HKLR 58.

[47] Evans, *NLS*, note 13 above, at p 16.

[48] *Id*, p 36. Note that the obligation of the family, especially the men, to provide women (widows and unmarried daughters alike) with a maintenance can be seen as the *quid pro quo* for their exclusive entitlement to land, but this *quid pro quo* seems to have seriously eroded nowadays.

[49] Evans, *NLS*, note 13 above, at p 17. Also *Re Wong Chio-ho* [1969] HKLR 391. Note the opposite observation in the *Strickland Report*, note 28 above at p 69 and Appendix 17. The author's personal knowledge of the Chinese culture agrees with Evans's remarks.

family to which it has lost a woman, send her off in the grandest manner they can afford."[50] However, the courts have mistakenly looked upon such dowry as a matter of entitlement,[51] as they are designed to evaluate only legal rights and are simply not equipped to assess such moral or social obligations.

It is traditionally uncommon for Chinese people to draw up wills, detailing the distribution of their property after their death.[52] First, this is considered undesirable, as the preparation of wills inevitably "[gives] rise to morbid thoughts";[53] death is a taboo subject always to be avoided if possible. Second, it is considered unnecessary, if permissible at all. Under *strict* Chinese customary law, land does not belong to the individuals but to the clan as a whole.[54] Devolution of land on death has been described as "a passing of control of family property from one generation to another".[55] The concept of personal ownership is therefore inherently limited, and the interest of an individual 'landowner' in his land is rather akin to a life interest in the English sense.[56] Hence, strictly speaking, under customary laws, there is no general power to dispose of property by will, since this presupposes personal ownership of property in the sense that the land is totally at the disposal of the *owner*. Accordingly the sons are inherently entitled to divide their father's property among themselves equally after his death, and the father could not by deed or will alter this pattern of succession.[57] Although the testamentary power of a Chinese person was confirmed by the court,[58] notwithstanding the custom, people generally do expect property to be devolved within the family in the absence of any express provisions. Wills are therefore considered unnecessary, unless the deceased particularly wished to pass his property to his widow or daughters.

C. Tsos and Tongs

Apart from the devolution of land as described above, land is also commonly 'settled'on some kind of 'trusts'.[59] S 15 of the NTO, which embraces family land-holding, provides:

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50 Evans, *NLS*, note 13 above, at p 17.

51 *Wong Pun-ying v Wong Ting-hong* [1963] HKLR 37.

52 This is especially so in the New Territories, see *Strickland Report*, note 28 above, at p 54.

53 Selby, *op cit.*, note 11 above at p 73.

54 Evans, *NLS*, note 13 above at p 33 and Selby, *op cit.*, note 11 above at p 71.

55 Evans, *NLS*, *id*, at p 41.

56 Because of this inherently limited concept of personal ownership that an individual is never the absolute owner of his land, it was the custom that any villager wishing to sell his land should give his clan a pre-emptive right to purchase the same before offering it to outsiders. Indeed clauses of rights of pre-emption were found in nearly all customary land deeds. However, considerable sale to outsiders in the past seems to indicate that such clauses may have been no more than a formality and that the villages are generally not opposed to sale of land outside the clan. See Selby, *op cit.*, note 11 above at p 71. This non-opposition to outsiders owning clan land seems to squarely contradict the rationale of the male-only succession rule.

57 *Strickland Report*, note 28 above at p 17. The general principle is that a will cannot defeat the rights of legitimate successors, i.e. the sons, even though in practice the father may give instructions in relation to matters of details. Even if these instructions went beyond matters of details, they were nonetheless normally respected, because of the superior position of the father in the family hierarchy.

58 *Re Tse Lai-chiu* [1969] HKLR 159.

59 For an account of the historical background of these trusts, see Selby, *op cit.*, note 11 above at p 54.

> Wherever any land is held from the Crown under lease or other grant, agreement or licence in the name of a clan, family or *Tong*, such clan, family or *Tong* shall appoint a manager to represent it...

There are mainly two types of these 'family' settlements, namely the *Tso* and the *Tong*. These "family or quasi-family institutions"[60] are forms of perpetual lineage trusts whereby land is held in common ownership for the benefit of the whole lineage.[61] The reference to 'clan' and 'family' land is puzzling, because there has apparently never been any reference in the cases to any communal land registered under these two headings. Evidently, the *Tso* and the *Tong* are the only two forms of customary communal land-holding, but curiously only the *Tong*, but not the *Tso*, is expressly recognised by the NTO.[62] Nonetheless, it was decided that *Tso* land is 'family' land and is therefore also registrable (and requires registration) under s 15.[63] It should be noted that these forms of family land-holding, unlike English family settlements, are not aimed at providing future generations with an income. Rather they reflect the Confucian filial ethics and their main purpose is to maintain sufficient funds for the veneration of a common ancestor or religious worshipping.[64]

1. Formation of a *Tso*

Mills-Owens J gave a well-quoted definition of the *Tso*:

> Speaking generally, a *Tso* may be shortly described as an ancient Chinese institution of ancestral land-holding, whereby land derived from a common ancestor is enjoyed by his male descendants for the time being, living for their lifetimes and so from generation to generation indefinitely. Thus every male descendant of the common ancestor automatically becomes entitled at birth to an interest in the land for his lifetime; on his death his interest merges so as automatically to enlarge his interests of the surviving male descendants; thus his interest at any given moment during his lifetime depends on the number of male descendants then living and on his death it forms no part of his estate [65]

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60 Selby, *op cit.*, *id* at p 46.

61 These trusts are preserved from the common law rule against perpetuities (the English statutory rule being inapplicable by reason of Application of English Law Ordinance (Cap 88)). *Tang Yau Yi Tong v Tang Mou Shau Tso* [1995] 2 HKC 245; Wong, *Chinese Customary Law - an Examination of Tsos and Family Tongs* (1990) 20 HKLR 13.

62 These are yet another two fine examples of how the NTO was drafted without due regard to the reality in the New Territories.

63 *Lai Chi Kok Amusement Park v Tsang Tin-sun* (1965) HKLR 413, *Li Tang-Shi v Li Wai-kwong and A-G*, note 44 above.

64 Confucius preached filial piety and respect for the elders and ancestors in the 5th century BC; see Selby, *op cit*, note 11 above at p 54. Cf. the anomalous exceptions to the beneficiary principle under English trust law, where purpose trusts for the saying of masses in private (*Bourne v Keane* [1919] AC 815 at pp 874-875) and the erection and maintenance of graves and sepulchral monuments (*Re Hooper* [1932] Ch 38) were held to be valid. See David Hayton, *Hayton and Marshall. Cases and Commentary on the Law of Trusts*, (London: Sweet and Maxwell, 2nd ed., 1991), at pp 189-190.

65 *Tang Kai-chung v Tang Chik-shang*, note 20 above at pp 279-280. A member cannot bequeath or otherwise assign his interest in a *Tso*, because his right ceases upon his death. Although this may be quite similar to a right of survivorship, it seems that such communal land-holding is not a form of joint

A *Tso* is named after the common ancestor and can be formed in three ways, according to the *Tang* case (1995)[66]:

1. A *Tso* may be formed not by the common ancestor himself during his lifetime, but by his son or sons on or after his death as a matter of filial duty in accordance with the Confucian tradition for the purpose of veneration of the common ancestor. A *Tso* may also be formed when the son or sons buy a piece of land and name it after the ancestor, or when the sons inherit land from the father and set aside part of it in the name of a *Tso* and divide the rest among themselves.
2. A living male, on purchasing property, had it conveyed not to himself but to his *Tso* — effectively creating a settlement.[67]
3. *Tso* may also be formed after the death of a male dying intestate and without male issue, by the adoption of a son by his widow for him according to Chinese customary law.[68]

The primary purpose of a *Tso* is to generate income for venerating the ancestor in whose name the *Tso* was set up. Common ownership of the land ensures that the land remains intact and prevents unilateral dispositions against common wishes. Indeed those who presently manage the land have a duty to pass the land intact to succeeding generations, this being the natural corollary of the fact that members of a *Tso* do not own the *Tso* land outright.

2. Formation of a *Tong*

In contrast, a *Tong* is normally formed by the landowner during his lifetime, as an alternative to allowing the land to be divided among his sons according to custom (as described above). By forming a *Tong*, he can ensure that the *Tong* land will remain intact so that it can be enjoyed communally by his male descendants in perpetuity. Selby noted three possible motives for a landowner to establish a *family Tong*,[69] which is the closest in nature and purpose to a *Tso*. First, this can prevent endless subdivision of the land as time goes by, and may encourage his descendants to stay together in the village. Second, potential disputes among his sons over the division of land will simply be pre-empted. Third, he can be assured that there will be income from this land to fund the proper veneration of his name. A *Tong* can also be established by the sons or later descendants by mutual agreement, for purposes of

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tenancy, as it is possible that each branch of the family has a distinct share in the *Tso* (see Selby, *op cit.*, note 11 above at pp 60-61). Hence it seems that a *Tso* is some sort of halfway house between joint tenancy and tenancy in common.

66 [1995] 2 HKC 245 at p. 254; but note that the judge relied heavily upon the *Tang* case (1970) note 20 above, which is arguably a somewhat flimsy basis for this classification.

67 However, this suggests a misunderstanding of the word '*Tso*', whose literal meaning relates to ancestors, with the corollary connotation that the person in question is already dead (Wong, *op cit*, note 61 above at p 15). Moreover, this is contrary to the observations of an anthropologist, who remarked that *Tsos* were almost invariably formed on a posthumous basis. A land-owner can at the most instruct during his lifetime that his land or part of it is to be set aside as family land after his death (Evidence of Mr. Aker-Jones in *Li Tang-shi v Li Wai-kwong and A-G,* note 44 above at p 374).

68 However, this third method is nowadays obsolete, as customary adoption is abolished by the Adoption Ordinance (Cap 290). Wong, note 44 above at p 16.

69 Selby, *op cit.*, note 11 above at p 58.

veneration of a common ancestor. *Tong* membership devolves in a manner similar to that of a *Tso*.[70]

There are also many other forms of *Tongs*, e.g. religious or business *Tongs*, where the members may have no hereditary links among themselves.[71] These may be formed for economic or strategic purposes, e.g. *Tongs* were formed to pool resources to purchase weapons for defending the villages from the British (when they took over the colony) and the Japanese (during the Second World War).[72]

3. Management of *Tsos* and *Tongs*

Whenever any land is held in the name of a *Tso* or *Tong*, a manager must be appointed and such an appointment must be registered in the New Territories Land Office as required by s 15 of the NTO.[73] Only then would the legal position of the *Tso* or *Tong* be secured. A manager so registered will have:

> [F]ull power to dispose of or in any way deal with the said land [i.e. the respective *Tso* or *Tong*] as if he were the sole owner thereof, subject to the consent of the Land Officer, and shall be personally liable for the payment of all rents and charges and for the observance of all covenants and conditions in respect of the said land.[74]

It was suggested that s 15 was an attempt to strike a compromise between customary communal ownership of land in the name of somebody long dead, with the English notion of private ownership. Selby suggested that s 15 was a device designed to be "an interface between the English and Chinese systems, allowing the beneficiaries of [*Tsos* and *Tongs*] to appoint a manager who, subject to the approval of the Land Officer, would have legal capacity to manage and to meet the liabilities of and deal in land held by such bodies,"[75] in a capacity similar to that of a trustee under English law.

Although these managers are supposed to serve the interests of the members of the *Tso* or the *Tong*, the NTO does not have any provisions protecting the members from fraudulent managers who embezzle trust funds, such as rent. Indeed most of the villagers never trusted these quasi-trustees, particularly where the managers literally disposed of the income from the land "as if they were the sole owners thereof" and the villagers were unable to monitor the activities of the managers due to their lack of education.[76] This may be one of the reasons for the insertion of the requirement of the Land Officer's consent, so as to prevent unscrupulous

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70 It is also possible for *Tong* membership to devolve like 'personal' land, as in *Tang Yau Yi Tong v Tang Mou Shau Tso*, note 61 above.

71 Selby, *op cit.*, note 11 above at p 57.

72 Selby, *id.*, at p 59.

73 Note that the reference to 'clan' and 'family' land in s 15 is apparently superfluous and that the omission of '*Tso*' is probably a matter of legislative oversight. *Id*, pp 10-11.

74 S 15 of the NTO.

75 Selby, *op cit.*, note 11 above at p 56.

76 Selby, *id* at p 62. This is probably less of a problem now as literacy has steadily increased over the years, partly as a result of compulsory education for children in the territory.

transactions to the prejudice of the common interest.[77]

IV. Legal Issues Relating to Land Succession

If the family / clan system were truly an "internally self-regulating system with its own norms and its own dispute-settling mechanism",[78] courts would be unnecessary for the resolution of disputes relating to family land. However, social and family values have changed, and the 'negotiation and compromise' approach has proved to be insufficient. Consequently an increasing number of cases are brought to the court, even though the latter are ill-qualified for applying and enforcing Chinese customary laws.

One of the most obvious reasons for the marked increase in litigation in recent years is the ever-climbing market prices of land. This is because of the acute shortage of land in the territory brought about by the rapid urbanisation, especially after the Second World War. As a result, many indigenous people who want to realise a lucrative profit by selling off land became dissatisfied with the communal form of land-holding by *Tsos* and *Tongs*. Since, as described above,[79] the primary purpose of *Tsos* and *Tongs* is to generate income for the veneration of ancestors, by custom such land is *supposedly* 'inalienable, indivisible and perpetual'.[80] However, in practice land has often been sold,[81] subject to the requirement that any disposition of land can only be made with the unanimous consent of all the members concerned.[82]

However, this system of compromise has its weaknesses.[83] First, as in most situations of communal ownership, there are naturally problems of economic hold-outs, especially when large sums of money are involved.[84] It is usually difficult for all the co-owners to reach a mutually satisfactory agreement, some of whom may raise spurious objections, dissenting either out of spite or for their personal advantages, and expect to be bought off at a price. Second, reaching a consensus has become more difficult, with the younger generation, now

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77 Selby, *id.*, at p 56. Arguably the manager of such *Tsos* and *Tongs* should not be subject to English concepts of fiduciary duty relating to trustees, primarily because it is unnecessary, as there are traditional Chinese rules against embezzlement of trust property, such as s 150 of the Ta Tsing Lu Li, which broadly stated that embezzlement should be treated as theft. Moreover, English trust laws should not apply as a matter of principle — the *Tso / Tong* members ought not to be allowed to have their cake and eat it. If such perpetual trusts are preserved intact because a special exemption from the English rule against perpetuities and the beneficiary principle, the *Tso / Tong* members should not be allowed the protection of English law on fiduciary duties. However, there were yet no reported cases relating to breaches of trust. See also Wong, *op cit.*, at pp. 21-23.

78 Evans, *CLCS*, note 31 above at p 21.

79 *Id*, p 11.

80 *Kan Fat-tat v Kan Yin-tat*, note 23 above, at p 533.

81 See note 56 above.

82 *Kan* case, note 23 above at p 536. Arguably such sale of *Tso / Tong* property can be regarded as a *pro tanto* dissolution of the land-holding institutions. Cf. the dissolution of unincorporated associations under English law, where any unincorporated association can always be dissolved the by a unanimous vote of all its members; express provisions for such dissolution are unnecessary. See *News Group Newspaper Ltd. v Society of Graphical and Allied Trades (SOGAT) 1982* [1986] IRLR 226 at 229 per Lawton LJ.

83 Selby, *op cit.*, note 11 above at p 64.

84 H Demsetz, *Towards a Theory of Property Rights*, 57 American Economic Review 347, on the various criticisms on the economic inefficiency created by communal ownership.

mostly better educated than their seniors, being less malleable to the wishes of the elders. Moreover, many members who have substantial interests in the land have emigrated and now reside abroad.

Such customarily inalienable form of land-holding has been preserved against the English rule against perpetuities, which, but for the stipulated provision in s 13 of the NTO, would have applied and rendered these perpetual family trusts invalid.[85] As mentioned before, application of Chinese customary laws under s 13 is mandatory, and that any conflicting English rule of law, including the rule against perpetuities, must not applied.[86] Indeed, had the law been otherwise it would become incompatible with the express legislative recognition of such communal land-holdings. However, this necessarily means that the 'mischief' which the perpetuities rule aim to cure- that of land being (at least theoretically) indefinitely inalienable- remains outstanding.

However, this is not to say that a mechanical application of English law would invariably produce a just result. One example is *Wu Koon-tai v Wu Yau-loi*.[87] In this case, Wu Cheong-yu[88] was the original Crown lessee and registered owner of the piece of land in question in the New Territories near Tuen Mun. He died in 1921, leaving Wu Hung-chi, the grandfather of the defendant and appellant of the present case, as his only surviving son and accordingly, the only person entitled to succeed to the property under Chinese customary laws. However, Hung-chi never formally succeeded to the property, because no grant of probate or administration of the estate of Cheong-yu was ever made, and Hung-chi was never registered as the successor to the property, as he was entitled to, under s 17 NTO.[89] In 1934 Hung-chi purported to sell the land to Wu King-yip. The deed of conveyance was, according to the expert witness, a "valid and proper conveyance in accordance [with] Ch'ing[90] Law",[91] duly witnessed by village elders, with no allegations of fraud or forgery at all. Hung-chi died in the 1940's. The defendant's father Wu Shang became registered as the successor in as late as 1951 pursuant to s 17, as a result of the "District Office's title revamping exercise to pave the way for the possible Crown resumptions in the proposed construction of Tai Lam Chung

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85 By reason of s 3 of the AELO (Cap 88). It should be noted that English Acts of Parliament do not apply to Hong Kong unless it is contained in the Schedule to that Ordinance or by reason of their own terms or other legislation: see s 4 of the same Ordinance. Therefore it is the common law rule against perpetuities, immune from subsequent statutory modification (e.g. the Perpetuities and Accumulations Act 1964) which applies to Hong Kong generally.

86 *Id*, p 4.

87 1995, Appeal No. 70 (Civil). Court of Appeal Transcript: Judgment of 12 July 1995.

88 Also reported as "Wu Cheong U" in the case, a difference in translation of the same name of the same person.

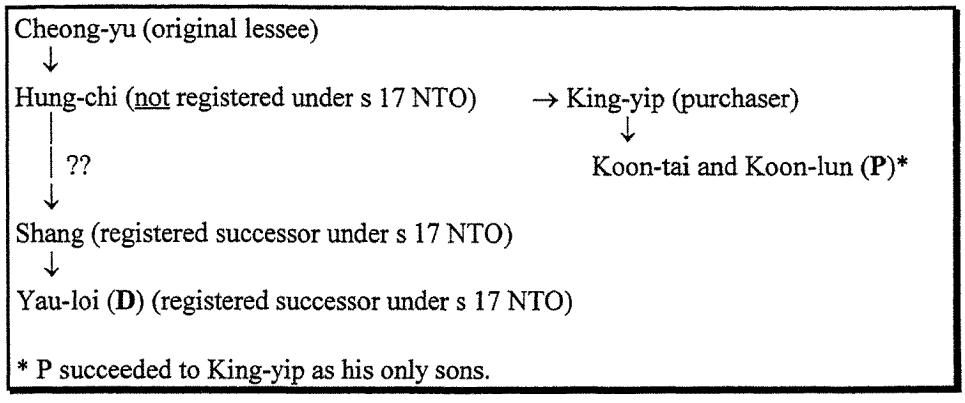
89 S 17 of the NTO provides that: "In the event of the death of any person in whose name any land is registered otherwise than as a manager [i.e. 'personal' land], if no grant of probate or administration of the estate of the deceased is made by the High Court within 3 months after such death, the Land Officer, on ascertaining the name of the person who is entitled to such land in succession to the deceased person ... shall register the name of the successor, and upon such registration being effected the said land shall vest in the successor for all the estate and interest of the deceased person therein, or for such estate and interest as shall be entered on the register by the Land Officer against the entry of the name of the successor..."

90 "Ch'ing" and "Qing" are merely different formats of romanisation of the same Chinese character and bear exactly the same meaning, "of or relating to the Qing Dynasty" (1644 - 1911).

91 See note 87 above at p 5.

Reservoir".[92]

Wu Yau-loi, the defendant, was similarly registered as the successor in 1963 after Shang's death. The plaintiffs, who are the sons of King-yip, now claimed that King-yip acquired the beneficial ownership of the land by reason of the valid conveyance in 1934. The plaintiffs argued that, since they were the only persons entitled to succeed to King-yip's property, they were beneficial owners of the land, and that Yau-loi held the land in trust for them. The facts can be represented by the following diagram.



The majority (Litton VP and Mayo LA) held that the 1934 sale was ineffective in conferring King-yip of any title in the land, legal or equitable. This is simply because Hung-chi, the purported vendor, failed to register as a successor under s 17 NTO to Cheong-yu's estate and therefore never had any title to sell — a simple example of the *nemo dat qui non habet* rule. Consequently, when Shang was registered as a successor in 1951 pursuant to s 17 of 'all the estate and interests of the deceased person therein', the relevant 'deceased person' could only be Cheong-yu. Since Cheong-yu never sold the property to anyone during his lifetime, his entire estate passed on to Shang intact in 1951.[93] Similarly, the whole of the property was passed on to the defendant when he was registered as the successor in 1963. The plaintiffs accordingly inherited no rights in the land from their deceased father, the purported purchaser.

Another corollary of the inability of Hung-chi to pass any title in land was that there was no valid contract of sale of land. The question of part performance was thus held

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[92] *Id*, p 18 per Liu J.

[93] *Id*, p 7.

not to have arisen at all.[94] Although the issue was settled with the conclusion that Hung-chi was never able to convey any interest in the land because none was ever vested in him, Litton VP went further and suggested that the instrument containing the Chinese conveyance would in any case be unenforceable, either as a deed of conveyance which was never registered,[95] or as a land contract which was not signed by the vendor according to s 3(1) of the Conveyancing and Property Ordinance,[96] as it was signed only by a village witness to the transaction. The appeal was therefore allowed and the case was to be re-tried on the point of adverse possession, as the trial judge "made no findings of fact specifically referable to the question."[97]

Liu LA dissented. He held that according to Chinese customs in the New Territories, which was not disputed, Hung-chi was beneficially entitled to the whole of the property in question in succession to his father Cheong-yu.[98] Since it is trite law that a beneficiary of an estate may sell his interest before the relevant grant,[99] Hung-chi had the capacity to sell this beneficial interest in the property to King-yip, despite his failure to be registered as the successor: "he was merely unable to pass a good legal title."[100] Registration of Shang as a successor in 1951 "could only vest in Shang what remained of the estate of Cheong-yu", i.e. "what Cheong-yu owned at the time of his death in 1921 less any beneficial interest so divested by Hung-chi."[101] The fact that the 1934 conveyance was unregistered did not render the transaction void but merely unenforceable.[102] However, this valid but unenforceable

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94 The plaintiffs could presumably have argued on the point of proprietary estoppel Hung-chi represented to the plaintiffs' father that he had title in the land, at least by his conduct of entering into the purported transaction, if not from the actual wording of the 1934 conveyance (*Id*, p 4). King-yip relied on this representation to his detriment by entering into the transaction and paying the full market price of the land without shortfall. Despite Hung-chi's lack of title to sell, an 'equity' thus arose in favour of King-yip. This 'equity' would bind both Shang and the defendant, as both of them were merely heirs of Hung-chi and were not purchasers for value. However, it is doubtful whether this 'equity' of King-yip could pass on to the plaintiffs.

In any event, this argument of proprietary estoppel is doomed to failure according to the reasoning of the majority, who ruled that it was absolutely impossible for King-yip to acquire any interest in the land because of the *nemo dat* rule. For a more detailed analysis of the operation of proprietary estoppel, see Gray, *Elements of Land Law*, (London: Butterworths, 2nd ed) at pp 312-368.

95 See note 87 above at p 6 per Litton VP. The system in Hong Kong is a registration of deeds, not of title as in England. Under s 3(2) of the Land Registration Ordinance (Cap 128) all unregistered deeds, conveyances, and other instruments in writing are void for all purposes against "any subsequent bona fide purchaser for valuable consideration".

96 Cap 219. S 3(1) states that "no action shall be brought" upon any such land contracts unsigned by the vendor.

97 See note 87 above at p 12. According to Litton VP, who seemed nevertheless prepared to rule out plaintiffs' claim in relation to adverse possession even in the absence of proper findings of fact, see pp 13-14.

98 *Id*, p 17.

99 During the administration period a beneficiary has an inchoate right in the assets of the estate which is transmissible and can be disposed of *inter vivos* before the grant. Clive V Margrave-Jones, *Mellows: The Law of Succession*, (London: Butterworths, 5th ed., 1993) at pp 415-417. However, it can be argued that the reasoning does not apply to the present case where there was never any administration whatsoever.

100 See note 87 above at p 18.

101 *Id*, p 17.

102 *Id*, p 20.

transaction was fed by part performance by the purchaser King-yip.[103]

It is understandable that the majority[104] of the Court of Appeal was concerned that the general law of property and conveyancing was universally adhered to, and that "the law is no respecter of persons" and makes no exception for people "living in a remote village" who happen to be ignorant of the law.[105] However, this decision amounts to an almost definitive example of the statute being used as an instrument of fraud. It was not disputed that the deed of conveyance was valid according to the expert witness on Qing Law. There can be no doubt about the details of the 1934 conveyance. The property was clearly identified, even the details of the manner in which the transaction was concluded was noted in the deed.[106] The transaction could be confirmed by at least 3 persons: the middleman who arranged for the parties to meet, the witness to the transaction and the writer of the instrument. King-yip paid in full the current market price, and the testimony given by different witnesses in court was consistent. The customary practice in this case provided a fully self-regulatory system, but the plaintiffs were penalised and deprived of their property because they failed to notice the niceties of the statutory requirement. The plaintiffs were perfectly entitled to assume that their father King-yip acquired a good title to the land in 1934, because this was exactly what they would have obtained according to Chinese customary laws, which are what the NTO aims to preserve. As noted by Litton VP, when the defendant applied to the Land Office to be registered as the successor to the estate of Wu Shang, King-yip, in his capacity as the village representative, signed the written notice posted at the village giving notice of the defendant's application and inviting objections to the succession.[107] Litton VP apparently considered this to amount to King-yip's acquiescence of taking the property subject to the defendant's interest, because otherwise King-yip should have "required the defendant to make some form of written acknowledgment of [King-yip's] interest"[108] before signing the notice in support of the defendant's application. However, it is equally arguable that it is unfair to require King-yip to consider inserting such a caveat, because it was entirely reasonable for him to be confident that he safely had the full title to the land in his hands.

It is interesting to note that Shang was registered as a successor beyond doubt solely to allow the Land Officer to straighten out the records on the register for the purpose of distributing the compensation money for government land resumption. The registration was probably done in great haste and without careful investigation into the relevant titles to the land. It is highly unlikely that the Land Officer was aware of the 1934 transaction at all, especially when it was never duly registered. Indeed, the fact that the registration of Shang as a successor under s 17 took place some 10 years after the death of his father seems to suggest that, but for this spring cleaning of Land Office records in 1951, Shang was no more aware of the statutory structure of registration than King-yip or the plaintiffs. Although Hong Kong is by no means vast, the nearest Land Office was in Tai Po, which is practically at the other end

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[103] *Id*, p 21.

[104] It may be of interest to note that the dissenting Liu J, who recognised the Chinese customary conveyance in 1934 despite Hung-chi's 'lack of title to sell' for the sole reason of failure to register as a successor according to English general law of property, also happened to be the only Chinese judge in this Court of Appeal.

[105] See note 87 above at p 5 per Litton VP.

[106] *Id*, p 4.

[107] *Id*, p 9.

[108] *Id.*

of the territory. The judge was doubtlessly correct when he noted that, in 1934, it required a whole day's journey from the Tai Lam Chung village (where the property in question is situated) to the Tai Po Land Office, and that it was "not uncommon for villagers to conduct land transactions without attending the District Office".[109] It is arguably unfair to penalise the plaintiffs' family for following the village norm as much as the defendant's family did.

However, the alternative solution is also less than perfect. Had the decision been in favour of the plaintiffs, it would mean that the defendant, the present registered owner of the land, would be holding the land in trust for the plaintiffs.[110] This would be an extremely awkward incident of an English trust giving effect to a land contract valid only according to Chinese customary law. The plaintiffs then would be allowed to have their cake and eat it: English formalities relating to land transactions do not apply when it comes to the upholding the validity of the unregistered deed of conveyance, which as a land contract was not signed by the vendor, but then English law does apply when it comes to imposing a trust on the defendant who possessed the legal title to the land. As remarked by Cheung J,[111] there are cases "where east and west simply do not meet". It seems that the main cause for all the uncertainties and confusion is that judges and lawyers alike tend to oscillate from English law to Chinese customary laws, whichever seems convenient as an *ex post facto* means of justifying their decisions or arguments. Perhaps the best solution lies in adhering to one system and applying the rules of that system consistently.

As opposed to the *Wu* case (discussed above), which concerned "individually owned" land,[112] the dispute in *Li Tang-shi*[113] *v Li Wai-kwong*[114] concerned *Tso* land, or at least what seemed to be so. The facts of the case are as follows. At the time of his death in about 1908, Li Wah Fuk was registered as the owner of some landed property, consisting of paddy fields and some houses in the New Territories.[115] The land was therefore the 'personal' property of Li Wah Fuk, i.e. not subject to any *Tsos* or *Tongs*. Li Wah Fuk died with no sons to succeed him. In 1912 the widow plaintiff in the present case, and two other men bearing the surname Li were registered under s 15 of NTO as trustees of the property, which was described in the Instrument as Li Wah Fuk *Tso*.[116]

According to the Chinese custom, if a man owning land died intestate leaving a widow but no male issue, the widow, as a woman, could not succeed to the property, but she was entitled to the income generated by the land pending the adoption of a successor. She had the right (and, arguably, duty[117]) to adopt a male successor. An important qualification to her discretion in choosing such an heir is the requirement that he "must be the nearest relation of agnatic descent from her deceased husband. [The successor] must bear the husband's surname

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109 *Id*, p 6.

110 It would simply be far too bold to argue that the records at the Land Registry are meaningless nonentities, even if sometimes this may actually well be the unfortunate reality.

111 *Tang Yau Yi Tong v Tang Mou Shau Tso*, note 61 above.

112 So far as this concept of individual ownership is compatible with the Chinese customary setting, as discussed at note 56 above.

113 The 'name' of the plaintiff literally means that she is "a woman originally from a Tang family who is married into and now belongs to the Li family". It is possible that she has a different maiden name on her documents of identification.

114 See note 44 above.

115 *Id*, p 369.

116 *Id*, p 370.

117 D. M. Emrys Evans, *The Widow Who Would Not Adopt* (1971) 1 HKLJ 84 (hereafter "*WWNA*") at 84.

and be of the proper generation."[118] Although "no one can dictate to her whom she adopts",[119] her right to choose may in practice be severely limited if there are only a few eligible candidates. There is no time limit imposed on the widow for an adoption to be made; indeed no heir was adopted for 60 years in the present case, and there seemed to be no incentive for the widow to do so speedily.[120]

As the other two male trustees passed away, the plaintiff remained as the sole trustee in 1939.[121] It is not difficult to imagine the family's disapproval of the widow's exclusive legal control of her late husband's property, the result of her tardiness in adopting a successor.[122] In 1959 the first defendant[123] applied to the District Office to have a statement registered to the effect that he had "an interest in the *Tso*",[124] and that the property could not be sold or mortgaged without his consent. The basis of his claim was not clear, but possibly on the argument that he was the first cousin once removed from Li Wah Fuk,[125] and hence he was the only person eligible to be adopted as the successor. The argument is rather suspect[126] because the first defendant was not born until 19 years after the death of Li Wah Fuk, although this is nevertheless technically possible. The District Officer refused his application.[127]

The defendant applied again in 1965, this time to a new District Officer, to be registered as an additional manager. Considering the interests of the *Tso*[128] and that the defendant was the last of the line of Li Wah Fuk,[129] the District Officer granted the application. However, this appointment was held in the present case to be invalid on the ground that a District Officer had no power under s 15 to appoint additional managers: he could only

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118 [1969] HKLR 367 at 371.

119 *Id.*

120 As a widow is entitled to the income of the land pending adoption, it should not be surprising that she had no interest to make an adoption, thereby diverting the income away from herself to the adopted successor, even if she is entitled to be maintained for life by the heir as part of the *quid pro quo* arrangement.

121 No reasons were given to the court why the two deceased trustees were not replaced by 2 new trustees, note 118 above at p 377.

122 Evans, *WWNA*, note 117 above at p 84.

123 "The Attorney-General was made a second defendant, apparently because of the allegations of wrong-doing (in the technical sense) on the part of the officials of the Land Office, namely their alleged wrongful appointment of the first respondent as a joint manager followed by their alleged wrongful removal of the appellant [the plaintiff]." per Mills-Owens J, [1969] HKLR 629 at 632. Since the discussion will focus on the dispute between the plaintiff and the first defendant, the latter will hereafter be referred to as the "defendant".

124 *op cit.* note 118 above at p 377, but note that the judge later said that the defendant actually claimed only "an interest in the present management of the *Tso*" at p 379.

125 According to a meeting of the elders of the Lis, the family tree apparently started with the great grandfather of the defendant, who is also the grandfather of the deceased Li Wah Fuk. see *op cit.*, *id* at pp 377-378.

126 But this is apparently nevertheless accepted without dispute in the case, *id* at p 369.

127 The process of arriving at the decision in 1959 was very complicated and will not be discussed here. *Id* at pp 377-380.

128 The District Officer granted the defendant's application considering that (i) the plaintiff had at least once dealt with the land unilaterally without consulting the elders; (ii) she was then very old and could not even be found; and (iii) it was thought that there would be no danger of disintegration of the *Tso* in appointing the defendant as an additional manager: the elders will still have to be consulted and the two managers would have to act together when making decisions relating to the *Tso*. *Id* at p 382.

129 This view was shared by the elders of the village and the Li clan, *id* at pp 381-382.

remove an existing manager and then replace her/him with a new one.[130]

Two years later, the defendant successfully applied to remove the plaintiff from the managership of the *Tso*, the reasons given being that she failed to fulfil her customary duties in relation to grave-sweeping ceremonies, payment for the re-internment of certain Li ancestors, etc., although arguably these were duties in the plaintiff's capacity as a widow and not as a manager of the *Tso*.[131] Urged on by the defendant to make a quick decision, the District Officer decided the matter in favour of the defendant unilaterally without hearing the plaintiff's version of facts.[132]

The plaintiff brought the present action to challenged the validity of this decision of the District Officer's, arguing that the landed property in question had never been the family land of the Lis, and that in effect she was the sole beneficial owner of such "personal" property. Briggs J held that the District Officer's decision to remove her from managership was null and void on ground that it contravened requirements of natural justice. He also held that the fact that the property was registered as a *Tso* under s 15 NTO was conclusive indication that the land was family and not personal land, and dismissed the plaintiff's claim to beneficial ownership. Consequently the plaintiff remained as the sole trustee of the *Tso*, in which the defendant had no recognised interest.

This case is interesting for the issues it raises. For instance, the case once again showed that it is not easy at all to fit the Chinese customary system into the English legal framework. One example is that the judge, who was probably not versed in the niceties of Chinese family relations, was therefore in no position to challenge the defendant's claim that he was the only eligible candidate for adoption according to the complex family tree, even though he was somewhat sceptical and did not consider the evidence "very satisfactory".[133] However, more significantly, the case provides a valuable opportunity to discuss the precise nature of the *Tso* — the most mysterious aspect of the case.

As discussed above,[134] a *Tso* is usually established posthumously so that land is set aside to generate income for the filial purpose of venerating the deceased ancestor according to the Confucian tradition. Such land is communally owned by its members and does not form

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130 *Id*, p 383. Arguably this narrow and overly literal interpretation of s 15 is artificial and absurd. It is artificial and arbitrary in that a District Officer is allowed to remove a manager and then appoint a new one, but not the other way round, the result of which is the same anyway. The consequences are absurd: it is surely in the family's interest, if matters are still unclear, to have an additional manager so as to render unscrupulous dispositions by present manager(s) more difficult.
As against this, however, it can also be argued that appointing additional managers to a *Tso / Tong* may have far-reaching impact, e.g. that advantageous dealings in the land may be unnecessarily hindered as the consent of an additional person need to be procured, and should not be inferred lightly unless there is the strongest indication in the wording of a provision in an Ordinance.

131 *Id*, pp 371 and 383-384.

132 It is interesting to note that Briggs J's remark that he was "at a loss to understand the need for haste at that stage. The matter had dragged on for a very long time and a few more days would have made no difference. Such a further delay would not affect the first defendant who anyway ... was [apparently] collecting certain of the *Tso* rents." (*id* at p 388) The most obvious possible motive on the part of the defendant that springs to one's mind is that he was anxious to remove the plaintiff whose consent to some lucrative transaction with some third party was necessary (as a co-manager) but not forthcoming, especially when the once relatively worthless "paddy fields" as Li Wah Fuk left them when he died in 1908 had become far more valuable in the ever-escalating land market.

133 *Id*, p 390.

134 *Id.*

the personal property of any individual as such. However, it is doubtful whether these consequences were intended by the Li family when the land was registered as 'Li Wah Fuk *Tso*' in 1912. It is possible that the trustees were appointed not to serve purposes of ancestral worship but solely to prevent the young widow from alienating the land. Indeed this was part of the argument put forward by the plaintiff when asserting that the land was never family land in the first place and that she was beneficially entitled to it.[135] The judge dismissed the plaintiff's argument by rightly describing the arrangement as unnecessary, as it would in any event be impossible for the widow, who could not succeed to any land, to execute a sale on her own.[136] However, granted that the second half of the claim, that the widow was beneficially entitled to the land, was doomed to fail in the light of the general Chinese customary prohibition of women owning any land, it seems that Briggs J failed to give due consideration to the first limb of the plaintiff's argument in relation to the true purpose of the whole arrangement with respect to the land.

As accepted by the judge, the land in question was originally the *personal* property of Li Wah Fuk when he died.[137] There was apparently no evidence that the land was intended to be set aside in the name of a *Tso* so as to allow male descendants to have successive life interests in the property. Indeed, it is doubtful as to *who* could have been entitled to make the decision of settling the property as family land under a *Tso* in the first place. It is not clear at all which of the family members possessed a sufficiently strong interest in the property to have such power to make such an important decision affecting it, when there were no sons of Li Wah Fuk and a successor had yet to be adopted. Another question of *when* this decision was made is equally difficult to answer, as there was no evidence of any family discussion meetings to the effect. It is important to note that a *Tso* is not merely a suffix to the name of a deceased person.[138] It does carry significant and presumably irrevocable consequences in that the beneficial interests capable of subsisting in the property would be forever altered. Hence the establishment of a *Tso* should not be lightly inferred unless the circumstances are unequivocal.

On the contrary, all the circumstances of the case suggest that the "*Tso*" was only meant to be an interim arrangement whereby the land would be managed by the widow which would end when an heir was adopted by the widow and succeeded to the land.[139] The family did not appear to be worried in the least about the veneration of Li Wah Fuk; their main concern seemed solely to relate to the adoption of a successor. When the defendant requested the District Officer to cancel the appointment of the plaintiff as a manager, the most important reason relied upon was that the plaintiff neglected her duties of ancestral worship as the widow of Li Wah Fuk, not in her capacity as a manager of the *Tso*.[140]

Indeed, arguably the registration of the property as a *Tso* under s 15 of the NTO was most inappropriate. Not only are the perpetual nature and purpose of ancestral veneration of a *Tso* contrary to the intentions by the parties in the present case, the statutory powers of a trustee are incompatible with those of a widow pending adoption of successor. S 15 confers

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135 *Id, op cit* at p 374. See also Evans, *WWNA*, note 117 above at p 88.

136 *Id*

137 *Id* Note again that the notion of 'personal' property is inherently qualified by custom.

138 *Id,* p 375.

139 Evans, *WWNA*, note 117 above at p 88.

140 Remarks of Briggs J, *op cit,* note 118 above at p 383.

on the widow-trustee a power of sale, albeit a fettered one,[141] which she would never otherwise acquire.[142] Under customary laws, she would at most be allowed to manage the land or collecting rent, before an adoption was made. Moreover, such a power of sale defeats precisely the whole purpose of the arrangement, namely to prevent alienation and keep the land intact within the family before a successor is adopted. In fact this establishment of the *Tso* rendered it even more difficult, if not impossible, for the rest of the Li family to intervene in the event of the widow recalcitrantly selling the property. As suggested by various dicta,[143] only members of the *Tso* can have a say in its management. Even if arguably the dicta should not be taken at face value out of context, there can be no sensible justification for allowing non-members to interfere with the management or sale of *Tso* property. If this conclusion is acceptable, the fact that Li Wah Fuk had no sons and no adopted successors created particular difficulties for the Li Wah Fuk *Tso*: it had no members. The widow was therefore put into the perfect position to be recalcitrant: theoretically speaking no one was entitled to oppose her dealings in the land after the death of the other two trustees. However, in practice, she may not be as absolutely unimpeachable because the District Officer might well feel inclined to withhold his consent in the light of objections from the family, even though they may be non-members. Nonetheless, it is hard to imagine that the family intended to totally depend on the District Officer's sympathy in regulating the plaintiff's dealings in the land when they could exert more direct pressure on her merely as a widow managing the personal landed property of her deceased husband.

It follows from the above discussion that perhaps what was intended by the family when Li Wah Fuk died was not the establishment of a *Tso*, in any event not a *Tso* as commonly understood. It is possible that such a designation of the temporary pre-adoption arrangement as a *Tso* was not challenged in the present case only because it was very briefly mentioned by Mills-Owens J in the *Tang* case (1970) that "it appears... that in some circumstances" a *Tso* may also be formed this way.[144] The judge's casual reference to 3 possible ways of formation of a *Tso* has been faithfully and uncritically adhered to beyond reason by subsequent judges as the ultimate threefold classification.[145] It is therefore arguable that such *temporary Tsos*-pending-adoption are actually not registrable under s 15 of the NTO because they do not constitute "clan, family or *Tong*" land at all, and that the various dicta affirming that the *Tsos* are registrable and require registration should be restricted to the *perpetual Tsos* as commonly understood. Alternatively, if the Ordinance intends that all *Tsos* are to be treated alike, then the property of Li Wah Fuk should not be registered as a *Tso* at all in 1912, precisely because it falls outside the descriptions of a *Tso* in every sense. In fact a lot of confusion and dispute could have been avoided but for the fact that most of the District Officers are not versed in the niceties of the customary laws as adapted within the statutory framework, and they are thus not in a position to advise the villagers not to register the land as

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141 Notices would have to be published and the consent of the District Officer has to be obtained, see s 15 of the NTO.

142 Evans, *WWNA*, see note 117 above at p 90.

143 *Tang* case 1970, note 20 above at 320: "On the occasion of any intended dealing it is the practice of the Land Officer to give public notice thereof inviting objections from *members of the Tso*"; and *Kan* case 1987, note 23 above at 537C: "the sale of *Tso* property required unanimous consent of all *Tso members*" (Emphasis added).

144 *Tang* case 1970, *id* at 281.

145 *Tang* case 1995, note 61 above.

a *Tso*.[146] Indeed, it was suggested that such an appointment of the widow as a "management trustee for an unascertained individual"[147] should not require "the registration and protection procedures of the Ordinance";[148] the system adequately provides for its own regulation already.

Legal nuances aside, the practical results of the decision in the *Li* case were most unfortunate. The defendant, who was — at least in the absence of evidence to the contrary — the only possible successor eligible for adoption, was denied any interests in the property. It became even less likely that he would be adopted by the plaintiff widow shortly after the trial, particularly in view of the fact that the two parties must have been in a rather bitter deadlock for the case to have come to court in the first place. He thus would not be able to acquire a beneficial interest in the land until after the death of the plaintiff, if at all.[149] On the other hand, the property meanwhile was put in the hands of an old lady in her eighties[150] who was in a very poor state of health. Indeed she was not well enough to even give evidence at trial, and appeared for merely a few minutes probably only to dispel any suspicion that she no longer existed.[151] To make matters worse, nobody knew of her whereabouts. "For a long time the plaintiff could not be traced;"[152] she gave no address on the writ other than that of her solicitor's.[153] Even though all the circumstances suggested that she was "no longer fit to be the manager of the *Tso*",[154] according to the custom she could not be removed from the management merely because she was old and incapable. However, it was possible that the District Officer considered this a "good cause" to exercise his statutory powers to replace her under s 15 of the NTO.[155] Yet all this chaos would not have ensued but for the mysterious and unexpected metamorphosis of the personal property of Li Wah Fuk into family '*Tso*' land, the far reaching and irrevocable consequences of which were probably not intended by any of the parties involved and suited nobody's purposes. It seems that an overhaul to the operation of the NTO is long overdue.

V. Possible Solutions to the Total Legal Chaos

It emerges from the above discussions that the law relating to succession to land in the New Territories is in a dire need of a comprehensive overhaul. Identifying the precise legal position under the Chinese customary laws preserved by reason of the NTO "can be a perfect

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146 The consequences of this cannot be overlooked, because the Land Registration Ordinance (Cap 128) apparently has no provisions empowering the court to rectify any errors (perhaps except in cases of fraud where the court exercises its inherent jurisdiction, since "fraud unravels everything", as remarked by Lord Denning MR in *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 at 624F), however grave and unjust, on the register, and the Registrar has no obligation to verify all the details contained in an instrument before registering it.

147 Note the similarities with exhaustive discretionary trust in English law.

148 Evans, *WWNA*, note 117 above at p 90

149 Per Briggs J, *op cit* note 118 above at 390

150 According to one witness, "the plaintiff was only about twenty when she lost her husband [in 1908]." *id* at p 375. So the plaintiff must be around eighty years old when the case was heard in 1969.

151 *Id*, p 370.

152 Per Briggs J, *id* at 384. See also note 128 above.

153 *Id* at 369.

154 *Id* at 388.

155 *Id*

nightmare even for experts",[156] mainly because there is no authoritative source for such archaic customs. Such cases were "almost always lengthy, complex and perhaps sometimes interminable".[157] The two cases discussed above also demonstrate how awkward and unfair this complex co-existence of English common law and Chinese customary laws can be.

The system is also manifestly discriminatory against women as they are deprived of the right to own any land solely because of their gender.[158] Although the statute *itself* does not expressly prohibit women from inheriting land *per se*, especially where the deceased had made a will,[159] the *practical effect* of the statute is nevertheless discriminatory. Since the general intestate succession laws do not apply to the New Territories, the resulting default position is that under Chinese customary laws only men are allowed to succeed to land in the absence of a valid will, and this is incompatible with the principle of sexual equality. This has especially significant practical consequences when it is estimated that hardly 10% of the population makes a will.[160] In any event, it is undeniably absurd that such feudal customary laws which date back to at least the Qing dynasty overthrown in 1911 and blatantly prejudice against women are preserved in Hong Kong, a most modern and advanced city where sexual equality is respected in most other respects.

Despite such legal and social complications persisting in the New Territories regime, the government remains unperturbed. The over-optimistic approach of the government and lawyers alike can be best summed up as such: "Time cures... the inheritance issue and other inequalities will diminish as society develops."[161] Indeed when the Strickland Report proposed to reform, *inter alia*, the law of intestate succession, the government regrettably gave in to the strong lobbying of the Heung Yee Kuk,[162] a statutory organisation of indigenous residents established in 1926[163] whose role is to advise the government on New Territories matters. As a result, the New Territories was immune to the various radical family property legislations in 1971.[164]

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156 "NT Sex Discrimination with Official Backing", *South China Morning Post* (hereafter as '*SCMP*'), 7 August 1990, p 17.

157 "Watchdog Lashes Out at 12-Year Legal Delay", *SCMP*, 5 May 1995. The Legal Aid Department took 12 years to decide whether to take on a case involving a New Territories *Tso* land dispute, the complexity of the case being a major reason.

158 Cheng Lai-sheung, the leader of the Anti-Discrimination Female Indigenous Residents Committee, is a typical victim of the system. Her father died intestate in 1984, and her brothers inherited all his land and six houses to her exclusion according to the customs. Cheng's brothers sold the building in which she lived in 1992, and Cheng has been harassed to move out by the developers who bought the property. See "Hong Kong Clans Fight Land Rights For Women", *Independent on Sunday*, 26 June 1994, p 14; "Hong Kong Women Fight Tradition Over Land Rights", *SCMP*, 6 May 1994. No doubt such eviction by harassment is illegal, but it is not easy to show that the developers are ultimately the responsible party.

159 Carol Jones, *Addendum to Part V of the Report of the Hong Kong Council of Women and the Third Periodic Report by Hong Kong under Art 40 of ICCPR* [International Covenant on Civil and Political Rights], unpublished; Carol J Petersen, *The Green Paper on Equal Opportunities for Women and Men· An Exercise in Consultation or Evasion?* (1994) 24 HKLJ 8 at 14.

160 "Where There's No Will There Will Still Be A Way", *SCMP*, 25 June 1994, p 1.

161 "Politics and Equal Rights - Inheritance", *SCMP*, 17 April 1994, p 17.

162 Literally meaning 'The Consultation Group on Rural Affairs'.

163 "Heung Yee Kuk Control Wavers", *SCMP*, 21 October 1990, p 9.

164 See the savings provisions in relation to New Territories land in Intestates' Estates Ordinance (Cap 73) s 11, Probate and Administration Ordinance (Cap 10) s 75, and Deceased's Family Maintenance

A. The First Attempt at Reform

An initiative to reform eventually came when the Bill of Rights[165] was proposed and debated in 1990. The proposed reform, however, was naturally not aimed at curing the mischief of the co-existence of the Chinese customary laws and the common law. The predominant view was that the customary male-only succession laws would be incompatible with Articles 1 and 23 of the Bill of Rights, which prohibit discrimination on the grounds of sex. The Kuk boldly but unsuccessfully requested that the custom of male-only succession be exempt from the Bill, with an ingenious argument that the inevitable litigation as a result of any reform of the customary laws — which would at most affect 6% of the total Hong Kong population — would create considerable social disorder.[166] Nonetheless the customs survived intact and were never declared unlawful by the courts, because the final version of the Bill is only binding on the government; relationships between private parties were excluded from its scope.[167] Reform of the customary succession laws was therefore once again postponed.

B. The Second Attempt(s) at Reform

The next initiative to reform came when the Housing Authority realised in June 1993, to the horror of the public and to the great embarrassment of the government and the legal profession, that its Home Ownership Scheme ("HOS") housing estates in the new satellite towns in the New Territories were actually subject to Chinese customary laws, by reason of the sweeping wording of the NTO. The government overlooked the fact that the actual scope of the NTO is not, as commonly misconceived, confined to the rural indigenous villages, and has therefore failed to grant the necessary exemption under s 7 of the NTO.[168] An urgent solution was thus necessary to remove the doubts over the rights of succession to some 340,000 properties, including private and HOS flats and other commercial and industrial developments on non-rural land in the New Territories.[169] Many of the non-indigenous owners of such properties would have taken equal succession rights for men and women for granted and assumed that the general laws of Hong Kong would apply. Accordingly they ought not to be bound by customary laws to the contrary, particularly when most of them were not even aware of the customary regime. Given the sky-high prices for land in Hong Kong, the consequences may be drastic: many women may be deprived of a substantial part of their savings of their whole life if they can never own or succeed to their matrimonial home to whose purchase price they contributed.[170]

Ordinance (Cap 129) s 2.

165 Which later became Hong Kong Bill of Rights Ordinance (Cap 383), enacted in 1991. It was said to be an attempt to restore the confidence in the community after the suppression of the pro-democracy movement in China in June 1989. For more information on this, see Andrew Byrnes and Johannes Chan, *Public Law and Human Rights - A Hong Kong Sourcebook*, (Hong Kong: Butterworths, 1993) p 215.

166 "Heung Yee Kuk May Oppose Bill", *SCMP*, 17 May 1990, p 5; "Legco Could Extend Freeze On Rights Bill", *SCMP*, 19 July 1990, p 5.

167 Hong Kong Bill of Rights Ordinance (Cap 383) s 7.

168 Hon Rev. Fung Chi-wood's speech, *Hansards 1*, note 13 above at p 233.

169 Hon Mr. Edward Ho's speech, *Hansards 2*, note 6 above at p 4539.

170 Hon Mr. Albert Chan's speech, *Hansards 1*, note 13 above at p 250.

Although s 7 of the NTO provides for a mechanism to apply for exemption from the Ordinance, it was mainly intended to be used by the developer when the government is drawing up the terms of the lease. After the individual flats in the multi-storey buildings are sold to the public, it is almost impossible to get all the owners of the undivided shares in the lease to apply jointly to the government, especially when they may not all meet the same conditions to qualify for the same exemption.[171] Moreover, such complex and time-consuming administrative measures would have no retrospective effect, and thus do not provide a comprehensive solution.

The only sensible option therefore seemed to be to retrospectively exempt the leases of non-indigenous land by legislative means. Although it may be dangerous to set such a precedent of legislative retrospectivity,[172] such a risk seemed to be well justified by the gravity of the matter and the need for expediency in the circumstances. Anxiety over litigational floodgates was quite unwarranted,[173] as such retrospective exemption would merely correct a legal aberration and restore the original position as presumably intended by all those affected:[174] it is only about ratifying the current practice, not recrimination.[175] At the same time, it can also avoid the NTO being used as an instrument of fraud by people previously unaware of the regime who found it convenient to subsequently rely upon the customary succession laws and defeat the claims of widows and daughters of the deceased property owner.[176]

It is important to note that the reform was initially intended to be confined to non-rural land only,[177] solely for the purposes of rectifying the government's omission to exempt the leases for the new towns in the New Territories. It was not the objective of the original motion to promote sexual equality in the New Territories by a sweeping repeal of the customary succession laws. However, apparently only six of the twenty-five Legislative Council ("Legco") members who spoke at the Legco meeting appreciated this limited scope of the reform:[178] the rest seemed to have proceeded on the mistaken basis that the new legislation, thought to be inspired by the principle of sexual equality, would apply to all rural and non-rural land in the New Territories.

Although it may be disquieting, if not totally surprising, that the legislators were not fully aware of the scope of the motion being discussed, the debates were at least important for educational purposes. Although no attention was drawn to the legal complexities of the NTO regime — the topic of technical legalities indeed never proved to be politically attractive as an powerful vote-winner — the debates generated wide public discussion about the underlying principle of sexual equality and promoted public awareness of the situation in the New Territories in respect of land succession rights. It was against this background that the reform of customary laws eventually gained its critical momentum, and resulted in Hon. Ms Christine Loh's proposal to amend the motion in January 1994 so as to extend it to rural land as well.

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171 Hon Rev. Fung Chi-wood's speech, *Hansards 1*, *id* at p 234.

172 Hon Mr. Frederick Fung's speech, *Hansards 1*, *id* at p 236.

173 *Id*, p 237.

174 Hon Mr. James To's speech, *Hansards 1*, *id* at p 262.

175 See note 168 above at p 275.

176 A classic example of such use of the statute as an instrument of fraud can be seen in the *Wu* case.

177 See note 168 above at p 232.

178 See the speeches of Hon Mr. Tam Yiu-chung, Hon. Mrs. Peggy Lam, Hon Mr. Jimmy McGregor, Hon Mr. Simon Ip, Hon Mr. Henry Tang and Hon Mr. James To, *Hansards 1*, *id.* at pp 241, 244, 248, 252, 260 and 261 respectively.

The strongest argument supporting this amendment was that such flagrant disregard of the principle of sexual equality, as demonstrated by the male-only succession customs, is simply intolerable in a modern society like Hong Kong in the 1990s. Given that Hong Kong has developed and changed beyond recognition in the last century, customary succession laws dating back to at least the last imperial dynasty are certainly anachronistic and ought to be repealed. A strong indication of the public commitment to sexual equality can be found in the Basic Law, the mini-constitution of Hong Kong to come into operation after the 1997 handover. It adopts, as part of Hong Kong's future domestic law, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,[179] and women's equal rights in all social matters are thereby protected.[180] It is surely wrong, even if possible, to stop the natural and inevitable movement of equality.

In addition, the economic and social justification of the preservation of Chinese customary laws have disappeared. Rural and urban land alike are *both* now mainly an important form of capital, to be traded on the market like any other commodity.[181] Land is regularly sold to non-clan people, even though this is not allowed under the strictest customs. It seems that 'outsiders' are allowed to intrude into clan premises as long as they have got the money. If the indigenous people can accept 'Western' free market capitalism, they certainly cannot consistently oppose the equally 'Western' concept of sexual equality on the ground that this conflicts with their tradition of keeping family land intact within the clan. Furthermore, most of the indigenous land is no longer used for farming as it was decades ago.[182] Car parks, car dumps, open storage space for containers, together with construction sites for other commercial and industrial developments, have more than doubled since 1983 over some 15,000 hectares of land in the New Territories. Indeed such use (or abuse, to be more precise) of land caused such deterioration of the environment that the government sought to tighten the planning legislation in 1990, which again created much tension between the indigenous population and the government.[183]

A third argument supporting the universal reform is that the political basis of NTO will soon disappear. As discussed above, the NTO was probably no more than an exchange of powers between the colonial government and the indigenous landed squires in the New Territories. The indigenous people were offered various privileges and legal concessions, including the right to adhere to their own customs, in return for their support and recognition of the legitimacy of the colonial government. Such an exchange of power will surely have no role to play when Hong Kong ceases to be a colony and reverts to China in 1997.[184] Moreover,

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179 Article 39 of Basic Law. See also Article 25, which guarantees equality before the law for all Hong Kong residents.

180 Hon Mr. Martin Lee's speech, *Hansards 1*, note 13 above at p 241.

181 A typical indigenous village of the some 740 affected by the proposed reform is Ma Tin village in Yuen Long: "It has about 1,000 villagers and sits oddly juxtaposed next to the bustling town centre of Yuen Long [a satellite town in the western part of the New Territories]. It is serviced by the Light Transit Railway [a street tram service quite similar to the Dockland Light Railways] and its residents live in modern Spanish-style town houses and drive Japanese cars. Once occupied solely by the Tang clan, other clans have moved in over the decades... [T]oday Ma Tin village is home to seven clans." See "Behind The Battle Of Sexes", *SCMP*, 27 March 1994, p 12.

182 For example, the *Li* case discussed note 118 above, the land in question consisted of rice paddies when Li Wah Fuk died in 1908.

183 "The Farmers Fight Back", *SCMP*, 20 October 1990, p 17.

184 See note 172 above, p 45-46.

any concerns over requirements of a non-expropriation clause in an international lease will simply become irrelevant.

It may be interesting to note the timing of such long-awaited reforms. Although the various legal and social problems have persisted for decades and although various issues have been brought to the government's attention on numerous occasions, nothing has been achieved until just before Legco became fully open to election in 1995. Suddenly all the political parties and pressure groups became deeply interested in the issue and passionately joined the discussion of the reform, which would affect at most 6% of the population of Hong Kong. This is in stark contrast from the past practice of "discreet lobbying by government officials and other influential figures".[185] Although it may be objectionable how "politics has crept, like dust, into every nook and cranny of life in Hong Kong" and that the politicians' main concern may only be the latest opinion poll,[186] the development is at least healthy in that it helps to make the political process more transparent.[187] The fact that the issues were highly politicised also provided the critical pressure on the government to eventually abandon its inertia to properly address the issue of customary succession to rural land, albeit under the banner of sexual equality and not of clarification of the law. Whatever the motives behind the politicians, the extension of the reform is definitely welcome in that this legislative stone killed two birds: not only was it a long overdue attempt to address the issue of unequal succession rights between the sexes in the New Territories, it incidentally provided the perfect opportunity to spring-clean the legal uncertainty inherent in the application of archaic customary laws within the statutory framework.

C. Strongest of Opposition to the Reforms — the Heung Yee Kuk

Not surprisingly, the local interests, largely represented by the Heung Yee Kuk, strongly opposed the extension of the reform to rural land. Bitter protests and scuffles aside,[188] the Kuk was up in arms with firm and furious arguments against the new legislation. First, it claimed that the reform would destroy the indigenous traditions and customs, and that the clan system would thereby disintegrate. It insisted that respecting the customs and lifestyles of minorities was part and parcel of democracy.[189] It maintained that it was not for the government to interfere with the indigenous villagers' "domestic affair" of male-only succession and impose

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185 "Gender Wars", *Far Eastern Economic Review*, 7 April 1994 at p 21. An example of discreet consultation can be seen in the Government House conference between the then Governor, Sir David Wilson, and 5 Kuk members in relation to the Town Planning Ordinance (Amendment) Bill. See note 183 above.

186 See note 161 above.

187 See note 185 above.

188 Hon Mr. Lau Wong-fat, the chairman of the Kuk, once rightly commented that "[The] villagers are not exactly articulate in arguments. They sometimes express anger with violence." The rural residents without fail lived up to their "reputation for daring and violence", issuing threats of violence and rape to the female legislators who visited some indigenous villages, assaulting another legislator outside the Legco building during a protest and threatening to burn those legislators supporting the amendment. See note183 above; "Thousands Protest Against Law Changes", *Business Times* (Singapore), 29 April, 1994; "Threats of Violence Against Legislators Planning Rural Visit", *SCMP*, 24 March 1994, p 3; "An Ugly Blow Of Dissent Fells Legislator", *SCMP*, 23 March 1994, p 1; "Villagers Declare War On Plan To Change Inheritance Rules", *SCMP*, 4 April 1994, p 3.

189 *Hansards 1*, note 13 above, at p 243.

its Western values on them, particularly when their patrilineal system in no way prejudiced the interests of the rest of the Hong Kong population.[190]

Yet history alone is not to be given blanket protection: one must look at the heart of such traditions. Succession is not merely a custom; it is also a right, which incidentally can fetch a lucrative market. Where rights of individuals are involved, it becomes important that no one is unfairly discriminated against.[191] Indeed, it was the indigenous people, more than any urban 'outsiders', who were primarily responsible for the disintegration of the clan life-style. As mentioned above, it was they who allowed the rice paddies and fish ponds to be replaced by construction sites and junkyards for the storage of containers. "Those who have fragmented and sold their ancestral land to developers and used the proceeds to buy cars and overseas property have no right to speak of tradition."[192] Erosion of rural customs, caused by increasing emigration, urbanisation and the weakening of ancestral bonds,[193] began long before the motion was even tabled.

Moreover, the customary legal regime operated satisfactorily in the past because it was supplemented by a framework of social and familial obligations. Women back in the truly feudal days did not exactly need to have property rights in their own hands, because it was hardly conceivable that they would be evicted out of their own homes: "the *quid pro quo* was that the male clan members had to care for the widows or unmarried sisters, taking them into the family house."[194] However, as family values changed drastically over the years, many of the indigenous men no longer observe their social duties in return for their privileges according to the rules of the game. For example, a woman was reported to have been harassed by developers who purchased her home through her brothers after their father's death, with her as a sitting tenant.[195] Since the traditional framework broke down under new social circumstances, women need stronger legal protection. There is simply no justification classifying the matter as 'domestic' as an excuse to put it out of the reach of the rest of the population, who are just as much part of Hong Kong as the indigenous people.

The second major argument relied upon by the Kuk was that the manner in which land devolves upon the owner's death is purely a matter of personal choice and family arrangement. It was argued that the customary succession rules actually constitute the execution of an unwritten will of the ancestors, which has been observed through the generations and which genuinely reflect and realise the wishes and proprietary rights of the rural landowners. The government therefore has no right to suppress such private family arrangements by the new legislation, let alone under such a "pretence" of sexual equality.[196]

Yet this argument is a complete *non sequitur*. No doubt each person has the right to decide how his property is to be distributed after his death: the position is indeed the same in English law. The reform never purported to impose a manner of property distribution upon anyone against his wishes. The new legislation governs only *intestate* succession and as such comes into operation only when the deceased had not made valid provisions for his personal

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190 Hon Mr. Tam Yiu-chung's speech, *Hansards 2,* note 6 above at p 4544.

191 Hon Mrs. Selina Chow's speech, *Hansards 2, id* at p 4569.

192 "The Landed Classes Cling To Privilege", *SCMP*, 29 March 1994.

193 "Stopping The Clock On Equal Rights Is Wrong", *SCMP*, 30 July 1990, p 14.

194 "Hong Kong Clans Fight Land Rights For Women", see note 158 above.

195 *Id.*

196 "Kuk Issues Challenge On Laws Of Inheritance", *SCMP*, 10 May 1994, p 7; also Hon Dr. Tang Siu-Tong's speech, *Hansards 1*, see note 13 above, at p 268.

choice during his lifetime. Indeed arguably one of the main functions of law to provide a residuary fall-back position where the individuals concerned failed to make their own arrangements.[197]

The issue has since ceased to be a mere private family dispute when many indigenous women actually complained to the government and to the Legco members. It would then be wrong for the government to turn a deaf ear to their grievances.[198] If the verbal wills of the ancestors in relation to land succession were indeed to be observed, the indigenous villagers surely ought to observe with equal vigour and enthusiasm their ancestors' other unwritten instructions to uphold the Confucian family values and to care for their female relatives.

The Kuk's third main argument against the reform is that the government ought not to introduce legislations which are likely to be repealed after 1997, on the ground that the new legislation would conflict with the Sino-British Joint Declaration[199] and the Basic Law,[200] both of which guarantee that the rights of the indigenous people shall remain unchanged after the 1997 handover.[201] The internal conflict of the Basic Law, guaranteeing sexual equality on the one hand and preserving discriminatory customs on the other, is by no means easy to resolve.[202] Nonetheless, it seems unlikely that the Chinese government would repeal the new legislation, especially when China herself provided for equal succession rights by enacting the Law of Succession and the Law of Protection of Women's Rights in 1985 and 1992 respectively.[203] Neither will there be any political capital to be gained from the issue "once Britain is out of the way".[204]

The Kuk's final argument, that there had been insufficient consultation need only be mentioned to be defeated. The issues were doubtlessly widely discussed by the public in the eight months after the original motion was tabled. Moreover, the indigenous population, constituting at most 6% of the total Hong Kong population, can be but *over*-represented in the legislative process. Its chairman is necessarily a member of the Legco, and at least three other Legco members[205] are closely related to it. It seems that the problem was not that consultation was inadequate, but that the Kuk was dissatisfied that its views were not given full effect.

The controversy over the reforms was in fact far more than a conflict between feudal traditions and sexual equality. Large-scale urbanisation caused the rice paddies and fish ponds to be rapidly replaced by skyscrapers and expressways. As a result the price of land soared to

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197 The Intestate' Estates Ordinance (Cap 73) does exactly the same where the wills have failed for some technical reasons, or where the deceased died partly testate and partly intestate. D M Emrys Evans, *The Law of Succession in Hong Kong*, (1980) 10 HKLJ 19 at pp 58 and 66.

198 Hon Rev. Fung Chi-wood's speech, *Hansards 2*, see note 7 above at p 4557.

199 The relevant guarantee is contained in an annex of the Joint Declaration, which was signed in 1984.

200 Article 40 of the Basic Law states that "The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region."

201 The speeches of Hon Mr. Andrew Wong and Hon Mr. Lau Wong-fat in *Hansards 1*, note 13 above at pp 260 and 268 respectively.

202 Note the reluctance on the part of the Chinese government to make a definite statement on the compatibility of the two Basic Law provisions. "Lu Ping Interviewed On Inheritance Rights in Hong Kong,", *BBC Monitoring Service: Asia Pacific*, 21 July 1994. [Mr. Lu is the Director of the Hong Kong and Macao Affairs Office under the State Council.]

203 Hon Mr. Martin Lee's speech, *Hansards 1*, note 13 above at p 239.

204 "Inside Hong Kong - Old Fights New In Battle Of Sexes", *The Daily Telegraph*, 30 March 1994 at p 18.

205 Hon Mr. Andrew Wong, Hon Dr. Tang Siu-Tong, and Hon Mr. Tsim Pui-chung.

record-setting heights. The exclusive right of indigenous men to succeed to land became a "jealously guarded ticket to prosperity".[206]

In addition to the considerable economic stakes, the indigenous population also feared that the reform on succession rights might only mark the beginning of the slippery slope to the gradual erosion of their unique political privileges. The chairman of an indigenous village organisation is entitled to a seat on the district's rural committee. Each chairman of the 27 rural committees automatically becomes an ex-officio member of the relevant District Board. Most significant of all, the chairman of the Heung Yee Kuk, the most powerful New Territories group by far, necessarily becomes a Legco member. The right to vote in the above rural elections is one of many other privileges denied to women,[207] which may explain why the Kuk may not be in the best position to give an unbiased view of the sentiment relating to sexual equality in the New Territories.

In fact, the Kuk knew full well that its power and influence was gradually diminishing. The Kuk used to be heavily relied upon by the government for its local leadership in the New Territories; it literally controlled the area like a mini-government.[208] The Kuk provided an important source of regional stability in the politically uncertain 1960s and 1970s. The government also depended very much on the Kuk's support in the 1980s to persuade the indigenous inhabitants to sell their farmland for the development of the new towns. Back in those days, when the Kuk members were close allies with the government, many of them received British honours, ranging from Justice of the Peace to the CBE.

However, after the new towns have been successfully developed, the Kuk's support to the government became increasingly dispensable, and the government thus became less malleable to the Kuk's pressure. With the influx of urban population into the New Territories, the majority of which who moved to the new towns for the lower rents of public housing owing little allegiance to the elite group of landowners in the Kuk, the Kuk's indigenous supporters became only a small fraction of the New Territories population. Kuk's powers through its ex-officio members on the District Boards and the Regional Council further weakened as the proportion of elected seats gradually increased over the years in the democratic movement. The Kuk's inability to gather 'urban' support may also explain why the political parties saw no incentive in merging with them. Indeed various politicians won the Legco elections in 1991 without much support from the Kuk,[209] and the main political parties concentrated mainly on mobilising the support of the new towns. It is therefore understandable why the Kuk felt rather bitterly betrayed by the government, and why it tried desperately to resist the repealing of the peculiar customary succession laws and to cling onto every one of the remaining exclusive economical and political privileges, the Latin roots of the word 'privilege' coincidentally meaning "private law".[210]

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206 See note 204 above.

207 "Inquiry Launched After Women Banned From Village Election", *SCMP*, 9 February 1995.

208 "Kuk's Power On The Wane", *SCMP*, 27 March 1994, p 12; "Behind The Battle Of Sexes", note 181 above; "Heung Yee Kuk Control Wavers", note 163 above.

209 That the new legislation on succession rights was passed despite adamant resistance of the Kuk once again demonstrated the weakening influence of the Kuk.

210 *Oxford Advanced Learner's Dictionary*. (London: Oxford university Press, 5th ed., 1995).

D. The Outcome of the Reforms

Not surprisingly, the amended reforms, applying to rural and non-rural land alike, were passed smoothly in the Legco. Given the strong public sentiment towards sexual equality,[211] the critical political climate and the delicate timing of the reforms, no politicians dared to give less than full support to the reforms, which became almost synonymous with sexual equality. The Kuk had in fact lost the battle ever since it accompanied its arguments with violence, after which it lost almost all sympathy from the public and the media to their opponents.[212] Naturally, Legco simply cannot be seen to cave in to violence if it is still to command any sort of authority in the hearts of Hong Kong people.

The reforms successfully became law after a most emotional three-hour debate.[213] In order to allay the fears of the indigenous inhabitants over any outright abolition of customary law in one legislative stroke, the Secretary for Home Affairs stressed that the reform aims to deal with land succession only and that their other exclusive privileges, such as burial rights and rates exemptions, would remain intact.[214]

E. Impact of the Successful Reform

The New Territories Land (Exemption) Ordinance[215] ("NTL(E)O") came into operation on 23 June 1994. Under s 3 of the NTL(E)O, all land in the New Territories shall be deemed to be exempt from Part II of the NTO, which includes the all-important s 13 with regard to recognition and enforcement of customary laws. In relation to *non-rural* land, the exemption is deemed to be given *retrospectively* "for *any* purpose" as from the commencement date of the relevant Crown lease. Whereas in relation to *rural* land, the exemption is deemed to be given *prospectively* "for the purpose of *entitlement to rural land in succession... only*" as from the commencement date of the NTL(E)O.[216] This separate treatment of rural and non-rural land is welcomed since it serves to reflect the intentions of owners of non-rural properties by ratifying the current practice retrospectively and also strives to cause the minimal disturbance to existing titles to 'individually-owned' rural land.

However, the laws in relation to customary land trusts, i.e. *Tsos*, *Tongs* and any other clan and family land, will remain unchanged by reason of the savings provision in s 5 of the NTL(E)O. Although this may be regrettable from a legal point of view since difficulties and

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211 A Survey Research Hong Kong (SRH) poll, one of the most authoritative in the territory, revealed that 77% of the Hong Kong people supported the equal inheritance proposal. See "Confidence At Four-Year Low", *SCMP*, 9 May 1994, pp 1-5

212 "Behind The Battle Of Sexes", note 181 above.

213 The motives of the speech-makers are questionable. See the speeches of Hon Mr. Allen Lee, Hon Mrs Peggy Lam, Hon Mr. Alfred Tso in *Hansards 2*, note 7 above at pp 4542, 4548 and 4550 respectively.

214 Speech of the Secretary for Home Affairs, *Hansards 2*, *id* at p 4587; "Equal Inheritance Rights Endorsed By Legislators", *SCMP*, 23 June 1994, p 6. However, the fears of the indigenous people proved genuine indeed· the government issued a guideline on rural elections, stating that the "one person, one vote" principle should be observed. Although the guideline is not legally binding, the Home Affairs Department reserved the right to veto election results if the guideline is not followed, e.g if the women were excluded from the voting as according to the male-only tradition. See "Inquiry Launched After Women Banned From Village Election", note 207 above.

215 Ord 55 of 1994.

216 [All italics added.]

uncertainties inherent in the complex customary laws on such institutions will remain, it seems sensible and pragmatic to compromise rational legal development with the importance of not disturbing the present intricate trust memberships of *Tsos* and *Tongs*. Moreover, such trusts arguably involve a lesser element of land devolution. Very strictly speaking, they can be considered to be private unincorporated associations whose main purpose is incidentally the holding of communally-owned land. Therefore arguably there is less justification for the law to interfere into this relatively private matter and regulate the manner chosen by the members in which such 'society' membership is handed down, while other unincorporated associations are given almost complete freedom to handle their own membership matters. On the other hand, it may not be totally unreasonable for the law to intervene when their 'membership' rules are blatantly discriminatory. After all, the existence of these societies depend entirely on the special legal intervention exempting them from the rule against perpetuities.

Beyond the realms of *Tsos* and *Tongs*, the NTL(E)O indirectly brings the Intestates' Estates Ordinance[217] and the Probate and Administration Ordinance[218] into operation in relation to New Territories land freshly deemed to be exempt from the NTO. It is impossible to discuss here in detail the technicalities of the IEO/PAO mechanism, which has been in force in the rest of Hong Kong since 1971. Broadly speaking, the new law brings about two major changes to the position of the widow.[219] The first is in relation to the administration of estates. Under the previous law, the court usually would only ensure that the administration went to the right person, leaving the actual distribution to be governed by the customary laws. Under the 'new'[220] law, however, although the widow is equally entitled to apply for a grant of administration for her deceased's husband's estate, and equally has first priority for such a grant[221] just as before, she is now put into a considerably more favourable position. She now acquires the powers of a personal representative and consequently a formally unimpeachable right to administer the estate. Accordingly she becomes *de jure* the new head of the family, even to the exclusion of an adult son, a position she would never enjoy under the customary laws.

The second impact is in relation to the allocation of beneficial interests.[222] Unlike the customary laws which only allow the deceased's estate to be distributed among his closest male relatives, to the exclusion of his widow or daughters, the IEO gives priority first to the surviving partner to a valid marriage, the legitimate children next, the latter ranking equally regardless of gender. If the net estate of the deceased is below the statutory threshold,[223] the widow may then even take the whole of the estate to the exclusion of any children, a position impossible under the customary laws. Both aspects of the new legislation should, theoretically at least, considerably improve the position of the widow, thereby largely reducing discrimination against women in this context.

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217 Cap 73.

218 Cap 10.

219 Evans, *NLS*, note 13 above at p 35.

220 They are 'new' only in relation to the New Territories: they have been in force in the rest of the territories since 1971.

221 S 36 PAO.

222 Evans, *NLS*, note 13 above at p 37; Evans, *The Law of Succession in Hong Kong*, note 197 above at p 57.

223 A Law Reform Committee suggested raising the amount from HK$50,000 to HK$500,000.

F. The Winners and The Losers of the Battle

Since the battle was essentially not so much about the rights of the indigenous women as it was about politics, it came as no surprise that the main winners and losers of the battle were the main political players. Hon Ms Christine Loh "stormed" into the list of the ten most popular legislators in Hong Kong for the first time after she aggressively procured the extension of equal succession rights to rural land.[224] Joining the Legco through government appointment in 1992, she enjoyed a tremendous victory in the direct elections of Legco in 1995 (where for the first time all the appointed seats were abolished) in probably one of the most liberal geographical constituencies in Hong Kong.[225]

Another 'winner' was Hon Mr. Lau Wong-fat. Although he failed to convince the Legco with his arguments against the reform, he won the emotional support of the Heung Yee Kuk, not the least by walking out of the Legco building without finishing his speech,[226] partly out of frustration, partly as a local hero. He still remains politically active, as a seat in the Legco was reserved for him by reason of his continued leadership in the Kuk. Indeed he did not need the support of the general electorate, just as his fellow liberal politicians did not depend on the votes of the indigenous population.

What about the indigenous women, who are supposedly at the focus of the new legislation and are presumably rescued from the previous customary regime? Since the coverage of the developments diminished as the media's interest in the matter quickly waned, it is difficult to determine whether their position is significantly improved by the reforms. The limited reports seem to suggest that the indigenous women are in practice severely hindered from exercising their new inheritance rights by immense social pressure,[227] although of course it is always possible too that the women agreed not to exercise their freshly won rights in return for a share in the spoils.[228] Nevertheless, apart from obtaining an equal right to inherit land as their male counterparts, the women probably also acquired stronger bargaining power in family negotiations, because one of the men's most powerful weapons — the threat of eviction — has disappeared by reason of the reform.

VI. Conclusion

The long-awaited reforms in relation to land succession in the New Territories seemed to be of more symbolic than practical significance. It signified that the government eventually agreed to withdraw its legislative blessing given a century ago to sexually discriminatory practices in the New Territories, but this rare impetus to reform proved to be vulnerable to pragmatic considerations and left the customary land trusts, namely *Tsos* and *Tongs*, intact. Nevertheless, this limited reform under the banner of sexual equality also removed much of the inherent difficulties in identifying the century old customs practiced only by a tiny proportion of the population, and the laws relating to intestate succession to New Territories

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224 "Loh Storms Into Legco's Top 10", *SCMP*, 30 April 1994, at p 2.

225 She became a legislator representing Hong Kong Island Central. The Hong Kong Island was shown to be the most liberal area in an opinion survey reported in "Repeal Archaic Succession Law, Says Survey", *SCMP*, 30 July 1990, p 1.

226 "Equal Inheritance Rights Endorsed By Legislators", note 214 above.

227 "Women Denied New Land Right", *SCMP*, 18 April 1995.

228 As suggested in "The Landed Classes Cling To Privileges", note 192 above.

land is therefore much clarified. There will, at last, be no more oscillating between the two sets of incompatible legal rules leading to awkward and unjust decisions. Although some uncertainties still remain because of the preservation of the laws relating to *Tsos* and *Tongs*, this solution seems to be a realistic and sensible compromise.

Yet this limited reform was already sufficient to provoke bitter sentiments from the rural landowners. The Kuk was even reported to have issued a writ against the government, seeking a declaration that it was illegal for the government to pass legislation which alters their customary rights and interests.[229] When this ingenious act, if it actually took place at all,[230] seemed to be of no avail, the Kuk vowed to assist the indigenous men to sign a communal will, pledging to adhere to the customary inheritance practice.[231] Again, this apparently turned out to be another instance of the Kuk's wishful thinking, as collective wills are simply unknown to the law. Presumably what the Kuk had in mind was some sort of agreement between the indigenous men to draw up their individual wills, which all state that only their sons and/or other male relatives can succeed to their land. However, this is unlikely to circumvent the new legislation if a landowner failed to draw up his will in the agreed form. In the absence of such a 'customary practice adherence will', his land will still be devolved in the statutory manner. At the same time, it is unclear what sort of damages his fellow villagers can claim for breach of contract, if they can bring such an action at all, because strictly speaking they have suffered no losses.[232]

Although it is uncertain what further changes to the law will take place in Hong Kong when it is no longer a 'borrowed place', there appears to be no reason for the recent reforms to be repealed under the new Chinese regime, particularly when equal succession rights are protected by China's domestic laws. More importantly, it is certainly unsound to repeal the reforms and nullify the much needed accomplishments in terms of legal certainties brought to the law of succession.

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229 "Equal Inheritance Rights Endorsed By Legislators", note 214 above.

230 Indeed it seems incredible that the Kuk's lawyers would advise such a tactic.

231 "Moves to Counter Women's Land Rights", *SCMP*, 24 June 1994.

232 Except perhaps mental distress in the knowledge that the customary practice is not adhered to, which is hardly recoverable under the law of contract.

THE RIGHT OF ABODE IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

香港特別行政區的居留權問題

CATHERINE SIU KA-YIN*

For years before the Reunification, the issue of the right of abode rarely left the headlines. With a sizeable proportion of Hong Kong residents holding an overseas passport (or with the ability to obtain one), the fear of losing the cherished right of abode in Hong Kong was of great concern not only to the people, but also to the authorities on both sides of the border. The "brain-drain" effect was clear, with many of Hong Kong's best and brightest emigrating for the perceived safety of a second "home". In addition, political wrangling between Britain and China prevented any clear, bilateral solution to calm the jitters.

This exhaustive article, written in the last months of British rule, details the controversy surrounding the right of abode issue in the run-up to 1997. In particular, the political bickering and the underlying policy clash between Britain and China are scrutinised. The author analyses the nationality laws as well as the Basic Law in an attempt to find a long-term solution for the residents who also hold overseas nationality, an almost uniquely Hong Kong problem.

一直以來，有關香港特別行政區居留權的安排都引來不少爭議。雖然籌委會和一些中國官員曾就這方面發表意見，但對於港人在法律上的地位，還是存在著不少含糊的地方。

在文中，作者首先會從歷史角度追溯居留權問題的由來，並分析居留權和國籍的分別。她指出中英雙方對居留權問題的不同看法，從而討論那些移居海外的港人和在港的少數族裔人士在回歸後所要面對的身份問題，以及特區護照的國際地位等等。通過對居留權問題的探討，作者希望政府能就這問題向市民提供一個肯定的答案，讓所有香港特別行政區的永久居民都能享有同等的權利，共同邁向繁榮安定的目標。

I. Introduction

Uncertainty associated with the arrangements for the right of abode in the HKSAR has been, to a large extent, clarified as a result of recent discussions in the Preparatory Committee and the public expressions of opinion by various PRC officials on the issue. However, there is still a continuous debate on the legitimacy and practicality of the various proposed arrangements, for Hong Kong residents to be able to continue to enjoy their various rights, which are dependent on their classification as permanent residents.

This dissertation will examine the present confusion and uncertainty regarding the right of abode of the inhabitants of Hong Kong. The effects of the various nationality proposals on the arrangements for the transfer of sovereignty on the different interest will be addressed. It is hoped that this descriptive dissertation will provide a more comprehensive understanding of the

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imminent problem that the inhabitants of Hong Kong are faced with.

II. Background to the Present Problem

A. Uniqueness of the Problem

Fundamental to the issue of the nationality of the inhabitants and the right of abode in Hong Kong is the question of sovereignty. It is on this question of sovereignty over Hong Kong that Britain and China hold conflicting views, which created this unique problem.

The Opium Wars led to the Treaty of Nanking 1842[1] and the Treaty of Tianjin 1848[2], under which the Hong Kong Island and the Kowloon Peninsula were ceded to Britain. The New Territories were leased to Great Britain in the Convention of Peking 1898[3]. In all three treaties, no mention was made of the nationality of inhabitants, and there had been considerable doubt existing since the time of the acquisition as to whether the associated Chinese population were British subjects at all[4].

Conflicts between the Chinese and the British on the question of sovereignty stems from the irreconcilable views about these three treaties.[5] Britain regarded these treaties valid and binding, according to common law principles of international law.[6] Hence, she regards the people of Hong Kong as British nationals upon cession. However, China maintains that the treaties were unequal, forced upon her under military threat, and hence void. China asserts that she has never lost sovereignty over Hong Kong, and Britain has never held any valid title to the territory. It follows that the inhabitants of Hong Kong had never acquired any valid British nationality, nor could they retain one upon reunification: they had always been Chinese nationals. Although the two parties eventually resolved this conflict by avoiding direct reference to this issue of sovereignty in the texts of the *Sino-British Joint Declaration*,[7] no agreement could be reached on the related question of nationality and therefore, arrangements for the change of nationality were provided for in the two separate memoranda instead of in the texts of the treaty.

In addition, the case of Hong Kong is unique in the sense that it is the only one of the numerous British colonies that was to become part of another state after decolonisation. In 1972,[8] China successfully removed Hong Kong from the agenda of the United Nations

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1 *Hertslet's China Treaties* (3rd ed., 1908) vol. 1, pp 7-12.

2 *Id*

3 *Id.*

4 There was a possible mutual error in the Chinese and English versions of both treaties on the point of whether they were "cessions or merely 'grants to a tributary'". For a more detailed discussion, see R.M. White, "HK, Nationality and the British Empire: Historical Doubts and Confusions on the Status of the Inhabitants" (1989) 19 HKLJ 11 at 19 and A. Dicks, "Treaty, Grant, Usage, or Sufferance? Some Legal Aspects of the Status of HK" (1983) 95 China Quarterly 426 at 445.

5 P. Wesley-Smith, *Unequal Treaties 1898-1997: China, Great Britain, and Hong Kong's New Territories* (HK: Oxford University Press, 1983) pp 194-97.

6 In their contractual aspect, treaties create rights and obligations as far as the parties inter se are concerned and are as binding on the signatories as parties to a private contract are bound. See Harris, *Cases and Materials in International Law* (London: Sweet & Maxwell, 1993) p 27.

7 *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong [December 19, 1984]* para. 1 & 2.

8 N. Jayawickrama, "The Right of Self-Determination" in P. Wesley-Smith (ed.), *Hong Kong's Basic Law:*

Decolonisation Committee, on the grounds that it was a Chinese territory occupied by the British. Resolution of the question of Hong Kong was within China's sovereign right and would occur at a time China thought appropriate. Hong Kong should thus not be included in the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and People. Britain, with motive still unclear,[9] acquiesced to China's request, and thus agreed to the end of any possibility of an independent Hong Kong- more than ten years before the people of Hong Kong started to be aware of their plight and of their right of self-determination under customary international law.

B. Significance of the Issue to the Inhabitants of the HKSAR

Due to the uniqueness of the situation, the inhabitants of Hong Kong are faced with an unprecedented problem in international law. Uncertainty on the question of sovereignty and hence nationality, and the lack of directly applicable precedent in international law has made the issue of nationality of the inhabitants of Hong Kong a popular topic of legal research. Furthermore, the lack of understanding of international law principles by the officials of the PRC result in the various declarations and expressions in public of their often non-legalistic and conflicting views[10] on the arrangements for the people of Hong Kong regarding their right of abode in the territory.

Clarification on this issue is of immense importance to the inhabitants of Hong Kong because a wide range of rights and privileges are to be enjoyed exclusively by "permanent residents" of the HKSAR. On the international arena, whether a person would be considered a British national holding his/her BN(O) passport or a Chinese national because of his/her holding a SAR passport would determine whether s/he would be offered diplomatic protection by the British or Chinese embassy in a third country. At the national level, only a "permanent resident" of the HKSAR is entitled to a wide range of social and political rights. These include the right to enjoy social security and other social allowances,[11] taxation,[12] the right to vote[13] and stand for office,[14] and to be appointed to specific important government positions[15].

Problems and Prospects (HK: Faculty of Law, University of HK, 1990) pp 91-93 and "Hong Kong: The Gathering Storm" (1991) 22 *Bulletin of Peace Proposals* 157 at 164-65.

9 Such acquiescence could be the result of the lack of thought on the part of the British. Alternatively, it could be Britain's recognition of the approaching expiration of the 99-year British sovereignty over HK, and that arrangements for the return of the territory to China were required. It should, however, not be read as an indirect admission of unlawful rule over HK by Britain herself in the international community. P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, (HK: Longman, 1994) p 51-52.

10 The various and contradicting views on the application of PRC Nationality Laws and immigration policies to the different categories of inhabitants of Hong Kong expressed by the Preparatory Committee, the Preparatory Working Committee, Mr. Lu Ping, Mr. Qian Qichen and Mr. Zhang Zhensheng on various occasions without actual authority from the National People's Congress, the highest law-making body in the PRC.

11 Provided in Article 36, *The Basic Law of the Hong Kong Special Administration Region of the People's Republic of China*, promulgated by the National People's Congress on April 4, 1990.

12 *Id*, Article 42

13 *Id*, Article 26

14 *Id*.

15 These include the positions of the Chief Executive (Art. 44), members of the Executive Council (Art. 55), "principal officials of the HKSAR" (Art. 61), members of the Legislative Council (Art. 67), the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court (Art. 90), and several major

This has a negative impact on the confidence of the skilled labour and investors, and is the major cause of the "brain drain"[16] from the territory in recent years. According to the Hong Kong Government Secretariat, the estimated number of emigrants peaked in 1992 at 66,000 and the official figure for the year 1994 was 62,000.[17] This was said to be underestimated by at least 10 to 15 per cent. [18] Critics of this wave of emigration have argued that this loss of skilled manpower will lead to a decline in productivity and the demise of Hong Kong as a viable industrial and financial centre, with Singapore and Shanghai the most likely candidates to overtake it.[19] However, it should be noted that Hong Kong has had the benefit of absorbing a considerable flow of immigrants, some of which are also highly skilled[20] and the extent of the "brain drain" may not be as massive as some think.

Uncertainty of the international status of the SAR and BN(O) passports, and the failure to obtain visa-free exemptions from many countries[21] for holders of these documents meant that tourism and trade links with these countries will not be as strong or smooth as before. This would undermine the status of Hong Kong as a major international financial centre[22] and the international competitiveness of the city[23].

III. The Right of Abode

A. Right of Abode and Nationality

In most states, nationality would come hand in hand with the right of abode. However, the British position is anomalous. With changes to the U.K. nationality laws over the years, the "right of abode" and "nationality" have become two distinct concepts. The former term is a term of art created in U.K. immigration law under the 1971 Immigration Act. The term "right of abode" means the freedom "to live in, and to come and go into and from, the U.K. without let or hindrance except such as may be required under and in accordance with [the 1971 Act] to enable the right to be established or as may be otherwise lawfully imposed on any person."[24] British Nationality, on the other hand, is merely a status, and does not guarantee the right of abode in the

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positions in the civil service: the Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration, and Commissioner of Customs and Excise (Art. 101).

16 W. Menski (ed.), *Coping With 1997: the Reaction of the Hong Kong People to the Transfer of Power*, (Staffordshire: Trentham Books, 1995) Chapter 4.

17 *Hong Kong 1995* (HK: Government Printer, 1995) p 57.

18 R. Skeldon (ed.) *Emigration From Hong Kong* (HK: The Chinese University Press, 1995) Chapter 4.

19 According to a survey carried out by Coopers & Lybrand Management Consultants for Sun Hung Kai Developments Ltd. Results were released on 18 March 1996 and were supplied to the HK Government for its reference. See extract and detailed discussion of the survey in *Ming Pao,* 19 March 1996.

20 Menski, note 16 above, pp 144-150.

21 According to *Eastern Express,* 20 November 1995, most of the countries in the world are yet undecided as to visa-free status to HKSAR passport holders, upon entry to their countries after 1997.

22 According to I. A. Tokley, *Banking Law in Hong Kong* (HK: Butterworths, 1996). HK ranks the fourth in the world as a financial centre in terms of capitalisation, below New York, London and Tokyo.

23 According to the speech given by the Financial Secretary of HK on the 1996 Budget, as a member of WTO, imports, exports and re-exports form a vital part of the territory's revenue. World trade for HK has doubled every six years since 1969. "Budget 96: The Speech" *South China Morning Post,* March 1996.

24 *Immigration Act of 1971*, s 1(1).

U.K.. Thus, the "right of abode" is a broader term than "nationality."

Under U.K. immigration law, there are many types of "British Nationality", as will be seen below. However, amongst the various types of "British Nationality", only "British Citizens" have the right of abode in the U.K.. Hence, there is a correlation between "right of abode" and "British Citizenship", but the "right of abode", "nationality" and "British Citizenship" remain distinct concepts, with the "right of abode" encompassing the widest category of people.

In order to understand the background to the meaning and significance of the right of abode, an examination of the nationality laws of the U.K. and the relevant international law principles is necessary.

B. United Kingdom Nationality Law

The laws of the U.K. in the area of nationality has changed considerably in the past 50 years. Its historical development brought about changes to the status and privileges of the inhabitants of Hong Kong as British nationals. The most significant consequence was the progressive limitation which led to the eventual removal of their right of abode in the United Kingdom.

It was at a time when colonial extension of the British Empire was in its full swing that the *British Nationality and Status of Aliens Act 1914* defined a natural born "British subject" as "any person born within His Majesty's dominions and allegiance."[25] The test of nationality was simply the place of birth. Being born on British territory would make one a "British subject", and thus able to enjoy complete freedom of entry into Britain, regardless of whether s/he was born in Britain or in any of the British colonies, including Hong Kong.

Gradually, a large part of the British Empire became independent states.[26] However, these former colonies had wanted to maintain a link with Britain and among themselves, thus leading to the creation and expansion of The Commonwealth. As a consequence, the *British Nationality Act of 1948*[27] was enacted introducing important reforms. The meaning of "British subject" was changed to mean "Commonwealth citizen"[28] and each independent Commonwealth country was to create its own citizenship,[29] with the "common clause" provision in each country's nationality law bestowing a British subject or Commonwealth citizen status. This new citizenship was thus a gateway to British "subjecthood" or "Commonwealth citizenship", and all existing British subjects were allotted the appropriate "gateway citizenship". The dependent parts of the Commonwealth,[30] under Britain, shared its "gateway citizenship", which was named "Citizenship of the United Kingdom and Colonies" (CUKC).[31] Thus, the majority of the people of Hong Kong became CUKCs under this legislation.

Until 1962, all British subjects or Commonwealth citizens (including the residents of

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25 *Id.*

26 Including Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon.

27 *British Nationality Act 1948*, 11 & 12 Geo. 6, ch. 56. This Act came into force on 1 January, 1949.

28 *Id*, s 1(2)

29 *Id*, s.1(1) & (3).

30 At the time of the *British Nationality Act of 1948*, the UK had about 50 colonies and protectorates. The great majority of these are now independent. Of the dozen inhabited dependencies which remain, only HK could conceivably be independent. Pitcairn Island, for instance, had a population of 61 in 1980. See White, "Nationality Aspects of the HK Settlement" (1988) 20 Case W. Res. J. Int'l L. 225 at 227.

31 *Id.* ss 1(1), 4-22.

Hong Kong) retained the right to enter the U.K. It was then restricted to those born there or holding a U.K. Government issued, rather than colonial government issued, passport under the 1962 legislation.[32] At the time, the process of decolonisation was proceeding at an accelerated pace, and in anticipation of imminent self-government and independence, the British Government decided to cut "the umbilical cord that joined the colonies to the mother country"[33] by limiting immigration into Britain. Each U.K. independence legislation stipulated that those acquiring citizenship of the new state thereby lost CUKC status, unless they were expatriates born there and had an ancestral connection with the U.K.[34] Thus, existing CUKCs were divided into two classes: those holding U.K. Government issued passports with the right to enter both Britain and the colony, and those holding colonial government issued passports with the right to enter the colony only. It follows that a Hong Kong inhabitant who held a British, rather than a U.K., passport, in common with all other Commonwealth Citizens who held passports issued by their respective colonial governments, was then subject to immigration control if s/he attempted to enter Britain.

However, with the independence of Kenya,[35] the CUKCs there (mainly East African Asians) were given the choice between giving up their British citizenship and becoming Kenyan citizens, or to remain British. Not many applied for the decolonised state's citizenship, many of which failed. The subsequent "Africanisation" by the new government rendered the lives of these East African Asians intolerable and they sought entry into the U.K. In response to this sudden influx of immigrants, the British Government immediately introduced legislation revoking their right of entry. The *Immigration Act 1971* was passed which provided that only a "patrial" of the U.K. can have the "right of abode" in U.K. A CUKC could only be a "patrial" if s/he had come from the U.K., or had a parent or grandparent who had come from the U.K., or had settled in the U.K. and been ordinarily resident there for five years, or, in the case of a woman, had been married to a "patrial". A "patrial" had the right of unconditional entry into the U.K. whereas a non-patrial CUKC could only enter and settle in the U.K. by permission on conditions. This resulted in the creation of three classes of CUKCs: those with a right of entry to the U.K., those with a right to enter a colony, and those with no right to enter anywhere.[36]

This situation led to the *British Nationality Act 1981*,[37] which replaced CUKC status with

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32 *Commonwealth Immigrants Act, 1962*, 10 & 11 Eliz. 2, ch 21, s 1(3).

33 N. Jayawickrama, "The Right to a Nationality, its Application to HK" in *Legal Forum on Nationality, Passports & 1997*, McInnis, J.A. (ed.) 1989, 83 at 86.

34 It should be noted that the people who fall into the category of "patrial" under the 1962 legislation, are expatriates in foreign countries with an ancestral link with the UK who would have become nationals of the foreign state for reason of their having been born in the foreign country as the second or third generation of an expatriate family. The preservation of the right of abode in the UK of these foreign nationals under the 1962 Act would be an effective recognition of dual nationality of these people by the UK.

35 *Kenya Independence Order*, S.I. 1963, No. 1968.

36 Under the new law, a holder of a UK passport could enter Britain only if s/he has an ancestral connection with the UK. Clearly few, if any, East African Asians fulfil this requirement. Those who were refused entry into the UK under the new legislation fall into this category of CUKCs who do not have the right of abode anywhere - neither in the UK nor in decolonised Kenya. This led to the case *East African Asians v. United Kingdom* (1973) 3 Eur. Hum. Rts. Rep. 76, in which the European Commission on Human Rights found that the British had subjected the plaintiffs to "degrading treatment", and therefore were in violation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Nov. 4, 1950, 213 U.N.T.S. 221). For a detailed discussion, see M. F. McElreath, "'Degrading Treatment' - From East Africa to Hong Kong: British Violations of Human Rights" (1991) 22 Columbia Human Rights Law Review 331.

37 *British Nationality Act, 1981*, 29 & 30 Eliz. 2, ch. 61. The Act came into force on Jan 1, 1983 - *British*

three new "gateway citizenships". These are: "British Citizenship" (BC),[38] "British Dependent Territory Citizenship" (BDTC),[39] and "British Overseas Citizenship" (BOC).[40] Out of the three, only BC would confer right of abode in the U.K. to its holder. It should be noted that over 90% of the BDTCs were in Hong Kong [41] at the time. Methods of acquisition were changed, so that birth in the United Kingdom and in a colony confers BC and BDTC status respectively. Marriage would also confer BC and BDTC status, but only if a partner, in the first case, is a BC or settled in the U.K., and in the second case, is a BDTC or settled in a colony[42].

As a result of pressure from Hong Kong and especially its civil servants, who feared reprisals after 1997, a new method was introduced as an amendment during the passage of the bill through Parliament,[43] allowing a person to be registered as a BC and acquire a right of entry to the U.K. if the Secretary of State thinks fit in the circumstances of the case. However, this discretion of the Secretary of State is only exercisable in the case of civil servants of a colonial government or a member of any body established by law in a colony appointed by the Crown.[44] This limited provision short circuits the usual registration process, which required five years of settlement in the United Kingdom.

From the British viewpoint, those born or naturalised in Hong Kong, or descended in the male line from such a person, were CUKCs before the 1981 Act and became BDTCs as result of that Act, having lost the right of abode in the United Kingdom in 1962. Those born, naturalised or descended since the 1981 Act are subject to the new rules of acquisition. Thus, a child born in Hong Kong of a BDTC or settled parent is a BDTC, but not otherwise[45].

Whether Britain had acted in accordance with her international legal obligations towards its nationals by not providing all of them with the right of abode in the U.K. had been discussed in depth elsewhere[46] and will not be dealt with here.

C. Chinese Nationality Law

The applicability of the nationality law of the PRC to the future HKSAR is specifically provided for in Article 18 and Annex III of the Basic Law.[47] Thus it will be the relevant law upon the transfer of sovereignty and will govern the nationality status of the inhabitants of Hong Kong.

Nationality Act, 1981, (Commencement Order 1982), S.I. 1982, No. 933.

38 *1981 British Nationality Act*, Part I, s.39.

39 *Id*, Part II.

40 *Id*, Part III.

41 See note 31 above.

42 *1981 British Nationality Act*, ss 1(1), 15(1).

43 See debate in Standing Committee on *1981 British Nationality Act: Official Report, House of Commons, Standing Committee F,* Mar. 31, 1981, pts. 1, 2, cols. 903-914 (23rd Sitting).

44 *1981 British Nationality Act,* ss 4(5), (6).

45 See detailed discussion in White, "HK, Nationality and the British Empire: Historical Doubts and Confusions on the Status of the Inhabitants" (1989) 19 HKLJ 10 at 29. Contrary to the British view, there had been considerable doubt existing in HK and in China since the time of acquisition of the various parts of HK as to whether the associated Chinese population were British subjects at all. This would cast doubt on whether they became CUKCs in 1948, and hence, BDTCs in 1981.

46 J. Chan, "Nationality" in R. Wacks (ed.) *Human Rights in HK* (HK: HKUP, 1994) p 470.

47 Article 18 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* states that only the national laws of the PRC listed in Annex III shall be applicable to the HKSAR.

Traditionally, Chinese "subjecthood" was indelible.[48] Chinese law regarded nationality as descending essentially only *jus sanguinis* (blood relationship), with Chinese national status being determined by birth from a Chinese national father irrespective of the place of birth. The previous three nationality laws of China[49] (on the similar principles) deemed all Chinese born anywhere in the world, as long as they descended from the Chinese bloodline, Chinese nationals. Chinese nationals were denied the right to denaturalise without government consent. The resulting dual nationality of Chinese who were also citizens of foreign countries created problems during and after the World War II.[50] Therefore, it was natural for the PRC Government to follow the trend of nationality laws in other countries[51] and incorporate notions of *jus solis* (the place of birth) in the 1980 Nationality Law.

The 1980 Nationality Law of the People's Republic of China,[52] which was simply a recast of the previous traditional law on nationality on similar principles, combines the doctrines of *jus sanguinis* and *jus solis* to deny Chinese nationality to a child born overseas to Chinese parents settled abroad when the child acquires foreign nationality at birth.[53] Under the 1980 Law, "any person born in China whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality"[54] and that "any person born abroad whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality," subject to the proviso that "a person whose parents are Chinese nationals and have settled abroad or one of whose parents is a Chinese national and has settled abroad and who has acquired foreign nationality on birth does not have Chinese nationality".[55] According to a writer, this seems to suggest that in order for one not to be deemed a Chinese national, acquisition of foreign nationality on birth is required regardless of whether one or both parents are settled abroad[56].

Furthermore, children born in China to stateless people and those of uncertain nationality settled in China have Chinese nationality.[57] Aliens and the stateless may also acquire it if they are "willing to abide by China's constitution," and they have close relatives in China, have settled in China, or have "other legitimate reasons".[58]

Under Chinese nationality law, dual nationality is not permitted,[59] and voluntary foreign

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48 P. Wesley-Smith, note 5 above, p 142.

49 The *1909 Nationality Law* adopted by the Qing Dynasty (1644-1911), *The Amended Nationality Law* in 1914 and the *1929 Nationality Law* adopted by the Kuomintang (Nationalist) Government. For details, see T. Chen, "The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast Asia" (1984) 5 NYL Sch. J Int'l & Comp L. 281.

50 Many Chinese had settled in countries such as Malaysia and Indonesia which do not recognize dual nationality. The Chinese policy of deeming these overseas Chinese as Chinese nationals and not allowing their renunciation of Chinese nationality created difficulties for them to continue living in these overseas countries. See generally Note, "Expatriating the Dual National" (1959) 68 Yale LJ 1167

51 See Gong, "On the Nationality Law of China" (1959) Beijing Rev. No. 45, at 24-25.

52 *Nationality Law of the People's Republic of China*, adopted at the Third Session of the Fifth National People's Congress 10 July 1980.

53 *Id*, Article 5.

54 *Id*, Article 4.

55 See note 53 above.

56 White, "HK: Nationality, Immigration and the Agreement with China" (1987) 36 International and Comparative Law Quarterly 483 at 487.

57 See note 52 above, Article 6.

58 *Id*, Article 7.

59 *Id*, Article 3.

naturalisation after settlement abroad removes Chinese nationality.[60] It should be noted that the requirements for settlement abroad and acquisition of foreign nationality must both be satisfied before one loses Chinese nationality. Provisions for naturalisation, renunciation and resumption all require "legitimate reasons".[61] All provisions are prospective since existing status were declared to remain valid.[62]

The application of this law results in all those of Chinese descent in Hong Kong being Chinese nationals, unless they have settled abroad and have taken another nationality. Because of the rule against dual nationality, the efficacy of any British form of nationality held by Hong Kong people was implicitly denied. However, the legislation is skeletal and interpretations of phrases such as "legitimate reason" and "settled abroad" is unclear. This leads to the ambiguity in the determination of the statuses of certain groups of Hong Kong residents after 1997, which shall be closely examined below.

D. International Law and Nationality

Traditionally and fundamentally, international law regulate relations between states. The classical doctrinal position saw nationality simply as an attribute granted by a sovereign state to its subject. That position was reflected in the *1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*[63] which declares that "it is for each state to determine under its law who are its nationals", but such law shall be recognised by other states "in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality".[64] This indicates that the power of a state to confer nationality is subject to the constraints of international law. The Convention recognises the autonomy of municipal systems, but declares that a dual national may not be represented by one of his/her states against the other.[65] A third state confronted with competing assertions of nationality should apply either the test of "habitual and principal residence" or "most close connection".[66] These tests have been applied in a number of decisions, but do not seem to provide clear precedents for Hong Kong.[67]

However, it has been argued that even if the idea of "effective nationality" is not generally accepted, had the issue arose, any British form of nationality would be difficult to deny and any Chinese form difficult to assert on the inhabitants of Hong Kong, which is an

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60 *Id*, Article 9.

61 *Id*, Articles 10-16.

62 *Id*, Article 17.

63 179 L.N.T.S. 89. Signed at The Hague, 12 April 1930, in force in 1937. 20 parties were signatories, including the UK and the National Government of the Republic of China which was the government in power in China at the time. Under international law principles of state succession of treaties, the People's Republic of China is not bound by the Convention, which is nevertheless binding on the UK. The analysis that follows in relation to international law principles is based on the arguable assumption that the principle in the Convention are well-established in the international community and expected to be followed by the PRC Government as customary international law even though it does not have the strict binding effect of a 'hard' law as being a signatory to the Convention does.

64 *Id*, Article 1.

65 *Id*, Article 4.

66 *Id*, Article 5.

67 For example, *Nottebohm* [1955] I.C.J. Rep. 4; *Flegenheimer* [1958] 25 I.L.R. 91; *Merge* [1955] 22 I.L.R. 443.

internationally recognised British colony.[68] However, the issue did not arise, due to restraint on the part of both the principal parties, and the powerlessness of the Chinese government in a large part of China for a major part of the past 150 years.[69]

Equally, the transfer of sovereignty in 1997 would reunite Hong Kong with the PRC, rendering almost all of the residents in Hong Kong of Chinese ethnic origin "Chinese nationals" under the same principles of international law, since the HKSAR, as part of the PRC, would be their place of "habitual and principle residence," and China would be the country of "most close connection".

IV. Acquisition of the Right of Abode in Hong Kong

A. The Present Framework - The Immigration Ordinance

The present framework for the acquisition of right of abode in Hong Kong is formulated under the Immigration Ordinance[70].

The Immigration Ordinance states that "Hong Kong permanent residents enjoy right of abode in Hong Kong".[71] Section 2A of the Ordinance defines the "right of abode in Hong Kong" as the right to land in Hong Kong; not to have imposed upon him any condition of stay; not to have a deportation order made against him; and not to have a removal order made against him. It also states that all "Hong Kong permanent resident[s]" have the right of abode in Hong Kong.

Schedule 1 sets out the criteria that have to be satisfied for one to be a "Hong Kong Permanent Resident". Under that provision, a person has to be "wholly or partly of Chinese race and has at any time been ordinarily resident" in Hong Kong for a continuous period of at least 7 years.[72] A BDTC who has "a connection with Hong Kong" or has a connection with any of the British Dependent Territories other than Hong Kong, and has at any time been married to a BDTC who has a connection with Hong Kong also has the right of abode.[73] A Commonwealth citizen who has had the right to land in Hong Kong under the previous legislation in force before 1 January 1983 also has the right of abode.[74]

B. The Future Framework - The Joint Declaration and The Basic Law

As stated above, due to the conflict between the Chinese and the British on the fundamental question of sovereignty, the arrangements for the change of nationality of the inhabitants of Hong Kong are only provided for in the two memoranda accompanying the treaty .

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68 White, note 45 above, p 489.

69 For the historical details, see Wesley-Smith, note 5 above, Chapters 2 & 3.

70 Cap 115.

71 *Id*, s 2A.

72 An expatriate who has come to work in HK and has stayed in HK legitimately for a continuous period of over 7 years would become a "HK permanent resident".

73 For example, by birth, naturalisation or registration in HK. There will be no distinction on ethnic grounds.

74 See note 70 above, Appendix, which states that immediately before January 1, 1983, "Hong Kong belongers" had the right to land in HK. These included: (i) a British subject who was born in HK; (ii) a British subject by naturalisation in HK; (iii) a British subject by registration in HK under the *British Nationality Act 1948*; (iv) a British subject married or who had been married to, or was a child of, a person falling into the previous three categories.

Under the Chinese memorandum,[75] the Chinese government states that:

> Under the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the British Dependent Territories Citizens' Passport or not, are Chinese nationals.
> Taking account of the historical background of Hong Kong and its realities, the competent authorities of the Government of the People's Republic of China will, with effect from 1 July 1997, permit Chinese nationals in Hong Kong who were previously called British Dependent Territories Citizens to use travel documents issued by the Government of the United Kingdom for the purposes of travelling to other states and regions.
> The above Chinese nationals will not be entitled to British consular protection in the HKSAR and other parts of the People' Republic of China on account of their holding the above-mentioned British travel documents.

The Basic Law sets out the requirements for permanent residency in the HKSAR in Article 24. It stipulates six specific categories of people who will have the right of abode[76] in post-1997 Hong Kong:

1. Chinese citizens born in Hong Kong before or after the establishment of the HKSAR;
2. Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR;
3. Persons of Chinese nationality born outside Hong Kong of those residents listed in Categories (1) and (2);
4. Persons not of Chinese nationality who have entered HK with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the HKSAR;
5. Persons under twenty-one years of age born in Hong Kong of those residents listed in Category (4) before or after the establishment of the HKSAR; and
6. Persons other than those residents listed in Categories (1) to (5), who, before the establishment of the HKSAR, had the right of abode in Hong Kong only.

Furthermore, it is also provided in Article 18 of the Basic Law, that the Nationality Law of the PRC is also relevant in determining the nationality statuses of the inhabitants of the HKSAR.

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[75] This is not part of the international treaty between Britain and the PRC and has no binding effect on the parties. It is merely a unilateral declaration by the PRC Central People's Government, and is not endorsed by the National People' Congress, the highest law-making body in the PRC. Therefore, strictly speaking, it does not have any legal force and cannot be relied on for the assertion of rights. However, it is arguable that under the general principles of administrative law, PRC government actions contrary to the assurance given in the Memorandum would constitute a breach of a legitimate expectation. See generally *Halsbury's Laws of England* (Fourth Edition - Reissue) *Administrative Law*, Vol. I (1), para 81.

[76] The Basic Law uses "right of abode" instead of "nationality" as the criteria in defining the rights of inhabitants of the HKSAR thus recognising and preserving the cosmopolitan nature of the city of HK as an international business centre and thus creating the means for expatriates to participate in the Government and society.

Therefore, Article 24 must be considered in the light of the basic framework under the *1980 Nationality Law of the PRC*. It should be noted that under the Basic Law, the "right of abode" is more connected with "citizenship" than under the colonial regime at present.

The intention of the above provisions is to preserve the right of abode in Hong Kong for the vast majority of people who enjoy it now. However, their actual effects on the various groups of people in Hong Kong will depend on their interpretations and will be discussed in detail below.

V. The Different Inhabitants of Hong Kong

A. Ethnic Chinese BDTC/BNO Passport Holders

Under the *Hong Kong (British Nationality) Order 1986*, all residents of Hong Kong holding BDTC status shall cease to hold that status on July 1, 1997. Instead, they will be entitled, upon application, to a new status of British National (Overseas) (BNO), which is not transmissible to a second generation. A large proportion of the population in Hong Kong are not eligible to apply for the BNO passport, as they had not held a BDTC passport. Thus, they must go through the process of naturalisation in order to become a BDTC before they can apply for BNO passports. The last date for application for naturalisation was 31 March 1997. Thousands of people flocked to hand in last-minute applications at the Immigration Department, and the Government had to let these applicants queue up at a sports ground nearby. It was estimated that the number of applications submitted in the week before the deadline was over 130,000.[77]

The problem of the 98.1% of the population of Hong Kong[78] who are ethnic Chinese people holding BDTC/BNO passports stems from the confusion over their true nationality. As mentioned earlier, the non-recognition of the "Unequal Treaties" by China could mean that the inhabitants of Hong Kong are not recognised by the PRC to have ever been British nationals, since China has never considered Hong Kong to have ever come under legitimate and valid British sovereignty.

However, although there has never been a clear conclusive statement on this issue, the claim is impossible to sustain, as Hong Kong has been recognised universally as a British colony, and applying the tests of "habitual and principle residence" and of "most close connection" under the principles of international law would result in Hong Kong confirmed a British colony.

Furthermore, the diplomatic actions of the PRC in the past have also indicated that China does in fact recognise that Hong Kong is British territory.[79] Thus, it was argued that Hong Kong has been a British territory since the treaties and is considered "abroad" from China. Its inhabitants, having settled in Hong Kong, have "settled abroad" and therefore have lost Chinese Nationality under Article 5 of the 1980 Nationality Law of the PRC. They should be solely and truly British nationals.

The choice between the British and Chinese viewpoints in determining the true nationality of Hong Kong inhabitants in the period between 1841[80] and 1997 would produce

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77 Source: Immigration Department, *TVB News* 1 April 1996.

78 Source: HK Census and Statistics Department, *Hong Kong 1991 Population Census, Main Report*. See Table 4.1 in R. Skeldon (ed.), *Emigration From Hong Kong: Tendencies and Impacts* (HK: CUP, 1995).

79 As has been pointed out by F. Ching in "One Country, Two Nationalities ?" in W. McGurn (ed.), *Basic Law, Basic Questions: The Debate Continues* (HK: Review Publishing, 1988) p 89.

80 On 26 January 1841, Captain Charles Elliot proclaimed HK a British Colony and issued a proclamation

entirely different effects from the 1997 transfer. Additional ambiguity also rests with the determination of the time to which the provisions in Basic Law Article 24 refers. It is silent on when the determination of a person's Chinese nationality should be made, although all six sub-sections depend on the status of Chinese nationality/citizenship at some stage in time.

If the determination is to be made only when the question becomes relevant for the particular person, it can been immediately foreseen that much confusion will be created, since a person's nationality will be different depending on the point in time and the Chinese or the British analysis with regard to sovereignty over Hong Kong that is adopted.

If the determination is to be made at birth, and if the British view is adopted, then all BDTC/BNOs born in HONG KONG before 1997 would have been born as British nationals instead of Chinese nationals, and therefore would not fall under Article 24 at all. However, according to the Chinese analysis, such people born in Hong Kong (even before 1997) would be Chinese nationals and so Article 24 would be applicable. It is the author's view that the determination of the nationality of an inhabitant of Hong Kong should be made at his/her time of birth, as Article 24(1) refers to "birth" in "Hong Kong before or after the establishment of the HKSAR". This time reference is incompatible with the British view of sovereignty, since BDTC/BNOs born in colonial Hong Kong could not have been born as Chinese citizens. However, it will be compatible with the analysis adopted by the Chinese government, which is to become the sovereign power governing the HKSAR in the future when the Basic Law and its Article 24 comes into force.

If the determination is to be made at the time of the transfer of sovereignty, then both the British and the Chinese views will produce the same results. The BDTC/BNOs in Hong Kong, assuming that they do not have right of abode in other parts of the world,[81] shall become Chinese nationals as the territory comes under Chinese sovereignty on 1 July 1997. This consequence follows from the first analysis above that, due to the void "unequal treaties", Hong Kong has always been Chinese territory, and the resumption of Chinese sovereignty over the territory in 1997 will have no effect on the status of the inhabitants, who have always been, and shall of course be, Chinese nationals, as provided for in Article 4 of the *1980 Nationality Law of the PRC*.

Alternatively, adopting the second analysis, although the inhabitants of Hong Kong have been British nationals in the past century and a half, after the reunification the territory will become a part of China. From a similar precedent in Burma in 1960,[82] which involved a transfer of sovereignty from one country to another, as well as the inhabitants, a transfer of territory means a change in nationality, according to accepted principles of customary international law and in the absence of contrary arrangements agreed between the two signatories to the Joint Declaration. Therefore, the inhabitants of Hong Kong who are BDTC/BNOs who have the right of abode in Hong Kong, shall only automatically become nationals of China upon 1 July 1997.

Furthermore, following the established international law principles, the country of "habitual and principle residence" of the inhabitants of Hong Kong shall be China instead of the United Kingdom after the transfer of sovereignty. Although they may continue to hold BNO passports, it shall be impossible for the inhabitants to assert that they should still be considered British nationals instead of Chinese nationals. This is because a passport is not conclusive proof

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"To the Chinese Inhabitants of HK" informing them that they were now subjects of the Queen of England.

[81] The status of those who do have the right of abode in other countries are different and shall be dealt with in the sections below.

[82] See note 79 above. p 88.

of the holder's nationality under principles of international law, and the British has not given the right of abode in the United Kingdom to BNO passport holders. Therefore China, and not Britain, will definitely be the country of "the most close connection" to the these people, regardless of the fact that they hold a particular type of British passport.

It is provided in the Chinese Memorandum in the Annex to the Joint Declaration that:

> Under the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the "British Dependent Territories citizens' Passport" or not, are Chinese nationals.[83]

The phrase "Hong Kong Chinese compatriots" remains undefined both in the Basic Law and the PRC Nationality Law, but it has been discussed elsewhere[84] that "compatriot" is not a legal term in China and has an everyday meaning of "fellow countryman". Therefore, the above paragraph is no more than a tautology saying that "all Hong Kong Chinese nationals are Chinese nationals". It is not a sweeping provision making all who are of the Chinese race Chinese nationals, since the mainland population is far from homogenous, with the Government recognising that about fifty-five ethnic groups[85] make up the Chinese nation, and the term "ethnic Chinese" normally referring to the dominant ethnic group, the Han people. The *1980 Nationality Law* also provides for the loss of Chinese nationality by Chinese nationals and the acquisition of Chinese nationality by non-Chinese nationals in particular circumstances. Hence, it was proposed[86] that China's nationality law is not racially-based and no person can be labelled a "Chinese national" or a "non-Chinese national" merely because of ethnic origins. Nevertheless, the use of the phrase "all persons wholly or partly of Chinese race" as a criterion[87] in the *Immigration Ordinance* of Hong Kong has given rise to the misconception that there is a racial criterion in Chinese nationality law.

The truth is that all ethnic Chinese residents holding BDTC/BNO passports shall be Chinese nationals on 1 July 1997, and China considers them Chinese nationals because of its non-recognition of dual nationality, as provided for in Article 3 of the 1980 Nationality Law. Since Britain, unlike China, allows for the renunciation of its nationality if a person has another valid foreign nationality,[88] it is obviously easier for the BDTC/BNOs in Hong Kong to renounce their British nationality and become Chinese nationals, in the case when the renunciation of one nationality is required. However, the British nationalities of these Hong Kong people are not recognised by both the Chinese and the international community[89] and therefore, renunciation of their British nationality will not even be necessary.

Under established principles of international law, these British passport holders are

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83 The Chinese Memorandum accompanying the *Joint Declaration.*

84 See note 79 above, p 84.

85 Including Tibetans, Koreans, Uigurs, Kazakhs, Uzbeks (who are Caucasians), and Mongols.

86 See note 79 above.

87 Schedule 1, Immigration Ordinance (Cap 115).

88 Section 21, *Commonwealth Immigrants Act 1962*. Pursuant to Britain's obligations under the *1961 Convention on the Reduction of Statelessness*.

89 The incident of the HK businessman Albert Lam Boon-ling who was not allowed to leave Iraq during the Gulf War in 1990 for reason of his holding a British passport was ultimately solved by the Chinese embassy there which issued him with a certificate, identifying him as a Chinese national. It became his permit out of the war area and enabled him to return home to Hong Kong. *South China Morning Post*, 17 August 1990, p 19.

Chinese nationals, and, despite the passports will not be afforded British consular protection in any part of the PRC, including the HKSAR, as provided for in Article 4 of the Hague Convention, which states that·

> A State may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses.

Furthermore, Article 3 of the Nationality Law states that the PRC does not recognise dual nationality for any Chinese nationals. It is therefore provided in the Chinese Memorandum of the Joint Declaration that these Chinese nationals "will not be entitled to British consular protection in the HKSAR and other parts of the PRC on account of their holding" BDTC/BNO passports, which are to be regarded merely as "travel documents". Nevertheless, according to a prominent Legislative Councillor,[90] there had been assurance from the Office of the Political Adviser in Hong Kong that in practice, in response to requests for assistance, the British Embassy in the PRC or the Office of the Political Advisor in Hong Kong will approach the Chinese authorities in order to render assistance to Hong Kong inhabitants in the PRC. However, since this statement was made about 7 years ago (and only informally and verbally), it is doubted that this promise is possible to fulfil.

A possible way to circumvent the principles of international law is for the Hong Kong resident belonging to this category to renounce their Chinese nationality. It is only after they lose their Chinese nationality will British consular protection be offered. They may then be considered British nationals only, assuming the success of their claim of British nationality based on their holding of BDTC/BNO passports and their connection with Hong Kong as outlined above.

These people can only lose their Chinese nationality by applying for renunciation under Articles 10, 11, 14 and 16 of the Nationality Law. Under Article 10, the three grounds upon which Chinese nationals may apply for renunciation of their Chinese nationality are:

1. They are close relatives of aliens; or
2. They have settled abroad; or
3. They have other legitimate reasons.

The majority of inhabitants in the HKSAR are unlikely to be able to use the first ground. As for the second ground, it is arguable that having lived in the British colony of Hong Kong prior to 1997, they have "settled abroad". However, due to the non-recognition of British sovereignty in Hong Kong, it is highly unlikely that an application for renunciation on such a ground would be approved. Furthermore, neither the BDTC nor the BNO passport confers a real or effective British nationality. The first page of the BDTC passport, which will cease to be valid on July 1, 1997, gives the holder the right of abode in Hong Kong, whilst the first page of its post-1997 replacement, the BNO passport, does not give the holder right of abode anywhere in the world as the HKSAR is not within the realm of British sovereignty. Therefore, if such people do successfully renounce their Chinese nationality, they shall be left without the right of abode anywhere in the world, not even the HKSAR, and shall become stateless, which is clearly

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[90] M Lee, "The Problems Relating to Chinese Nationality", in *Legal Forum on Passports, Nationality & 1997* (HK: The Canadian Chamber of Commerce in HK and the Faculty of Law of the U of HK, 1989) p 37.

against international law principles in the *Convention on the Reduction of Statelessness in 1961*. The third ground, which is more likely to be used by most BDTC/BNO holders, requires "other legitimate reasons"- not defined anywhere in PRC laws. Therefore, its availability is doubtful. In any event, applications for renunciations are discretionary and rarely granted[91] and it is unlikely that the majority of the population in Hong Kong will be able to lose their Chinese nationality by this method.

In conclusion, the majority of Chinese inhabitants in Hong Kong, despite their holding BDTC/BNO passports issued by the British Government, will become Chinese nationals upon the transfer of sovereignty. They will not be able to enjoy British consular protection in the PRC nor in the HKSAR, and probably not in most third countries as well. It is unlikely that they will be able to renounce their Chinese nationality. Otherwise, they will become stateless.

B. Returned Emigrants

The number of emigrants from Hong Kong[92] had increased rapidly from an estimated 22,400 in 1980 to 42,000 in 1989. This reaction to the anti-democratic massacre at Tiananmen Square on 4 June 1989 was reflected in the accelerated emigration figure of 62,000 in 1990. Since then, the level of emigration from the territory has stayed at an average of around 60,000 each year. A very large number of these people fall into the highly-skilled and highly-educated categories.[93] This "brain drain" has created concern over the future of Hong Kong as a viable industrial and financial centre, and the possible loss of its international competitiveness.

However, a large proportion of these highly-skilled emigrants have obtained foreign citizenship as an "insurance policy" against the uncertainties associated with the future of Hong Kong after 1997. Many of them have returned, or plan to return to re-join the local workforce upon obtaining foreign citizenship. Their ability to enjoy their previous rights as permanent residents are determining factors in their decision to return to their homeland to continue to live and contribute to the society as the citizen that they were previous. Making these privileges readily available to these people will attract the return of the previously lost skilled labour.

Whether this can be achieved depends on the policy that will be adopted by the HKSAR Government on this issue. The public had always demanded the clarification of the requirements for permanent residence after 1997. Under the present *Immigration Ordinance,* these returned emigrants, since they have been "ordinarily resident"[94] in Hong Kong for over 7 years before they emigrated, they would be able to satisfy the requirement ("has *at any time* been ordinarily resident in Hong Kong"). Although Article 24(4) of the *Basic Law* contains a similar criteria that would entitle one to the right of abode in the HKSAR, the words *"at any time"* are absent in the section. Therefore, there was ambiguity as to whether the present liberal policy towards returned emigrants will be adopted by the HKSAR Government, which would mean that these people returning after 1997 will have to live for the *"continuous period"* of seven years in the HKSAR all over again before they can be permanent residents and enjoy the right of abode again.

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91 *Id*, p 43.

92 Government Secretariat, HK, *Table 3.1 "Official Hong Kong Government Estimates of Emigration, 1980-1994"* in R. Skeldon, note 78 above, p 57.

93 *Id*, p 56.

94 Under s 2(1) of the *Immigration Ordinance* "ordinarily resident" is defined as not including any stay in HK without lawful entry, in contravention of a limit of stay, as a refugee or while detained in HK or in prison or in detention pursuant to the sentence or order of any court.

Presumably, "*continuous period*" denotes a period of time during which the person in question is resident in Hong Kong without significant interruptions, and lapses during the time in which s/he is out of Hong Kong. Whether periods of absence from Hong Kong is significant or not is to be determined by the Immigration Department, as is the practice now. It would be impractical to define it in the strict sense, which seems to be the definition adopted by many Chinese officials, to mean a totally uninterrupted period of residence in Hong Kong.

The Preparatory Working Committee had recommended the above strict policy to the Chinese Government, and in June 1995, it was announced by Mr. Lu Ping[95] in Beijing that 1 July 1997 would be the cut-off date for permanent residents. Emigrants who return to Hong Kong before that date shall continue to be permanent residents of the HKSAR. Those who return after that date will have to live for seven years in the HKSAR again before they can resume this status.

This approach was clearly unfavourable to emigrants, who may not be able to leave their foreign country of residence before the cut-off date because of citizenship requirements.[96] However, in response to lobbying from citizens here in Hong Kong, and in consideration of the economic prosperity that will be affected by such a strict approach, the Foreign Minister of the PRC, Mr. Qian Qichen, announced in November 1997[97] that a liberal approach shall be adopted by the PRC Government on this issue.

Discussions of the future HKSAR on the issue of permanent residence continued under the Preparatory Committee. They decided not to follow the recommendations of the PWC and it was announced[98] in Beijing on 24 March 1996 that emigrants who have returned before 1 July 1997 will be treated as permanent residents of the HKSAR, without having to live in the territory for another seven years. They will be treated as Chinese nationals and will not be able to enjoy foreign consular protection in the HKSAR. As for those who return after 1 July 1997, they have a choice between entering the territory as permanent residents or as foreigners.

People entering the HKSAR shall be given a form to fill out on their plane/vessel.[99] They have to state on it whether they are permanent residents or foreigners. If they choose to retain their status as permanent residents, they only need to produce their "three star" Hong Kong Identity Cards[100] upon entry. These people will not have to report their status to the Hong Kong Immigration Department and will be treated as Chinese nationals without the right to foreign consular protection in the HKSAR. If the entrants choose to state themselves as foreign nationals in the form, they will have to register with the Immigration Department. These "foreign nationals" will not enjoy visa-free entry into the Region and will not have the right of abode.

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95 As the Chairman of the Preparatory Working Committee. *Renmin Ribao* 27 June 1995.

96 The common residential requirements for citizenship are: 2 years for Australia, 3 years for Canada, 3 years for the USA and 5 years for the UK.

97 19 November 1995 Speech given at the ASEAN summit in Japan. *Ming Pao*, 20 November 1995.

98 Announcement made by Mr. Lu Ping, Chairman of the Preparatory Committee. *South China Morning Post*, 25 March 1996.

99 According to announcement to the press by Mr. T. S. Lo, member of the Legal Sub-committee of the Preparatory Committee on March 22, 1996 *South China Morning Post*, 26 March 1996.

100 *Registration of Persons Ordinance*, (Cap 177). Under the Ordinance, the three stars on the ID Card denotes permanent residence of the holder. Eligibility for this ID Card depends on the definition of "permanent resident" in the *Immigration Ordinance* since only those who have the right of abode in HK will have the 'three stars' on their ID Cards. Therefore, if the returned emigrants in question have always been permanent residents in HK and have always enjoyed the right of abode in HK, they would all have their three star ID Card and will be able to use the scheme announced by Mr. Lu Ping.

They must live in the HKSAR for 7 years in order to acquire a permanent residence status. However, they are guaranteed foreign consular protection in the Region. The choice of status by the entrants is final and absolute, due to the recognised[101] practical impossibility of finding out whether a permanent resident is or is not also a foreign national by the authorities.

However, despite the guaranteed foreigner consular protection to those who enter as foreign nationals under this scheme, there is still doubt whether this guarantee will actually be put into practice if the need arises. On the other hand, there had been assurances[102] from both the Australian and Canadian Consulate Generals' Offices that, should the need arise, citizens of these countries will be give consular protection in the HKSAR regardless of their having entered the region as permanent residents, as the local immigration administration has no effect on these foreign governments. In effect, then, the returned emigrants entering as permanent residents will enjoy the right of abode in the SAR and will be treated as Chinese nationals by the authorities, but in times of need, they will still be able to utilise their status as foreign nationals, and will be offered consular protection all the same. This may actually be considered an indirect recognition of dual nationality by the PRC Government, contrary to Article 3 of the Nationality Law.

Furthermore, the scheme also makes an incorrect presumption that all those who have right of abode in a foreign country are the citizens/nationals of those countries. This is not necessarily so. Most countries require a certain number of years of residence by an immigrant before s/he can apply for citizenship. During those years of residence, the immigrant will be a permanent resident and will enjoy the right of abode in that country, but they are not yet nationals of the country. Mr. Lu Ping's scheme does not address the status of the people who may have obtained permanent resident status of foreign countries, but not citizenship, all the while returning to Hong Kong for business and work.

According to draft legislation on Chinese nationality and its applicability to the HKSAR tabled in the National People's Congress on 7 May 1996,[103] the HKSAR Immigration Department will be empowered to handle applications for renunciation of Chinese nationality of returned emigrants who want to reside in the HKSAR as foreign nationals. This still does not clarify the obvious loophole in the scheme that if a undeclared person is later faced with the threat of political arrest, he can, as evident from the outline of the scheme by Mr. Lu Ping, immediately report his foreign nationality to the immigration authorities and get consular protection from the PRC. If this was possible, then the loss of foreign consular protection as a consequence attached to enjoying the right of abode in the HKSAR would be virtually non-existent.

In addition, the proposed scheme ignores the nationality laws of the foreign countries which do not recognise dual nationality. If dual nationals returned to the HKSAR as returned emigrants and opt to retain their status as permanent residents of the HKSAR, they would have a very ambiguous status under the present scheme with regard to their true nationality. They will be considered Chinese nationals under the scheme, even though they have already renounced their Chinese nationality, and their foreign country of citizenship would not recognise them as nationals of China. This would lead to confusion if such a person, after a considerable period of living in the HKSAR as a permanent resident, is in need of consular protection, either in the HKSAR or in a third country. The position of the country offering consular protection would be

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101 See note 97 above.

102 *Id.*

103 *South China Morning Post*, 8 May 1996. The China News Agency informed the author that the actual draft legislation is unavailable for review by the general public.

ambiguous, and judging from the precedent of the Gulf War incident mentioned,[104] the answer will be flexible, and depend on the actual circumstances.

Finally, it should be noted that besides consular protection, many rights are attached to permanent residency. The proposal does not address any of these other rights, which are just as important to people faced with the choice of entering the HKSAR either as a foreigner or as a Hong Kong permanent resident. These consequential rights, privileges and liabilities should be clearly addressed by the policy-makers in order to enable the people concerned to make informed choices.

C. British Nationality Scheme

The *British Nationality (Hong Kong) Act 1990* confers effective British nationality on 50,000 chosen families in Hong Kong through the implementation of the British Nationality Scheme. It was launched with an intention to provide the people of Hong Kong with reassurance at a time when it needed it most, in the aftermath of the 1989 crisis, so that Hong Kong people would not emigrate, in the certain knowledge that they could do so at a later date, if they wished.

This was reacted to by China with hostility, as China views the scheme as British interference in Hong Kong affairs, after the transfer date. China's political position is that, upon its "resumption of sovereignty", the HKSAR should be rid of all connections and interference from Britain, in order to show that it is truly within Chinese control. Hence, the Chinese Government had announced that it would not recognise British nationality granted under this scheme, and would treat these British passports in the same way as a BNO passports after 1997.[105] The Vice-Chairman of the Legislative Affairs Commission of the NPC, Mr. Qiao Xiaoyang, had announced that recent draft legislation on Chinese nationality and its applicability to the HKSAR will stipulate in legal terms China's stance that passports issued under the British Nationality Scheme would not be recognised[106].

However, it is doubtful whether this threat by the Chinese Government can actually be carried out, since the British passports issued under this scheme are exactly the same as the standard British passport. It will be impossible to distinguish those that were issued under the scheme and those that are not. Furthermore, since local policies are not binding on foreign consulates in the HKSAR, the British Consulate will surely offer protection to its nationals in the HKSAR when the need arises, regardless of whether their passports had been acquired under the scheme or not.

D. Passports of Convenience

Some people in Hong Kong had acquired foreign passports, by purchase, of less popular countries such as Fiji, Tonga, Lesotho, Panama or Venezuela.[107] The validity of these passports in the HKSAR is unclear, as the issue had not been discussed in either the PWC or the PC.

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104 See note 98 above.

105 Announcement made by Mr. Lu Ping, Chairman of the Preparatory Committee, in Beijing on 24 March 1996. *Ming Pao*, 25 March 1996.

106 See note 103 above.

107 R. Skeldon, "Emigration, Immigration and Fertility Decline: Demographic Integration or Disintegration ?" in Y. Sung and M. Lee (eds.), *The Other Hong Kong Report 1991* (HK: The Chinese University Press, 1991) pp 241-243.

However, a strict interpretation of the Nationality Law of the PRC[108] would mean that these Hong Kong Chinese would still be considered Chinese nationals, since they have never "settled abroad", and thus not satisfying one of the two requirements for losing their Chinese nationality.

However, in the light of the liberal approach taken by the Preparatory Committee towards returned emigrants, it may be the case that a similar approach will be taken towards these holders of passports of convenience. In any event, it would be almost impossible to distinguish these people from returned emigrants, as they are all valid foreign passport holders. Unless the authorities demand inspection of each and every passport for evidence of the holder having left Hong Kong and "settled" elsewhere, no discrimination can be carried out. Whether such an approach will be taken by the SAR government still remains to be seen, but under recent draft legislation presented to the NPC,[109] the Immigration department would be empowered to handle changes to people's nationalities whenever they want to reside in the HKSAR as foreign nationals and renounce their Chinese nationality, and it would seem that the approach taken towards this category of persons would be quite liberal.

E. Ethnic Minorities

At present, about 2% of the population are ethnic minorities. These people have contributed to the economic development of the colony ever since its establishment and many of them have grown up in Hong Kong, taking it as their home. Some no longer have residence in their own country of origin. Some do not even speak their own native languages.

Under the *Immigration Ordinance*, these residents of Hong Kong fall into the category of "resident British citizens", and under Section 8, they have the right to land in Hong Kong, to not have imposed upon them any conditions of stay, and not to have a removal order made against them. However, with the transfer of sovereignty, arrangements for these people will take away these rights and may even leave some of them stateless.

Under the *Hong Kong (British Nationality) Order 1986*, this category of people have the option of becoming British Nationals (Overseas). Several thousands[110] of non-Chinese people who do not have the right of abode elsewhere will have no choice but to become Chinese nationals, because by the mere virtue of the BNO status they do not enjoy the right of abode anywhere after 1997.[111] Article 24(6) of the *Basic Law* provides for the right of abode to be enjoyed by these people who had enjoyed it before 1997 and who do not enjoy the right of abode anywhere else. This will include the majority of the ethnic minorities in Hong Kong at present. Ethnic minorities who were born in Hong Kong will also fall under Article 24(6).

The recent draft legislation tabled before the NPC provides for the empowering of the HKSAR Immigration Department to handle applications for Chinese nationality by non-Chinese nationals.[112] It appears that the ethnic minorities will be allowed to enjoy their previous rights and privileges, including the right of abode in Hong Kong, as permanent residents of Hong Kong, by

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108 Article 9.

109 See note 103 above.

110 According to Mr. Ravi Gidumal, President of the Indian Resources Group in his letter to Mr. Praful Patel dated 26 May 1993, there are approximately 4,500 Indians, 2,500 Pakistinians and the rest a mixture of Europeans, White Russians, etc. The total is estimated at between 7,000 to 8,000 people.

111 For a detailed discussion of the British treatment of these ethnic minorities in Hong Kong in contravention of human rights principles, see J. Chan, note 46 above, p 481.

112 See note 103 above.

applying for Chinese nationality.

However, Article 24 does not provide for those who have retained their native citizenship, despite having lived in Hong Kong for generations, and have never returned to their native countries. Their citizenship may be the only link they have with their native countries. These people, despite having treated Hong Kong as their home and presently enjoy the right of abode, will not enjoy it anymore after 1997, since they do not only "have the right of abode in Hong Kong only", and will not fall under Article 24(6).

They may try to invoke Article 24(4) as, presumably, they have entered Hong Kong with valid travel documents and have "ordinarily resided" in Hong Kong for a "continuous period" of more than 7 years. However, the third criteria in the Article, "... *have taken Hong Kong as their place of permanent residence before or after the establishment of the HKSAR.*" is ambiguous, since such a criteria is non-existent in present legislation. It will be hard to determine whether these ethnic minorities, who have been living in Hong Kong for many years, would be classified as satisfying this requirement.

Of course, these people, if they wish, can apply for Chinese nationality under Article 7 of the *Nationality Law*. Since they have settled in Hong Kong both before and after 1997, they can easily fall into the second ground of application, of "having settled in China".[113] Thus they will become Chinese nationals and will be able to enjoy the right of abode in Hong Kong and be entitled to the many social and political rights that they have previously enjoyed. However, they would lose their native nationality under Article 3 of the *Nationality Law*. Many have argued that this is a violation of their rights, but in the light of the relationship and conflict over the issue of sovereignty between China and Britain, the dilemma presented to them was unavoidable. It is, however, fortunate that the number of people who fall into this category is small. Furthermore, the loss of their native nationality will be under PRC Nationality Law only, and may not be recognised under the nationality laws of their countries of origin, which may recognise dual nationality[114].

Moreover, even if these people do become Chinese nationals and enjoy the right of abode in the HKSAR, it remains doubtful as to whether they will enjoy their political rights as before. Although it was not expressly stated anywhere that the right to office and to be appointed to senior positions in the SAR government requires an ethnic Chinese, the removal of all non-ethnic Chinese personnel at the minister level by way of early retirement (localisation)[115] could indicate the possible makeup of the HKSAR government. This is clearly a condition that one cannot read literally from the text of the Basic Law. This would surely constitute a breach of the rights of these ethnic minorities as against the ICCPR[116].

Nevertheless it must be noted that China does in fact recognise the rich diversity of its inhabitants, [117] and hence the definition of "Chinese nationals" should include all the minority groups. This recognition is evident in both the Chinese Constitution and in the Chinese currency, where each bank note is inscribed with the main minority languages. Such racial distinction

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[113] Article 7(2).

[114] India, for one, does not recognise dual nationality.

[115] As in the case of the Minister of Transport, H. Barma, who is ethnic Indian. He has been asked to retire in 1996 despite being only in his 40s. He has been restated in another senior position in the Government, which does not fall into the list of positions in the HKSAR that would require staffing by Chinese Nationals, as discussed above.

[116] *The International Convention on Civil and Political Rights*, adopted by the United Nations in 1973.

[117] Ching, note 79 above, p 83.

should not be read into the Chinese Nationality Law nor the Basic Law, which seems to be the practice adopted by the PWC, the PC and the majority of the people of Hong Kong now. However, this is not a popular argument and from the present state of play, it seems that the rights of the ethnic minorities in the HKSAR will not be recognised to a large as an extent before the transfer.

F. Children of Illegal Immigrants

Under present law, these children have no right to remain in Hong Kong.[118] Only those having either parent lawfully settled in Hong Kong have acquired the right to live in Hong Kong by birth.

Under Article 24(1) of the *Basic Law*, any Chinese citizen born in Hong Kong before or after the establishment of the HKSAR will enjoy the right of abode. This will allow children of illegal immigrants from China born in Hong Kong between 1 January 1983 and 1 July 1997, who do not have the right of abode under the present law, to have the legal right to take up residence in their birthplace after 1 July 1997.

Most children of Hong Kong residents born outside Hong Kong were born in the PRC.[119] Under the present *Immigration Ordinance*, they do not have the right of abode in Hong Kong, unless they were born before 1 January 1983.[120] Therefore, children of a Hong Kong parent born outside Hong Kong after 1 January 1983 would not have the right of abode in Hong Kong.

However, under Article 24(3) of the *Basic Law*, these children are specifically given the right of abode in the HKSAR. Therefore, it had been a worry of the Hong Kong Government that there would be a sudden influx of these children into Hong Kong immediately after the transfer of sovereignty. It has begun to bring in these children in a gradual manner, and in May 1995 the Hong Kong and Chinese Governments agreed to further increase the daily one-way quota by the addition of 45 permits, making a total of 150 a day. Of the additional 45 permits, 30 will be allocated to these children.

However, the sudden influx of these children, who have the legitimate right of abode in the HKSAR, upon the transfer in 1997 can be avoided if the PRC Government adopts the appropriate measures and limit their immigration into the HKSAR by something similar to the present quota system, thus making the inflow into the SAR a gradual process that can be better absorbed by the local society.

VI. SAR Passports

SAR passports can only be issued to the inhabitants after 1 July 1997. According to the Director

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[118] Under the *Immigration Ordinance,* to have the right of abode in HK, the child must be born to a "Hong Kong belonger", which does not include illegal immigrants. However, there have been pregnant women from the PRC entering HK illegally to find HK resident husbands and give birth in HK. This would enable the child to stay in HK for reason of its being the child of a "Hong Kong belonger" father.

[119] The number of such children are rapidly increasing, with the keeping of mistresses in the PRC by men from HK becoming more and more common in recent years. It was estimated that at the end of 1994, there were about 64,000 children in this category in the PRC. See the 1995 *4th Periodic Report to the United Nations Committee on Human Rights* by Hong Kong, para 286.

[120] The Appendix to the Ordinance provides that a "Hong Kong belonger" has the right to land in Hong Kong immediately before 1 January 1983 which includes, in sub-section (iv), a child born to a "Hong Kong belonger" falling into the previous three sub-sections.

of Immigration,[121] the SAR passport will be issued to residents of Hong Kong on a first come first served basis, with priority being given to applicants who do not hold any other valid travel documents such as the BNO passport and the Certificates of Identity, and are in a hurry to leave the SAR for overseas work or studies, or to those whose travel documents are due to expire within a year from 1997. It was estimated that to issue SAR passports to all the residents of Hong Kong would take five to ten years, but the Director predicted that there will not be a "passport rush", since most of the residents hold other valid travel documents such as foreign passports and BNO passports, which will enable them to travel in any event.

The uncertainty over who will be eligible for a SAR passports had a deterring effect on various countries in the world, many reluctant to admit SAR passport holders visa-free entry. So far, only Britain and Singapore had announced visa exemptions for SAR passports, and most countries are still undecided on the issue.[122] Not surprisingly, many of them have stated that, at present, Chinese passport holders need visas, SAR passport holders would most likely be required to obtain visas as well, since the SAR passport is seen by most countries as a special type of PRC passport.

Therefore, the ease of travel of the people of Hong Kong will be inhibited even more than if they use their BNO passports, which already has less visa-free countries than the present BDTC passport. This explains the preference of the BNO over the SAR passport and the flood of applicants for naturalisation in the week preceding the deadline in March 1996. The Director's prediction that there will not be any flooding of applications for the SAR passport after 1997 due to the availability of BNO passports to the people is also reasonable. However, since the BNO passport is not transferable to a second generation, next generation Hong Kong residents will have to live with the SAR passport's inhibited travel in the world, unless the Chinese and SAR governments are more active lobbying. They should demonstrate to the world the strict issue of the document, the strength of the economy, and the credibility of the legal system here in Hong Kong, which would unlikely drive residents to abscond, which is the main worry. This seems to be a distant goal and much work must still be done to build up the reputation and credibility of Hong Kong, away from the image of the PRC as corrupt and oppressive- from which everyone wants to flee.

VII. Conclusion

Many problems created by the confusion over nationality and right of abode issues in this pre-transfer period have been clarified one by one. However, it remains uncertain whether the promises made by China will be carried out after 1997, judging from the ever-changing policies adopted by China in changing circumstances. The burden of uncertainty is born heavily by the people of Hong Kong, not the two sovereigns, and had resulted in the worsening trend of emigration.

As the transfer date approaches, and as the economy of Hong Kong slowly improves relative to Western countries, more and more emigrants will return to Hong Kong to make their living. The category of returned emigrants encompass the upper-middle class in the society of Hong Kong, who emigrate either with professional skills or wealth. Their return to Hong Kong is vital for the prosperity of Hong Kong after 1997. The recent announcement made by the

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[121] Mr. M. Leung, at the meeting of the Secretariat Committee of the Legislative Council on 10 January 1996. See *Ming Pao,* 11 January 1996, for a detailed report.

[122] According to survey by the *Eastern Express* on 20 November 1995.

Chairman of the Hong Kong and Macao Affairs Office, Mr. Lu Ping, and the Preparatory Committee, on the scheme regarding the status of returned emigrants after 1997 has created optimism in Hong Kong, since it removed the stringent constraints placed on returned emigrants that were present in previous suggestions.

The lack of legal authority of the Preparatory Committee and Mr. Lu Ping (and thus doubts over their promises) will be soon removed when the draft legislation on Chinese Nationality and its Applicability to the HKSAR is tabled before the highest law-making body, the National People's Congress, and approved and endorsed into law. It is expected that the draft legislation will be a legal implementation of the Preparatory Committee scheme. It is a pity that the actual draft legislation is not available for review by the general public in Hong Kong. Otherwise, the legislation will be more widely accepted by the people in Hong Kong, and confidence in the future of the HKSAR will be even stronger.

The basic principle regarding the PRC's policy of maintaining the prosperity and stability of Hong Kong[123] is put into practice by the Basic Law's using "right of abode" instead of Chinese nationality as the criteria for the determination of rights and freedoms in the HKSAR. The cosmopolitan nature of Hong Kong as an international city of trade and finance is recognised and effectively preserved. The implementation into legislation by the NPC of the recent proposal of empowering the Immigration authorities of the HKSAR to handle applications for Chinese citizenship by non-Chinese nationals will further give effect to such recognition. With effective means to acquire Chinese nationality by non-Chinese nationals, the rights and privileges of the permanent residents of Hong Kong (Chinese and non-Chinese alike) will be guaranteed, and all will have equal rights to participate in society. Nevertheless, the policy regarding the status of the ethnic minorities should be addressed, in response to their continuous lobbying for clarification over a long period of time.

However, it must be kept in mind that the PRC's basic policy of "One Country, Two Systems" refer to the economic system more so than the political system.[124] A fundamental purpose of the Basic Law is the preservation of the market economy in Hong Kong, and the political institutions under the Basic Law were designed to achieve this end without conferring a high degree of *political* autonomy on the SAR. Hence, the provisions in the Joint Declaration and the Basic Law should be considered in this light. It follows that the Chinese Memorandum of the Joint Declaration by the PRC Government should also be interpreted in a way that gives effect to such an economic-oriented basic policy. Therefore, the requirement of a "Chinese compatriot" as Chinese national may be interpreted as requiring them to be people who are not democracy activists, and who are not disruptive to the political system under the PRC Central Government, so that the executive-led, non-democratic political system under the Basic Law will be sustained. The question is, would current permanent residents of Hong Kong, such as democrats Mr. Martin Lee and Mr. Szeto Wah, be denied their right of abode in the HKSAR after the transfer for reason of their not being "Chinese compatriots," because of their political stance and activities ? Such political discrimination would seem impossible, but ambiguity remains before the issue is legally clarified.

With just over 300 days to the reunification, it is the author's hope that uncertainty regarding the future right of abode and nationality status of the different categories of people in Hong Kong will be not only be clarified, but legally guaranteed and ascertained. Although the matter with regard to the complex issue concerning returned emigrants has been recently

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[123] Preamble, *Sino-British Joint Declaration.*

[124] Y. Ghai, "Sovereignty and Autonomy: The Legal Regime of the Basic Law" (Unpublished, 1995)

clarified by the Preparatory Committee, much work must still be done by the NPC and its Legislative Affairs Commission in order to legalise the scheme. There are also the ethnic minorities, whose position in their future home, the HKSAR, has yet to be clarified. Hopefully, the NPC of the PRC will be able to come up with a viable solution giving all permanent residents, Chinese and non-Chinese alike, the same rights and privileges in the future HKSAR, so that all its residents may work together towards the ultimate goal of prosperity and stability of the city as an international business centre.

EDUCATION AND LAW: CHINA'S 1986 COMPULSORY EDUCATION LAW, A DECADE IN ACTION

教育與法律：中國的《義務教育法》—— 十年來的動向

WONG KANG KAU*

China's new superpower status must be maintained by an educated professional class, capable of competing in the global economy. As the rise of East Asia demonstrates, economic and education reform go hand in hand. The 1986 Compulsory Education Law (CEL) was introduced by the Chinese government with this aim in mind.

The following article was written in late 1996, ten years after the convention was implemented The author examines the provisions of the CEL, and their effect, both intended and unintended He reviews from a socio-legal standpoint the past performance of the CEL, as well as its side-effects and failings Finally, he looks at the ideological stance behind education reform in China.

文化大革命後，中國雖然大力鼓勵基本教育，但小學教育仍未得到普及，很多學童在小學後紛紛輟學，導致社會人口中有不少文盲及半文盲。爲了解決這個問題，中國在一九八六年實施了《義務教育法》(Compulsory Education Law)，希望透過執行義務教育提高國民的文化水平及培養崇高的理想和人格。

本文的作者先闡釋《義務教育法》的性質、目標、法律依據、財政問題及管理問題，然後再從法律、政治及社會經濟三個角度去剖析《義務教育法》所產生的矛盾和衝突，以及它們所會帶來的影響。

I. Introduction

China's 1986 Compulsory Education Law (CEL), which came about amid the national policy of economic and legal modernisation as heralded by the 3rd Plenary Session of the Chinese Communist Party (CCP) in 1978, is the first piece of comprehensive educational legislation since the founding of the People's Republic of China in 1949. The goals of economic prosperity, legal modernisation, and education reform require a high quality, universalised basic education system. Hence, the success of CEL is to be judged by its impact, perceived and actual, on all levels of educational attainment in basic education. The 1986 legislation forms the backdrop for all serious economic political and educational discourse in China. Even before the Revolution in 1949 there were several important government regulations and decisions which guided the development of basic education. The "Common Programme" adopted during the formative years of the People's Republic supported the universalisation of basic education. But the long and tortuous history of China's development of basic education suggests that the reform of basic education in China is one that is fraught with contradictions and conflicts.

* The author would like to thank Professor Yash Ghai and Ms Jill Cottrell for their valuable advice.

The implementation of the CEL ran into some familiar difficulties often associated with the nation's current struggle for modernisation. This essay attempts to examine the CEL, to appreciate the philosophy and logic behind it, and to understand the mechanisms through which basic education is developed. The focus is on the legal and policy framework most likely to help the education authorities and pupils make the best of their school experience.

The essay is a socio-legal analysis of the diverse influences of a specific piece of social legislation. It considers the socio-economic, politico-ideological underpinning of the Law and the consequences of its implementation. It also evaluates the key provisions as it relates to various central aspects of education, as well as its extra-legal effects. The essay closes with some tentative observations on the future of the Law and basic education in China.

II. Sources of Research Materials

This is primarily a library research project. Materials were drawn principally from sources originating in China. They include: legislation promulgated by the National People's Congress ("NPC") or its Standing Committee; delegated legislation and administrative regulations promulgated under the major national laws like the CEL; administrative regulations and rules made by the State Council, its ministries or commissions which have a legislative status. Provisions, measures, directives, decrees; regulations and rules enacted by local people's congresses or their standing committees or by local people's governments at county or township levels, and above all, the Chinese Constitution itself.[1] Furthermore, the laws and regulations of China are collected in yearbooks and compilations of laws, or singly released in national and regional daily newspapers or specialised legal press; various categories of legal and educational information are published periodically by Chinese official agencies and academic institutes in popular specialised education and law magazines and journals.

Materials on the laws of China are readily available in the Law Library of the University of Hong Kong. The University's Law-on-Line legal information database is also an excellent source of China laws. The vast majority of these items are published in the Chinese language; a few of them were translated into English by the Chinese authorities themselves or by foreign organisations. Generally, the information is quite reliable. Secondary source materials can be found in the Hong Kong University Main Library and Law Library.

III. Significance of the Study

A close reading of the existing literature on Chinese education indicates that there has been a paucity of detailed and systematic studies of specific educational legislation like the CEL. A study adopting the socio-legal approach to a legal perspective on the issues of the reciprocal relationship between education and law is even harder to come by. This essay attempts to contribute to the slowly growing literature on education and law in Asia.

IV. Theoretical Approach

A. Law and Society

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[1] Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths Asia, 1992) p 87.

In an insightful research note [2] Professor Yash Ghai stated that a major weakness of traditional legal research is its relative reticence on how law relates to society, and how society relates to law. Instead, it assumes that law regulates social behaviour or governs social life. This assumption, Professor Ghai continued, can lead to misguided action and a waste of resources if the law can actually do little to shape human behaviour. He suggested socio-legal research as an alternative approach for the agenda of legal research. The primary concern of socio-legal research is to explore the reciprocal relationship between the law and society. He explained that the epistemological stance of socio-legal research eschews the view that law is a closed or internally consistent corpus of rules. Rather, it takes as its starting point the view that law is continually being shaped and reshaped by dynamic socio-economic forces in society. Also categorically refuted is the view that law can regulate social behaviour but not vice versa. Socio-legal research aims to reveal the consequences of a specific legislation by looking at the law as it is, not as it ought to be, since the eventualities of a law may be very different from those claimed in the justification of its adoption.[3]

Professor Ghai argued that the law operates at two different levels- the practical and the ideological. The practical function of law clarifies, codifies and propagates the legal norms whereas the ideological function of law promotes the idea that the law is an autonomous configuration of rules which are relatively independent from the influences of society, and administered by an independent legal profession and disinterested judiciary. Such an ideological (or, rather, idealistic) conception of law generally facilitates the rule of the ruling elite.[4] However, the unrestrained manipulation of the law by the ruling elite can backfire on them and give rise to a legitimacy crisis of the law- itself increasingly being challenged legally or constitutionally by aggrieved members of the public.[5] If the law loses its legitimacy it also loses its ideological appeal to the general public. The power of legal ideology derives from the liberal ideology of the "rule of law".[6] In conclusion, Professor Ghai emphasised that socio-legal research must analyse the historical role which law has played in the economic and politico-ideological developments of a society. Only by exploring the political-economic complexities of a society will one obtain important insights into the dynamics between society and law.[7]

Elsewhere, Michael Tigar defined legal ideology as "a statement in terms of a system of rules of law, of the aspiration, goals, and values of a social group".[8] The legal ideology of the ruling elite is always the ruling legal norms in society. But since ideology is a product of "social practice crystallised out of human conflict", the legal ideology of the ruling elite is designed to suppress rival groups and divert the general public's attention to interpreting (as opposed to challenging) the system of rules. The ruling elite (who alone possess state power)

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2 Yash Ghai, "Nature and Purpose of Legal Research" (September-October 1989), The Nairobi Law Journal Monthly No.18, 1.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 Michael Tigar, with the assistance of Madeline R Leung, *Law and the Rise of Capitalism*, (Monthly Review New York & London Press 1977) p 284.

can claim that its legal ideology is "the law of the land".[9] But since there will always be room for interpreting the rules to suit one's own interest, contradictions and conflicts are bound to develop between the prevailing social system and the formal legal norms that claim to govern and represent the collective interest.

Contradictions also arise when the socio-economic base for the emergence of law changes, but the latter develops out of pace with the political structure.[10] What a dissenting group can do at this point is to test the limits of the dominant legal ideology, to push it to its limits.[11] If the legal ideology is relatively unstructured or still at its rudimentary stage of development, there would be more space for its interpretation and reinterpretation.

Tigar[12] argued that while the roots of legal ideology are economic self-interest, it is essential not to lose sight of the central and crucial role played by legal ideology in the exercise of state power. Thus, legal ideology, economic interest and state power are mutually reinforced. Here the views of Ghai and Tigar coincide. Tigar also stressed that legal ideology is the popular justification for controlling the daily lives of the people and for state repression over them. Calls for social changes are frequently couched in terms of legal ideologies.[13] Law and legal institutions reflect the interests of the dominant group, but can change their character as a new social group gradually replaces its predecessor.[14] Social inequalities are institutionalised through the interplay of legal ideology, economic domination and state power.

B. State Power, Legislative Authority, and Judicial Interpretation in China

The Chinese Communist Party's initiative in legal modernisation in 1978 marked the beginning of a long reform. The new leadership's first move was to revitalize the law-making process within the National People's Congress. Since China is a unitary state, major legislation comes from the central state organs. Local legislation, though limited in scope, is permitted because of China's immense size and diversity. The NPC is empowered to pass laws and regulations, and to amend the Constitution. The State Council and its affiliated ministries and departments have the authority to promulgate and implement administrative laws and regulations. Provincial and municipal People's Congresses have jurisdiction over the passage of local laws and regulations. Local Congresses of ethnic minority regions can enact regional laws and regulations in conformity with their own cultural and social-economic background.[15]

Despite the growing importance of the legislative organs, control over the law-making process is fragmented and ineffective. Generally speaking, China's legislature and judiciary lack independence. There have been many instances of People's Congresses at all levels ratifying improper decisions of the Party and government units. Other instances of misconduct

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9 *Id*, p 286.

10 *Id.*

11 *Id*

12 *Id*

13 *Id*, p 288.

14 *Id.*

15 Willy Wo-Lap Lam, *Toward a Chinese-Style Socialism An Assessment of Deng Xiaoping's Reforms* (Oceanic Cultural Service Co., 1987); Albert Chen, *op cit.*, in Johnson A. Constance, *Chinese Law: A Bibliography of Selected English-Language Materials* (Far Eastern Law Division, 1990).

include promulgating new regulations and abrogating existing legislation without proper approval of the People's Congress.[16]

The crux of the problem is that the Chinese legislative process is dominated by administrative bureaucracies which existed before the current program of legal modernisation. China's present legislative structure arose out of this immense administrative bureaucracy. But the ability of these bureaucrats to dominate the enactment and enforcement of laws rests more on than their power to issue some form of secondary and primary regulations. They have a subtle and pervasive control over the Chinese legal system, an internal disease.[17]

C. Education and Law in China

The idea of compulsory education is encouraged by the state apparatus which calls for some legitimate education authority.[18] The structure of this may be rooted in constitutional provisions as in the case of compulsory basic education in China. The Chinese Constitution stipulates, in broad terms, the various duties and rights of school-age children, parents, state authorities, as well as their respective responsibilities toward one another. The provisions on rights and duties in the Chinese Constitution have particularly influenced the development of compulsory education in China. The passing of the CEL in 1986 and other subsidiary laws or amendments to the Chinese Constitution further strengthened the idea of compulsory education. The structure of the education authority also derives its legitimacy from the Party-State ideology as manifested in important political decisions, such as the Reform of the Educational Structure of 1985 made by the Central Committee of the CCP. The relationship between education and law is complex. It demonstrates that law is needed to provide for the legitimacy of education authority structure (with respect to compulsory education) since "compulsory" immediately imply coercion. In education terms, it asks a critical question: does good law give rise to good education or vice versa.

V. History of the 1986 Compulsory Education Law

The case for a new education law rests in the events of the past 45 years. So we must ask whether the CEL is a change away from the revolutionary doctrine, or within. The CEL exhibits continuities and discontinuities within the Maoist revolutionary model of education, as well as the post-1978 elitist model. Both education models recognise the need to eradicate illiteracy and provide workers and peasants with culture and practical skills for socialist construction.

The Jiangxi Soviet period from 1929 to 1934 was the CCP's earliest attempt at developing socialist education and work ethics. The thrust of Jiangxi Soviet socialist education was a unified labour school which required productive work for students and teachers. It also required compulsory attendance until the age of seventeen.[19] Many innovations of this socialist education system were applied in China after the Revolution. After the founding of the PRC the CCP stipulated in the "Common Programmes" the

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16 *Id*, p 174

17 Perry Keller, "Sources of Order in Chinese Law", 42 AJCL (1994) 739.

18 See note 2 above, p 360-364.

19 John Cleverley, *The Schooling of China* (London: Allen & Unwin, 2nd ed., 1991) p 95.

systematic and gradual popularisation of basic education. The Cultural Revolutionary education of 1966 to 1976 incorporated many of the innovations from the Yenan Period.

Post-1978 education development is a product of post-Cultural Revolution educational policies. The post-Mao leadership's reaction to the excesses of the Maoist revolutionary education was to denounce the "leftist mistakes" of the Cultural Revolution. By 1980, steps were taken to rectify those leftist excesses. The post-Mao leadership debated and advanced the new Party orthodoxy that schooling must relate directly to the new economic order- the "Four Modernizations" (industry, agriculture, science and technology).

The implications of this new ideology of economic modernisation for education was spelled out in two widely publicised documents from the mid-1980s: "Decision of the CCP Central Committee on the Reform of the Educational Structure" and "The Compulsory Education of the China". The former laid down the orientation and substance of reform, whilst the latter set a time-frame for the implementation of compulsory basic education in various parts of the country. Officials at all levels of government controlled and administered the reform at the various rural and urban schools and tertiary institutions.

In Beijing's eyes, the CEL represents a milestone in the development of universal basic education and education legislation in China.[20] Despite the fact that China's basic education system has greatly expanded since the Revolution, primary education is still lacking. This leaves many school-age children, particularly girls, out of primary schools. That in turn leaves many teenagers and adults illiterate or semi-illiterate. Moreover, the quality of education in rural areas is generally below the urban standard. This dire situation hurts the current socialist modernisation drive.

The ideology of socialist modernisation is the standard term of reference in all official thinking today. The Post-Mao CCP derived its legitimacy from the ideology of socialist modernisation. The CCP promoted the ideology rigorously to gain popular support, and treated it as the guiding principle on policy and action. Ideology has been invoked time and again to rationalise capitalist-style economic and legal reform.[21] In economic reform, the leadership fiddled with the idea of a "socialist market economy". The idea soon found its way into the CCP Constitution in late 1992 and early 1993.[22]

The switch from "rule by man" to "rule of law" has a more than ideological persuasion. As Perry Keller pointed out, the CCP's legal doctrine stresses the instrumental role of law which owes its origin to Vyshinsky's legal doctrine of instrumentalism. This doctrine ignores the distinction between law and politics, and perpetuates the supremacy of the Communist Party.[23] As Keller noted, "[Party Supremacy has] been used to justify the use of Party directives to suspend or alter the operation of law and use of Party policy documents to provide the necessary context for legal interpretation. These doctrines have also sustained the

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[20] "Introducing Compulsory Education" *Beijing Review,* 12 May 1986, No.19, pp 4-5.

[21] Yash Ghai et al (eds). *The Political Economy of Law: A Third World Reader* (London: Oxford University Press, 1987), pp 253-261

[22] Albert Chen, "The Developing Theory of Law and Market Economy in Contemporary China" (13-14 October 1995), a paper presented at the Conference on Market Economy and Law, at the City University of Hong Kong & at Peking University. For a recent study of socialist market economy in the former Eastern Bloc countries, see Jan Prybyla, *Reform in China and Other Socialist Economies* (Washington: the AEI Press, 1990).

[23] See note 18 above. Also Hilaire McCoubrey & Nigel White "A La Vyshinsky and Socialist Legality" & "The Development of Chinese Legal Theory", *Jurispendence* (London: Blackstone Press 1993) pp 117-124.

view that law derives its coherence of meaning from its political and social context than from a reasoned interpretation of statutory language".[24]

Thus, a need for legal reform does not necessitate a corresponding need for political reform. The relationship between legal and political liberalisation is a simpler matter than some western observers believe. They tend to think that political reform will eventually lead to a pluralistic political order emerging in China.[25] But the Leninist doctrine of the communist vanguard makes liberal political reform difficult as it would eventually undermine the party's monopolisation of power. But as the Chinese economy becomes increasingly liberalised, increased economic freedom will show the political structure to be a source of contradictions and conflicts. When contradictions intensify, state power can be preserved either by relying on the continued supremacy of the CCP for control, or by relying on the tried and tested ideology of "socialist modernisation".

If economic liberalisation is rooted in a sound legal system, education reform can be implemented within a sound regulatory framework as well. The sources of legitimising public education may emanate from some provisions of the constitution.[26] Article 46 of the Chinese Constitution stipulates that "Citizens of the PRC have the right as well duty to receive education"; Article 19 provides that "The state develops socialist education and works to raise the scientific and cultural level of the whole nation.... The state runs schools of various types, makes primary education compulsory and universal, develops secondary, vocational and higher education and promotes pre-school education..." Article 45 states, "the state and society help to make arrangements for the work, livelihood and education of all the blind, deaf-mute and other handicapped citizens." Article 122 stipulates, "the state gives financial, material and technical assistance to the minority nationalities to accelerate their economic and cultural development."

It is recalled that China's 1986 CEL is founded on the relevant provisions of the Constitution and conceived from past experience, in recognition of the socio-economic realities of China. However, contradictions emerge between the legislation itself and its implementation. In retrospect, the enforcement of the CEL was fraught with problems because of significant discrepancies between the statutory duties of the legislation and the material support required to give effect to them.

The idea of compulsory schooling was not well-received in some areas of China. The countryside, where agricultural reform requires a different sort of labour training than the cities, was particularly hard hit. "Compulsory" carries an oppressive connotation which easily conjures up images of China's notorious "labour-reform camps", where social and political misfits are sent. The idea of "compulsory" is open to several different interpretations depending on the point of view of the social group. Unfortunately, for some teenagers and parents, compulsory education simply meant grudging attendance at school. As an OECD study of compulsory education cautioned, young people are dissatisfied with prolonged compulsory education.[27]

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[24] *Id*, p 755.

[25] See note 29 above, p 171.

[26] See note 2 above.

[27] OECD, *Compulsory Schooling in a Changing World* (OECD) (1983) 11.

Despite this somewhat cynical view of compulsory,[28] almost all kinds of societies find compulsory education important for the development of the state. I shall closely examine China's *raisons d'etre* for adopting the CEL.

The aims of the CEL are based on the constitutional principles mentioned earlier. It paves the road for making education up to junior secondary school free, universal and compulsory. Although education officials in different parts of the country have different opinions as to how fast the CEL should be implemented, they all seem to agree that basic education should be given a statutory status. Indeed, the promulgation of another major national law on education reform in 1995 represents the high water-mark of the development of education legislation in China.[29]

Article 3 of the CEL states:

> In compulsory education the state policy on education must be implemented to improve the quality of instruction and enable children and adolescents to achieve all-round development - morally, intellectually and physically - so as to lay the foundation for improving the quality of the entire nation and for cultivating well-educated and self-disciplined builders of socialism with high ideals and moral integrity.

Popularisation of basic education in China was given legal protection only as early as 1982 when citizens' rights to receive education were written into the Constitution of 1982. The passing of the CEL for the provision of 9 years of free and universal education was a result of several considerations. Since the 3rd Plenum of the Central Committee of the CCP in 1978, the close relationship between economic development and education was recognised; the agricultural and industrial reforms rapidly rose the standard of living and increased national wealth. All these factors have created favourable conditions for the adoption and implementation of the CEL. After all, there have been increasing popular demands for the creation of such an education law on the basis of the impressive achievements of the popularisation of primary education since the Revolution.

VI. A Decade of China's Compulsory Education Law in Action

The CEL consists of 18 articles. The Law can be examined under four main problem areas: (1) Nature and Objectives; (2) Stages and Procedures of Implementation; (3) System of Administration; and (4) Legal Responsibilities, Sanctions and Discipline.

A. Nature and Objectives

The CEL signalled a new phase for Chinese education: to render compulsory schooling universal and free of charge.

Article 1 of the CEL underscores the aim and reasons for its adoption and highlights its essentially socialist character. It states, "This Law is formulated, in accordance with the Constitution and the material conditions of China, for purpose of promoting elementary

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[28] Bowles & Gintis, *Schooling in Capitalist America: Educational Reform and the Contradiction of Economic Life* (New York: Routledge & Kegan Paul, 1976).

[29] See the full text in *Complete Collection of New Laws of the People's Republic of China*, (in Chinese) Vol 1 (1995), Beijing, pp 113-127.

education and the building of a socialist society that is advanced culturally and ideologically as well as materially."

Article 3 states, "...to achieve all-round development - morally, intellectually an physically - so as to lay the foundation for improving the quality of the entire nation and for cultivating well-educated and self-disciplined builders of socialism and high ideals and moral integrity." This provision sets forth the objectives and guiding principles of a nine year compulsory education. During the implementation of the Law, there were numerous press reports that some primary and secondary school authorities single-mindedly pursued high class-promotion rates in order to demonstrate the good results of their administration, thereby securing funding for their schools. This craving for high class-promotion rates in schools inevitably increased the burden on pupils. Moreover, this is the exact opposite of the fundamental principles of a "socialist education", which emphasises the all-round development of children, i.e., morally, intellectually and physically, as stipulated in Articles 3 and 8.

There are also criticisms of compulsory education in general. Critics of compulsory education hold widely different views about a child's freedom to be educated.[30] Some critics want to liberate children from the oppression of school, while others complain that compulsory education takes away the freedom of parents to decide the content, nature, and extent of their children's education.[31] Under the school attendance laws parents will be penalised if they fail to send their children to a state-recognised school. Thus, the freedom of both parents and children will be restricted. The critics argued that if school attendance was not compulsory some parents might provide better alternative schooling for their own children. For example, parents would be able to provide a more individualised education at home, tailored to the special needs of their children.

B. Alternative Forms of Education

They would also have the option of educating their children in the private school system. These expensive fee-paying schools attract better qualified teachers and set a high standard for core subjects, though they are compelled to follow a national curriculum, as is the practice in China.[32] Private schools are also free to choose enrollees on their own terms. The contradiction here is that while parents have a choice over where to enrol their children, they cannot dictate over what is taught. The government continues to stringently enforce a unified national curriculum. In fact, much criticism of compulsory education surrounds what is taught rather than the theory of compulsory education itself. On the other hand, it was argued that compulsion and education are themselves incompatible because it is not possible to compel

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30 Rosemary Chamberlin, *Free Children and Democratic Schools: A Philosophical Study of Liberty and Education* (New York: the Falmer Press, 1989) p 90.

31 *Id.*

32 "China's First Private School for Aristocrats", *Guizhou Ribao* ("Guiizhou Daily") 19 February 1993, p 7. Translated in FBIS, 29 April 1993, pp 14-17. Also "A Deep Perspective of Non-Governmental and Private Schools", *Zhongguo Jiaoyu Bao* ("Chinese Educational Post"), 24 November 1992, p 2. Translated in FBIS, 2 February 1993, pp 31-34.

children to learn if they do not want to learn.[33] Children will learn only that which interests them though it may not necessarily be what that they need to know.[34]

In China, the success of compulsory education is to be judged by its impact on the pupils and the extent to which it achieved its objectives. A decade after the CEL has come into force, education problems are still unresolved. This is evidenced by the widespread problem of school dropouts, grade-repeating and non-attendance of school.[35] In 1989, the official dropout rate in primary schools was 3.2 percent with more primary school pupils failing to complete the full five or six years of primary school. In middle schools, the dropout rate was 7.3 percent. Dropouts were particularly numerous among the 13-14 years olds, and among girls and in rural areas. [36]

The 1992 figures of primary school dropouts stood at five million.[37] Efforts are being made to encourage these truants to return to school but the problem is that many cannot afford to pay school expenses. Based on the 33 million children who did not attend school, it is believed that one in every four illiterates in the world is Chinese.[38] The 1995 statistics indicate that illiterate or semi-illiterate Chinese constitute 12.1 percent of the total population. That is, there is one illiterate Chinese for every eight persons in the population.[39]

Another controversial issue in Chinese basic education is the CEL system of "key-point" schools. The key-point schools were introduced in 1953, but seriously attacked for their elitism during the Cultural Revolution. They were reintroduced in 1978. Although the numbers of key-point schools are small, a substantial minority of senior secondary key-point schools in urban areas serve as feeding schools for universities.[40] "Parents have objected to the competition for entry to key-point schools, to their receiving favoured treatment in funding and teacher supply, and to the practice of selling places in these key middle schools as a means of increasing school revenue."[41] Parents objected to the preferential treatment given to some pupils in these key-point schools, which demoralised teachers and pupils who failed to gain entry to them.

The socially divisive effect of key-point schools was intensified by the reintroduction of the gradually emerging private school sector. In 1993, there were more than 1200 private schools in China.[42] These extremely expensive but better endowed schools were criticised by some parents as creating a new generation of "aristocrats" in Chinese society.[43] Under the current "socialist market economy", the concept of "market" was extended to the education sector. Now, parents have a wider choice of schools, though only the rich can afford the exorbitant and deregulated tuition fees.

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33 See note 42 above, p 100.

34 *Id.*

35 See note 23 above, p 243; also Zhu Qingfang, "The Urban-Rural Gap and Social Problems in the Countryside", *Chinese Law and Government* (January-February 1995) pp 84-85.

36 See note 23 above, p 242.

37 *Id*, 242.

38 John Friske (ed), *China· Facts & Figures, Annual Handbook*, Vol 17 (1993) 432.

39 *Apple Daily*, Hong Kong, 6 April 1996.

40 See note 23 above, p 242.

41 *Id.*

42 See note 44 above, p 33.

43 *Id.*

The development of a privileged private school sector alongside a public school system is nothing new, and even compatible with the spirit of the CEL. Article 9 provides for the state to encourage enterprise, institutions and other segments of society to establish schools as prescribed by the Law. But the Law is silent on the exact types of schools. Presumably both public and private schools can coexist under the Law, though adverse social consequences of such a system do not seem to be recognised by the authorities. Many are concerned with the growing contradictions and conflicts between private and public schools and between city and rural schools. Notably, Chinese critics charge that private schools are socially divisive because pupils have an unfair advantage when applying to universities and colleges funded with public money.[44] The Law allows some parents to opt out of the public school sector for a superior education.

The Law guarantees equality of access to basic education but cannot guarantee the equality of the quality of education, as Article 7 makes available an option to choose between academic junior secondary school and junior vocational-technical secondary school. For most rural school children, junior secondary education means the end of their formal schooling, therefore, the quality of education would have a significant bearing on their chances in life. In light of the widespread phenomenon of truancy and non-registration, the Law has failed. Nonetheless, with the legal protection of the CEL, it is hard to justify the past or continuing education discrimination against rural residents on economic grounds alone, as they are greatly disadvantaged not for what they do but for where they live.

Article 12 establishes that the state shall mobilise all social forces to help improve the quality of compulsory education through China, particularly in rural areas and areas where people experience financial difficulties. Article 12 is an important provision because it recognises the needs of rural people. However, it remains to be seen how effective Article 12 will be.

A significant area of inadequacy of the CEL has been its lack of provisions in relation to the curriculum in rural schools. As a commentary in the official "Beijing Review" pointed out, even though an education network and a nine year compulsory education system has been set up in the countryside, rural needs are generally overlooked.[45] The number of pupils who proceed to universities and senior secondary technical schools constitute only five percent of those who complete primary school. The vast majority must work in the countryside. Because teaching is not geared to local needs many people have a basic education, but cannot use what they have learnt as it did not include agriculture, technology, or management skills. It is submitted that rural schools should teach the less academically gifted children useful techniques for local production.[46]

A unified set of national textbooks in the basic subjects has been in use. Concerns have been expressed that the national texts are too difficult and dull, and cannot serve local purposes.[47] It should be noted, however, that the CEL does provide for the inculcation, at least in principle, of practical skills for pupils in junior secondary schools (although this provision is not immediately apparent). Article 7 states that compulsory education is divided into two stages: primary education and junior secondary education. The term "secondary education" is mentioned instead of "junior secondary school". This is because compulsory education not

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[44] See note 34 above, p 38.

[45] Ge Wu, "Re-Orienting Rural Education" (18-24 January 1988) *Beijing Review.*

[46] *Id.*

[47] See note 23 above, pp 244-246.

only includes junior secondary (academic) schools, but also junior secondary vocational and technical schools.[48] Strictly speaking, junior secondary vocational and technical schools are not part of the basic education system. The reason for including them in the nine year compulsory education programme is because they meet the practical needs of some localities.[49] The CEL (Articles 7 & 8) deliberately leaves open the option of establishing junior vocational and technical schools to allow for some flexibility in local needs and affordability. At present, the numbers of primary school graduates in rural areas who proceed to the junior secondary vocational technical schools remain very small in comparison with urban school graduates. It remains to be seen, therefore, how effective the Law has been in providing an impetus for restructuring the rural school curriculum.

The popularisation of basic education in China is primarily targeted at the rural population. The ideal of "socialist construction" as specified in Article 3 could not be achieved without appropriate curricular reform in rural schools. The CEL would have a greater positive impact on reform of basic education in the countryside if rural education and rural economic construction were to reform side by side.

VII. Stages and Procedures of Implementation

Article 2 establishes:

> The state shall institute a system of nine year compulsory education. The authorities of provinces, autonomous regions and municipalities directly under the Central Government shall decide on measures to promote compulsory education in accordance with the degree of economic and cultural development in their own localities.

Whilst Article 7 states:

> Compulsory education shall be divided into two stages: primary school education and junior middle education. Once primary education has been universalised, junior middle school education shall follow. The department in charge of education under the State Council shall decide on the duration of each stage.

About 80 percent of the 1.2 billion strong population live in the countryside, with many minorities living in frontier areas. The economic and cultural development in these areas is uneven. The implementation of the compulsory education law of nine years is to be flexibly applied according to local conditions though the ultimate goal is to reach a unified basic education system. The statutory duties imposed in Articles 2 and 7 take into account these local variations, and allow for some flexibility in implementing basic education by granting a high degree of autonomy to regional governments.

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[48] *Education in Contemporary China,* (Chengsha, Hunan Province, China) (1990) 229.

[49] *Id.* It was reported in 1993 that the State Education Commission began drafting laws and regulations on vocational and technical education, but conceded that the growth rate of rural secondary vocational schools was lower than that of urban one.

From this point of view, China can be divided into three parts: (1) areas with a comparatively advanced cultural and economic development; (2) areas with a moderately developed economy and culture; and (3) areas with a less developed economy and culture. It was anticipated that compulsory education in areas with a comparatively advanced cultural and economic development be achieved around 1990; category two around 1995; and category three by the turn of the century.[50] There are four different modes for basic education in practice in China.

Respectively of primary and secondary education, they are: (1) six and three years, (2) five and four years, (3) five and three years, and (4) an aggregate of nine years. In the countryside, most of the primary and secondary school education lasts for five and three years respectively. Since there are enormous difficulties in the countryside in supplying teachers, school premises, teaching equipment, textbooks, and funds, the duration of the five-and-three-year mode is the most realistic option. It was nonetheless officially deemed only as a transitional system. To do otherwise would be detrimental to the popularisation of basic education in the rural areas.[51] Articles 2 and 7 do not prescribe the exact number of years of compulsory education to be applied in different regions. The option is left to the discretion of local authorities.

The backward state of the rural economy has a significant impact on the enrolment age. Article 5 stipulates, "All children who have reached the age of six shall enroll in school ...." But at present most of the children go to school at the age of seven. Without adequate provision of teachers, school premises, equipment and funds, it would be impossible to enroll all children at the age of six, especially in the countryside where primary school education is not yet universalised.[52] Whether children should start school at the age of six or seven is a matter best left at the discretion of local education authorities. Thus, Article 5 continues, in areas where it is not possible to enroll children at the age of six, enrollment age may be postponed to the age of seven. It was also suggested that especially gifted children may start school earlier than usual, whereas those living in remote areas may postpone enrollment still further.[53]

Pursuant to Article 17, the State Education Commission promulgated under the Law on 14 March 1992 the "Detailed Rules for the Implementation of Compulsory Education".[54] These rules provide more specific guidelines for the implementation of the Law by local authorities at various levels. Chapter Two of the Detailed Rules deals with the procedures of implementation, and Rule 8 lays down the basic pre-conditions for the implementation of the CEL in various localities. The basic pre-requisites include: the supply of qualified teachers, school premises, funds, and teaching equipment. Rule 9 stipulates that various lower levels of government should report to the provincial government, or act according to local administrative regulations, if they encounter any difficulties in the enforcement of the

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50 See note 40 above, p 155

51 *Id*, p 154.

52 *Id.*

53 Yi Shen, "The Promulgation of the Compulsory Education Law is a Big Event in Our Country's Educational History", *Jiaoyu Yanjiu* No 4 (1986), pp 18-22.

54 Reproduced in *Study Guide of the Compulsory Education Law of China*, (People's Education Press, Beijing 1992) pp 19-30.

compulsory education law. Rule 10 states that provincial government should formulate plans for implementing compulsory education, to be adopted by city or countryside governments.[55]

As a comparison of socialist systems, the experience of the former Soviet Union in eliminating illiteracy was more successful than that in China. The Soviet Union achieved universal primary education (4 year system) in the rural areas and universal junior secondary school education (7 year system) in the cities and towns as early as 1934- 17 years after the October Revolution. Illiteracy in the Soviet Union was eliminated in 5 years in 1939- 22 years after the October Revolution.[56]

Many education officials in China rightly expressed the concern that in the three years since the adoption and implementation of the CEL, they encountered numerous difficulties in education itself. Even in the relatively affluent rural communities of the Pearl River Delta, many junior secondary school enrollees quit schools to engage in commercial activities.[57] Education officials complained that implementing a nine year compulsory education policy was too hasty; the target was also too bold because the requisite material conditions and teacher supply were still inadequate.[58] Other officials expressed similar views. In many localities there was still a lack of concrete plans for implementation under local conditions, i.e. whether it was desirable to prioritise implementation of six years of compulsory schooling or nine years.[59] There was also the problem of commercial interests overtaking education ones.

VIII. Legal Responsibilities, Sanctions and Discipline

A. Specific Articles of the CEL

Article 16 of the CEL provides that no organisation or individual may appropriate, withhold or misuse funds earmarked for compulsory education, disrupt order in education, occupy or damage school buildings, grounds or facilities. Persons who violate these provisions shall be subject to administrative sanction or penalties. Where damage is caused, the offenders shall be ordered to pay compensation. If the circumstance is serious and a crime is committed, criminal responsibility shall be investigated in accordance with the law.

Article 15 spells out the disciplinary measures to be meted out to law-breakers. It states that if school-age children do not enroll in schools, the local government shall admonish and criticise their parents or guardians, and order them to send their children to school. In cases where enterprises or individuals employ school-age children, the local government shall admonish and order them to stop such employment. In serious cases, offenders may be fined, ordered to suspend their business operations, or have their business licenses revoked.

Like most other provisions of the CEL, these broad guidelines lend themselves to different interpretations upon implementation. It was not until April 3, 1992 that the State Education Commission, with the approval of the State Council, promulgated the "Detailed Rules for the Implementation of the Compulsory Education Law" to supply a quasi-legal

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[55] *Complete Collection of Laws and Regulations of the PRC* (Democratic Legal Press, Beijing 1994) pp 1133-1253.

[56] Chen Xia, *Education's Hidden Trouble is the Neglect of Elementary Education and Failure to Eliminate Illiteracy* (11 January 1990) translated in JPRS, pp 62-63.

[57] See note 71 above.

[58] *Guangming Ribao* (Bright Daily) Beijing, 26 March 1989.

[59] *Id.*

mechanism for enforcing the CEL.[60] The SEC document, dispatched to various levels of governments, contains eight chapters. Chapters 6 and 7 are relevant here; they deal with administration, supervision and a code of penalties.

In Chapter 6, under "Administration and Supervision", Rules 34 to 37 prescribe a system of "responsibility target" for the implementation and control of compulsory education. Governments at various levels, together with their educational departments, exercise that power of administration and supervision over the schools. The administrative performance of government officials is assessed on the criteria of how well they meet their own "responsibility target".

In Chapter 7, under the head of "Code of Penalties", there are six rules (Rules 38 to 43). The main thrust of Chapter 7 lies with the specification of a range of administrative sanctions imposed on a variety of infractions against the rules of compulsory education. Particularly noteworthy are the administrative sanctions on officials who fail to meet enrollment targets set for compulsory education because of dereliction of duty, failure to take necessary remedies, or the use of unauthorised textbooks. Administrative penalties also deal with serious cases through criminal charges, such as the embezzlement of education funds, negligence of duty resulting in the collapse of school premises, or causing injures or deaths to pupils and teachers. In cases where parents or guardians fail to enroll their children in schools, they should be criticised and educated by government authorities. Moreover, proprietors of businesses and enterprises who employ school-age children for wage-paying work are liable to be punished. Criminal offences such as insulting and assaulting teachers or pupils, and appropriation and destruction of school property are dealt with by the Public Security Bureau in pursuance of the Law of Public Order, Administration and Penalties.

If convicted offenders wish to appeal, they may do so by applying for an administrative review of their case in accordance with the law and regulations. If they are still not satisfied with the result, they may initiate proceedings in the People's Court within the limitation period. But if they do not take any action at all within the limitation period, and fail to comply with the penalty passed, the government department imposing the penalty shall apply to a People's Court for a declaration compelling the offenders to serve the penalty.

A parent of a pupil from the city of Liaoyuan, Jilin Province, wrote a complaint to the editor of "Renmin Jiaoyu" ("People's Education") about unreasonable measures used to increase teachers' salaries by requiring school children from outside the school district to pay an additional RMB 30 yuan per semester, or 60 per school year, as a teacher's "hard work fee". This practice meant that pupils who could not afford to pay were forced to quit. Many parents have reported this situation to the school leadership and education departments, but to this day the problem has not been resolved. More recently, the State Education Commission has vowed to stop the trend of arbitrarily charging high fees from primary and secondary school pupils. The SEC reiterated that compulsory education pupils should be exempt from tuition fees, and incidental fees (while permitted) should be reasonable; no school should collect any other fees without government approval.[61]

On the other hand, education officials and schools perform legal duties by drafting many school-age children into school in order to boost enrollment rates. Once they have entered school, local officials care little about their actual education or graduation. Local officials have been summoned to track down truant pupils, but they have not had much

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[60] See full text of the document in note 38 above.

[61] See note 52 above.

success because of underlying socio-economic forces which dissuade children from returning.[62]

Article 13 compels graduates of normal colleges to take up education work. The likely consequence is that given the prevailing socio-economic status of teachers and the existence of a relatively free labor market, a policy that compels all graduates of normal colleges to embrace teaching as their lifelong careers is likely to meet considerable resistance.

Article 17 provides that various legislative bodies of the local government may, in accordance with the law and local conditions, formulate specific measures to implement the Law. This provision is a potential source of dispute because of the extensive discretionary powers enjoyed by local authorities. What if some local measures conflict with specific provisions of the CEL ? How should parents or school personnel challenge the legality of certain local decisions- in a People's Court ? Would the People's Procurators take up these cases on their behalf ? This is an area full of potential problems, relevant not only in education.

On a lighter note, Article 14 stipulates, "Teachers should be respected by the public". This is a public duty that no law-enforcement officials can ever endorse.

On religion, Article 16 states, "No one may make use of religion to engage in activities which interfere with the implementation of compulsory education." This is a remarkable example of vague phraseology conferring the widest scope of discretion to interfere with religious freedom. For example, how should the provision be applied with regard to Tibetan children ? Can they learn about Tibetan culture, the religion of Mahayana Buddhism, or recent Tibetan history ?

B. Legal Culture

A new "legal culture" is being cultivated in Chinese society. The "People's Daily" stated that cadres and youths are the major targets for the popularisation of law. The article also stated that knowledge of the law, particularly by senior cadres, is a matter of great importance. It is necessary for every department to gradually change its administrative method from relying on policy solely to relying on both policy and legal methods.[63]

But old habits die hard, more so if they are old bureaucratic habits. This point is taken up in an article in the Beijing magazine "Liaowang" ("Lookout").[64] The article explores the various factors that may explain the "rupture zone" between legislation and law enforcement in China today. According to the article, China since time immemorial was a feudal social formation. Deep-seated traditional habits and traditional ethos were predominant in causing friction with the rule of law.

Despite the founding of the PRC, the vestiges of feudal society survived into the new society. Senior Party cadres were not quite able to distinguish between "rule by man" and "rule by law". Bureaucratic interests even deliberately sabotaged the law. Under dynastic rule of old people who break the criminal code are either sent to the guillotine or thrown to jail summarily. Today, government officials think of the CEL as a "soft" law, as it encroaches on traditional family values, which determines that the father (not the state) exercises unfettered control over his own children.

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[62] See note 80 above, p 35.

[63] *Renmin Ribao*, 16 June 1985, p 2.

[64] *Liaowang* (Overseas ed.), No 27 (3 July 1989), pp 16-18.

Fetishism for high production frequently leads people to fall foul of the law. New state policies and rules digress from original laws and regulations. When contradictions emerge, the law is at the mercy of policy- the mixing of law-making and policy formulation. Arguably, with China just beginning to erect a legal framework, it is inevitable that some legislations are irrational, loose, and difficult to enforce. As the legislative efforts in the 1980s produced a large number of laws and regulations, the law enforcement departments are overburdened. Legislative authority and supervision are duties bestowed by the Constitution upon the Standing Committee of the People's Congress. Unfortunately, the method of supervising law enforcement is one of bureaucracy, where only reports are heard, suggestions made and appeals declared. Such a bureaucratic style of work cannot solve the problem since a large-scale inspection of law enforcement carried out by representatives of the People's Congress is of the traditional "campaign type" that can produce only temporarily results.[65]

C. *Enforcement of Compulsory Education*

As to legal enforcement of compulsory education in China, it is necessary to note that although the Constitution is the legal basis of the CEL, the Law receives its mandate from the political "Decision of the CPC Central Committee on the Reform of the Educational Structure", promulgated in 1985. This lays downs the content and direction of the education reform. The CEL constitutes a legal basis for challenging breaches of compulsory education, but the mechanisms of challenge are seriously flawed, as discussed above. Under the current education system legal enforcement mechanisms include: the People's Court, government cadres, educational officials, educational inspectors, and grass-roots organisations like neighborhood committees and branches of Communist Youth League.

Judicial enforcement is unlikely because traditionally, Chinese society is among the least litigious societies in the world. Chinese people have a traditional prejudice against litigation in court. The dispute resolution mechanisms in China put a great deal of emphasis on extra-judicial practices like mass education (through criticism and self-criticism), persuasion, consultation, reconciliation of mediation. Even during court proceedings mediation still takes priority. Adjudicators proceed with a judicial remedy only after mediation completely fails to reach a compromise between the disputants.[66]

Another legal mechanism that gives effect to the provisions of the CEL is educational inspectors. Supervision and inspection directly under the central government were carried out in 11 provinces and cities in 1992, accounting for less that half of all 23 provinces and concentrating mainly in the urban areas. In the countryside, where compulsory education is most in need of supervision and inspection, the establishment of supervision and inspection organs is only at a rudimentary stage. Nationwide, the education inspecting system is not yet fully developed.[67]

Government cadres, educational officers, and grass-roots organisations are other legal enforcement mechanisms that can challenge those who contravene the CEL. But, as discussed above, there have been many instances of breaches of the Law that were not solved by legal or

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[65] *Id*

[66] Donald Clarke, "Dispute Resolution in China", *Journal of Chinese Law*, Vol 5 (1991) 245.

[67] "Education Inspection Offices in 92 Percent of Cities", translated in *FBIS* (14 August 1992); "Supervision over Education", *People's Republic of China Yearbook 1993/94*, 289. Also see note 63 above.

political means. Such a continuous flouting of the law takes many forms. For example, schools arbitrarily charge extra fees; parents' complaints to government authorities are met with disgust; difficult cases of truancy that result from specific religious and cultural traditions of ethnic minorities or from sheer economic necessity in many rural households are all, in degrees, ignored.

However, as one study pointed out, teachers cannot hold the school principals and party cadres accountable for the wrongdoing. Teachers tend to feel that they're vulnerable targets within the system and may refrain from airing their opinions about matters of education administration and Party politics, for fear of a personal vendetta or retribution.[68] In a nutshell, legal enforcement of the stipulations of the CEL has at best led to a defective compliance, and at worst resulted in total paralysis.

XII. Conclusion

In this essay, I have sought to place the Compulsory Education Law of China within a broader socio-economic and political context. The main thrusts of the study are to explore the contradictions and conflicts which are inherent in the Law as a piece of social policy legislation. The study also reflects on what the Law had set out to do and its possible effects, intended or unintended. It has been possible for me to make comments on the Law's track record as it has been 10 years since enactment.

The analysis of the Law focused on four main thematic questions: (1) nature and objectives of the Law, (2) stages and procedures of implementation, (3) system of educational administration, (4) legal responsibilities, sanctions and discipline. The study was intended as a contribution to critical discussion within the legal and educational community and the wider public.

As well, the analysis was directed at exposing the contradictions and conflicts inherent within the legislation on three levels: (1) contradictions and conflicts between the various provisions of the Law itself - internal consistency; (2) those between the provisions and their implementation; and (3) those between the provisions and other central government policies. The data lends support to the findings that, at the first level of analysis, in terms of policy formulation, it can be said that the Law is characterised by internal consistency rather than contradictions. The duties imposed by some of the provisions of the Law and the policy guidelines enunciated in Party Decisions have led to conflicts since promulgation.

It is at the level of policy implementation that the inherent contradictions expose themselves. The material conditions for the CEL's intended imposition are still inadequate, as seen by the many examples previously cited. It has been suggested that the central government should provide full funding for basic education as many other countries have done. It is submitted that the policy on "key-point" schools should be abolished as it tends to discriminate against rural children, dampen their enthusiasm for education and damage future job prospects.

To help the CEL's implementation, the central government has launched a consistent attack on feudal attitudes and ideologies on the role of law in society. However, the government's attempt to create a sound legal system and promote the concept of "rule of law" has been fraught with difficulties. The idea of legal modernisation has gained currency since

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[68] See note 80 above, p 86.

1978, and peaked in 1993 when Qiao Shi, the most senior leader in charge of legislative affairs espoused the official view on law, and linked it to the socialist market economy in China.[69] The gradual integration of the Chinese and World economies will mean that China will be exposed legally as well as economically, as Tigar had pointed out earlier. Qiao Shi said, "the globalisation of economic activities requires Chinese law on trade and investment to be compatible with foreign and international practice."[70] Thus, the role of law in the domestic economy and in international trade and finance is recognised by the government.

Within China, it has been difficult for the Chinese government to govern through the "rule of law", as many Chinese people still cling to the feudal concept of "power above law". Hence, the central government is obliged to seek other means of legitimacy for its modernisation initiatives, including that in education. The defective enforcement of the CEL, in many respects, led the central government to rely more on the supremacy of the Party and its governing ideology. The party claims its legitimacy by championing the cause of "socialist modernisation". The new orthodoxy in the post-Mao era serves to justify the continued centralisation of power in the Party.

The adoption and implementation of the CEL is an integral part of the propagation of the "rule-of-law". But its defective implementation revealed serious contradictions and conflicts between the provisions of the Law and their actual enforcement at the local level. This is common knowledge among China analysts. A motto very much in vogue in Chinese society today states that "policy measures at the top; counter-measures at the bottom". This really points to the detrimental widespread practice of "bureaucratic maneuvering" to sidestep central directives in order to satisfy one's own selfish ends.

It is important to note that some legal provisions are difficult to enforce in actual terms. The viable alternative must then be sought in the political and ideological domain. For example, under the present basic education program, the responsibilities for administration and financing are to be decentralised to various lower-level governments, which is justified by the ideology of "walking-on-two-legs" and "local self-reliance". However, the supremacy of the "leadership of the Party" means that the Party retains ultimate control over education policy in the areas of direction and finance. Social contradictions experienced as a result of the conflicts between the statutory intent of the CEL and state policy take many forms, but are often manifested in the conflicts between school administrators and Party cadres, between teachers and school administrators, and between parents and school authorities.

With an open economy developing out of pace with a closeted political class, serious contradictions between a liberal economic ideology of "rule of market" and the conservative Party ideology of the "Four Basic Principles" are inevitable. Rapid economic liberalisation destabilises the education system, especially in basic education. The shift from a centrally planned economy to a market-oriented one magnified opportunities for official corruption. The enormous discretion exercised by bureaucrats over resource distribution distorted education and legal reforms, as reflected in the failure of compulsory education. The fact that education reforms were proposed primarily on economic grounds would suggest strongly that education's place is ultimately relegated below political and economic imperatives.

Basic education is particularly vulnerable because of the central government's long-term policy to prioritise higher education over basic education, and urban schools over rural

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[69] See note 26 above, p 2.

[70] *Id*, pp 2-3

schools. Furthermore, because of most people's short-sighted economic view of education, economic investment inevitably takes precedence over educational needs.

With contradictions intensifying between economic and political structures, and between the old feudal concept of law and the new legal culture, the development of basic education will ultimately suffer. The adoption and implementation of the CEL in 1986 has been a concrete expression of collective intellectual conscience: one that cares about the education of our children, the backwardness of Chinese society, and the new forces unleashed by the process of modernisation. In the interests of basic education, it is suggested here that, given the abundance of initiatives, the real problem is with implementation of education reform as intended. The Chinese leadership is no doubt genuinely committed to social reform, but the problems lie within its own inefficient bureaucracy.

LEGAL JURISDICTION OVER THE PEOPLE'S LIBERATION ARMY STATIONED IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

駐香港特別行政區中國人民解放軍審判權的問題

REGAN CHONG SIK-YU*

Perhaps one of the more memorable images from the Reunification was that of the People's Liberation Army (PLA) crossing the HKSAR-PRC border at the stroke of midnight, to be welcomed in a ceremony by local villagers. There was a time when even the thought of the Chinese army entering Hong Kong would fill Hong Kong people with fear. Now, half a year later, the PLA has finally dropped out of the headlines.

Produced in the last year of British rule, the following note was written partly in response to the once widespread fears that members of the PLA would misbehave whilst stationed in the HKSAR. The author explores the historical parallel with the colonial garrison, and the differences between the Chinese and United Kingdom garrison laws. In addition, the type of offence is of vital importance as to which country and court has jurisdiction. This article details and summarises the relevant legal provisions dealing with the jurisdiction over the PLA in the HKSAR.

香港於一九九七年七月一日正式回歸中國，根據《中國憲法》第三十一條，全國人民代表大會頒佈《基本法》以推行「一國兩制」。而《基本法》第十四條第一及三段明確落實中國人民解放軍於主權移交後取締英軍駐守香港特別行政區。因此，中國中央軍委草擬了《香港駐軍法》並提交全國人民代表大會通過及執行。

本文作者就駐港解放軍審判權的問題出發，解釋當遇上刑事及民事訴訟時該由中方或港方主審，以及討論該駐軍法對香港法制所會帶來的影響。

I. Introduction

The Crown colony of Hong Kong will revert to Chinese sovereignty on 1 July 1997. Under Article 31 of the Constitution of the People's Republic of China (PRC) (1982),[1] the PRC's National People's Congress (NPC) in 1990 promulgated the Basic Law of the Hong Kong

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1 Article 31 of the Constitution of the PRC (1982) vests the state with the power to establish special administrative regions when necessary.

Special Administrative Region to strengthen the political experiment of "one country, two systems"[2] proposed by the Chinese Communist Party (CCP) in the early 1980s for the reunification of China.[3] The first and third paragraphs of Article 14 of the Basic Law[4] formally establish the People's Liberation Army (PLA) as the replacement for the British garrison after the handover. For this purpose, laws concerning the HKSAR garrison have been drafted by the Central Military Commission (CMC) of the PRC, and will be sent to the NPC for enactment.[5]

A. The Present Laws Governing Jurisdiction over the Armed Forces

All members of the PLA (after 1997) and the British garrison (before 1997), while serving in Hong Kong, are subject to local Hong Kong law. But in addition, the former will also be subject to PRC law (which include Chinese military law),[6] whereas the latter are also subject to English law and British military law.[7]

In the PRC, no single law code contains all the military laws; instead, Chinese military law can be found in separate declarations of the NPC, with headings as various as "Law...", "Notice...", "Procedures...", etc. Among them, the *Interim Regulations of the PRC on the Punishment of Soldiers in Breach of Their Duties 1981* (Interim Regulations 1981) is the most important statute governing criminal offences committed by members of the PRC's armed forces (this includes the PLA and the Chinese People's Armed Police Force (PAP),[8] and their employees).[9] Jurisdiction over cases which involve both military personnel and civilians was

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2 Wei Dingren et al., *Xianfaxue* ("Constitutional Law") (Beijing: Peking University Press, 1993) p 306. The workings of "one country, two systems" is defined as "a region within the PRC that, due to historical reasons, is permitted to maintain its particular political system which is different from the socialist system presently practised by the rest of the PRC, provided that it is carried out under the leadership of the central government and with the consent of the NPC."

3 Dong Likun, *Xianggangfa De Lilun Yu Shijian* ("The Theory and Practice of the Hong Kong Law") (Beijing: Falu Press, 1990) pp 20-21.

4 Article 14 of the Basic Law states that the Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region.

5 Discussion in the media about the (then) proposed HKSAR Garrison Law first appeared in early 1996. For example, please see p A1, *Ming Pao Daily,* 3 May 1996. According to a high ranking PLA officer, the Draft HKSAR Garrison Law was to have been published by January 1997, and passed by the NPC in March 1997. Please also see p A8, *Ming Pao Daily*, 12 September, 1996.

6 Paragraph 4, art 14 of the Basic Law provides that members of the HKSAR garrison will have to abide by the laws of both the PRC and the HKSAR.

7 Paragraphs 3 and 53, vol 41, *Halsbury's Laws of English*, (London: Butterworths, 4th ed, 1983). At common law, soldiers do not cease to be citizens, and are subject to all the duties and rights of other civilians, as *per Burdett v Abbot* (1812) 4 Taunt 401, pp 449-450, *per* Mansfield CJ.

8 The Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice Concerning Matters Relating to the Criminal Cases Involving Members of the Chinese People's Armed Police Force 1987 (hereafter referred to as Provisions 1987) extended the scope of the application of the Interim Regulations 1981 to include members of the PAP as well. The latter was created from the PLA in 1983, in order to assist local police with public. There are now two kinds of police in the PRC: the *gongan* (the "public security forces", equivalent to the ordinary police) under the Ministry of Public Security, and the *wujing* (the PAP) under the CMC (art 93 of the Constitution of the PRC 1982 gives the CMC the power to lead the PRC's armed forces). The PAP is still considered a part of the PRC's "armed forces".

9 Extra-organizational staff and workers (*zaibian zhigong*) in the PLA are equivalent to non-combat personnel in the Western armies.

first laid down in the *Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the General Political Department of the PLA Concerning Matters Relating to the Cases Involving Both the Army and Civilians 1982* (Provisions 1982).

The PLA's entry into the commercial sector was followed by more legislation in the 1980s. This included the *Circular of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the General Political Department of the PLA Concerning the Jurisdiction over the Cases in Which the Demobilised Soldiers Violate Laws and Commit Crimes When They Retire from the Military Services and on the Way to Their Destinations 1986* (Circular 1986), and the *Supplementary Provisions of the Supreme People's Procuratorate, the Ministry of Public Security and the General Political Department of the PLA Concerning the Investigation of the Cases Involving Both the Army and Civilians 1987* (Supplementary Provisions 1987).

Under common law, many courts were reluctant to hear cases involving servicemen for three reasons. First, often it was said that the offence was committed in the course of duty, and thus subject to different considerations. Secondly, a civilian court should normally not proceed against an individual at the expense of military administration and duty performance. And finally, there might be perfectly acceptable remedies (or punishment) under military laws.[10]

In colonial Hong Kong, the demarcation line between the jurisdictions of the civilian and military courts is laid down in the United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965. While British military law in the Service Discipline Acts (the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957) apply to servicemen in Hong Kong,[11] many present Hong Kong Ordinances also contain specific provisions governing the position of the British garrison in many aspects such as disqualification, exemptions and powers, firing practice and land.

B. How Jurisdiction is Shared between a Military and Civilian Court

Reluctance to change is in human nature. With the approach of 1997, there is growing public concern about the jurisdiction of the HKSAR judiciary over the future PLA garrison (hereafter referred to as the HKSAR garrison).[12] The underlying reason for such worry is that there are considerable differences between the PRC and Hong Kong regarding the division of jurisdiction between civilian courts and military courts in cases dealing with members of the armed forces. The main differences are as follows.

1. Jurisdiction of military courts in criminal cases

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[10] *Dawkins v Lord F. Paulet* (1869) L.R. 5 Q.B. 94. See also: O. Hood Phillips, Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law* (London: Sweet & Maxwell, 7th ed, 1987) p 352; S. A. De Smith, *Constitutional and Administrative Law* (London: Penguin, 1994) p 228.

[11] The Army Act 1955, ss 207(1), 217, 222, the Air Force Act 1955, ss 207(1), 215, and the Naval Discipline Act 1957, ss 115(1), 127(1), (2).

[12] On 10-11 July 1996, Legco debated a Democratic Party motion that the HKSAR civilian courts should exercise jurisdiction over the HKSAR garrison. However, the motion was defeated by the "pro-China" faction. See: p2, *Sing Tao Evening Post*, 11 July 1996; p A12, *Ta Kung Pao* 12 July 1996. It was eventually passed on 20 November 1996. Also see note 99 below.

(1) In the PRC, military courts have jurisdiction (mainly personal jurisdiction, but also territorial jurisdiction in certain situations) over the following matters:[13]

(a) criminal offences committed by any member, on active service,[14] of the PLA;[15]

(b) criminal offences specified in the Interim Regulations 1981, committed by any ex-serviceman while he[16] was on active service, i.e. committed prior to the serviceman's discharge from the PLA;[17]

(c) criminal offences committed by any demobilised serviceman at a barracks or its vicinity while on his way home after being demobilised;[18]

(d) criminal offences committed by civilians at any commercial company or community institute run by the PLA, provided that such company or institute does not fall within the jurisdiction of any public security organ;[19] and

(e) criminal cases which not only relate to military affairs but also occur at any facilities shared by the PLA and the regions, such as barracks, warehouses, airports and piers, etc.[20]

(2) In Hong Kong, an offence, committed by a member, or a member of a civilian component, of the British forces, and

(a) which arose out of and in the course of his duty;[21] or

(b) against a member, or a member of a civilian component, of the British Forces, or a dependant of any such member;[22] or

(c) against property belonging to the government of the United Kingdom or the British armed forces,[23]

will be dealt with summarily by a commanding officer if the offence is a minor one, or if serious, by a court-martial.

2. Jurisdiction of civilian courts in criminal cases

(1) In the PRC, civilian courts have jurisdiction over certain categories of

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13 Xu Bin, *"Lun Jundi Hushe Xingshi Anjian De Guanxia"* ("Discussion on the Jurisdiction over Criminal Cases Involving Both the Military and the Regions") [1989] 6 *Faxue Zazhi* ("Law Magazine") pp 25-26.

14 A PLA member is considered to be "on active service" so long as he remains a member of the PLA, that is, during the period from admission to discharge. In the UK, however, the term "on active service" is restricted to describing a period of active engagement for the purpose of protection of life and property. Please see: s 224(1) Army Act 1955, and s 222(1) Air Force Act 1955.

15 Provisions 1982, rule 1.

16 The term "he" shall be gender-neutral throughout this essay.

17 See note 15 above, rule 5.

18 Circular 1986.

19 Supplementary Provisions 1987, rule 3.

20 *Id*, rule 5.

21 The United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965, s 3(1)(a).

22 *Id*, ss 3(1)(b), 2(6).

23 *Id*, s 3(1)(c).

criminal cases relevant to the military. They are as follows:[24]

(a) any civilian who, together with any PLA member on active service, committed a criminal offence;[25]

(b) criminal offences, except those specified in the Interim Regulations 1981, committed by any ex-serviceman while he was on active service, i.e. committed prior to his discharge from the PLA;[26]

(c) criminal offences committed outside a barracks and its vicinity by any serviceman prior to his admission to the armed forces, or by any newly recruited PLA member to whom a duty has not yet formally handed over;[27]

(d) criminal offences committed by civilians at any commercial company or community institute run by the PLA, provided that such company or institute falls within the jurisdiction of any public security organ;[28]

(e) criminal cases which not only relate to regional affairs but also occur at any facilities shared by the PLA and the regions, such as barracks, warehouses, airports and piers, etc.;[29]

(f) criminal offences committed by extra-organisational staff & workers[30] serving the PLA, and family members of any PLA member, at a barracks or its vicinity;

(g) criminal offences committed by civilians at a barracks or its vicinity;[31] and

(h) criminal offences committed by any PAP member on active service.[32]

(2) In Hong Kong, a serviceman or a civilian member of the British garrison will be tried in civilian courts for committing an offence, where

(a) the offence is not what is contained in section 1(2) above; or

(b) a certificate is issued by or on behalf of the Governor, either before or in the course of the trial, that the officer commanding the British garrison has notified the Governor that it is not proposed that the case should be dealt with by a court-martial or

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24 Xu, note 13 above.

25 Note 15 above, rule 2.

26 *Id*, rule 5.

27 *Id*, rule 4. The offending PLA member will be dismissed before facing the civilian courts.

28 Note 19 above.

29 *Id*, rule 5.

30 Note 9 above.

31 Note 8 above, rule 3.

32 Note 8 above extended the Interim Regulations 1981 to include PAP members, but failed to specify whether the PLA military judiciary has jurisdiction over the offending PAP members. In practice, the offender is usually handed over to a civilian court, which prosecutes under the Interim Regulations 1981, or the Criminal Law of the PRC 1979, or both. Triggered by the staggering murder of Li Peiyao (formerly the vice-chairman of the NPC) by his PAP guard in February 1996, the CMC set up a military court with exclusive jurisdiction over the PAP in 1 August 1996. See p 5, *South China Morning Post* 11 August 1996, which cited a report of the *People's Liberation Army Daily*.

summarily by an officer.[33]

3. Civil proceedings

(1) The civilian courts of the PRC, generally speaking, have jurisdiction, in civil proceedings, over PLA members or legal persons of the PLA such as factories or companies run by the PLA.[34] However, jurisdiction of PRC's civilian courts has been limited since January 1, 1993, when the military courts were vested with power to deal with cases involving disputes over contracts entered into, or property owned by, PLA members or PLA legal persons.[35]

(2) The British servicemen stationed in Hong Kong, acting in their personal capacities and not in their capacities as servants or agents of the British governments, may be sued in a Hong Kong court. However, if the British garrison or its servicemen are acting within the scope of their authority as servants or agents of the British government, they can only be sued in a U.K. court, but not in a Hong Kong court, whether in contract or in tort, because the Crown Proceedings Ordinance (Cap 300) precludes an action being brought against the Ministry of Defence in the courts of Hong Kong[36] but under the Crown Proceedings Act 1947 (as amended) an action does lie in the English courts against the Ministry of Defence.[37]

In short, members of PRC's armed forces are, in any circumstances, subject to jurisdiction of military judiciary, and can remain so even after their discharge from the forces if it is discovered that they had broken military law prior to the discharge. From time to time the PRC's military judiciary calls for greater jurisdiction of military courts over servicemen,[38] and these were

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33 Note 21 above, s3(2)(a) permits the Commander of British garrison to waive jurisdiction, if he considers it necessary, such as in cases of public concern.

34 Lu Mingjian at al., *Zhongguo Sifa Zhidu Jiaocheng* (" The Chinese Judicial System Curriculum") (Beijing: People's Court Press, 1991) p 99.

35 Li Junwu, Da Zuming, *"Junshijiguan Zai Jingjishenpan Zhong De Falunwenti"* ("Legal Issues in Cases Involving Economic Disputes Dealt with by the Military Courts") [1994] 1 *Faxue Zazhi* ("Law Magazine") pp 41-42. A reason for the change of jurisdiction may have been the difficulties of enforcement faced by the civilian courts, against the PLA.

36 Section 34(2)(C) of the Crown Proceedings Ordinance states that the Crown can only be sued when the servant or agent (of the Crown) in question is paid wholly and solely by the Colony. Expenditure on the British garrison stationed in Hong Kong is provided by the taxpayers of both Hong Kong and the UK.

37 Section 2(6) of the Crown Proceedings Act 1947 states that the Crown can be sued in an UK court only if the Crown's servant or agent is paid wholly out of the Consolidated Fund of the UK.

38 Li Desheng, *"Wujing Renyuan Junzhi Fanzui Ying You Junshisifajiguan Guanxia"* ("Members of the People's Armed Police Force Who Breach Their Duty by Committing Offences Prescribed by the Interim Regulations 1981 Should Be Subject to Jurisdiction of Military Judiciary") [1990] 6 *Faxue Zazhi* ("Law Magazine") 23. See also Li Keren, *"Wujing Bumen Jianli Zhuanmen Sifajigou Shizaibixing"* ("The Establishment of Special Judicial Institutions within the People's Armed Police Force Is Inevitable") [1992] 2 Modern Law Science pp 56-57. There were also calls to extend the jurisdiction of the military courts over extra-organizational staff and workers of the PLA. See Cui Mingxiu, *"Jundui Feijunzhi Renyuan Zuian Guanxiaquan Zhengyi"* ("The Dispute about Jurisdiction over Criminal Cases Committed by the Extra-organizational Personnel of the Armed Forces") [1994] 2 *Renmin Jiancha* ("People's Procuracy") pp 22-

sometimes met by the corresponding legislation.[39] On the other hand, Hong Kong civilian courts have considerable jurisdiction over members of the British garrison and such condition remains a rule.

II. The Soldier in the PLA

A. Punishment

In China, the principle that convicted servicemen are to be given heavier punishments than their civilian counterparts is best embodied in the Interim Regulations 1981, in which more than a half of the offences carry a death penalty, whilst the Criminal Law of the PRC 1979 does not.[40] On the contrary, any defendant British serviceman is punished to the same extent as is his civilian counterpart on the same charge.[41]

B. Obligations

Young PLA members are required to show, not only their ardour for warfare, but also their apathy towards women. According to the *Interim Provisions Concerning the Strict Observance of the Marriage Law* of the PRC promulgated by the General Political Department of the PLA in December 1980, the rights for a PLA member to engage in a romantic relationship with any person or to get married are limited in the following ways:

1. PLA members are asked not to:
   (1) engage in a romantic relationship with any person in the early stage of his career, nor marry young; nor
   (2) engage in a romantic relationship with or marry any person who
      (a) works for the PLA; or
      (b) lives at the neighbourhood of such member's barracks; or
      (c) belongs to an ethnic minority of the PRC, unless both parties insist vigorously on marrying each other and parents' consent of the ethnic minority party has been obtained; or
      (d) comes from overseas, Hong Kong or Macau (or Taiwan, by inference).
2. PLA members are not allowed to get married while on active service.

C. Privileges

Rights accompany obligations.[42] The PLA is vested with some privileges or legal rights to

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39 Note 32 above.

40 The Decision of the Standing Committee of the NPC Regarding the Severe Punishment of Criminal Elements Who Seriously Endanger Public Security 1983 led to the execution of many criminals, including those who should not have been liable to death penalty under the Criminal Law of the PRC 1979.

41 Zhou Jian and Xu Qiping, *"Jiantan Junshi Falu zeren"* ("A Brief Talk on the Military Legal Responsibility") [1990] 4 *Hebei Faxue* ("Hebei Jurisprudence") p 47.

42 Qian Shougen, *"Junshifa De Yiban Yuanze He Woguo Junshifa De Teshu Yuanze"* ("The General

enhance performance of military duties. For example, Article 26 of the Marriage Law of the PRC 1980 provides that a petition for divorce by the spouse of a member of the armed forces on active service will not be allowed unless consent is obtained from the member concerned.[43] However, Article 25 of the same statute prescribes that a court can grant a divorce decree, on the grounds that a civilian couple have little affection for each other, even if one party does not want to divorce. Another good example is Article 181 of the Criminal Law of the PRC 1979, which sets a maximum imprisonment term of 3 years for any person found guilty of cohabiting or marrying the spouse of a member of the armed forces on active service, harsh, compared to the maximum two years' term of imprisonment or criminal detention for any person found guilty of bigamy as laid down in Article 180 of the same statute. These two statutes are to provide special protection for a serviceman's marriage, and thus theoretically guarantee the combat effectiveness of the armed forces.[44]

D. Legal Status

Before PRC law, the PLA is a special group of people. As far as the servicemen's special legal status is concerned, it is indisputable that the PRC law goes beyond colonial Hong Kong law not only in terms of the scope of jurisdiction of military courts over servicemen, but also in terms of the degree of regulation. The cause of the discrepancy is, frankly speaking, the antithesis between the supremacy of national interests and the doctrine of "equality before the law". The PRC stresses the former, whereas the English law talks more about the latter. Therefore, it is reasonable to predict that the lenient mode of jurisdiction of the British military court over the stationed servicemen in the colonial Hong Kong will probably not remain after 1 July 1997, when the HKSAR garrison begins its tour of duty in a strange land crowded with strangers, and far away from the PRC's central government.[45]

III. The PLA and the PRC

A brief mention must be made about the PLA's special role within the PRC hierarchy. Needless to say, it is not a secular, non-political army, as is the case with most Western military organisations. According to Marxist theory, the army's main function lies in defending the

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Principle of Military Law and the Special Principle of the Military Law of Our Country") [1995] 1 *Faxue Zazhi* ("Law Magazine") p 38.

[43] Yu Fengmei, *"Ying Jiaqiang Junhun De Falu baohu"* ("The Protection of the Servicemen's Marriages Should Be Enhanced") [1995] 3 *Faxue Zazhi* ("Law Magazine") p 39.

[44] Legislation providing special protection for servicemen whose wives petition for divorce is not a recent legal innovation of the CCP. It had first appeared in the Republic of Chinese Soviet (established by the CCP in 1931) in the southern Jiangxi province during the Warlord's period. Similar legislation can be found in the laws of communist-controlled northern China from 1937 to 1945, at the time of the Japanese invasion: Ye Xiaoxin, *Zhongguo Fazhishi* ("History of Chinese Legal System") (Beijing: Peking University Press, 1992) pp 375-378, 394-395. This continued undisturbed during the civil war between the CCP and the Kuomintang (KMT) from 1946-1949: Pu Jian, *Zhongguo Fazhishi* ("History of Chinese Legal System") (Beijing: Guangming Daily Press, 1995) pp 399-401. Such legal ideas are not peculiar to the communists, but the Chinese people- similar legal provisions, such as the Servicemen Marriage Ordinance, art 10, are also found on KMT-controlled Taiwan. See *On the Marriage Law and Succession Law of the Chinese Communist Party* (Taipei: Mainland Affairs Commission of the Executive Yuan, 1993) p 84 (in Chinese).

[45] "Strange" in the sense that the newly-arrived PLA members would be in a new and exotic environment.

interests of the ruling class, i.e. the proletariat. Indeed, the leadership of the party and army are often the same; indeed, the generals' influence can often be seen, as in the Taiwan missile crisis of 1995.

Thus the problem of Hong Kong, long regarded as a haunt of the bourgeois. How can a Socialist regime allow its own to be judged by a anti-revolutionary court ? And Article 8 of the Basic Law makes it very clear that the law of the HKSAR is, indeed, bourgeois law. This question remains unanswered to date.

IV. Will the Military Judiciary of the HKSAR Garrison Undermine the Legal System of the HKSAR?

The rule of law and judicial independence of Hong Kong common law legal system will not be undermined simply because of the presence of a military judicial system in the HKSAR garrison. I cannot see how, on a piece of land, one judicial system will undermine another judicial system when the demarcation of their jurisdiction over the HKSAR territory (or, more precisely, the HKSAR garrison) is clear-cut and fair. A distinct division of jurisdiction will be feasible as long as the legislator, that is the legislators of the CMC of the PRC, draws the demarcation line with expertise and prudence. A clear-cut avoids a conflict of laws, thus providing little room for legal manoeuvring, which makes the law more predictable.

On the other hand, a fair demarcation of jurisdiction has several dimensions, namely legal, constitutional and political. These will be explored later.

A. Phantom 'Conflict of Laws'

The concurrent operation of the Hong Kong common law system and the PRC military judicial system could foster perceptions that a "conflict of laws" may arise when, in reality, this is not the case. A well-defined demarcation of jurisdiction will obviate "conflict of laws" situations. Nevertheless, there are some likely scenarios in which such conflicts may be perceived to have arisen, which might lead to a sense of injustice and confusion.[46] For example, in Hong Kong, intimidation is a criminal offence punishable on conviction by imprisonment,[47] whereas in the PRC it is not a criminal offence, and cannot bring about any action in tort.[48] Conversely, in Hong Kong, slander is not a criminal offence, though it is heard in civil proceedings;[49] however, in the PRC, it is both a criminal offence[50] and a tort.[51] Hence, if a PLA guard, while trying to persuade some mischievous intruder teenagers to leave the barracks, loses his temper and threatens to beat

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[46] These conflicts include those of legal awareness, observance of law, laws, application of laws, jurisdiction and litigation procedure, etc. See Chen, note 51 above.

[47] Crimes Ordinance (Cap 200), ss 24-27.

[48] Chinese jurists opine that intimidation cannot be a criminal offence because by threatening somebody, the wrongdoer would not be creating a favorable condition for himself to commit a crime, and in addition, the victim would not have suffered significantly. See Gao Mingxuan et al.(eds), *Xingfaxue* ("Criminal Law") (Beijing: Peking University Press, 1989) pp 206-207, as well as: Li Youyi et al (eds), *Minfaxue* ("Civil Law") (Beijing: Peking University Press, 1988) p 653.

[49] Slander is a common law action, though codified and amended by the Defamation Ordinance (Cap 21), ss 5, 16, 19(3), 21, 23 and 24.

[50] The Criminal Law of the PRC 1979, art 145.

[51] The Civil Code of the PRC 1986, art 101.

the intruders up unless they leave immediately; HKSAR prosecutors will indict for intimidation. The wrongdoer PLA member will consider the law unfair to the garrison

B. Constitutional Restraint

Some people do not realise that as a region of the PRC,[52] the HKSAR, however autonomous,[53] will not possess sovereignty. Thus power to determine its jurisdiction will fall squarely on the shoulder of the PRC. Residual powers lies with the Central People's Government, not the HKSAR.[54] Thus, the jurisdiction of a region like HKSAR is determined not by the region itself, but by the central government.

It is not uncommon for people to view the scope of jurisdiction exercised by a judiciary to be the degree of judicial independence enjoyed by that judiciary. After all, judicial independence does not necessarily vary with jurisdiction. Having a wide scope of jurisdiction makes a judiciary omnipresent, but not necessarily independent.

The rule of law, well-established in Hong Kong legal system, could be undermined if the Chinese court-martial is not as good as its British counterpart at practising the common law, with which the rule of law is inextricably linked. Logically speaking, we cannot rule out the chance that a PLA court-martial in the HKSAR would be seen as backward and not as sophisticated as a common law trial, simply because of its adherence to the civil law system, and its subordination to CCP supervision.. The performance of court-martial judges will be vital in persuading the public that justice will be done in the HKSAR garrison. In short, the extent of jurisdiction exercised by the stationed PLA court-martial will have an inevitable influence on the rule of law in the HKSAR.

C. Political Compromise

The malleable nature[55] of the term "sovereignty" can be clarified by the fact that a sovereign state alone has jurisdiction over everything in its territory. Since the HKSAR is not a sovereign state, nor the HKSAR garrison a foreign visiting force, rules of international law will not apply, and yet can be the basis from which inferences may be drawn. The rationale for the concession of jurisdictional immunity to a visiting force is generally to avoid impairing the integrity and efficiency of the visiting force.[56] Similarly, since jurisdiction of the authority of a foreign visiting force over that visiting force is considered justifiable by the courts of the admitting state, it will be reasonable for the PRC to reserve its jurisdiction over its troops stationed the HKSAR. Finally, if a political compromise can be made between a strong troop-sending sovereign state and a weak troop-admitting sovereign state, why can't there be jurisdictional compatibility between the central (Beijing) and the peripheral (HKSAR) within a country ?

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[52] Article 1, Basic Law.

[53] Article 2, Basic Law.

[54] Chen, *Id*, pp 111-112; Dong, note 3 above, pp 52-54; Yun and Zhong, *Id*, pp 162-163.

[55] Alan James, *Sovereign Statehood: The Basis of International Society* (London: Allen & Unwin, 1986) pp 237-239.

[56] Shearer, note 87 above, p 207.

V. Afterthought

Legal professionals in the PRC and Hong Kong may probably hold different views on the division of jurisdiction over the HKSAR garrison. Some Hong Kong people may even speak out against the establishment of a PLA military court in the HKSAR. What will be the way out ? Again, generosity or willingness to compromise is essential to the success of the "one country, two systems" experiment. Hong Kong people must admit that the jurisdiction of the HKSAR's civilian courts over the HKSAR garrison and its members is not a self-derived nor reserved right, but the direct result of a voluntary delegation of power by the sovereign state- the PRC. Hong Kong's legal professionals should appreciate that even visiting forces stationed at foreign sovereign states have considerable jurisdiction over their members, as is general practice under international law. The Hong Kong community should understand its delicate position[57] as a minority in a nation which has itself felt threatened for hundreds of years by the looming presence of Western civilisation.[58] On the other hand, in the face of what might be termed as Hong Kong arrogance, mainland China could show her generosity and mercy by conceding her jurisdiction over the HKSAR garrison in the HKSAR as much as possible, whilst maintaining sovereignty.

Government arrogance, ignorance, and insensitivity to the feelings of Hong Kong people for the rule of law would be lethal to "one country, two systems" concept. No division of jurisdiction over the HKSAR garrison should provide an excuse for distrust and political overreaction.

VI. The Twilight

On October 23, 1996, the Draft HKSAR Garrison Law was revealed at a meeting held by the Standing Committee of the NPC. The draft law suggests the following division of jurisdiction over the HKSAR garrison:[59]

> Criminal Cases
> 1. The military judiciary will have jurisdiction over members of the

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[57] There is much academic justification (mainly from the mainland) for the PRC to place more weight on "one country" when implementing the policy of "one country, two systems", or to give priority to the Socialist system when choosing between "two systems". See Wei, note 2 above, pp 306-31: "After implementing the 'one country, two systems', no matter how the economies of Taiwan, Hong Kong and Macau develop, the dominant position of the socialist economy of our country (the PRC) will stand fast, thus the socialist character of our country [the PRC] will remain unchanged... According to the concept of 'one country, two systems', Taiwan, Hong Kong and Macau shall be merged with, and become part of, such a country called the People's Republic of China. It is not 'two countries, two systems', but implementation of two systems on the premise of 'one country'." See also Kuan Hsin-chi, "Chinese Constitutional Practice" in Peter Wesley-Smith and Albert H.Y. Chen (eds), *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988) p 55: "In both Chinese legal theory and political practice, 'one country, two systems' does not mean that the two systems are united under federalism; the socialist system is the foundation for 'one country, two systems'; there must not be equal status between the 'two systems'."

[58] The colonial oppression imposed on the Chinese in the 19th and early 20th century left a bitter taste.

[59] Page 1, *South China Morning Post*, 24 October 1996. For the text of the Draft HKSAR Garrison Law, see p A15, *Ming Pao Daily*, 24 October 1996.

HKSAR garrison,[60] for example, in cases,

(1) where an offence committed by a member of the HKSAR garrison arises out of and in the course of duty; or

(2) where an offence committed by an off duty member of the HKSAR garrison against another member of the garrison.

2. The HKSAR courts will not have jurisdiction over members of the HKSAR garrison except in cases where an offence is committed by a member of the garrison but which does not arise out of and in the course of duty and the offence is,

(1) committed against a Hong Kong resident or any person other than the HKSAR garrison personnel;[61] or

(2) recognised by the HKSAR law.[62]

3. The HKSAR courts will try and convict a Hong Kong resident, or any person other than the HKSAR garrison personnel, who is a co-accused in a case over which the military judiciary has jurisdiction.[63]

Civil Cases

Any person or organisation other than the HKSAR garrison personnel can sue members of the HKSAR garrison in torts and in the cases where the tort is,

1. deemed to arise out of and in the course of duty, the case will be heard by the PRC's Supreme People's Court;[64] or

2. not deemed to arise out of and in the course of duty, the case will be heard by the HKSAR courts.[65]

The proposed rule is very much like the existing rule governing the British garrison. Remarkably, military lawmakers had sought to comply with the "one country, two system" policy and did not disappoint Hong Kong people, because, as far as the legal system of the PRC is concerned, the draft law is a big step towards diversification. In the eyes of the military, the draft law is considered a great concession to the HKSAR. Few Hong Kong legislative councillors question its compliance with the Basic Law.

Compliance with the Basic Law will lend greater legitimacy to the HKSAR Garrison Law, but will not necessarily make the latter perfect. The reasons are as follows.

Firstly, the British Martial-Court and the Hong Kong judiciary both operate in a common law legal system. However, after the handover, there will be a conflict of laws,[66] because a member of the HKSAR garrison could be tried under either PRC law or HKSAR law (or both). The problem is inherent in the nature of the PLA and Hong Kong's legal system.

Secondly, the laws governing the British garrison such as the Crown Proceedings Ordinance (Cap 300) were not in the best interests of the people of the Colonial Hong Kong. For

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[60] The Draft HKSAR Garrison Law, article 20, para 1.

[61] *Id.*

[62] *Id.*

[63] *Id*, article 20, para 2.

[64] *Id*, article 23.

[65] *Id.*

[66] Regional conflicts of law occur when two regions have different laws, and both are applicable to a particular case

instance, torts committed by a member of the British garrison against a Hong Kong resident are actionable only in U.K. courts. Undoubtedly, the language barrier would put a Hong Kong plaintiff attending the U.K. court at a disadvantage. Unfairness will equally be found in a tort case heard at a court in Beijing (where the Supreme People's Court of the PRC is situated).

Thirdly, in the PRC, the concept of torts and the judiciary's experience in handling such actions is less developed than those in Hong Kong due to the short history of PRC's present legal system. The National Compensation Law of the PRC, which governs actions in torts brought against the government, was not in force until 1995, and therefore relevant case law is scarce. Thus, litigants will find much inconsistency in the approach towards compensation in the PRC courts and the HKSAR courts.

Fourthly, although military confidentiality and the reputation of the PLA are two of the underlying reasons for handing over a case involving a tort committed in Hong Kong by a member of the HKSAR garrison to a Beijing court, it would make more sense if article 23 of the Draft HKSAR Garrison Law permits flexibility by including a clause which matches the United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965, section 3(2), para (a), so that the Supreme People's Court can waive its jurisdiction over certain cases.[67] That way, the Military court may pass cases back to the civilian court at its discretion. In fact, the right of the Supreme People's Court to waive, or claim, its jurisdiction over certain civil cases is entrenched in PRC law,[68] and putting a waiver clause like this into the Draft HKSAR Garrison Law is really only following existing PRC practice.

Finally, judgments made by the Supreme People's Court are conclusive, and thus executed immediately. In accordance with the Procedure of Adjudication Supervision, any person who is party to the proceedings, or who considers his legal rights affected by the judgment of the Supreme People's Court, may at the discretion of the Supreme People's Court present a petition (to this same court). But the execution of the judgment will not be suspended until resolution of the petition.[69] On the other hand, the right of appeal is a legal right under the common law system, and the execution of a judgment can be stayed if the parties appeal..

On 24 December 1996, the Standing Committee of NPC tabled some amendments to the Draft HKSAR Garrison Law.[70] Two of the most striking amendments are as follows:

1. A clause, added to Article 20, provides that the military judiciary and HKSAR courts may exchange cases (dealing with a PLA soldier), if they deem it appropriate;
2. A clause, added to Article 23, provides that the Supreme People's Court shall apply HKSAR laws in torts dealing with the PLA garrison in the HKSAR.

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67 This is Dr Liu Nanping's idea. Conversely, Dr Chen Ruihua considered the idea unrealistic because he believed that even if the idea is embodied in the HKSAR Garrison Law, the Supreme People's Court would be reluctant to let go of its jurisdiction over the HKSAR garrison.

68 The Civil Procedure Law of the PRC 1991, art 21, provides that the Supreme People's Court has jurisdiction over certain civil cases of first instance namely, cases which might have great importance countrywide and cases which are deemed by the Supreme People's Court to fall within its jurisdiction.

69 The Civil Procedure Law of the PRC 1991, article 178. See also Chai Fabang, *Minshi Susong Fa* ("Civil Procedure Law") (Beijing: Peking University Press, 1992) pp 294-297.

70 The NPC Standing Committee put forward six amendments to the Draft HKSAR Garrison Law regarding arts 7, 10, 20, 23 & 26, and inserted a new article which govern the resolution of contractual disputes between the HKSAR garrison and Hong Kong residents. See p A2, *Ming Pao Daily,* 25 December 1996, and p 4, *South China Morning Post,* 26 December 1996.

On 30 December 1996, the NPC Standing Committee passed the HKSAR Garrison Law. The committee endorsed it with minor amendments, by adopting stricter provisions on Article 18 which bans PLA troops from engaging in profit-making business,[71] leaving the original rule on jurisdiction untouched, that is, in cases where a Hong Kong resident, or any person (or any organisation in torts) other than the HKSAR garrison personnel, is a victim, guilty members of the HKSAR garrison would be subject to the jurisdiction of:

1. Local courts if the offence or the tort was committed while off-duty, though the local court may waive its jurisdiction in criminal cases;
2. The Military judiciary if the offence was committed while on-duty, though the military judiciary may waive its jurisdiction;
3. The Supreme People's Court, if the tort was committed while on duty.

[71] Page 4, *South China Morning Post,* 31 December 1996; p 4, *Hong Kong Standard,* 31 December 1996.

ACQUISITION OF HONG KONG RESIDENCE STATUS BY CHINESE PROFESSIONALS AND MANAGERS

內地專才獲取香港居民身分的問題

ALEX KL LAU*

Under the "One Country, Two Systems" concept, the People's Republic of China and the Hong Kong Special Administrative Region share international political sovereignty, but maintain separate borders, as it was before Reunification. Hong Kong's economic strength comes from the services industry; the focus is on trained, professional people. With the gradual integration of the two economies, the need for such personnel (especially those with PRC experience) will only increase.

This article examines the means by which Chinese professionals can live and work in Hong Kong. The author takes us through the present law, possible reforms, and the underlying policy behind such restrictions. Various different types of visas are discussed along with their requirements. Lastly, the author points out the few loopholes in the law, as well as possible amendments.

自中國於一九七八年實施對外開放政策後，香港與中國的商貿關係日見密切，不少中外商行都在港設置分公司以處理有關貿易，而聘請內地專才來港工作的情況亦越來越普遍。由於香港各類居留簽證的細則並非於成文法中受確認而是以入境事務處內部政策指引爲依歸，所以不少內地專才的僱主都爲員工申請成爲香港居民的事而煩惱。

本文作者於文中就這個問題解釋有關法例的內容和申請資格，以及提出一些方法和途徑予有關人士參考，以替在港工作的內地專才獲取香港居民的身分。

I. Introduction

This paper discusses the means by which a professional or manager who is a national of the People's Republic of China (PRC) may qualify for residency status in Hong Kong.

Our territory is inarguably the major gateway to the PRC. Since the latter's adoption of the "open door" policy in 1978, many overseas companies have been expanding their business activities into this huge market. These companies often establish a subsidiary or representative office in Hong Kong.

It is common for such local branches to recruit well-educated and experienced PRC professionals. They provide the needed expertise for business in China. Many Hong Kong-based companies are also interested in these people for the same reasons. It is therefore important to understand the relevant Hong Kong immigration requirements for the entry of these professionals and managers.

Immigration is a unique branch of law in Hong Kong. This is because many of the requirements for residency visas are not codified in legislation. Instead, they appear in the

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internal policy guidelines of the Hong Kong Immigration Department (HKID). This note seeks to clarify the confusion encountered by potential employers in Hong Kong as well as by the applicants for these residency visas.

For the purpose of this note, "PRC nationals" refer to those holding a Private Individual's passport. Holders of Public Affairs passports, Diplomatic passports and Double Journey entry permits are not permitted to work for private employers in Hong Kong.

II. Sources of Law

In a modern jurisdiction, one would expect all immigration law to be codified[1]. In Hong Kong, this is not the case. There is an Immigration Ordinance, as well as subsidiary legislation.[2] However, these statutes do not set down all of the requirements of residency visas in Hong Kong. In fact, most of these requirements are contained in the confidential internal policy directives of the HKID, which are not available for viewing by the general public. Although there have been calls for the publication of these policies, this has not been done. Instead, the HKID has published concise brochures which briefly outline visa requirements- unsuitable for academic scrutiny. If further information is required, one must ask the HKID bureaucracy itself.

III. Types of Residency Visas

A. Right of Abode

In order to obtain residency status in Hong Kong, a person must either have the right of abode or a residency visa.

A Permanent Resident enjoys the right of abode in Hong Kong.[3] Prior to 1983, any person born in Hong Kong automatically acquired the unqualified right of abode upon birth. This included children born to illegal immigrants and Vietnamese refugees in Hong Kong awaiting resettlement overseas. However, it was clear that not everyone in Hong Kong enjoys automatic right of abode. It was estimated that in 1986, only 60% of the population was entitled to this privilege.[4]

When considering the position of a PRC national, particular attention should be paid as to his parents' birthplace. If one parent was born in Hong Kong, then the applicant will automatically acquire the right of abode, regardless of age. The reason is that having a Hong Kong-born parent entitles the applicant to British Dependent Territory Citizenship (BTDC) by descent, which carries with it the right of abode.[5] If the applicant is illegitimate, then the nationality and right of abode must derive from the mother.

For the purpose of this note, it is assumed that the PRC national does not have the right of abode in Hong Kong.

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1 For example, the Canadian Immigration Act, s 4.

2 Cap 115.

3 Immigration Ordinance, s 2A.

4 WS Clarke "Hong Kong Immigration Control: the Law and the Bureaucratic Maze" (1986) HKLJ 342.

5 British Nationality Act 1981 s 16, read together with Immigration Ordinance, First Schedule, Para 3(b).

B. Visas Available

1. Types of visas

The types of residency visas available to a professional or manager and his family members are:

(i) Employment Visa;
(ii) Employment (Investment) Visa;
(iii) Dependent Visa, which is available to the applicant's immediate family.

While the "Trainee Visa" is available in the U.K., this category does not exist in Hong Kong. In general, anyone without the right of abode wishing to work in Hong Kong must apply for an Employment Visa, no matter how short the period of employment and regardless of whether the position is paid.[6]

2. Additional requirements and prohibitions

If a visitor has no intention of working while in Hong Kong, he need not apply for an Employment Visa- but he is strictly prohibited from any duties of employment. In one case,[7] a visitor became the director of a Hong Kong company. He then filed a Director's Return (Form X) at the Companies Registry as required under the Companies Ordinance.[8] He was, however, charged with an offence under the Immigration Regulations,[9] which provide that permission given to a person to land in Hong Kong as a visitor shall be subject to the consideration that "he shall not establish or join in any business". The HKID took the view that he had committed a breach of the Regulations by becoming a company director.

While the visitor in that case was acquitted, it was noted that non-resident directors of Hong Kong companies may run the risk of prosecution if their intended position was not disclosed to the HKID upon arrival in Hong Kong.[10]

A PRC national is required to satisfy the basic requirements of a residency visa. Moreover, several additional requirements apply only to PRC nationals. These are discussed in detail below in Part V.

IV. General Requirements for Residency Visas

A. Employment Visa[11]

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6 Holders of Dependent Visas are permitted to work without seeking a separate Employment Visa however; see part IV section 3(b) below.

7 *Taylor v. R* (Crim App. 501/76) (unreported)

8 Cap 32.

9 PG Willoughby, "Notes of Cases" (1976) HKLJ 381.

10 Immigration Regulations r 2(4).

11 There are several Employment Visas which are not available to Professionals and Managers: Domestic Helper; Overseas Worker under the Importation of Labour Scheme; and Airport Construction Workers under the Provisional Airport Authority.

1. The applicant's background

The applicant must prove to the HKID that (i) he possesses academic qualifications and vocational experience not otherwise readily available in Hong Kong, and (ii) that his employment in Hong Kong will be beneficial to the local economy.

To satisfy the first requirement, the successful applicant should be assuming a professional or managerial post under the Hong Kong employer. Examples of this are senior specialised managers, lawyers, accountants, and their ilk. A non-executive post may encounter difficulties in the application as there are many young people in Hong Kong seeking junior posts.[12] The applicant must also demonstrate that he has the relevant working experience. Therefore a person who has little or no experience in the area of work he is applying to perform in Hong Kong will likely fail in his application.

The satisfaction of the second requirement (being beneficial to Hong Kong's economy) is closely tied to the first requirement. This is because those in senior positions often require junior or clerical assistance in the discharge of their duties. Thus, it can be argued, the economy will benefit by this creation of new employment.

2. The employer's background

The Hong Kong employer must demonstrate that its business genuinely requires additional staff. The employer is required to submit to the HKID audited accounts and tax returns. If the employer is constantly losing money, it will be difficult to justify the necessity for further staff. The employer must also produce recruitment records to demonstrate that suitable Hong Kong candidates cannot be found.

3. Change of Employment

If the applicant wishes to change jobs after obtaining an Employment Visa, he must seek the approval of the HKID. This is true whether he is changing employers or position- be it promotion, demotion, or transfer. The HKID will assess the Change of Employment application as if it were a new application; i.e. all of the requirements of an Employment Visa, as outlined above, are again examined against the applicant's new position.

The legal basis for the change of employment procedure is as follows: the HKID deems the Employment Visa holder's right to live and work in Hong Kong to be subject to the condition that he shall only take such employment or establish or join such business as may be approved by the HKID.[13] This means that the visa holder was approved for employment at a specific post and specific employer. Any change to this situation triggers the need to reapply for approval under the Change of Employment procedure.

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[12] On rare occasions, overseas applicants do succeed in obtaining non-executive posts The author once successfully assisted a Danish university student in obtaining an Employment Visa. She was in the middle of her undergraduate studies and had no working experience. She was appointed as the private tutor for the children a Danish diplomat in Hong Kong. As the parents could not recruit a Danish-speaking tutor locally, this young student succeeded in her application.

[13] Albert HY Chen, "Judicial Review of Immigration Tribunal Decisions" (1985) HKLJ 212.

4. Renewal

The Employment Visa is granted initially for one year. At the end of that period, if the applicant continues to work at the same post with the same employer, he may apply for a two-year renewal of his visa. Thereafter, the renewal periods are for a further two years and three years respectively.

If he has been working in Hong Kong continuously for seven years while holding a valid Employment Visa, he may qualify as a Permanent Resident.

5. Appeal

An unsuccessful applicant has a very limited appeal procedure open to him. He may reapply later when his case is stronger. Although there is an Immigration Tribunal in Hong Kong, it deals mainly with Removal Order cases.

B. Employment (Investor) Visa

This visa was created for those wishing to set up their own businesses in Hong Kong; therefore managers and professionals planning to work for an employer in Hong Kong should not apply for this visa.

An exceptional situation may be where a professional is the majority shareholder of a Hong Kong company and he applies for an Employment Visa for a position as a senior executive with his company. The HKID may challenge the application because the applicant is effectively the owner of his company, and would in effect be employing himself. The HKID may regard the application as one for an Employment (Investment) Visa, which carries different requirements. In essence, the requirements are such that the appellant must demonstrate a successful business background, and that he will run his business in Hong Kong in a manner beneficial to the economy.

C. Dependent Visa

1. Eligibility

The spouse of an applicant, their unmarried children under 21 (not 18, which is the age of majority in Hong Kong),[14] as well as parents over 60 are entitled to dependent visas. It is important to note that the spouse must be legally married to the appellant. Therefore, fiancé(e)s, common law spouses and co-habitees do not qualify.

All dependents will continue to hold Dependent Visas until there is a change of relationship (divorce, for example, in which case the spouse will need to leave Hong Kong-unless she or he secures an Employment Visa on her or his own merits), or until the dependent becomes a permanent resident.

2. The Dependent visa holder's right to work

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[14] s 2(1), Age of Majority (Related Provisions) Ordinance (No. 32/1990).

Upon acquisition of a Dependent Visa, the holder may also work in Hong Kong. It is important to note that the holder of a Dependent Visa is not subject to the Employment Visa and Change of Employment requirements set out above. In other words, holders of dependent visas need not possess any formal academic qualifications nor any vocational experience. They may work for any employer so long as they secure an offer of employment. They may also change jobs as often as they wish.

V. Additional Requirements and Restrictions for PRC Nationals

A. The Two-year Rule

Having satisfied all of the factors set out above, a PRC national must also prove that he has been outside the PRC, Hong Kong and Macau during the whole period, or a substantial portion of the two years immediately preceding his application for an Employment Visa. This is known as the "two-year rule". For instance, if a PRC national submitted his application on 1 October 1996, he must demonstrate that he was mainly outside of the PRC, Hong Kong and Macau between 1 October 1994 and 30 September 1996. Short trips back for pleasure or business during this period are allowed.

This additional requirement is difficult to satisfy. It eliminates many otherwise eligible PRC nationals. Only students, employees seconded overseas or emigrants would qualify by spending the requisite amount of time away from the three territories. This is a policy decision implemented by the HKID for the purpose of controlling the number of PRC nationals qualifying for Employment Visas in Hong Kong.

B. Effect of Naturalisation by a Second Country

Many PRC nationals do not satisfy the two-year rule and yet wish to qualify for employment visas. One method used successfully until 1990 to circumvent the two-year rule was to be naturalised by another country, usually through an investment scheme.[15] After investing the sum required by the third country, the PRC investor would be naturalised immediately under that country's citizenship legislation. The investors then secure the citizenship of that country, with accompanying passport. Indeed, the investor may not need to set foot in that country itself to obtain its citizenship.

Under this scheme, it was thought that former PRC nationals need not observe the two-year rule as they had acquired new nationalities. This method was used with success until 1990. Although this procedure is legal under the laws of Hong Kong, the HKID will take a disapproving view of such applicants. For the purpose of applications for Employment Visas, the HKID has, since mid 1990, been requiring these newly naturalised applicants to continue to satisfy the two-year rule, despite their new passports.

The continued application of the two-year rule means that it is now impossible for a PRC national to bypass the rule by merely investing and being naturalised by a country with no residency requirements. It is submitted that this is once again a policy decision by the HKID to continue to impose the two-year rule despite the change of the applicant's nationality.

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[15] Available only in some jurisdictions.

C. *Dependents*

The dependents of PRC nationals are not automatically entitled to dependent Visas upon approval of the Employment Visa application. Each dependent must also satisfy the two-year rule, together with other standard requirements such as proof of relationship with the principal applicant.

Dependents who do not qualify for a Dependent Visa can only visit Hong Kong on a Visitor Visa or a Double Journey Entry Permit. Alternatively, the Employment Visa holder must return to the PRC to visit his or her dependents.

D. *No Student Visas*

Theoretically, if the children of a PRC applicant do not satisfy the two-year rule (and therefore cannot qualify for a Dependent Visa) the family might consider enrollment in a local school, and apply for a Student Visa. They could then accompany their parents who are working in Hong Kong.

Unfortunately, this method cannot work as a PRC national, of whatever age, cannot apply for a Student Visa in Hong Kong.[16]

The author submits that this restriction is again motivated by Hong Kong's policy decisions. The restriction is not contained in the Immigration Ordinance nor in subsidiary legislation. Taken together with the requirements of PRC nationals and their spouses, this puts a very difficult burden on PRC nationals who wish to live, work, or study in Hong Kong.

E. *Permanent Residence for PRC Nationals*[17]

After working in Hong Kong continuously for 7 years, the PRC applicant may qualify as a Permanent Resident.[18] The applicant must be wholly or partly of Chinese race.[19] The phrase "Chinese race" has not been defined, and is therefore a difficulty which may arise, as the practicalities of proving one's race is inherently difficult.[20]

There may be a break in the 7 year period of residence. This would occur when an Employment Visa expires before renewal. It has been decided that an immigration officer has the power to extend the over-limit period after the expiry of the visa, thus solving the problem of overstaying and allowing for continuity. In this situation, there is no break in the seven year period and the visa holder need not restart the seven years all over again.[21]

However, this power is not retroactive, and thus does not assist those with a break in their stay prior to this decision. The seven years must start afresh after the break. It was suggested that the Immigration Ordinance be amended to resolve this situation,[22] but the point

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16 Note, however, that a Dependent Visa holder can study in Hong Kong.

17 A Permanent Resident cannot be removed or deported.

18 Immigration Ordinance s 2(1).

19 *Id.*

20 RJ Faulkner, "Immigration Ordinance" (1972) HKLJ 360 at 365.

21 *Director of Immigration v. See-And Paisarn*, Civ App No. 66/88 (unreported).

22 Patrick Sheehan, "Case Comments" (1989) HKLJ 235.

is now academic as this power was given over seven years ago.

VI. Future Changes

A. The Basic Law

The Basic Law was promulgated by the National People's Congress in 1990, and came into effect with the transfer of sovereignty on 1 July 1997. The Basic Law provides a legal basis for the governing of Hong Kong, including immigration matters. It therefore has a quasi-constitutional effect. The Basic Law provides that:

> For entry into the Hong Kong Special Administrative Region, people from other parts of China may apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central Peoples' Government after consulting the Government of the Region.[23]

The words "approval", "settlement", and "competent authorities" have not been defined. Moreover, there is no other provision under the Basic Law specifically dealing with the entry into Hong Kong by PRC nationals. It is therefore submitted that the above-mentioned visa requirements are unaffected by the Basic Law, subject to further enactment of new legislation.

B. Suggested Changes

It is submitted that possible changes to the above requirements may take one of the following alternative routes.

1. Remain as internal policy

This would allow for greater flexibility in assessing applications. Policies allow for a higher degree of discretion than the word of the law. A case may be strong in some aspects but weak in others, and yet still be approved because the case officer is entitled to consider the application as a whole. He is not restricted by clearly defined requirements which must otherwise be followed rigidly by the HKID.

One problem, however, is that the literature containing the relevant guidelines are not readily available to the public, and may even be classified as confidential or for internal use only. It is submitted that more be revealed to the public, so as to facilitate a sound case before submission.

Even if the selection criteria remain as they were before 1997, it may become more difficult to obtain Employment Visas. After 1 October 1996, the number of universities increased to six, up from only two ten years ago. With a large number of local graduates, it will become increasingly difficult to satisfy the requirement that no suitable local candidate could be found.

With respect to vocational experience, proficiency in Chinese is becoming an

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[23] Article 22

increasingly important requirement in senior local positions.

2. Codify as law

Codification will clarify a lot of confusion, but this may also mean that applications are left with very little flexibility in consideration. Under this route, visa requirements will be statutory and easily accessed by the public. Everyone will know what the criteria are, but the HKID may also be obliged to fail cases where the applicant fails to satisfy any one of the factors, no matter how trivial.

It is submitted that codification of the basic visa requirements should be encouraged so as to clearly lay down the most important criteria. Nevertheless, the HKID should still have discretionary powers, specifically conferred under the statute, when assessing applications. This is because every case is unique and must be considered on its own merits.

C. Conclusion

Whichever route is adopted, it is submitted that the future HKID will be at least as informative to the public as the current HKID.

A legal provision can be easily made by amending the relevant ordinance, such as the Hong Kong Immigration Ordinance or the Chinese Nationality Law. Alternatively, a policy statement need only be announced verbally by the responsible Chinese Government official without any subsequent legislative action. Whichever way is adopted will have far-reaching consequences.

DIRECTORATE CIVIL SERVANTS BARRED FROM THE SELECTION COMMITEE

高級公務員被拒參選成為選舉委員會委員

KAREN TO*

Due to Hong Kong's unique political structure, civil servants had traditionally wielded a powerful if unseen influence in the administration of the Crown colony under British rule. With the change of sovereignty, the political actions of those in the civil service have become the focus of much scrutiny. The question often posed is: which is more important, the individual political rights of civil servants, or the interests of greater society in a politically neutral public body ?

The article was written in early 1997 as an overview of the controversy surrounding the Government's refusal to allow senior civil servants to enter the Selection Committee. This article is clearly relevant in light of the SAR government's decision to forbid senior civil servants to stand as candidates for the National People's Congress in December 1997. The balancing of individual and group rights is an ancient problem, and will no doubt surface again in the years to come.

三位首長級官員聯同本地高級公務員協會就香港政府禁止高級公務員參選成爲選舉委員會委員的決定申請司法覆核一案，終於在一九九六年九月十二日審結。

案中申訴人以高級公務員參選成爲選舉委員會委員並不會與其公職產生利益衝突爲理據，反對政府以職級作爲界線，禁止高級公務員成爲選舉委員會委員。本文作者透過分述申訴和答辯雙方的立場和論據，以及上訴庭的判決，進一步剖析整個判決對香港公務員所會造成的影響。

I. Introduction

> Senior Civil Servants must recognise the loss of some rights is a small price to pay to preserve the integrity of the government and the civil service to ensure good government.' Justice Raymond Sears said as he upheld the government's ban on senior civil servants serving on the Selection Committee.[1]

"This is not a small price to pay. It's a very big price. These are our most important political rights," said Mr Hui Kwok-hung, Chairman of the Senior Non-Expatriate Officers' Association after the High Court (now the Court of First Instance) upheld on 12 September 1996 the Government's ban on senior civil servants serving on the Selection Committee.[2] Mr Hui, Mr Leung Chi-chiu, and Mr Ma Siu-leung were among the 1,170 Directorate Officers prohibited by the Hong Kong Government from serving on the Selection Committee.

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1 *South China Morning Post,* 13 September 1996.

2 *Id.*

Together with the Senior Non-Expatriate Officers' Association ("SNEOA"), they applied for Judicial Review against the government ban, but their application was rejected by Sears J, who in his judgment also said that the ban was "justifiable and reasonable". This view was supported by Governor Chris Patten, who said that the ban was "right and sensible"[3] and was pleased to see that the guidelines for Directorate Officers had received "legal endorsement".[4]

The case drew widespread public attention and discussion on the nature of the role the civil service in ensuring a smooth transition of government. The Chinese Government's proposal of a Provisional Legislature to be selected by the Selection Committee was met with resistance from the outgoing colonial government.

In light of this political situation, Sears J raised an interesting point at trial: if civil servants are said to be loyal to the colonial government by not serving on the Selection Committee prior to July 1 1997, will they suddenly be rendered disloyal at the stroke of midnight of 1 July, upon the change of government? The delicate balance between individual and public interests will have to be scrutinised in order to ensure the neutrality and impartiality of the civil service. The case directed the public's attention to the role of the civil service after the hand-over. This paper will discuss the arguments brought forward by the two sides and the effect of the Court ruling on Hong Kong civil servants.

II. Background

In 1984, the British and Chinese governments agreed in the Joint Declaration to continue with their discussions over Hong Kong in a friendly spirit and to develop a cooperative relationship in order to ensure a smooth transition of government in 1997.[5] The two governments also agreed that there was a need for closer cooperation on procedural matters for the changeover as well as economic and cultural affairs of the future Hong Kong Special Administrative Region ("HKSAR").[6] However, the relationship between the two governments deteriorated with the breakdown of talks on the 1994-95 electoral arrangements put forward by Governor Patten. Negotiations on key issues were at a deadlock. The Chinese Government unilaterally declared that the legislature directly elected in 1995 was a body that had violated the Basic Law and the Joint Declaration, and would be disbanded on 1 July 1997 upon the establishment of the HKSAR.

In its place, the Preparatory Committee[7] decided that a Provisional Legislature would be set up to deal with matters immediately after the changeover.* The Provisional Legislature would have the power to enact laws[8], examine and approve budgets[9], revenue, and public

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3 *Id.*

4 *Hong Kong Standard*, 13 September 1996.

5 Clause 1, Annex II, The Sino-British Joint Declaration.

6 *Id*, cl 5.

7 Paragraph 2 of the Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (4 April 1990) state that the Preparatory Committee of the HKSAR was "responsible for preparing the establishment of the HKSAR." There has been much controversy over whether this is enough to form a legal basis for the Provisional Legislature.

* [editor's note: the Provisional Legislature is now a reality, but was merely an idea at the time of writing. Amendments have been kept to a minimum, to ensure that the context of the work remains intact.]

8 Clause (5)(a), Decision of the Preparatory Committee for the HKSAR of the National People's Congress on the Establishment of the Provisional Legislature of the HKSAR (24 March 1996).

expenses[10], as well as to listen to and debate upon the Policy Address of the Chief Executive[11] and to appoint the judges of the Court of Final Appeal and the Chief Justice of the High Court of the HKSAR.[12] All in all, its function was to be the same as that of the Legislative Council before 1997. The Provisional Legislature would operate until the establishment of the first Legislative Council of the HKSAR and not beyond the 30th June 1998.[13] Its members would be elected by the members of the Selection Committee[14], which would be composed of 400 permanent Hong Kong residents from the commercial, professional, labour sectors, as well as former political figures.[15]

The Hong Kong Government declared that it would work cooperatively with the Preparatory Committee on the basis of three established parameters:

> (1) That the arrangements for cooperation be fully consistent with the Joint Declaration and the Basic Law, and be in the interests of Hong Kong;
> (2) That the authority and credibility of the Hong Kong Government would not be compromised; and
> (3) That the morale and confidence of the civil service would not be affected and that civil servants would not be subjected to conflicting loyalties.[16]

The Hong Kong Government considered the establishment of the Provisional Legislature to be inconsistent with the Basic Law and the Joint Declaration and therefore regarded the body as unnecessary and without justification, and considered itself under no duty to provide it with any assistance whatsoever.[17]

As for the composition of the Selection Committee, the Hong Kong Government shared the community's expectation that it should be as widely representative as possible. Civil servants, though employees of the government, are also members of the Hong Kong community, and arguably should not have been deprived of the chance of serving on the Selection Committee. However, the Hong Kong Government recognised that there was a greater need for the civil service to appear neutral and apolitical and not be subject to any accusations of bias or conflicts of interest, whether these be actual or perceived. This was considered especially important for the higher ranking Directorate Officers, who would be involved in policy formulation and promulgation. It is accepted policy that civil servants, as servants of the Government, should cooperate with the new Chief Executive and the new Legislature after the handover, no matter who they may be or what they may decide. The

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9 *Id.* cl (5)(b).

10 *Id.* cl (5)(c).

11 *Id.* cl (5)(d).

12 *Id.* cl (5)(e).

13 *Id.* cl (7).

14 Paragraph 4 of the Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR (4 April 1990) state that the *raison d'etre* of the Selection Committee is to recommend a candidate for the first Chief Executive through consultations and report the recommended candidate to the Central People's Government for appointment.

15 *Id*, para 3.

16 Hong Kong Government press release, 28 December 1995.

17 Foreign and Commonwealth Office press release, 25 March 1996; comments by United Kingdom Foreign Secretary Malcolm Rifkind at a press conference in the Hague, 20 April 1996.

ability to work closely with different political masters is the basis for an efficient civil service. In deciding whether to allow civil servants to serve on the Selection Committee, these conflicting principles would have to be considered and individuals' rights to participate in public affairs weighed against the need for a neutral and impartial civil service.

On 13 August 1996, a Civil Servant Branch Circular[18] was issued and distributed to all civil servants, setting out guidelines over the question of whether civil servants may serve on the Selection Committee. The circular affirmed that except for all Directorate Officers, Administrative Officers, Police Officers and Information Officers, all other civil servants may decide for themselves whether they wish to accept nominations or put their names forward as Selection Committee candidates.[19] Civil servants who breached the circular faced disciplinary action which could lead to their dismissal from office. As a result, three Directorate Officers, Mr Leung Chi-chiu (Consultant, Department of Health), Mr Ching Kam-cheong (Chief Engineer, Transport Department), and Mr Cheung Kin-keung (Chief Engineer (Civil), Housing Department), together with the SNEOA, applied for Judicial Review against the decision of the Secretary for Civil Service prohibiting Directorate Officers from serving on the Selection Committee.

III. Relief Sought

The four Applicants sought:

1. A declaration that the decision of the Secretary for Civil Service prohibiting all civil servants coming within the definition of Directorate Officers from serving on the Selection Committee for the First Government of the HKSAR amounted to a violation of Articles 16, 21(a) and 22 of the Hong Kong Bill of Rights Ordinance.[20]
2. Further or in the alternative, a declaration that the decision of the Secretary for Civil Servants was *ultra vires*, void and of no effect.
3. A writ of *certiorari* to remove the decision of the Secretary for the Civil Service into the High Court for the purpose of quashing the decision.

IV. Policy on Civil Servants Participating in Political Activities

Civil Servants owe their allegiance to the Crown, represented in Hong Kong through the Hong Kong Government, their duties being the execution of their orders. It is essential that the public should have confidence in civil servants, whose personal views should not affect the discharge of their official duties. It is a long-standing and well-established principle that the civil service should remain neutral, apolitical and not be subject to any perception or accusation of bias or conflicts of interest[21].

A number of guidelines and regulations were set out by the Hong Kong Government governing the participation of civil servants in political activities. Examples include: Civil

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18 "Civil Service Membership for the First Government of the HKSAR", *SCMP*, 13 August 1996.

19 *Id*, para 3.

20 Cap 383 LHK.

21 Clause 15.1, "Statement of Intent, UK Home Service Regulation 15: Political Activities"

Service Regulations 520-525 on 'public communications' by officers; Civil Service Regulations 550-559 on 'outside work'; and a Civil Service Branch Circular specifically on 'conflict of interest'.[22] In view of increasing democratic developments, the Hong Kong Government issued a further Civil Service Branch Circular[23] in 1990 which dealt with political parties and activities. While there is no general objection to civil servants joining political organisations, the Government stated that civil servants themselves should ensure that conflicts of interest with their official duties do not arise. In particular, the circular warned that all Directorate Officers, Administrative Officers and Information Officers were defined as members of the "Restricted Group", who, due to their seniority, would be particularly susceptible to accusations of bias and were thus prohibited from participating in political activities within Hong Kong. Maintaining public confidence in the civil service was paramount- and was a principle accepted by both sides of the dispute as well as the two national governments.

The British Foreign Minister Mr Malcolm Rifkind, and the Chinese Vice-Premier and Foreign Minister Mr Qian Qichen restated in April 1996 the importance of continuity in the civil service as an essential ingredient for a smooth transition. They reconfirmed the importance of politically impartial civil servants. This was also the view of the Preliminary Working Committee.[24]

V. Directorate Officers as a Distinct Group

As of 1 April 1996, the Hong Kong Civil Service had about 182,000 people on its payroll, equivalent to 6.1% of the Hong Kong total work force. Among them were 1170 Directorate staff representing 0.7% of all civil servants. They are the leaders in the professional and management areas, and responsible for the administration and professional leadership of the entire civil service. A civil servant does not gain entry to the directorate level merely because of his length of service, but on the basis of character and ability as well as experience. Directorate staff rank the highest on the salary scale, and receive correspondingly the largest amount in terms of fringe benefits. Their appointment is governed by a separate advisory body- the Standing Committee on Directorate Salaries and Conditions of Service, which is solely responsible for advising the Governor on the terms and conditions of service of directorate officers. As opposed to non-directorate posts, which are created by various Heads of Department under delegated authority, the creation of directorate posts must be individually approved by the Establishment Sub-Committee and Finance Committee of the Legislative Council. A Directorate Officer must also attend discussions on the creation of directorate posts before the Establishment Sub-Committee.

In addition, a special committee, namely the Advisory Committee on Post Retirement Employment, was established specifically to advise on applications from Directorate Officers

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[22] Civil Service Branch Circular 19/92, 4 December 1996.

[23] "Civil Servants Joining Political Organisations and Participating in Political Activities", Civil Service Branch Circular 26/90, 18 October 1990.

[24] Paragraph 17, "Some views of the Preliminary Working Committee of the HKSAR Preparatory Committee on Maintaining the Stability of Hong Kong Civil Service and its System", 8 December 1995. para 8 stated: "Provisions concerning participation in politics by civil servants embodied in the existing Civil Service Regulations should be retained. Civil Servants are not allowed to participate in any other activities which are inconsistent with the principle of remaining politically impartial."

for post-retirement employment, whereas non-directorate officers are handled by individual departments. The distinctiveness of Directorate Officers is also recognised by the SNEOA, with their own separate category in the civil service structure.[25]

Directorate Officers formulate, explain, implement and defend government policies. They are expected to work with members of the District Boards, Municipal Councils, the Legislative Council, and other advisory or professional bodies. They must be seen by the public as performing their duties without any bias or prejudice. Whether they are discharging government duties or taking a political stance, it is important to avoid giving the public the impression that they are acting or have acted in conflict of interest. Directorate Officers are permitted to vote in elections for the Legislative Council, Urban and Regional Councils, as well as the District Boards. All civil servants except Directorate Officers are allowed to nominate candidates or indicate their support in other ways. The Government's objective behind this policy was to ensure that senior civil servants do not become politicised. This very real possibility would compromise the impartiality necessary for the discharge of duties. Therefore, Directorate Officers and their ilk were strongly advised not to indicate support for a particular candidate by any means, and not to become involved in any form of political activities themselves.

Similar restrictions on civil servants can be found in the United Kingdom.[26] Generally, the higher the position in the administration, the greater the restriction imposed. In the United Kingdom, civil servants are divided into three categories. The first is a "politically free" group which is made up mainly of industrial and non-office grades. They are at liberty to engage in all kinds of local and national political activities. The second is the "intermediate group" composing clerical and typing grades who may apply for permission to engage in political activities, with the exception of parliamentary candidature. Finally, the "politically restricted" group which includes all staff above Executive Officer level are barred from national political activities, but may seek permission to take part in local activities.[27] Even when permission is given, a civil servant's political views should not constitute "so strong and so comprehensive a commitment to the tenets of one political party... as to inhibit loyal and effective service to Ministers of another party."[28]

VI. The Demarcation Issue

The Applicants accepted that civil servants who were directly involved in policy formulation and promulgation, such as Police Officers, Administrative Officers and Information Officers were exposed to a higher potential risk of conflict of interest than other civil servants. The Applicants did not challenge the underlying principles justifying the prohibition by the Hong Kong Government, namely the maintenance of the impartiality and neutrality of the civil servants.

What was in dispute was the demarcation of such a prohibition by the imposition of a blanket ban on all Directorate Officers. The Applicants contended that the potential risk of conflict of interest had nothing to do with the way they were paid or which grade they were in

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[25] Paragraph 5A, Constitution of SNEOA.

[26] United Kingdom Home Service Regulation 15.

[27] Tom Brennan, *Politics and Government in Britain*, (Cambridge University Press, 2nd ed., 1992) p 278.

[28] United Kingdom Home Service Regulation 15.12.

but instead was associated with the nature of their office, duties and functions in their respective department in the government.

The individual Applicants in the case were professionals who had reached or nearly reached the top of their respective professional grades. They were two Civil Engineers and one Doctor, whose duties involved no policy formulation or promulgation but only implementation. They were neither involved in the enforcement of public order, nor did they work in the Government Secretariat. They contended that an individual assessment exercise on a case by case basis would have been a better approach than a blanket ban on all Directorate Officers.

While the Applicants agreed with the Government that there should be a line drawn, the question was where it should be drawn. A case by case basis was obviously not a good choice as it would incur enormous administrative costs. What was more important was the perception of the general public, as a perceived conflict of interest would not have been that much different from an actual one, if the people regarded it as the same. It is not surprising that the public considered all Directorate Officers, the leaders of the civil service, to have important responsibilities and functions. The specific government department a Directorate Officer was from would be of little concern; the focus being on seniority and not the field of work.

There is no doubt that the membership of the Selection Committee was of great interest. Members were asked about their political views on the candidates running for the post of Chief Executive and members of the Provisional Legislature. If the Applicants had won their review, the decision would have the undesirable effect of senior civil servants choosing and being seen to be choosing the Chief Executive who would be in effect their future boss !

Civil servants would have been seen as taking sides and manifesting a preference for a particular person. It would have also been perceived by the public as an attempt by civil servants to curry favour with potential candidates who may be the Chief Executive, and possible charges of nepotism would be hard to disprove should the favoured candidate win. And if the views of the civil servants were divided over the choice of the Chief Executive, divided loyalties would no doubt hinder the effectiveness of administration.

VII. Political Rights

The Applicants contended that the circular issued by the Secretary for the Civil Service prohibiting Directorate Officers earning $86,000 per month or above from serving on the Selection Committee was an act of disenfranchisement. By disallowing them to serve on the Selection Committee, the Government took away their voting rights for both the selection of the Chief Executive and members of the Provisional Legislature. The Applicants further contended that determining the right to vote on the basis of income was unreasonable. In England, as early as the 18th century, the right to vote no longer adhered to the measurement of one's income level (but in the opposite sense !). The right to vote has been expressed as a fundamental common law and human right as early as 1703 in *Ashby v White*.[29] It would therefore be irrational for the Hong Kong Government to, on one hand, introduce democracy

[29] (1703) 2 Ld Raym 938; 92 ER 126, at 139, Holt CJ held: "Let all people come in, and vote fairly; it is to support one or the other part, to deny any man's vote... It is a great privilege to [chose] such persons, as are to bind a man's life and property by the laws they make."

into the territory, and remove the right to vote on the other.

Political rights guarantee an individual's right to take part in the process of political decision making. It is fundamental that citizens are allowed to participate in public affairs by way of elections on organs of government, in order to exercise influence on the decision making ability of the administration. Political rights are protected and enforceable under international law by the International Covenant on Civil and Political Rights ("ICCPR"), and domestically under the Bill of Rights Ordinance. The Applicants asserted that the prohibition was a violation of 3 Articles in the Bill of Rights Ordinance: Articles 21(a), 22 and 16.

1. Article 21(a) of the Bill of Rights Ordinance.

Article 21(a) provides:

> Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1)[30] and without unreasonable restrictions: a) to take part in the conduct of public affairs, directly or through freely chosen representatives.

The prescribed functions of the Selection Committee can be construed as being matters of public affairs. Service on the Selection Committee is a way of taking part in public affairs. The prohibition of Directorate Officers to serve on the Selection Committee, as contended by the Applicants, was an unreasonable restriction, depriving them of their right and opportunity to participate in public affairs matters.

In response, the Hong Kong Government emphasised the phrase "without unreasonable restrictions". The Hong Kong Court of Appeal in *R v Sin Yau Ming*[31] held that human rights guaranteed by the Hong Kong Bill of Rights Ordinance were not absolute and was subject to limitations analogous to those contained in s 1 of the Canadian Charter of Rights and Freedoms, that is, "only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[32] As far as the phrase "reasonable limits" is concerned, the concept of reasonableness in public law was treated in the context of Wednesbury reasonableness.[33] To prove an administrative decision as unreasonable in the Wednesbury sense, the applicants must prove that it is irrational, and "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[34] The Hong Kong Government contended that the prohibition on Directorate Officers did not amount to Wednesbury unreasonableness, but was, rather, a sensible act essential to maintain the neutrality and the impartiality of the civil service. Sears J in his judgment considered the prohibition by the government as both necessary and rational, and that any man of the public will regard it as reasonable. In view of the evidence given by the Government, the judge found that the prohibition imposed on the Directorate Officers were fully justified.

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30 The distinctions in Article 1 (1) are "distinction if any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

31 [1992] 1 HKCLR 127

32 *Id*, p 142.

33 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

34 *Per* Diplock LJ, *CCSU v Minister for Civil Service* [1985] 1 AC 374, 410.

2. Article 22 of the Bill of Rights Ordinance.

Articles 22 of the Bills of Rights Ordinance provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Applicants submitted that the prohibition was based on a difference in remuneration or property. It was a discriminatory act of disenfranchisement which breached the doctrine of equality before the law stated in Article 22.

There was no doubt that equality before the law is an entrenched fundamental human right. It was held in *R v Man Wai-keung (No.2)*[35] and *Lee Miu Ling V AG*[36] that no departure from this principle of equality before the law is valid unless such departure was necessary, proportionate to such need and rational. Any departure therefrom must be justified. It must be shown that (a) sensible and fair-minded people would recognise a genuine need for some difference; (b) that the difference embodied in the particular departure selected to meet that need was rational; (c) that such departure was proportionate to such need.

The same issue was considered by Bokhary JA in *Lee Miu Ling v AG*. He asked: "Would sensible and fair minded people condemn that arrangement as irrational or disproportionate ? The question cannot be answered by a public opinion poll or by referendum. It must be answered by a judicial decision.[37] Does the importance of the impartiality and neutrality of the civil service outweigh the individual political rights sacrificed by the Directorate Officers ? Though Sears J was sympathetic to the Applicants, who were honourable men faithfully serving the government, the integrity of the entire civil service must come first.

3. Article 16 of the Bill of Rights Ordinance.

Article 16 of the Bill of Rights Ordinance provides:

> (1) Everyone shall have the right to hold opinions without interference.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers...
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and

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[35] [1992] 2 HKCLR 207, 217.
[36] [1996] 1 HKC 124, 130.
[37] *Id*, p 131.

are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Voting can be considered as a form of expression. As held in *Ming Pao Newspapers Ltd v AG*[38], any restrictions on the guaranteed right of freedom of expression must be proportionate to the aim sought to be achieved. The Applicants contended that the prohibition failed to achieve a proper balance between the effects of the measure and the objective.

A side-effect of the prohibition was to deprive the Selection Committee of valuable members. The body was intended by the Chinese Government to include persons with practical experience who have served in Hong Kong's executive, legislative and advisory organs prior to the establishment of the HKSAR, and persons representative of various strata and sectors of society.[39] The leading figures of the civil service branch were barred from serving on the Selection Committee simply because they were appointed to the level of Directorate Officers. Without their participation, the Selection Committee could not be said to have been able to discharge its functions and duties fully, properly and fairly.

In addition, except for the first Chief Executive, the future Chief Executives of the HKSAR will be elected by the Election Committee which will have a similar composition as the Selection Committee.[40] The prohibition thus serves as a precedent for the future HKSAR to once again deprive Directorate Officers of the chance to exercise their political rights.

The Hong Kong Government contended that the demarcation was a balance between the principle of individual political rights and that of maintaining neutrality and impartiality of civil servants. What the Government had done was perform a balancing act: the majority of civil servants were allowed to join the Selection Committee as private citizens and become involved in public affairs if they wished. But it was also reasonable that certain restrictions be placed on sensitive categories of civil servants. As a result, four groups of civil servants in particular fields of work were subject to specific restrictions: for example, Police Officers could vote but may not participate in political activities. All Directorate Officers, Administrative Officers and Information Officers could join political organisations, but may not overtly participate in political activities such as speaking publicly, distributing political publications, campaigning or lending support to political organisations or platforms.[41] Senior civil servants, being the cream of the civil service, have a duty not to contradict government policy.[42]

VIII. Conclusion

The civil service has significantly contributed to Hong Kong's success by maintaining an efficient and sterling service to the people of Hong Kong. A large part of this success stems

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38 (1996) 6 HKPLR 103, 111.
39 See note 14 above.
40 Annex I, The Basic Law.
41 See note 21 above.
42 *SCMP*, 13 September 1996.

from its ability to make decisions and to carry them out without fear of political reprisal.[43] Civil servants form the axis of a comfortable hand-over. It is important that Directorate Officers keep themselves above political controversies. Neutrality is a corollary of efficiency in their case. It requires civil servants to put aside their political allegiance and moral views in the execution of their duties, lest their prejudices deflect them from their publicly assigned responsibilities. Moral neutrality and hierarchical loyalty go hand in hand, and they are both preconditions for administrative efficiency.[44]

As the government is firmly committed to a policy of non-cooperation with the Provisional Legislature, Directorate Officers have a duty to toe the line. Being the leaders of the civil service, the Directorate Officers are both the servants and masters of Hong Kong society. Their continued commitment to an efficient public service is obviously the preference of all Hong Kong people, as well as both the British and Chinese Governments. Their role will only increase in the run-up to Chinese rule.

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[43] Editorial, *Hong Kong Standard,* 13 September 1996.

[44] Terry Lui Ting, "Changing Civil Servants' Values", *The Hong Kong Civil Service and Its Future* (Oxford University Press, 1988) pp 138-139.

INTERNATIONAL BREACHES BY THE GOVERNMENT OF THE UNITED KINGDOM IN THE CONTEXT OF THE ETHNIC MINORITIES OF HONG KONG

英國政府於香港少數族裔問題上的國際性違反

NEETA R DADLANI*

This note enumerates the violations of the Convention on the Elimination of all Forms of Racial Discrimination ("the Convention") by the United Kingdom with respect to certain residents of Hong Kong, and was the basis of a letter if appeal to the United Nations in Geneva. The author first sets out a description of the legislative and historical background of the issues surrounding nationality in Hong Kong. She then details the violations of the Convention. Finally the author concludes by urging the Government of the United Kingdom to fulfil its obligations under the Convention.

***Editor's Note, March 1997**: The UN Committee on the Elimination of Racial Discrimination came to the conclusion that ethnic minorities in Hong Kong have been racially discriminated against. Their report concluded that the status granted to them (no right of abode in the U.K.) differs from the full citizenship conferred upon the predominantly white population living in another dependent territory. In relation to Article 5(d)(i)(ii) and (iii), the Committee expressed considerable concern about Hong Kong residents of South Asian origin who would effectively become stateless after 1997. It also drew attention to the obligations of the U.K. under Article 10 of the Convention on the Reduction of Statelessness.*

In response to pressure, the British Prime Minister, Mr John Major, promised to grant full British passports to any member of an ethnic minority in Hong Kong if they faced pressure after the handover. It is the opinion of the author that this remains an unsatisfactory solution due to the lack of procedures and rules governing the granting of these passports, for example the lack of a clear definition of important terms. This ambiguity leaves the fulfilment of Mr Major's promise difficult, and at worst impossible.

香港現在大約有三千至四千名少數族裔人士，他們都因爲九七問題，很可能成爲無國籍的居民。他們一方面並不符合獲取中國國籍的資格，另一方面又因爲種族的問題，使他們不能獲得香港特別行政區的護照，而只能獲得一本並不賦予他們英國居留權的英國海外公民護照 (BOC) 或英國國民（海外）護照 (BNO)。雖然這些少數族裔人士在九七後能獲得英國海外公民護照 (BOC) 或英國國民（海外）護照 (BNO)，但由於這些護照並不賦予他們居留及返回簽發國家的權利，所以給予這些少數族裔人士上述兩種護照只是一種形式而已。

本文作者透過敘述整件事的歷史及法律背境，指出大英帝國在這件事上如何違反《消除各種種族歧視公約》，並促請英國政府履行公約裡的義務，以保障少數族裔人士

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* LLB (HKU); currently a PCLL (HKU) student. The author would like to express her greatest appreciation to Mr George Edwards for his continuous guidance and assistance in the process of preparing this paper. Thanks are also owed to Mr Ravi Gidumal for his valuable comments on the draft of this paper.

的權利和體現該公約中的精神。

I. Historical and Legislative Background

A. Introduction

There are 3000-4000 ethnic minorities resident in Hong Kong who are not entitled to the nationality of their ethnicity; ethnic Indians who are not entitled to Indian citizenship under the laws of India are an example. These ethnic minorities are not entitled to Chinese nationality because only ethnic Chinese may hold Chinese nationality under the Nationality Law of the People's Republic of China (PRC). Similarly, Annex I, paragraph XIV of the Sino-British Joint Declaration provides that Hong Kong citizens of Chinese race will be issued Hong Kong Special Administrative Region (HKSAR) passports. This will entitle them to live in, leave and lawfully return to the HKSAR. Hong Kong's ethnic minorities, because of their race, will not be accorded such passports. They are to be issued either British Overseas Citizens (BOC) or British National (Overseas) (BNO) passports- neither of which gives the right of abode in the United Kingdom. Although the United Kingdom recognises the ethnic minorities of Hong Kong as citizens of the United Kingdom they are not accorded full civil rights such as the right of abode in the U.K. Yet the ethnic minorities have the same duties towards the Crown as do holders of full British citizen passports.

II. A Brief History of British Nationality Law

The earliest legislation relating to British Nationality was the *British Nationality Act of 1948*. Under this act all commonwealth citizens were "British subjects". The British government adopted a policy of "composite nationality" towards all British subjects who were termed "Citizens of the United Kingdom and Colonies" (CUKC). Prior to 1 January 1983, any person born in Hong Kong was a CUKC. Acquisition of CUKC nationality could be by birth, descent through male line, registration, naturalisation, or marriage to a male CUKC.

Until 1962, any CUKC could freely enter the United Kingdom. However since 1962 the United Kingdom government has progressively placed immigration controls on the entry of CUKCs into the United Kingdom.

Under the *1971 Immigration Act,* only CUKCs who were classified as "patrials" were free from immigration control. Patriality required the existence of an ancestral link with the United Kingdom. Patriality made it difficult for anyone who was not white to be free from immigration control.

The *British Nationality Act of 1981* re-classified CUKCs. Under that legislation, patrials continued to have the right of abode in the U.K. and be British citizens. CUKCs with connections to British colonies were classified as British Dependent Territory Citizens (BDTCs). Those who did not fit into any one of the above categories were classified BOCs. Thus, Hong Kong's ethnic minorities are BDTCs at present.

The *Hong Kong British Nationality Order of 1986* established the British position on the nationality of the inhabitants of Hong Kong. Under this Order the people of Hong Kong are entitled, upon application, to the new status of BNO. In 1997 the BDTC status will automatically expire as Hong Kong will no longer be a British colony. Thus, in 1997, the ethnic minorities will lose the BDTC, their only national status. Because of their ethnic origin

they will not be entitled to HKSAR passports or Chinese nationality.
The government of the United Kingdom has ratified the *Convention on the Reduction of Statelessness*. Article 10 provides that States Parties have an obligation to prevent statelessness upon territorial transfer. Recognising that if the ethnic minorities do not apply for a BNO they will become stateless in 1997 the Government of the United Kingdom in the *Hong Kong British Nationality Order 1986* provided for BOC status to be automatically accorded to any individual who as a result of the transfer of sovereignty became stateless. This status, like the BNO, does not provide the bearer the right to live in or return to the United Kingdom. The territorial transfer leaves the ethnic minorities of Hong Kong with only a formal status, as two of the most fundamental attributes of nationality the right of abode and the right of return to the issuing country are not conferred by the BNO or BOC status.

III. The British Government's Violations of the Convention

A. No Right of Abode: Breach of Article 5(d)(i)

The United Kingdom has breached Article 5 (d) (i) by not allowing their citizens (the ethnic minorities) to reside within the borders of the United Kingdom.

The BNO passport pledges that the holder has the right of abode in Hong Kong, but the United Kingdom can not implement this pledge after 1997. It would be a breach of the PRC's sovereignty for the U.K. to confer on certain British citizens the right of abode in territory. Thus, the right of abode in Hong Kong cannot be guaranteed for Hong Kong's ethnic minorities.

The BOC passport similarly is unlikely to have a pledge conferring right of abode in Hong Kong. Thus, the holder of this document will not be entitled to the right of abode in either Hong Kong or the United Kingdom (or in fact anywhere else in the world).

B. No Right to Return to One's Own Country: Breach of Article 5(d)(ii)

Based on the qualified rights accorded to holders of the BNO and BOC passports, the United Kingdom has also violated Article 5(d)(ii) by not allowing its citizens (the ethnic minorities) the right to return to their own country- the U.K.

The ethnic minorities' inability to return to their home country effectively deprives them of the ability to visit other states.

C. No Nationality: Breach of Article 5(d)(iii)

The United Kingdom has violated Article 5(d)(iii) by not giving its citizens (the ethnic minorities) a nationality. The present status of members of the ethnic minorities lack the most fundamental attributes of a nationality, the right of abode.

The Indian community is by far the largest ethnic minority group in Hong Kong. These Indian people, along with other minorities, are being denied the same civil rights as other citizens of the United Kingdom's colonies. For example, the British Government has only recently, by the *British Nationality (Falkland Islands) Act 1983* accorded the *white (Caucasian)* BDTCs of the Falkland Islands full British citizenship, and yet is unwilling to provide the same rights to the non-white ethnic minorities in Hong Kong.

Unlike most of the United Kingdom's former colonies which, after attaining independence, were able to enact their own citizenship laws covering *all* of their inhabitants. Hong Kong will undergo a transfer of sovereignty. The incoming sovereign (China) will not confer nationality on those Hong Kong people who are not of Chinese ethnicity. Thus, the situation of Hong Kong's ethnic minorities is different from that of citizens of other former British colonies. Hong Kong's ethnic minorities are in limbo because they are not full British citizens, and because of their race, cannot be Chinese or HKSAR citizens.

While the United Kingdom recognises the ethnic minorities as United Kingdom citizens it does not accord them the same rights as other citizens of the United Kingdom and thus the United Kingdom violates the *Convention* by such a differentiation.

1. No right of abode: violation of Article 5(d)(i)

Article 5(d)(i) of the *Convention* obliges States Parties to ensure that each citizen of the State enjoys the right to move and reside within its borders. Although the BNO states that the holder of this passport holds a permanent identity card and has the right of abode in Hong Kong, such a pledge is of little security when the State making the pledge can no longer enforce the pledge. Recently, the Government of the United Kingdom has verbally "guaranteed" that should the ethnic minorities come under pressure to leave the HKSAR they will be given the right of abode in the United Kingdom. Under the terms of the *Convention* the ethnic minorities of Hong Kong require more than a pledge which is not legally binding. The ethnic minorities must not be left with a guarantee which may be subject to different interpretations by future governments. Under the terms of the *Convention* British national must be given the right to live in their home country, the United Kingdom.

2. No right of return: a violation of Article 5(d)(ii)

The United Kingdom violates Article 5(d)(ii) of the *Convention* by not allowing the ethnic minorities to return to their own country, the United Kingdom.

Article 5(d)(ii) places an obligation on States Parties to ensure that all of its citizens have the to travel freely and the right to return to their own country. The Hong Kong ethnic minority citizens of the United Kingdom do not have the right to return and live in the United Kingdom should they so desire.

It is doubtful whether ethnic minorities holding either a BNO or a BOC passport will be able to travel freely after 1997. While about one hundred and eighty countries exempt a full British Citizen from visa or entry permit requirement, only about seventy states grant exemption to BNO passport holder. This number will likely drop after 1997 because after 1997 the United Kingdom will not be obliged to accept back the holder of the passport should he or she be repatriated by another State. The BNO states that the holder of this passport holds a permanent identity card and has the right of abode in Hong Kong, a place over which the British government can exercise no jurisdiction after 1997. Foreign governments are unlikely to receive a holder of the BNO on a pledge in his or her passport that the issuing government is not in a position to implement.

The BOC passport, like the BNO passport, does not entitle the holder to live in the United Kingdom. Unlike the BNO passport, the BOC passport is not likely to have a similar pledge with respect to right of abode in Hong Kong, and is therefore an even weaker document. It is a document entitling the holder to no right of abode anywhere in the world.

The worth of this document even for travel purposes can be questioned as few countries are likely to be enthusiastic about issuing a visa to an individual whose national state refuses him or her admission, as discussed above.

3. No nationality or de facto stateless:[1] a violation of Article 5(d)(iii)

The United Kingdom violates Article 5(d)(iii) of the *Convention* by leaving the ethnic minorities of Hong Kong with only a formal nationality. It is submitted that their present nationality (BNO or BOC) leaves them *de facto* stateless, as they do not enjoy the most essential feature of a nationality, the right of abode.

The most fundamental attribute of nationality is the right of abode in the state issuing the nationality. In this case, the right of an ethnic minority holding BNO or BOC status to enter, live, and return to the United Kingdom. This is a right of the national which is exercisable against his state even in the absence of expulsion by another state.

Although BNO and BOC passport holders owe the same allegiance to the Crown as full British citizen and technically have the same civil and political rights as full British citizens, many of these rights cannot be enjoyed if a national is not allowed to enter the state granting those rights. Thus it is submitted that the ethnic minorities are in effect stateless although they do possess a formal nationality.

IV. Conclusion[**]

With less than 100 days until the transfer of sovereignty the plight of the Hong Kong's ethnic minorities must be treated with a high level of urgency. The ethnic minorities of Hong Kong urge the British Government to honourably fulfil its obligations under Article 5(d)(i), (ii) and (iii) by granting the ethnic minorities the right to reside, enter and live in the country of their nationality. The ethnic minorities of Hong Kong must be given full British nationality. The United Kingdom must not be allowed to breach fundamental provisions in this *Convention.*

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[1] An elaboration of this argument can be found in Chan, note 5 above at p 482.

[**] Please also see the Editor's Note in the introductory extract.

IMPLEMENTATION OF ARTICLE 95 OF THE BASIC LAW: MUTUAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS BETWEEN THE HONG KONG SPECIAL ADMINISTRATIVE REGION, MAINLAND CHINA, AND THE TAIWAN REGION

《基本法》第九十五條的貫徹：香港特別行政局、中國大陸及台灣地區之間的民事及商業判決的相互認及執行

CHARLES CHAU CHI-CHUNG*

The Law cannot operate in isolation. Much of the Law's effectiveness derive from its international aspect, for example, the fact that a judgment obtained in one country is valid in another, or that a landmark decision in one jurisdiction is also recognised elsewhere. No where is this more clear in situations where political events prevent respective courts from communication, justice being the ultimate loser.

This article deals with judicial assistance (in civil and commercial disputes) between the HKSAR, Mainland China, and Taiwan, and its facilitation by Article 95 of the Basic Law. The author summarises the historical background of the present political landscape, vital to any discussion over the present legal relationship. He then analyses the HKSAR's role in the tripartite relationship, before looking at recent legal events which demonstrate that politics has gotten in the way of justice.

隨著香港特別行政區的成立，在中、港、台之間有關相互承認及執行對方的判決該問題上，應當改動原有基制。

作者在文中提出了四個可供採用的模式去處理中、港兩地的判決，其中較可能的是由中、港同時訂立一條內容相同的條例，並於處理案件時由兩地法院進行協商。至於港、台的判決，香港應沿用回歸前普通法的法則，而台灣則會根據近期通過的《香港澳門關係條例》(Statute Governing the Relations with Hong Kong and Macau)去處理有關案件。最後，作者指出在實行這些方法時所要面對的困難與挑戰。

I. Introduction

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* LLB (HKU), PCLL student. The author is most grateful to Professor Yash Ghai, Sir Y.K. Pao Professor of Public Law of the University of Hong Kong, for his guidance and invaluable comments on an earlier draft of this article. The author wishes to thank also Dean Albert Chen, Associate Professor Philip Smart, Lecturer Benny Tai of HKU for their advice on research. This article reflects the law of Hong Kong as at 1st September 1997. The views expressed in this article are mine alone and not necessarily shared by my teachers. Needless to say, all the errors are also mine.

> The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.[1]

With the lowering of the Union Jack at midnight on the 30th June 1997, Hong Kong is once again an integral part of China. Under the notion of "One Country, Two Systems", the Hong Kong Special Administrative Region (HKSAR) is allowed to maintain its pre-existing systems, including the judicial system, and retain the laws previously in force.[2] As our legal and judicial systems are fundamentally different from those in other parts of the People's Republic of China (PRC), and as the relationship is no longer governed by international law, some new legal mechanisms should be effected to regulate and to harmonise their operation so as to do justice.

On the other hand, our judicial relations with the Region of Taiwan[3] should also be adjusted owing to the change in political reality. Such relations are particularly important in view of our increasing interactions with the Mainland and Taiwan. Although Article 95 of the Basic Law of the HKSAR ("the Basic Law") provides the legal basis for this action, no specific understanding on the detailed arrangement had been concluded by the Sino-British Joint Liaison Group (JLG).[4] Therefore, in spite of the establishment of the HKSAR, the precise mode of implementation of this Article and the exact scope of co-operation are still uncertain.[5]

The phrase "Judicial Assistance"[6] is a legal term better known in countries of the civil law tradition than those of the common law.[7] It is used for all acts of mutual assistance

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1 Basic Law of the HKSAR (Basic Law), Article 95.

2 Basic Law, Articles 5, 8. According to s 5 of the Reunification Ordinance enacted by the Provisional Legislative Council (PLC) on 1st July, 1997, "laws previously in force" means "the common law, rules of equity, Ordinances, subsidiary legislation and customary law in force immediately before 1st July, 1997 and adopted as laws of the [HKSAR]". Nearly all are retained, except for those listed in the Annex 1 and 2 of the *Decision of the Standing Committee of the National People's Congress (NPCSC) on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the HKSAR of the PRC* adopted at the 24th sitting of the 8th NPCSC on 23rd February, 1997. This is further confirmed by the Court of Appeal in *HKSAR v Ma Wai-kwan, David & Others* [1997] HKLRD 761.

3 In this article, the Taiwan Region may be referred to as "the Republic of China" (the "ROC").

4 The JLG was established under para 5 of the *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (the Joint Declaration)*. Its main functions are to conduct consultations on the implementation of the Joint Declaration and to discuss matters relating to the smooth transfer of sovereignty. In fact, it was reported that an agreement on the arrangements of judicial assistance after the transfer of sovereignty was concluded at its 39th meeting and the British side would present a bill incorporating the understanding to the Legislative Council (the LegCo) for enactment. However, its contents were not made public. It was later discovered that only a legislation named Mutual Legal Assistance in Criminal Matters Ordinance (No. 87 of 1997), which deals with international criminal judicial assistance, was passed in the last LegCo meeting, and no bill on civil matters had been presented. It is therefore submitted that no agreement on civil judicial assistance between the Mainland and the HKSAR has been made.

5 Yash Ghai, *Hong Kong New Constitutional Order: The Resumption of Sovereignty and the Basic Law*, (Hong Kong: University of Hong Kong Press, 1997) p326.

6 As suggested by Yash Ghai, the use of the word "juridical" in Article 95 was not intended to distinguish it from "judicial", *id.* P 327.

between courts and other designated organs of judicial administration in independent jurisdictions".[8] In a narrow sense, it refers to a court (and other designated organs of judicial administration) serving judicial documents such as a writ of summons, power of attorney, and proof of marriage or adoption.[9] In a broad sense, it includes acts such as the taking of evidence in legal proceedings and mutual recognition and enforcement of court judgments and rulings.[10]

As judicial assistance is a broad topic, the scope of discussion in this article will be restricted to the issue of mutual recognition and enforcement of civil and commercial judgments between Mainland China, the Region of Taiwan and the HKSAR. After briefly examining the present arrangements in these three regions, I will discuss the special considerations and difficulties of constructing appropriate models of recognition and enforcement from the standpoint of constitutional law and political reality. As the HKSAR is the centre of discussion, the mode of establishing relations between the PRC and Taiwan courts themselves will not be specifically dealt with.

II. The Pre-Reunification Arrangements

A. The Colony of Hong Kong[11]

Before reunification, the PRC was treated as a foreign nation in the legal system of Hong Kong. As such, a Chinese judgment could be recognised and enforced in the Colony either by virtue of common law rules or under statute.

To enforce at common law, fresh proceedings must be initiated. Though the merit of the case need not be re-examined,[12] several conditions must be fulfilled. Firstly, the foreign court must be of competent jurisdiction according to Hong Kong's conception of private international law.[13] Secondly, the judgment should be final and conclusive. It does not mean that there must be no rights to appeal, but if the appeal is pending, the court will generally stay

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7 David McClean, *International Judicial Assistance*, (Oxford: Cleardon Press, 1992) p 1.

8 Ghai, note 5 above, p 327; Edward Epstein, "Service of Process between Hong Kong and the PRC", a paper presented at the "International Conference on Conflict & Interactions of Laws: Mainland China, Hong Kong and Taiwan", organized by the Faculty of Law of the University of Hong Kong and the Graduate School and School of Law, Soochow University, 8-9th February 1993, p 2.

9 Ghai, *id*; Epstein, *id.*

10 Ghai, *id*; Epstein, *id*, p 3.

11 For details, see generally W.S. Clarke, "Reciprocal Enforcement of Judgments" (1989) Law Lectures for Practitioners 99; David Sutton, "Enforcing Judgments and Arbitration Awards" (1990) Law Lectures for Practitioners 1; M.D. Copithorne, "International Civil Proceedings with Particular Regard to Canada and Hong Kong" in William Angus (ed.) *Canada - Hong Kong: Some Legal Considerations* (Toronto: Joint Centre for Asia Pacific Studies, 1992) pp 72-74; J.C.H. Morris, *Conflict of Laws* (London: Sweet & Maxwell, 1993); Dennis Brock, "Hong Kong", in Charles Platto and William Horton (eds.) *Enforcement of Foreign Judgments Worldwide* (London: Graham & Tortman and Int'l Bar Association, 1993) pp 39-47.

12 Tai, Benny, "Mutual Recognition and Enforcement of Judgments between Hong Kong and the PRC", a paper presented at a "Symposium on Legal Interaction between Hong Kong and China", organized by the Chinese Law Research Group, Faculty of Law, University of Hong Kong, 29th June 1991, p 3.

13 *Id.*

the execution.[14] Thirdly, only judgments for fixed sums of money are actionable while those for taxes and penalties are not.[15]

Even if the above criteria are satisfied, the defendant may raise a number of defences. For example, if the judgment was obtained by fraud, or contrary to Hong Kong's public policy or natural justice, or given in proceedings brought in breach of a jurisdiction or an arbitration clause.[16]

Enforcement of foreign judgments in Colonial Hong Kong under the statutory scheme is governed by the Judgments (Facilities for Enforcement) Ordinance,[17] Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance[18] and Foreign Judgments (Reciprocal Enforcement) Ordinance.[19] Prior to the reunification, the effect of these ordinances was to allow a judgment obtained in the superior courts of England[20] and other specified jurisdictions[21] to be enforced in the Colony simply by registration in the Supreme Court of Hong Kong (as it then was), subject to the fulfilment of several requirements. In fact, the difference between the statute and common rules is procedural rather than a substantive basis for enforcement.[22] But an application under the statutory scheme will exclude any common law action for enforcement.

As these statutes have no application to PRC judgments, only common law rules can be considered. Although a PRC judgment was theoretically enforceable in Hong Kong before the reunification, there had been no such precedent during the colonial era.[23] As argued by Mr. Benny Tai, it was mainly because, firstly, there was no practical effect in enforcing such a judgment,[24] and secondly, litigation was not a common way for dispute resolution amongst Chinese people. It would mean the end of relationships and prospects of future co-operation.[25] It is also submitted that there existed a fatal technical problem during the enforcement process.[26]

Politically, the "Republic of China" ("ROC") on Taiwan and its Kuomintang (KMT) government has no diplomatic status with the United Kingdom, the sovereign state of the colonial administration. However, it did not necessarily mean that its laws and court systems should be neglected.[27] But there was also no precedent for the recognition and enforcement of

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14 For a recent Hong Kong illustration, see *Chiyu Banking Corporation v Chan Tin Kwun* [1996] 2 HKLR 395.

15 See Smart, note 11 above, p 472.

16 Foreign Judgment (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

17 Cap 9.

18 Cap 46.

19 Cap 319.

20 English judgments were enforced through Cap 9.

21 Cap. 319. The jurisdictions listed in the schedule include the Commonwealth, France, Germany, Italy, etc.

22 Smart, note 11 above.

23 This is confirmed by the Judiciary Administrator in her reply letter dated 2nd May, 1997 to the author.

24 Tai, note 12 above, p 8.

25 *Id.* See also W.D.D. Dennis, "China", in Platto and Horton (eds.), note 11 above, p 38.

26 This point was inspired by Associate Professor Philip Smart of the Univserity of Hong Kong and it will be dealt with in detail in Part D.

27 *Taiwan Via Versand Ltd. v Commodore Electronic Ltd.* [1993] 2 HKC 650; Chen, Albert, "The Impact of the 1997 Transition on Taiwan-Hong Kong Legal Relations", (1995) 23 Hwa Kang Law Review 57, p 66 (in Chinese).

Taiwan judgments.[28] If such a case had arisen, it seems that our courts would have applied the common law rules to solve the problem.

B. The PRC [29]

Recognition and Enforcement of foreign judgments in the PRC is governed by the Civil Procedure Law. According to Article 267, both individuals and foreign courts can apply to the intermediate people's court, which has jurisdiction to enforce a foreign judgment or written order.[30] Before it can be enforced, several conditions need to be met. First and foremost, it should be legally effective.[31] This requirement is similar to the requirement of being "final and conclusive" under common law. Secondly, the PRC court will review the judgment or written order in accordance with the respective international treaties concluded or acceded to by the government of the PRC. If no treaties on judicial assistance were in effect between the country involved and the PRC, the parties can only resort to the principle of reciprocity.[32] However, the meaning of such a term is unclear. It has been argued that it means that the conditions laid down by a court of a foreign state on the recognition and enforcement of a judgment given by a court of the PRC, cannot be stricter than the conditions laid down by a court of the PRC on recognition and enforcement of a judgment given by a court of that state.[33] In practice, the party must prove that there is precedent that a PRC judgment has been enforced in that state or that a PRC judgment would be enforced in the future.[34] Moreover, the judgment should not contradict the basic principles of the law of the PRC nor violate State sovereignty, security or social and public interest. This requirement is too vague and could be interpreted arbitrarily. Therefore, the PRC is not a state where judgment given by courts of other legal districts are readily enforceable."[35]

Although the British colonial administration in Hong Kong was not recognised by the PRC leaders, it is submitted that prior to reunification, should a request have been placed before a PRC court, it would have appeared that it would have been subjected to the conditions for a "foreign state".[36]

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[28] This point was also confirmed by the Judiciary Administrator in her reply letter dated 2nd May 1997 to the author.

[29] For details, see Tai, note 12 above, pp 9-13; Liu, Yang, "Judicial Assistance in China: Late Start but Rapid Development", (1995) 3 China Law 60 (bi-lingual); Zou, Deci, "Provisions on Judicial Assistance in the Civil Procedure Law" 45 Forum of Law and Politics 41 (in Chinese).

[30] See also "Certain Opinions of the Supreme People's Court Concerning the Application of the Civil Procedure Law", Article 319.

[31] Article 286; for a discussion of the meaning under the PRC law, see Jiang, Wei and Xiao, Jianguo, "The Effect of a Judgment", (1996) 71 Forum of Law and Politics 1 (in Chinese).

[32] It should be noted that according to Dennis, note 11 above, p 36, the Chinese expression should best be translated as "comity".

[33] Tai, note 12 above, p 11.

[34] Dennis, note 11 above, p 37.

[35] Tai, note 12 above, p 12.

[36] Tai, *id.*, p 10. See also Steve Nelson, "Certain Judgments rendered in Hong Kong May be Recognized in the PRC", 1 China Law Practice, Vol.5, (21 January, 1991).

C. *The Taiwan Region*[37]

In Taiwan, the procedure for enforcement of foreign judgments is provided in Article 402 of the Civil Litigation Law and Article 4 of the Enforcement Law. A foreign judgment will not be recognised by a Taiwan court if it falls within one of these circumstances.[38]

a. The foreign court involved has no jurisdiction on the case. Like its Hong Kong counterpart, jurisdiction will be determined by Taiwan law.
b. The losing party, being a citizen of the "ROC", did not receive proper notice of the litigation, and accordingly did not respond to and defend his case in court at trial. However, if the notice had been served properly in the foreign state or through a channel of judicial assistance in accordance with Taiwan law, and the party was still absent from the litigation, he or she will not be protected under this provision.
c. The foreign judgment is in contravention of the public order and fine custom of Taiwan. That means a foreign judgment will not be recognised and enforced if enforcement of it would violate the basic policies and spirit of the establishment of the ROC, its economic interest or the traditional Chinese culture.
d. Mutual recognition or reciprocity is lacking.
e. The judgment is not final and conclusive. Again, this requirement is similar to the requirement in Hong Kong.

As mutual recognition is stressed in Taiwan law and there had been no such Hong Kong precedent,[39] it was not strange to see that no Colonial Hong Kong judgments had been recognised and enforced there.

III. *Mutual Recognition and Enforcement of Civil and Commercial Judgments between Mainland China and the HKSAR*

A. *An Overview of the Reunification and the Basic Law*[40]

The framework for recognition and enforcement of civil and commercial judgments between the Mainland and the HKSAR cannot be understood without a basic understanding of the arrangement of reunification and the Basic Law.

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37 See generally Zhou, Wei, "Several Issues on the Establishment of the Judicial Assistance System between the Two Shores" in Chang, Zheng and Wang, Guangyi (eds.) *Legal Analysis on the Relationships between the Two Shores* (Sichuan: Sichuan University Press, 1992) pp 237-241 (in Chinese).

38 Paras (a)-(d) are provided in Article 402 of the Criminal Litigation Law, while para (e) is provided in Article 4 of the Enforcement Law.

39 See note 28 above.

40 For a comprehensive list of materials on the reunification, see Peter Wesley-Smith, "A Bibliography of Hong Kong Transition" (1997) 27 HKLJ 247; see also Ghai, note 5 above, "References and Bibliography", pp 473-489.

Hong Kong has always been a part of China. Between 1842 and 1898, the then Qing dynasty was forced to sign the three "unequal treaties"[41] with the United Kingdom. The combined effects of these treaties were to cede Hong Kong Island and the Kowloon Peninsula permanently and to grant a 99-year lease of the New Territories and the surrounding islets, due to expire on the 30th June 1997. To the leaders of the PRC, these treaties are void as they were imposed upon them by the "imperialist power". They are of the view that the Hong Kong question be settled through negotiation when "conditions are ripe", the status quo maintained until that time.[42]

After the Cultural Revolution, and in particular, the 3rd Plenary Session of the 11th Chinese Communist Party (CCP) Central Committee in December 1978,[43] reunification of China was put onto the agenda once more. Deng Xiaoping, then the leader of the PRC, advocated the notion of "One Country, Two Systems" to unify China. At the same time, as the close of the 99-year lease drew closer, the United Kingdom government consistently inquired of the PRC's stance on Hong Kong.[44] It was under these circumstances that the two governments started negotiations in 1982.

After nearly two years of negotiations,[45] the *Sino-British Joint Declaration* was signed on the 19th December 1984. It was agreed that the PRC would resume the exercise of sovereignty over Hong Kong at midnight on 30th June 1997. Hong Kong would become a "Special Administrative Region" directly under the Central People's Government (CPG) in accordance with Article 31 of the PRC Constitution. In the *Joint Declaration*, the PRC government set out its basic policies regarding Hong Kong.[46] These can be summarised into four general principles, namely, (1) Resumption of Sovereignty; (2) One Country, Two Systems; (3) Hong Kong People Governing Hong Kong; and (4) A High Degree of Autonomy. These policies were enshrined in the Basic Law, promulgated by the National People's Congress (NPC) of the PRC on the 4th April 1990.

The Basic Law is in practise the constitution of the HKSAR. According to the Court of Appeal, it is a "unique document".[47] Its purpose is to ensure that basic policies (whose essence are to preserve the pre-reunification social, economic and legal systems for 50 years) are implemented and that there is continued stability and prosperity in the HKSAR".[48] It reflects an international treaty (the *Joint Declaration*) on one hand, and deals with the relationship between the Sovereign and an autonomous region on the other. It also stipulates the organisations and functions of the different branches of the HKSAR government and sets out

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41 Treaty of Nanjing (1842), Convention of Beijing (1860) and Convention of Beijing (1898).

42 Deng Xiaoping, *On the Question of Hong Kong*, (HK: New Horizons Press, 1993) p 64.

43 During this meeting, Deng Xiaoping's line was confirmed. The meeting declared that economic construction, instead of class struggle, should be emphasized. It is significant in the history of the CCP.

44 See note 42 above.

45 Mark Roberti, *The Fall of Hong Kong: China's Triumph and Britain's Betrayal* (New York: John Wiley & Sons, 1994); Robert Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial Retreat* (London: John Murray, 1993). However, these books may be regarded one-sided as they rely mainly on British sources.

46 Article 3 of the *Joint Declaration.*

47 *HKSAR v Ma Wai-kwan, David & Others,* note 2 above at 773.

48 *Id.* at 772.

the rights and obligations of the citizens.[49] Chan CJHC is of the view that the Basic Law has at least three dimensions: international, domestic, and constitutional.[50]

B. Special Considerations in the Construction of an Appropriate Model[51]

In constructing the model of enforcement in the HKSAR, some may argue that references can be drawn from other federal countries that have non-unified legal systems, like the USA and Australia. However, although the HKSAR is to a certain extent similar to a unit in a federal system, it is submitted that it has special features that make it distinctive. Thus, these models should not be implanted directly in the HKSAR.

First of all, all the units in a federal nation are under the same social and economic system. However, according to the Basic Law, the HKSAR is granted a "high degree of autonomy"[52] and the socialist system and policies are not to be practised here.[53] Thus, they are two sets of fundamentally different systems in one unified nation. The PRC is a socialist state, the legal system of which is based mainly on the USSR model. The HKSAR, on the other hand, is a capitalist region in a socialist nation that maintains the common law system and pre-unification laws.[54] In fact, the HKSAR is entitled to have its own set of laws and national laws have no effect, except for those listed in the Annex III of the Basic Law.[55] Thus, both the substantive and the procedural laws of the two regions are different and thus should be regarded as two distinct jurisdictions.[56]

Secondly, most of the provisions of the PRC Constitution are incompatible with the Basic Law. Therefore, it appears that it has, at most, only indirect effect over the HKSAR.[57] This would be impossible in a federal state.

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49 *Id.* at 773.

50 *Id*

51 Ronald Gravson, *Comparative Conflict of Laws· Selected Essays*, Vol.1, (London: North Holland, 1977).

52 Article 2.

53 Article 5.

54 Article 8.

55 On 1st July, 1997, the NPCSC, after consultation with the newly formed Committee for the Basic Law and the HKSAR government, added five additional national laws to Annex III. They are: (1) Law of the PRC on the National Flag; (2) Law of the PRC on National Emblem; (3) Law of the PRC on the Territorial Sea and the Contiguous; (4) Law of the PRC on Garrisoning of the HKSAR; (5) Regulations of the PRC concerning Consular Privileges and Immunities. They were promulgated, to be applied in the HKSAR by the Chief Executive in the Gazette No.1 / 1997 (L.N. 386 of 1997). At the same time, Order on the National Emblem of the PRC Proclaimed by the CPG with the Design of National Emblem, Notes of Explaination and Instructions for Use attached were deleted. Thus, there are now ten national laws applied in the HKSAR. It should also be stressed that the laws listed here are confined to those relating to defence and foreign affairs and other matters outside the autonomy of the HKSAR.

56 Hu, Zhenjie, "The Present and Future of Inter-Regional Judicial Assistance in China: My Experience in the Court in the Special Economic Zone", (1993) 59 Law Review 12 (in Chinese); Yu, Xianyu, *International (Inter-regional) Conflicts of Laws* (Beijing: People's Daily Press, 1995) pp 699-714 (in Chinese).

57 Tai, note 12 above, pp 19-20; Hu, *id.*, p 13; Dong, Likun, "The Recognition and Enforcement of Judgments in Civil and Commercial Cases in Mainland China, Taiwan and Hong Kong"", a paper presented at "International Conference on Conflict & Interactions of Laws: Mainland China, Hong Kong and Taiwan", organized by the Faculty of Law of the University of Hong Kong and the Graduate School and School of Law, Soochow University, 8-9 February 1993, pp 15-16 (in Chinese). Before the

Moreover, unlike other states with non-unified legal systems, the HKSAR is vested with independent judicial power, including that of final adjudication.[58] In other words, there is no common final appellate court for the settlement of conflicts between the respective courts of the Mainland and the HKSAR.

In addition, the Mainland and the HKSAR do not share a common legal culture or history. The dominant ideology for the mainland legal system is Marxist-Leninist and the Mao Zedong Thought.[59] On the contrary, the fine heritage of the rule of law and respect of individual rights are regarded highly in Hong Kong. These notions remain unchanged after the resumption of sovereignty.

Furthermore, a strong atmosphere of trust and confidence towards their counterpart's legal system is lacking.[60] This may be due to the divergence of the legal culture.

The impact of these special conditions on the mutual recognition and enforcement of PRC judgments will be examined in the course of the discussion on the feasibility of the different modes.

C. Possible Models[61]

There are four possible models for the mutual recognition and enforcement of civil and commercial judgments between the Mainland and the HKSAR. In the following paragraphs, I will discuss their respective feasibility and predict the option more likely to be adopted.

1. Enforcement under the PRC Constitution

This proposal is similar to the existing USA model. Under its Constitution,[62] judgments given by the courts of other states (within the same federal system) should be given "full faith and credit". Different standards are to be adopted for judgments rendered by foreign countries. No jurisdictional preconditions are needed to be satisfied before a judgment can be recognised and enforced in another state. In addition, a simple registration procedure is available.

According to this proposal, a new clause should be inserted into the PRC's Constitution to provide that a civil commercial judgment rendered by a Mainland court be

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reunification, it was thought that only Article 31 of the PRC Constitution, which provides for the legal basis for the establishment of the HKSAR, has legal effect over the HKSAR. However, in *HKSAR v Ma Wai-kwan, David & Others*, note 2 above, the Court of Appeal, in adjudicating the legality of the PLC which was appointed and is working under the authority of the sovereign, held that the courts of the HKSAR have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. It is because that the NPC is the highest organ of state power under the Constitution of the PRC (Articles 57, 58, 62, 67), and the NPC and the NPCSC can exercise this power by way of decisions and resolutions. Therefore, the Court of Appeal is bound to give effect to its enactments (780-781, per Chan, CJHC). Therefore, it seems that many provisions of the Constitution will have impact on the HKSAR.

58 Basic Law Article 19.

59 Preamble of the PRC Constitution.

60 Tai, note 12 above, p 18.

61 See note 12 above. Tai argues that the HKSAR should adopt a conditional enforcement model, instead of a full enforcement and a non-enforcement model. The author concurs. In this article, the phase "model", however, refers to the detailed procedure for recognition and enforcement of judgments in the HKSAR.

62 Art 4, Sec 1 and its implementing statute, 28 U.S.C. 1728. See Li, Xintien, "On the Model of Judicial Assistance between Mainland and Hong Kong", (1997) 82 Law Review 63 (in Chinese).

treated as a judgment of the HKSAR, and vice versa, by the opposing courts. It should be recognised and enforced upon application. Though this suggestion is regarded as the simplest way, it is in fact undesirable and may also be unlawful.[63] As mentioned above, the PRC Constitution has no general or direct application to the HKSAR.[64] Therefore, even if there is such a provision in the Constitution, it is doubtful whether it would applicable in the HKSAR.[65] It is surely undesirable to have some provisions in the Constitution that have legal effect in the HKSAR and others that do not. Moreover, taking account of previous PRC practice, the NPC is not likely to amend the Constitution for such a minor technical issue.

2. Enactment of a PRC statute applicable to the HKSAR

Since the maintenance of judicial relations with other parts of the PRC is in accordance with the law[66], it has been suggested that the NPC enact a new statute similar to the Judgment Extension Act 1868 of the United Kingdom, to provide a legal basis for the mutual recognition and enforcement of judgments between the Mainland and the HKSAR.[67] The conditions and procedures for the recognition and enforcement are to be prescribed in that legislation. It should be applied universally in all parts of the PRC, including the HKSAR.[68]

The main defect of this proposal is in the uncertainty of national legislation on Hong Kong. As mentioned above, the HKSAR is vested with legislative power.[69] The laws of the HKSAR are the Basic Law, the "laws previously in force in Hong Kong", and the laws enacted by the legislature".[70] National laws are not applicable except for those listed in Annex III of the Basic Law.[71] Other national laws can only be added to the Annex by the NPCSC after consultation with the Basic Law Committee and the SAR government,[72] and more importantly, they should be confined to issues relating to defence, foreign affairs, and other matters outside the limits of the autonomy of the HKSAR.

The advocates for this option may argue that since inter-regional judicial assistance involves the administration of justice on the Mainland, it would not fall within the HKSAR's autonomy. Thus, the NPCSC would be perfectly entitled to insert such a newly enacted law into Annex III.[73]

However, those who object to this option may argue that after a careful inspection of Annex III, one will have no difficulties in discovering that the nature of those applicable national laws are confined to issues regarding sovereignty: for example, the National Anthem,

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63 Yu, note 56 above, p 711; Dong, note 57 above, p15.

64 See note 57 above.

65 Dong, note 57 above, p 15.

66 Basic Law Article 95.

67 Dong, note 57 above, p 16. For a brief account of the English model, see Li, note 62 above, p 64.

68 Song, Hang, "Conference of Private International Law of China 1995", (1996) 76 Law Review 81, p 83 (in Chinese); see also Han, Depei and Huang, Jin, "Inter-regional Conflict of Laws Code Should be Enacted to Solve the Conflicts between Mainland China, Taiwan, Hong Kong and Macau", (1993) Journal of Wuhan University (Issue 4) 54 (in Chinese).

69 Basic Law Article 2.

70 Article 18.

71 *Id.*

72 *Id.*

73 Song, note 68 above, p 83.

the National Flag, or National Day. More importantly, autonomy in maintaining judicial assistance relations with other parts of the PRC "through consultation" was granted expressly in Article 95. Furthermore, although implementation should be governed "in accordance with law", the phrase "law" should not be construed to mean "a national enactment" when read with other articles and the legislative intent of the Basic Law[74]. It is therefore submitted that to adopt this proposal would constitute an infringement of the HKSAR's autonomy and thus a violation of both Article 31 of the Constitution and the Basic Law.[75]

3. Reaching agreements with individual provinces

The third choice for the implementation of Article 95 in the context of mutual recognition and enforcement of judgments is by bilateral agreements with different provinces themselves.[76] If we adopt a natural interpretation of Article 95, it appears to be the most appropriate practice.

This proposal is also grounded on a precedent of judicial assistance between Mainland and Hong Kong. In 1988, an agreement on administrative arrangements made between the Registrar of the then Supreme Court of Hong Kong and the President of the Economic Court of the Guangdong Higher People's Court was concluded. Though it was only concerned with the service of procedural documents in civil and economic proceedings, it was regarded significant, being the first step of establishing judicial assistance relations between the two systems.[77]

However, to employ this option is not without difficulty. First of all, it would seem unnatural for the HKSAR to negotiate with different individual provinces on what is essentially the same agreement (for mutual recognition). A lot of time and energy would thus be wasted.[78] Secondly, in a unitary state like the PRC, it does not appear likely that the CPG would allow the provinces to adopt different judicial policies. Thirdly, there would be a relatively long period of "uncertainty" (or "a legislative vacuum") before all the agreements can be put in place.

In view of these problems, a remedial proposal was made. It had been argued that the phrase "other parts of the country" should mean "jurisdictions" or "legal districts", instead of "administrative districts".[79] Therefore, in 1999 the PRC will have three "jurisdictions" or "legal districts", namely the Mainland, the HKSAR and the Macau SAR. Each jurisdiction will be entitled to conclude comprehensive agreements on judicial assistance, and of course, to include mutual recognition and enforcement of judgments, with the other two.

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[74] For example, under Article 110, the HKSAR government may formulate monetary and financial policies, safeguard the free operation of financial business and financial markets, and regulate and supervise them "in accordance with law". It is surely not the intention of the legislators that the financial activities in the HKSAR be regulated by a Mainland legislation. Thus, the term "law" in the Basic Law should undoubtedly mean "law of the HKSAR", instead of "national law".

[75] Dong, note 57 above, p 17.

[76] *Id.*, p 22; Zhan, Meisong, "Several Issues Concerning Judicial Assistance in Civil and Commercial Laws between Mainland China and Hong Kong, Macau and Taiwan", (1992) 52 Law Review 43, p 46 (in Chinese).

[77] Chen, Albert, "Conflicts of Laws between Mainland China and Hong Kong", in Chen, Albert, and Chan, Johannes (eds.), *Human Rights and the Rule of Law: The Challenges in the Transitional Period in Hong Kong* (Hong Kong: Wide Angle Press, 1986) pp 50 (in Chinese); Tai, note 12 above, p 13.

[78] Li, note 62 above, p 65; Song, note 68 above, p 83; Zhan, note 76 above, p 46.

[79] Song, *id.*.

In spite of the artificial interpretation of the term "other parts", it is submitted that this option sounds workable. Needless to say, the two SARs will be represented by their respective Courts of Final Appeal in the agreement. The only problem arising would be the determination of the court representing the Mainland jurisdiction. The most logical answer is the Supreme People's Court in Beijing as it is the supreme court of the Mainland jurisdiction. However, in the eyes of the CPG, though the Court of Final Appeal can exercise the power of final adjudication in the HKSAR, it is only a regional or local court. The Chinese leaders may regard it as inappropriate for the Supreme People's Court, which is head of the hierarchy in the PRC's legal system, to conclude an agreement with an inferior, regional court on an equal basis.[80]

It was recently proposed that the Higher People's Court of the Guangdong Province serve as the Mainland's representative.[81] It was argued that Guangdong is not merely geographically closest to the SARs, but also in its historic, customary and economic relationships. Due to this proximity, the courts in Guangdong have been dealing with many disputes involving Hong Kong. Furthermore, Guangdong has already established some kind of judicial assistance relations with Hong Kong, but there is a desperate need to upgrade it to a more comprehensive agreement.[82] Having concluded such a comprehensive understanding, other provinces may choose to join the agreement as a party.[83] While this proposal avoids confining the meaning of "other places" to the "whole Mainland", it will reflect reality. It is therefore worth considering.

4. Simultaneous legislation

Under this proposal, both the PRC and Hong Kong will simultaneously enact a piece of legislation with the same substance.[84] Though the conditions of enforcement in the two places are not identical, there is no material conflict between them. It will thus be unnecessary for both sides to change their existing legal principles. To implement this suggestion in the PRC, no NPC meetings will be required to amend the Civil Procedure Law under the PRC legal system. The NPCSC, which meets every two months, can pass the necessary supplementary provisions.[85]

It is also open to the Supreme People's Court to issue a judicial opinion to direct all levels of courts that in facing a request for recognition and enforcement of a HKSAR judgment, they must by analogy apply the relevant provisions on the enforcement of a foreign judgment. In the HKSAR, the PLC[86] or the Legislative Council (LegCo) should at the same

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80 Hu, note 56 above, p 15.

81 Tu, Tianfeng and Xu, Zongbao, "1997: Inter-regional Judicial Assistance between Guangdong and Hong Kong", (1997) 75 Chinese Lawyer 51 (in Chinese).

82 *Id*, p 52.

83 *Id*; see also Zhan, note 76 above, p 46.

84 Zhan, *id.*; Yu, note 56 above, p 713; Dong, note 57 above, pp 23-24; see also Wu Jianfan, "'One Country, Two Systems' and the Hong Kong Basic Law", (1997) 77 Chinese Legal Science 3, pp 13-14 (in Chinese).

85 This is a very common method for the PRC to change its law in view of the new circumstances.

86 The first LegCo is expected to be formed in mid-1998. The legality of the PLC has been affirmed by the Court of Appeal in *HKSAR v Ma Wai-kwan, David & Others*, note 2 above; for the debate on the legality of the PLC, see Ghai, note 5 above, pp 270-280; Chen, Albert, "The Provisional Legislative

time enact a new law, similar to the existing Cap 319, to specifically deal with Mainland judgments.

People may argue that judicial assistance relations be made "through consultation" rather than by compulsion, and thus regard this option to be in contravention of Article 95. However, Article 95 can be regarded as authorisation for the HKSAR to maintain judicial assistance relations and to render assistance with other parts in China. As they should be made "in accordance with law", the aims of these enactments are to prescribe the detailed methods and procedures for implementation. When a particular issue arises, the HKSAR courts may exercise their power under this newly enacted law to initiate consultation with the mainland courts and to give mutual assistance. Since this is a simple and easy process, it appears likely to be adopted.

D. Fatal Technical Problem

It is submitted that if the problems concerning the finality and conclusiveness of the PRC judgments are not cured, then no matter how perfect the model of enforcement is, no judgments can actually be enforced at the end of the day. This problem is illustrated by *Chiyu Banking Corporation Ltd. v Chan Tin Kwun*[87]. In discussing whether the judgment rendered by the Fujian Intermediate People' Court was final and conclusive, Cheung J ruled that it was not, because it was "not final and unalterable in the court which pronounced it".[88] It was left open to be altered by the same court upon retrial if the Supreme People Procuratorate subsequently lodges a protest.[89] If a protest was lodged, the court would have to retry the case. The power to alter its own decision was thus retained.[90] Accordingly, the Hong Kong court ordered a stay of proceedings to avoid a multiplicity of actions.

Under the "trial supervision system" on the Mainland a higher court at its discretion may decide to hear a case itself, or direct the lower court to a retrial.[91] Applications from the losing parties are not required and no time limit is designated. Therefore, by applying the reasoning of this case, no PRC civil judgments are final and conclusive as all are subject to potential retrial by the same court in the future. It is submitted that the adverse impact of this legal problem be cured as soon as possible.

IV. Mutual Recognition and Enforcement Civil and Commercial Judgments between Taiwan Region and the HKSAR

The Taiwan Region is a very special place. It is undoubtedly an inalienable part of China, but it is not under the jurisdiction of the Beijing Government (i.e. the CPG mentioned in the above paragraphs), which was formed by the Chinese Communist Party (CCP) in 1949. In

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Council of the SAR", (1997) 27 HKLJ 1; Yash Ghai, "Dark Days for our Rights", *South China Morning Post,* 30 July 1997. This issue is not within the scope of discussion of this article.

87 See note 14 above.

88 *Id.*, p 399.

89 Civil Procedure Law Articles 185, 186.

90 *Id.* Dai, Yuzhong, "The Countercharge System in the Chinese Legal Framework", (1995) 3 China Law 63 (bi-lingual); for a discussion of the court system of the PRC, see Chen, Albert, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths, 1992) Ch 7.

91 Civil Procedure Law Article 177; see also Chen, *id.*, p 173.

spite of the non-recognition of the legitimacy of the KMT authorities by both the PRC and the United Kingdom, Hong Kong has established close economic and commercial relations with Taiwan over the past 48 years. Such a relationship is maintained notwithstanding Hong Kong's reunification with the Mainland. Thus, to facilitate trade and commerce, judicial assistance relations between the two places should be developed further, or at least be preserved, after 1997.

A. Is a Taiwan Judgment Enforceable in the HKSAR?

Taiwan's legal status and the Taiwan-HKSAR relationship are not expressly stipulated in the Basic Law. Meanwhile, there are no express restrictions on the establishment of relations with Taiwan. Therefore, in discussing the implementation of Article 95 in the area of recognition and enforcement of Taiwan judgments, we need to examine, firstly, whether the SAR government is entitled to establish judicial relations with Taiwan at all, and if the answer is yes, to then examine the scope of autonomy of the HKSAR to decide whether authorisation from the CPG in Beijing is needed.

As mentioned above, the common law jurisdictions have developed a flexible and realistic approach in the conflict of laws, in that even if a government is not recognised, it does not necessarily mean that its laws should be completely ignored.[92] This principle can be illustrated in *Taiwan Via Versand Ltd. v Commodore Electronics Ltd.*,[93] a case deciding whether a Taiwan company has *locus standi* to sue in Hong Kong. Mr. Justice Patrick Chan (as he then was) held that though there was no formal recognition of Taiwan as a State of Government (by the United Kingdom, the sovereign power at the time), ordinary citizens in Hong Kong conducted their affairs on the basis that there was such a government and legal system. No one could close his or her eyes to this reality. It would be unfair to allow a Hong Kong citizen who has entered into a business transaction with full knowledge of this political loophole to escape liabilities on this basis.[94] As the pre-reunification common law are is still applicable in the HKSAR,[95] there seems to be no reason to bar the recognition and enforcement of Taiwan judgments if we apply the reasoning of this case.

B. Relationship with Taiwan: Who Is in Charge?

As discussed above, the HKSAR enjoys a high degree of autonomy to exercise executive, legislative, and independent judicial power, while the CPG is responsible for defence and foreign affairs.[96] On the establishment of judicial relations, the CPG's "assistance or authorisation" is required only in the case of foreign states.[97] As Taiwan is not a foreign state,

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92 Chen, note 27 above, p 66.

93 See note 27 above.

94 *Id.*

95 Basic Law Articles 8, 160; see also Daniel Fung, "Mutual Legal Assistance as between Hong Kong and the Mainland in the Run-up to and beyond 1997", Speech at the Far Eastern Economic Review Conference, "Countdown to 1997: Roadmap to Hong Kong's Continued Prosperity", held on 9 June 1995, p 1.

96 Basic Law Articles 2, 13, 14.

97 Basic Law Article 96: "With the assistance or authorization of the [CPG], the Government of the [HKSAR] may make appropriate arrangements with foreign states for reciprocal judicial assistance."

but only a "region" or a "part" of the PRC in the eyes of the Chinese leaders, it appears that the HKSAR is allowed to establish and maintain such relations as permitted under Article 95 without the CPG's intervention. It is submitted that to hold that the HKSAR as without autonomy over this issue would not only be a gross violation of the Basic Law, but more seriously, a violation of the spirit of the PRC's Constitution- which declare that Taiwan is a "part" of the PRC !

According to Vice-Premier & Foreign Minister Qian Qi-chen, all Taiwan issues in the HKSAR involving national sovereignty or the relationship between the two shores should be handled by the CPG, or by the SAR government under the CPG's instructions.[98]

It is submitted that maintaining judicial assistance relations within the PRC is surely unrelated to the sovereignty and enforcement of a Taiwan judgment, and does not mean recognition of the legitimacy and legality of the KMT government in Taiwan.[99] However, it should be noted that the Taiwan issue is a very sensitive area, and expressly allowing a Taiwan judgment to be recognised and enforced in the HKSAR may give people the wrong impression about the legal status of the KMT authorities. Moreover, it appears that most, if not all, of the Taiwan issues in the HKSAR may involve the relationship between the two shores. Therefore, though from a purely legal viewpoint the HKSAR is entitled to autonomy in maintaining judicial assistance relations with the Taiwan Region, in reality such a relationship is likely to be determined by the CPG.

In view of the CPG's likely involvement, the present status of the relationship between the two shores and the stance of the PRC on judicial assistance with Taiwan must first be examined to predict the prospects of mutual recognition and enforcement of judgments with the Taiwan Region.

C. Special Considerations in the Construction of an Appropriate Model

1. Relationship between the two shores

The governance of China was separated in 1949. After victory in the civil war, the CCP established the PRC with Beijing as the capital. The pre-existing KMT government was forced to Taiwan. Neither recognised the other. In the eyes of KMT leaders, the CCP is a "rebellious group".[100] Its control over China is illegal. For the CCP, the government in Beijing is the sole and legitimate government of China. It does not view the KMT authorities in Taiwan as an equal political entity.[101] It is at most a local authority and its laws have long ceased to have effect on the Mainland.[102]

For the past 48 years, there has been no official contact between the two authorities. However, the relationship has improved in the early 90's. In February 1991, the "Guidelines for National Unification" was adopted by the National Unification Council of the KMT

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98 Referred to in Chen, note 27 above, p 59. Mr. Qian was concurrently Chairman of the Preparatory Committee of the HKSAR and its Preliminary Working Committee.

99 Chen, *id.*, p 66.

100 Chiu, Hungdah, *Constitutional Development and Reform in the Republic of China on Taiwan* (Maryland: School of Law, 1993) pp 14-22.

101 Chen, note 27 abvoe, p 59.

102 "Instructions of the CCP Central Committee on the Abolition of the Collection of Six Laws of the KMT and the Confirmation of the Judicial Principles of the Liberated Areas" (1949).

authorities.[103] On 30th April of the same year, Taiwanese President Lee Teng-hui officially announced the end of the "Period of Mobilisation for the Suppression of the Communist Rebellion".[104] The CCP was no longer regarded as a rebellious organisation and Mainland China was recognised as a distinct area under the jurisdiction of a different political entity.[105] The Straits Exchange Foundation (SEF) was established as the only private organisation empowered by the KMT Government to handle relations with the Mainland. Meanwhile, a corresponding organisation, the Association for Relations Across the Taiwan Straits (ARATS), was also set up by the CCP government.

Under the policy of no official contact with the Communists, the SEF is only authorised to deal with non-political issues.[106] Between 27-29th April 1993, there was a historic conference between the two Associations in Singapore, led by their Chairmen, Mr. Wang Tao-han (ARATS) and Mr. Koo Chen-fu (SEF). Four important agreements were signed at the end of the conference.[107] A limited extent in judicial assistance was also arranged.[108] However, the relationship between the two shores have turned sour since 1996. The Beijing government was annoyed by Lee Teng-hui's active involvement in the international political arena, and the initiation of direct popular presidential elections in Taiwan. At the time of writing, this unpleasant relationship continues.

2. Judicial Assistance between the two shores

As mentioned above, the laws passed by the KMT government have been declared invalid since 1949.[109] To recognise and to enforce a Taiwan judgment in Mainland China is impossible at the moment.[110] Owing to the special position of Taiwan, the PRC has not proclaimed an official stance on this aspect so far. In fact, the doctrine of "Inter-regional Judicial Assistance" that the PRC intend to govern future judicial assistance relations between the Mainland and the SARs is not applicable to Taiwan at present, as the prerequisite requirement is the existence of a unified nation.[111]

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103 Zhou, Wei, "Principles and Models of Establishing Judicial Assistance Relationships between the Mainland and Taiwan", a paper presented at International Conference on Conflict & Interactions of Laws: Mainland China, Hong Kong and Taiwan, organized by the Faculty of Law of the University of Hong Kong and the Graduate School and School of Law, Soochow University, 8-9 February 1993, pp 2-3 (bi-lingual).

104 *Id*

105 Hu, Jason, *A Brief Introduction to the Republic of China*, (Taipei: Government Information Office, 1995) p 45.

106 *Id.*, pp 48-49.

107 They are agreements on document authentication, on tracing and compensation of lost registered mail, on establishment of systematic liaison and communication between the two associations and the joint accord.

108 Zhou, *id.*, p 3.

109 See note 102 above.

110 Dong, note 57 above, pp 6-7; Zhou, note 103 above, p 7; Wang, Xiping, "Several Problems Concerning the Establishment of Inter-regional Judicial Assistance between the Two Shores", (1992) 7 Social Sciences 39, p 40.

111 Zhou, *id.*, p 6; Weng, Qiyin, "'One Country, Two Laws' and Inter-regional Conflict of Laws", (1990) Jurisprudence (Issue 12) 11 (in Chinese).

On the Taiwanese side, the "Statute Governing the Relations Between the People of the Taiwan Area and the Mainland Area" passed by the Legislative Yuan in 1992 can be regarded as the first step in providing a legal framework for the recognition and enforcement of Mainland judgments.[112] But throughout the enactment, the laws of the Mainland are labelled "provisions" only. This is undoubtedly due to a strong reservation on the legal status of the PRC laws.[113]

Since the key elements for establishing inter-regional judicial relationships are both lacking, the two authorities are reluctant to have any official contacts with each other. It seems unlikely that there will be any developments in this area in the near future.

D. Possible Models

In view of political reality, the HKSAR is unlikely to be allowed to reach any mutual understanding on this issue with the Taiwan authorities through "direct negotiation". The simplest way would be to incorporate the pre-reunification common law rules into new legislation, namely a Taiwan Region Judgments (Reciprocal Enforcement) Ordinance. It should be drafted with due care, to avoid embarrassing the CPG. Such a statute can clear up the legal uncertainty and facilitate the economic relationship between the HKSAR and Taiwan region without the need of reaching any mutual official agreement.[114]

However, it is submitted that both the CPG and the HKSAR government may want to avoid giving people the wrong impression by recognising the legitimacy of the KMT government and its court system. Furthermore, the existence of an express statute may also hinder the PRC's policies towards Taiwan, which the HKSAR may have to follow. Therefore, enforcement through common law rather than by statute may be more appropriate in the eyes of the PRC. The main advantage of this method is flexibility. The matter will only be examined and discussed when it is necessary to do so. In addition, the unnecessary political debate on the status of Taiwan and the extent of the autonomy of the HKSAR can be avoided. The matter can be settled in a more legalistic manner by independent judges following pre-1997 common law rules.

Of course, there are drawbacks to this approach. Firstly, the lack of legislation and precedents means uncertainty. Secondly, in our trial system the parties in litigation are free to raise any issue they like. Thus, the defendant in such a case may plead that recognition and enforcement of Taiwan judgments is not within the autonomy of the HKSAR but is the responsibility of the CPG, and involves the CPG-SAR relationship. As the interpretation of the Basic Law will affect the result, the Court of Final Appeal may need to seek an interpretation from the NPCSC before making an unappealable judgment.[115] This will make the issue unnecessarily complicated. As the mode of interpretation is not specified in the Basic Law, it may be difficult to predict the result. Thus, people may be unwilling to take the risk of being the first applicant. This may harm the HKSAR's commercial relationship with Taiwan in the long run.

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[112] Hu, note 105 above, p 47-48.

[113] Dong, note 57 above pp 3-4; Zhou,note 103 above, pp 3-4.

[114] Zhou, *id*, pp 7-8.

[115] Basic Law Article 158. For a discussion on the problems of the interpretation of the Basic Law, see Yash Ghai, note 5 above, Ch 5.

Concerning reciprocal recognition in Taiwan, the "Statute Governing the Relations with Hong Kong and Macau" was passed by the Legislative Yuan on the 18th March 1997. The new statute regards the HKSAR as a distinct region apart from the PRC. Under Article 42, the criteria for recognition and enforcement of judgments of foreign states, i.e. Article 402 of the Civil Litigation Law and Article 4 of the Enforcement Law, are to be applied by analogy to the HKSAR's judgments. This means that pre-1997 conditions for enforcing a Hong Kong judgement is preserved. However, as reciprocity is the guiding principle,[116] should there be no precedent for enforcement of a Taiwan judgment in the HKSAR, it will be very difficult, if not impossible, for a Hong Kong party to succeed in the Taiwanese court.

V. Conclusion

As the economies of Mainland China, Taiwan and Hong Kong are becoming more and more inter-dependent, it is submitted that the maintenance of judicial assistance relations between the three regions is of vital importance to the continuing growth of trade. If people cannot be assured that a judgment will be enforced in the other regions with certainty, it will only be at the expense of our own interests.

[116] Article 56.

THE FREEDOM OF EXPRESSION AND ARTICLE 23 OF THE BASIC LAW

言論自由與基本法第二十三條

TONY YUEN TAT-TONG*

The Freedom of Expression is a basic human right recognised by all modern societies. The freedom to espouse political opinions contributes to well-meaning intellectual discourse. The Freedom of Expression's importance to Hong Kong is underlined in its inclusion in both the Bill of Rights Ordinance and the Basic Law.

In this article, the author analyses the past, present, and future of the Freedom of Expression in Hong Kong, through both the legislative and political aspects. Article 23 of the Basic Law, which prevents any acts of "treason, secession, sedition, and subversion" against the People's Republic of China, has been the focus of much criticism from those who see it as a lever by which the Freedom of Expression can be legally curtailed. The political motives of both the mainland authorities and the SAR government are studied, especially their sincerity in maintaining the political Freedom of Expression, given their actions before and after the establishment of the SAR. Finally, the author assesses the power of local legislation created under the auspices of Article 23.

香港一向是一個享有高度言論自由的地方。市民就政治、經濟、民生等各種事情作出的意見，只要沒有侵犯別人的權利，均不受干預或任何審查。隨著九七回歸以及一國兩制的落實，基本法第二十三條中列明香港特別行政區應自行成立禁止任何叛國、分裂國家、煽動叛亂、顛覆中央人民政府及竊取國家機密的行爲。

由於中港兩地在法制上對民主及人權的看法有所分歧，所以兩者對言論自由、煽動叛亂及顛覆等詞也有不同的界定。作者在本文中就基本法第二十三條會否限制或干預港人所享有的言論自由以及當中所指有關煽動叛亂及顛覆中央罪的範圍，去論述基本法第二十三條與言論自由之間的關係和衝突，以及討論在這情況下該如何在保障社會及個人權益之間取得一個平衡。

I. Introduction

> To overthrow a political power, it is always necessary first of all to create public opinion, to work in the ideological sphere. This is true for the revolutionary class as well as for the counterrevolutionary class; to establish a political power, we must depend on two barrels, one is the barrel of a gun and the other is the barrel of a pen.[1]

Totalitarian governments have draconian laws to protect their political power through the

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1 Mao Tse-tung, *Selected Works of Mao Tse-tung* (Beijing: Foreign Languages Press, 1965).

suppression of the freedom of expression.[2] Having regard to current PRC practice, there might not be any exception to this practice in the HKSAR.[3] The June 4 massacre in 1989 woke the people of Hong Kong from a dream of rule of law under Chinese rule, and into the realities of a communist centralised leadership of the post-Mao China. The implementation of 'one country, two systems' policy is paramount, and the fears of the socialist system dominating the capitalist system[4] would be relieved if the policy is applied correctly. However, the reality is that law is still conceived of and operates as an instrument to uphold socialist political order, and help perpetuate party domination.[5]

After the June 4 massacre, Hong Kong was seen by the Chinese leaders as a base for subversion of the mainland government.[6] It was feared by those in Hong Kong that tight political control would be exercised after the change of sovereignty in order to preserve the political power of the PRC.[7] That fear was highlighted by the imprisonment of Wang Dan for plotting to subvert[8] the government: there are similar offences under Basic Law Article 23.

The main concern was that BL23 would be used to suppress the freedom of expression[9] and legitimate dissent, and at worse, basic human rights. Whether these are justified concerns depends mainly on how the various offences under BL23 are defined and

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2 Political repression is defined by Goldstein as "government action which grossly discriminates against persons or organisations as presenting a fundamental challenge to existing power relationships or key government policies, because of their perceived political beliefs"; See Goldstein, Robert J. *Political Repression in Modern America: From 1870 to the Present* (Boston: Schenkman, 1978); see also Christian A. Davenport, "Constitutional Promises and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties are Suppressed" in (August 1996) Vol. 58 No. 3 *The Journal of Politics*, pp 627-54.

3 Article 23 of the Basic Law provides: The HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

4 The implementation of 'one country, two systems' was advocated by Deng Xiaoping with the major premise of 'one country'. See Po Hing Jo, *Political System of the People's Republic of China* (Hong Kong: Joint Publishing (H.K.) Ltd., 1995) p 457.

5 Edward J. Epstein, "Law and Legitimation in post-Mao China" in Pitman Potter (ed.) *Domestic Law Reforms in Post-Mao China* (USA: An East Gate Book, 1994).

6 Joseph Y S Cheng et al., *The Other Hong Kong Report 1992* (Hong Kong: Chinese University Press, 1992) pp xix, xx-xxiv.; see also Tsim Tak-lung, "The Implementation of the Sino-British Joint Declaration" in Richard Y C Wong and Joseph Y S Cheng (eds), *The Other Hong Kong Report 1990* (Hong Kong: Chinese University Press, 1990) pp 131, 139-45.

7 Under the first part of BL23, only treason, secession, sedition, subversion against the CPG is prohibited. Arguably, subversion against the Communist Party is lawful. But as there is no clear demarcation between state and government in China, any challenge against the communist regime can be seen as a challenge to the state. Clearly, a liberal interpretation of BL23 indicates that subversion against the SAR government is not Prohibited. As such, this part of BL23 is more lenient than the present law of sedition which prohibit any person do any act, utter any words and publish publications with seditious intention against not only the Sovereign or Her Majesty or Her Heirs or Successors but also the Government of Hong Kong.

8 It is not an offence in the present statute book in Hong Kong and it is a rather new offence in the common law system.

9 The impact on the freedom of press is most important. However, in this paper, freedom of expression is broadly interpreted so as to include other forms of freedoms such as freedom to demonstrations and protests.

applied. However, while the definitions are important, people must not lose sight of the more fundamental question of how the 'one country, two systems' policy would be implemented, and the amount of autonomy actually enjoyed by the HKSAR. These two fundamental questions are dependent on the scope of the various offences under BL23.[10] The scope of the offences depends on whether Chinese law or common law is used in interpreting them.[11]

This paper examines the freedom of expression under BL23[12], and whether an appropriate balance can be struck between the two without one being eroded by the other. Firstly, the freedom of expression is defined- in both the Eastern and Western interpretations.[13] Next, the offences of subversion and sedition are discussed.[14] The legal limitations of BL23 are scrutinised in detail. Finally, we attempt to find the definitive balance which provide for both a free society and a politically stable one.

II. Freedom of Expression

A. Scope

The freedom of expression includes the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through any medium. It can also include the right to remain silent and listen to the opinions of others. The right of access to

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[10] BL23 is clearly a prominent article to test how successful is the implementation of "one country, two systems" and the degree of autonomy enjoyed by the future HKSAR. The tight political control in China and the violation of basic human rights by legal means is clearly different and not compatible with the increasingly political active Hong Kongers. It might be used to interfere with the political activities in HKSAR which may be lawful in the present legal system of Hong Kong. The Chinese Vice-premier, Mr Qian Qi-chen, has hinted that activities to commemorate the June 4 crackdown will be prohibited after the handover. *South China Morning Post,* 17 October 1996; *Asian Wall Street Journal,* 16 October 1996.

[11] The common law offences of sedition and subversion are defined more clearly and try to strike an appropriate balance between the aim of protecting the national security without usurping the basic rights of the citizens. The Chinese Law of subversion and sedition are vaguely defined and seems to cover everything in the counter-revolutionary offences. This may not be exaggerating. There was a joke circulated in China. Question: "What is the easiest thing for one to be nowadays?" Answer: "To be a counter-revolutionary". For there are a lots of brands. There are diary counter-revolutionaries, private-letter counter-revolutionaries, counter-revolutionaries for telling the party what is in one's mind and so on. Li Zhengtian, "Lawless Laws and Crime-less Crimes" in Douglas Merwin (ed.) *Socialist Democracy and the Chinese Legal System* (USA: East Gate Books, 1985), p 168

[12] In this paper, only the offence of subversion and sedition are discussed owing to the limitation of words. In fact, other offences created by BL23 may also have drastic effect on freedom of expression; for example, the offence of 'theft of state secret' restricts freedom of information and the prohibition of local political organisation establishing ties with foreign political organisation restricts freedom of association. These depends on what is meant by 'state secret' and 'political organisation'. For a discussion of 'state secret' in Chinese law, see "Introduction to the State Secrets Laws of the PRC" in (Fall 1983) Vol.11 No.4 *China Law Reporter*

[13] The two systems in Hong Kong context refer to the capitalist system and the socialist system. But in fact the divergence on the perception of democracy and human rights is due to the different political, social and philosophical values between the East and West.

[14] In this paper, only the offences of sedition and subversion are dealt with and incidentally comment upon the offences of treason and secession because in practice treason and secession are unlikely to happen. This assumption is only correct if treason is defined in the common law where ordinary citizens cannot commit it.

information and the protection of personal privacy are also crucial. It embraces the right to assemble and to form associations with others in joint expression.[15] It includes the belief and communication of ideas as well as different forms of conduct.[16] Emerson argued that a distinction should be made between "expression" and "action" and restrictions on expression should be minimal or nonexistent.[17] Expression is normally conceived as doing less injury to social goals[18] than action. It is generally less irremediable in its impact and has a less immediate consequence. Zechariah Chafee described the distinction:

> [T]he normal criminal law... is directed primarily against actual injuries. Such injuries usually are committed by *acts*, but the law also punishes a few classes of words like obscenity, profanity and gross libels upon individuals, because the very utterance of such words is considered to inflict a present injury upon listeners, readers or those defamed or else to render highly probable an immediate breach of peace. This is a very different matter from punishing words because they express ideas which are thought to cause a future danger to the state.....[19]

The law of treason is an example of the distinction between "expression" and "action" by the requirement of "overt act".[20] A decision of the U. S. Court of Appeals said of treason:

> While the crime is not committed by mere expression of opinion or criticism, words spoken as part of a program of the propaganda warfare, in the course of employment by the enemy in its conduct of war against the United States may be an integral part of the crime.... The use of speech to this end .... made acts of words.[21]

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15 Thomas I., Emerson, *The System of Freedom of Expression* (USA: Ransom House Inc., 1970) p 3. See also Article 10 of the *European Convention on Human Rights*, freedom of expression includes freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

16 There are many forms of expression, from throwing broccoli on to the lawns of the White House to burning the flag or the Basic Law; from displaying an outrageous piece of sculpture in a municipal part to trailing a message in the sky. Yash Ghai, "Freedom of Expression" in R. Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992).

17 This is because the power of the state over the citizens is so pervasive and construction of doctrines to restrict this power is so difficult that only by drawing a protective line between expression and action is possible to strike a safe balance between authority and freedoms.

18 The social goals in a liberal-democratic society are determined by the citizens while the social goals in a anarchy is determined by the political leader himself/herself. For example, in Hong Kong, the primary social goals is generally viewed as the maintenance of continuing prosperity and stability. BL23 may be viewed by the Chinese Leaders as a mean to maintain the stability of Hong Kong as they feel that frequent demonstrations and protests give rise to an unstable society.

19 Zechariah Chafee, *Free Speech in the United States* (Cambridge: Harvard University Press, 1948) pp149-150.

20 In Hong Kong, the offence of treason and treasonable offences are provided in ss 2 and 3 of the Crimes Ordinance (Cap 200) which also provide that "manifests such an intention by an overt act" and "... and manifests such intention by an overt act" respectively for treason and treasonable offence.

21 *Gillars v. United States* 182 F. 2d 962 (D. C. Cir. 1950) at 971

Hence, it is submitted that while it is not practical to make a distinction between "action" and "expression", a broad interpretation of freedom of expression that covers actions also should be adopted.[22]

B. Justification for the Freedom of Expression[23]

Freedom of expression should be specially protected, because it assists in the creation of a more stable society. It maintains the precarious balance between healthy social coverage and necessary consensus. This is because the suppression of discussion makes a rational judgment impossible, substituting force for reason. Suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas. Because suppression conceals the real problems facing society, this diverts public attention from the critical issues. By contrast, greater cohesion in a society can be promoted in open discussion, as people are more ready to accept decisions that go against them if they have a part in the decision making process. Thus, the freedom of expression provides a framework in which conflicts, necessary to the progress of society, can take place, without destroying the society itself. It is an essential mechanism for maintaining the balance between change and stability.

It is more than a platitude to say that the freedom of expression plays an important role in the political process, as a fundamental safeguard in democratic society. For example, access to information is of crucial importance to effective political participation.[24] In the words of Jennings:

> Without freedom of speech the appeal to reason which is the basis of democracy cannot be made. Without freedom of association, electors and elected representatives cannot bind themselves into parties for the information of common policies and the attainment of common ends.[25]

Freedom of expression ensures that opponents of the government can freely express their views to the public, providing the voters with a genuine choice in any elections.[26] Whatever

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22 This is in accord with the approach adopted by the European Court of Human Rights. *AG of Gambia v Momodu Jobe* [1984] AC 698.

23 There are at least ten justifications for freedom of expression, including the consequentialist and non-consequentialist justifications. They include the argument from truth, argument from interest accommodation and social stability, argument from exposure and deterrence of abuses of authority, argument from autonomy and personality development, argument from liberal democracy. However, owing to the limitation of words, this paper focuses on the argument from the stability and argument from democracy for freedom of expression as they are most relevant to Hong Kong. For more detailed discussion on justifications of freedom of expression, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (London: Cambridge University Press, 1982), ch 2-3; Kent Greenawalt, "Free Speech Justifications" in Mahendra P. Singh (ed.) *Comparative Constitutional Law* (India: Eastern Book Co., 1989); see also E Barendt, "Why Protect Free Speech?" in *Freedom of Speech* (Oxford: Clarendon Press, 1987), Ch 1.

24 Paddy Hillyard and Janie Percy-Smith, *The Coercive State* (London: Fontana Paperbacks, 1988) p 111. For a detailed discussion about free press and democracy, see generally Judith Lichtenberg (ed.) *Democracy and the Mass Media* (USA: Cambridge University Press, 1990) ch 9 and 13.

25 Jennings, *Cabinet Government* (UK: Cambridge University Press, 3rd ed., 1959)

26 Judith Lichtenberg, *op cit.*, note 24 above, p 91

else the concept of democracy entail, it must include the notion of fair competition for posts of leadership. One of the most important modern formulations of the concept of democracy was by Joseph Schumpter:

> [T]he democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the people's vote.[27]

Thus the essence of democracy require individuals who want to attain governmental office speak out to convince their fellow citizens. An important feature of this right is the freedom of expression in practice: the right of a newspaper to publish, or a speaker to talk. It includes the fundamental rights of the general public to learn about and choose from the competing candidates and ideas. Suppressing political dissent means taking away the public's right to hear and choose.

C. Existing Limitations on the Freedom of Expression

Despite the importance of the freedom of expression, no society has an absolute freedom of expression. This control is necessary in order to ensure that all persons in a society enjoy the freedom of expression equally, and to ensure that social interests are not damaged. The right to express oneself must be reconciled with the rights of others.

Even under the common law, there are many restrictions.[28] For example, one must not defame others; sedition and incitement are not allowed; offences connected with obscenity are prohibited; blasphemy (which consists of publication of scurrilous or ludicrous matter abusing or denying or attacking the Christian religion); interference with the administration of justice in relation to particular proceedings; the Official Secrets Act as applied to Hong Kong (to a degree) controls the freedom of information; the common law action of breach of confidence is used to restrain anyone threatening to reveal confidential information; and finally, government papers are not available for public scrutiny until 30 years after publication.[29]

D. Different Views of the Freedom of Expression

The freedom of expression involves limitation on the power of the state to interfere with or

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[27] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Bros., 1942), p 269.

[28] It is generally believed that no political or social system exists with a totally free flow of information as control over information and ideas is inherent in the very human society - the human desire to conform. See Jane Leftwich Curry and Joan R. Dassin (eds), *Press Control Around The World* (USA: Praeger Publishers, 1982) chapter 11. In fact, it is argued by Gertrude Robinson that "it is entirely too simpleminded to evaluate a country's information system as more or less democratic by merely recording the presence or absence of censorship practices". See Gertrude Joch Robinson, *Tito's Maverick Media* (Urbana: University of Illinois Press, 1977) p 61. Note also that it has recently been argued that there is no such thing as free speech; see, for example, Stanley Fish, *There's No such Thing as Free Speech: And it's a Good Thing, Too* (New York, Oxford: Oxford University Press, 1994).

[29] Hong Kong government pledged to be open and accountable to the people under the leadership of Governor Chris Patten, and some information which were not available to ordinary citizens are now obtainable upon request. See "Code on Access to Information" (Hong Kong: Government Printer, 1996)

abridge relevant laws. This limitation must be reconciled with the rights of greater society. It is this process of reconciliation that is most controversial. This process involves the legitimacy of state action: under what circumstances may the state interfere with the activities of its citizens ? Different approaches draw the distinction between a totalitarian society and a liberal-democratic society. In the former, no rival loyalties are permitted and a "consensus" exists between the political parties (or party !).[30] In the latter, government interference in the freedom of expression is limited.

This difference is due to a number of factors. First, the socialist view on democracy is different from the liberal view. For the socialist countries, a democratic system is a system that governs in the interests of the people, which is collectively determined by the state, as interpreted by party leaders. While they will take into account the desires of the people by a process of solicitation of mass opinion, they control this process, and hence formulate policies based on their understanding of the situation at any particular stage.[31] This means that democracy is not a means but an end. For Chinese officials, socialist democracy is superior to bourgeois democracy because socialism is based on political, social and economic equality.[32] In the official view, capitalism was to blame for the shortcomings of western democracy. In order to prevent the rule of the capitalist, the government had to put their enemies under strict supervision, a dictatorship of the proletariat.[33] Thus, in the official Chinese government view, though the relationship between the masses themselves should be democratic, the state ought to exercise dictatorship over its enemies.

It is stressed by the Chinese leaders that the mass media be politically identified with the Party Central Committee. It must keep an eye on the masses, and fight against bourgeois liberalisation.[34] Thus no publication can say anything against or depart from the official line as established by the party, and the press must safeguard national interests and state policies. 'Sensational' topics are not allowed (until recently).[35] Socialist democracy[36] also justify state's control over mass media, supposedly giving voters fair media coverage of both the government and opposition. In reality, this is 'positive' government interference rather than 'minimal' interference, as in Western states.

Similarly, the teleological argument claims that the freedom of expression is not an end in itself, but an instrument for achieving the objective of winnowing truth from error-better achieved through positive government interference than none at all. With respect to the above arguments, it is submitted that they cannot stand. This is because the primary function of the freedom of expression is to protect individuals in seeking knowledge by their own

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30 Enforced conformity in speech and action is the typical characteristics of totalitarian regimes and China is certainly no exception in this respect. Chalmers A. Johnson, *Communist Policies Toward The Intellectual Class* (Hong Kong: Union Research Institute, 1970) p iii

31 John P. Burns, *Political Participation in Rural China* (London: University of California Press, 1988) pp 14-15.

32 *Id.* See also Li Honglin, *Socialism and Liberty* (Shanghai: Shanghai Renmin Preee, 1980), p 30 (in Chinese); see also *People's Daily* 13 July 1996 in which the US model of democracy was described as democracy for the rich minority while Chinese democracy respected the masses.

33 The dictatorship of the proletariat is in fact one of the four cardinal principles of the Chinese constitution. See Constitution of the PRC (1982), preamble.

34 "Media Must Serve People, Socialism - Jiang" Vol. 32 No. 50 *Beijing Review* (1989), pp 4-5

35 "Press Ethics: The Chinese Way" Vol. 34 No. 4 *Beijing Review* (1991), pp 5-6

36 This argument was used to justify regulations of press.

rational actions. Thus, to restrict freedom for the purpose of enhancing socialist democracy[37] is to foster governing at the cost of individuals rights. State control of the media can affect public opinion over a long period of time, as it is the only voice heard. This kind of editing by the government can be used to sway public opinion, undesirably resulting in a kind of ideological domination. It is submitted that out of the two political roles of the freedom of expression, the watchdog function and the democratic function[38], the former is far more important than the latter.

The West see the media with totally different functions. An influential school of thought, initiated by John Stuart Mill, regards "unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable"[39]. According to Mill, open discussion is necessary for the discovery of truth; even false views should not be prohibited because challenges over them promotes re-examination that only strengthens the truth.[40] Mill thought that interference with expression can only be justified when it is required to protect other more important rights. This way of thinking implies that the government has an obligation to protect and even encourage the expression of rival views. In the absence of public debate, policies are likely to be unintelligent.

E. East vs West on Human Rights

Furthermore, there is the divergence in the treatment of human rights owing to different political or government systems. There are sharp differences between the East and the West in the philosophical conception of human rights. The dominant view in western countries is that human rights are based on 'natural law'[41]; they are innate in all individuals. Hence, they precede any state structure and must be absolutely respected by the government.[42] One of the prerequisites of civil co-existence between the state and citizens is breached when the government violates human rights. By contrast, in socialist countries, human rights exists in society only to the extent that they are specially recognised; the state may limit them when circumstances so require, as they do not pre-exist the state but are recognised by it.[43]

In addition, there is divergence in the cultural and religious conceptions of human rights.[44] For the West, human rights means above all protecting the sphere of individual

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37 However, Chinese scholars have been exploring the concept of socialist democracy, arguing that democracy, involving the right to vote for and criticise power-holders, is an essential part of socialism.

38 The watchdog function and the democratic function are more or less the same in a liberal-democratic society where the press has the function of observing the government and criticises it if it has done wrong. But in the socialist countries, the watchdog function is quite different from the democratic function because their perception on democracy is different from the West.

39 J. S. Mill, "On Liberty" in Essays in Politics and Society (Toronto: University of Toronto Press, 1977) p 260

40 *Id.*

41 But note that there is debate between the positivism and theory of natural law, and possibly utilitarianism. They have different approaches to rights.

42 Antonio Cassese, *Human Rights in a Changing World* (Great Britain: Polity Press, 1990)

43 *Id.*

44 Capotorti, F., "Human Rights: The Hard Road Towards Universality", in R. St. J. Macdonald and D. M. Hohnson (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Boston: Martinus, 1983), pp 977-1000; see also Graefrath, B., "The Application of International Human Rights Standards to States with Different Economic, Social and Cultural Systems",

freedom against the overweening power of an invasive state.[45] For socialist countries, an individual's freedom can be realised only in a society in which classes, bound up in the capitalist system of production, cease to exist, so that the individual can fully participate without hindrance or inequalities in the life of the community.[46] Socialist thinkers argue that freedom does not necessarily mean adding restraints on a coercive or oppressive central power; rather, freedom means the creation of mechanisms which promote and enhance integration between the individual and community.[47] The emphasis is not on the dialectic between liberty and authority, but on that between the individual and community.[48]

Having accounted for the different approaches towards the freedom of expression between the liberal-democratic state and the socialist country, it is conceivable that legislation derived from BL23 will be suppressive of the freedom of expression. This may not necessarily be the case, although legislation derived from BL23 will only do detriment to the freedom of expression.

III. Further Restrictions on the Freedom of Expression: The Law of Sedition and Subversion

A. Intention of Article 23: A Historical Review

The purpose of BL23 can be discovered by looking at various stages of the drafting process. As BL 23 is of great political significance, its application will mostly depend on the political environment. Article 22 of the draft Basic Law of HKSAR of PRC (from 1988, for the solicitation of opinion):

> The HKSAR shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government. [49]

The major premise of this is the protection of national unity and the preservation of the power of CPG. This basically seek to prevent potential disturbance and maintain stability and prosperity. But it is not clear as to what kind of action constitute an "act designed to undermine national unity or subvert the CPG". Some suggest that "subvert the CPG" be replaced with "treason"[50]. Thus it is arguable that the intention of Article 22 in 1988 was to deal with treason. This argument would receive support if we see how article 22 was amended in 1989. In February 1989, Article 23 of the Draft Basic Law:

> The HKSAR shall enact law on its own to prohibit any act of treason, sedition,

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in *Bulletin of Human Rights* (Geneva, United Nations, 1985) pp 7-16; see also Antonio Cassese, *Human Rights in a Changing World* (Great Britain: Polity Press, 1988).

45 *Id.*

46 Michael C. Davis (ed.), *Human Rights and Chinese Values* (Hong Kong: Oxford University Press, 1995) pp 35-56.

47 *Id.*

48 *Id.*

49 *The Draft Basic Law of the HKSAR* (For the Solicitation of Opinions) (Hong Kong: BLDC, 1988)

50 Reference Papers For the Basic Law of the HKSAR of the PRC (Hong Kong: Secretariat of the Consultative Committee for the Basic Law of the HKSAR of the PRC, Feb 1989), p 23.

or theft of state secrets. [51]

Due to the vague meaning of "subversion", it was replaced by the more concrete "treason, sedition and theft of state secrets". Treason and sedition are both recognised in the common law, while the theft of state secrets is mainly a Chinese concept. The 4 June 4th event (culminating in Hong Kong by the one million-strong demonstration) led to a further amendment (or rather, a redrafting of Article 23). The Hong Kong demonstrators called for democracy in China, and the removal of Chinese Communist leaders. This annoyed the Chinese government, who responded by redrafting Article 23.[52] The Chinese members of the drafting committee recommended in the meeting in December 1989 that the clause "subversion against the CPG" be added. Their intention to protect the CPG from being subverted was clear.[53] Finally, the version of Article 23 today:

> The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the CPG or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies.

Arguably, the revival of "subversion against CPG" correspond to the Chinese leaders' fears of Hong Kong as a base of subversion. Moreover, it may be said that the actions of Hong Kong people in reaction to the June 4 massacre could be viewed as "subversion" by the Chinese leaders. The prevention of a repeat after 1997 might have been the possible intention of BL23.

The reality is that there is tight political control in the HKSAR. BL23 is aimed at ensuring tight political control over the freedom of expression, which is an inseparable element in democracy. Hence, the implementation of BL23 will have great significance for democracy in the HKSAR, as the democratic arrangements[54] under the Basic Law will be meaningless if the freedom of expression is suppressed by the government.

B. Defining Subversion: A Comparative Review

Another crucial factor is interpretation. Subversion has no general meaning for legal and political theorists, and there is no such concept in constitutional law.[55] The offence of subversion was introduced in response to domestic threats to state security. It is also due to national security that the constitutional right of free speech was suspended.[56] On this basis,

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51 *The Basic Law of the HKSAR of the PRC* (Draft) (Hong Kong: DLDC, Feb., 1989)

52 Cheung Kit-fung, *No Change, For 50 years? China, England and Hong Kong arguing about the Basic Law* (Hong Kong: Wave Press, 1991) (in Chinese), pp 216-222.

53 *Id.*

54 According to the decision of the NPC on the method for the formulation of the of the first government, 20 members returned by geographical constituencies, through direct elections. See Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of HKSAR Adopted at the Third Session of the Seventh NPC on 4 April 1990

55 Spjut, R. J., "Defining Subversion" (1979) 2 British Journal of Law and Society, p 254.

56 Peter Hanks, "Nationality Security - A Political Concept" (1988) 14 Monash University Law Review, at

subversive activities are generally regarded as those which threaten the safety or well-being of the state, and which are intended to undermine or overthrow parliamentary democracy by political, industrial or violent means.

The statutory definition of subversion is relatively new in common law jurisdictions. I will examine and compare the statutory definitions of subversion in New Zealand, Canada, Australia and Hong Kong discover the true essence of subversion.

1. New Zealand

In New Zealand, s.2 of the Security Intelligence Service Act 1969 define subversion as:

> Attempting, inciting, counseling, advocating, or encouraging-
> (a) the overthrow by force the government of New Zealand; or
> (b) the undermining by unlawful means of the authority of the state of New Zealand.

2. Canada

In Canada, subversion was defined as:

> Activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means.[57]

This was criticised as too broad, as it was interpreted by the Security Service as inclusive of changes in government policy- including strikes or demonstrations.[58]

Section 2 of the Canadian Security Intelligence Service Act[59] provide the statutory definition of what constituted "threats to the security of Canada":

> In this Act "threats to the security of Canada" means:
> (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
> (b) foreign influenced activities within or relating to Canada that are detrimental to the interest of Canada and are clandestine or deceptive or involve a threat to any person,
> (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state, and

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[57] First paragraph of the 1975 Cabinet Directive on "the Role, Tasks, and Methods of the Royal Canadian Mounted Police" From the nineteenth century to 1984, the organisation of domestic security intelligence work in Canada was the responsibility of the Royal Canadian Mounted Police (R.C.M.P.).

[58] Justice D. C. McDonald, *Commission of Inquiry Concerning Certain Activities of the R.C.M.P., Second Report: Freedom and Security under the Law* (1981), pp 438-440.

[59] Canadian Security Intelligence Service Act, 32-33 Elizabeth II, Chapter 21, 1984.

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of the government in Canada,[60] but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

3. Australia

In Australia, subversion was regarded as a separate security concern. Section 4 of the Australian Security Intelligence Organization Act (ASIOA) 1979 states that threats to security could arise from espionage, sabotage, subversion, active measures of foreign intervention and terrorism. Section 5(1)(a) of the ASIOA defined subversion as:

> Activities that involve or lead to, or are intended or likely ultimately to involve or lead to, the use of force or violence or other unlawful acts (whether by those persons or others) for the purpose of overthrowing or destroying the constitutional government of the Commonwealth or of a state or Territory.

The ASIOA 1979 was amended in 1986 and it replaced the terms subversion and terrorism with the less focused "political motivated violence". The term "political motivated violence" was defined as:

(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or
(b) acts that-
    (i) involve violence or are intended or are likely to involve or lead to violence (whether by persons who carry on those acts or by other persons); and
    (ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory.

This is a new definition of subversion (although the term "subversion"' itself has been excised from the legislation). The emphasis is on violence directed to the overthrow or destruction of the constitutional system of government. In the absence of violence, current or potential, activities that might disturb the equilibrium of the political system do not raise a security concern within the Act.[61]

The ASIOA 1986 added:

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[60] This paragraph is usually referred to as subversion section. See Peter Gill, "Defining Subversion: The Canadian Experience Since 1977" (1989) Public Law at 621.

[61] Peter Hanks, *op. cit.*, note 56 above, p 131.

> 17A: This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organization shall be construed accordingly.

4. Hong Kong

In Hong Kong, the government tried to introduce the definition of subversion in 1996.[62] Section 4 of the Crimes (Amendment)(No. 2) Bill 1996 repealed s 5 of the Crimes Ordinance[63] and substituted a new s 5 on subversion:

> A person who -
> (a) does any unlawful act with the intention of overthrowing the Government of the United Kingdom by force;
> (b) incites or conspires with any other person to overthrow the Government of the United Kingdom by force; or
> (c) attempts to overthrow the Government of the United Kingdom by force, is guilty of subversion and liable on conviction on indictment to imprisonment for 10 years.

Defining subversion is inadequate if both a narrow and broad interpretation are allowed. The narrow interpretation is that activities are subversive if they threaten the sovereign and are so intended. The wider interpretation is that activities are subversive if they disrupt the operation of government policy, the motive in the long run being the overthrow of the state. Thus, in defining subversion, it is of crucial importance not to confuse "subversion" with "legitimate dissent".[64] It is important to give a clear definition of subversion to avoid the risk that ordinary activities in a liberal-democratic[65] society be classified "subversive".

The lack of a clear legal definition raised concerns that legitimate dissent from the government policy might be easily categorised as subversive.[66] A clear line should be drawn between subversive and non-subversive activities. It is submitted that the combination of "unlawful act" and "intention" in s 5(a) brought more acts within the scope of subversion.[67] The requirement of violence as in Australia should be adopted as additional safeguard on the freedom of expression. Moreover, under s 5(b), acts of incitement must be conducted through

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62 The introduction of this bill is because of the failure to reach an agreement in the Sino-British Joint Liaison Group after more than two years of discussion on the proposal to legislate for BL23 and how to localise the Official Secrets Act.

63 Cap 200

64 Peter Gill, "Defining Subversion: the Canadian Experience since 1977" (1989) Public Law 617 at 621.

65 Of course, Hong Kong is not and will not be qualified a liberal-democratic society for the time being and in the foreseeable future. The point is that the existing liberties enjoyed by people of Hong Kong should be classified as subversion.

66 Richard Cullen and Fu Hualing, "Subversion and Article 23 of the Hong Kong Basic Law" Conference on Trends in Contemporary Constitutional Law

67 Similar concern was raised by Hong Kong Human Rights Monitor. See Minutes of the Sixth meeting of the Bills Committee on the Crimes (Amendment)(No.2) Bill 1996 held on 28 February 1997. Copies can be found in the web site of http://legco.gov.hk/yr96-97

speech or writing to be actionable for subversion.[68] The offences relating to overthrow of government in s.5(c) are wide in scope, and is covered under s 2 of the Crimes Ordinance.[69] The lack of a "clear and imminent danger" test also render the scope of the offence of subversion dangerously wide.[70] A provision positively declaring that lawful advocacy, protest or dissent is not subversion should be introduced, as in Australia and Canada.

It was also suggested by Director Lu Ping that the Hong Kong media would not be allowed to "advocate" the independence of Taiwan in the HKSAR, but only "objective reporting".[71] According to Director Lu, the former will be illegal while the latter will not be a breach of the law. But the distinction between "advocacy" and "objective reporting" is a fine one, and the concept of the latter in China can be quite different from that in Hong Kong.[72] He also drew a distinction between "expression" and "action":

> [T]hey can criticise the Chinese Government. They can object to our policies. They can *say* anything they like, but if it led to *action* they have to be careful. If they really want to overthrow ... the central Government, that's another thing.[73]

C. *Defining Sedition: A Comparative Review*

1. Hong Kong

In Hong Kong, the origins of seditious speech can be traced back to 1900. Two regulations were made under section 16 of the Post Office Ordinance (No. 24 of 1900). Regulation 1 provided that the importation of any seditious publication into Hong Kong through the Post Office is prohibited. Regulation 2 provided that the Post Master-General may seize all such seditious publications and cause the same to be returned to the post office at which they were mailed.[74]

In 1907, the Chinese Publications (Prevention) Ordinance (No.15 of 1907) was passed to prevent the publication and manufacture in Hong Kong of seditious publications aimed against the Chinese (Ching) government by the Chinese Revolutionary Party.[75] It was pointed out by the Governor at the time that "the measure is not intended to in any way curtail the

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68 s 5A of the proposed Bill creates the offence of secession which is defined as "a person who incites or conspires with any other person or who attempts to supplant by force the lawful authority of the Government of the UK in respect of any part of the UK or in respect of any British dependant territory".

69 Section 2 is about the offence of treason.

70 *Id.*

71 This remark was made by Director Lu in an interview with CNN.

72 Lee, Chin-chuan, *China's Media, Media's China* (Boulder, Colo: Westview Press, 1994), p 225; for a short summary of discussion of mass media in China, see Jorg-Meinhard Rudolph, "China's Media: Fitting News to Print" in (1984) 33 Problems of Communism, pp 58-67.

73 *South China Morning Post,* 1 June 1996.

74 *Regulations of Hong Kong 1844-1914* (Hong Kong: Government Printer, 1915) p 429 Compare with the present Post Office Ordinance Cap 98, s 32(1)(h) provides that no person shall post, tender for posting or send by post any seditious publication within the meaning of any enactment relating to sedition.

75 The ordinance was originally called Seditious Publication Bill but owing to the criticism by the English press, it was changed to regulate the Chinese press only. See Hong Kong Government Gazette, 20 September 1907, p 1188 and *Hong Kong Hansard 1907*, p 56.

freedom of press as regards legitimate criticism of current events in China".[76]

In 1914, the Sedition Ordinance (No. 5 of 1914) was passed in order to prevent the sending into Hong Kong of seditious publications from India to Indian troops stationed here.[77] It was feared that highly seditious material would affect the loyalty of the colonial army, if it contained matter "which is subversive of all social and economic conditions and which if disseminated among ill-educated persons are likely to be productive of disturbance and ill-feeling in the colony".[78]

The Sedition Ordinance 1938 replaced the 1914 ordinance. The 1938 ordinance was part of a pattern of similar legislation passed in many colonies in the late 1930s to curb rising nationalist movements, especially those in West Africa.[79] The current law in Hong Kong on sedition was codified in the Crimes Ordinance[80]:

> Section 10 provides:
> (1) Any person who[81] -
> (a) does or attempts to do, or makes preparation to do, or conspires with any person to do, any *act* with seditious intention; or
> (b) utters any seditious words; or
> (c) prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publication; or
> (d) imports any seditious publication, unless he has no reason to believe that it is seditious, shall be guilty of an offense and shall be liable for a first offense to a fine of $5,000 and to imprisonment for 2 years.
> (5) In this section-
> "seditious publication" means a publication having a seditious intention;
> "seditious words" means words having a seditious intention.

Seditious intention is the key concept which affecting the scope of the above offenses and it is defined in s 9:

> Section 9 provides:
> (1) A seditious intention is an intention-
> (a) to bring into hatred and contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the government of Hong Kong or the Government of any other part

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76 Lugard to Colonial Office, 25 October 1907: CO129/341/630-1.

77 This ordinance was a war time measure and made no concessions to permissible categories of political speech. It is not intended to control civilian publications as it is primarily concerned to prevent disloyalty amongst the army. See David Clark, "Sedition and Article 23" in P. Wesley-Smith (ed) *Hong Kong Basic Law Problems & Prospect* (Hong Kong: Faculty of Law University of Hong Kong, 1990), p 47.

78 H. C. Trapnell, "The Indian Press Prosecution" (1898) 14 LQR 72-91 cited in Clark, *id.*

79 See note 77 above.

80 Cap 200

81 Section 8 of the Crimes (Amendment)(No. 2)Bill amended s 10(1) by adding after who: "with the intention of causing violence or creating public disorder or a public disturbance".

of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established.

(b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or

(d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or

(e) to promote feelings of ill-will and enmity between different classes of population of Hong Kong; or

(f) to incite persons to violence; or

(g) to counsel disobedience to law or to any lawful order.

(2) Any act, speech or publication is not seditious by reason only that it intends-

(a) to show Her Majesty has been misled or mistaken in any of Her measures; or

(b) to point out errors or defects in the government or constitution of Hong Kong as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(c) to persuade Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established; or

(d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Hong Kong.

The language of ss 9(1)(a)-(g) is obscure and the boundaries of the offence are impossible to determine with any degree of certainty. Even though the words "hatred and contempt"[82], "to excite disaffection"[83], and "administration of justice"[84] have been judicially interpreted, there are other terms such as "ill-feeling" and "different classes" which are conceptually vague and wide in scope.

In the Crimes(Amendment) Bill 1996, only the requirement of "intention of causing violence or creating public disorder or a public disturbance" is added and the requirement of "violence or resistance or defiance for the purpose of disturbing a constituted authority" is omitted. This shows that the Government is reluctant to introduce a stronger safeguard for the

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[82] *DPP v Obi* [1961] ALL NLR 186 (Fed SC); *R v Loshak* (1966) ALR 1964-66 Sierra Leone 526, 540.

[83] "Disaffection when used in relation to a Sovereign or a Government means not merely the absence of affection and regard, but disloyalty, enimity and hostility and 'exciting disaffection' refers to the implanting or arousing or stimulating in the minds of the people a feeling or view of opinion that the Sovereign and the Government should not be supported, but they should be opposed". *Burns v Ransley* (1949) CLR 101, per Latham CJ; See also *R v Barron* (1918) 44 DLR 332, 333 (Sask CA); *Besant v Advocate-General of Madras* (1919) LR 46 IA 176, 193 (PC); *R v Millien* [1949] Mauritius R 35, 44; *Public Prosecutor v Ooi Kee Saik* [1971] 2 MLJ 108, 112.

[84] It includes a statement about jury selection: *R v Mchugh* [1901] 2 IR 569, 574 (QBD).

freedom of expression.[85] Moreover, the new requirement of "intention of causing violence or creating public disorder or a public disturbance" is unsatisfactory and still inhibits the freedom of expression to a great degree.

From s 9, it is a defence if the attempt to procure the alteration of any matter in Hong Kong is by lawful means. The question is what is meant by "lawful means". It is submitted that there are at least two interpretations. The first is that if the means by which the alteration of the government is not prohibited by law, it will be lawful. For example, if one advocates in the newspaper that the present government should be changed and if there is no law which makes the advocacy unlawful, this will constitute a defence under s 9(1)(b). According to this interpretation, political criticisms and opposition did not come within the scope of the offence. It is arguable that to "advocate and encourage" revolution of whatever kind is lawful. But what is lawful may depend on the timing of such advocacy. It was suggested in *R v Hush ex parte Devanny*[86] that the crucial factors in assessing the imposition of penalty is the timing of the call for revolution and the degree of danger caused by it to the state.[87] It has also been suggested by Clark that the political environment will affect the attitude of the authorities towards free speech.[88] In *R v Aldred*[89], Hand formulated a test that focused on the words themselves to see whether they violated the law:

> Words are not only the keys to persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be part of that public opinion which is the final source of government .... Yet to assimilate agitation, legitimate as such , with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.[90]

This test is "the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of the State ?"[91] It is a question for the jury to decide. A more restrictive test of "clear and present danger" can be found in *Adrams v US*[92] and *Schenck v US*[93], courtesy of Holmes:

> The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that

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85 In a discussion with Professor Ghai, he suggested that this may be because the HK Government thinks that the Bill will stand a better chance of being accepted by the Chinese Government.

86 (1932) 48 CLR 487

87 It is criticized by Chafee that "the definition of sedition is so loose that guilt or innocence must obviously depend on public sentiment at the time of the trial". See Chafee, Z Jr, *Free Speech in the United States* (1914), at 506.

88 See note 77 above, p 58.

89 (1909) 22 Cox CC 1

90 James E. Bosberg, "Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson" in (Spring 1990) 10 Oxford Journal of Legal Studies, citing part of judgment by Hand.

91 *R v Aldred* (1909) 22 Cox CC 1 at 3

92 250 US 616 (1919)

93 249 US 47 (1919)

they will bring about the substantive evils that Congress has a right to prevent.[94]

The test of permissible speech focuses on the particular circumstances surrounding each case. This test was discussed by Justice Brandies in *Whitney v California*[95] that "in order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated". It is submitted that the "present and imminent danger"' test is a preferable standard.

The second interpretation is that as there are no lawful means by which the people of Hong Kong can replace the present government, the act in question must be illegal.[96] This means that any attempt to alter the government must amount to an act with a seditious intention.

It is also a defence if the person only has one of the intentions under s 9(2). The word "only" is crucial. Only if the intentions are pure will they be lawful. That is to say that if someone acts, speaks, or publishes with a mixed motive their actions are not seditious.[97] Canada, New Zealand, and Australia do not use the word "only" in their legislation. Instead, if the act or action in question is made in "good faith" it will be lawful. The good faith defence restricts the scope of the offence and the Hong Kong definition assumes an attitude of suspicion against the citizens, while the good faith defence assumes that citizens are generally loyal, if at times mistaken.[98]

There is almost complete agreement in the common law jurisdiction that sedition should be made obsolete.[99] In Hong Kong, there is only one reported case on seditious libel.[100] In England, there has been only one instance of proceedings being brought for sedition in the last 15 years.[101] This is because of the unwillingness of the jury to convict.[102]

2. England

In England, the Law Commission suggested that there is no need for the codification of sedition.[103] Therefore, in England, the offence of sedition remains a matter of common law.[104]

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94 *Id.* at 52

95 274 US 357 (1927)

96 See note 77 above, p 49

97 *R v McLachlan* (1924) 42 Cox CC 249, 258 (NS SC)

98 See note 77 above.

99 *Id.*

100 *Fei Yi-ming and Lee Tsung Ying v R* (1952) 36 HKLR 133

101 The Law Commission Working Paper No. 72 Second Programme, Item XVIII Codification of the Criminal Law Treason, Sedition and Allied Offences ("The Law Commission"), pp 30, 46 citing the statistics given by the Director of Public Prosecutions.

102 Prior to 1792, in securing the offence of seditious libel as an effective means to suppress freedom of expression, the elements of the offence were divided: the jury decided the question of fact of publication and the judge decided the question of law of the seditious content; see *R v Harris*, 7 St. Trials 925. With the emergence of the role of jury in the English justice system and as the prosecutions began to stress the seditious effect of words rather than their intrinsically libellous nature, the Libel Act 1792 (also known as Fox's Act) was enacted to settle the dispute concerning the respective roles of the jury and the bench in favour of the former. Since that, it is for the jury to decide upon the elements of the offence. The issue whether there is a breach of order is a question of fact for the jury.

103 The Law Commission, see note 101 above, p 48

Strictly speaking there is no offence described as "sedition" in English law, but only the common law offence of seditious libel[105], defined as the oral or written publication[106] of words with a seditious intention, or an agreement to further a seditious intention by doing any act.[107]

In *R v Burns*[108] Cave J, in his direction to the jury, said that seditious intention is:

> An intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to promote feelings of ill-will and hostility between different classes of such subjects. An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to secure their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention.[109]

It is not sufficient to merely show that the words were used with the intention of achieving one of the objects as set out above- an intention to cause violence must also be proved.[110]

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104 In 1819, there was a statutory definition of sedition. In the Criminal Libel act 1918, s. 1 defines seditious libel as "words tending to bring into hatred or contempt the person of his majesty, his heirs or successors, or the Regent, or the government and constitution or the United Kingdom as by law established, or either House of Parliament, or the excite his Majesty's subject to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means.

105 There are two forms of seditious libel: seditious speech and seditious writings. Sedition or "seditio" is a concept know to Roman law; it refers to rebellions against the government and early cases also used the term "seditio" as a synonym for "secessio", or secession; see *R v Stroud* (1629) St Tr 235, 242-3 (KB); *R v Burdett* (1820 4 B & Ald 95, 97-9; 106 ER 873, 874-5. See also Smith and Hogan, *Criminal Law* (United Kingdom: Butterworth & Co.(Publishers) Ltd., seventh edition, 1992) p 749; Sir James Fitzjames Stephen, *A History of the Criminal Law of England* Vol 2 (1883) p 298; 11 Halsbury's Laws of England, para 827

106 The issue of whether there is publication is seldom in dispute; it is a question of fact for the jury to decide. The fact that publication of similar material had gone unpunished was no defence. It has not only be proved that the defendant had 'invented' or 'made' the libel or had 'caused it to be made' but also that he had 'uttered' it or at least had intended to do so. See *R v Harris*, 7 St. Trials 925; *R v Holt* 5 St. Trials 436; *Trial of Dover, Brewster & Brooks*, 6 St. Trials 563;

107 The elements of the offence of seditious libel as established by the late seventeenth century were 'a writing with seditious content must have been published with a "knowing and malicious" state of mind'.; for a summary of the historical development of the offence of sedition, see David Clark, "Sedition and Article 23" in Peter Wesley-Smith (ed.), *Hong Kong's Basic Law Problems & Prospects* (Hong Kong: Faculty of Law University of Hong Kong, 1990) pp 34-43. See also P. Hamburger, "The Development of the Law of Seditious Libel and Control of the Press", (1985) 37 Stanford Law Review 661; W. S. Holdsworth, *A History of English Law*, vol 8, 325-374, vol 10, 672-92.

108 (1886) 16 Cox C.C. 335, 360

109 This is Stephen's definition of seditious intention.

110 *R v Collins* (1839) 9 C. & P. 456, 461, per Littledale J.; *R v Burns* (1886) 16 Cox C. C. 355, 367; *R v Aldred* (1909) 22 Cox C. C. 1, 4, per Coleridge J.

These views were cited and approved of in the Canadian case of *Boucher v. R*[111]. In that case the court held that "the seditious intention upon which a prosecution for the seditious libel must be founded is an intention to incite violence or to create public disturbance or disorder against His Majesty or the institutions of Government. Proof of an intention to promote feelings of ill-will and hostility does not alone establish a seditious intention. Not only must there be proof of incitement to violence in his connection, but it must be violence or defiance for the purpose of disturbing constituted authority". It is submitted that any definition wider than that expressed in *Boucher v. R* not be adopted.

It remains unclear on the authorities as to the nature of the intention required in sedition. It is submitted that it would be dangerous to adopt an objective test. The subjective test as enunciated in *R v. Steane*[112] should be adopted, even though the Defendant must be proved objectively to have such an intention.[113]

3. Australia

Since 1920, Australia has, at the Commonwealth level, a codified law of sedition in ss 24A-24F of the Crimes Act 1914 ("the 1914 Act") as amended by s 11 of the Intelligence and Security (Consequential Amendments) Act 1986 ("the 1986 Act").[114] In s 24C, it made it an offence, punishable by up to three years' imprisonment for any person who with the intention of causing violence or creating public disorder or public disturbance, if a person (a) engages in or agrees or undertakes to engage in, seditious enterprise; (b) conspires with any person to carry out a seditious enterprise; (c) counsels, advises or attempts to procure the carrying out of seditious enterprise.

Also, under s 24D of the Crimes Act 1914, it is an offence punishable by up to three years imprisonment to write, print, utter or publish seditious words. Section 24B provides that seditious words are words expressive of a seditious intention. Section 24A provides that an intention to effect any one of the certain specified purposes is a seditious intention. The 1914 Act s 24A provides those purposes:

> (a) to bring the Sovereign into hatred or contempt;
> (b) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the

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111 [1951] 2 D.L.R. 369, 382-4.

112 [1947] K.B. 997

113 s 65A(1) of the Criminal Procedure Ordinance (Cap 221) provides that "a Court or jury, in determining whether a person has committed an offence- (a) shall not be bound in law to infer that he intended or foresaw a result of his acts or omissions by reason only of its being a natural and probable consequence of those acts or omissions; but (b) shall decide whether he did intend or foresee that result by reference to all evidence, drawing such inferences from the evidence as appear proper in the circumstances".

114 War Precautions Act Repeal Act 1920 repealing the War Time Precautions Act 1914. See S. Ricketson, "Liberal Law in a Repressive Age: Communism and the Law 1920-1950" (1976) 3 Mon LR 101; M. Head, "Sedition: Is the Star Chamber Dead?" (1979) 3 Crim LJ 89; E. Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987) pp 152-160; See also Laurence W Maher, "The Use and Abuse of Sedition" (1992)14 SydLR 287 at 288. The Intelligence and Security (Consequential Amendments) Act 1986, No. 102 of 1986 contained in Acts of Parliament of the Commonwealth of Australia passed during the year of 1986, vol 2 (Canberra: Australian Government Publishing service, 1987), p 2138 provides the amendments to s 24A of the 1920 Act.

Parliament of the United kingdom;
(c) to excite disaffection against the Government or Constitution of any of the King's Dominions;
(d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
(e) to excite disaffection against the connexion of the King's Dominions under the Crown;
(f) to excite His majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
(g) to promote feelings of ill-will and hostility between different classes of His majesty's subjects so as to endanger the peace, order or good government of the Commonwealth.

The 1986 Act repealed s 24A(b), (c) and (e) of the 1914 Act. The mens rea of the offence was redefined in a way that reproduced the corresponding element of the common law offence as it had emerged a century before by ss12-14 of the 1986 Act. It was held in *R v Chief Metropolitan Stipendiary Magistrateex ex parte Choudhury*[115] that it must be proved that the seditious conduct of the accused was carried out "with the intention of causing violence or creating public disorder or a public disturbance". To establish the offence of seditious libel, proof of an intention to promote feelings of ill will and hostility between different classes of subjects alone does not establish a seditious intention. There must not only be proof of incitement to violence in this connection, but also of violence or resistance or defiance for the purpose of disturbing a constituted authority.[116]

Section 24F states that it is not unlawful for a person, acting in good faith, to endeavour to show that the government is mistaken in its actions or policies, to attempt to bring about a change of government by lawful means, or to do anything in good faith in connexion with an industrial dispute.

Section 24F:
(1) Nothing in the preceding provisions of this Part makes it unlawful for a person:
(a) to endeavour in good faith to show that the Sovereign, the Governor-General, the Governor of a state, the Administrator of a Territory, or the advisors of any of them, or the persons responsible for the government of another country, has or have been, or is or are, mistaken in any of his or their counsels, policies or actions;
(b) to point out in good faith errors or defects in the Government, the constitution, the legislation or the administration of justice of or in the Commonwealth, a State, a Territory or another country, with a view to the reformation of those errors or defects;

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[115] [1991] 1 QB 429
[116] *Id.*

(c) to excite in good faith, in order to bring about their removal, any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different classes of persons; or
(d) to do anything in good faith in connexion with an industrial dispute or an industrial matter.

(2) For the purpose of subsection (1), an act or thing done:
(a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth;
(b) with intent to assist an enemy:
(i) at war with the Commonwealth; and
(ii) specified by proclamation made for the purpose of paragraph 24(1)(d) to be an enemy at war with the Commonwealth;
(c) with intent to assist a proclaimed enemy, as defined by subsection 24AA(4), of a proclaimed country as so defined;
(d) with intent to assist persons specified in paragraphs 24AA(2)(a) and (b); or
(e) with the intention of causing violence or creating public disorder or a public disturbance; is not an act or thing done in good faith.

As observed, there is a wide range of situations where a person may be considered acting in good faith, as opposed to both English law and Hong Kong law. For instance, s 24F(1)(a) covers not only "measures" as in the English Law but also "counsels", "policies" or "actions" although arguably the concepts overlap. There are no equivalents under Hong Kong law. But s 24 makes it clear that the good faith defence is not available if it is proved that he had the intention of causing violence, creating public disorder, or a public disturbance, and this seems to be superfluous as the prosecution is required to prove intention, the same under s.24C.

D. Subversion and Sedition in Chinese Law

In Chinese law, there is no clear distinction between subversion and sedition. Both are punishable as counter-revolutionary offences. Article 92 of the Criminal Law 1979 provides:

> Any person who plots to subvert his government or split his country shall be sentenced to life imprisonment or to imprisonment for above ten years.[117]

Subversion can be achieved by any means; there is no requirement that the offence has to be committed through violence, force or unlawful means. According to the Supreme People's Court, the requisite actus reus include activities aimed at peaceful transformation: the gradual

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[117] This the one of the criminal codes passed in the Second Session of the Fifth National People's Congress of the People's Republic of China on 1st July, 1979. English translation is taken from Yu Man-king, *A Full Translation of the Criminal Law Code, Criminal Proceedings Code Organizations of the People's Courts Code Organizations of the People's Public Prosecutions Departments Code of the People's Republic of China* (Hong Kong: Great Earth Book Co., 1980), p 30

seizure of state power and the changing of the nature of the socialist system.[118] The essence of the offence seem to be a combination of a series of elements, each of which, in isolation, is not unlawful, but when put together amount to subversion.

However, in China there is no lawful means to initiate a formal change of government, rendering all attempts to a change of government unlawful. As a result, all plans to change the government are subversive. And immediacy and directness are not required. The term "plotting" indicated that subversion includes the planning of subversion, even by one person alone. Moreover, plotting includes planning in secret and as well as acting in public.[119] Overthrow means to dethrone or to topple according to its ordinary meaning. For the purpose of subversion, "governments" means both the central and local governments of China, and includes all branches of the state.[120]

The law of sedition can be found in Article 102 of the Criminal Law 1979, which provides:

> Any person who for counter-revolutionary purpose engages in any of the following acts shall be sentenced to imprisonment for below 5 years, penal servitude, supervision or deprivation of political rights, if he is a first important or a person guilty of heinous crime in similar nature shall be sentenced to imprisonment for above 5 years:
>
> (1) Inciting the masses to resist or hinder the operation of the law or order of the state.
>
> (2) Using counter-revolutionary slogan, handbill or other ways to propagandise or incite the overthrowing of the regime of dictatorship of the proletariat or socialist system.

As mentioned before, the conceptual difference between subversion and sedition is not clear in Chinese law. However, the essence of sedition is to incite others to overthrow the government, whereas subversion requires active organisation and participation. Therefore, in convicting Wang Junto and Wei Jingsheng, the court recognised the distinction between words which are sufficient for sedition, and acts which are required for subversion.

Unfortunately, the conceptual difference between the two was twisted significantly in China in two cases concerning the act of writing to Taiwan in the early 1980s. A notice issued by the Ministry of Public Security and circulated by the State Counsel[121] stated that it is subversive for anyone to write to enemy special agencies to offer strategies and plans for the purpose of ultimately overthrowing the government.

In the Li case, Li wrote to Taiwan in 1976 to "defame" the government's rural policy and proposed to the Taiwan government that it was the time for the Nationalists to return to

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[118] Editorial Committee of "Criminal Cases", SPP, *Xingshi Fanzui Anli Congshu: Fan Gemingzui* ("Criminal Law Cases: Counter-revolutionary Offences") (Beijing: Chinese Procuratorate Press, 1992), p 35.

[119] Plotting usually means planning in secret. But what the dissidents did in the 1989 Democracy Movement, they clearly acted in public. Therefore, public planning is included.

[120] Shum Lok Ping (ed.), *A Complete Guide to Chinese Law Part I* (Hong Kong: China Printing, 1995), at 3.2.2.

[121] Notice of the Ministry of Public Security on Strictly Punishing the Criminal Elements Who Wrote to the Guomindang Special Agencies (14 September 1981).

Mainland. Li proposed that the first step was the establishment of a local rural government loyal to Taiwan. Li was convicted of subversion. In the Che case, Mr Che had proposed to the Taiwan government to eliminate the communists through force, and asked Taiwan for the means to do so. Mr Che was convicted of subversion. The reason behind the use of the subversion charge rather than sedition may be because of the different penalties for subversion and sedition.[122]

In the eighth meeting of the Standing Committee of the National People's Congress, the offence of counter-revolution was replaced by the offence of "jeopardising state security".[123] The change of name was made in consideration of changing circumstances and the overall interests of the country.[124] The amendment has little effect on the old law as the activities which were considered counter-revolutionary remain a crime under the amendment. Any activity that aim to overthrow the dictatorship of the proletariat is still covered by the same law. But offences such as murder, manufacturing firearms and stealing guns are excluded, and is treated as ordinary criminal acts.

Threatening national safety means an act which would cause catastrophic damage to the national interest, for example, subverting the government or overthrowing its socialist system. Thus the new law of jeopardising state security is mere a change of name.[125]

E. Common Law or Chinese Law ?

It was made clear that the newly amended criminal law of subversion in China will not be applied to Hong Kong.[126] However, under BL18, national law may be applied to SAR by reason of turmoil within HKSAR. Moreover, under BL158, the SCNPC will interpret BL23, as it concerns the relationship between the Central Authorities and the Region. The power to disallow legislation of HKSAR under BL17 could set a precedent. The SCNPC may invalidate legislation on subversion which does not accord with the meaning adopted by the SCNPC.

On the other hand, the Basic Law states that SAR shall enact laws on its own, and it is open for the SAR government to adopt either the common law or the Chinese law of subversion and sedition. It is basically a political question.[127] It is submitted that the SAR should follow the common law of sedition and subversion, as the relevant Chinese law is highly restrictive to the freedom of expression, and not applicable to Hong Kong. This would fall in line with the 'one country, two systems' policy.

F. The Future of the Freedom of Expression in Hong Kong

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122 Article 103 of the Chinese Criminal Law Code provides: In this Chapter, the above mentioned counter-revolutionary crimes except articles 98, 99 and 102, if the injury caused to the state or the people particularly serious and the circumstances particularly wicked may be sentenced to death.

123 *South China Morning Post*, 1 March 1997; *Ming Pao*, 1 March 1997; *Hong Kong Standard*, 26 December 1996; *Ming Pao*, 4 October 1996.

124 It was quoted by the Xinhua News Agency from the SCNPC vice-chairman Wang Hanbin.

125 "Changes to Criminal Law 'mostly cosmetic'" *South China Morning Post*, 26 December 1996

126 *South China Morning Post*, 2 March 1997. It quotes the words of Cai Cheng, the Chinese NPC Law Committee vice-chairman.

127 When legislation is being drafted, it is likely that they will become politicised. As to the legislation for BL23, it was likely that political considerations had an important role to play as the offences concerned are basically political crimes.

1. The Tung Proposal

The Standing Committee of the Eighth National People's Congress at its Twenty-fourth sitting on 23 February 1997 made a decision on the treatment of the laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law that, among others things, major amendments to the Societies Ordinance[128] since 17 July 1992 and major amendments to the Public Order Ordinance[129] since 27 July 1995 could not be adopted as laws of the HKSAR. In pursuance to this, the Chief Executive-designate proposed to amend the two ordinances and a consultation document was presented in April 1997.[130]

The introduction of "national security" as a ground for refusal of registration or objections to procession aroused concerns. It was feared that the rights to procession and association will be infringed owing to the vague concept of national security.[131] In addition, the SAR courts may not have jurisdiction to decide "national security".[132] After consultation, the Chief Executive's Office (CEO) published the Public Order (Amendment) Bill and the Societies (Amendment) Bill in which "national security" is defined as "the safeguarding of the territorial integrity and the independence of the PRC".

The inclusion of "national security" in the amendments would be in line with BL23.[133] Arguably, it was the intention of the CEO that the intention to attack "national security" covers subversion and sedition. In fact, it was stated that:

> [I]n future, when the HKSAR Government enacts laws to implement Article 23 of the Basic Law, ... we will then consider whether consequential amendments should be made to the Societies Ordinance.[134]

Although the amendments do not contain the terms "subversion" and "sedition", it is conceivable that peaceful procession and association touching upon "national security" be banned. This argument is convincing when we look at the 1988 draft of the BL which provided that the "HKSAR shall prohibit by law any act designed to undermine national unity". Mr Tung is keen to assure the Chinese leaders that allowing Hong Kong to remain capitalist will not endanger the sovereign rights of the nation. Remarks made by the [former] Secretary for Policy Co-ordination Michael Suen Ming-yeung that calls for independence of

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128 Cap 151.

129 Cap 245.

130 The consultation document produced great controversy in Hong Kong on the civil liberties and social order.

131 A group of legal experts including Professor Yash Ghai, Raymond Wacks, Peter Wesley-Smith and Albert Chen made a joint submission that called for the deletion of the notion of national security as a ground for restrictions on rights; they said that "given the loose and indiscriminate reference to the term 'national security' in the PRC, the worries of many Hong Kong people are understandable". They submitted that national security should be confined to those situations where the existence of a nation or its territorial integrity or political independence is endangered by force or the threat of force. *South China Morning Post*, 2 May 1997.

132 *R v Secretary of State for home Affairs ex parte Hosenball*; *Counsel of Civil Service Unions v Minister of Civil Service*. Surely, the argument of 'act of state' under BL19 will also come into play.

133 *South China Morning Post*, 16 May 1997

134 Statement of the CEO on Civil Liberties and Social Order (HKSAR CEO office, May 15 1997) p 4.

Taiwan and Tibet be banned on grounds of national security[135] make a case in point.

2. Legitimate Expectations

Although there are legitimate limitations on rights, its meaning is always misinterpreted by those in authority or its correct meaning is redefined to justify the state's infringements.

One such expectation is a free press, which would assist in a stable society through open discussion of dissenting views. A free and robust media promote conciliation by encouraging discussion of controversial issues before they reach a volatile or explosive stage. For example, the June 4 Tianamen incident was caused, in part, by widespread frustration with corruption- an issue the press had been told to keep quiet on, due to the political dimension. It was no accident that one of the strongest and earliest demands of the protesters was an open media.[136]

However, these expectations must be balanced by the needs of the greater good. Nocick argues that the only legitimate function of the state is to protect rights.[137] While the author does not adopt such an extreme approach,[138] it is believed that the persons in power can never make law to control freedom at the expense of the basic human rights. Although Tung Chee-hwa has said that he is firmly committed to individual rights and freedom in Hong Kong, his sincerity is questionable because of the hindrance from the Chinese government. In the consultation document on Civil Liberties and Social Order, it was said that:

> The HKSAR Government is committed to the continued protection of human rights.....We must also strike a balance between civil liberties and social stability, personal rights and obligations, individual interests and the common good. Within the generality of this commitment, we seek to establish broad consensus among the people as to where the balance should lie.

The equal right to freedom of expression among citizens is sufficiently guaranteed under the existing legal system as discussed above. Any further restrictions on it under the pretext of ensuring the equal right to enjoy seems to be superfluous.

IV. Legal Limitations to Article 23

A. The Bill of Rights Ordinance vs Legislation on Article 23

The Hong Kong Bill of Rights Ordinance[139]("the Ordinance") is clearly an obstacle to the legislation of BL23.

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135 *South China Morning Post,* 16 May 1997

136 Julia Ching, *Probing China's Soul: Religion, Politics, and Protest in the People's Republic of China* (USA: Harper & Row, 1990) p 18.

137 Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1973)

138 Nozick's approach was highly unrealistic and has little support; see, for example, F. A. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1952), p 285

139 Cap 383.

> Article 16(1):
> Everyone shall have the right to hold opinions without interference.
> Article 16(2):
> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

It was suggested that there is ample scope for challenging Hong Kong law as well as the future legislation of BL23 on the basis of BR16.[140] But there has been little experience of BR16 (or of its equivalents in the international covenants) either in Hong Kong or in international courts.[141] It was also suggested that the freedom to hold opinions is an absolute right.[142] Laws limiting freedom of expression must be clear, accessible, and fair, and they must be indispensable.[143]

But as freedom of expression entails special duties and responsibilities, it may be subject to restrictions provided by law. In fact, Article 16(3) provides:

> [T]he exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) for respect of rights or reputations of others; or
> (b) for the protection of national security or of public order (ordre public), or of public health or morals.

It is necessary to see what meaning is attached to the expressions of "national security", "public order", and "public health or morals" in order to analyse the scope of the limitations.[144] The approach to the interpretation of the ordinance is important in discovering the meanings.

The long title of the ordinance and s 2(3) implied the appropriateness of applying international jurisprudence in its interpretation.[145] This has at least two implications.[146] The first is that as the purpose of the ordinance is to extend human rights, it should be given a broad and liberal interpretation. It was argued by Lord Wilberforce that a Bill of Rights called for a "generous interpretation avoiding what has been called the 'austerity of tabulated legalism',

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140 P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman Asia Ltd., 2nd ed., 1994), p 375

141 *Id*, p.374.

142 Kevin Boyle, "Freedom of Opinion and Freedom of Expression" in Johannes Chan and Yash Ghai (eds.), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993), pp 314-15.

143 Yash Ghai, "Freedom of Expression" in Raymond Wacks (ed.) *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992) pp 392-96.

144 Yash Ghai, "Derogations and Limitations in the Hong Kong Bill of Rights" in J. Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach*, see note 142 above p 180.

145 P. Wesley-Smith, *op cit.*, note 140 above, p 322.

146 *Id.*

suitable to give to individuals the full measure of the fundamental rights and freedoms".[147] The implication is that rights are to be broadly interpreted and the limitations narrowly.[148] In *R v Sin Yau-ming*[149], it was stated that the Bill of Rights is a constitutional document and should be regarded as being *sui generis*, and that the courts should adopt a purposive approach in interpreting it.[150] The second is that the interpretation of the ICCPR made by the UN Committee on Human Rights and the European Commission.[151]

1. National Security

This concept has rarely been subject to judicial analysis and there have been very few judicial attempts to address the contradiction inherent in it.[152] It was suggested that it was for the government, not the judges, to determine what the interests of national security required:

> National security is the responsibility of the executive government; what action is needed to protect its interests is ... a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.[153]

Similarly, in *R v Secretary of State for Home Affairs ex parte Hosenball*[154], the Court of Appeal asserted that "the balance between national security and individual freedom is not for the court of law. It is for the Home Secretary". It was suggested that it ought to be interpreted narrowly and that it does not extend to the broader concept of public safety. Limitations under national security are valid only if there is a threat to the country as a whole, and not merely a part of it.[155]

In addition, restrictions are not based on national security if their only purpose is to avoid riots or other troubles, or to frustrate revolutionary movements which do not threaten the life of the whole nation.[156] In the Public Order (Amendment) Bill 1997[157] submitted to the provisional legislature, "national security" is defined as the safeguarding of the territorial integrity and the independence of the PRC. Whether this definition will be adopted for the purpose of BL23 is not clear. It was said that it will be re-examined in the context of BL23

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147 *Minister of Home Affairs v. Fisher* [1980] AC 319, 329; *Ong Ah Chuan v Public Prosecutor* [1981] AC 648; *Data Menterii Othman Bin Baginda v. Dato Ombi Syed Idris* [1981] 1 MLJ 29; *AG of Gambia v Momodou Jobe* [1984] AC 698.

148 This is consistent with the approach adopted in the European Court of Human Rights which has said that the general rule is the protection of freedom and the only exception is its restriction.

149 [1992] 1 HKCLR 127

150 *Id.*

151 See note 140 above, p 183.

152 Peter Hanks, "National Security - A Political Concept" (1988) 14 Monash University Law Review

153 *Council of Civil Service Unions v Minister of Civil Service* [1985] A.C. 374 at 412 per Lord Diplock

154 [1977] 1 W.L.R 766

155 *Arrowsmith v UK* (1978) 19 D & R 22

156 A Kiss, "Permissible Limitations on Rights" in Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981)

157 Legal Supplement No. 3 Published by the Authority of the CEO, the HKSAR of PRC (15 May 1997)

later on.[158]

2. Public Order (*Ordre Public*)

It is suggested that the insertion of the French expression *ordre public* shows that the term is intended to have a broader meaning than the English law concept of public order; however, the ambit of the French expression is unclear.[159] It permits limitations and at the same time restricts them.[160] On the one hand, it may permit restrictions for a number of reasons such as peace and order, safety, public health, aesthetics, morals, and consumer protection. On the other hand, the concept indicates the principle that there are limitations on the state's powers, especially by reference to human rights, respect of which is an element in the exercise of public authority.[161]

In its interpretation of "general welfare" that governs the scope of restrictions in the American Convention on Human Rights, the Inter-American Court of Human Rights attempted an interpretation of *order public*. The court recognised the difficulty of defining with precision the concept of "public order" and "general welfare", and that the concepts can be used as much to affirm the rights of individuals as to justify the limitations on the exercise of those rights in the name of the collective.[162] It was decided that general welfare was an integral element of *ordre public* in democratic societies, the main purpose of which is the protection of rights of man. The court also emphasised that *ordre public* may under no circumstances be invoked as a means of denying a right guaranteed by the Convention, or to impair or deprive it of its true contents; when it is invoked as a ground for limiting human rights, it must be subjected to an interpretation that is strictly limited to the "just demands" of a democratic society.[163]

B. The Basic Law vs Legislation on Article 23

There are restrictions in the Basic Law on the implementation of BL23. Firstly, BL27 provides for:

> Hong Kong residents shall have freedom of speech, of press and of publication; freedom of association, of assembly, of procession and of demonstration; and of the right and freedom to form and join trade unions, and to strike.

This contains the freedom of expression.[164] BL27 provides for the rights to freedom of expression while BL23 bans or restricts it. Prima facie, the two articles are in conflict.

A closer scrutiny of the other parts of the Basic Law is certainly necessary for a full

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158 *South China Morning Post*, 17 May 1997.

159 Yash Ghai, see note 142 above, *op cit.*, p 192.

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 The rights under BL27 certainly can be classified as freedom of expression.

appreciation of the range of rights guaranteed under it.[165]

It is believed that rights under BL27 can be taken away by law in HKSAR. Moreover, it has been suggested that a right in strict legal sense is coupled with a correlative duty in other persons to respect the claim inherent in the right.[166] According to BL42, Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in HKSAR.

In various articles of the Basic Law, the rights and freedoms of the citizen of Hong Kong are protected "in accordance with the law". This concept is dangerous since it may mean that there is no restriction on the power of the legislature.[167] In BL4, the HKSAR is required to safeguard the rights and freedoms of the residents of HKSAR and of other persons in the region in accordance with the law.[168] Hence, it is arguable that the rights are not absolute, at least in the mind of the drafter of the Basic Law. However, it does not mean that BL23 is unrestricted. It has been suggested that laws restrictive of the freedom of expression must be clear, accessible and fair and they must be necessary in the sense of being indispensable.[169] Some academics suggested that such restrictions not go beyond the necessity for the maintenance of national security, public order, public safety, public health, public morals and the safeguarding of the rights and freedoms of other persons in a free and democratic society.[170] The requirement that restrictions be "necessary in a democratic society" appears in many international human rights instruments and the essence of a democratic society is plurality, tolerance, and broadmindedness.[171]

Another limitation is BL39. BL39 states:

> [T]he provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.
> The provisions in ICCPR contain rights to freedom of expression; however, it should be noted that international treaties were not enforceable in the domestic courts.[172] Hence, the protection by the provisions of ICCPR is effective only if

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165 Yash Ghai, "Rights and Freedom" (unpublished) p 16.

166 P. Wesley-Smith, note 140 above, *op cit.*, p 312. Compare with Charles Sampford, "The Dimensions of Rights and Their Stututory Protection" in CJG Sampford and DJ Galligan (eds), *Law, Rights and Welfare State* (London, Sydney, Wolfeboro: Croom Helm, 1986) p 177 (Rights are logically prior to duties and cannot be respected in terms of duties without loss of meaning') See also HJ McCloskey, "The Moralism and Paternalism Inherent in Enforcing Respect for Human Rights", pp 156-60 in the same volume.

167 J. Chan, "Protection of Civil Liberties" in P. Wesley-Smith and Albert H Y Chen (eds), *The Basic Law and Hong Kong's Future* (Hong Kong, Singapore, and Malaysia: Butterworths, 1988) p 208.

168 The phrase 'in accordance with law' appears many times in the Basic Law. For example, BL6, BL36 and BL41.

169 Yash Ghai, "Freedom of Expression" in Raymond Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992) pp 392-96.

170 J. Chan, *op cit.*, note 167 above, p 209.

171 *Sunday Times v UK* (1979) 2 EHRR 245 ; *Handyside v UK* (1978) 1 EHRR 737; *Dudgeon v UK* (1981) 4 EHRR 149; *Lingens v Austria* (1986) 8 EHRR 407 ; *Re Compulsory Membership of Journalists Association* (1986) EHRR 165.

172 J Chan, "Basic Law and the International Covenant" in A Chen, and J Chan (eds), *Human Rights and the Rule of law - The Challenges of Hong Kong's Transition* (Hong Kong: Wide Angle Press, 1987) pp

> they are incorporated into domestic legislation.[173] Nevertheless, more importantly, the second paragraph of BL39 provides:
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Just what is meant by "as prescribed by law" ? Originally, BL15 of the preliminary draft provided that "the rights and freedoms of Hong Kong residents shall not be limited save in accordance with law".[174] It was amended as the present BL39. It recognises the concern about unlimited freedom, and tries to strike an appropriate balance between legitimate restrictions of the fundamental rights and the protection of them.[175]

BL39 was based loosely on similar clauses in international human rights instruments.[176] Any restrictions under BL39 must be "necessary", and necessity is to be decided by the court.[177] Necessity is interpreted by current international jurisprudence as the existence of a pressing social need and the requirement of proportionality in relation to any measures adopted.[178] But what is "necessary" depends mainly on the ideology of a country. For example, what may be "necessary" in a socialist state may not be so in a liberal democratic society.[179] Secondly, it is unclear as to "such restrictions that shall not contravene the provisions of the preceding paragraph of this Article". Arguably, the restrictions shall not contravene the provisions in the ICCPR and ICESCR as applied to Hong Kong.

V. Conclusion

To quote the words of Stone, as a reminder to those in authority who worry about "too much" or "unlimited" freedom:

> [T]here must be renewed recognition that societies are kept stable and healthy by reform, not by thought police; this means that there must be free play for so-called "subversive" ideas - every idea "subverts" the old to make way for new. To shut off "subversion" is to shut off peaceful progress and to invite revolution and war.[180]

Hong Kong has reached a stage of civic maturity in which the open expression of revolutionary, subversive, or seditious opinion can be tolerated. Hong Kong is a society that does not punish people for having ideas or expressing them. There is no reason why we

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85-93 (in Chinese)

173 The Bill of Right Ordinance was enacted by reproducing most of the provisions in the ICCPR.

174 This is the version in the Preliminary Draft of Basic Law; See J Chan, "Protection of Civil Liberties", in *op cit.*, note 172 above, p 208.

175 *Id.*

176 *Id.*

177 *Id.*

178 *Sundays Times v. UK* (1979) 2 EHRR 245; *Handyside v UK* (1978) 1 EHRR 737; *Dudgeon v UK* (1981) 4 EHRR 149

179 J Chan, note 172 above.

180 Stone, I F, *The Haunted Fifties 1953-1963* (1989 ed.) at 68.

should penalise "subversive" or "revolutionary" ideas. The acid test of a society's commitment to the freedom of speech is in its willingness to tolerate extremely unpopular and critical expressions of opinion. One of the shared values which made society more cohesive and stable is "the preference for consultation rather than open confrontation". In consultation, different or radical opinions are to be expected. The use of draconian laws to suppress the freedom of expression shows only a mistrust of the people.

It has been suggested that the law of sedition, subversion, and treason are effective means to suppress dissenting opinion. [181] But tight restrictions on the freedom of expression will not be well-received in Hong Kong, as it will no doubt affect the way of life.[182] If the principle of "looking for similarities but allowing small difference"[183] applied, I see no reason why dissent should not be allowed if there is no danger to the authority. To quote the judgment of Brandeis J:

> [T]o justify the suppression of free speech there must be reasonable ground that serious evil will result if free speech is practised. There must be reasonable grounds to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. But even advocacy of violation (of the law), however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as a means for averting a relatively trivial harm to society.[184]

The argument that "if people should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist, for it is very necessary for all Governments that the people should have a good opinion of it"[185] is obsolete.[186] Indeed, the Government should not be the only one subjected to criticism: public figures should also accept a greater degree of scrutiny in the interests of accountability and free political debate:

> [T]he limits of acceptable criticism are accordingly wider as regard a politician as such than as regards a private individual. Unlike the latter the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalist and the public at large and he must consequently

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181 Philip Hamburger, "The Development if the Law of Seditious Libel and the Control of Press" (Feb. 1985) 37 Stanford Law Review, pp 661-765.

182 Article 5 of the Basic Law provides, inter alia, that the "way of life" shall remain unchanged for 50 years.

183 The Chinese Vice-premier, Mr Qian Qi-chen "invited" the Democratic Party to take part in the "election" of the Provisional Legislature. He said that Chinese Government is "looking for similarities but allowing small difference".

184 *Whitney v California* (1926) 274 U.S. 376-377

185 *R v Tutchin* (1704) 14 St Tr 1095 at 1128 (KB) per Lord Holt

186 The modern critique of *R v Tutchin* can be found in *Niharendu Dutt Majumdar v Emperor* AIR 1942 FC 22, 25 in which it is stated: "the time is long gone when mere criticism of Governments was sufficient to constitute sedition, for it is recognised that the right to utter honest and reasonable criticism is a source of strength to a community rather than a weakness".

> display a greater degree of tolerance.[187]

In China, despite constitutional protection of the freedom of expression, some maintain that these are no more than legalistic "window-dressing". Xu Bing described it as:

> Legal provisions are divorced from real life, and that some constitutional and legal rights of the citizens remain only on paper and citizens cannot really fully enjoy them.[188]

Similarly, the power of the rights in BL27 and BL39 is only as good as the interpretations. The author is pessimistic, due to recent implications from the CEO on the amendments of two ordinances on civil liberties and freedom. The balance between civil liberties and social order is unquestionably different from that in the West, due largely to the divergence of perception on human rights. Thus "anything is constitutional, or anything is unconstitutional, just as you choose to look at it"[189]. But, that does not mean that the freedom of expression cannot co-exist with BL23: economic considerations must play a role in affecting the political and legal arena.[190]

While there is still confusion over the concept of rights, the maintenance of stability and prosperity in Hong Kong is of paramount importance to the economic development of China. As such, the Chinese Government would be unwise to introduce laws which destroy the freedom of expression, a freedom which contributed much to the economic success of Hong Kong.

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187 *Lingens v Austria* (1986) 8 EHRR 103, para 42

188 Kent, Ann. "Waiting for Rights: China's Human Rights and China's Constitution, 1949-1989" (1991) Human Rights Quarterly 13, pp 170-201.

189 World Classics (OUP, 1983), p 260 quoted in E Barendt, "Is there a United Kingdom Constitution?" (1997) 17 Oxford Journal of Legal Studies, p 137

190 Different people have different desires, goals and values. The problem is that there is no general consensus on moral matters.

With the Compliments

of

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